LABOUR LAW; SOCIAL SECURITY LAW

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INFLUENCE OF "NEGATIVE" LAWMAKING OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE CONSTITUTIONAL COURT OF UKRAINE ON LABOUR LAW

Formulation of the problem in general. Today the debates about the introduction of the idea of judicial lawmaking have intensified in legal science. However, it is unfortunate that the law of Ukraine "On the Judicial System and Status of Judges" from July 7, 2010 gave no clear law-making powers to the judicial branch. [1] The Constitutional Court of Ukraine is an exception as it can affect with its decisions the appearance, alteration or termination of the law.

On the other hand, coming into effect in the 2006 of the Law of Ukraine "On the Enforcement and Application of Practice of the European Court of Human Rights", Article 17 of which stated that Ukrainian courts apply in deciding cases the Convention and the case-law as a source of law, raised questions about the influence of the practice of this judicial body on both legal relations in general and on labour relations in particular [2].

The degree of scientific development of the problem. Certain issues of "negative lawmaking" of the European Court of Human Rights and the Constitutional Court of Ukraine on national legislation, including labor legislation, were studied in the works of Bezpyata V.F., Kalinichenko P.A., Paliyuk V.P., Popov O.V., Tykhogo V.P., Fuley T.I.

and other scientists. However, the question of influence of negative lawmaking of both international and national judicial bodies hasn’t been the subject of study in legal science yet.

Task setting. This paper aims to conduct a study of current trends as to the impact of "negative lawmaking" of the European Court of Human Rights and the Constitutional Court of Ukraine on labor legislation.

The main material of the study. An important prerequisite for the establishment of the relationship of international and national labor law was their recognition at the level of legal obligations (International Covenant on Economic, Social and Cultural Rights, the European Social Charter), which opened conceptually and qualitatively new prospects for the development of civilized legal relations regulated to different levels of social life. However, how the effect of international rules is spread within a particular state and whether law enforcement agencies can directly apply them depends on the specific approached developed in certain country towards the operation of the international law in the national legal system. If implemented mechanisms are based on the theory of dualism, according to which international law and domestic law are treated as separate legal systems, the provisions of international treaties and adequate protection of the rights asserted in them start to act after their integration, penetration by the set procedure into the legal framework of the state. But according to monistic principles that are in force in Ukraine (Article 9 of the Constitution of Ukraine), the state is an indispensable party before individuals whose rights are directly generated by international standards and are is direct sources of law since their coming into force [3, p.113] .

Of course, a considerable role in this is played by judicial law-making, which is a kind of law-making and it has all the features that characterize any law-making. On the basis of this structure under judicial law-making it is necessary to understand caused by the basic functions of judicial power legal activity of the higher courts are authorized to create, modify or terminate regulatory requirements.

As it is stated in legal literature, the types of judicial lawmaking are negative and positive law-making [4, p.12]. In addition, the legal nature of the decisions of the Constitutional Court and the European Court of Human Rights defines their feature to act as a source of law in negative and positive forms. The essence of negative lawmaking lies in making decisions by a judicial body aimed at the termination of the legal norms. Positive law-making is related to the introduction of changes to the law that do not involve its abolition, after which the norm remains in effect, but in a somewhat altered, modified form.

The first example of negative lawmaking in law is considered to be a decision of Judge Edward Coke in the case of Thomas Bonhema who was convicted by doctors tribunal (a body of caste guild government) to pay a fine, half of which by law should have come at the disposal of President of the Chamber (1610). In that decision Judge E. Coke, citing the principle of common law (nemo in iudex in propria causa), which is a legal axiom declared invalid the regulation of the Parliament of Great Britain in force. E. Coke noted that in many cases the common law makes it necessary to correct laws (acts of parliament), but sometimes it is necessary to recognize them completely invalid. For if a law is contrary to law and reason (common right and reason), common law comes into effect and the law is declared invalid [5, p.279-281].

Negative lawmaking of the Constitutional Court of Ukraine and the European Court of Human Rights has remained largely unexplored in legal science of Ukraine, not to mention fundamental researches and covering of some of its problems. This is primarily due to a certain novelty of this research topic. It should be noted that the Constitutional Court of Ukraine in the field of judicial lawmaking stands at the moment a kind of monopoly. Whereas, considering cases on the constitutionality of laws and other legal acts, the Constitutional Court of Ukraine may recognize them totally or partially unconstitutional, thus in accordance with Part 2 of Art. 152 of the Constitution of Ukraine they become invalid from the date of the decision of the Constitutional Court of Ukraine on their unconstitutionality. In accordance with Part 3. Art.150 of the Constitution of Ukraine, such decisions are binding on the territory of Ukraine, are final and can not be appealed. [6]

The essence and the concept of "negative lawmaking" of the Constitutional Court of Ukraine is often referred to in contemporary jurisprudence, but the doctrinal definition of this concept in its application is used infrequently. Negative lawmaking of the Constitutional Court of Ukraine is an activity the body of the constitutional jurisdiction of Ukraine as to declaring as unconstitutional and loss of force of regulations and their legal norms [7, p.69].

Thus, using the analogy and recognizing a particular legal act as unconstitutional and terminating it, the Constitutional Court of Ukraine and the European Court of Human Rights act as negative law-makers, while the legislature does positive law-making.

A striking example of negative lawmaking of the European Court of Human Rights and its impact on labour legislation is its decision in cases of «Simutenkov» and «Bosman».

In particular, the decision of the European Court of Justice in Bosman case (1995) had a remarkable influence on the regulation of free movement of labour in the European Union and the direct influence of Art. 39 of the EU Treaty. It is worth mentioning that prior to this decision in European club football there existed a system of "quotas" for foreign players to participate in the national championship matches, as well as complicated conditions for sportsmen of their transfer from one club to another. Therefore, in this case Belgian footballer Jean-Marc Bosman appealed against the legality of two existing systems at the time: first, the system of transfer of football players, according to which a football player, even if his contract with the club expired, could transfer to another club only with the consent of both clubs and usually by paying a certain amount by the new club as "transfer money" and the second, so-called "quota system" which provided the opportunity to participate in a match for the club only a certain number of foreign players [8, p.43-44].

When the provisions of the European association agreements were given direct action, restrictions were removed also for legionnaires from countries candidates for EU membership. The direct effect of provisions of these agreements was fixed decision in the case «Deutscher Handballbund». European Association Agreements contained provisions on non-discrimination of workers from third country on the territory of a Member State on grounds of citizenship. Claims of Russian legionnaire I. Symutenkov were grounded by the Partnership and Cooperation Agreement between the European Communities and their Member States 1994, which in paragraph 1 of Art. 23 contains literally identical formula of inadmissibility of discrimination of workers in labor rights, is the same as the European Association Agreement [9].

In addition, Russian players and V. Karpin V.Onopko filed lawsuits to e Spanish courts. It is also know that Ukrainian footballer A. Shevchenko appealed to the Italian court with the same claim and won the case. [9]

Moreover, a precedent in «Simutenkov» case gave a broad interpretation of the prohibition of non-discrimination in the labour rights of citizens of third countries who are legally employed in the EU. The case clearly states the equality not only in terms of labor (as proclaimed in the EU Charter of Fundamental Rights), but also in regard to wages and conditions of dismissal. The impact of these judgments on transfers of players within the European Union can not be overestimated – its making resulted in abolition of restrictions on the number of foreign players in the national championships, and allowed professional players at the end of their contract with the club to transfer freely to another club. However,

decision in Bosman case is considered to be a major source of international labour law regarding the free movement of labour in the EU, and thus affects the entire legal framework of the EU.

At the same time, as it was noted by V.F. Bezpyata and V.P. Paliyuk, almost all Procedural Codes of Ukraine regulating the work of the court when hearing the appropriate categories of cases reproduced the provisions of Art. 9 of the Constitution of Ukraine. In particular, it is indicated in Art. 4 of the Economic Procedural Code of Ukraine, Art. 8 of the Civil Procedure Code of Ukraine 2004 and Art. 9 of the Code of Administrative Procedure of Ukraine. The provisions of Art. 8 of the Code of Administrative Judiciary of Ukraine, unlike other procedural codes of Ukraine further indicate that the court applies the principle of priority of law based on judicial practice of the European Court [10, p. 25-29; 11].

Furthermore, it is necessary to pay attention to the practice of the Constitutional Court of Ukraine on the unconstitutionality of the laws of Ukraine and legal norms of labour legislation. A striking example of the negative impact on the lawmaking in labour law is the decision of the Constitutional Court of Ukraine of 22.05.2008, № 10-rp/20089 in the case of the subject and content of the Law of Ukraine on the State Budget of Ukraine, which declared unconstitutional and made invalid the norms of economic, customs, financial and labour law. [12] There are also a decision of the Constitutional Court of Ukraine № 8-rp/2005 of 11 October 2005 in the case about the amount of pensions and monthly lifetime allowance, a decision of the Constitutional Court of Ukraine № 6-rp/2007 of 9 July 2007 in the case of social security of citizens and some others which directly or indirectly terminate provisions of the labor legislation of Ukraine [13; 14].

Conclusions and prospects for further development. Thus, the most obvious form of decision of the European Court of Human Rights and the Constitutional Court of Ukraine, which acts as a source of law is the decision on the recognition of an act unconstitutional or illegal, resulting in the loss by regulation of its legal force, and public relations are regulated quite differently.

It should be noted that gaps in legislation that formed in the result of recognition of legal norms as unconstitutional or terminated remain not eliminated for some time by bodies that are entitled to making laws and exercising the legal regulation within their jurisdiction.

In this case, during the period between making the decision by the European Court of Human Rights or the Constitutional Court of Ukraine to recognize law unconstitutional or terminated and the moment of making changes in this legal act by the legislator in effect are norms contained in

decisions of courts above. With this, the negative lawmaking, which is done by the European Court of Human Rights and the Constitutional Court of Ukraine, significantly increases the level of regulation of such relationships by providing them with a dynamic character. Although, in this case, the law-making of the European Court of Human Rights and the Constitutional Court of Ukraine, of course, becomes positive, which, in turn, is already the subject of a separate research.

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