THE ROLE OF ECTHR CASE LAW IN LAND LAW: THE EXPERIENCE OF UKRAINE COMPARED TO OTHER STATES

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Annotation. The case law of the European Court of Human Rights plays a varying role in the resolution of land-related legal disputes across different jurisdictions. At the same time, the question of the Strasbourg Court's influence remains of significant theoretical and practical importance. Under Ukrainian legislation, the case law of the ECtHR is formally recognised as a source of land law. However, approaches to this issue differ substantially across European states. This article examines the role of ECtHR judgments within the Ukrainian legal system, particularly in the context of land law, and provides a comparative analysis with selected European jurisdictions, including the United Kingdom, Ireland, Spain, and Germany. The study also identifies key challenges associated with the recognition and application of ECtHR case law as a source of land law in Ukraine.

Key words: European Court of Human Rights, source of law, land law, Ukraine, human rights, ECtHR case law.

1. Introduction.

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – "the Convention", "ECHR") is a crucial legal instrument that sets high and unifying standards for the European legal community, including in the field of land rights. The Convention establishes that "the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties" [7, art. 46]. Although the Convention provides that judgments of the European Court of Human Rights (hereinafter – "the Court", "ECtHR") are binding upon the parties to the case, this does not imply that all other decisions of the Court automatically constitute a source of land law in every member state. As a result, the legal nature of the Court's case law is determined differently within each national legal system.

2. Analysis of scientific publications.

The issue of ECtHR case law as a source of land law in Ukraine has been the subject of scholarly research by numerous academics, including T.O. Kovalenko, S.I. Marchenko, V.O. Hlushkov, D.V. Sannikov, M.V. Sannikova, R.B. Sabodash, among others. This highlights both the relevance and importance of the topic for the Ukrainian legal system.

3. The aim of the article.

The comparison, analysis, and adoption of relevant foreign legal experience is an essential element in the development and improvement of national legislation. Accordingly, this article is dedicated to analysing the role of ECtHR case law in the land law in Ukraine and comparing the Ukrainian context with selected European jurisdictions.

4. Review and discussion. The Role of ECtHR Case Law in the Resolution of Land Disputes in Ukraine.

Ukrainian legislation explicitly recognizes the case law of the European Court of Human Rights as having a significant role within the national legal system. In order to implement its international obligations, Ukraine adopted the Law "On the Execution of Judgments and Application of the Case Law of the European Court of Human Rights" (hereinafter – "the Law"), which directly states that domestic "courts shall apply the Convention and the case law of the Court as a source of law" [11, art. 17]. Similar provisions are also found in a number of other normative legal acts, such as the Civil Procedure Code of Ukraine. According to Article 10 of this Code, courts are required to apply both the Convention and the ECtHR's case law as sources of law, including in matters relating to land law [10, art. 10].

On the one hand, such legal certainty should have a positive impact on the application of the law, since the legislation explicitly defines the status of the case law, thereby eliminating the possibility of conflicting interpretations. On the other hand, it creates certain complications. For example, issues arise with respect to the hierarchy of sources of land law. It is well established that the Constitution of Ukraine has the highest legal force. In turn, laws are adopted on the basis of the Constitution and must comply with it [6, art. 8]. Subordinate normative legal acts occupy an even lower position in the hierarchy of sources of land law. This system provides a clear framework for resolving conflicts between legal norms in the adjudication of land disputes.

At the same time, when the case law of the ECtHR is explicitly recognized as a source of law at the legislative level, a number of logical questions arise in this context. For instance, what is the place of this source of law in the hierarchy of sources of land law? Should it have the same legal force as the Convention itself, or a lower one? What exactly is recognized as the ECtHR's case law and, accordingly, as a source of domestic land law? Does it include only the judgments rendered in cases against Ukraine? Is it limited to legal positions repeatedly expressed in the Court's case law, or is a single judgment sufficient? How exactly should we identify the legal position within an ECtHR judgment that qualifies as a source of Ukrainian land law? None of these unresolved issues constitute an insurmountable obstacle. The situation could be improved by introducing clarifying amendments, which are currently absent in the Ukrainian legal system.

The recognition of the ECtHR's case law as a source of Ukrainian land law can hardly be considered a problem, given that both the Convention and the Court's case law establish a high standard for the protection of human rights. This should be viewed positively, especially in light of the Constitution, which provides that human rights and freedoms determine the content of state activity, and their affirmation and protection constitute the primary duty of the state [6, art. 3]. However, the lack of clarity regarding the specific nuances of this issue hinders the effective implementation of the legislative provisions in practice. Due to the absence of a well-structured approach, references to the ECtHR's case law in land dispute resolution tend to be formal and perfunctory in nature, often lacking a thorough analysis of its relevance.

At the same time, an analysis of the Ukrainian judicial register shows that even under these circumstances, ECtHR case law frequently appears in court decisions concerning land disputes. Ukrainian courts often refer to the legal positions of the European Court of Human Rights in cases such as Zelenchuk and Tsytsyura v. Ukraine, Stretch v. the United Kingdom, Rysovskyy v. Ukraine, East/West Alliance Limited v. Ukraine, Sporrong and Lönnroth v. Sweden, The Former King of Greece and Others v. Greece, and many other judgments when resolving land-related cases.

The Role of ECtHR Case Law in the Resolution of Land Disputes in Common Law Countries. The proper development of a national legal system is impossible without borrowing the best practices from other countries, which makes a comparative analysis of the approaches of Ukraine and other European countries on this issue appropriate and useful.

First and foremost, we can refer to the legislative regulation of this matter in the United Kingdom, where the Human Rights Act was adopted in 1998. The purpose of the Act is to strengthen the implementation of the rights and freedoms enshrined in the European Convention on Human Rights. Among other

provisions, the Act states that "it's unlawful for a public authority (meaning a court or tribunal, and any person certain of whose functions are functions of a public nature) to act in a way which is incompatible with a Convention right". The Act does not stipulate that "Convention right" necessarily means the rights as interpreted by the ECtHR, but exclusively refers to the Convention itself [5].

Additionally, Section 2 of the Act provides that: "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any— (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, (...) whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen" [5]. Therefore, courts are required to take into account ECtHR case law; however, the Act does not explicitly establish that such case law constitutes a binding source of law. Moreover, the Act grants courts discretion in applying any given ECtHR decision. This demonstrates a high level of legal detail in statutory regulation, which Ukrainian legislators could draw upon to improve the current state of national legislation.

The situation in Ireland is similar where the European Convention on Human Rights Act (2003) was adopted. According to this Act, local courts, when interpreting and applying the provisions of legislation or the rule of law, must do so in a manner compatible with the "Convention provisions." However, the term "Convention provisions" here also does not include the interpretations developed by the European Court of Human Rights, but simply the rights as set forth in the Convention itself. Thus, pursuant to Section 4 of this Act, "judicial notice shall be taken of the Convention provisions and of any declaration, decision, advisory opinion or judgment of the ECtHR established under the Convention on any question in respect of which that Court has jurisdiction (...) and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments" [3].

As in the case of the UK Act, the Irish Act similarly solves this issue and obliges courts to "take due account of the principles." As a result of analyzing both Acts, we can conclude that local legislators did not directly establish that the ECHR case law is a source of land law or any other law in these countries, although courts shall "take due account" / "take into account" the principles set out in the decisions or other documents adopted by the ECHR.

The Role of ECtHR Case Law in the Resolution of Land Disputes in Other European Countries. For a more comprehensive analysis of this topic, it is also worth paying attention to the approach of other countries on this matter. For example, the Spanish Constitution limits itself to a rather general rule that provisions concerning the fundamental rights "shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain" [9, art. 10]. The Constitution does not explicitly mention the Convention or the practice of the ECtHR. At the same time, Aida Torres Perez in the article notes that the role of ECtHR case-law remains a subject of academic debates, but the tendency is that national courts need to follow the case law of the ECtHR [1, p. 161].

Luis Lopez Guerra pays attention to the primacy of international law as provided by the Spanish Constitution. For instance, section 96 establishes that valid international conventions become part of the domestic legal system. Accordingly, it is not necessary to incorporate specific provisions of the Convention into local legislation for them to be enforceable, as they apply directly. However, the Constitution still regulates the issue of treaties, but what about the Court case law? The scholar, referring to the decisions of the Spanish Constitutional Court, notes that in this case there is a so-called "double renvoi," since Article 10.2 of the Constitution provides that provisions concerning rights and freedoms are interpreted in accordance with international agreements, while the Convention, in turn, stipulates that the Court interprets the application of the Convention. As a result, "the case law of the ECHR has immediate binding force in the Spanish legal order" [8, pp. 69-70].

It is also possible to examine the situation in Germany. As Alessandra Di Martino notes, the German Constitutional Court mostly relies on the principle according to which national judges take into account the Convention and the practice of the European Court of Human Rights [2, p. 134].

In this context, an important reference is the Order of the Federal Constitutional Court of Germany dated 14 October 2004. According to this court decision, the Convention is incorporated as federal

legislation and "must be taken into account when interpreting national law", while the judgments of the ECtHR are obligatory for all state bodies, with some reservations. The Constitutional Court stated that: "the Convention and the case-law of the European Court of Human Rights serve as guidelines for interpretation when determining the content and scope of fundamental rights, provided this does not restrict or lower the level of fundamental rights protection afforded under the Basic Law, which is not intended by the Convention" [4, para. 30-32].

At the same time, it is envisaged that courts, under certain circumstances, may not take into account the ECtHR case-law if, for example, the ECtHR judgment directly contradicts legislation or constitutional provisions. By "taking into account" is meant "acknowledging the Convention requirements as interpreted by the Strasbourg Court and applying them to the case at issue insofar as such application does not violate higher-ranking law" [4, para. 62].

Analyzing the above, it can be concluded that the German Constitutional Court generally follows a conservative approach in this regard and provides for a limited legal force of the ECtHR case-law. Even if the ECtHR case-law in this context can be considered a source of law, including land law, it occupies a less significant place in the hierarchy of national legislation.

5. Conclusions.

Based on the analysis of national and international legislation, it can be concluded that Ukraine's approach to defining the role of the ECtHR case-law in land law system differs from that of other countries. The countries analyzed generally oblige courts to take into account the ECtHR case-law, but there are no explicit provisions stating that the ECtHR case-law is a source of law. At the same time, Ukraine's recognition of ECtHR case-law as a source of land law is difficult to consider a mistake. Moreover, this approach generally corresponds to other legislative provisions. For instance, according to the Civil Procedure Code of Ukraine, in the event of a conflict between a legal act and an international treaty, courts must apply the international treaty, in particular in land disputes [10, art. 10]. This establishes the supremacy of international law, and considering that some legal positions outlined in the ECtHR case-law are essentially an organic continuation of the Convention, the case-law should have a similar significance.

At the same time, both the Convention and the case-law of the ECtHR protect the human rights, the guarantees and safeguarding of which are the goals of a modern democratic state. The fact that the Ukrainian legislator decided to incorporate these rights, which are recognized and endorsed not only by the national parliament but also by the democratic European community, into national legislation minimizes the risks associated with this decision.

Thus, if the case-law of the ECtHR is recognized as a source of law in resolving land disputes, the state effectively delegates part of its sovereignty, as it allows the Court to create new rules. While, upon signing an international treaty, the parliament and other state bodies exercise control over what exactly is signed and ratified, this control becomes significantly limited when the ECtHR's legal positions change. Each new legal position is not approved by the parliament every time but is by default considered part of the national law. However, the legally elected parliament ultimately has the right to delegate this part of sovereignty, which it has received from the people.

Moreover, the approach of the Ukrainian legislator is logical, since even if the ECtHR case-law is not recognized as a formal source of law, in practice the failure to comply with the Court's legal positions may lead to further violations of Ukraine's international obligations. This is because a complainant who considers their rights violated due to a national court decision conflicting with a certain ECtHR legal position can file a complaint with the Court and ultimately receive a favorable judgment, which is binding and must be enforced. Therefore, taking into account and adhering to the legal principles established by the ECtHR case-law is a rational step that aligns with Ukraine's international commitments.

Therefore, the fact that the case law of the European Court of Human Rights is recognized in Ukraine as a source of land law is difficult to consider a mistake. At the same time, the problem lies in the absence of a mechanism for implementing this provision. For example, the Parliament provided in the Civil

Procedure Code of Ukraine that only an international treaty applies in case of its inconsistency with a national legal act, but it ignored the situation when a national legal act contradicts the legal position of the ECtHR. The place of the ECtHR case law in the hierarchy of national legislation is not defined, which makes it impossible to determine how to resolve conflicts between ECtHR legal positions and national land legislation. Additionally, the legislator did not specify what exactly is meant by the "practice of the ECtHR" — whether it is established case-law, a specific legal position in each decision analogous to ratio decidendi, or something else. All these factors effectively prevent the practical possibility of considering ECtHR case law as a source of land law due to the lack of mechanisms and rules for implementing this provision. Further theoretical study of this issue and the development of legislative amendments that could improve the situation remain relevant.

References:

1. Aida Torres Perez. The Judicial Impact of European Law in Spain: ECHR and EU Law Compared. Yearbook of European Law. Volume 30, Issue 1, 2011. Pages 159–179. Retrieved from https://doi.org/10.1093/yel/yer006.
2. Di Martino, A. National Constitutions and the ECHR. Comparative Remarks in Light of Germany's Experience. In: The Constitutional Relevance of the ECHR in Domestic and European Law: An Italian Perspective. 2013. Pages 119–134. Retrieved from: https://www.corteidh.or.cr/tablas/28469-1.pdf.
3. European Convention on Human Rights Act 2003. Retrieved from https://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/pdf.
4. Federal Constitutional Court of Germany. Judgment of the Second Senate of 14 October 2004 – 2 BvR 1481/04. Retrieved from: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs20041014_2bvr148104en.html.
5. Human Rights Act 1998. Retrieved from https://www.legislation.gov.uk/ukpga/1998/42/contents.
6. Konstytutsiya Ukrayiny [Constitution of Ukraine]. (n.d.). zakon.rada.gov.ua. Retrieved from https://zakon.rada.gov.ua/laws/show/254к/96-вр [in Ukrainian].
7. Konventsiya pro zakhyst prav lyudyny i osnovopolozhnykh svobod [Convention for the Protection of Human Rights and Fundamental Freedoms]. (n.d.). zakon.rada.gov.ua. Retrieved from https://zakon.rada.gov.ua/laws/show/995_004 [in Ukrainian].
8. López Guerra, L. Spain and the European Court of Human Rights: Individual Applications and the Recurso de Amparo. Journal of Constitutional Law, 4 (7). 2015. Ankara. Pages 67-83. Retrieved from: https://anayasader.org/wp-content/uploads/2020/05/Lopez-Guerra-AYHD-7.pdf.
9. Spanish Constitution. https://senado.es. Retrieved from https://www.senado.es/web/conocersenado/normas/constitucion/detalleconstitucioncompleta/index.html?lang=en.
10. Tsyvil'nyy protsesual'nyy kodeks Ukrayiny [Civil Procedure Code of Ukraine]. (n.d.). zakon.rada.gov.ua. Retrieved from https://zakon.rada.gov.ua/laws/show/1618-15 [in Ukrainian].
11. Zakon Ukrainy "Pro vykonannya rishen' ta zastosuvannya praktyky Yevropeys'koho sudu z prav lyudyny" [The Law of Ukraine "On Execution of Judgments and Application of Practice of the European Court of Human Rights"]. (n.d.). zakon. rada.gov.ua. Retrieved from https://zakon.rada.gov.ua/laws/show/3477-15 [in Ukrainian].

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