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The Constitutional Court of Ukraine  
Конституційний Суд України

Anglais / English / Englisch / английский

# **CONSTITUTIONAL COURT OF UKRAINE**

## **NATIONAL REPORT**

**XVI<sup>th</sup> Congress of the Conference of European Constitutional Courts  
“Cooperation of Constitutional Courts in Europe –  
Current Situation and Perspectives”**

**Kyiv, Ukraine  
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## **I. Constitutional Courts between constitutional law and European law**

### **1. Is the constitutional court obliged to consider European law in performance of its tasks?**

The Constitutional Court of Ukraine as the state body shall act exclusively on the grounds, within the limits of authority and in the manner envisaged by the Constitution and laws of Ukraine (paragraph 2 of Article 19 of the Constitution of Ukraine).

The task of the Constitutional Court of Ukraine shall be to guarantee the supremacy of the Constitution of Ukraine as the Fundamental Law of the State throughout the territory of Ukraine; its activities shall be based on the principles of the rule of law, comprehensive consideration of cases, and legal soundness of decisions it adopts (Articles 2, 4 of the Law of Ukraine “On the Constitutional Court of Ukraine”). Since the international treaties that are in force, agreed to be binding by the Verkhovna Rada (the Parliament) of Ukraine, are part of the national legislation of Ukraine (Article 9 of the Constitution of Ukraine) they are binding for the Constitutional Court of Ukraine as well.

Some of these treaties are conditioned by the membership of Ukraine in the Council of Europe (since 1995) and are the instruments of the European law. These are, in particular, the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “the Convention”), the European Convention on the Exercise of Children’s Rights, the European Social Charter (as amended). In addition, Article 17 of the Law of Ukraine “On Execution of Judgments and Application of the Case-Law of the European Court of Human Rights” stipulates obligatory application of the Convention as the source of law while considering cases for judges of Ukraine, including the Constitutional Court of Ukraine.

The so-called “situational superiority” of the international treaty over law or other legislative act of Ukraine, provided by Article 19 of the Law of Ukraine “On the International Treaties of Ukraine” also relates to specific features of application of the European law in Ukraine. According to its content, if the international treaty of Ukraine which entered into force in the established order, sets forth the rules other than those envisaged in the respective legislative act of Ukraine there shall be applied rules of the international treaty. It does not mean their priority over the constitutional norms: the international treaties shall not contravene the Constitution of Ukraine, otherwise their signing is possible only after introducing relevant amendments to the Constitution of Ukraine (paragraph 2 of Article 9). The subject which establishes such incompliance (upon the petition of the President of Ukraine or the Cabinet of Ministers of Ukraine) is the Constitutional Court of Ukraine – the sole body of the constitutional jurisdiction in Ukraine.

In view of Ukraine’s aspirations to become a member of the European Union (hereinafter referred to as “the EU”) special attention is paid to the implementation of the EU legal instruments in the national legal system. According to sub-item 2.1 of Chapter III of “Agenda of Association Ukraine –

EU” (adopted on June 16, 2009) in order to prepare and facilitate implementation of the Association Agreement the parties decided to maintain a dialogue and to cooperate to strengthen respect to democratic principles, rule of law and proper governance, human rights and fundamental freedoms, in particular national minorities, as it is mentioned in basic Conventions of the UNO and the Council of Europe and their respective protocols. It does not oblige the Constitutional Court of Ukraine to consider the EU law while considering cases, however, it exerts influence on application of both international and regional standards of the human rights.

Thus, the Constitutional Court of Ukraine takes into account the European law in performance of its tasks proceeding from the provisions of the Constitution, laws of Ukraine on the international treaties of Ukraine and status of the Constitutional Court of Ukraine.

## **2. Are there any examples of references to international sources of law?**

### **a) the European Convention of Human Rights and Fundamental Freedoms**

The Constitutional Court of Ukraine applies the provisions of the Convention when considering cases on human and citizen’s rights and freedoms. Sometimes there is only statement on the effect of Convention provisions in the legal system of Ukraine (Decisions dated December 25, 1997 No. 9-rp/97, December 1, 2004 No. 19-rp/2004, July 9, 2007 No. 6-rp/2007, January 29, 2008 No. 2-rp/2008, October 8, 2008 No. 20-rp/2008, March 13, 2012 No. 5-rp/2012). Yet, there are numerous references to specific provisions of the Convention, in particular:

- prohibition of torture (Article 3)<sup>1</sup>;
- right to freedom and personal inviolability (Article 5)<sup>2</sup>;
- right to fair trial (Article 6)<sup>3</sup>;
- establishment of punishment by law (Article 7)<sup>4</sup>;
- right to respect of private and family life (Article 8)<sup>5</sup>;
- freedom of expression of views (Article 10)<sup>6</sup>;
- freedom of meetings and associations (Article 11)<sup>7</sup>;
- right to effective mean of legal protection (Article 13)<sup>8</sup>

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<sup>1</sup> Decision dated December 29, 1999 No. 11-rp/99.

<sup>2</sup> Decisions dated July 8, 2003 No. 14-rp/2003, June 29, 2010 No. 17-rp/2010, October 11, 2011 No. 10-rp/2011.

<sup>3</sup> Decisions dated June 24, 1999 No. 6-rp/99, November 16, 2000 No. 13-rp/2000, January 30, 2003 No. 3-rp/2003, November 2, 2004 No. 15-rp/2004, June 20, 2007 No. 5-rp/2007, March 11, 2010 No. 8-rp/2010, September 9, 2010 No. 19-rp/2010, October 20, 2011 No. 12-rp/2011, December 13, 2011 No. 17-rp/2011, December 14, 2011 No. 19-rp/2011, January 18, 2012 No. 1-rp/2012.

<sup>4</sup> Decisions dated April 19, 2000 No. 6-rp/2000, January 26, 2011 No. 1-rp/2011.

<sup>5</sup> Decisions dated May, 31 2011 No. 4-rp/2011, October 20, 2011 No. 12-rp/2011, January 20, 2012 No. 2-rp/2012.

<sup>6</sup> Decision dated April, 10, 2003 No. 8-rp/2003.

<sup>7</sup> Decisions dated October, 18 2000 No. 11-rp/2000, June, 12 2007 No. 2-rp/2007.

- prohibition of discrimination (Article 14)<sup>9</sup>;
- limitation of political activity of foreigners (Article 6)<sup>10</sup>;
- limits of application of rights limitation (Article 18)<sup>11</sup>;
- protection of ownership (Article 1 of the First Protocol)<sup>12</sup>;
- freedom of moving (Article 2 of the Protocol No. 4)<sup>13</sup>;
- general prohibition of discrimination (Article 1 of the Protocol No. 12)<sup>14</sup>.

### **b) the Charter of Fundamental Rights of the European Union**

The effect of the Charter of Fundamental Rights of the European Union covers the EU member-states, Ukraine being not a member of the EU. There are no references to this source of law in the jurisprudence of the Constitutional Court of Ukraine.

### **c) other instruments of international law at European level**

The case-law of the Constitutional Court of Ukraine has more than one example of reference to the instruments of international law at European level. First of all, the Constitutional Court of Ukraine takes into consideration the European charters and conventions ratified by Ukraine, but there are also references to acts of recommendation character of the Council of Europe or acts of the EU which formally are not binding for Ukraine.

The provisions of the *European Social Charter* of 1996 are reflected during consideration of issues of social rights protection, in particular, the right to social provision (Article 12)<sup>15</sup>, healthcare, social and medical provision (Articles 11, 13)<sup>16</sup>, housing (Article 31)<sup>17</sup>.

While resolving the mentioned issues the Constitutional Court of Ukraine also referred to the provisions of the *European Convention on Social and Medical Assistance* dated December 11, 1959 (Articles 1, 8-17) and the *European Code of Social Security* dated April 16, 1964<sup>18</sup>.

The European Charter on the statute for judges dated July 10, 1998 was applied in terms of responsibility of a judge (item 5.1)<sup>19</sup>, his/her remuneration and social security (item 6)<sup>20</sup> and as an act on the whole<sup>21</sup>.

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<sup>8</sup> Decisions dated January, 30 2003 No. 3-rp/2003, December, 14 2011 No. 19-rp/2011, March, 11 2010 No. 8-rp/2010.

<sup>9</sup> Decision dated April, 12 2012 No. 9-rp/2012.

<sup>10</sup> Decision dated June, 12 2007 No. 2-rp/2007.

<sup>11</sup> Decision dated May, 31 2011 No. 4-rp/2011.

<sup>12</sup> Decisions dated October, 10 2001 No. 13-rp/2001, February, 12 2002 No. 3-rp/2002, March, 24 2005 No. 2-rp/2005, June, 12 2012 No. 13-rp/2012.

<sup>13</sup> Decisions dated November, 14 2001 No. 15-rp/2001, June, 29 2010 No. 17-rp/2010.

<sup>14</sup> Decision dated April, 12 2012 No. 9-rp/2012.

<sup>15</sup> Decisions dated July, 9 2007 No. 6-rp/2007, October, 8 2008 No. 20-rp/2008.

<sup>16</sup> Decision dated May, 29 2002 No. 10-rp/2002.

<sup>17</sup> Decision dated March, 13 2012 No. 5-rp/2012.

<sup>18</sup> Decision dated May, 29 2002 No. 10-rp/2002.

<sup>19</sup> Decisions dated March, 11 2011 No. 2-rp/2011, June, 16 2011 No. 5-rp/2011.

<sup>20</sup> Decisions dated March, 20 2002 No. 5-rp/2002, October, 11 2005 No. 8-rp/2005, June, 18 2007 No. 4-rp/2007, December, 14 2011 No. 18-rp/2011.

<sup>21</sup> Decisions dated December, 1 2004 No. 19-rp/2004, May, 16 2007 No. 1-rp/2007.

Also during consideration of cases concerning independence of judges the Constitutional Court of Ukraine applied the provisions of *Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe “Independence, efficiency and role of judges”* dated October 13, 1994<sup>22</sup> and *Recommendation of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities* dated November 17, 2010 No. 12 (2010)<sup>23</sup>.

The provisions of the *European Charter of Local Self-Government* dated November 6, 1996 concerning conception of local self-government (Article 3)<sup>24</sup>, sphere of its competence (Article 4)<sup>25</sup>, change of territorial borders of bodies of local self-government (Article 5)<sup>26</sup> and conditions of performance of functions on the local level (Article 7)<sup>27</sup> have more than once were the subject of attention of the Constitutional Court of Ukraine.

The issues of “language rights” have caused reference of the Constitutional Court of Ukraine to the provisions of the *European Charter for Regional or Minority Languages* dated November 5, 1992<sup>28</sup> and the *Framework Convention for the Protection of National Minorities* dated February 1, 1995<sup>29</sup> and concerning the protection of citizens` rights in court of arbitration – the *European Convention on International Commercial Arbitration* dated April 21, 1961<sup>30</sup>.

The case law of the Constitutional Court of Ukraine has examples of reference to *acts of governing bodies of the Council of Europe: Resolution of the Parliamentary Assembly of the Council of Europe dated December 25, 1998 No. 1165 (1998)* (items 6, 11, 12)<sup>31</sup>, *Recommendation of Committee of Ministers of the Council of Europe on the status of public officials in Europe* dated February 24, 2000 No. R (2000) 6<sup>32</sup> and its *Recommendation on the position of the victim in the framework of criminal law and procedure* dated June 28, 1985 R (85) 11 and *concerning improvement of domestic remedies* dated May 12, 2004 Rec(2004) 6<sup>33</sup>.

The Constitutional Court of Ukraine has more than once referred to the acts of the EU. Such references took place, in particular, while considering the cases on:

- protection of rights of consumers of credit services when in addition to the *Charter of Consumer Rights* (approved by the Resolution of the Consultative Assembly of the Council of Europe dated May, 17 1973 No. 543) *Directive*

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<sup>22</sup> Decisions dated June, 24 1999 No. 6-rp/99, December, 1 2004 No. 19-rp/2004, October, 11 2005 No. 8-rp/2005, May, 16 2007 No. 1-rp/2007, March, 11 2010 No. 7-rp/2010.

<sup>23</sup> Decision dated December, 14 2011 No. 18-rp/2011.

<sup>24</sup> Decision dated December, 25 2003 No. 21-rp/2003.

<sup>25</sup> Decisions dated July, 13 2001 No. 11-rp/2001, September, 16 2009 No. 7-rp/2009.

<sup>26</sup> Decision dated January, 16 2003 No. 1-rp/2003.

<sup>27</sup> Decision dated May, 13 1998 No. 6-rp/98.

<sup>28</sup> Decisions dated December, 20 2007 No. 13-rp/2007, April, 22 2008 No. 8-rp/2008, December, 13 2011 No. 17-rp/2011.

<sup>29</sup> Decisions dated December, 14 1999 No. 10-rp/99, December, 20 2007 No.13-rp/2007.

<sup>30</sup> Decision dated January, 10 2008 No. 1-rp/2008.

<sup>31</sup> Decision dated January, 20 2012 No. 2-rp/2012.

<sup>32</sup> Decision dated March, 13 2012 No. 6-rp/2012.

<sup>33</sup> Decision dated December, 14 2011 No. 19-rp/2011.

*2005/29/EC of the European Parliament and the Council dated May 11, 2005 on unfair commercial practices, Directive 2008/48/EC of the European Parliament and the Council dated April 23, 2008 on credit agreements for consumers*<sup>34</sup> was applied.

- possibility of introducing prohibition to finance political parties from certain sources (specifically, by state bodies and bodies of local self-government, foreigners) when *Regulation (EC) No. 2004/2003 of the European Parliament and the Council of the EU on the regulations governing political parties at European level and the rules regarding their funding* dated November 4, 2003<sup>35</sup> was applied;

- possibility of establishment of certain age limits for labor activities when *Directive of the Council of the EU 2000/78/EC dated November 27, 2000 on general framework for equal treatment in employment and occupation*<sup>36</sup> was applied.

In view of gradual approaching of Ukraine to the EU membership the exercise of the constitutional control and the official interpretation of national legislation by the Constitutional Court of Ukraine with account of legal acts of the EU and their interpretation by the European Court of Justice will have a tendency for strengthening.

Furthermore, the Constitutional Court of Ukraine referred to acts of the EU. For example, while considering the issue of the protection of rights of consumers of credit services in addition to the *Charter of Consumer Rights* (approved by the Resolution of the Consultative Assembly of the Council of Europe dated May, 17 1973 No. 543), it applied *Directive 2005/29/EC of the European Parliament and the Council dated May 11, 2005 on unfair commercial practices, Directive 2008/48/EC of the European Parliament and the Council dated April 23, 2008 on credit agreements for consumers*<sup>37</sup>. Some decisions of the Constitutional Court of Ukraine have reference to *Directive of the Council of the EU 2000/78/EC dated November 27, 2000 on general framework for equal treatment in employment and occupation*<sup>38</sup>, *Regulation (EC) No. 2004/2003 of the European Parliament and the Council of the EU on the regulations governing political parties at European level and the rules regarding their funding* dated November 4, 2003<sup>39</sup>.

#### **d) other instruments of international law at international level**

When considering cases, the Constitutional Court of Ukraine often refers to acts of this group, first of all those which became a part of the national legislation and are binding for Ukraine.

In particular, considering issues of civil, political, economic, social and cultural rights the Constitutional Court of Ukraine referred to the relative

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<sup>34</sup> Decision dated November, 10 2011 No. 15-rp/2011.

<sup>35</sup> Decision dated June, 12 2007 No. 2-rp/2007.

<sup>36</sup> Decision dated October, 16 2007 No. 8-rp/2007.

<sup>37</sup> Decision dated November, 10 2011 No. 15-rp/2011.

<sup>38</sup> Decision dated October, 16 2007 No. 8-rp/2007.

<sup>39</sup> Decision dated June, 12 2007 No. 2-rp/2007.

international covenants. Thus, the provisions of the *International Covenant on Civil and Political Rights* of 1966 were applied regarding:

- general prohibition of discrimination (Article 2)<sup>40</sup>;
- right to life (Article 6)<sup>41</sup>;
- right to freedom and personal inviolability (Article 9)<sup>42</sup>;
- right to liberty of movement and freedom to choose the residence (Article 12)<sup>43</sup>;
- equality before the court, right to a fair and public hearing by a competent, independent and impartial court established by law (Article 14)<sup>44</sup>;
- establishment of punishment by law (Article 15)<sup>45</sup>;
- prohibition of interference to privacy, family, home, correspondence, attacks on honour and reputation of a person (Article 17)<sup>46</sup>;
- freedom of expression, freedom of information (Article 19)<sup>47</sup>;
- right to marriage and family (Article 23)<sup>48</sup>;
- right to take part in the conduct of public affairs, to vote and to be elected, to have access to public service (Article 25)<sup>49</sup>;
- equality of everyone before the law and prohibition of discrimination (Article 26)<sup>50</sup>.

Reference to norms of the *International Covenant on Economic, Social and Cultural Rights* of 1966<sup>51</sup> concerned:

- general obligation of the state to gradual full realization of the rights recognized in the Covenant by all appropriate means (Article 2)<sup>52</sup>;
- criteria of admissibility of the right limitation (Article 4)<sup>53</sup>;
- right to form trade unions (Article 8)<sup>54</sup>;
- obligation of the state to provide children with protection and care necessary for their well-being (Article 10)<sup>55</sup>;
- right to an adequate standard of living (Article 11)<sup>56</sup>;
- right to education (Article 13)<sup>57</sup>.

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<sup>40</sup> Decisions dated November, 16 2000 No. 13-rp/2000, January, 30 2003 No. 3-rp/2003.

<sup>41</sup> Decision dated December, 29 1999 No. 11-rp/99.

<sup>42</sup> Decisions dated June, 29 2010 No. 17-rp/2010, October, 11 2011 No. 10-rp/2011.

<sup>43</sup> Decisions dated November, 14 2001 No. 15-rp/2001, June, 29 2010 No. 17-rp/2010.

<sup>44</sup> Decisions dated November, 16 2000 No. 13-rp/2000, January, 30 2003 No. 3-rp/2003, November, 2 2004 No. 15-rp/2004, December, 14 2011 No. 19-rp/2011, April, 12 2012 No. 9-rp/2012.

<sup>45</sup> Decisions dated April, 19 2000 No. 6-rp/2000, January, 26 2011 No. 1-rp/2011.

<sup>46</sup> Decision dated May, 31 2011 No. 4-rp/2011, Decision dated January, 20 2012 No. 2-rp/2012.

<sup>47</sup> Decision dated January, 20 2012 No. 2-rp/2012.

<sup>48</sup> Decision dated June, 3 1999 No. 5-rp/99.

<sup>49</sup> Decision dated June, 4 2009 No. 13-rp/2009.

<sup>50</sup> Decision dated April, 12 2012 No. 9-rp/2012.

<sup>51</sup> Decisions dated March, 17 2005 No. 1-rp/2005, July, 9 2007 No. 6-rp/2007, January, 29 2008 No. 2-rp/2008, October, 8 2008 No. 20-rp/2008.

<sup>52</sup> Decision dated January, 25 2012 No. 3-rp/2012.

<sup>53</sup> Decisions dated July, 7 2004 No. 14-rp/2004, October, 16 2007 No. 8-rp/2007, March, 13 2012 No. 5-rp/2012.

<sup>54</sup> Decision dated October, 18 2000 No. 11-rp/2000.

<sup>55</sup> Decision dated February, 3 2009 No. 3-rp/2009.

<sup>56</sup> Decision dated June, 10 2010 No. 15-rp/2010.

Among the references of the Constitutional Court of Ukraine to the conventional norms of the international law the most frequent are those to the acts on the protection of social rights, such as:

- *Convention on Minimal Norms of Social Security of June 28, 1952, Convention on Medical Provision and Assistance in Case of Illness of June 25, 1969 and the Recommendation of the same name of June 25, 1969*<sup>58</sup>;
- *Convention of the International Labour Organization on Freedom of Association and Protection of the Right to Organize of 1948 No. 87*<sup>59</sup>;
- *Convention of the International Labour Organization on Discrimination in Respect of Employment and Occupation of 1958 No. 111*<sup>60</sup>;
- *Convention of the International Labour Organization on Termination of Employment at the Initiative of the Employer No. 158 of June 28, 1982*<sup>61</sup>.

When considering other crucial issues the Constitutional Court of Ukraine applied the provisions of the *Convention on the Rights of the Child* of 1989<sup>62</sup>, the *UN Convention against Corruption* of 2003<sup>63</sup>, the *Civil Law Convention on Corruption* of 1999, the *Criminal Law Convention on Corruption* of 1999<sup>64</sup>, the *Convention on Ensuring the Rights of National Minorities* of October 21, 1994<sup>65</sup>.

It is rather widespread to refer to *the Universal Declaration of Human Rights of 1948*<sup>66</sup> both as an act on the whole as well as its provisions concerning:

- equal rights and equality before the law (Articles 1, 2, 7)<sup>67</sup>;
- right to life, freedom and personal inviolability (Article 3)<sup>68</sup>;
- right to effective remedy by court (Article 8)<sup>69</sup>;
- prohibition of arrest, detention and exile (Article 9)<sup>70</sup>;
- right to fair and impartial trial (Article 10)<sup>71</sup>;
- prohibition to interfere to privacy, family, home or correspondence (Article 12)<sup>72</sup>;
- freedom of movement and residence (Article 13)<sup>73</sup>;
- right to marriage, family and protection of family by the society and the state (Article 16)<sup>74</sup>;

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<sup>57</sup> Decisions dated November, 21 2002 No. 17-rp/2002, March, 4 2004 No. 5-rp/2004.

<sup>58</sup> Decision dated May, 29 2002 No. 10-rp/2002.

<sup>59</sup> Decision dated October, 18 2000 No. 11-rp/2000.

<sup>60</sup> Decisions dated October, 16 2007 No. 8-rp/2007, April, 5 2011 No. 3-rp/2011.

<sup>61</sup> Decision dated July, 9 1998 No. 12-rp/98.

<sup>62</sup> Decisions dated November, 21 2002 No. 18-rp/2002, February, 3 2009 No. 3-rp/2009.

<sup>63</sup> Decision dated March, 13 2012 No. 6-rp/2012.

<sup>64</sup> Decision dated October, 6 2010 No. 21-rp/2010.

<sup>65</sup> Decision dated December, 14 1999 No. 10-rp/99.

<sup>66</sup> Decision dated January, 29 2008 No. 2-rp/2008.

<sup>67</sup> Decision dated April, 12 2012 No. 9-rp/2012.

<sup>68</sup> Decisions dated June, 29 2010 No. 17-rp/2010, October, 11 2011 No. 10-rp/2011.

<sup>69</sup> Decisions dated May, 23 2001 No. 6-rp/2001, January, 30 2003 No. 3-rp/2003, December, 14 2011 No. 19-rp/2011.

<sup>70</sup> Decisions dated June, 29 2010 No. 17-rp/2010, October, 11 2011 No. 10-rp/2011.

<sup>71</sup> Decision dated November, 2 2004 No. 15-rp/2004.

<sup>72</sup> Decisions dated May, 31 2011 No. 4-rp/2011, January, 20 2012 No. 2-rp/2012.

<sup>73</sup> Decision dated November, 14 2001 No. 15-rp/2001.

- right to take part in the government of his country, right of equal access to public service (Article 21)<sup>75</sup>;
- right to social security (Article 22)<sup>76</sup>;
- right to adequate standard of living (Article 25)<sup>77</sup>;
- right to education (Article 26)<sup>78</sup>;
- establishment of limitation of human rights and freedoms (Article 29)<sup>79</sup>.

Among international acts of the declaratory character which the Constitutional Court of Ukraine has applied, there are *the Declaration of the Rights of the Child* of 1959, *the Vienna Declaration and Plan of Action adopted on the II World Conference on Human Rights* on June 25, 1993<sup>80</sup> and *Pacem in terris* of 1963<sup>81</sup>.

Moreover, the Constitutional Court of Ukraine has applied some recommendatory *acts of bodies of the United Nations Organization*:

- “*Basic Principles on the Independence of Judiciary*” endorsed by the UN General Assembly resolutions 40/32 of November, 29 1985 and 40/146 of December 13, 1985<sup>82</sup>;
- “*Procedures for the effective implementation of the basic principles on the independence of judiciary*” endorsed by resolution 1989/60 of May 24, 1989 of the UN Economic and Social Council<sup>83</sup>;
- “*Guidelines for Consumer Protection*” endorsed by the UN General Assembly resolution 39/248 of April 9, 1985<sup>84</sup>;
- *International Code of Conduct for Public Officials* endorsed by the UN General Assembly on December 19, 1996<sup>85</sup>;
- *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)* endorsed by the UN General Assembly resolution 45/110 of December 14, 1990<sup>86</sup>;
- *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* endorsed by the UN General Assembly resolution 43/173 of December 9, 1988;
- *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* endorsed by the UN General Assembly resolution 45/113 of December 14, 1990<sup>87</sup>;

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<sup>74</sup> Decision dated June, 3 1999 No. 5-rp/99.

<sup>75</sup> Decision dated October, 5 2005 No. 6-rp/2005.

<sup>76</sup> Decisions dated March, 17 2005 No. 1-rp/2005, October, 8 2008 No. 20-rp/2008, December, 26 2011 No. 20-rp/2011, January, 25 2012 No. 3-rp/2012.

<sup>77</sup> Decision dated June, 10 2010 No. 15-rp/2010.

<sup>78</sup> Decision dated March, 4 2004 No. 5-rp/2004.

<sup>79</sup> Decisions dated May, 31 2011 No. 4-rp/2011, January, 20 2012 No. 2-rp/2012.

<sup>80</sup> Decisions dated June, 24 1999 No. 6-rp/99, March, 11 2010 No. 7-rp/2010.

<sup>81</sup> Decision dated January, 29 2008 No. 2-rp/2008.

<sup>82</sup> Decisions dated June, 24 1999 No. 6-rp/99, May, 16 2007 No. 1-rp/2007, April, 5 2011 No. 3-rp/2011.

<sup>83</sup> Decisions dated December, 1 2004 No. 19-rp/2004, March, 11 2010 No. 7-rp/2010, December, 14 2011 No. 18-rp/2011.

<sup>84</sup> Decision dated November, 10 2011 No. 15-rp/2011.

<sup>85</sup> Decision dated March, 13 2012 No. 6-rp/2012.

<sup>86</sup> Decision dated November, 2 2004 No. 15-rp/2004.

- “Safeguards guaranteeing protection of the rights of those facing the death penalty” endorsed by the UN Economic and Social Council resolution 1984/50 of May 25, 1984<sup>88</sup>;
- *Arbitration rules of United Nations Commission on International Trade Law (UNCITRAL)* of June 15, 1976<sup>89</sup>;
- *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* endorsed by the UN General Assembly on November 29, 1985<sup>90</sup>;
- “*The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*” endorsed by the sub-commission on prevention of discrimination and minorities protection of the UN Economic and Social Council in 1984<sup>91</sup>;
- “*Basic Principles on the Role of Lawyers*” endorsed by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders on August 27 to September 7, 1990<sup>92</sup>.

### **3. Are there any specific provisions of constitutional law imposing a legal obligation on the constitutional court to consider decisions by European courts of justice?**

The Constitution and laws of Ukraine bind the state to consider judgments of the European Court of Human Rights (ECHR).

Thus, Article 55 of the Fundamental Law of Ukraine stipulates the constitutional right of every person after exhausting all domestic legal remedies to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions (paragraph four). Ensuring and implementation of this right is directly connected to signing and ratification of the Convention by Ukraine in 1997 which, according to Article 9 of the Constitution of Ukraine, became a part of the national legislation of the state. This fact conditioned the expansion of the jurisdiction of the ECHR to Ukraine and obligation of the state to execute final judgments of the ECHR in any cases to which it was a party pursuant to the requirements of Article 46 of the Convention.

According to Article 92 of the Constitution of Ukraine, the Law of Ukraine “On Execution of Judgments and Application of Case-Law of the European Court of Human Rights” was adopted in order to develop the mentioned constitutional and international provisions. This law binds courts when considering cases to apply the Convention and the case law of the ECHR as a source of law (paragraph 1 of Article 17) and indicates the binding nature of execution by Ukraine of judgments against Ukraine (Article 2).

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<sup>87</sup> Decision dated October, 11 2011 No. 10-rp/2011.

<sup>88</sup> Decision dated January, 26 2011 No. 1-rp/2011.

<sup>89</sup> Decision dated January, 10 2008 No. 1-rp/2008.

<sup>90</sup> Decision dated December, 14 2011 No. 19-rp/2011.

<sup>91</sup> Decision dated June, 12 2007 No. 2-rp/2007.

<sup>92</sup> Decision dated November, 16 2000 No. 13-rp/2000.

Pursuant to this law, measures of general character are taken (Article 13) in order to abide by the provisions of the Convention by the state, violation of which have been established in a Court judgment, ensuring elimination of shortcomings of system character which caused violation revealed by the ECHR, as well as elimination of a reason for submission of claims against Ukraine to the ECHR caused by the problem which used to be a subject of consideration at the ECHR. These are the measures directed towards elimination of the system problem indicated in the ECHR judgment and its source, in particular:

- a) introduction of amendments to current legislation and practice of its application;
- b) introduction of amendments to administrative practice;
- c) ensuring legal expertise of draft laws;
- d) ensuring professional study of the Convention and the ECHR case-law by prosecutors, lawyers, law-enforcement bodies officers, officers of immigration services, other categories of employees, whose professional activity is related to law enforcement, as well as holding people in custody;
- e) other measures which are defined – on the condition of supervision by the Committee of Ministers of the Council of Europe – by the state-rapporteur according to the ECHR judgments in order to eliminate shortcomings of system character, termination of violations of the Convention caused by these shortcoming and ensuring maximal reimbursement of consequences of these violations.

As for consideration of decisions of the European Court of Justice it shall be mentioned that its jurisdiction is obligatory for the EU member-states only, and its decisions are obligatory for the parties and for national court which applied for a preliminary decision. Ukraine is not a member-state and the Ukrainian legislation does not have provisions concerning obligatory consideration of decisions of the European Court of Justice by national courts.

Thus, the mentioned provisions of the Constitution and laws of Ukraine legally oblige the Constitutional Court of Ukraine to the following forms of consideration of the ECHR judgments:

- application as a source of law;
- change of practice of application of the current legislation of Ukraine in case of its amendment aimed at elimination of a system problem and its source mentioned in the ECHR judgment (in cases against Ukraine).

#### **4. Is the jurisprudence of the constitutional court influenced in practice by the jurisprudence of European courts of justice?**

As a matter of fact, the influence of the ECHR case-law on the Constitutional Court of Ukraine jurisprudence is manifested by both direct references to the ECHR judgments and similarity of approaches to resolution of

cases and opinions of the Constitutional Court of Ukraine regarding the existing legal positions of the ECHR without reference to such source. Let us focus on the latter, since examples of direct references to the ECHR case-law are the answer for the following question of the questionnaire.

It shall be mentioned that in the history of the constitutional jurisdiction of Ukraine the effect of the ECHR case-law for the first time was recognized in the Decision of the Constitutional Court of Ukraine dated December 29, 1999 No. 11-rp/99 (case on death penalty). And even though the Constitutional Court of Ukraine avoided direct reference to the legal position of the ECHR concerning non-conformity of death penalty as a type of punishment to the provisions of Article 3 of the Convention, it is obvious that it was influenced by the ECHR judgment dated July 7, 1989 in the case *Soering v. United Kingdom*. Moreover, the basis of substantiation of this Decision was the principle of purposefulness of legislation: it was mentioned that for the period of existence of death penalty in the Ukrainian legislation the purpose of imposition of death penalty by the court decision was legally undefined and this did not correspond to substantial requirement of natural law concerning positive legislation which shall serve a tool of attaining clear, legitimate and publicly important purposes.

The abovementioned example is an evidence of shaping legal understanding of the Constitutional Court of Ukraine in the direction outlined by the ECHR. Common traits of practice of these two judicial bodies are the application of approach to legal understanding in which both natural legal and positivistic legal views, as well as humanistic principle (orientation towards ensuring human rights, dignity and interests) are presented.

Reflection of such legal understanding can be found in the Decision of the Constitutional Court of Ukraine dated November 2, 2004 No. 15-rp/2004 (case on imposition of more lenient sentence by court) in which it gave definition of the rule of law: "... it is the supremacy of law in a society. The rule of law implies its accomplishment in the sphere of legislation and law enforcement, in particular, in a legislation which by its purpose has to be encouraged by the idea of social justice, freedom and equality. One implication of the rule of law is that law is not restricted to legislation as one of its forms, but rather comprises other social regulatory means such as ethical norms, traditions and customs legitimized on a certain cultural level of a society as they have been worked out during its historical development. Found in all of these elements are a characteristic consistent with the justice ideology and the idea of law largely reflected in the Constitution of Ukraine. This interpretation of law by no means justifies identifying it with legislation which may well be unjust, specifically, by restricting the freedom and equality of the person. Justice is one of the fundamentals of the law and is crucial to determining its role as a social relations regulator and a general human measure of law. Justice is most often looked at as a property of law which, in particular, is reflected in equivalent legal tariffs for similar types of offensive conduct and in a legal responsibility that is proportionate to the gravity of offence".

The Constitutional Court of Ukraine pointed out such elements of the rule of law as justice, certainty, clarity and unambiguousness of legal norm, principle of

proportionality, principle of trust of citizens to the state in other decisions as well (in particular, Decision dated January 30, 2003 No. 3-rp/2003 in the case on consideration by the court of individual resolutions of investigator and prosecutor, Decision dated September 22, 2005 No. 5-rp/2005 in the case on permanent use of land plots, Decision dated July 9, 2007 No. 6-rp/2007 in the case on social guarantees of citizens).

At the same time, such understanding of the rule of law and its elements is established by the ECHR and may be seen, in particular, in its judgments in the case “Brumarescu v. Romania” dated October 28, 1999, in the case “Baranowski v. Poland” dated March 28, 2000, in the case “Ryabykh v. Russia” dated July 24, 2003, in the case “Svetlana Naumenko v. Ukraine” dated November 9, 2004, in case “Nikula v. Finland” dated March 21, 2002.

The ECHR case-law concerning the right to fair trial which is stipulated by Article 6 of the Convention is of special significance within this context. In particular, in the Court judgment dated July 20, 2006 in the case “Sokurenko and Strygun v. Ukraine” the ECHR indicated that Article 6 of the Convention did not oblige member-states of the Convention to establish courts of appeal or cassation, however, in those states where these courts existed it was necessary to abide the guarantees defined in Article 6.

In applying approaches and the positions of the ECHR, the Constitutional Court of Ukraine in the Decision dated August 29, 2012 No. 16-rp/2012 (case on jurisdiction of some categories of administrative cases) indicated that in cases which do not envisage appellate and cassational challenge of a decision of court of general jurisdiction in order to provide human and citizens` rights and freedoms legislative regulation of mentioned issues shall conform to requirements of the Fundamental Law of Ukraine, first of all the principle of the rule of law, in particular such components as proportionality between interests of person and society, as well as justice, reasonableness, consistency of law etc. Herewith, it was mentioned that such regulation of jurisdiction of some categories of administrative cases defined by the disputed legislative provisions provides preconditions for impartial execution of justice by the High Administrative Court of Ukraine as a court of first instance within a reasonable term, secures guarantees of fair judicial consideration of a case and establishes an order for a court to adopt a grounded and lawful decision.

Based on the abovementioned, the Constitutional Court of Ukraine came to conclusion that legislative provisions concerning jurisdiction of the mentioned categories of administrative cases to appellate administrative courts as courts of the first instance and the High Administrative Court of Ukraine as a court of appellate instance do not contravene the Constitution of Ukraine.

Thus, the result of the mentioned influence is the development of the jurisprudence of the Constitutional Court of Ukraine within the framework of the European legal tradition with account of current natural and legal approaches and humanistic values.

**5. Does the constitutional court in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?**

When referring to the judgments of the ECHR in its jurisprudence, the Constitutional Court of Ukraine acts in accordance with the laws of Ukraine, which established that the jurisdiction of the ECHR applies to Ukraine, and the courts during the consideration of the cases apply the ECHR case-law as a source of law. Number of such references has remarkably increased in recent years. Thus, of 22 cases of the Constitutional Court of Ukraine, which have been affected by the ECHR case-law, 20 were decided on in 2007 - 2012. Account was taken of both the ECHR's understanding of the general principles of law and specific issues of the protection of human rights and freedoms, as evidenced by the following examples.

Such opinions of the ECHR on some components of the principle of the rule of law were applied in a number of the decisions of the Constitutional Court of Ukraine:

one of the fundamental aspects of the rule of law is a principle of legal certainty, which envisages respect for the principle *res judicata* – principle of the finality of court's decisions. This principle states that neither party is entitled to seek review of a final and binding judgment merely because it aims to achieve a new hearing and a new decision.

- (the ECHR's judgment in the case "Ponomaryov v. Ukraine" dated April 3, 2008// Decision of the Constitutional Court of Ukraine dated March 11, 2010 №8-rp/2010);

- practice, arisen in view of the legislative gap and which causes detention of a person for an unlimited and unpredictable period under the circumstances when such detention is envisaged neither by particular provision of the legislation nor by any court decision, per se contradicts the principle of legal certainty, which is implicated by the Convention and is one of the key elements of the rule of law.

When we speak on the deprivation of liberty, an extremely important condition is that ensuring the general principle of legal certainty. The requirement of "quality of law" within the meaning of Article 5 § 1 of the Convention implies that when the national law envisages the possibility of the deprivation of liberty, such law shall be sufficiently accessible, clearly elaborated and apprehended in its application to avoid any risk of arbitrariness (the ECHR's judgments in cases "Yeloyev v. Ukraine" dated November 6, 2008, "Novik v. Ukraine" dated December 18, 2008// Decisions of the Constitutional Court of Ukraine dated June 29, 2010 № 17-rp/2010 and October 11, 2011 N10-rp/2011);

- one of the components of the principle of the rule of law is the expectation that the court shall apply such punishment to each offender which the legislator considers proportional (the ECHR's judgment in the case "Scopolla v. Italy" dated September 17, 2009// Decision of the Constitutional Court of Ukraine № 1-rp/2011 dated January 26, 2011);

- restriction will not be compatible with Article 6 § 1 of the Convention if it does not have legitimate purpose and if there is absence of proportionality between the measures used and intended aim (the ECHR's judgment in the case "Osman v. the United Kingdom" dated October 28, 1998// Decisions of the Constitutional Court of Ukraine dated June 20, 2007 N5-rp/2007 and March 11, 2011 №2-rp/2011).

Considering the issue regarding the conditions of legitimacy of restrictions of specific rights, the Constitutional Court of Ukraine referred to the following positions of the ECHR:

- restriction of human and citizen's rights and freedoms are deemed admissible if they are implemented in accordance with the effective legislation and comply with the rule "preservation of the main content of the rights and freedoms" (the ECHR's judgment in the case "Requenie v. Hungary" dated May 20, 1999, "Welfare Party and Others v. Turkey" dated February 13, 2003// Decision of the Constitutional Court of Ukraine № 2-rp/2007 dated June 12, 2007);

- exercise of social and economic human rights to a great extent depends on the situation in the states, especially financial one. Such provisions also apply to the issues of admissibility of reduction of social benefits (the ECHR judgments in the cases "Airey v. Ireland" dated October 9, 1979, "Kyartan Asmundson v. Iceland" dated October 12, 2004// Decision of the Constitutional Court of Ukraine dated December 26, 2011 № 20-rp/2011).

Among the examples of the references to the legal positions of the ECHR related to the right to a fair trial there are the following:

- Article 6 § 1 of the Convention concerns the inalienable right of a person to access to court. The necessity to receive special permissions on access to court is a direct violation of the right to court's access.

Applicant is obliged to demonstrate his/her readiness to participate in all stages of the proceedings related to himself/herself, refrain from using techniques related to the delay in proceedings as well as apply to the maximum all the means of domestic legislation to expedite the hearing process (the ECHR's judgment in the cases "Golder v. the United Kingdom" dated February 21, 1975, "Union Alimentaria Sanders S.A. v. Spain" dated July 7, 1989 // Decision of the Constitutional Court of Ukraine dated from December 13, 2011 № 17-rp/2011);

- the right to defence is not absolute and according to the content of Article 6 of the Convention only urgently needed measures to restrict the right to defence are acceptable.

Subparagraph "b" of Article 6 § 3 of the Convention guarantees the accused "to have adequate time and facilities to prepare his/her defence", which means that such preparation covers everything "necessary" for the preparation of the case to be examined by the court. In addition, the opportunities available to everyone accused in criminal offence shall include familiarization – aiming at preparing defense - with the results of investigation conducted during the proceedings. However, the issue of adequacy of time and opportunities, provided to the accused,

should be addressed in the context of circumstances of each specific case (the ECHR's judgment in the cases "Van Mechelen and others v. the Netherlands" dated April 23, 1997, "Polufakin and Chernyshev v. Russia" dated September 25, 2008, "Korniyev and Karpenko v. Ukraine", dated October 21, 2010, "Gavazhuk v. Ukraine" dated February 18, 2010 // Decision of the Constitutional Court of Ukraine dated January 18, 2012 № 1-rp/2012);

- the right of enforcement is a component of the right to access to the court, envisaged by Article 6 of the Convention, for the purposes of which enforcement of decision, given by any court, must be regarded as an integral part of the proceedings (the ECHR's judgment in the case "Shmalko v. Ukraine" dated July 20, 2004// Decision of the Constitutional Court of Ukraine №11-rp/2002 dated April 25, 2012).

Regarding the guarantees of the right to liberty and personal inviolability the following has been taken into account:

- a person shall not be deprived or cannot be deprived of liberty except the cases provided in Article 5 § 1 of the Convention. This list of exceptions is exhaustive and only narrow interpretation of these exceptions corresponds to the purposes of this provision, namely, to guarantee that no one shall be arbitrarily deprived of his/her liberty (the ECHR's judgment in case "Garkavyi v. Ukraine" dated February 18, 2010// Decision of the Constitutional Court of Ukraine №10-rp/2011 dated October 11, 2011);

- establishing that any deprivation of liberty shall be "in compliance with procedure, prescribed by the law", Article 5§ 1 does not simply refer to the national legislation but it also refers to "quality of law", requiring law's compliance with the rule of law. So "quality of law" means that in case when the national law envisages the possibility of the deprivation of liberty, such law shall be sufficiently accessible, precisely formulated and foreseen in its application – in order to avoid any risk of arbitrariness (the ECHR's judgment in the case "Soldatenko v. Ukraine" dated October 23, 2008// Decision of the Constitutional Court of Ukraine № 10-rp/2011 dated October 11, 2011);

Specific features of the implementation of the citizen's right to freedom of expression are reflected in the reference that the limits of acceptable information regarding officials and officers may be wider comparing with limits of such information regarding ordinary citizens. Therefore, if the officials or officers act without legal basis, they shall be ready to critical reaction on the part of the society (the ECHR's judgment in the cases "Janowski v. Poland" dated January 21, 1999, "Nikula v. Finland" dated March 21, 2002// Decision of the Constitutional Court of Ukraine dated April 10, 2003 № 8-rp/2003).

Thus, the jurisprudence of the Constitutional Court of Ukraine may be considered as a conductor of the European standards of the protection of human rights and freedoms, introduced by the ECHR.

## **6. Are there any examples of divergences in decisions taken by the constitutional court and the European courts of justice?**

At present there are no competing legal positions in the jurisprudence of the Constitutional Court of Ukraine and the ECHR case-law, but there are some examples of different approaches to the solution of similar issues.

In particular, when solving the case on equality of parties to the trial (Decision of April, 12, 2012 № 9-rp/2012), the Constitutional Court of Ukraine noted that the direct participation of the convicted person, who is serving a criminal sentence in penal institutions as party of the proceedings creates preconditions for complete, comprehensive, objective and impartial hearing; and decision on the procedure of the participation of the convicted as a party to proceedings shall be taken by the court in the manner and on the terms specified by the relevant procedural law.

The Constitutional Court of Ukraine concluded that in terms of constitutional appeal the provisions of Article 24 of the Constitution of Ukraine on the equality of citizens in the constitutional rights and freedoms and before the law in relation to the provisions of paragraph 1 of Article 55, item 2 of paragraph 3 of Article 129 of the Fundamental Law of Ukraine on the protection of human and citizen's rights and freedoms by the court and equality of all participants in the judicial process before the law and the court must be understood so that everyone (including the person convicted and serving a criminal sentence in penal institutions) has equal rights guaranteed by the state to protect the rights and freedoms in the courts and to participate in his/her proceedings determined by the procedural law order in the courts of all jurisdictions, specializations and instances. Herewith there are references to Article 14 of the Convention and Article 1 of Protocol № 12 to it in the text of the above-mentioned decision and there was also mentioned the constitutionally guaranteed equality of all people in their rights and freedoms, which means the necessity to ensure them with equal legal possibilities of substantive and procedural nature to implement rights and freedoms similar in content and scope. It is noted that one can not be limited in the right to access to the court or to be deprived of this right, which covers the ability of a person to engage in litigation and participate directly in the proceeding.

Analysis of the ECHR case-law on similar issues shows that the principle of equality of the parties in respect of the right to participate in the trial is interpreted by it in terms of the provisions of Article 6 of the Convention, and not of Article 14 and Article 1 of Protocol № 12 to it, that is, through the right to a fair trial and with obligatory account of the specifics of an applicant's case, and not through prohibiting discrimination. Thus, in the judgments of the ECHR in cases "Dombo Beheer B.V. v. the Netherlands " dated October 27, 1993 and "Krchmar and Others v. the Czech Republic" dated June 3, 2000 the Court stated that the principle of competition and equality of parties, which is one of the features of a wider meaning of a fair trial means that each party must be given a reasonable opportunity to know the position of the other side, evidence it presented and express opinions about them, as well as present his/her case under conditions that

do not make him/her feel uncomfortable comparing with the opposite party. Article 6 of the Convention does not directly provide the right to conduct the hearing in case of the applicant's appearance, but rather a general concept of a fair trial includes the course of criminal proceedings in the presence of the accused. However, as it was stated in the judgment of the ECHR in the case "Kabwe and Chuguev v. the United Kingdom" dated February 2, 2010, in civil cases there is no absolute right to the presence in court, with the exception of a limited category of cases in which the character and lifestyle of the person have direct relations to the subject of the case or where the decision depends on the behavior of an individual.

Another example is the decision of the Constitutional Court of Ukraine dated June 10, 2003 №11-rp/2003 in the case of a moratorium on the forced sale of the property and the ECHR case-law *regarding the timing of execution of court decisions*.

The Constitutional Court of Ukraine recognized the Law of Ukraine "On introduction of moratorium on the forced sale of property" of November 29, 2001 №2864-III to be constitutional, according to which in order to improve the Ukraine mechanism of forced sale of the property determined by the laws of moratorium was reinstated on the use of forced sale of assets of state enterprises and business entities, in statutory funds of which the State owns at least 25 percent. It was noted that the impugned law does not violate the constitutional requirement of binding decisions, since it did not cancel court decisions on expropriation of enterprise's property taken before and after the adoption of this Law, they remain in force, but their execution is suspended to improve the mechanism of the forced sale of the property, i.e. the Law establishes the term of their execution extended for this period.

According to the established ECHR case-law the right to access to the court under Article 6 of the Convention includes the right to enforce the judgment without undue delay. As stated in the ECHR judgment in the case "Immobiliare Saffi v. Italy", delay of execution for a period which is essential for solving problems of public nature, under certain circumstances may be considered reasonable. However, the ECHR found no grounds and found a violation of Article 6 § 1 of the Convention in two cases against Ukraine on the application of the law, the provisions of which have been recognized by the Constitutional Court of Ukraine as not violating the principle of compulsory enforcement.

Thus, in the judgment "Sokur v. Ukraine" dated July 26, 2005 the ECHR noted that the Ukrainian legislation provides two situations where enforcement proceedings in respect of public enterprises can be suspended for an indefinite period, without any opportunity for creditors to challenge the stop or get compensation for the delay, one of which - a ban on the sale of assets of state enterprises to pay their debts. Without denying their common legitimacy, the ECHR stated that the legislation did not provide plaintiff (applicant or state enforcement) any opportunity to challenge such restrictions in the case of their arbitrary or unlawful application, and there was no possibility of contact with a claim for damages for delay in the execution, caused by such restrictions. The ECHR decided that due to the delay of about three years of enforcement in the

applicant's case the State authorities deprived the provisions of Article 6 § 1 of the Convention of all practical effect.

It should be noted that although the ECHR case-law must be applied by the Constitutional Court of Ukraine as a source of law, at the same time the basic principles of the activities of both judicial institutions should be considered. In particular, taking into account its objectives, the Constitutional Court of Ukraine shall be guided by the principles of the national constitution. In addition, the ECHR noted that in certain cases the national authorities, taking into account direct knowledge of their own society and its needs take a better position than an international court to evaluate what the public interest is. Therefore, while applying the legal positions of the ECHR, there must be taken into account the principles, the letter and spirit of the national constitution and basic constitutional values must be protected.

### **7. Do other national courts also consider the jurisprudence of European courts of justice as a result of the constitutional court taking it into consideration in its decisions?**

As it was noted above, in accordance with the laws of Ukraine "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol and Protocols №№ 2, 4, 7 and 11 of the Convention" and "On the Implementation of the judgments and application of the case-law of the European Court of Human Rights" the jurisdiction of the ECHR applies to Ukraine, and courts should apply the Convention and the ECHR case-law in cases as a source of law; the jurisdiction of the European Court of Justice does not cover Ukraine. So the answer to this question reflects only the effects of application of the ECHR case-law.

Analysis of practice of the courts of general jurisdiction of Ukraine shows many examples of application of the ECHR case-law, taken into account in the decisions of the Constitutional Court of Ukraine, both when deciding cases, and in making procedural decisions. As a rule, it occurs as a reproduction of the content of the ECHR legal positions in the form and context in which they appear in the decisions of the Constitutional Court of Ukraine. Yet there are also simple references of the relevant decisions of these courts and presentation of a larger version of the ECHR legal position than the quote from the decision of the Constitutional Court of Ukraine. The latter evidences that the courts of general jurisdiction of Ukraine not only take into account the ECHR case-law, which is referred by the Constitutional Court of Ukraine in its decisions, but also directly examine the context in which relevant legal position of the ECHR was expressed.

National courts of various instances and specialization apply the following ECHR positions that have been taken into account in the decisions of the Constitutional Court of Ukraine:

- without denying the right of a State to establish - in rather wide limits of discretion in accordance with its domestic legal, social, economic policy or for other purposes - restrictions in the use of the property in view of the public interest,

it should be borne in mind that these restrictions, however, should not lead to the deprivation of the possibility of such use, that is, to their complete loss (the ECHR's judgment in the case of "James and Others v. the United Kingdom " dated February 21, 1986 // Decisions of the Constitutional Court of Ukraine dated October 10, 2001 № 13-rp/2001, and December 10, 2009 № 31-rp/2009);

- limits of acceptable information on officials and officers may be wider comparing with those regarding ordinary citizens. Therefore, if the officials or officers act without legal basis, they should be ready for a critical response from the society (the ECHR's judgment in the cases "Janowski v. Poland" dated January 21, 1999, "Nikula v. Finland" dated March 21, 2002 // Decision of the Constitutional Court of Ukraine dated April 10, 2003 № 8-rp/2003);

- restrictions will not be compatible with Article 6 § 1 of the Convention if it has no legitimate aim and if there is no relationship of proportionality between the measures employed and the taken aim [concerning the conditions of validity of restriction of the right to a fair trial] (the ECHR's judgment in the case "Osman v. the United Kingdom" dated October 28, 1998 // Decisions of the Constitutional Court of Ukraine dated June 20, 2007 №5-rp/2007, March 11, 2011 №2-rp/2011);

- appeal of individuals and / or entities to arbitration is legitimate if the refusal of the state court service happened for the free will of the parties to the dispute (the ECHR's judgment in the case "Deweert v. Belgium" dated February 27, 1980 // Decision of the Constitutional Court of Ukraine dated January 10, 2008 №1-rp/2008);

- in dealing with cases on adoption particular importance is paid to the principle of the priority of the child's interests (the ECHR's judgment in the case "Pini and Bertani and Manera and Atripaldi v. Romania" dated June 22, 2004 // Decision of the Constitutional Court of Ukraine dated February 3, 2009 №3-rp/2009);

- the use of testimony of persons, made when they were witnesses without a lawyer or other professional in the field of law, to prove the guilt of a crime, committed by them (by witnesses) or their assisting offenders is a violation of Article 6 § 1 of the Convention (the ECHR's judgments in the cases "Yaremenko v. Ukraine" of June 12, 2008, "Lutsenko v. Ukraine" dated December 18, 2008, "Shabelnik v. Ukraine" dated February 19, 2009 // Decision of the Constitutional Court of Ukraine dated September 30, 2009 № 23-rp/2009);

- the right to a fair trial, guaranteed by Article 6 § 1 of the Convention must be understood in the light of the preamble of the Convention, relevant part of which states that the rule of law is the common heritage of the High Contracting Parties. One of the fundamental aspects of the rule of law is the principle of legal certainty, which includes respect for the principle of res judicata - principle of finality of judgments. This principle states that neither party is entitled to seek review of a final and binding judgment merely because it aims to achieve a new hearing and a new decision.

Article 6 of the Convention does not oblige States - Parties to the Convention to establish courts of appeal or cassation. However, where there are such courts, it is necessary to follow the guarantees, set out in Article 6 (the ECHR's judgments for "Sokurenko and Strygun v. Ukraine" dated July 20, 2006,

"Ponomaryov v. Ukraine" dated April 3, 2008 // Decision of the Constitutional Court of Ukraine dated March 11, 2010 №8-rp/2010);

- the absence of explicit provisions that would determine whether it is possible to extend properly (if so, under which conditions) the application under trial of preventive measure of detention, chosen for a fixed period under investigation, does not meet the "predictability of the law" for the purposes of Article 5 § 1 of the Convention. The practice, originated from the legislative gap, and leads to detention for an unlimited and unpredictable period in circumstances when such detention was provided neither by any specific provisions of law nor any judicial decision, it is in itself contrary to the principle of legal certainty, implicated by the Convention and which is one of the key elements of the rule of law.

When we talk about the deprivation of liberty, the extremely important condition is ensuring the general principle of legal certainty. The requirement of "quality of law" within the meaning of Article 5 § 1 of the Convention implies that when a national law envisages possibility to deprive of liberty, such a law must be sufficiently accessible, precise and foreseeable in its application to exclude any risk of arbitrariness (the ECHR's judgment in cases "Yeloyev v. Ukraine" dated November 6, 2008, "Novik v. Ukraine" dated December 18, 2008 // Decision of the Constitutional Court of Ukraine dated June 29, 2010 №17-rp/2010);

- admissibility of evidence is the prerogative of national law and, under general rule, these are national courts that are authorized to assess the evidence provided to them (the ECHR's judgment in "Teixeira de Castro v. Portugal" dated June 9, 1998, "Shabelnik v. Ukraine" dated February 19, 2009 // Decision of the Constitutional Court of Ukraine dated October 20, 2011 №12-rp/2011);

- Article 6 § 1 of the Convention concerns the inalienable right to access to court. Direct violation of the right of access to court is the need to obtain special permission to appeal to the court.

The applicant is obliged to demonstrate willingness to participate in all stages of the proceedings related directly to him/her, refrain from using techniques that are associated with a delay in the proceedings and exhaust all the means of domestic legislation to expedite the hearing (the ECHR's judgment "Golder v. the United Kingdom" dated February 21, 1975, "Union Alimentaria Sanders SA v. Spain" dated July 7, 1989 // Decision of the Constitutional Court of Ukraine dated December 13, 2011 №17-rp/2011);

- the implementation of social and economic human rights is largely dependent on the situation in the states, especially financial one. These provisions also apply to the question of admissibility to reduce social benefits (the ECHR's judgments in "Airey v. Ireland" dated October 9, 1979, "Kyartan Asmundson v. Iceland" dated October 12, 2004// Decision of the Constitutional Court of Ukraine dated December 26, 2011 № 20-rp/2011);

- the right to defense is not absolute, and under the meaning of Article 6 of the Convention the only urgently needed measures are acceptable to restrict the right to defense.

Subparagraph "b" of paragraph 3 of Article 6 of the Convention guarantees the accused "to have adequate time and facilities for the preparation of his/her

defense", which means that such preparation covers everything that is "necessary" for the preparation of the case to the trial. In addition, the opportunities available to everyone charged with a criminal offense shall include familiarization - for the purpose of preparing his/her defense – with the results of investigations conducted throughout the proceedings. However, the question of adequacy of time and opportunities provided for the accused, should be addressed in the context of the circumstances of each case (the ECHR's judgments in "Van Mechelen and Others v. the Netherlands" dated April 23, 1997, "Polufakin and Chernyshev v. Russia" dated September 25, 2008, "Kornyev and Karpenko v. Ukraine" dated from October 21, 2010, "Gavazhuk v. Ukraine" dated February 18, 2010 // Decision of the Constitutional Court of Ukraine dated January 18, 2012 №1-rp/2012);

- the right to enforcement is a component of the right of access to court, envisaged by Article 6 of the Convention, for the purposes of which enforcement of a decision given by any court must be regarded as an integral part of the trial (the ECHR's judgment in the case "Shmalko v. Ukraine" dated July 20, 2004 // Decision of the Constitutional Court of Ukraine dated April 25, 2012 №11-rp/2012).

In general, the jurisprudence of national courts of Ukraine is characterized by quantitative and qualitative growth of examples of application of the ECHR case-law by the courts of general jurisdiction, both directly and through its consideration by the Constitutional Court of Ukraine.

### **8. Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national constitutional courts?**

In terms of protection of the rights and freedoms enshrined in the Convention, the EU Charter of Fundamental Rights, the constitutions of European countries the European courts (ECHR, the European Court of Justice) and national constitutional courts often consider similar legal issues both formally and essentially. The similarity of issues causes the existence of significant potential for interaction of their jurisdictions. Due to the existence of international commitments for the national courts to consider the jurisprudence of European courts, such effect occurs mainly in the following direction: jurisprudence of the European Courts → jurisprudence of the national constitutional courts. Only a small number of cases reflects a reverse movement, for instance, when the national constitutional court had the opportunity earlier than European courts, to resolve a specific legal issue and to work out its legal position with regard to this or that aspect of implementation of individual right or freedom. In our opinion, this situation has existed in the relationship between the Constitutional Court of Ukraine and the ECHR. In particular, there was the decision on the admissibility of the application of electoral pledge.

So, the Decision of the Constitutional Court of Ukraine of 30 January 2002 №2-rp/2002 declared the provisions of Article 43 of the Law of Ukraine on Election of People's Deputies of Ukraine unconstitutional. The Court held that the election pledge is not a direct or indirect restriction of the right to stand for

elections, because it is not essential for citizens' right to elect and be elected. The Constitutional Court of Ukraine has concluded that the presence of a legitimate aim in applying this institution exists and stressed that the election pledge is intended, first of all, to contribute to the responsible attitude on the part of potential candidates for deputies in relation to the election, and secondly, to prevent abuse of voting rights. Moreover, it is a kind of obstacle to excessive or unnecessary use of the State budget funds, imposed to cover the costs of the election.

In turn, the ECHR, in handling the case "Sukhovetsky v. Ukraine" (judgment of 28 March 2006), noted that it had never expressed an opinion about the election pledge to be paid by the person who expresses a desire to be nominated a candidate for parliamentary elections (§ § 53, 56).

Taking into account the wider powers of the state in this field and taking the argument of the Constitutional Court of Ukraine, the ECHR held that the impugned measure pursued a legitimate aim (§ 62). Moreover, the ECHR expressed satisfaction that the system of electoral pledge, adopted at that time by the Ukrainian political institutions was an acceptable compromise between these conflicting interests, and its entry into force remained the subject of careful consideration by national legislative and judicial branches under current conditions (§ 67).

Ultimately, the ECHR decided that there had not been a violation of Article 3 of the First Protocol to the Convention as collection, payment, required from the applicant, can not be considered excessive or one that is insurmountable administrative or financial obstacle for some candidates who want to join the race, and moreover, it can not be an obstacle for the emergence of sufficiently representative political movements or interference with the principle of pluralism (§73). This means that the introduction of election pledge in Ukraine did not narrow the voting rights of the applicant to such an extent that they would have limited the nature and would deprive of their effectiveness.

There are also examples of coherent interrelation of the ECHR case-law and the jurisprudence of the Constitutional Court of Ukraine.

For instance, the Decision dated 10 April 2003 №18-rp/2003 in the case on dissemination of information the Constitutional Court of Ukraine accepted the position of the ECHR that the limits of acceptable information regarding officials and officers may be wider than the same information regarding ordinary citizens, expressed in view of the application of Article 10 of the Convention in the judgments of "Nikula v. Finland", "Janowski v. Poland" and others.

In the course of time, the ECHR in its judgment "Siryk v. Ukraine" dated June 30, 2011 took into account the legal position of the Constitutional Court of Ukraine, set out in the above-mentioned Decision, according to which an appeal to the law enforcement body regarding a violation of human rights by an official or officer of the body while performing functional responsibilities can not be considered as dissemination of information that defames the honour, dignity or business reputation, or harm the interests of the people. Having concluded that the rule of law, which contained the concept of dissemination of information was not clearly formulated, the ECHR noted that the application of the relevant provisions

of the Civil Code of Ukraine was to be decided by the national courts, dealing with the applicant's case in the light of the above decision of the Constitutional Court of Ukraine (§§36, 38). This was one of the reasons for establishing a violation of Article 10 of the Convention in this case.

Regarding the impact of the jurisprudence of the Constitutional Court of Ukraine on that of the European Court of Justice one should note the following. Ukraine is not an EU member that is why there are no international treaty and national legislative grounds for close cooperation between these courts. Currently, there are only two cases considered by the European Court of Justice, in which Ukrainian legal entities were the parties to the proceedings; the Court did no references to the jurisprudence of the Constitutional Court of Ukraine. However, this does not preclude the potential application of the legal positions of the Constitutional Court of Ukraine by the ECJ, in particular those concerning the protection of human rights and freedoms, since today such protection is one of the functions of the ECJ.

## **II. Interactions between constitutional courts**

### **1. Does the constitutional court in its decisions refer to the jurisprudence of other European or non-European constitutional courts?**

The Constitutional Court of Ukraine has not referred to the jurisprudence of the constitutional courts of foreign countries in its decisions, which may be viewed as the result of objective factors. One of them is related to the legal nature and legal consequences of its decisions. Since the latter in accordance with the Constitution of Ukraine (Article 150) shall be binding on the territory of Ukraine, it is legally impermissible to refer to the legal sources which are not obligatory for our country in the text. Another factor is determined by the fact that the Ukrainian legal system belongs to the Roman-Germanic legal family, in which the case-law (jurisprudence) historically has not played such a role, as in the countries of Anglo-Saxon legal family (common law system).

At the same time, in examining cases the Constitutional Court of Ukraine takes into account the foreign practice of constitutional justice regarding relevant issues. References to the legal positions of constitutional courts of other countries may be found in dissenting opinions of judges of the Constitutional Court of Ukraine.

### **2. If so, does the constitutional court tend to refer primarily to jurisprudence from the same language area?**

In Ukraine the official language is Ukrainian, therefore, the proceedings of the Constitutional Court of Ukraine is performed in it. Taking into consideration the objective circumstances, such as national identity of the Ukrainian people, this language is not used by any other constitutional court.

However, now in Ukraine, as in one of the successor states of the Union of Soviet Socialist Republics, the Russian language is widely used. The translation of the decisions of the Constitutional Court of Ukraine is accomplished into this language as well. Because of its accessibility in most cases the Constitutional Court of Ukraine primarily refers to the decisions of bodies of constitutional jurisdiction which consider the cases in this language (the Russian Federation) or carry out the translation in it (some constitutional courts of the post-Soviet countries). The Constitutional Court of Ukraine is inclined to take into account the decisions of these constitutional courts given the common historical past and similar conditions of the development of the countries.

Nevertheless, the attention of the Constitutional Court of Ukraine is increasing towards studying the experience of other developed democracies, which becomes as much reality, as more information about the decisions of the bodies of constitutional jurisdiction of foreign countries in the English version is posted on their official web-sites.

### **3. In which fields of law (civil law, criminal law, public law) does the constitutional court refer to the jurisprudence of other European or non-European constitutional courts?**

The Constitutional Court of Ukraine is entitled to decide on the constitutionality of the laws of Ukraine, legal acts of the Parliament, the Government, the President, the Parliament of the Autonomous Republic of Crimea, as well as to provide the official interpretation of the Constitution of Ukraine and laws of Ukraine. Since the subject of regulation of these acts is a wide range of public relations, the jurisprudence of the Constitutional Court of Ukraine promotes the development of various areas of law. For this purpose it becomes expedient and sometimes useful to refer to the relevant jurisprudence of the bodies of constitutional jurisdiction of other countries.

Thus, in the field of constitutional law such references have been increasingly related to the protection of human and citizen's rights and freedoms and have been linked to implementation of:

- the right to life (concerning the death penalty as a form of criminal punishment);
- the right to liberty and security (concerning the boundaries of application of the administrative detention as a procedural measure of ensuring proceedings in cases of administrative offenses);
- the right to private and family life and the right to information (concerning the possibility to disseminate confidential information about a person without his/her consent);
- the right to social security (concerning the determination of the volume of the right to social security by the state, based on its existing financial resources).

This experience is useful, since decisions on these issues are passed on the basis of similar definitions of relevant norms, enshrined in the national constitutions. For the same reasons the Constitutional Court of Ukraine refers to

the jurisprudence of the bodies of constitutional jurisdiction of foreign countries in considering cases related to the implementation of universally recognized principles of legal, democratic state, usage of state symbols, functioning of representative bodies of power (terms of their authorities, pre-term termination of powers), the judiciary (the issue on the judicial system and the status of judges), state bodies with special status (the National Bank of Ukraine, the Prosecutor's Office, the High Council of Justice, etc.).

The references of the Constitutional Court of Ukraine to the relevant jurisprudence of other countries in dealing with tax law issues are quite frequent.

At the same time, due to differences which are typical for constitutional norms on the state system of some states, the Constitutional Court of Ukraine actually does not refer to their jurisprudence regarding the division of powers between the legislative and executive branches, as the regulation of these issues differs substantially. Yet, this practice is examined when considering issues on delegation of powers of the parliament to the executive power.

The Constitutional Court of Ukraine paid some attention to foreign jurisprudence in the area of criminal law and procedure, including the following aspects:

- the concept of criminal liability and forms of its realization;
- requirements for quality of criminal law and validity of the criminalization of acts in the prescriptions of criminal law;
- implementation by witnesses, victims and other persons of the right to legal assistance during the inquiry, preliminary investigation and during explanations at any public authority.

There are not so many examples of references to the jurisprudence of other constitutional courts in civil law, particularly on protection of the rights of credit services' consumers.

#### **4. Have decisions of the constitutional court noticeably influenced the jurisprudence of foreign constitutional courts?**

The Constitutional Court of Ukraine is striving to ensure the availability of its jurisprudence for a wide range of interested persons through various means, contributing in this way to further development, including mutual reception of jurisprudence. Thus, the official web-site of the Constitutional Court of Ukraine contains all its acts in the national (Ukrainian) language, decisions and opinions - in Russian, and their summaries - in English. Almost all decisions and opinions (their summaries) are sent to the European Commission "For Democracy through Law" (Venice Commission) for publication in the Bulletin of constitutional justice and to the Republic of Armenia for publication in the International Journal "Constitutional Justice" of the Conference of Constitutional Control Organs of the Countries of Young Democracy. Exchange of decisions is carried out with the constitutional courts of the Republic of Belarus, the Republic of Bulgaria, the Republic of Lithuania, the Republic of Moldova, the Republic of Poland, the Russian Federation, the Republic of Tajikistan, the Republic of Turkey, and the

Republic of Serbia, as provided for by relevant bilateral memoranda on cooperation. Information on the Constitutional Court of Ukraine regarding topical issues is reflected in the reports of the Chairman of the Constitutional Court of Ukraine delivered during his foreign visits.

Therefore, ensuring availability of the decisions of the Constitutional Court of Ukraine for familiarization with their content allows reasonably expect their possible impact on the constitutional jurisprudence of foreign courts. Undeniable form of such influence is the reference to specific decisions of the Constitutional Court of Ukraine.

Thus, the Decision of the Constitutional Court of the Slovak Republic dated February 11, 2009 № PL. ÚS 6/ 08 refers to the decision of the Constitutional Court of Ukraine dated January 30, 2002 No 2-rp/2002 in the case on election pledge and formulated legal positions regarding the purpose of the application of the election pledge institute, later applied in the ECHR judgment in the case "Sukhovetsky v. Ukraine" dated March 26, 2006. Comparative analysis of the reasoning parts of these decisions indicates the perception of the legal position of the Constitutional Court of Ukraine by the Constitutional Court of the Slovak Republic regarding the fact that a legitimate aim of election pledge is to provide the responsible attitude of citizens as possible candidates for deputies before their participation in elections (prevention from participation of frivolous candidates in elections) and on the other hand - non-recognition of covering the costs on the elections as other legitimate aim of the establishment of this institute.

Another example of the impact on foreign jurisprudence of constitutional courts is the Decision of the Constitutional Court of Ukraine in the case on the death penalty on December 29, 1999 No 11-rp/99, which declared unconstitutional the provisions of the Criminal Code of Ukraine, which envisaged the death penalty.

As noted in the Opinion of the Constitutional Court of the Republic of Belarus of March 11, 2004 No 3-171/2004 on the application of the death penalty as a type of punishment, the overwhelming majority of European countries does not apply the death penalty, the decision on its abolishment were usually taken by representative bodies or bodies of constitutional review and the experience of the post-Soviet countries (including Ukraine) in solving the problem of the death penalty is an important factor that facilitates the adoption of the decision by the Republic of Belarus.

Addressing the issue of inadmissibility for consideration of the constitutional complaint of Mr G., the Federal Constitutional Court of Germany (Decision of October 30, 2000) concluded on the invalidity of the applicant's arguments about the possibility of applying death penalty to him in Ukraine, focusing on the above-mentioned Decision of the Constitutional Court of Ukraine.

## **5. Are there any forms of cooperation going beyond the mutual acknowledgement of court decisions?**

Over the years the Constitutional Court of Ukraine has established and maintains fruitful relationships with the bodies of constitutional jurisdiction of many countries. Such cooperation has various forms, especially it comes about through the activities of international associations of constitutional courts and the bilateral exchange.

Thus, the Constitutional Court of Ukraine participates in multilateral cooperation, including conferences, seminars, official meetings with numerous bodies of constitutional jurisdiction, implemented within the framework of the World Conference of Constitutional Justice, the Conference of European Constitutional Courts, the Conference of Constitutional Control Organs of the Countries of Young Democracy, the European Commission "For Democracy through Law" of the Council of Europe (Venice Commission). One of these international forums – Conference of Secretaries General of Constitutional Courts and Equivalent Bodies - was founded (in 1999) at the initiative of the Constitutional Court of Ukraine.

Contributing to the development of such cooperation, the Constitutional Court of Ukraine regularly organizes various international events to exchange ideas and experience among judges of constitutional jurisdiction, usually in cooperation with the Venice Commission, the German Foundation for International Legal Cooperation, OSCE Project Co-ordinator in Ukraine. These events took place in the form of international seminars [" Budget of the Constitutional Court: control and management" (1998), "Interpretation of the Constitution and principles of constitutional review" (1998), "Effects of norms of international law in the national legislation" (1998), "Relations between the Constitutional Court and the Ombudsman in the context of human rights protection" (1999), "Enforcement of the decisions of Constitutional Courts" (1999), "The Role of the Constitutional Court in the state and society" (2001)] and international conferences ["Current problems of the constitutional jurisdiction: the nature and prospects of development "(2001), " The impact of the European Court of Human Rights case-law on the national constitutional justice" (2005), "The Constitutional Court in the system of state bodies: current problems and ways of their solution"(2008), " The protection of human rights by bodies of constitutional justice: possibilities and problems of individual access" (2011)].

In turn, the judges of the Constitutional Court of Ukraine and the staff also participate in international conferences, seminars and other events organized by the bodies of constitutional jurisdiction of foreign countries.

Bilateral cooperation is widespread. Currently the Constitutional Court of Ukraine signed Memoranda on cooperation with 9 bodies of constitutional jurisdiction, including the Republic of Belarus, the Republic of Bulgaria, the Republic of Lithuania, the Republic of Moldova, the Republic of Poland, the Russian Federation, the Republic of Tajikistan, the Republic of Turkey, and the Republic of Serbia. These agreements provide for a close and regular cooperation

which is carried out mainly in the following forms: bilateral exchange of working and study visits, symposia, seminars, conferences and meetings on topical issues of constitutional jurisdiction of common interest; exchange of scientific, technical, regulatory and legal information. For example, only at the end of 2012 judges of the Constitutional Court of Ukraine and their counterparts from the Republic of Lithuania, the Republic of Poland and the Republic of Serbia held three bilateral scientific and practical conferences dedicated to the guarantee of the independence of constitutional courts. The list of specified forms of cooperation, stipulated in memoranda, is not full and may be extended by mutual agreements.

The Constitutional Court of Ukraine has established very close and regular co-operation with bodies of constitutional jurisdiction of some countries even in the absence of the Memorandum. So, bilateral relations with the Federal Constitutional Court of Germany were established and maintained with the assistance of the German Foundation for International Legal Cooperation. In recent years judges of the Constitutional Court of Ukraine and the staff made a series of working visits to Germany to participate in the international scientific conferences, professional meetings on the constitutional and legal issues and to exchange scientific and methodological experience at the level of the secretariats of two constitutional courts. Similar visits were paid to the Republic of Poland.

In general, during the years of its activities in order to implement various forms of cooperation in the field of constitutional justice the Constitutional Court of Ukraine received delegations of over 50 countries, and its representatives attended about 40 countries with official visits.

### **III. Interactions between European courts in the jurisprudence of constitutional courts**

#### **1. Do references to European Union law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human Rights have an impact on the jurisprudence of the constitutional court?**

There are rare examples of the impact of the EU law or jurisprudence of the European Court of Justice through the ECHR case-law on the Constitutional Court of Ukraine decisions. The immediate impact is found as a result of comparative analysis of the ECHR judgment in the case "Skopolla v. Italy" of September 17, 2009 and the Decision of the Constitutional Court of Ukraine of January 26, 2011 No 1-rp/2011 (case on the commutation of the death penalty to life imprisonment). Thus, referring to the ECHR case-law, the Constitutional Court of Ukraine actually reproduced its reference made in § 37 to item 3 of Article 49 of the EU Charter of Fundamental Rights, noting that one of the components of the rule of law is the expectation that the court will apply punishment which the legislator considers proportionate to each offender (paragraph five item 4 of the motivation part). Then in the fourth paragraph of item 5 of the Decision the Constitutional Court of Ukraine applied the ECHR reference in § 38 to §§ 66-69 of the ECJ's Decision in

criminal proceedings against Silvio Berlusconi and others (joint cases S-387/02, S-391 / 02 S-403/02). They stated that Article 7 of the Convention is an important part of the rule of law and it allows the principle of retroactive effect of softer criminal law; this principle is the basis of the rule establishing that in case of differences between the criminal law effective at a time of committing an offence and the criminal law, that took effect before a final decision, courts must apply the law, which provisions are more favourable to the accused.

In view of this and other examples of the ECHR case-law, the Constitutional Court of Ukraine has concluded that the provisions of the Criminal Code of Ukraine of 1960, according to which the death penalty as a type of punishment was commuted to life imprisonment, should be perceived as those that mitigate criminal liability of a person and have retroactive effect in time, i.e. they are applicable to persons who have committed the most serious crimes under this Code before entering of the Law of Ukraine "On Amendments to the Criminal Code, the Code of Criminal Procedure and Correctional Labour Code of Ukraine" into force, including persons sentenced to death, whose sentences were not enforced at the time of the enactment of this law.

## **2. How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human Rights and the Court of Justice of the European Union?**

As there was noted above, the jurisdiction of the ECHR extends to Ukraine but the jurisdiction of the European Court of Justice does not. Unlike the EU member states, Ukraine has no commitments to enforce the decisions of the European Court of Justice, and in practice there were no issues on the protection of human rights and freedoms at the level of the EU Court of Justice. This fact, in particular, explains lack of prerequisites for any significant influence of the jurisprudence of the Constitutional Court of Ukraine on the relationship between the ECHR and the ECJ. However, since the formation of mechanisms to protect human rights and freedoms is in dynamics, possibility of influence of the jurisprudence of the Constitutional Court of Ukraine on the relationship between the ECHR and the ECJ can not be excluded in the future.

## **3. Do differences between the jurisprudence of the European Court of Human Rights, on the one hand, and the Court of Justice of the European Union, on the other hand, have an impact on the jurisprudence of the constitutional court?**

There are relatively rare discrepancies in the jurisprudence of the two European courts. Their number has decreased in recent years as a result of adjustments of the ECJ decisions and its aspiration to avoid divergences with ECHR case-law.

Individual differences regarding the existence of the right to protection against self-incrimination under the right to a fair trial<sup>93</sup> and about application of guarantees concerning respect for private life and home to the business companies and their professional production premises<sup>94</sup> have not led to difficulties in perceiving certain provisions of the Convention by the Constitutional Court of Ukraine, since during the period of their existence these issues were not the subject of the proceedings.

Regarding the influence of other possible discrepancies in the jurisprudence of the European Courts on the jurisprudence of the Constitutional Court of Ukraine one can note the following. Answers to the above questions indicate that the legislation of Ukraine imposes requirements only on the application of the ECHR case-law and that the Constitutional Court of Ukraine has never referred to the decisions or legal positions of the European Court of Justice, the impact of the jurisprudence of which has indirect nature - through the ECHR judgments. Therefore, we can speak about the impact of these discrepancies only when the Constitutional Court of Ukraine makes reference to the ECHR judgments, in which there are indications thereon. However, such cases have not been revealed.

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<sup>93</sup> This refers to the decision of the ECJ in the case S-374/87 "Orkem v. Commission" of October 18, 1989 on the one hand, and the judgment of the European Commission on Human Rights in the case "Saunders v. the United Kingdom" of May 14, 1994, the ECHR Judgment in the case "John Murray v. the United Kingdom" of February 8, 1996 - on the other hand. The jurisprudence was corrected, as indicated by the Decision of the ECJ in the case C-238/99 "Petal, Limburgse Vinyl Maatschappij and others v. Commission" (PVC II) of October 15, 2002.

<sup>94</sup> This refers to the ECHR Judgments for "Chappell v. the United Kingdom" on March 30, 1989, "Niemietz v. Germany" of December 16, 1992, on the one hand, and the Decision of the ECJ in the combined cases S-46/87 and S-227/88 "Hoest v. Commission" of September 21, 1989 - on the other hand. The jurisprudence was corrected, as indicated by the Decision of the ECJ in the case S-94/00 "Roquette Frères v Council" of October 22, 2002.