

# PLACE OF COURT PRECEDENT IN THE SYSTEM OF LAW OF THE EUROPEAN UNION AND IN THE SYSTEM OF LAW OF UKRAINE

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## ABSTRACT

*The authors investigated the place of court precedent in the system of law of the European Union and in the system of law of Ukraine. In particular, the essence of court precedent is revealed by analyzing the positions of scientists to determine this concept and its features. Restored the law basis for the activities of the European Court of Human Rights and the International Court of Justice. Seen features of the use of court precedent in the use of law in countries of general and continental law, namely in England, Germany, France. The problems of the place of court precedent in the Ukrainian national system of law in the framework of modern euro-integration processes are investigated. The features of the implementation of the case-law of the European Court of Human Rights in the national Ukrainian legislation in the context of its adaptation to European Union law in the context of European integration are clarified.*

**Keywords:** Source of Law, Court Precedent, European Court of Human Rights, UN International Court, Human Rights Convention.

## INTRODUCTION

The increasing role of court precedent together with legal acts, are explained by the possibility of filling in gaps in legislative regulation by quickly responding to shifts in the process of regulating public relations. The law systems of countries where court decisions have traditionally been recognized as a major source of law are attributed to the British-American system of law. In the European continental tradition, the production of law falls within the competence of the legislature, whereas the exercise of the judiciary is linked to the application of law. It is obvious that the legislature cannot regulate the issues of economy, society, the world in all individual cases, but sets general rules. Thus, the question of legal certainty and fairness in the application of the law becomes important. In the Member States of the European Union, the ways in which national and European laws are interpreted by courts are characterized by their own peculiarities. In doing so, interpretation of the law is important in terms of the functionality and efficiency of any judicial system (Oppermann, 2018).

## Problem Statement

The current state of the Ukrainian legal system indicates that it is undergoing reform and requires the implementation of European legal standards into Ukrainian realities. Therefore, in the context of Ukraine's integration into the European community, the study of the place of judicial precedent in Ukrainian domestic law becomes relevant, in the process of adaptation of domestic legislation to the norms of European Union law.

## LITERATURE REVIEW

We are working on a rigorous test in the field of law first and foremost - a study that looks substantially at what has been achieved for all researchers. Therefore, it is advisable to consider some of the approaches of scholars to the definition of court precedent.

Thus, Komarenko (2014) understands, under judicial precedent, the rule of conduct created in the course of a particular court case and, as a result, is fixed by the relevant court decision, and is subsequently binding upon such cases for the courts of the same or lower instance. Exploring the theoretical foundations of judicial precedent, Zherbykina (2018) proposes the author's definition of this concept, namely:

*“judicial precedent is a lawful decision of a court, to which it enters into force, which is binding and enforceable. or the advisory nature of its application by other courts in the administration of justice in resolving a similar legal issue in similar law relationships. ”*

The author also emphasizes that, in fact, judicial precedent is intended to establish a peculiar rule of conduct, which should be taken into account in the present moment of time and be considered and applied as a model in the future.

Sahnyuk (2017) The essence of judicial precedent is the detailing of provisions of legislative acts, interpretation of contradictory or unclear content of legal norms, ie giving the law a persuasive nature and facilitating the development of a unified approach to the application of legal rules.

Scientists at Kurylo & Pantaliienko (2016) draw attention to the peculiarities of the basis of judicial precedent, noting that the need for it does not come from the legislator, but is detected directly by the subjects of law enforcement. It is emphasized that precedents are created not in all cases that are subject to review, but only in those that require appropriate intervention. The basis of judicial precedent implies the identification of a particular gap, the lack of specificity, the need to interpret existing rules, or even adjust them in the light of changes in material external circumstances.

In the context of the issue under investigation, the position of Ispolinov (2017) is interesting, according to which modern international courts not only apply and interpret the law, but also establish new legal provisions. Therefore, scientists are invited to consider the precedent of judicial decisions on the basis of three criteria. These include: (1) the bindingness of previously ruled court decisions; (2) the practice of the international courts of appeal (International Tribunals concerning the former Yugoslavia and Rwanda, the European Court of

Human Rights and the Court of Justice of the European Union) or supervisory jurisdiction (vertical precedent); (3) the precedent of international judicial authorities (horizontal precedent).

## METHODOLOGY

In determining the place of judicial precedent in the European Union law system and in the legal system of Ukraine, dialectical, comparative and formal law methods were used. The essence of the concept of judicial precedent is revealed by means of the dialectical method. The comparative law method allowed to determine the peculiarities of the use of judicial precedent in law enforcement in the countries of common and continental law, namely in England, Germany, France. Using the formal-law method, the issue of the place of judicial precedent in the Ukrainian domestic legal system within the framework of modern European integration processes was investigated.

## FINDINGS AND DISCUSSIONS

In examining the place of judicial precedent in the system of law, it is important to note that they may include acts of national judicial authorities, that is to say courts of general and constitutional jurisdiction, as well as international judicial bodies to which the European Court of Human Rights belongs, the United Nations International Court of Justice.

According to Art. 19 of the 1950 Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter-the Convention on Human Rights), to ensure compliance by the High Contracting Parties with their obligations under the Convention and the Protocols, has been established by the European Court of Human Rights (hereinafter-ECHR) on a permanent basis (Law of Ukraine, 1950). Officially, ECHR cases are not regarded as precedents, but are seen as the only source of dynamic interpretation of the Convention on Human Rights. In its practice, the ECtHR adheres not to precedent as such, but raises relevant legal questions and answers to them in the process of interpreting the rules of the Convention on Human Rights.

According to Art. 38 of the Statute of the United Nations Tribunal of 1946, the court whose function is to settle the disputes brought before it shall apply:

1. International conventions, whether general or separate, establishing rules recognized by States Parties;
2. International custom as evidence of common law practice;
3. The general principles of law recognized by civilized nations;
4. The judgments and teachings of the most highly qualified publicists of different countries as an aid to the rule of law (Statute of the International Court of Justice, 1946).

Commenting on the text of Art. 38 of the Statute of the United Nations Tribunal, De-Brabandere (2016) states that, although there is no rule of law in precedent, there is a widespread use of references to preliminary rulings and case-law of other courts in the work of the United Nations Tribunal.

The law systems of countries where judicial decisions have traditionally been recognized as the main source of law are referred to the British-American system of law. In common law jurisdictions, enforcement is based on the principle that, in a similar case, a court is required to

enforce a decision of a high court, and courts of appeal are bound by their past decisions. The English doctrine of court precedent presupposes the resolution of a particular case by clarifying the question whether or not it was already the subject of consideration in a similar case before. If the answer to that question is yes, the court is guided by the available decision. Decisive in the selection of a precedent is the position of a judge, based on his or her own vision, assessment of the circumstances of the case, etc. (Sardar & Waqar, 2016).

It is important to emphasize that in England the rule of precedent is traditionally rigid. This is explained by the inability of any court to deviate from the precedent, which in turn contributes to the stability of legal regulation. At the same time, the decisions taken according to old precedents are adapted to the current conditions of legal validity by using the judge's discretion in the choice of precedent and interpretation in the process of application in a particular case (Gammie, 2019).

Classical representatives of Romano-German law are the legal systems of Germany and France. In Germany, precedents are not a source of law in the strict sense. Previous decisions of the same court or other or higher courts are not legally binding but are rather regarded as an authoritative example of a correct interpretation. The case law of Supreme Court precedents is taken into account in the activity of lower courts. Although one cannot disregard a lower court judge's right to speak against a precedent, the appellate judicial system is empowered. Its practical effect approaches the results of the common law doctrine, which can be analyzed as a "*persuasive body*". His character is presumably binding in the sense of forecasting the outcome of a court case. Thus, the jurisdiction of the Supreme Court of Germany guarantees a degree of legal certainty and equal treatment of such cases (Berger, 2016).

The French doctrine is also not a binding force of judicial precedent. This is explained by the fact that the court decision, made on the basis of the law, is not a source of law, but is a legal fact. However, with the increasing role of the case law, the decisions of the High Court of Cassation-the French Court of Cassation-are now recognized as a source of French law (Marchenko, 2016).

With regard to determining the place of court precedent in the legal system of Ukraine, the issue of applying ECHR practice deserves important attention. According to Art. 17 of the Law of Ukraine "*On the enforcement of judgments and the application of the case law of the European Court of Human Rights*" of 23 February 2006, the Ukrainian courts apply the Human Rights Convention and the ECHR practice as a source of law when considering cases. the case law of the European Court of Human Rights (Law of Ukraine, 2006). Based on the case law in Ukraine, it can be argued that the higher courts have often used the ECHR case law when considering cases.

It should be noted that, prior to the adoption of the Law of Ukraine "*On the Enforcement of Judgments and the Practice of the European Court of Human Rights*", on 17 July 1997, Ukraine ratified the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol and Protocols No. 2,4,7 and 11 to the Convention by the adoption of the relevant Law. In accordance with its provisions, without a special agreement, the jurisdiction of the ECHR was found to be binding on all questions concerning the interpretation and application of the Convention (Law of Ukraine, 1997). Thus, as a result of the ratification of the

Convention on Human Rights, it is regarded as part of Ukrainian law and a source of domestic law. The granting of the ECtHR in accordance with the rules of the Convention on Human Rights to law-making confirms the granting of the status of a source of law by the decision of this Court. In its turn, the jurisdiction of the ECHR extends to a catalog of issues related to the interpretation and application of the Convention and its Protocols. States parties to the Convention on Human Rights have a responsibility to enforce ECtHR decisions in any case in which they are parties (Law of Ukraine, 1950). Having ratified the Convention on Human Rights, Ukraine has undertaken to legally adopt ECtHR practices and to resolve issues related to the need for such practices.

### RECOMMENDATIONS

Following the ratification of the Convention on Human Rights by Ukraine in 1997 and the adoption of the Law of Ukraine “*On the Enforcement of Judgments and the Application of the Practice of the European Court of Human Rights*” in 2006, the ECHR case is the source of Ukrainian law. Despite the national courts' recourse to the ECHR's case-law and the provisions of the Convention on Human Rights, the case-law of the ECHR is an aid in the process of interpreting and defining the content and scope of fundamental human rights. Therefore, the ECHR's practice in the system of sources of Ukrainian law is legally placed after international treaties, the consent of which is provided by the Verkhovna Rada of Ukraine. At the same time, the implementation of ECHR case law into national Ukrainian legislation will allow strengthening the already established mechanism of protection of human rights and protected by law in accordance with European standards and norms, as well as approximation of the Ukrainian legal system to European countries and adaptation of national Ukrainian legislation to the rules of law of the European Union in the context of European integration.

### CONCLUSION

Thus, the study on the place of judicial precedent in common law (England) and continental doctrine (Germany and France) gives the opportunity to state the following. While common law jurisdictions are commonplace, in the context of the European continental tradition, it is not the judicial cases but the laws that have the force of law. At the same time, in the conditions of today, there is an approximation of these legal systems in the context of the place of judicial precedent in law enforcement. This is explained by the fact that the use of judicial precedent in the enforcement of continental law by countries becomes more widespread in clarifying and interpreting the provisions of the law. In the countries of the common law, on the contrary, the legislative path of the development of law is of particular importance.

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