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THE PRINCIPLE OF DIRECT EFFECT OF THE NORMS OF THE CONSTITUTION AND THE SPECIFICS OF ITS APPLICATION BY THE COURT

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SUMMARY

The paper is devoted to the study of the principle of direct effect of the norms of the Constitution of Ukraine and the specifics of their application. The author mentions, that this principle applies mainly to the provisions on the rights and freedoms of a man and a citizen. There have been noted positive changes in the procedural legislation concerning the right of the court to apply the norms of the Constitution as rules of direct action in case the court concludes that the law is contrary to the Constitution of Ukraine. The author has analyzed the existence of a limited interpretation of the application of this principle in the criminal process. The conclusions give a description of the constitutional and legal mechanism of direct effect of the norms of the Constitution of Ukraine and indicates the positive expectancy of their use.

Key words: direct effect of norms of Constitution of Ukraine, Supremacy of Law, Constitutional Court of Ukraine, courts of general jurisdiction, procedural legislation, constitutional and legal mechanism.

ПРИНЦИП ПРЯМОЇ ДІЇ НОРМ КОНСТИТУЦІЇ ТА СПЕЦИФІКА ЙОГО ЗАСТОСУВАННЯ СУДОМ

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АНОТАЦІЯ

Робота присвячена дослідженню питання принципу прямої дії норм Конституції України та специфіки їх застосування. Автор зазначає, що вказаний принцип стосується головним чином положень щодо прав і свобод людини і громадянина. Відзначено позитивні зміни в процесуальному законодавстві щодо права суду застосовувати норми Конституції як норми прямої дії, якщо суд дійде висновку, що закон суперечить Конституції України. Автором проаналізована наявність обмеженого тлумачення застосування вказаного принципу в кримінальному процесі. У висновках наведено характеристику конституційно-правового механізму прямої дії норм Конституції України та зазначено позитивні очікування від їх використання.

Ключові слова: пряма дія норм Конституції України, верховенство права, Конституційний Суд України, суди загальної юрисдикції, процесуальне законодавство, конституційно-правовий механізм.

REZUMAT

Lucrarea este dedicată studiului principiului efectului direct al normelor Constituției Ucrainei și specificul aplicării lor. Autorul remarcă faptul că acest principiu se referă în principal la prevederile referitoare la drepturile și libertățile omului și cetățenilor. Sunt remarcate schimbări pozitive în legislația procesuală privind dreptul instanței de a aplica normele constituției ca normă de acțiune directă, dacă instanța ajunge la concluzia că legea contravine Constituției Ucrainei. Autorul analizează existența unei interpretări și aplicări limitate a acestui principiu în procedurile penale. În concluzii, este dată caracteristica mecanismului juridic constituțional al acțiunii directe a normelor Constituției Ucrainei și sunt indicate așteptările pozitive ale utilizării lor.

Cuvinte cheie: efect direct al normelor Constituției Ucrainei, statul de drept, Curtea Constituțională a Ucrainei, instanțele de jurisdicție generală, legislația procesuală, mecanismul constituțional.

Introduction. The state does not have enough developed legislation, but it is also necessary for its provisions to be practically implemented in real life, so that every person will be able to exercise his constitutional rights and freedoms while being protected by the state. Even a well-known lawyer, Charles-Louis de Montesquieu, wrote: “When I go to a certain country, I do not check if there are good laws, but how they are implemented, because good laws are found everywhere” [1, p. 291].

The Professor of Oxford University, Albert Wan Daicy stated that “history sufficiently proves this”: “Foreign constitutionalists, in defining rights, did not pay enough attention to

the unconditional need to foresee the necessary means of legal protection, through which their proclaimed rights could be realized” [2, p. 511].

The problem of the implementation of the Constitution, the transfer of its requirements to the legitimate conduct of all members of public relations is now of particular urgency. Basically, it becomes central not only for constitutional law, but for all jurisprudence.

The subject of the latter is first of all the legal aspects of the implementation of the constitutional provisions – an analysis of their methods (forms), stages, procedures [3, p. 58].

Researchers of the issue of direct effect of the norms of the Constitution of Ukraine paid attention in their works to such scholars as Yu. Todyka, V. Shapoval, V. Selevanov, S. Shevchuk, V. Korniienko, M. Kudriavtsev, and a number of other lawyers. At the same time, the issue raised remains insufficiently investigated, in particular, the mentioned refers to the mechanism of the application of the concept of direct effect of the norms of the Fundamental Law of Ukraine.

We should agree with the opinion of V. Shapoval, who writes that the provisions on the direct effect of the norms of the Constitution of Ukraine above all means that all without exception, public authorities and their officials in their law enforcement activities should not only be guided by constitutional norms, but make appropriate decisions directly on the basis and in the content of these norms [5, p. 4].

The principle of direct effect of the rules of the Constitution was directly defined in Article 1 of the Constitution of Germany in 1949, provided in Article 5 of the Constitution of the Republic of Bulgaria 1991; Chapter 3 of Section II of the Constitution of the Republic of Macedonia, 1991; Article 15 of the Constitution of the Republic of Slovenia, 1991; Article 8 of the Constitution of the Republic of Poland, 1997, Article 15 of the Constitution of the Republic of Estonia 1992; Article 6 of the Constitution of the Republic of Lithuania 1992; Article 15 of the Constitution of the Russian Federation in 1993; Article 7 of the Constitution of the Republic of Moldova, 1994; Article 112 of the Constitution of the Republic of Belarus, 1994; Article 8 of the Constitution of Ukraine, 1996.

The purpose of the article is to reveal the ways to implement the norms of the Constitution as rules of direct action, taking into account that some restrictions were imposed on the interpretation of this norm. In the legal doctrine as well as in the practice of courts, the opinion is widely used, according to which the legal acts (first of all laws), which do not conform to the Constitution of Ukraine but are not formally recognized by the Constitutional Court of Ukraine as unconstitutional, are subjects to the use of courts. It often happens that the courts do not even question the “special” provisions of the law, which contradict the general provisions of the Constitution of Ukraine. However, with the adoption of the procedural codes, one more opportunity to re-examine the established positions regarding the application of the norms of the Constitution of Ukraine in their direct action appeared.

Basic rights, human and civil rights, enshrined in Section II of the Constitution of Ukraine, are partly taken from the Universal Declaration of Human Rights adopted on December 10, 1948, by the United Nations. The document was based on the best works of human thought that were at that moment in this issue. Its principles are in the basis of many human rights pacts, conventions and agreements concluded since 1948. “The International Bill of Human Rights” was adopted by the General Assembly in 1966 to approve two International Covenants: “The International Covenant on Economic, Social and Cultural Rights” and “The International Covenant on Civil and Political Rights”. Our country ratified these acts in 1973, the same was done by more than one hundred other countries in the world, and thus they undertook to bring their national legislation in line with the requirements stated in the Covenants. International legal acts have gained the rule over internal law. The Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in accordance with the Universal Declaration of Human Rights in order to comply with the signatories (members of the Council of Europe) and to ensure the enjoyment of human rights and fundamental freedoms on its territory. Ukraine ratified the Convention on July 17, 1997, and for our state it came into force on September 11, 1997.

Full compliance with Section II of the Constitution with current international standards gives grounds to believe that the

Constitution of Ukraine is legal in content, but the content itself is not enough if such provisions are not implemented in the daily life of a person and a citizen of the country.

Based on the provisions of Art. 9 of the Constitution of Ukraine that existing international treaties, the consent of which is binding on the Verkhovna Rada of Ukraine, is part of the national legislation of Ukraine, the court can not apply the law regulating the legal relationship, which is considered, other than an international treaty. At the same time, international treaties are applied if they do not contradict the Constitution of Ukraine. According to Part 2 of Art. 6 of the Constitution, the legislative, executive and judicial authorities exercise their powers within the limits established by the Constitution and in accordance with the laws of Ukraine [4, p. 52].

The Supremacy of the Constitution is one of the defining elements of the rule of law and the rule of law. The Constitution of Ukraine guarantees each person the right to apply to the court for the protection of their constitutional rights and freedoms. The Constitution has the highest legal force, and its norms are rules of direct action. The orientation to the inalienable human rights as a legal source is one of the most characteristic features of our Constitution. The principle of the Supremacy of Law implies not only the recognition of human rights and freedoms, but also the obligation to observe and ensure the state. This requirement of the principle of supremacy is enshrined in Article 3 of the Constitution of Ukraine, according to part two of which the rights and freedoms of man and their guarantees recognize the content and direction of the state, and their approval and provision is the main responsibility of the state. It follows that both the activities of the state as a whole, and its bodies, including the legislative, should have a legal character. The mentioned above provision in a positive form formulates another essential requirement of the rule of law principle – the requirement of a legal law. After all, the legal nature of the activity of the plow of legislative power means that the content and direction of lawmaking should determine the rights and freedoms of man [4, p. 53–54].

The question of the volume (limits) of direct norms of the Constitution remains controversial. In legal literature, it has been conventionally called two approaches – wide and narrow. Thus, the authors of the scientific and practical commentary on the civil law of Ukraine advocate a broad interpretation, emphasizing that it can not be argued that once Article 8 § 3 of the Constitution guarantees access to a court directly on the basis of the Constitution for the protection of human and civil rights and freedoms, then and the previous provision of this part that the norms of the Constitution are rules of direct action, refers only to the provisions of the Constitution, which establish the rights and freedoms of man and citizen. Consequently, part third of Art. 8 of the Constitution gives importance to the norms of direct action to all norms, which are formulated in the Constitution of Ukraine [6].

Ideologist and architect of the constitutionality of the Supremacy of Law principle S. Holovati in the commentary to Article 8 of the Constitution of Ukraine was a passionate supporter of the narrow approach. He insists on, that: 1) the norms of direct action in the Constitution are exclusively those rules relating to the rights and freedoms of man and citizen; 2) appeal to a court directly on the basis of constitutional norms of direct action is guaranteed only for the protection of human and civil rights and freedoms, and not for their restriction; 3) to apply to the court on the basis of constitutional rules of direct action can only private individuals, but not public authorities or their officials [7].

In all the constitutions mentioned above, the idea of the direct effect of constitutional norms in one way or another concerned rights and freedoms of man and citizen. With the requirement of inviolability of rights and freedoms of man and

citizen, the provisions of part three of Article 22 of the Constitution of Ukraine, which established a direct prohibition of the anti-legal act, were prescribed. Thus, when new laws are adopted or amendments made to existing laws are not allowed to narrow the content and scope of existing rights and freedoms. This position is also expressed in the first part of Article 64 of the Constitution of Ukraine, according to which constitutional rights and freedoms can not be limited except in cases stipulated by the Constitution. This means that such restrictions can not be established by law, unless provided for by the Constitution. In this regard, the provisions of some laws and other normative legal acts that impose restrictions on human rights and freedoms without proper constitutional grounds should be considered unconstitutional and ineffective. The constitution contains a special prohibition of an offending law in a state of war or a state of emergency (Article 64.2 of the Constitution of Ukraine) [4, p. 53].

The Constitution involves certain mechanisms that make it impossible to reduce its legal level. In particular, Article 157 of the Constitution of Ukraine establishes that the Constitution of Ukraine can not be changed if the changes envisage the abolition or restriction of the rights and freedoms of man and citizen, and Article 159 of the Constitution – that the bill on amendments to the Constitution is considered by the Verkhovna Rada of Ukraine only if there is a conclusion of the Constitutional Court of Ukraine regarding the compliance of the draft law with the requirements of Article 157 of the Constitution of Ukraine. In the issues of the implementation of the Constitution of Ukraine M. Koziubra argues, that in the mechanism of constitutional regulation two main elements are distinguished – the normative basis, that is, the constitutional provisions (norms) and their implementation. The latter is in the mechanism of constitutional regulation no less important than the constitutional provisions themselves. Any assessment of the Constitution of Ukraine should also be based on how its provisions are implemented in public relations. It is the level of their realization, that is, in the practice of everyday activities of state bodies, public associations, officials and citizens. This is the main indicator of reality, the authenticity of the Constitution. In this sense, we can say that the implementation of the Constitution of Ukraine is a way (form) of its actual existence, a real being [8].

In addition to the requirements of ensuring the legal direction of laws and other regulatory legal acts, the Constitution also contains a number of requirements for the regulatory system, the observance of which is ensured by the rule of law. The supreme legal force of the Constitution and the direct effect of its norms determine the rule of law in the so-called formal sense. It is not necessary to identify the direct effect of constitutional norms solely with law enforcement practice, in particular judicial. Such an action is characteristic of all forms of government activity: legislative, executive, judicial. Direct effect of the provisions of the Constitution takes place when citizens exercise constitutional rights and freedoms. Regarding the legislator, the direct action of the Constitution means that when adopting laws, it only needs to specify and detail the constitutional provisions, as well as to establish constitutional procedural forms of their implementation. To deviate from the letter of the Basic Law, from the values laid down in it, does not have the right [4, p. 54].

The same applies as well to the use by the executive authorities of the norms of the Constitution in their direct actions, for example, to ensure the social justice of the implementation of the basic provisions of the Constitution – not just to guarantee certain rights: the right to education, the right to work, the right to social protection, and the duty of state bodies create conditions for the possibility of obtaining qualitative education, provide decent pensions, wages, medical package of services,

those things without which it is impossible to qualitative life of a person in a legal state.

It is clear from the direct effect of the provisions of the Constitution that their concretization is also possible by law enforcement agencies, primarily by courts, by direct application of the provisions of the Constitution of Ukraine, in cases where the decision on the basis of the law proves to be impossible.

Part 3 of Article 8 of the Constitution of Ukraine stipulates that the norms of the Fundamental Law are rules of direct action, which implies the necessity of impossibility of the application of the law that the Constitution contradicts – because then the norms of the Constitution of Ukraine will not be applied directly. However, in order to substantiate the necessity of applying the current law, which may contradict the Constitution but not recognized as unconstitutional, reference is often made to Article 150 of the Constitution, which refers to the competence of the Constitutional Court of Ukraine the question of the constitutionality of laws and a number of other acts: “To the powers The Constitutional Court of Ukraine includes: 1) resolving issues regarding compliance with the Constitution of Ukraine (constitutionality): laws and other legal acts of the Verkhovna Rada of Ukraine; Acts of the President of Ukraine; acts of the Cabinet of Ministers of Ukraine; legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea” [9].

This provision was interpreted by the Supreme Court of Ukraine in the Resolution of the Plenum of the Supreme Court of Ukraine № 9 of November 1, 1996 “On the Application of the Constitution of Ukraine in the Administration of Justice”, in the way that (item 3) “<...> the court can not, by applying the Constitution as an act of direct action, to recognize unconstitutional laws or legal acts listed in Article 150 of the Constitution, as it is assigned to the exclusive competence of the Constitutional Court of Ukraine” [10]. In turn, the position of the Supreme Court of Ukraine is often interpreted in such a way that the court can not only formally recognize the law (another act on the list) unconstitutional, as the Constitutional Court of Ukraine does – with the legal consequences provided for in Part 2 of Article 152 of the Constitution of Ukraine (loss of the act of validity), but also in the broader sense, by making a simple conclusion that the act does not conform to the Constitution, therefore, should not apply.

In fact, this position allows the court to choose the easiest way – to apply a law, which is usually quite specific, and not to apply the general, abstract provisions of the Constitution, recognizing the law as non-conforming to the Constitution. In order to conclude that the law of the Constitution of Ukraine is not in conformity, it is necessary to have some courage and to spend extra efforts to substantiate its position – since such a conclusion will often be completely unclear, precisely because of the abstract nature of the provisions of the Constitution.

It is unlikely to be a fuse for a situation where courts simply shy away from resolving the issue of compliance with an act of the Constitution, is the provision of paragraph 2 of the above-mentioned Resolution, which provides that “courts in the consideration of specific cases should assess the content of any law or other legal act in terms of its compliance with the Constitution and in all necessary cases to apply the Constitution as an act of direct action” [10].

Constitutional rights and freedoms of a person and a citizen are directly effective. They define the goals and content of laws and other normative legal acts, the content and direction of the activities of the legislative and executive authorities, local authorities and ensure the protection of justice. Proceeding from this principle and guaranteeing the Constitution of judicial protection of constitutional rights and freedoms, judicial activity is aimed at protecting these rights and freedoms from any encroachments by ensuring timely and qualitative consideration of specific cases. It should be borne in mind that according to

Article 22 the Constitution enshrined in it rights and freedoms of man and citizen are not exhaustive. Since the Constitution of Ukraine, as stated in its Article. 8, has the highest legal force, and its norms are the rules of direct action, the courts when considering specific cases evaluate the content of any law or other legal act in terms of its compliance with the Constitution and in all cases necessary to apply the Constitution as an act of direct action.

The court may on the basis of Article 144 of the Constitution recognize them as not being in conformity with the Constitution or laws of Ukraine, decisions of local self-government bodies, and on the basis of Article 124 of the Constitution – acts of state executive bodies: ministries, departments, local state administrations, etc. The appeal to the Constitutional Court of Ukraine in this case is not required.

Judicial decisions must be based on the Constitution, as well as on the current legislation, which does not contradict it. According to the author, in the previous versions of the procedural codes a complex mechanism was issued that did not provide the court with the opportunity to effectively and quickly use the norms of the Constitution as rules of direct action, namely: “In case of a doubt in court in the course of consideration of the case on the compliance of the law or another legal act of the Constitution of Ukraine, the decision on the question of constitutionality of which falls within the jurisdiction of the Constitutional Court of Ukraine, the court appeals to the Supreme Court of Ukraine to resolve the issue of the introduction of on the Constitutional Court of Ukraine a submission regarding the constitutionality of a law or other legal act” [11]. Accordingly, the court was deprived of the opportunity to make a decision on the basis of the norms of the Constitution, the procedure for submitting an application to the Constitutional Court of Ukraine was mandatory and, in case of acceptance of such a submission, there was a long procedure for consideration of the question of the constitutionality of the law or other legal act. In fact, all this time, the person who appealed to the court for protection could not hope to solve her case before the Constitutional Court of Ukraine resolved the question of the compliance of a certain legislative act with the Constitution.

As it was already mentioned above, the norms of the Constitution of Ukraine are the rules of direct action (Part 3 of Article 8), and in case of a conflict between them and some other act, including the law, the application, of course, is subject to the rule of the Constitution. On 03.10.2017, the Verkhovna Rada of Ukraine adopted the Law of Ukraine Number 2147–VIII “On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine and Other Legislative Acts”, which came into force on December 15, 2017. Thus, in particular, Part 4 of Article 7 of the Criminal Code of Ukraine specifies the conditions under which a court applies the Constitution of Ukraine as a norm of direct action: “If a court concludes that a law or other legal act is contrary to the Constitution of Ukraine, the court does not apply such law or other legal act, norms of the Constitution of Ukraine as rules of direct action. In this case, the court, after a decision is made in the case, appeals to the Supreme Court to resolve the issue regarding the submission to the Constitutional Court of Ukraine of a submission regarding the constitutionality of a law or other legal act assigned to the jurisdiction of the Constitutional Court of Ukraine” [11].

With the adoption of these changes, the courts actually provided an effective mechanism for the application of the norms of the Constitution as rules of direct action, provided the person’s right to legal certainty and consideration of the issue raised within a reasonable time.

At the same time, there is a branch of law in which the application of the norms of the Constitution as rules of direct action is justified limited. So, according to Article 3 of the Criminal Code of Ukraine, the legislation of Ukraine on criminal liability is the Criminal Code of Ukraine, which is based on the Constitution of Ukraine and generally recognized principles and norms of international law. That is why the specialists of criminal law occupy a dualistic position – without contesting the universality of the principle of direct effect of constitutional norms, at the same time, they emphasize the necessity of the principle formulated in Part 3 of Article 3 of the Criminal Code of Ukraine. So M. Havroniuk and T. Yakimets point out that no law on criminal liability introducing criminal liability can act autonomously, separately from the Criminal Code of Ukraine [12].

However, it should be taken into account that the crime and punishment of the offense, and especially its “other criminal consequences” are regulated by the norms of not only the Special Part, but also the General Part of the Criminal Code of Ukraine. In this sense, “the law on criminal liability” can be considered a lot of constitutional norms. Now they are implemented in the Criminal Code of Ukraine, which stipulates the absence of direct application by the investigating authorities and the courts of the articles of the Constitution of Ukraine. For example, the content of Art. 59 of the Constitution of Ukraine on the retroactive effect of the law in time is reflected in Articles 4 and 5 of the Criminal Code of Ukraine. If in Art. 27 of the Constitution establishes that everyone has the right to protect their lives and health, life and health of other people from illegal encroachments, then in accordance with this in Art. 36 of the Criminal Code of Ukraine regulates the rights of the person to the necessary defense [13].

There is an opinion that in relation to Part 3 of Article 8 of the Constitution of Ukraine it is necessary to apply a restrictive interpretation, namely to recognize that the effect of this norm does not apply to those norms of the Constitution of Ukraine which establish the criminality or punishment of an act.

Conclusions. The research conducted allows us to formulate the constitutional and legal mechanism of direct effect of the norms of the Constitution of Ukraine, which includes: 1) the norms of direct action in the Constitution are mainly provisions relating to the constitutional rights and freedoms of man and citizen; 2) any appeal to the court for the protection of human rights and freedoms directly on the basis of constitutional norms of direct action should be not only guaranteed, but also implemented; 3) if an international agreement, the consent to which the Verkhovna Rada of Ukraine has made binding, establishes rules other than those established by law, then the rules of the international treaty of Ukraine shall be applied; 4) the direct application of the Constitution of Ukraine if the court concludes that the law or other legal act is contrary to the Constitution of Ukraine and in the further appeal to the Supreme Court for a further resolution. The court has a question about the constitutionality of the relevant act; restrictive interpretation of the norms of the Constitution as norms of direct action against those who establish the crime or punishment of the act.

According to the author, the introduction of legislative amendments proposed by the President of Ukraine to the procedural legislation, in particular, regarding the introduction of norms according to which, in the event that the court concludes that a law or other legal act is contrary to the Constitution of Ukraine, the court does not apply such law or other legal act, but applies the norms of the Constitution of Ukraine as rules of direct action (Article 10 of the Civil Code of Ukraine, Article 7 of the CAS Ukraine) will provide an opportunity to revive the norms of Art. 8 of the Constitution of Ukraine, which until then had been used by courts fairly quorum, in most cases as banquet rules.

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