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DEROGATIONS FROM THE OBLIGATIONS IN ABIDING BY THE STATE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN UKRAINE

Current issues in Ukraine are related to many objective and internal problems at the same time. There have been provided some derogation in the sphere of realization some articles of the Convention for the Protection of Human Rights and Fundamental Freedoms or, as it is also called, European Convention on Human Rights (ECHR), on the occupied terrains of the state. Within impossibilities to protect human rights on the Donbas and Crimean territory, we can state that violation of human rights standards exists and Ukrainian governmental bodies cannot be responsible for the effective functioning of the law of European human rights standards. That is why there was issued the Statement of the Supreme Soviet of Ukraine “About derogation of Ukraine from certain obligations, specified by the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms”¹. As it claims, temporarily Ukraine cannot provide the protection of human rights in accordance with the ECHR and the invader country takes responsibility to observe and protect them. So, the human rights are violated on the mentioned territories and derogation from the obligations to observe the law is temporarily unavailable. This means that the temporarily unavailable implementation of European human rights is limited.

But if on the occupied terrains the ECHR cannot be provided temporarily, at the same time on the Ukrainian territory there are many violations related to some challenges within current situation. These issues have not been finally solved yet. There still have not been found the strict recommendations and scientific remedy how to cope with the actual question both practically and theoretically. But many scientists and specialists on human rights protection problems have been scrutinizing various problems of human rights protection. Among them there should be mentioned V. Palyuk², who scrutinizes the ECHR applying for disclosure of the rule of law. The author also pays attention on the adoption of European standards on human rights into the courts’ practice³. The scientist O. Scripnyuk in his article proves that the idea that in the new Constitution of Ukraine the notions of specific rights should be set out in the same way as in the European Convention of 1950⁴. The Chairperson of the UHR Commission O. Tarasov during his report pointed out that Ukrainian State withdrew itself from the obligations of state to respect international human rights, to protect them in Donetsk and Lugansk regions and forgot about focusing on the implementation of the international humanitarian law to protect civilians during the armed conflict on the captured territories⁵. Foreign scientists prove that even in European practice there is still hesitation among the judges in their particular decisions to rely on the ECHR and as the outcome there are vague and general references to it⁶.

The aim of the article is to analyze the problems of realizing the implementation of the European Convention in Ukraine – both on the controlled and captured territories. The tasks of the paper are to scrutinize the definitions “implementation”, “international implementation”, point out the main problems of the ECHR implementation and current challenges related to the violation of human rights standards within Ukrainian legislation.

Human rights and freedoms are the right to own, use and disposal of the political, economic, social and cultural (spiritual) values, which are the kind, way of behavior or activity of the person or a team of persons in the community with the aim of satisfaction their political, economic, social and cultural (spiritual) needs and interests.

All abovementioned rights and freedoms should be protected and provided within international standards on human rights, which are slowly being implemented in Ukraine as well. Even though there was approved the National Strategy in the Field of Human Rights by Presidential Decree 501/2015 of 25 August 2015⁷, the specialists in the sphere of human rights protection declare that this document is too declarative. The Director of the Human Rights Group Y. Zakharov states that the National Strategy has lumped together the rights of three generations, which should be considered separately and according to different ranges of requirements. Moreover, the author points out that the Strategy doesn’t cover the overall state’s human rights policy⁸.

In accordance with the aforementioned omissions, it is necessary to feature that one of the most important international standards is the European convention on human rights, which was drafted in Rome on 4 November 1950 and came into force on 3 September 1953. The adoption of the convention by the Council of Europe was the first step in implementing the Declaration of Human Rights in writing. The Article 1 of the ECHR "Obligation to respect human rights" tells that the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention. There are 17 key articles relating to rights and freedoms in the convention outlined in section I (Articles 2-18). Section II is devoted to the European Court of Human Rights within articles 19-51. Section III (Miscellaneous provisions) gives coverage of the articles 52-58. The ECHR also includes additional Protocols.

Implementation of the ECHR has been done since ratifying it by Ukraine in 1997. But before explaining the problems of the ECHR implementation, it is necessary to realize what is "implementation" and how many stages does the state do to implement international standards on human rights.

The term "implementation" is used in reference to actual compliance with human rights standards by individual states as well as all initiatives taken by those states themselves, other states and international organs or other bodies to enhance respect for human rights and prevent violations. The national implementation of human rights standards includes such stages of implementation:

1. *State's recognition of human rights* when we are talking about their proclamation, consolidation in the Constitution and other laws, the state's participation in the adoption and ratification of relevant international acts.

2. *The stages of human rights realization*. They are divided into two parts: social and political human rights, vital and economic human rights. But as the International Covenant on economic, social and cultural rights (ICESCR) in the article 2.1. tells: human rights must be provided by the states step by step (gradually).

3. *Institutionalization of human rights realization*. The establishment or recognition of state bodies, other public organizations and officials that are specifically obliged to facilitate the providing, (security), and protection the human rights. The enlargement of currently working state bodies (courts, prosecutor's offices etc.) and establishment of some new institutions, for instance, Constitutional Courts, Parliament Commissioner for Human Rights etc.

4. *Limitation of human rights*. Interpretation and concrete understanding of human rights legislation is needed, in particular, to unify understanding of state-legal regulation.

5. *The procedure of human rights realization* explains how to realize human right, in which form etc. When we are talking about the right to religion, the procedure is not necessary, but when we are talking about the right to get pension, the procedure is necessary.

6. *Installation and implementation of legal means of the protection of human rights*. It includes prevention of law violation and legal responsibility.

In Ukraine among the problems of implementation of the ECHR are, first of all, the reasons, related to the problems, connected with the occupied territories and impossibilities to provide legal protection of human rights. In accordance with the situation, there was issued the Statement of the Supreme Soviet of Ukraine "About derogation of Ukraine from certain obligations, specified by the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms"⁹. Within the legal act Ukrainian governmental bodies are not responsible for the providing of the Ukrainian legislation on human rights protection during the period when Crimea, Donetsk and Lugansk territories are not under the state's control. This derogation is reflected in the articles 5, 6, 8 and 13 of the Convention. So, temporarily the inhabitants of mentioned terrains are deprived of the right to liberty and security; the right to a fair trial; the right to respect for private and family life and right to an effective remedy.

For today the aforementioned issue can be solved provided the people, who move to the Ukrainian cities, which are controlled by the Ukrainian governments and officially become registered as internally displaced persons. But even not all their rights are protected within Ukrainian European human rights standards because of lots of reason. They are related with state's populism to provide the people with all needs, especially social payments, accommodation, the possibility of effective protection of rights in the courts etc. In addition to abovementioned, it is necessary to stress that hostility has led to increasing of tortures, military crimes, disappearances of people, which is especially common among the military defenders of Ukraine. Lots of them are deprived of the promised possibilities and are being limited in their human rights and freedoms. As it is stressed in the Art. 3 (Section I) of the ECHR, no one shall be subjected to torture or to inhuman or degrading treatment or punishment¹⁰.

The problem is also related to the aspect that in Ukraine there are still unresolved such issues as enforcement of decisions and application of the European Court of Human Rights practice.

The cause's problems of application of the Court are¹¹:

- 1) ambiguity of regulating the use of the Court's practice at the legislative level;
- 2) lack of coordination on the part of the state, including the judiciary on the application of the Court's practice;
- 3) the importance to realize for judges some instructions them to be aware of the Court's work.

In Ukraine there are still actual such issues, which are related to the ECHR's decisions¹²:

1. responsibility for not doing or improper performance of such decisions;
2. normative justification of the liability;
3. a clear delineation of authority who have to verify the implementation of decisions of the Court and to respond to violations of the scope of the European Convention etc.

It is necessary to emphasize that all the rights of all the generations have been increasingly violated during last two years because of warfare. And it doesn't mean that in our country we don't have clever lawyers, vice versa we

still do proclaim the necessity to adopt European standards but, at the same time, don't eradicate some soviet traditions. Moreover nowadays in order to limit the quantity of human rights violations there should be stopped the war, first of all. Secondly, it should be realized the mechanism of preventive methods, for instance, preventive justice as the element of the defense and protection of individual rights. Preventive justice is a complex and systematic activity, which, except from such organs of preventive bodies as notaries also includes quasi notary authorities, mediators and state registrars. I. Lykholat proves her own opinion that preventive justice helps not just in preventing conflicts (for instance in family law), but it is also an effective mean to prevent fraudulent acts¹³ etc.

It should be pointed up that abovementioned global for Ukraine problems of human rights violations and derogations from the state's obligations to provide them under the European Convention are to become both theoretical and practical issue within its solving as the part of transdisciplinarity.

First of all, the authorities must provide appropriate living standards for all the citizens of Ukraine. Economy of Ukraine is in the deep stagnation. Devaluation of the hryvnia and price increase is the strict confirmation of the thoughtless policy.

Second, national and foreign lawyers should prevent all the current challenges, such as corruption, inability to protect human rights in the courts without bribery, based only on the fair trial, as it is mentioned in the ECHR.

There is an urgent need of underlining the international experience and a case law in Ukrainian legal practice within human rights protection.

As it has been mentioned, the principles of the preventive justice should be legally adopted in Ukraine, emphasizing the international experience in this practice.

The problem of human rights protection should have political and even geopolitical importance not just during the period of war, but in the peacetime to prevent most acquired situations.

Sociologists and historians must research the problems of human rights protection in different countries through the historic retrospective and nowadays to compare the best achievements and gaps in the countries' experience. For instance, to build a free democratic state with European values, we should understand all the negative outcomes of soviet times.

As it is mentioned in the Art. 9 (Section I) of the ECHR, "Everyone has the right to freedom of thought, conscience and religion..."¹⁴. Because of the capturing of the Crimea, Crimean Tatar people are deprived of their ethnic and religious identity. This situation must unite all the religious representatives to educate the sense of respect both through religious writings and a canon law. The scientists of the last one should find out such theoretic recommendations, which will bring new positive guideline how to protect human rights of suffered ethnic people, notwithstanding on the controlled or uncontrolled territory. In the age of diplomacy all the issues can be definitely solved.

So, diplomatic law and the principles of diplomacy should become the key norms in the situation that we do have in Ukraine and those ones, which used to be in Georgia, Moldova, and Armenia etc.

So as Ukraine is a very young European legal state, to improve our legislation on human rights and its adoption in practice, the international experts should be invited to advice our lawyers in the aspects of implementation of the international standards. This underlining of the experience will mostly help Ukraine to limit such a big quantity of human rights violations. And, finally, it is necessary to emphasize that there should be changed the mentality of the Ukrainian people to overcome all the aforementioned problems.

¹ Постанова Верховної Ради України «Про Заяву Верховної Ради України «Про відступ України від окремих зобов'язань, визначених Міжнародним пактом про громадянські і політичні права та Конвенцією про захист прав людини і основоположних свобод» від 21.05.2015 : [Електронний ресурс]. – Режим доступу: <http://zakon4.rada.gov.ua/laws/show/462-viii>

² Палюк В. Застосування Конвенції про захист прав людини і основоположних свобод для розкриття принципу верховенства права // Науково-практична Інтернет-конференція 14.12.2012 : [Електронний ресурс]. – Режим доступу: http://legalactivity.com.ua/index.php?option=com_content&view=article&id=417%3A141212-18&catid=54%3A2-1212&Itemid=68&lang=ru

³ Палюк В. Запровадження європейських стандартів у галузі прав людини в українську судову практику // Юридичний журнал : [Електронний ресурс]. – Режим доступу: <http://www.justinian.com.ua/article.php?id=2993>

⁴ Скрыпнюк А. В. Права и свободы человека и гражданина: международные стандарты, национальная практика и проблемы их конституционной модернизации в Украине / А. В. Скрыпнюк // Проблемы законности. – Вып. №125. – 2014 : [Електронний ресурс]. – Режим доступу: <http://cyberleninka.ru/article/n/prava-i-svobody-cheloveka-i-grazhdanina-mezhdunarodnye-standarty-natsionalnaya-praktika-i-problemy-ih-konstitutsionnoy-modernizatsii-v>

⁵ Intervention of the chairperson of the Ukrainian Human Rights Commission Oleksii Tarasov during the 2015 OSCE Human Dimension Implementation Meeting : [Електронний ресурс]. – Режим доступу: <http://www.osce.org/odihr/185886?download=true>

⁶ Frank Emmert. The Implementation of the European Convention on Human Rights and Fundamental Freedoms in New Member States of the Council of Europe – Conclusions Drawn and Lessons Learned. – Indiana University Robert H. McKinney School of Law, December 12, 2011 : [Електронний ресурс]. – Режим доступу: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971230

⁷ Указ Президента України Про затвердження Національної стратегії у сфері прав людини № 501/2015 від 25.08.2015. – Режим доступу: <http://zakon5.rada.gov.ua/laws/show/501/2015>

⁸ Zakharov Y. Human rights in Ukraine in 2015: key trends // Доповідь правозахисних організацій «Права людини в Україні 2015» : [Електронний ресурс]. – Режим доступу: <http://helsinki.org.ua/publications/zvit-pro-diyalnist-spilky/>

⁹ Постанова Верховної Ради України «Про Заяву Верховної Ради України «Про відступ України від окремих зобов'язань, визначених Міжнародним пактом про громадянські і політичні права та Конвенцією про захист прав людини і основоположних свобод» від 21.05.2015 : [Електронний ресурс]. – Режим доступу: <http://zakon4.rada.gov.ua/laws/show/462-viii>

¹⁰ The European Convention on Human Rights : [Електронний ресурс]. – Режим доступу: <http://www.hri.org/docs/ECHR50.html>

¹¹ Рабінович П. М. Європейська конвенція з прав людини: проблеми національної імплементації (загальнотеоретичні аспекти): Пр. Львів. лаб. прав людини і громадянина / П. М. Рабінович, Н. М. Раданович; Акад. прав. наук України, Наук.-дослід. ін-т держ. буд-ва та місц. самоврядування. – Л.: Астрон, 2002. – 192 с.

¹² Верланов С. О. Економічні і соціальні права людини: європейські стандарти та їх впровадження в юридичну практику України (загальнотеоретичне дослідження). – Л.: Край, 2009. – 196 с.

¹³ Лихолат І. П. Превентивна юстиція – елемент системи охорони та захисту прав особи / І. П. Лихолат // Часопис Київського університету права. – № 4, 2015. – С. 24–27.

¹⁴ The European Convention on Human Rights : [Електронний ресурс]. – Режим доступу: <http://www.hri.org/docs/ECHR50.html>

Резюме

Барабаш Ю. В. Відхилення від зобов'язань у дотриманні державою Європейської конвенції з прав людини в Україні.

У статті вказані основні відхилення держави від зобов'язань в дотриманні Європейської конвенції з прав людини в Україні. Охарактеризовано погляди науковців щодо вказаної проблеми, вказано на можливі шляхи її вирішення.

Ключові слова: права людини, міжнародні стандарти, імплементація, захист прав, Європейська конвенція з прав людини, Конституція України.

Резюме

Барабаш Ю. В. Отклонения от обязательств в соблюдении государством Европейской конвенции о правах человека в Украине.

В статье указаны основные отклонения государства от обязательств в соблюдении Европейской конвенции по правам человека в Украине. Охарактеризованы взгляды ученых относительно указанной проблемы, указано на возможные пути ее решения.

Ключевые слова: права человека, международные стандарты, имплементация, защита прав, Европейская конвенция по правам человека, Конституция Украины.

Summary

Barabash Y. Derogations from the obligations in abiding by the state of the European Convention on Human Rights in Ukraine.

The article has shown the main derogations from the obligations of the state in abiding by the European Convention on Human Rights in Ukraine. There have been characterized the views of scientists on this problem and given some possible ways to solve it.

Key words: human rights, international standards, implementation, protection of human rights, the European Convention on Human Rights, the Constitution of Ukraine.

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ТОРГІВЛЯ ЛЮДЬМИ ЯК ФОРМА НАСИЛЛЯ НАД УРАЗЛИВИМИ ГРУПАМИ НАСЕЛЕННЯ

Актуальність даної теми дослідження зумовлена тим, що цей рік залишається так само складним щодо ситуації з біженцями. Число людей, які перемістилися внаслідок конфліктів та переслідувань, досягло більше ніж 50 мільйонів чоловік, що є одним із найбільш високих рівнів з часів Другої світової війни. Нині це одна з глобальних проблем сучасності, а міграційна криза в Європі є однією з найбільш актуальних та болючих тем останнього часу. Потік біженців з Близького Сходу та Африки – двох частин світу, де йде громадянська війна, а також страшенне зубожіння, розруха та голод – не припиняється.

Безперечним є той факт, що жорстокі конфлікти і гуманітарні кризи є живильним середовищем для торгівлі людьми. Такі ситуації, як переслідування, довільні затримання, тортури, звалтування, викрадення і насильницькі зникнення, руйнування будинків, зростання цін на продукти харчування і поступове обмеження доступу до водопостачання і санітарних послуг, що підвищує ризик виникнення хвороб і голоду, викликають внутрішнє і міжнародне переміщення населення та примусову міграцію. Багато людей, прямуючи на пошуки більш безпечного та забезпеченого життя, стають жертвами торговців і експлуататорів.

Жертвами торгівлі людьми стають і біженці, і особи, що просять притулок, і навіть внутрішньо переміщені особи. Всі вищезазначені категорії мають право на захист своїх ключових прав людини, так само як і пов'язані з їхнім статусом додаткові види захисту.