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IMPLEMENTACJA DOKTRYN EUROPEJSKIEGO TRYBUNAŁU PRAW CZŁOWIEKA DO PRAWA KRAJOWEGO: ASPEKT METODOLOGICZNY

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Adnotacja. Artykuł poświęcono metodologii poznania doktryn stosowanych przez Europejski Trybunał Praw Człowieka. Autor identyfikuje konkretne podejścia metodologiczne i ujawnia ich treść. Złożoność problematyki implementacji doktryn wypracowanych w ramach innych systemów prawnych, w szczególności organizacji regionalnych, wymaga zastosowania kompleksowego zestawu narzędzi metodologicznych dla ich prawidłowego postrzegania, wśród których poczesne miejsce zajmują podejścia aksjologiczne, hermeneutyczne, metody porównawcze i analizy treści. Autor podkreśla znaczenie uwzględnienia specyfiki prawa krajowego i jego społeczno-kulturowego charakteru. Wiele uwagi poświęca wyjaśnieniu treści podejścia aksjologicznego oraz osobliwościom jego wykorzystania do badania istoty doktryn ukształtowanych w orzecznictwie Europejskiego Trybunału Praw Człowieka w celu ich dalszej implementacji do krajowego prawa karno-procesowego.

Słowa kluczowe: aksjologia, hermeneutyka, metodologia, doktryna sądowa, podejście metodologiczne.

IMPLEMENTATION OF THE EUROPEAN COURT OF HUMAN RIGHTS DOCTRINES INTO NATIONAL LAW: METHODOLOGICAL ASPECT

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Abstract. The article is devoted to covering the methodology of knowledge of the doctrines used by the European Court of Human Rights. Specific methodological approaches are given and disclosed. The complexity of the issue of implementation of the doctrines formed within other legal systems, including regional organizations, requires a complete set of methodological tools to be understood, among which axiological, hermeneutic approaches, comparative method and methods of content analysis occupy a prominent place. Herewith, one should also take into account the peculiarities of national law and its social and cultural character. Considerable attention is focused on the axiological approach content clarifying and the specifics of its use for researching the essence of doctrines formed in the practice of the European Court of Human Rights with the aim of further implementation into national criminal procedural legislation.

Key words: axiology, hermeneutics, methodology, judicial doctrine, methodological approach.

ІМПЛЕМЕНТАЦІЯ ДОКТРИН ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ У НАЦІОНАЛЬНЕ ПРАВО: МЕТОДОЛОГІЧНИЙ АСПЕКТ

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Анотація. Стаття присвячена висвітленню методології пізнання доктрин, які використовуються Європейським судом з прав людини. У роботі вказуються конкретні методологічні підходи та розкривається їх зміст. Складність питання реалізації доктрин, сформованих у межах інших правових систем, зокрема регіональних організацій, вимагає для їх правильного сприйняття застосування цілісного комплексу методологічних інструментів, серед яких чільне місце посідають аксіологічний, герменевтичний підходи, компаративістський метод і метод контент-аналізу. Наголошується на важливості врахування особливостей національного права та його соціокультурної природи. Значна увага зосереджується на з'ясуванні змісту аксіологічного підходу та особливостях його використання для дослідження сутності доктрин, що сформовані у практиці Європейського суду з прав людини з метою подальшої імплементації в національне кримінально-процесуальне законодавство.

Ключові слова: аксіологія, герменевтика, методологія, судова доктрина, методологічний підхід.

Topicality. The methodology issue is one of the important ones for scientific research. It is precisely the correctly chosen methodology that allows one to obtain objective information about the relevant legal phenomenon, providing the possibility of reproducing the process of epistemology. The specified problems acquire special importance in the conditions of social

research, for which the pluralism of approaches to the perception of relevant phenomena and processes is immanent. Thus, the results of the legal phenomena understanding comparison within the limits of Western legal culture and the states of the post-Soviet space are indicative in this case. For example, we can point to the perception of courts, which according to the European legal tradition are interpreted as a separate branch of state power endowed with certain powers allowing to "restrain" the powers of other branches, and preventing their arbitrariness (the system of checks and balances as a mandatory element of the separation of powers) . However, within the post-Soviet space (we mean, in particular, the ideological and axiological contexts), the court is perceived, first of all, as a means of implementing the requirements of other state bodies, therefore it is no question of the actual independence of the judicial authorities or their impartiality. Herewith, if the texts of, for example, the constitutions of such states indicate the independence of the courts, then such a normative prescription is purely declarative, acting as a kind of "facade of democracy and legality" of the non-democratic authority. Let us emphasize that researchers within these two types of culture use the same logical methods that allow them to gain knowledge about the judiciary and the principles of its organization and activity.

That is why a detailed description of the methodology of knowledge, minimizing the subjective factor of epistemology, is crucial for researchers of social phenomena within the humanitarian field of knowledge.

At the same time, it is necessary to point out that a single approach to understanding both the legal methodology itself and its structure, as well as a direct "set" of methodological tools, has not been developed in domestic jurisprudence today.

Analysis of recent research and publications. Let us point out that certain aspects of the methodology of scientific knowledge of legal phenomena were studied by the following domestic scientists: Ye. Biloziorov, L. Dobroboh, M. Kelman, M. Koziubra, M. Korniienko, M. Kostytskyi, A. Kuchuk, L. Nalyvaiko, O. Minchenko, O. Orlova, V. Pekarchuk, I. Serdyuk, O. Tykhomyrov, O. Yarmysh, and others.

The papers of these authors became the methodological basis for determining the foundations of scientific epistemology for the implementation of the doctrines of the European Court of Human Rights in the criminal procedural legislation of Ukraine.

At the same time, it is worth pointing out that without a general understanding of the legal nature of the European Court of Human Rights practice, it is impossible to determine the means allowing a deeper disclosure of its individual aspects as well as a comprehensive perception of this legal phenomenon. Accordingly, certain methodological importance was also played by the papers of those scientists whose subject of knowledge was the activity of the European Court of Human Rights and the practice of this court.

Among the authors whose researches became the basis for understanding the practice of the European Court of Human Rights as well as the doctrines formulated within this practice, the following should be mentioned: I. Glowiuk, D. Gudyma, T. Dudash, V. Zavhorodnii, M. Korniienko, A. Kuchuk, I. Kushnir, O. Orlova, I. Pozigun, L. Serdiuk, and others.

Presenting main material. It should be noted that the type of understanding of law (and of human rights, accordingly) is important precisely in the aspect of the methodology of scientific knowledge of legal phenomena. The adequacy of perception of the European Court of Human Rights practice is ensured within the natural understanding of law. "Currently, there is being a change in the domestic legal doctrine due to the rejection of the predominance of law normative understanding and the implementation of the natural law school's provisions, that is a factor in the necessity to rethink a significant number of legal phenomena in the aspect of a new paradigm actualizing the modern jurisprudence methodology problems" (Кучук, Пекарчук, 2021: 28).

Accordingly, the subject of research requires going beyond legal normativism and basing the paper on the natural school of law provisions. It should be added that within the specified type of law understanding law is interpreted as a social and cultural phenomenon. "It is this approach that allows us to talk about law as a value, associate the possibility of achieving legal order within society with it, taking into account a person's interests, and realize the possibilities of the latter. Law is a means of resolving contradictions that exist in society, referring to the values formed within it" (Кучук, 2017: 101).

Let us add that the social and cultural nature of law emphasizes its dynamic nature: since law is a cultural component of the corresponding social association, law undergoes changes together with a change in the cultural paradigm or individual changes in the field of culture accordingly.

It is appropriate to note that the above determines the essentiality to use an *axiological approach* in this study.The social and cultural nature of law is the fundamental factor of this. Culture cannot exist beyond values; every culture is associated with axiology, based on certain values. The obviousness of this provision is confirmed by the presence of different legal cultures (legal families, legal systems, types of legal systems, etc.). As it was mentioned above, the Western and Soviet paradigms are based on different values: if the first one is based on a person and individualism, then the second is based on collectivism.

In terms of the axiological approach, one cannot but point out the view of the domestic scientist M. Kozyubra about the perception of law as "the art of goodness and justice" (jus est ars boni et aequi) for an adequate understanding of legal phenomena (Козюбра, 2010: 10).

Let us add that the above indicates the essentiality to use legal phenomena and a hermeneutic approach for epistemology, the significance of which for understanding the subject of our research will be covered below.

Thus, as we can see, the knowledge of the doctrines formulated and applied in the practice of the European Court of Human Rights should be carried out using an axiological approach determining, among other things, the meaningful and essential "filling" of these doctrines, and the direction of their interpretation.

As it was indicated above, the social and cultural nature of law, its connection with axiology determine the necessity to use a *hermeneutic approach*. "Legal hermeneutics acquires particular significance in the context of updating domestic legislation, generalizing the experience of normative regulation, making scientifically based recommendations for improving the mechanism for ensuring the implementation of laws, and implementing various social reforms" (Симон, 2019: 196) – the domestic scientist rightly points out.

In the conditions of the postmodern rejection of objective truth as knowledge about objects and phenomena (their relationships and trends) that is verified by means of practice and giving preference to the conventional theory of truth, the hermeneutic approach itself is quite important. Investigating the understanding of the truth in criminal proceedings, V. Vapniarchuk, characterizing this theory of truth, indicates the following: "Supporters of this theory consider as truth the position that is recognized as such by the agreement (convention) of the parties and found its consolidation in the final decision that ends the criminal case. According to this theory, a judgment is true (not true) not because it corresponds (does not correspond) to reality, but only because the subjects agreed to consider it true" (Вапнярчук, 2011: 267).

The hermeneutic approach is related to the interpretation of legal phenomena. Let us emphasize that the European Court of Human Rights itself uses this term when interpreting the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, revealing the implicit meaning of the latter, and "finding out" law. Thus, characterizing the position of legal realists regarding the importance of the judge, M. Melnyk emphasizes the "importance of the personality of the judge in the consideration of disputed cases and finding justice, which is mostly traced to his inherent discretionary powers in the process of analyzing and establishing the facts that took place and can be attached to the case with further consideration when making a decision" (Мельник, 2019: 11).

In the context of our research, it is worth pointing out that the significance of the hermeneutic approach was manifested by means of the knowledge of the essence and content of those doctrines that were formed in the practice of the European Court of Human Rights, as well as in the domestic criminal procedural legislation provisions' interpretation.

We will also add that the above determines the essentiality to also use the *method of content analysis*. An additional factor of the necessity to use this method is the legal nature of the studied institution of the Council of Europe, as well as the close connection of law with ideology and political activity. Analysis of the practice of the European Court of Human Rights allows us to assert that this Court protects the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms that reproduce the content of the Western theory of human rights, protects such values as human rights, the rule of law, justice and others (which is reflected directly or indirectly in the specified Convention). For example, public authorities in Russia and Belarus are guided by radically different values (de facto, not de jure). Although in the latter case, it is necessary to apply content analysis that will allow finding out the real state of the legal phenomenon within the national systems of the specified states.

Content analysis makes it possible to clarify the essence of recognized doctrines implemented in national criminal procedural legislation, and the domestic legislation prescriptions' content (in the context of the subject of our knowledge), which is especially important in the period of the transitory state of domestic jurisprudence, which has not yet fully moved away from the legal positivism prevailing (especially in legal activity).

The use of a *systemic approach* is of great importance for research in the criminal procedural sphere. Thus, law itself, regardless of different theories of the understanding of law existence, is interpreted as a system of certain phenomena (of which phenomena it depends on the specific legal school). Law is a systemic phenomenon. Accordingly, the epistemology of legal phenomena should be based on a systemic approach allowing comprehensive knowledge of the relevant object, taking into account the systemic connections of individual legal institutions and norms.

Thus, the knowledge of, for example, covert investigative (search) actions must also take into account the provisions on evidence and proof, on the principles of criminal proceedings, etc. Only in their systematic connection can one get the most objective and complete information about the subject of epistemology.

We would like to add that the systematic knowledge of the doctrines formulated in the practice of the judicial institution of the Council of Europe allows determine the positive and negative aspects of the implementation of some of them, in particular, due to their relationship with each other. In this aspect, we will point out the connection between the doctrine of legal certainty and the doctrine of the rule of law, the understanding of one of them will be incomplete without understanding the other one, and the implementation of the rule of law without the implementation of legal certainty is hardly possible.

The knowledge obtained with the help of a systemic approach allows for a comprehensive understanding of the studied phenomenon in relation to other phenomena of legal reality. Therefore, under the conditions, for example, of the adversarial nature of the parties in criminal proceedings, a change in the legal status of one of the participants affects the status of the others. Since, as is known from the theory of legal relations, criminal and procedural relations, being a type of legal relations, represent such relations, the participants of which possess mutual rights and obligations. Thus, the right of a participant in a criminal proceeding to file a petition presupposes the presence in one of the participants of this relations of the obligation to consider this petition and make an appropriate decision (which, in turn, determines the necessity to establish the appropriate procedure, in addition to determining the rights and obligations of the participants in the proceedings).

It is also appropriate to emphasize the complex combination of the approaches we have indicated that is quite clearly manifested precisely through the system. Thus, the given systemic connections regarding the establishment of the corresponding obligations of the participants in criminal proceedings allow us to clearly trace the axiological

basis of the relevant legal norms. Within the framework of criminal proceedings under the conditions of a non-democratic state and legal regime, the status of the accuser will involve a number of rights (and almost no duties), while the accused will have a number of duties and almost no rights.

In this aspect, the trial (as well as criminal proceedings in general) against Vasyl Stus, the echoes of which reach the present day, is indicative in this aspect. Thus, let's recall that in March 2021, the Kyiv Court of Appeal nullified the decision of the Darnytskyi District Court of Kyiv regarding the prohibition on the distribution of V. Kipiani's book "The Case of Vasyl Stus". V. Medvedchuk, who in 1980 was appointed as V. Stus's lawyer, filed an application to ban the distribution of this book.

The specified court process (towards the poet of the sixties) does not allow us to talk about competition in criminal proceedings, nor about the existence of rights of the accused, etc.

The *comparative method* also plays a crucial role in our research. In recent years, the use of the comparative legal method has been actualized in domestic jurisprudence. In our opinion, this trend is predictable, taking into account Ukraine's desire to join the European community implying, in particular, the necessity to harmonize the national legal system with the standards reflected in the legislation of the European Union member states. This task (harmonization) objectively determines the necessity of comparative studies. That is why the processes of globalization in general and European integration in particular, has become a factor in the actualization of the specified methodological tool, namely, the comparative research.

Let's emphasize that this method partially contributes to the possibility of determining the positive or negative consequences of the implementation of certain legal doctrines and institutions into national law. Although, first of all, it is aimed at identifying the common and distinctive characteristics of relevant legal phenomena and processes, however, in general, such knowledge occurs with the purpose of borrowing the best experience of legal activity, normative and legal regulation of relevant social relations.

In our opinion, it is comparative legal research that is a factor in improving the functioning of national legal systems. Only by comparing individual legal phenomena in the conditions of different types of legal systems (or within the same type, but in different national legal systems), it is possible to understand the positive and negative aspects of the application of the relevant legal institutions, to find out the possibilities for the implementation of legal concepts from other legal systems (taking into account the national peculiarities of the legal phenomena functioning).

Clarifying the content of individual doctrines formed in the practice of the European Court of Human Rights, formulating conclusions to sections and general conclusions necessarily involves the use of methods of analysis and synthesis.

In addition, the use of the specified methodological tools is of particular importance when solving the task of finding out the state of development of the studied problem. The description of the solution to this task involves the scientific papers' analysis by the subject of knowledge, their classification according to certain criteria that will allow determine the real state of the scientific epistemology of the implementation of the European Court of Human Rights doctrines into the criminal procedural legislation of Ukraine, which, in turn, will become the basis for further research of these problems with the aim of forming specific suggestions for improving national legislation.

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