

Interpretation of “legality” principles in judgments and decisions of European Court of Human Rights (based on materials of criminal proceedings)

Тлумачення принципу «законність» у рішеннях Європейського суду з прав людини (за матеріалами кримінальних проваджень)

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Ключові слова:

принцип «законність», рішення, практика, Європейський суд із прав людини, Конвенція про захист прав людини і основоположних свобод.

Target setting. As you know, in accordance with Article 19 of the Constitution of Ukraine “the legal order in Ukraine is based on the principles defining that no person can be forced to act in manner not provided by law. Officials of state power and local self-government bodies are obliged to act only on the basis, within the limits of one’s competence and authority and in the manner prescribed by the Constitution of Ukraine and domestic legislation”¹. This demonstrates, however, that the state guarantees the legality principle observance within its borders. According to Article 25 of the Constitution of Ukraine, our state guarantees care and protection to its citizens staying outside its territory², i.e. ensuring the legality principle abroad.

In accordance with Part 1 of Article 9 of the Criminal Procedure Code of Ukraine dd. 13.04.2012 “during criminal proceedings, the court, investigating judge, prosecutor, head of the pre-trial investigation body, investigator, other officials of public authorities are obliged to strictly comply with the requirements of the Constitution of Ukraine, this Code, international treaties established as binding upon the consent of the Verkhovna Rada of Ukraine, requirements of other legislative acts”³.

Having ratified the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, the First Protocol and Protocols № 2, 4, 7 and 11 to the Convention, Ukraine has recognized the jurisdiction of the European Court of Human Rights. Therefore, national law has enshrined it as mandatory to take into account the decisions of European Court of Human Rights in civil, commercial, administrative and criminal proceedings. In particular, Part 5 of Article 9 of the Criminal Procedure Code of Ukraine stipulates that «criminal procedure legislation of Ukraine is applied with consideration of decisions delivered by European Court of Human Rights»⁴.

Attention should be drawn to the fact that, according to officially published statistics of European Court of Human Rights, in 2017 7362 petitions against Ukraine were registered, 5960 in 2018 and 6218 – 2019⁵. We can see that despite a fixed decline in 2018 the number of petitions went up in the following year. We consider this to be an important sign justifying the need to analyze one of the key principles of Ukrainian legislation, including criminal procedure law – “legality”.

¹ The Constitution of Ukraine: Basic Law dd. 28.06.1996 № 254к/96-ВР. Amended: 01.01.2020. URL : <https://zakon.rada.gov.ua/laws/show/254к/96-вр>.

² The Constitution of Ukraine: Basic Law dd. 28.06.1996 № 254к/96-ВР. Amended: 01.01.2020. URL : <https://zakon.rada.gov.ua/laws/show/254к/96-вр>.

³ Criminal Procedure Code of Ukraine: the Law of Ukraine dd. 13.04.2012 № 4651-VI. Amended: 28.04.2020. URL : <https://zakon.rada.gov.ua/laws/show/4651-17>.

⁴ Criminal Procedure Code of Ukraine: the Law of Ukraine dd. 13.04.2012 № 4651-VI. Amended: 28.04.2020. URL : <https://zakon.rada.gov.ua/laws/show/4651-17>.

⁵ EUROPEAN COURT OF HUMAN RIGHTS: Analysis of statistics 2019. January 2020. URL : https://www.echr.coe.int/Documents/Stats_analysis_2019_ENG.pdf.

The aim of this paper is to formulate the concept of “legality” interpreted by the European Court of Human Rights on the basis of materials of criminal proceedings. This aim is achieved by completing the following tasks: analyzing the selected ECHR judgments which contain the interpretation of “legality”; distinguishing the mandatory elements that must be considered in the process of «legality» concept defining.

Analysis of the latest research and publications. Observation of legality principle in criminal proceedings were studied by Y. Hroshevyi, O. Drozdov, V. Zelenetskyi, O. Kaplina, M. Loskutova, S. Mishchenko, I. Pavlenko et al. At the same time researchers focused on the general issues of legality in criminal proceedings and selected aspects of legality according to ECHR practice. Individual ECHR interpretation of the “legality” principle based on the materials of criminal proceedings has not been taken as a subject of separate research.

1. Statement of basic material. Let’s start with the interpretation of the «legality» term. Dictionaries contain the following interpretation: “legality is a legal regime established in the society where the activities are carried out by all officials and citizens in accordance with the requirements of the law”⁶. The Great Encyclopaedic Legal Dictionary defines legality as “a complex political and legal phenomenon reflecting the legal nature of public life organization, the essential connection between law and power, law and the state”⁷.

It becomes clear that state power bodies and law enforcement acting through the authorized subjects, Ukrainian citizens and other persons residing within the territory of Ukraine are obliged to comply with the requirements of the Constitution of Ukraine, this Code, international treaties established as binding upon the consent of the Verkhovna Rada of Ukraine, laws, by-laws and other legislative acts in public life and during the performance of one’s duties.

Let us consider some aspects of the legality principle outlined in the ECHR practice.

In the case “Kharchenko v. Ukraine” (petition № 40107/02), the European Court of Human Rights considered a complaint regarding the illegal detention and improper conditions in the Kyiv detention facility, lack of effective remedies, etc.

As to the consideration of the Kyiv detention facility conditions, the applicant complained about the overcrowded cells and the inadequate conditions. The European Court of Human Rights stated that “according to case law ill-treatment falls within the scope of Article 3 of the Convention only if certain minimum level of cruelty is identified. This provision obliges the state to ensure that detention conditions comply with the principle of respect for human dignity, that manner and ways of such measure application do not result in any stress or procedures intensity of which exceeds the inevitable level of suffering that is always an unavoidable element of detention; therefore, taking into account the practical detention requirements, the health and well-being of such a person are to be properly protected”⁸.

In turn, Ukrainian government did not confirm its arguments regarding the adequacy of the Kharchenko’s detention conditions in Kyiv detention facility. As a result, the Court recognized a violation of the principle of respect for human dignity, namely Article 3 of the Convention. In our opinion, the authorized employees of the Kyiv detention facility did not comply with the legislation of Ukraine regarding proper detention conditions, prosecutors improperly exercised procedural supervision, and the court did not ensure relevant judicial control, resulting in the violation of legality principle along with relevant provisions of Convention.

In this case, ECHR interprets the principle of “legality” in the following manner: all actions of the state competent authorities must strictly comply with the requirements of national law. It is also clear that if in this case the provisions of national law contradict the ones in international treaties, the latter are applied. Also, any doubt expressed by the abovementioned state bodies regarding the ensuring of detention conditions in accordance with the legality principle leads to prevalence of lawful testimony of the detained person.

As to the applicant’s complaint about one’s unlawful detention in Kyiv detention facility, the Court concluded that the first term of detention established by the national court had been lawful and extension would be considered a violation under Article 5 (1c) of the Convention, as extension of the applicant’s detention term had

⁶ New Explanatory Ukrainian Dictionary / I. Radchenko, O. Orlova. K.: IE V. Holyaka, 2010. P. 233.

⁷ S. Bobrovnyk. Legality // Encyclopaedic Legal Dictionary / edited by the academician of the National Academy of Sciences of Ukraine Y. Shemshuchenko. K.: Yurydychna dumka, 2007. P. 274.

⁸ Decisions of European Court of Human Rights (with comments). 2(03)/2011/ *Official translation of ECHR decisions* / «Yurinkom Inter». P. 14.

been authorized by a prosecutor, a party to the case, who could not be obviously regarded as an «independent official authorized by law to exercise judicial power»⁹.

The European Court of Human Rights emphasized that there had been a violation of Article 5(3) of the Convention, as the domestic courts, extending the applicant's detention term, did not provide reasons for their decisions, but only referred to the adequacy of the preventive measure chosen in advance¹⁰. In addition, the national authorities have never considered the selection of another preventive measure. We believe that in this case ECHR interprets the principle of «legality» in such fashion: national courts must be guided by a set of rules enshrined in the law in order to prevent its violation. Also, every case is individual and new facts must be taken into account each time the detention term is extended as preventive measure.

Also ECHR has established that the term prescribed to consider the legality of detention depended on the date of court hearing in this specific case; under the case circumstances this would damage the interests of applicant and is a common problem for the Ukrainian cases¹¹. It was a violation of the Article 5(4) of the Convention.

It was noticed that in one specific case a number of Convention norms were violated, resulting in failure to observe the legality principle by the authorized law enforcement bodies of Ukraine, including courts.

Case "Panteleienko v. Ukraine" (Petition № 11901/02), the applicant filed a complaint to ECHR concerning an alleged illegal search of his office carried out by Ukrainian law enforcement authorities and the disclosure of confidential information regarding his mental condition by a national court. Panteleienko filed claims to national courts to reimburse the damages resulting from the abovementioned actions.

Considering the lawfulness of the search, the first instance court satisfied the applicant's claim and awarded the appropriate compensation amount. Pursuant to paragraph 16 of the ECHR judgment, «the national court ruled "to recognize the search as illegal". In particular, it stated that, in violation of Article 183 of the Criminal Procedure Code of Ukraine (1960), investigator, being aware of the applicant's location (he was in hospital at the time), did not present a search warrant to him. Moreover, contrary to Article 186 of the Criminal Procedure Code of Ukraine, the competent authorities, instead of collecting evidence relevant to the case, withdrew all official documents and certain personal items from the applicant's office. The applicant was literally deprived of an opportunity to perform his professional duties until August 6, 1999, when the relevant documents and belongings were returned¹². In this case, the national court emphasized the violation of the legality principle. The Ukrainian competent authorities did not comply with the requirements of Criminal Procedure Code of Ukraine, which led to the abovementioned consequences. Subsequently, this decision was contested in favor of the prosecutor's office.

Applicant indicated in his complaint that illegal search resulted in violation of Article 8 of the Convention. ECHR also mentioned that it was crucial to identify whether this intervention had been justified by Article 8(2) and, in particular, whether this procedure was organized "in accordance with the law" (within the context of article mentioned)¹³.

The Court emphasizes that expression "in accordance with the law" used in Article 8 (2) of the Convention imposes the obligation to comply with substantive and procedural rules mostly on national law and on the state¹⁴. That is, ECHR decision interprets the principle of as the need for the state to comply with the substantive and procedural rules of national law in the course of its official duties performance.

ECHR emphasized that the first instance court had given its initial opinion regarding the violation of search procedural requirements by law enforcement authorities. It should be noted that the substance of this finding was never overturned by the higher courts, although this decision was subsequently overturned due to other reasons. Moreover, the Government did not question this fact during the investigation and did not provide evidence to refute it. Under these circumstances the Court has found that interference at issue was not carried out «in accordance with

⁹ Decisions of European Court of Human Rights (with comments). 2(03)'2011/ *Official translation of ECHR decisions* / «Yurinkom Inter». P. 19

¹⁰ New Explanatory Ukrainian Dictionary / I. Radchenko, O. Orlova. K.: IE V. Holyaka, 2010. P. 23.

¹¹ Decisions of European Court of Human Rights (with comments). 2(03)'2011/ *Official translation of ECHR decisions* / «Yurinkom Inter». P. 23

¹² Case Panteleienko v. Ukraine (Petition № 11901/02) dd. 29.06.2006. URL : https://zakon.rada.gov.ua/laws/show/974_274.

¹³ Case Panteleienko v. Ukraine (Petition № 11901/02) dd. 29.06.2006. URL : https://zakon.rada.gov.ua/laws/show/974_274.

¹⁴ Case Panteleienko v. Ukraine (Petition № 11901/02) dd. 29.06.2006. URL : https://zakon.rada.gov.ua/laws/show/974_274.

the law» and thus there has been a violation of Article 8¹⁵. Taking the abovementioned into account, ECHR interprets the violation of “legality” principle as non-compliance with the law during the search carried out by law enforcement bodies of Ukraine and is backed by the initial decision of the national court. We note that Ukrainian government has not provided any evidence justifying the legality of search carried out by law enforcement agencies. Also, the relevant decisions of domestic courts contained only one, which was rendered by the national court of Ukraine and was the first to recognize the search as illegitimate, and then courts did not address this issue and did not reimburse any damage to the applicant. In our opinion, it resulted in violation of legality principle by not only the law enforcement but also the national courts – the latter did not consider the cases properly and substantially, providing other arguments and dragged out the trial, fully ignoring the restoration of applicant’s violated rights.

The applicant also filed a complaint under Article 13 of the Convention regarding the lack of effective remedies in breach of Article 8. According to paragraph 76 of the judgment under consideration, the Court recalls that Article 13 of the Convention guarantees a domestic remedy for the rights and freedoms enshrined in Convention, whatever format is used to ensure these by national legal field instruments. Thus, the effect of Article 13 is to ensure that the domestic remedy corresponds to the substance of the «justified complaint» under the Convention and guarantees adequate assistance, although the Contracting Parties may choose how to fulfill their Convention obligations under this provision¹⁶.

As to the possibility of challenging the lawfulness of search during the trial, ECHR noted that the applicant’s case had never been considered on the merits. It was closed at the pre-trial stage, and further review was related to purely procedural issues regarding the closure of the criminal case by the investigator on these grounds. Consequently, these proceedings did not and could not contain an assessment of the legality of certain investigative actions¹⁷. The Court also pointed out that the applicant could have applied to the higher prosecutor’s office to determine the illegality of search carried out in his office, but he did not do that. Despite this and the fact that the prosecutor is independent in one’s activities, this remedy would not be able to provide the applicant with legal protection.

The Court therefore considers that there has been a violation of Article 13 of the Convention in the present case, as the applicant had not been guaranteed a domestic remedy to defend his right to respect for his dwelling, under Article 8 of the Convention¹⁸. It means that «legality» principle is interpreted by ECHR in such a way that state is obliged to ensure the right of person to all possible national remedies.

With regard to the disclosure of confidential information on mental condition, the Court notes that both storage and use of information on a person’s private life by the public authorities violate the right to respect for private life guaranteed by Article 8 (1) of the Convention¹⁹. In this case, the national court received information about the applicant’s mental state and announced it to all persons present at the trial, which led to unnecessary expansion of the scope of persons familiar with these details.

The ECHR recognized that the abovementioned measures taken by the domestic court violated the applicant’s right guaranteed under Article 8 of the Convention²⁰. The Court of Ukraine has violated the national legislation rules on the disclosure of confidential information about a person, therefore, we believe that this results in a violation of the legality principle regarding its activities. That is, the ECHR interprets the principle of “legality” as obligation of public authorities to comply with the requirements of information law within the performance of their duties. In this case – adhering to requirements on maintaining confidentiality of personal information and avoid any disclosure without legal grounds.

The ECHR found that the disclosure of the data concerning the applicant’s mental state had also violated Article 13 of the Convention. After the first instance court had disclosed the personal information, Panteleienko filed a complaint to the national court of appeal, stating that the court of first instance had acted against the law. However, this did not lead to the cessation of confidential information disclosure contained in the case file or to any reimbursement of damages caused to applicant as a result of unlawful interference with his private life. This means that such protection in accordance with Article 13 of the Convention was ineffective.

¹⁵ Case “Panteleienko v. Ukraine” (Petition № 11901/02) dd. 29.06.2006. URL : https://zakon.rada.gov.ua/laws/show/974_274.

¹⁶ Case Panteleienko v. Ukraine (Petition № 11901/02) dd. 29.06.2006. URL : https://zakon.rada.gov.ua/laws/show/974_274.

¹⁷ Case Panteleienko v. Ukraine (Petition № 11901/02) dd. 29.06.2006. URL : https://zakon.rada.gov.ua/laws/show/974_274.

¹⁸ Case Panteleienko v. Ukraine (Petition № 11901/02) dd. 29.06.2006. URL : https://zakon.rada.gov.ua/laws/show/974_274.

¹⁹ Case Panteleienko v. Ukraine (Petition № 11901/02) dd. 29.06.2006. URL : https://zakon.rada.gov.ua/laws/show/974_274.

²⁰ Case Panteleienko v. Ukraine (Petition № 11901/02) dd. 29.06.2006. URL : https://zakon.rada.gov.ua/laws/show/974_274.

We emphasize that ECHR applies certain criteria to the analysis of legislative “quality”. The key ones were defined by the Court in the judgment delivered for “Sunday Times v. The United Kingdom” (1979) case: 1) the law must be comprehensible, serving as a relevant guidance for the citizen, sufficient in the context where certain legal norms are applied in the relevant case; 2) a norm cannot be considered a law if it is not formulated with sufficient clarity, which enables a citizen to regulate his behavior²¹.

In the case «Kats and others v. Ukraine» (Petition № 29971/04) dd. 18.12.2008 Court established that the term “lawful” and formulation “according to procedure established by the law”, contained in Article 5(1), basically refer to national legislation and oblige to guarantee the observance of substantive and procedural rules²².

Having analyzed Article 5 of the Convention, D. Homien states that “to consider deprivation of liberty as lawful, it must be based on an appropriate court judgment or, in case of a short-term detention subject to judicial review, on a relevant prosecutor’s order; to exclude the possibility of unjustified liberty deprivation any decision to apply such measure must be subject to independent judicial review and ensure accountability of the authorities for the measures taken”²³.

In this case, ECHR defines the “legality” principle as one that is to meet the following conditions: decision delivered by the competent authority, control and accountability regarding the delivered decision.

Taking this into consideration, we may conclude that the content of “legality” principle in the ECHR decisions includes a number of necessary non-exhaustive elements subject to uninterrupted observation, such as:

- the law must be comprehensible, serving as a relevant guidance for the citizen, sufficient in the context where certain legal norms are applied in the relevant case²⁴;
- a norm cannot be considered a law if it is not formulated with sufficient clarity allowing a citizen to regulate one’s behavior²⁵;
- delivery of the decision by competent authority;
- public authorities are obliged to be guided by both substantive and procedural rules of law in its professional activities;
- public authorities must comply with current state legislation while performing their professional activities, avoiding violation of the legal force hierarchy (enforcement of the legal act);
- public authorities must be guided by a set of legislative rules in order to prevent its violation;
- when competent authority delivers a procedural decision, it is necessary to take new facts into account each time, because each case is individual;
- all activities performed by state competent authorities must fully comply with requirements of national legislation;
- control and accountability for delivered decisions²⁶.

The abovementioned list of elements defining the content of “legality” principle is non-exhaustive as it is limited practically by the number of cases considered. These elements, in turn, are crucial for proper description of “legality” principle content.

Thus, the content of the “legality” principle, interpreted by the European Court of Human Rights on the basis of criminal proceedings, may be defined as a complex legal phenomenon reflecting the legal nature of public life, the relationship between law and power bodies, law and state, expressed in the relationship the state, represented by public authorities with its citizens and other persons in the course of criminal proceedings. Since in accordance with Articles 33 and 34 of the Convention, the parties may also be presented by non-governmental organizations, groups of persons and the state itself, the content of, interpreted by the European Court of Human Rights on the basis of criminal proceedings should be defined as stated above with consideration of any changes of parties in specific cases.

²¹ D. Homien. *European Convention on Human Rights: a short guide*. Third edition / D. Homien. K. : «Phoenix», 2006. P. 38.

²² Case Kats and others v. Ukraine (Petition № 29971/04)/ ECHR decisions dd. 18.12.2008 y. URL : https://zakon.rada.gov.ua/laws/show/974_485.

²³ D. Homien. *European Convention on Human Rights: a short guide*. Third edition. K. : «Phoenix», 2006. P. 38.

²⁴ D. Homien. *European Convention on Human Rights: a short guide*. Third edition. K. : «Phoenix», 2006. P. 81.

²⁵ D. Homien. *European Convention on Human Rights: a short guide*. Third edition. K. : «Phoenix», 2006. – P. 81.

²⁶ D. Homien. *European Convention on Human Rights: a short guide*. Third edition. K. : “Phoenix”, 2006. P. 38.

The following areas are deemed as the most promising for further scientific research: 1) studying other elements of the “legality” principle content in the ECHR decisions; 2) determination of “legality” principle criteria ECHR adheres to in complaint consideration.

Summary

Article presents analysis of «legality» concept and its interpretation by the European Court of Human Rights, based on materials of criminal proceedings along with individual definition regarding its use. Also author outlines certain mandatory elements that must be considered in the process of defining the “legality” concept.

Анотація

У статті розглядається зміст принципу «законність», що тлумачиться Європейським судом із прав людини за матеріалами кримінальних проваджень та подано власне визначення щодо його вживання. Також виокремлено обов'язкові елементи, які повинні бути наявні під час визначення змісту принципу «законність».

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