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Application and implementation of the European Convention on Human Rights in Ukraine: recent developments¹

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Ukkraine has been a member of the

Council of Europe since 1995. Two years later the Ukrainian Parliament ratified the European Convention on Human Rights (the Convention), which entered into force in respect of Ukraine on 11 September 1997.³ With ratification Ukraine recognised the compulsory jurisdiction of the European Court of Human Rights (the Court) over applications lodged against Ukraine, based on the right of individual petition. From 1 November 1998 to 31 December 2006, approximately 18,860 applications against Ukraine were lodged with the Court. Of these, 8,709 applications were declared inadmissible, 953 were communicated to the respondent Government, 310 were declared admissible and 260 judgments were adopted. In comparison, in 2005 and 2006 alone the Court adopted 241 judgments against Ukraine. In 2006 there were 3,906 applications lodged against Ukraine, 1,076 applications declared inadmissible and 313 applications were communicated to the Government of Ukraine for its observations. As

of 1 January 2007, there were 6,800 applications pending against Ukraine, which constituted 7.6% of the Court's workload.

Three 'blind spots' of the Ukrainian legal system account for this: the failure to enforce judicial decisions; the lack of judicial examination of cases within 'a reasonable time'; and attempts to review final and binding judgments that are in fact *res judicata*.

These three areas of concern have already been extensively examined by the Court. However, at the moment there is no indication that the situation in Ukraine is likely to change. Firstly, the judicial reforms initiated after Ukraine's declaration of independence in 1991 and the adoption of the 1996 constitution, expressly setting out the principles of the functioning of the judicial system, have never been completed. The judicial system also still has serious structural shortcomings,⁴ and is not trusted by the public. Secondly, there is the lack of desire of the State authorities to reform the system of enforcement of judgments and there have been recent legislative attempts to create more impediments to the enforcement of judgments against State-owned/controlled entities. Thirdly, there have been recent attempts to amend procedural codes⁵ in order to revive procedural possibilities for the courts, senior judges or prosecutors to review *res judicata* which may eventually lead to unreasonably long proceedings in civil, criminal, commercial and administrative cases.

One important recent development in the application and implementation of the Convention in Ukraine has been the adoption in 2006 by the Ukrainian Parliament of the 'Law on the Enforcement of Judgments and Application of Case-Law of the European Court of Human Rights' (the Act),⁶ setting out the procedure for the enforcement of judgments. This may be criticised on a number of levels. Firstly, it declares the case-law of the Court to be a source of Ukrainian law, although the Ukrainian legal system is a classical continental legal system, which does not recognise principles of *stare decisis*. It

also provides a clumsy definition of 'an enforceable judgment of the Court', which could lead to problems in enforcement of judgments or payment of compensation on the basis of a strike-out decision. The Court's case-law may be applied directly in the original or in translation, but this may not be enforceable as few judges or lawyers who apply the Convention are able to understand the official languages of the Court. However, the Act does establish a procedure for publication and dissemination of judgments, and a system of bodies responsible for the enforcement of the Court's judgments and their State funding. It also widens the scope of jurisdiction of the Government's Agent of the (European) Court and their status in the domestic executive. As a result, regardless of the considerable criticism that the Act may attract, it can still be regarded as a significant achievement of the Ukrainian Parliament.

As regards the enforcement of judgments, the Ukrainian government generally complies with the individual measures imposed by the Court's judgments⁷ and specifically with the payment of compensation for pecuniary and non-pecuniary damage. The State has also become more flexible about compensation for violations of the Convention and reaching settlements in cases involving established case-law.⁸ However, uncertainty remains about some measures, including those involving amendments to legislation, and reform of bodies and institutions subjected to review by the Court's judgments. None of these amendments were officially recognised as emanating from the European Court's judicial activities.⁹ However, under the 2006 Act, drafting amendments to legislation is the responsibility of the Office of the Government's Agent of the Court and the Ministry of Justice.

One recent example of ignorance as to how judgments should be enforced was *Melnychenko v Ukraine*¹⁰ concerning the applicant's inclusion in the Socialist Party's list of candidates for the 2002 elections after the 2005 judgment of the European Court. The decisions of the Central Electoral Commission on this point showed lack of even a basic

understanding of the Court's role in the supervision of Ukraine's compliance with the Convention and its interaction with the Ukrainian domestic legal system. It also showed problems that could arise in the enforcement of the Court's judgments. Fortunately, these mistakes have now been rectified by the administrative chamber of the Supreme Court of Ukraine, which has clearly held that Ukraine is to comply with its obligations under Art. 46(1) of the Convention and thus enforce final judgments given against it.

The procedure for the enforcement of a judgment under the 2006 Act is clear and is described in Art. 1 of the Act. However, it seems that the Act provides for no systematic possibility for review of legislative problems or for any way of avoiding judgments on issues already found to be contrary to the Convention in other States. The Ukrainian Parliament does not seem to consider, and is not properly informed about, recent judgments against Ukraine and the problems they raise. Thus, there is still a problem of the dissemination of information concerning the Convention among decision-makers and lobbyists in Ukraine.

Currently there are too many domestic problems to ensure compliance with the Convention at the domestic level. There is a need for systematic analytical work and political desire at this level to ensure that judgments are fully enforced and complied with. The Ukrainian authorities need to ensure that no cases like those that have already been decided appear before the Court and that effective and accessible domestic remedies exist to prevent possible violations of the Convention. This means not only payment of compensation awarded by the Court in just satisfaction claims, but also serious attempts to enforce the required measures in cases examined by the Court. This can be achieved by a more proactive approach by the domestic authorities aimed at disseminating information about the Court's case-law, preventive work on the review of legislation that may not comply with the Convention, and better training of those who directly apply the Convention at the domestic

level. If these goals are attained, both the domestic and international systems of human rights protection will have reached their ultimate goals.

1 P. Pushkar. *The Reform of the System of Criminal Justice in Ukraine: The Influence of the European Convention of Human Rights*. *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 11/ 2, 195–214, 2003.

2 The views expressed in this article are the personal views of the author and are not the official position of the Registry of the European Court of Human Rights.

3 'Law on the Ratification of the European Convention on Human Rights' - 17 July 1997.

4 See *Salov v. Ukraine*, (No. 65518/01) 6/9/05, §§ 80-86, regarding principles of independence and impartiality of the judiciary, appointment of judges etc.

5 See, for instance, Chapter 3 of the Code of Administrative Justice of Ukraine ('Review of cases in exceptional circumstances').

6 Signed by the President of Ukraine on 23 February 2006 and entered into force on 30 March 2006.

7 In cases concerning non-enforcement of judgments the Court can order the State to enforce the judgment at issue. See, for instance, the operative part of the judgment in the case of *Nosal v. Ukraine* (No. 18378/03) 29/11/05.

8 See *Lee v. Ukraine* (No. 6269/02) dec. 6/11/06.

9 PACE Recommendation no. 1764 (2006)

2 October 2006 and PACE Resolution (2006) on the Implementation of judgments of the European Court of Human Rights adopted on 2 October 2006.

10 *Melnychenko v. Ukraine* (No. 17707/02) 19/10/04.