АКТУАЛЬНІ ПИТАННЯ ЦИВІЛЬНОГО, МІЖНАРОДНОГО ТА ПРАВА ЄС

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EUROPEAN COURT OF HUMAN RIGHTS CASE LAW AS A SOURCE OF EUROPEAN UNION LAW

The article is devoted to the study of the legal nature of the decisions of the European Court of Human Rights as a source of law of the European Union. Within the scope of the doctrinal sources and the existing case law of the European Court of Human Rights and the Court of Justice of the European Union, the authors substantiate the logic of including existing the European Court of Human Rights case law in the EU law sources, citing arguments based on the EU law and the case law.

Keywords: EU law, case law of the ECJ, sources of the EU law, ECtHR, ECHR, case law of the ECtHR.

Problem setting. The European human rights and fundamental freedoms protection system is considered to be one of the best in the world. Its decisions are used not only by the European Court of Human Rights (hereinafter – ECtHR) itself, but also by the European Union Court of Justice (hereinafter – ECJ). These two courts have developed high standards of human rights regulation and protection. Their legal positions are used almost all over the world.

The ECtHR is a regional judicial body under the auspices of the Council of Europe, it is set and operates in accordance with the provisions of the European Convention on Human Rights (hereinafter – ECHR). In its turn, the Court of Justice is the institution of the Union, which, in essence, protects and guarantees the observance of rights and freedoms in the EU according to the Union's law.

However, there is a legal problem with the protection of the EU citizens' rights when they want to appeal against the decisions of EU agencies, bodies and institutions or their officials. These people cannot apply to the ECtHR because the EU (as an international entity) is not a signatory to the European Convention on Human Rights, except for the Member States themselves.

Although EU citizens can appeal only the decisions by their national authorities to the ECtHR, the actions and acts of the EU authorities (as a supranational level) could be appealed only to the Court of Justice. It could be seen as some kind of injustice, as the ECJ is the EU's institution.

However, the European Convention on Human Rights is still a source of the EU law, as the EU values set by the Founding Treaties have a lot in common with the values set by the Convention. It should also be mentioned that the ECHR is the source of the EU law, as the case law of the ECJ uses both its legal provisions and the case law by ECtHR.

Analysis of recent research and publications. The issues of the EU sources of law and ECtHR were analyzed by domestic and foreign scientists such as Komarova T. V., Jakovjuk I.V., Falaljejeva L. G., B.N. Topornin, Entin M.L., Kashkyna S. Ju., Zaccaroni G. and others.

Statement of the article objective. We can say that the purpose of that paper is to identify the examples of the decisions' of the ECHR usage as a source of law in the EU legal system.

Presentation of the main body of the article. First of all, we would like to define the EU law concept itself, as well as to give the list of its sources in order to find the place of ECtHR's case law in such a system.

The concept of "sources of law" in its general theoretical legal meaning could be interpreted from different points of view. For example, the prominent

Soviet scientist S. F. Kechekyan noted that the term "source of law" is one of the most obscure definition in legal science, because there is not only a generally accepted understanding of it, but also quite controversial is the meaning in which it is used. According to the scientist, the sources of law are a certain image that helps to understand rather than give an interpretation of what it means [1, c. 3].

Venegerov A.B. believes that the sources of law should be understood as the external form and method of objectification of legal norms [2, c. 206]. According to Kolodiy A.M., the source of law could be considered officially as objectified acts that contain legal norms [3, c. 162].

In general, the sources of law are understood as the external form of legal consolidation of legal norms and the method of giving the latter legal obligation, as it is mentioned in Ukrainian legal literature. This interpretation of this concept is quite logical and understandable. First, the rules of law must be enshrined in a certain legal act. Secondly, this consolidation provides them with legal force and, consequently, binding force.

As such an integration community as the EU consists of 27 countries, it can be argued that the sources of the EU law are rather complex multifaceted system designed to ensure and establish law and law enforcement in the Member States of such entity. The sources of EU law are heterogeneous, which, in turn, complicates their interpretation in both domestic and foreign legal doctrine.

According to Entin M.L., the EU law has a complex structure, and therefore it is quite difficult to build a system of sources of the EU law with the help of some universal criterion [4, c. 74]

It is difficult to disagree with the statement of B.N. Topornin, who pointed out that "the external impression of the EU law may be misleading at first glance". It often appears in the form of a large legal array, which covers a lot of acts that differ from each other in legal force, hierarchy of relations, limits of application, and many other properties. But in reality it is quite organized, systematized and internally agreed. The difficulties of its perception are sometimes explained by only one circumstance - the uniqueness of the EU law itself, the nature of which does not allow for direct analogies with either international or national law [5, c.111].

In terms of location and order of formation, all the sources of EU law, according to Professor L.M. Entin, should be classified into following groups by the way of creating:

a) Norms of fundamental (primary) law;

b) Secondary (derivative) law;

c) Norms of tertiary (additional) law.

The scientist refers the rules of the EU Founding Treaties to primary law. Norms developed on the basis of primary law refer to EU derivative law. They are created autonomously and adopted by the EU institutions. To the rules of the additional law L.M. Entin relegates norms whose source is acts of different instruments than the founding treaties or acts adopted by the institutions of the European Union (for example, agreements and conventions are concluded by Member States in order to implement the provisions contained in the founding treaties themselves) [6, c. 456]. The scholar also proposes another classification of sources of the EU law:

a) regulations (primary law of the Founding Treaties and secondary law adopted on the basis of primary);

b) general principles of law;

c) the decisions of the Court of Justice of the EU;

d) international agreements.

S. Y. Kashkin and P.A. Kalinichenko offer the following classification:

a) Sources of primary law;

b) Sources of secondary law:

c) Case law [7, c. 235].

According to the legal force, the sources of the EU law could be divided into mandatory and recommendatory sources. Mandatory instruments include:

a) imperative norms of international law jus cogens, general principles of law (rule of law, non-abuse of rights);

b) the Founding Treaties of the EU (TEU, TFEU), treaties amending the Founding Treaties (eg. the Lisbon Treaty); Charter of Fundamental Rights of the EU, treaties on the accession of new states;

c) principles of the EU law and case law of the Court of Justice;

d) international agreements of the EU;

e) acts of the EU institutions (directives, decisions etc.) [8].

Recommendation acts include conclusions, guidelines, resolutions, declarations. It should be noted that such acts constitute the so-called soft law of the EU. The case law of the Court of Justice of the EU has formed a position on such acts. In particular, the Court notes that, although they do not create obligations and rights, such acts are not without legal effect, and therefore the courts of the EU Member States must listen to and take into account acts of soft law [9].

Therefore, it should be noted that there is no definitive undoubtable list of sources of the EU law since the subjects of law enforcement are free not only to shape norms but also to choose their form of expression. Sources of the EU law differ from sources of national and international law. This is due to the legal and political nature of the EU, as well as the uniqueness of the EU

law itself. The diversity of EU was determined by the accession of Member States from different legal systems. This is especially evident through the precedent nature of the legal system. Through its decisions, the Court of Justice develops and complements EU law. That is still why the EU law has a special (specific form) called sui generis.

There are currently two systems of human rights protection in Europe, namely the ECtHR, which operates on the basis of the ECHR within the Council of Europe, and the Court of Justice, which operates under the TEU and the EU Charter of Fundamental Rights. It should be noted that the EU itself has not ratified the European Convention on Human Rights, but requires Member States to do so upon the accession to Union.

However, the non-accession of the EU to the European Convention on Human Rights does not prevent the Court of Justice from using the Convention as a source of law in its own judgments. In our opinion, this is due to the fact that general principles of law (in particular, human rights) are the source of EU law and above judicial precedent are in the hierarchy of sources.

Therefore, the Court cannot neglect human rights, including those enshrined in the Convention. Moreover, the EU is based on the values of respect for human rights accordingly, so the Court could not avoid referring to ECtHR judgments. The Court of Justice appealed to ECHR rulings when the Convention was not yet a source of the EU law. In addition, Article 6 § 3 of the TEU states that the fundamental rights guaranteed by the European Convention on Human Rights are general principles of the Union law.

If we analyze the case law of the EU, we can see that the Court of Justice takes into account the positions of the Convention, and uses them in its decisions. In Case C-60/00 Mary Carpenter v. Secretary of State for the Home Department the Court in the context of Art. 8 of the Convention established the plaintiff's right to respect for family life [10].

In another case [11] the Court referred to Art. 10 of the European Convention on Human Rights to define the scope of the provisions on the protection of freedom of expression at Community level [12, c. 533].

Therefore, on the basis of these decisions, it could be concluded that the Court of Justice adheres to the case law of the ECtHR and recognizes the specialimportance of the European Convention on Human Rights [13]. However, the Court of Justice has never stated on binding force of the Convention and the ECtHR case law [14, c. 207].

In addition, following the adoption of the EU Charter of Fundamental Rights, the Court began to apply it more than the European Convention on Human Rights and the case law of the ECtHR. The Court of Justice has appealed to the Charter in 122 cases and to the European Convention on Human Rights in 20 cases [15, c. 137].

The practice of different interpretations of the European Convention on Human Rights is common. Thus, the Court of Justice does not include the right to remain silent in the element of guarantees of Art. 6 of the Convention [16], while the ECtHR considers otherwise [17]. However, it should be noted that the Court of Justice reviewed the decision using the practice of the ECtHR, which certainly, stresses the importance of implementing decisions of the ECHR as a source of EU law. It also makes them a source of EU law, because some solutions law case of the EU based on the decisions of the ECtHR.

With the changes made by the Lisbon Treaty to the Founding Treaties, the EU has moved closer to the accession of the ECHR, and has also legally recognized the ECHR as a source of EU law. First, the EU received legal personality because the Union as an important subject of international law is able to acquire rights and obligations. This, in turn, brought it closer to cooperation with the Council of Europe and the ECtHR. However, EU citizens cannot complain about violations of rights and freedoms by the EU institutions to the ECtHR, as the EU is not a contracting party to the European Convention on Human Rights. Secondly, paragraph 2 of Article 6 TEU enshrines the EU's accession to the Convention. This provision is complemented by Protocol №8, which states that accession will not affect the powers of the EU and the Union's institutions [18]. In turn, Part 2 of Art. 59 of the European Convention on Human Rights includes the option of acceding the EU to the Convention.

The result of the EU accession to the European Convention on Human Rights will be required formal obligation of Convention provisions for institutions, agencies, bodies and officials of the Union. It should also be noted that one of the signs of acceptability for the exhaustion of all means of national legal protection under the Convention will be to apply to the Court of Justice for a decision [19, c. 156].

Thus, it can be argued that the EU's non-accession to the Convention does not affect the application of ECtHR decisions as a source of law. In addition, the Founding Treaties contain provisions recognizing the European Convention on Human Rights and, consequently, the case law of the ECtHR. The Court of Justice uses the decisions of the ECtHR and changes its own legal positions accordingly. All this indicates that the practice of the ECtHR is a source of the EU law.

As noted earlier, the urgency of the EU's accession to the Convention is due to the fact that the Courts in

Luxembourg and Strasbourg could sometimes make different legal positions on the same cases. In addition, EU citizens do not have the legal opportunity to appeal to the ECtHR against actions and acts of EU institutions, bodies, agencies and officials concerning the violation of their rights and freedoms.

For the first time, the Union's desire to join the European Convention on Human Rights arose in 1996. The ratification should be based on an agreement between the EU and the Council of Europe. The EU's founding treaties contain a provision according to which one of the institutions of the "legislative triangle" or a Member State may apply to the Court of Justice as to whether an international agreement is compatible with the Founding Treaties.

Therefore the EU Council (Council of Ministers) had addressed such an appeal to the Court as to the compatibility of such a draft agreement with the Council of Europe. The Court pointed out that the EU has no competence to join [20]. Thus, the decision of the Court of Justice was negative, and therefore the only way to join the European Convention on Human Rights was to amend or revise the Founding Treaties.

It should also be added that, despite this decision, the ECtHR has recognized the EU's high standards in the field of human rights protection [21]. Therefore, it seems logical to join the European Convention on Human Rights.

As noted earlier, the EU Member States have enshrined the desire to join the Convention by amending the Lisbon Treaty to the Founding Treaties.

Therefore, on June 4, 2010, the EU Council adopted a decision that allowed the negotiations to begin. On April 5, 2013, a draft agreement on such accession was ready. Therefore, in accordance with Art. 218 TFEU the Commission applied to the Court for an opinion on the compatibility of the draft agreement with the Founding Treaties [15, c. 138].

As in the first case, the Court again gave a negative assessment of the possibility of the EU joining the European Convention on Human Rights. In particular, the following was stated:

1. By joining the Convention, the EU will be a subject of external control, which is an unacceptable situation.

2. The interpretation by the ECtHR will be binding on all institutions, agencies, bodies and officials when the interpretation of the provisions of the Convention by the Court of Justice is not binding.

3. EU Member States cannot set higher standards than those set out in the EU Charter of Fundamental Rights.

4. If rights guaranteed by the Charter correspond to the rights in the Convention, competence of Member States should be limited, otherwise the rule is violated the effectiveness and unity of the EU law

5. The draft agreement views the EU as a state, not sui generis. The principle of empowerment of the EU is lost.

6. The problem of the institution of the co-defendant. The ECtHR will be able to decide on the correctness of the choice of the co-defendant by the Union, so it will analyze the correctness of the division of powers in the EU. This is an encroachment on the principle of separation of powers. That is, there will be external judicial control over issues that are internal to us.

7. Member States may apply to the ECtHR for advisory opinions on matters of principle. This will violate the autonomy of preliminary rulings by the Court of Justice [22].

One can agree with the decision of the Court of Justice of the European Union, as on purely formal issues the draft of such an agreement would to some extent contradict with the Founding Treaties. The Court cannot question and threaten the principles of the EU law established in landmark cases such as Van Gend en Loos [23] and Costa v. Enel [24].

In our view, in addition to the legal grounds which influenced the Court's decision, there could have been a political aspect. Upon accession to the Convention, the existence of two systems of protection of human rights and fundamental freedoms will change to one. This could damage the reputation of the Court of Justice itself, as well as its decisions. Of course, the judges of the Court of Justice themselves may not like this. However, such an opinion is only an assumption, so it cannot be considered reasonable and proven enough.

Thus, it can be said that the EU's desire to join the Convention is now regulated in the TEU, but there are many legal issues of the draft agreement that contradict with the Founding Treaties. In order to address this issue, the EU and the Council of Europe need to agree on key provisions of the agreement that would satisfy everyone.

In October 2019, the European Commission informed the Secretary General of the Council of Europe of its readiness to resume the negotiation process on the EU's accession to the European Convention on Human Rights. In early 2020, the Committee of Ministers decided on a negotiating mandate.

Therefore, from 29 September to 2 October, the Ad Hoc Negotiating Group, which includes representatives of the EU and the Council of Europe, met to find new instruments for the Union's accession to the European Convention on Human Rights. Also, this meeting has been held from 24 to 25 November, followed by a meeting and in February.

Zaccaroni G. believes that in order to properly resolve the legal issues of EU accession to the Convention, two key provisions should be taken into account:

1. Establishing a dialogue between courts for the purpose of consistency protection of rights and freedoms in Europe.

2. Ensuring freedom of discretion. It will be a powerful tool for harmonizing approaches and attitudes towards human rights in the EU [25, c. 46].

Thus, two previous attempts by the EU to join the European Convention on Human Rights were failed in the findings of the Court of Justice. As noted earlier, the decisions were reasonable and in line with the EU law. The Union and the Council of Europe must therefore take into account the issues raised in the Court's decision and reach a mutual agreement. Such a process may take years, but the prospect of improving the human rights system in Europe will reach a new level.

Conclusions. Summarizing the above statements, it should be noted that the decisions by the ECtHR is part of sources of the EU law. In our view, it should be reffered to the primary sources of law, as the Court of Justice adopts legal positions using the case law of the ECtHR.

In addition, there is a question on the place of such decisions in the hierarchy of sources of the EU law in terms of legal force, because the positions of the ECtHR are based on the general principles of international law.

ECtHR's judgments have become a source of the EU law through the case law of the Court of Justice. The EU is also based on values and guarantees the rights guaranteed by the Convention.

Although there are legal conflicts between court decisions, in some mentioned cases they then could be changed in favor of the ECtHR's position.

Thus, the EU's accession to the European Convention on Human Rights will take the level of protection of fundamental rights and freedoms in Europe to a new level. EU citizens will have the opportunity to challenge the actions or omissions of the EU institutions, agencies, bodies and officials to a judicial body of a regional system within Council of Europe framework. With accession, the will of the Member States and EU citizens, which is enshrined in the Founding Treaties of the EU (amended by the Lisbon Treaty), will be realized.

Summarizing we could make a prediction that the EU's accession to the ECHR is not a case of the nearest future. Given the mentioned before two negative ECJ's positions, as well as bureaucracy and the possible conflict of jurisdiction between Strasbourg and Luxembourg courts, we could guess that such accession process could last for ages.

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СУДЕБНАЯ ПРАКТИКА ЕВРОПЕЙСКОГО СУДА ПО ПРАВАМ ЧЕЛОВЕКА КАК ИСТОЧНИК ПРАВА ЕВРОПЕЙСКОГО СОЮЗА

Статья посвящена исследованию юридической природы решений Европейского суда по правам человека как источника права Европейского союза. На основе доктринальных источников и существующей практики Европейского суда по правам человека (далее ЕСПЧ) и Суда справедливости Европейского союза авторы обосновывают логичность включения существующей судебной практики ЕСПЧ к источникам права ЕС, приводя аргументы, основанные на теории права и судебной практике ЕС.

Ключевые слова: право ЕС, судебная практика Суда справедливости, источники права ЕС, ЕСПЧ, ЕКПЧ, судебная практика ЕСПЧ.

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СУДОВА ПРАКТИКА ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ ЯК ДЖЕРЕЛО ПРАВА ЄВРОПЕЙСЬКОГО СОЮЗУ

Постановка проблеми. Європейська система захисту прав людини і основоположних свобод вважається однією із найкращих у світі. Своїми рішеннями її впроваджує не тільки ЄСПЛ, а також Суд справедливості ЄС. Ці два судових органи розробили високі стандарти захисту та регламентації прав людини. Їх правові позиції використовуються майже у всьому світі. Однак, вбачається правова проблема із захистом прав громадянами ЄС, коли вони хочуть оскаржити рішення агенцій, посадових осіб, органів та інституцій. Ці люди не можуть звернутися до ЄСПЛ, оскільки ЄС (як міжнародний суб'єкт) не є підписантом ЄКПЛ , окрім держав-членів. Хоча громадяни ЄС можуть оскаржувати рішення своїх національних органів до ЄСПЛ, проте дії влади ЄС – тільки до Суду Союзу. З цього вбачається певна несправедливість, оскільки Суд справедливості є інституцією ЄС.

Аналіз останніх досліджень. До питань, що стосуються визначення правових джерел ЄС звертаються такі вчені, як Дж. Заккароні, Т. В. Комарова, Л. Г. Фалалєєва, Б. Н. Топорнін, М. Л. Ентін, С. Ю. Кашкіна, І. В. Яковюк та інші.

Метою нашої роботи є дослідження судової практики ЄСПЛ як складової джерел права ЄС.

Виклад основного матеріалу. Стаття присвячена дослідженню юридичної природи рішень Європейського суду з прав людини як джерела права Європейського союзу. На основі доктринальних джерел та існуючої практики Європейського суду з прав людини (далі ЄСПЛ) та Суду справедливості Європейського союзу автори обґрунтовують логічність включення існуючої судової практики ЄСПЛ до джерел права ЄС, наводячи аргументи, які базуються на теорії права та судовій практиці ЄС.

Система права ЄС є доволі розгалуженою і містить велику кількість елементів, тому слід зазначити, що не існує остаточного переліку джерел права ЄС. Оскільки суб'єкти правозастосування можуть на свій розсуд не лише формувати норми, але й обирати форму їх вияву. Тому джерела права ЄС відрізняється від національних та міжнародних джерел права і це зумовлено правовою та політичною природою ЄС. Вагомим фактором різнобарвності права ЄС стало приєднання держав-членів з різних правових систем, а це особливо проявляється через прецеденту природу правової системи. Неприєднання ЄС до ЄКПЛ не заважає Суду ЄС використовувати ЄКПЛ як джерело права у своїх судових рішеннях. На нашу думку, це пов'язано з тим, що загальні принципи права (зокрема, права людини) є джерелом права ЄС та стоять в ієрархії джерел вище судового прецеденту. Тому Суд не може нехтувати правами людини, включаючи ті, які закріплені в ЄКПЛ. Тим паче, ЄС заснований на цінностях поваги до прав людини відповідно, тому судовий орган ЄС ніяк не міг би уникнути посилання на рішення ЄСПЛ.

Висновки. На нашу думку, рішення ЄСПЛ можна вважати первинним джерелом права ЄС, оскільки Суд справедливості ухвалює правові позиції, використовуючи практику ЄСПЛ. Крім того, такі рішення можуть стояти вище в ієрархії джерел права ЄС за юридичною силою, тому що позиції ЄСПЛ ґрунтуються на загальних принципах міжнародного права.

Ключові слова: право ЄС, судова практика Суду справедливості, джерела права ЄС, ЄСПЛ, ЄКПЛ, судова практика ЄСПЛ.

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