

Essence of Criminal Law of the European Court of Human Rights

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The Convention for the Protection of Human Rights and Fundamental Freedoms (*the Convention*) takes an important place in the doctrine and practice of criminal law of Ukraine and other countries. However, it could present some differences in interpretation of the provisions of the Convention in the Ukrainian legislation and in the practice of the European Court of Human Rights (ECHR). The aim of the article is to approximate national criminal law to international standards and the practice of the ECHR. The object of the article is essence of Criminal Law in the practice of the ECHR.

Keywords: crimes, humanity, crime prevention, principles, human rights, victim, law enforcement.

Baudžiamosios teisės principai Europos Žmogaus Teisių Teisme

Žmogaus teisių ir pagrindinių laisvių apsaugos konvencija (toliau – Konvencija) tapo svarbia Ukrainos ir kitų šalių baudžiamosios teisės doktrinai ir praktikai. Tačiau Ukrainos teisės aktuose ir Europos Žmogaus Teisių Teismo (EŽTK) praktikoje Konvencijos nuostatos gali būti aiškinamos skirtingai. Straipsnio tikslas – suderinti nacionalinę baudžiamąją teisę su EŽTK tarptautiniais standartais ir praktika. Straipsnio dalykas yra baudžiamosios teisės esmė EŽTK praktikoje.

Pagrindiniai žodžiai: nusikaltimai, žmoniškumas, nusikalstamumo prevencija, principai, žmogaus teisės, nukentėjusieji, teisėsauga.

Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (*the Convention*) takes an important place in the practice of criminal law of Ukraine and criminal law doctrine.

The practice of the European Court of Human Rights (ECHR) is considered as a part of the legislation of Ukraine, in particular of criminal law. It was fixed in the Article 2 of the Law of Ukraine “On the implementation of decisions and application of the practice of the European Court of Human Rights” of 23 February 2006.

Some aspects of this issue have been studied in the works of scientists and scholars. In particular A. Mowbray studied the principle of fair balance in the jurisprudence of the European Court of Human Rights (Mowbray, 2010). V. Tuliakov researched the principle of legality in dynamics of the

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ECHR and other issues of approximation. G. Yepur researched implementation of international legal acts in the criminal legislation of Ukraine (Yepur, 2005). S. Khilyuk studied the principle of legality in criminal law interpretation of the European Court of Human Rights (Khilyuk, 2014). D. Yagunov studied the case law of the European Court of Human Rights (Yagunov, 2010). B. Schlink researched the principle of proportionality (Schlink, 2012). O. Soroka researched implementation of the case law of the European Court of Human Rights in the criminal law of Ukraine (Soroka, 2015). M. Khavronyuk researched the issue of harmonization of criminal legislation of Ukraine with the legislation of foreign countries and the requirements of international treaties (Khavronyuk, 2014).

At the same time, given the modern changes and challenges, the topic remains relevant. Particular attention should be paid to the category of victim. In the context of criminal law, it is a double one. Applicant commit a crime, but he (or she) is a victim of the government in the case of the ECHR. So, the human rights standards should be complied with people who have committed and been involved in crimes.

Purpose and objectives of the article

The aim of the article is to approximate national criminal law to international standards and the practice of the European Court of Human Rights.

To achieve this goal, the following tasks were set:

1. Define the essence of criminal law.
2. Establish the role of principles in the criminal law regulation. The essence of criminal law is expressed through its principles.
3. Promote and provide a systematic response to violations of the provisions of the Convention and take into account the practice of the ECHR. Promote the inadmissibility of violations of fundamental human rights and freedoms are provided in international documents.
4. To substantiate the need for additional guarantees for the implementation practice of the European Court of Human Rights.
5. Establish the need to comply with the human rights standards in sentencing perpetrators and criminals, especially in case life imprisonment.

Materials and methods

The methodological basis of the article is general and special methods. In particular, using of the *dogmatic method* helps to clarify the content of practice of the European Court of Human Rights, the content of international treaties that provide for fundamental human rights. The *dialectical method* facilitated the analysis of the practice of the ECHR. The *comparative law method* was used during analysis of the criminal law of foreign countries in order to use the practice of the ECHR. *Methods of deduction, analysis and generalization* were used in the study of doctrinal provisions on the subject. The *system-functional method* made it possible to analyze the available resources, which covers the issue of implementation of the practice of the ECHR.

The Convention provides for fundamental rights. The Criminal Code protects such rights from criminal encroachment.

In particular, Art. 2 of the Convention provides for the right to life. The Criminal Code of Ukraine provides for criminal liability for murder (Article 115 of the Criminal Code), manslaughter (Article 119 of the Criminal Code), etc. The criminal law of Ukraine does not provide for the death penalty.

However, it could present some differences in interpretation of the provisions of the Convention in the Ukrainian legislation and in the practice of the ECHR.

Value of Convention and principles in the practice of the European Court of Human Rights

Numerous violations of the articles of the Convention require a systematic response of the state and appropriate changes in both legislation and changes in law enforcement practices. The violations are, in particular, related to problems of interpretation of the provisions of the Convention.

The ECHR, applying its norms (which enshrine natural rights), does not create new norms, but gives the norms a new interpretation and reproduces it in decision. Thus, the norm acquires a new meaning without making changes to the ECHR, which ensures, on the one hand, stability, and on the other hand – the dynamics in the settlement of public relations.

In case of violation of the rights enshrined in the Convention, and subject to the passage of all courts at the national level, a person can apply to the European Court of Human Rights for protection of his violated right. The specificity is that a complaint is filed not against a certain person, but against a state that has not ensured the realization of human rights and freedoms at the national level.

The developers of the new Criminal Code propose to enshrine in the text of the Criminal Code a requirement for its mandatory compliance with the case law of the ECHR. According to Article 1.2.8 of the draft of the new Criminal Code the Code is applied taking into account the practice of the ECHR. The ECHR Convention and practice are examples of unification, an example of universal norms for all countries that have unified it. In addition, noncompliance with a decision of the European Court of Human Rights or the International Criminal Court (Article 7.6.6) is very relevant in this context. It is proposed to prosecute an official who has not complied with: a) a decision of the European Court of Human Rights or b) a judgment, ruling or decision on a fundamental issue of the International Criminal Court (Draft of the new Criminal Code of Ukraine, 2022).

Many cases of the ECHR emphasize that the Convention is a living instrument and therefore the content of stable eternal values can change depending on the economic, social and cultural situation, which also confirms the axiomatic nature of human rights as a concept and their implementation, including the erosion of human rights, is closer to the nature of legal fiction. The dynamics of the Convention (“living instrument”) are related to human qualities and human interaction in society, as violations of rights (mainly the commission of criminal offenses) are impossible without social interaction.

Each appeal to the ECHR can radically change the approach to the interpretation of a right or freedom for the whole world and Ukraine in particular. At the same time, the state must be careful in applying the case law of the European Court of Human Rights in order to preserve its national characteristics.

The ECHR Convention and Practice reflect the *principles of criminal law*, in particular the principle of subsidiarity (Volovik v. Ukraine, Mala v. Ukraine), the principle of legality and the principle of legal certainty (lex certa, nonretroactivity and lex mitior (Damjanović v. Bosnia and Herzegovina), Nulla poena sine lege parlamentaria (Article 7 of the Convention), Non bis in idem (Article 4 of Protocol No. 7) (Melnik v. Ukraine, Koretsky and Others v. Ukraine), the principle of proportionality and necessity, the principle of presumption of innocence (Garnaga v. Ukraine, Kotiy v. Ukraine), the principle of dynamic interpretation of the Convention and the principle of autonomy of interpretation (Zamula et al. v. Ukraine; Suk v. Ukraine; Luchaninov v. Ukraine). All these principles have humanistic content and are significantly important in the law enforcement practice.

Proportionality. For the correct application of the principle of proportionality by courts, the test of proportionality with a two-stage structure is crucial. First of all, the court has to establish that certain actions are limited by government actions. Next, the authorities must demonstrate to the court that they pursued a legitimate aim and that the restriction was proportionate to that aim (Pogrebnyak, 2012,

p. 50). The proportionality test includes three criteria: firstly, the means intended to achieve the objective of power must be suitable for achieving that objective (relevance); secondly, the tool that restricts the right of the individual least (necessity) should be chosen from all suitable ones; thirdly, the damage to an individual from the restriction of his right must be proportionate to the government's benefit in achieving the objective (proportionality in the narrow sense) (Cohen-Elia, 2011, p. 61). Proportionality in the narrow sense is also often referred to as the principle of balancing or the principle of balance of justice (Pogrebnyak, 2012, p. 50).

In assessing the appropriateness of the remedy, the court should take into account the existence of strictly prohibited means (such as torture), which makes it inappropriate to further analyze certain restrictions for their proportionality. In addition, the legitimacy of the goal pursued by the relevant means must be assessed. Legitimacy ought to follow from the Constitution and laws. At the heart of the requirement of the legitimacy of the goal is the opinion that state measures cannot be carried out without a corresponding goal. Such a goal requires an objective justification, in the absence of which a citizen can easily become the object of aimless politics (Albrecht, 2003, p. 68).

The principle of legal certainty. The ECHR judgment of the *Sunday Times v. The United Kingdom* v. 1 of 26 April 1979 stated that a rule cannot be regarded as a “right” one unless it is clearly worded, which allows a citizen to regulate their behaviour (paragraph 49). Due to case of the European Court of Human Rights “*S.W. v. the United Kingdom*” of 22 November 1995, the principle of legal certainty in the context of criminal law means that a person must know for what acts or omissions he may be prosecuted by formulating the relevant provision of the law, and if necessary – by its interpretation by the court (paragraph 35).

According to Art. 7 of the Convention, no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. Article 7 shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

The regulatory function of Criminal Law is not only to secure of criminal law protection objects by the normative-determined measures of state coercion, but also the achievement of harmony in relations between the state and citizens, where the responsibility of the offender corresponds to the state's duty to seek, fair punishment and rehabilitation of the offender; compensation and restitution to a victim of a criminal offense; achieving social peace and harmony at the national, local and individual levels. This fully corresponds to the interpretation of legality principle in implementation of the provisions of Article 7 of the Convention (Tuliakov, 2018, p. 192).

Some characteristic of the principle of legal certainty is also stated in cases of the ECHR. Among them are cases the *Sunday Times v. The United Kingdom* No 1 of 26 April 1979, *S.W. v. the United Kingdom* of 22 November 1995, *Soldatenko v. Ukraine* of 23 October 2008, and others. Art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 states that if national law provides for the possibility of deprivation of liberty, such a law must be sufficiently accessible, clearly worded and predictable in its application – to eliminate any risk arbitrariness (p. 111).

Prohibition of retroactive application of criminal law is one of the manifestations of the principle of *humanism* in a civilized, democratic state. The person must know (or should have the opportunity to know) about the criminal nature of such an act and punishment. The opposite would be inhumane and would not contribute to the achievement of the objectives and goals of the Criminal Code (Timofeyeva, 2020). Moreover, criminal law is an additional measure of protecting human rights, especially in extreme cases.

The principle of humanism is manifested in many decisions of the ECHR and is aimed at all actors. The case law of the ECHR is also interesting in that the applicant has a dual nature. He is a criminal on the one hand and a victim on the other, because the state has violated the right enshrined in the Convention in investigations, sentencing and treatment in places of detention. In particular, violation of Art. 3 of the Convention.

Criminal protection of fundamental human rights and the practice of the European Court of Human Rights

Right to life (Article 2 of the Convention, Protocol 6, Gongadze v. Ukraine, Malenko v. Ukraine, Irina Smirnova v. Ukraine). Based on Part 1 of Art. 2 of the Convention, no one shall be deprived of his life intentionally. Before the adoption of Protocols № 6, 13 to the Convention, deprivation of life had not considered as a violation of the above provision, if force is absolutely necessary: a) to protect any person from unlawful violence; b) to make a lawful arrest or to prevent the escape of a person lawfully detained; c) in taking lawful action to quell a riot or insurrection. Subject to the provisions of Art. 1 and 2 of Protocol No. 6 to the Convention on the abolition of the death penalty of 28 April 1983 (as amended on 11 May 1994) ETS № 114 the death penalty is abolished. No one shall be condemned to the death penalty or executed. The state may provide in its legislation for the death penalty for acts committed during war or imminent threat of war; such punishment is applied only in cases established by law and in accordance with its provisions.

The right to life as one of the highest humanistic human rights is protected by the Criminal Code of Ukraine through the existence of punishment for intentional or negligent deprivation of another person's life (Articles 115–118 of the Criminal Code of Ukraine). However, there is a deviation from this prohibition in accordance with the principles of criminal law.

A person is not subject to criminal liability for taking the life of another person if he died in the process of self-defence, if a person was attacked by a group of persons, if attacked in the home and with a weapon (Article 36 of the Criminal Code of Ukraine). Violation of the right to life, within the meaning of the Convention, also implies an encroachment on the freedom to directly realize the natural needs necessary for human life and development. Each article of the Criminal Code of Ukraine provides for the protection of humanistic rights and freedoms provided in the Convention or certain aspects of such rights.

To ensure the right to life in the broadest sense, the current Criminal Code of Ukraine provides for criminal liability for leading a person to suicide (Article 120 of the Criminal Code of Ukraine), which is the result of ill-treatment, blackmail, systematic humiliation or systematic unlawful coercion. Ill-treatment should be understood as ruthless, cruel acts that cause the victim physical or mental suffering (systematic infliction of bodily injuries or beatings, deprivation of food, water, clothing, housing, etc.). Systematic humiliation of human dignity was considered as a long-term humiliating treatment of the victim (constant insults, mockery of him, etc.).

Prohibition of torture, inhuman or degrading treatment or punishment (Article 3).

According to Article 3 of the Convention, no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

This article enshrines the absolute right, i.e. the state under no circumstances can deviate from the provisions of Art. 3. This means that torture cannot be committed to investigate another criminal offense or criminal offenses, to prevent the commission of new criminal offenses, etc. Torture or inhuman

treatment is unacceptable for a democratic state governed by the rule of law under any circumstances. Under this article, derogation during an emergency is not possible (Article 15 of the Convention).

However, there are some differences in the understanding of torture by the Ukrainian legislature and in the practice of the ECHR.

If the torture was carried out under the supervision of the state, the state must investigate, establish and prosecute the perpetrators, as well as compensate the victim.

It is unacceptable to limit the investigation in cases of allegations of ill-treatment, failure to conduct an investigation, termination, delay. The investigation must be swift and independent. In addition, there should be public scrutiny of such an investigation. The victim must have a real opportunity to participate in the investigation of a criminal offense.

Unfortunately, the current practice of compensating victims and ensuring the participation of victims in criminal proceedings does not meet international and European standards and needs to be improved. It seems that given the accompanying circumstances, failure to provide the victim with a real opportunity to participate in criminal proceedings, as well as the lack of informing victims about the progress of the investigation can be considered as inhuman treatment within the meaning of Art. 3 of the Convention.

In the case of Beketov v. Ukraine of 19 February 2019, application № 44436/09, violation of the substantive aspect of Art. 3 of the Convention was established in connection with the ill-treatment that the applicant suffered from police officers while under their control in the department (*Beketov v. Ukraine, 2019*).

In *Matushevsky and Matushevskaya v. Ukraine* (application no. 59461/08) of 23 June 2011, the State Government failed to ensure an effective investigation into the death of a suspect held in pretrial detention. The Government did not provide any plausible explanation for the injuries and the ECHR considered that these injuries were serious enough to indicate ill-treatment beyond the maximum level of cruelty established by Article 3 of the Convention (*Matushevsky and Matushevskaya v. Ukraine, 2011*). In general, “accidents” or rather their statement by the penitentiary system and law enforcement officers is quite common practice. Such cases are often not provided with an effective investigation, but not all such cases reach the ECHR or even the national court.

It should be said about failure to provide adequate medical care to convicts as a form of inhuman treatment. In the ECHR case *Garumov v. Ukraine* of 6 June 2019, application No. 70043/17, a violation of Art. 3 of the Convention was connected with the provision of inadequate medical care to the applicant during his detention due to unjustified delays by the authorities in providing the applicant with medical care after his medical condition, their inability to ensure his hospitalization for further examination and inpatient treatment, as well as further deterioration of his health (*Garumov v. Ukraine, 2019*).

In the ECHR case *Petukhov v. Ukraine* (no. 2) of 12 March 2019, application no. 41216/13, a violation of Article 3 of the Convention was found in respect of the applicant’s inadequate medication (therapy) tuberculosis during detention due to the fact that for a certain period of time the applicant was regularly provided with anti-tuberculosis drug to which he had resistance, lack of legal regulation in Ukraine of palliative care in places of imprisonment, failure to provide palliative care to the applicant, etc. So the applicant was not provided with any special conditions of detention other than those of healthy convicts (*Petukhov v. Ukraine* (no. 2), 2019).

Some other cases of the ECHR should be also mentioned. Among them *Winter v. The United Kingdom*, application №№ 66069/09, 130/10 and 3896/10 of 9 July 2013, *Laszlo Magyar v. Hungary*, application № 73593/93 of 20 August 2014, *Hutchinson v. The United Kingdom*. № 57592/08 of 17 January 2017, *Petukhov v. Ukraine*. № 2 application № 41216/13 of 12 March 2019.

Cases of inhumane treatment due to inadequate medical care are especially relevant in connection with the Coronavirus pandemic and with war in Ukraine. The state is not even physically able to provide proper conditions for convicts.

It is significant said about review of life imprisonment in the context of ECHR practice. The debate over “real” life imprisonment (that is, life imprisonment in which a convicted person is deprived of the opportunity to be released at any time in his life) has a long history. The introduction of this punishment was the response of European states to the abolition of the death penalty according to Protocols 6 and 13 to the European Convention on Human Rights. By the way, the debate over the appropriateness of life imprisonment without the right to further review according to Article 3 of the Convention has been continuing (*Timofeyeva, 2020*).

Ecological rights (Article 8 and criminal law aspect)

There are problems in the European legal doctrine regarding the separation of environmental rights. In particular, there is no separate article in the Convention that protected the right to a favorable environment. However, the ECHR has broadened the understanding of Art. 8 in this context under certain conditions.

In the case of *Hrymkivska v. Ukraine* of 21 July 2011, the applicant alleged that her home, private and family life had suffered significant damage as a result of the operation of a main road built close to her home. In result it caused consequences in the form of significant air pollution by exhaust gases, coal dust, which arose as a result of patching potholes on the road with cheap material from coal mines. Thus, the applicant pointed out that the house had become almost uninhabitable. In addition, this contamination has led to chronic respiratory diseases in her family. That is, the conclusion of a violation of Art. 8 depends on the specific circumstances, and the notion of “level of significant deterioration” is an estimate and may be determined by the degree of adverse effects and consequences, in particular “significantly impairs the applicant’s ability to use his home, private and family life”. However, it is often difficult to prove in practice that it is this pollution that has led to ill health. Having investigated in detail all the circumstances, the court still found a violation of Art. 8 of the Convention. A similar argument was made by the court in the case *Dubetska and Others v. Ukraine* of 10 February 2011. Mention should also be made of *Hatton and Others v. The United Kingdom* and *Moreno Gomez v. Spain*, which concerned exceeding noise limits.

The condition which described in this case is incompatible with normal life. Environmental rights are related to the right to life in a broad sense. The dynamics of the Convention in this matter might change and such violations could be considered in the context of Article 2 of the Convention in its wide context.

Crime against ecology are considered in the Criminal Code of Ukraine as well (Articles 236–254). Thus, the criminal law protects environmental rights that directly affect human health and life. If a state did not respond to a person’s appeal in this context, it would commit a crime against person and violates the provisions of the Convention.

The right to beg in the context of Art. 8 of the Convention.

In case *Lăcătuș v. Switzerland* (2021), the Geneva has violated Article 8 of the Convention on the right to respect for private and family life by fining and eventually imprisoning young woman for begging.

The applicant in this case was a member of the Roma community and of a fairly young age. She was also illiterate, unemployed and did not receive any social security or financial support. She began

begging for money on the streets of Geneva to survive. For three years, she received 9 individual fines of 100 Swiss francs under the Geneva Penal Code, which prohibits begging in public places.

In weighing the interests in question, the Court found that the applicant was in a “situation of obvious vulnerability” as a person who was poor, illiterate and completely without income. As a result, she “had the right inherent in human dignity to be able to express her grief and try to meet her needs through begging”. The (criminal) sanction imposed on the applicant was severe and, as she was in an unstable and vulnerable situation, the conversion of her fine into imprisonment was largely automatic (*Corina Heri, 2021*).

The court emphasized that the applicant had neither been exploited in poverty nor behaved aggressively. The Court ruled that “the motivation to make poverty less visible in the city and attract investment” is not a legitimate motivation for measures that limit the human needs of the law. The lack of less restrictive means has also not been convincingly demonstrated. As a result, the Court found that the respondent State had exceeded its discretion and had violated Article 8 of the ECHR.

Decisions on the coexistence of Barcelona and the Spanish Federation of Municipalities and Provinces discuss the possibility of further homelessness as people without rights. Thus, they proceed from the fundamental difference inherent in the criminal law of the enemy: the confrontation between people and persons without rights.

This case is an example of poverty discrimination. If the state cannot provide a person with decent living conditions, access to work and study, a salary appropriate for education and experience, state could not punish people for asking for help. But on the other hand, the dangers of child exploitation, human trafficking and slavery are also high in this context. Therefore, each case requires careful investigation.

Another issue that have risen in this case is the *approach to punishment*. Lăcătuș was sentenced to an administrative fine, but the ECHR recognized his criminal context. The ECHR considered penalties more broadly than national law. In its practice, the ECHR has repeatedly pointed to the criminal law nature of administrative penalties (including fines and arrests), disciplinary sanctions, etc.

In the ECHR case *Welch v. The United Kingdom* (complaint № 17440/90 of 09.02.1995), based on the content of Art. 7 of the European Convention, the court noted that in assessing a measure as a “punishment”, the starting point should be to determine whether its application is a consequence of a conviction for a “criminal offense”. Other factors that may be taken into account as significant are the nature and purpose of the measure, its definition in accordance with national law, the procedure for its application and implementation, and its severity (paragraph 28). In this context, it is a question of ensuring the human rights provided for in the Convention in the case of not only penalties but also administrative penalties (criminal law).

We are talking in particular about a fine, arrest. For instance, it is reflected in the ECHR case *Shvidka v. Ukraine*, statement № 17888/12 of 30 October 2014. It should be noted that certain forms of administrative and disciplinary liability are much stricter than forms of criminal liability, including certain fines.

Sentencing and other measures of a criminal law nature. In order for the court to make a decision, including when appointing a person to criminal responsibility and other measures of a criminal law nature, it is necessary to observe “... a balance of justice between the requirements of public interest and the protection of fundamental individual rights” (*Mowbray, 2010, p. 47*). The principle of fair balance is that the court decides on the law in symbiosis with the responsibilities of the Member States in accordance with the provisions of the Convention. National authorities must balance the interests of members of society with fundamental human rights and freedoms.

Conclusions

1. The main idea, essence and value of criminal law is to protect fundamental rights and impose fair punishments for their violation. Fair punishment should comply with the principles of criminal law. The essence of criminal law is expressed through its principles. Among them are the principles of humanism, legality, proportionality, individualization and differentiation of criminal responsibility.

2. There is a lot to be gained from the Convention and the practice of the ECHR. First of all the most obvious benefit is a fundamental role of rights of the Convention. Therefore, in the Criminal Code of Ukraine, violations of relevant rights are considered as a crime. Moreover this applies to the Criminal Codes of many European countries because of our common values. These values are also proclaimed in the Declaration of Association with the EU.

Each state has its own peculiarities in terms of criminal law regulation and protection, each country has the right to accept or not to accept certain recommendations formulated in a specific decision of the ECHR.

There are common global problems in European countries: environmental and economic crises, epidemics, epizootics, poverty. The best way to deal with them is first of all definite them. And secondly is to integrate and unify of international community in combating these crimes and to protect fundamental rights. The international community should focus their attention on inadmissibility of violation of fundamental human rights and freedoms.

3. The governments should focus their attention on a systematic response to violations of the provisions of the Convention and taking into account the practice of the ECHR. This could have a positive impact on criminal law policy.

The violations are, in particular, related to problems of interpretation of the provisions of the Convention. Provisions of Art. 8 of the Convention are related to other provisions of the Convention and the development of the ECHR practice on certain issues.

The Convention is dynamic, it changes under the influence of society, its provisions change in the process of development and acquire new meanings. In particular, the ECHR recognizes a violation of Art. 8 (the right to respect for private life) in those contexts in which he had not previously recognized. In particular, this applies to the interpretation of Art. 8 of the Convention in the context of the right to beg ("poverty") in the context of the right to freedom of expression, the opportunity to address people with grief and to draw attention to such a situation (*Lakatus v. Switzerland, 2021*). Moreover, the criminal law protects environmental rights that directly affect human health and life (*Hrymkivska v. Ukraine, 2011*). If a state did not respond to a person's appeal in this context, it would commit a crime against person and violates the provisions of the Convention.

4. In particular, some aspects of these standards had already been adopted in legislation by the government of Ukraine. For sure, this is a crucial instrument to prevent crime. However, as reality shows, this does deter neither people nor corporations from infringements.

The development of these provisions requires analysis and consideration in the development of a new Criminal Code. At the same time, it is necessary to be careful with the balance between human interests and the security of society and the state, The balance between freedom and security. It is important that the rights enshrined in the Convention remain fundamental and do not interfere with the interests and needs of the individual, which are much broader. In addition, speaking about the importance of the case law of the European Court of Human Rights for criminal law and its reform, it is also necessary to take into account the national characteristics of the state. The case law on Ukraine must be taken into account. Practice of other countries may also be applied, taking into account national specificities and legislation.

5. Last but not the least, the human rights standards should be complied with people who have committed and been involved in crimes. Attention should be paid to court sanctions. Court can declare a violation and award compensation. The further fate of the case, in particular the prosecution of specific officials, remains behind the scenes. It would also be fair to pay appropriate compensation not only from the state budget but also directly from the perpetrators to victim.

Bibliography

Legal normative acts

International conventions, recommendations etc.

Convention for the Protection of Human Rights and Fundamental Freedoms (1950). Rome, 4.XI.1950 [online]. Available at: https://www.echr.coe.int/documents/convention_eng.pdf

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1984). Adopted 10 December 1984 by General Assembly resolution 39/46[online]. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>

Constitution, Codes, Laws

Criminal Code of Ukraine(2001).*Vidomosti Verkhovnoyi Rady Ukrayiny* 5 April 2001, No 2341-III [online]. Available at:<https://zakon.rada.gov.ua/laws/show/2341-14>

Special literature

Albrecht, P. A. (2003). *The Forgotten Freedom: September 11 as a Challenge for European Legal Principles*. Berlin: BWV Berliner Wissenschafts-Verlag.

Cohen-Elia, Morat, Porat I. (2011). Amerikanskij metod v zveshivaniya interesov i nemeckij test naproporcional'nost': istoricheski ekorni (The American method of weighing interests and the German test of proportionality: historical roots). *Sravnitel'noekonstitucionnoeobozrenie (Comparative Constitutional Review)*, 3, 59–81 [in Russian].

Khavronyuk, M. I.; Gatselyuk, V. O. (2014). Zakonodavstvo Ukrayiny proty katuvan' ta inshykh zhorstokyykh, nelyuds'kykh abo takykh, shcho prynyzhuyut' hidnist', vydiv povodzhennya i pokarannya: [Legislation of Ukraine against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]: Scientific and Practical Commentary. Kyiv: Vaite. [in Ukrainian].

Khilyuk S.V. (2014). Lex stricta yak skladova pryntsyphu zakonnosti u kryminal'nomu praviv interpretatsiyi Yevropeys'kohosudu z prav lyudyny. [Lex stricta as a component of the principle of legality in criminal law interpretation of the European Court of Human Rights]. *Journal of the Bar Academy of Ukraine*, 7, 3 (24), 92–103. [online]. Available at: e-pub.aau.edu.ua [in Ukrainian].

Mowbray, A. (2010). A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights. *Published by Oxford University Press. Human Rights Law Review*, 10 (2), 289–317. <https://doi.org/10.1093/hrlr/ngq006>

Pogrebnyak, S. P. (2012). Pryntsyph proporsionnosti u sudovii diialnosti. (The principle of proportionality in judicial activity). *Filosofiiapravaizahalnateoriiaprava. (Philosophy of law and general theory of law)*, 2, 49–55 [in Russian].

Schlink, B. (2012). Proporcional'nost': k probleme balansa fundamental'nyh prav i obshhestvennyh celej. (Proportionality: Towards a Balance of Fundamental Rights and Public Purposes). *Sravnitel'noekonstitucionnoeobozrenie(Comparative Constitutional Review)*, 2, 56–77 [in Russian].

Soroka O. O. (2015). *Realizatsiya praktyky Yevropeys'kohosudu z pravlyudyny u kryminal'nomopravi Ukrayiny* [Implementation of the case law of the European Court of Human Rights in the criminal law of Ukraine]. Candidate's thesis. 12.00.08. Kyiv, 205 s. [in Ukrainian].

Timofeeva, L. Yu. (2020). *Humanistychna paradyhma: dosvid, vykyky ta perspektyvy kryminal'nohoprava Ukrayiny* [Humanistic paradigm: experience, challenges and prospects of criminal law of Ukraine]: monograph. Kharkiv: Pravo [in Ukrainian].

Timofeeva, L. Yu. (2020). Katuvannya ta nelyuds'ke povodzhennya v konteksti suchasnoyi praktyky Yevropeys'kohosudu z prav lyudyny [Torture and inhuman treatment in the current case law of the European Court of Human Rights]. *Bulletin of the Criminal Law Association of Ukraine*. 2 (14), 36–153. <https://doi.org/10.21564/2311-9640.2020.14.216748> [in Ukrainian]

- Tuliakov, V.O. (2018). Criminal policy in East European Territories. *Current issues of domestic jurisprudence*, 6, 191–194.
- Tuliakov, V. O. (2019). Pryntsyp zakonnosti v dynamitsirishen 'YESPL ta rozvytokkryminal' noho zakonodavstva Ukrayiny [The principle of legality in the dynamics of ECHR decisions and the development of criminal law of Ukraine]. *Conceptual principles of the new edition of the Criminal Code of Ukraine: materials of the International Scientific Conference, Kharkiv, October 17-19, 2019 / ed.: V. Ya. Tatsiy (ed.), AP Getman, Yu. V. Baulin and others. Kharkiv: Law, 2020, pp. 125-130 [in Ukrainian].*
- Yahunov, D.V. (2010). *Praktyka Yevropeys'koho sudu z prav lyudyny (pretsedenty ta komentari z pytan' kryminal'noho sudochynstva)* [Case law of the European Court of Human Rights (precedents and comments on criminal proceedings)]. Odesa: Feniks [online]. Available at: http://www.yahunov.in.ua/?page_id=578 [in Ukrainian].
- Yepur, H. V. (2005). Vprovadzhennya mizhnarodno-pravovykh aktiv v kryminal'ne zakonodavstvo Ukrayiny. [Implementation of international legal acts in the criminal legislation of Ukraine]. Candidate's thesis. 12.00.08. Kharkiv, 195 s. [in Ukrainian].

Court practice

Decisions of European Court of Human Rights

- Beketov v. Ukraine (2019). The European Court of Human Rights 19.02.2019[online]. Available at: https://zakon.rada.gov.ua/laws/show/974_d19#Text
- Cyprus v. Turkey (2001). The European Court of Human Rights. 10 May 2001, applications no 25781/94[online]. Available at: <https://rm.coe.int/16806b5964>
- Matushevsky and Matushevskaya v. Ukraine (2011). The European Court of Human Rights 23 June 2011 p., applications no 59461/08[online]. Available at: https://zakon.rada.gov.ua/laws/show/974_901#Text
- Moldovan and others v. Romania (2005). The European Court of Human Rights 12 July 2005, applications no 64320/01. Press release of the Registrar of the European Court of Human Rights concerning Judgment in the Case of Moldovan and others v. Romania[online]. Available at: <http://www.viaduk.net/clients/vs.nsf/0/68c2bdf26e4455ec-22576c400367f66?OpenDocument&Click>
- Petukhov v. Ukraine (No. 2) (2019). The European Court of Human Rights, 12.03.2019, applications no 41216/13[online]. Available at: https://zakon.rada.gov.ua/laws/show/974_d98#Text
- Hutchinson v. United Kingdom (2019). The European Court of Human Rights (Grand Chamber), 17 January 2017. applications no 5792/08[online]. Available at: <http://hudoc.echr.coe.int/eng?i=001-170347>
- Vinter and Others v. United Kingdom (2013). The European Court of Human Rights (Grand Chamber), 9 July 2013, applications No. 66069/09, 130/10 and 3896/10[online]. Available at: <http://hudoc.echr.coe.int/eng?i=001-122664>
- Funke v. France (1993). The European Court of Human Rights, 25 February 1993, application no 10828/84[online]. Available at: <http://hudoc.echr.coe.int/eng?i=001-57809>
- Quinn v. Ireland (2000). The European Court of Human Rights (Fourth Section), 21 December 2000, applications no 36887/97[online]. Available at: <http://hudoc.echr.coe.int/eng-press?i=003-68249-68717>
- Maktouf and Damjanović v. Bosnia and Herzegovina (2013). The European Court of Human Rights, 18.07.2013. Applications № 2312/08 and 34179/08[online]. Available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-12271>
- Saunders v. the United Kingdom. (1996). The European Court of Human Rights, 17 December 1996, application no 19187/91[online]. Available at: <http://hudoc.echr.coe.int/eng?i=001-58009>

Other

- Beg your Pardon!: Criminalisation of Poverty and the Human Right to Beg in *Lăcătuș v. Switzerland* (2021) [online]. Available at: <https://strasbourgobservers.com/2021/02/10/beg-your-pardon-criminalisation-of-poverty-and-the-human-right-to-beg-in-lacatus-v-switzerland/>
- Robochoyi hrupy z pytan' rozvytku kryminal'noho prava Komisiyi z pytan' pravovoyi reformy pry Prezydentovi Ukrayiny (2019) [Website of the Working Group on the Development of Criminal Law of the Commission on Legal Reform under the President of Ukraine] [online]. Available at: <https://newcriminalcode.org.ua/criminal-code>

Essence of Criminal Law of the European Court of Human Rights

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S u m m a r y

The Convention for the Protection of Human Rights and Fundamental Freedoms (*the Convention*) takes an important place in the doctrine and practice of criminal law of Ukraine and other countries.

However, it could present some differences in interpretation of the provisions of the Convention in the Ukrainian legislation and in the practice of the European Court of Human Rights (ECHR).

The aim of the article is to approximate national criminal law to international standards and the practice of the ECHR. The object of the article is essence of Criminal Law in the practice of the ECHR.

The international community should focus their attention on inadmissibility of violation of fundamental human rights and freedoms.

To sum up the main idea, essence and value of criminal law is to protect fundamental rights and impose fair punishments for their violation. Fair punishment should comply with the principles of criminal law. Among them are the principles of humanism, legality, proportionality, individualization and differentiation of criminal responsibility. The essence of criminal law is expressed through its principles.

Last but not the least, the human rights standards should be complied with people who have committed and been involved in crimes.

Baudžiamosios teisės principai Europos Žmogaus Teisių Teisme

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S a n t r a u k a

Žmogaus teisių ir pagrindinių laisvių apsaugos konvencija tapo svarbia Ukrainos ir kitų šalių baudžiamosios teisės doktrinos ir praktikos dalimi. Tačiau Ukrainos teisės aktuose ir Europos Žmogaus Teisių Teismo (EŽTT) praktikoje Konvencijos nuostatos gali būti aiškinamos skirtingai.

Straipsnio tikslas – suderinti nacionalinę baudžiamąją teisę su EŽTT tarptautiniais standartais ir praktika. Straipsnio dalykas – baudžiamosios teisės esmė EŽTT praktikoje. Tarptautinė bendruomenė turėtų sutelkti dėmesį į pagrindinių žmogaus teisių ir laisvių pažeidimo nepriimtinumą.

Apibendrinant reikia pabrėžti, kad pagrindinė baudžiamosios teisės mintis bei esminė vertybė yra pagrindinių teisių apsauga ir teisingų bausmių už jų pažeidimą skyrimas. Sąžininga bausmė turėtų atitikti baudžiamosios teisės principus – humanizmo, teisėtumo, proporcingumo, bausmės individualizavimo ir baudžiamosios atsakomybės diferencijavimo principus. Baudžiamosios teisės esmė yra išreikšta principais. Paskutinis, bet ne mažiau svarbus dalykas yra ir tai, kad žmogaus teisių standartų turi būti laikomasi ir nusikaltimus padariusių ir juose dalyvavusių žmonių atžvilgiu.

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