

THEORETICAL AND LEGAL DETERMINATION OF JUDICIAL PRECEDENT AND MECHANISMS OF JUDICIAL RULE-MAKING IN THE MODERN LEGAL SYSTEM OF UKRAINE

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INTRODUKTION

This scientific work provides a comprehensive analysis of the conceptual foundations of the functioning of the judicial branch of government, the mechanisms of judicial law-making, and the theoretical and practical aspects of judicial law. Particular attention is focused on determining the legal nature of decisions made by courts of various levels, as well as on resolving controversial issues regarding the hierarchical determination of judicial norm-setting acts in the system of sources of law in Ukraine. The author examines the issue of granting court decisions the status of a factor that directly influences the processes of forming legal norms. The work places particular emphasis on studying the significance of legal conclusions and explanations of higher judicial bodies, as well as their role in the evolution of the domestic legal system. Based on the analysis, a conclusion is formulated about the significant increase in the importance of judicial practice in modern conditions. The higher echelons of the Ukrainian judicial system are no longer limited to the function of resolving individual disputes; their competence has actually expanded to include elements of rule-making and ensuring the uniformity of law enforcement.

The article presents a comprehensive scientific study of the nature of judicial precedent and the specifics of judicial rule-making in the context of the dynamic transformation of the domestic legal system. The author analyses the fundamental principles of the functioning of the judiciary not only as an institution of law enforcement, but also as an active subject of legal standard setting. The main focus is on determining the hierarchical place of judicial acts in the system of sources of law in Ukraine and the legal status of Supreme Court decisions.

The issues of recognizing the precedent nature of judicial acts and their direct impact on the process of lawmaking are examined. Particular emphasis is placed on the legal nature of the conclusions of higher courts, which ensure the unity of judicial practice and stability of law enforcement. Based on a systematic analysis, it is argued that the role of the court in Ukraine has undergone a significant evolution: from the classic resolution of individual disputes to the performance of functions that actually acquire the characteristics of rule-making activity. The need for a clear legislative

distinction between judicial interpretation and the direct creation of new legal norms is justified in order to comply with the constitutional principle of separation of powers.

1. Theoretical and methodological principles of determining judicial precedent in the system of sources of law

As the rule of law develops and takes shape in modern Ukraine, new institutions of the legal system are emerging. One of these is the judiciary, which functions as an independent branch of government. Changes in socio-economic relations and the creation of new ones affect all spheres of state bodies, including the legal system, which is a complex, multifaceted mechanism without which no civilized state can function or exist in the global community.

An objective assessment of the current state of the legal system is impossible without taking into account the intense globalization and integration transformations occurring on a global scale and exerting a decisive influence on the national legal order. In this context, the issue of modernizing key components of the legal architecture – in particular, the institutional improvement of judicial bodies – takes on priority significance both for fundamental legal scholarship and for practical activities within Ukraine's legal system.

Contemporary globalization trends encompass not only the economic, environmental, and political spheres of social life, but also exert a decisive influence on the architecture of the national legal system. In this regard, the issue of the adaptability of Ukraine's legal system to the conditions of a globalized world remains highly relevant in practical terms. Resolving this issue requires the development of a fundamental theoretical framework capable of systematically explaining the mechanisms by which global and regional integration influence the structural elements of domestic law and the institutional stability of the state. In today's world, the law faces an important challenge: the problem of managing globalization and harmonizing its processes. The law serves as both an instrument of globalization and a means of managing its processes.

The distinctive feature of globalization in the legal sphere lies in the fact that this process manifests itself to varying degrees in all structural components of a country's legal system. This primarily concerns the legal framework, the system of sources of law, and the relationships between them. Globalization also manifests itself in the course of lawmaking and law enforcement, since the dynamism of the legal system is ensured, on the one hand, by the mechanism of lawmaking, and on the other – by factors of law enforcement.

One example of globalization's impact on the sources of national law is the evolution of the sources of law in modern Ukraine. This has resulted in the widespread use of legal contracts as a source of law across various branches of law, as well as the recognition and application of judicial practice (precedent) as a source of law.

This, in turn, has a certain impact on judicial bodies. We believe that globalization is such a comprehensive phenomenon that it extends to the courts as well.

It should be noted that, due to its unique characteristics, statutory law continues to be the dominant source of law in countries with a Romano-Germanic legal system. Alongside this, judicial practice, including international judicial practice, has come to play an increasingly important role. Formally, judicial practice in Ukraine is not binding following the adjudication of similar cases; however, lower courts have, to a greater extent than before, begun to follow the judicial practice of higher courts.

In his study of judicial precedent, R. Cross concludes that the concepts of «judicial precedent» and «judicial practice» are regarded as identical and interchangeable, generally appearing under the same term – «precedent»¹.

The U.S. legal system takes a fairly flexible approach to precedent as a source of law, which allows for the adaptation and transformation of judicial approaches in response to societal changes. In contrast, in countries of the Romano-Germanic legal family, a different conceptual model prevails, where judicial precedent is interpreted primarily through the lens of judicial practice or common law.

The key difference lies in the hierarchical nature of judicial acts: in the continental system, legal positions established by courts (particularly higher courts) are not binding on lower courts when resolving similar disputes. From a formal standpoint, judicial bodies are vested with equal authority and are not bound by the decisions of their peers. Consequently, the adoption of a higher court's legal position occurs not through institutional compulsion, but due to the intellectual persuasiveness and authority of the arguments presented.

As R. David noted, the continental model of judicial practice, unlike the Anglo-American common law system, allows each individual court to participate in lawmaking and to influence the formation and modification of legal norms².

A retrospective analysis and an examination of the evolutionary dynamics of the legal architecture have made it possible to conceptualize the law-making function of the judicial branch and to identify a range of issues related to its official legitimization in Ukraine. At the current stage of state

¹ Cross, R. *Precedent in English Law*. Oxford : Clarendon Press, 1985. P. 153.

² David, R., & Joffrey-Spinosi, K. *Major Legal Systems of the Modern World*. 1999. P.118.

development, the judiciary, acting as a fundamental component of the separation of powers, implements not only classical justice but also a specific form of judicial lawmaking, which is embodied through the mechanisms of judicial precedent and generalized judicial practice.

There is no consensus in the literature regarding judicial practice as a source of Ukrainian law and the rule-making function of higher judicial bodies; consequently, the issue of its recognition within the legal system remains unresolved. In this regard, the development of Ukrainian society requires further research into this legal phenomenon, taking into account various scholarly approaches.

Thus, in both academic theory and legal practice, two main viewpoints have emerged regarding judicial practice as a source of law and judicial lawmaking in general. Some authors, taking into account all positive factors, recognize judicial lawmaking and judicial practice as a source of law, while others do not consider judicial practice to be a source of law, since judicial bodies do not have lawmaking functions; their primary task is to apply the law, not to create it.

In our opinion, in accordance with the provisions of the Constitution of Ukraine, judicial practice in any of its manifestations is viewed not as a form of lawmaking, but exclusively as a law enforcement activity. In the author's view, the functional purpose of the court lies not in the creation of legal norms, but in the administration of justice – that is, the resolution of disputes based on current legislation.

In this context, judicial practice does not act as an autonomous «source of law» in the sense of direct lawmaking, but rather constitutes the objective reality of the functioning, implementation, and legal protection of established provisions. This is of fundamental importance both for the stability of the legal order and for the further evolution of jurisprudence. Thus, while lacking the status of direct lawmaking, judicial practice simultaneously serves as a solid foundation and a source of information for the future improvement of the legal framework.

Of course, it is hard to disagree with this, since the judicial precedents established by the higher courts may subsequently be adopted by the legislature and serve as the basis for new legal norms.

Currently, Ukrainian law has a system of formal sources of law, which includes legal custom, normative treaties, and normative legal acts. There are no grounds for recognizing judicial precedent and legal doctrine as formal sources of modern domestic law.

In contrast to these viewpoints, there are positive opinions regarding the existence of judicial practice as a source of law and judicial lawmaking within Ukraine's legal system.

The state of the judiciary is one of the key issues in the development of the Ukrainian state under current conditions. It serves as a litmus test for assessing the level of democracy in the country. The Constitutional Court has become a law-making body. By declaring laws and regulations – or specific provisions thereof – to be unconstitutional, the Constitutional Court thereby repeals them and, consequently, replaces certain legal norms with others.

Although the Constitutional Court and the Supreme Court do not possess a legislative function enshrined in law, they effectively perform it, and this activity in no way restricts the rights and freedoms of citizens or legal entities, nor does it infringe upon their interests; on the contrary, it protects their violated rights, freedoms, and legitimate interests in cases where a normative act is inconsistent with the Constitution.

Under these conditions, the higher courts bear an excessively heavy burden: they are forced not only to counteract serious distortions of the legal system but also, in the process, to develop the necessary doctrinal provisions to fill gaps in the scientific and theoretical elaboration of human rights issues. The gap created in the process is promptly bridged by judicial acts of the higher courts in the course of resolving legal disputes, with the legal positions enshrined therein bearing the hallmarks of precedent.

These debates are not new to Ukrainian academia and legal practice; they ebb and flow, but the issue of judicial lawmaking within the Ukrainian legal system persists. In our opinion, the function of judicial lawmaking by higher courts should be recognized and enshrined in legislation, with their powers, limits, form, implementation mechanisms, and duration of effect clearly defined. It is better to have lawmaking within the framework of the law than to ignore it altogether. This is what will constitute progress toward a rule-of-law state. In real legal practice, a mechanism for judicial lawmaking is being developed within the national legal system.

And this process is not quick; it is necessary to find the optimal procedures that would allow the higher judicial bodies, within the limits of their powers, to perform a rule-making function. This is where the special role of the higher judicial bodies lies, with their own procedure for judicial rule-making and a form of its expression that differs from that of the legislative and executive branches.

In our view, the strength of the judiciary depends primarily on whether the country is governed by the rule of law or by an authoritarian regime, a totalitarian system, or an oligarchy. The role of the judiciary in society is largely determined by the level of legal culture among the people and is rooted in respect for the courts, which is cultivated not over decades, but over centuries. It requires long-term, painstaking, and persistent work. And this work must begin right now.

In this case, the positive experience of judicial lawmaking in international legal systems can contribute to the formation and development of judicial lawmaking in our legal system, but with due regard for its specific characteristics.

Indeed, in foreign legal systems, active judicial lawmaking is not considered a violation of the principle of separation of powers. Judicial lawmaking exists because it is simply impossible to avoid. Inevitable judicial lawmaking is determined by the presence of gaps in the laws and the inherent uncertainty and ambiguity of many legal provisions, as well as the impossibility of denying justice in the absence of a clear, positive rule applicable to the dispute.

In our view, the law-making activity of higher judicial bodies, by the very nature of judicial power and its operations, is aimed not only at resolving legal disputes and protecting the rights, freedoms, and interests of parties based on the law, but also at formulating judicial norms. Since an unconstitutional normative act, a gap in the law, or the vagueness of legal provisions requiring interpretation grant the court the right, in the course of administering justice, to formulate a normative rule and provide an interpretation that will both resolve the legal dispute and fulfill the constitutional provision on judicial protection.

Judicial precedent historically emerged and developed within the context of the English legal system, whereas the legal tradition of the continental legal system rejected the possibility of judicial lawmaking. Despite the fact that in countries of the continental legal family, the normative nature of judicial acts is denied due to the doctrinal and ideological alienation of the ideas of judicial lawmaking, their actual role in the mechanism of legal regulation remains quite significant. Thus, in some states (France, Germany, etc.), while not recognized *de jure* as a source of law, judicial precedent *de facto* continues to play a significant role in legal regulation. In others (Switzerland, Portugal, Spain, etc.), judicial precedent is officially recognized as a source of law and is applied alongside the statute, although it has a subsidiary nature. Furthermore, in common law countries, the role of statute (law) in regulating social relations continues to strengthen, allowing us to conclude that there is a mutual permeation of certain legal institutions into the national legal systems of common law and civil law countries and, consequently, a convergence of the two legal families. Under these conditions, it is necessary to take a new approach to examine the role of courts in the sphere of legal regulation, particularly in light of the current needs of the Ukrainian legal system.

The assessment of the feasibility and legal validity of judicial precedent and judicial practice as sources of Ukrainian law remains a contentious and debated issue in domestic legal doctrine, despite the numerous works on this

topic. Given its complexity and fundamental importance for the Ukrainian legal system, the issue of judicial lawmaking requires further in-depth theoretical development, as the positions of authors researching this issue are characterized by largely contradictory and ambiguous conclusions.

The history of the emergence of case law is inextricably linked to medieval England. Over time, common law spread far beyond the borders of the United Kingdom, a development largely facilitated by the colonial policies of the English state. Judicial precedent as a source of law operates in the legal systems of common law countries, but also exerts its influence in countries of the Romano-Germanic legal family.

In the countries of the Romano-Germanic legal family, however, no general concept has been developed regarding the place, role, and significance of judicial precedent within the system of sources of law.

In Ukraine, as in most countries of the Romano-Germanic legal family, the attitude toward judicial precedent has been and remains ambiguous. For a long time, judicial precedent and judicial practice were not recognized in our country as a source of law, although they played a role in resolving similar cases in the absence of relevant statutory provisions.

Judicial precedent is always developed in the course of judicial activity. It is the form in which a court articulates new legal norms and interpretations of the law in its decision. However, not every judicial body has the authority to create legal norms; only the highest court in the judicial system does.

Of course, in order to determine whether judicial practice can serve as a source of law, it can only be considered in a narrow sense, since the «judicial activity» mentioned above cannot be a source of law in the formal-legal sense. Furthermore, the authors highlight the «weak points» in a narrow approach to understanding judicial practice. Thus, the authors quite often conflate two concepts: «judicial practice» and «decisions of higher courts», which is incorrect, since judicial practice (in the narrow sense) consists of «typical judicial decisions in specific cases resulting from a long-standing, consistent application of the law».

Judicial practice cannot be reduced to a single specific judicial act. In this regard, it would be incorrect to speak of recognizing judicial practice as a source of law in the formal sense, whereas in a substantive sense, judicial practice can rightly be called a source of law, since gaps in legal regulation, as well as situations of «legal vacuum» filled by judicial bodies, serve as a motivating factor stimulating proper legal regulation of the relevant social relations. In the context of this issue, the authors recognize the resolutions of the Plenums of the higher judicial bodies as a source of law (in the formal sense), subsuming them under the concept of «judicial practice», rather than judicial practice itself as such. Domestic legal literature presents various

positions on this issue. Some authors consider resolutions of the Plenums to be a source of law, while others do not recognize them as such. Authors also define the legal nature of these acts in different ways.

Democratic processes within Ukraine's legal system pertain to legal practice, including judicial practice. It is practice that adapts laws to real-life situations, demonstrates how effective and well-developed the legal system in the country is, signals problems and disruptions in its functioning, proposes ways to improve and correct shortcomings, develops legal positions regulating specific types of social relations, and elevates the standard of law.

Judicial practice and judicial precedent in every legal system have their own distinctive features and patterns of development. Precedents

are an integral part of any form of creative activity; they do not need to be introduced or artificially cultivated in the judicial sphere, as they are capable of arising, changing, and disappearing on their own within the structures of judges' customary practices and standards of court conduct, regardless of whether the legal system is predominantly oriented toward statutory law or judicial precedent. This allows us to note that judicial practice and precedent directly influence the regulation of relations within the legal system. And the more stable the legal system is, the more perfect judicial lawmaking becomes.

From the perspective of the modern understanding and practice of judicial lawmaking, the life of the law is possible only in practical activity, in its correction, supplementation, and, where necessary, in the development of legal provisions and legal positions (judicial norms) specifically by higher judicial bodies to establish a unified, universally binding judicial practice, and through social relations, thereby ensuring legal stability and the security of the law as a whole.

Judicial rule-making is a secondary activity of a higher judicial body; it is not a separate legislative process but arises when, in the course of performing its functions, the court encounters a gap or defect in the law, an unconstitutional law, or a provision of a legal act requiring interpretation. In such cases, to resolve the dispute, the court formulates a judicial norm that settles the dispute and becomes an additional regulator of social relations with characteristics of a precedent. It is precisely in such cases that the mechanism of judicial norm-setting is activated as a necessary and integral element of the legal system.

Although judicial norms possess a certain degree of normativity, they should not be equated with legal norms (of the law), as they contain normative rules applicable to a specific case, apply only to similar cases, and their duration is limited by the adoption of a new legal norm. This understanding of lawmaking by the higher judicial bodies in no way violates the principle of separation of powers, since each branch of government has its own strictly

defined functions of lawmaking. The legislative branch amends, repeals, and enacts laws; the executive branch enforces them and issues subordinate normative acts; the judicial branch applies normative legal acts, creating judicial norms when necessary and thereby performing a law-making function.

Judicial rule-making has become a distinctive function of the higher courts, enabling them, under current conditions, to establish judicial norms capable of regulating socio-legal situations prior to the adoption of a legislative act. The primary forms of judicial rule-making are judicial precedent and the judicial practice of the higher courts.

Today's reality allows for a fresh perspective on the role of the courts in Ukraine's legal system, as the unique element of «case law» will become a factor in the continuous improvement of the judiciary.

In its activities, the judiciary must not only apply the law but also create general norms when the legislature remains silent. Such activity by higher judicial bodies assists the legislature both in amending normative acts and in supplementing and overcoming gaps in regulatory and legal regulation, and constitutes an optimal and objectively existing form of judicial activity.

The law-making activity of courts in Ukraine's legal system is not formally (officially) recognized, is interpreted controversially in legal doctrine, but it does exist in reality and, through the higher courts, influences the development of law – just as it does in other countries on the European continent (Greece, Italy, the Netherlands).

The rule-making powers of the judiciary are not officially enshrined in legislation, but this does not mean that the judiciary, as a branch of government, is deprived of such powers in fact and in practice. On the contrary – the higher courts, alongside the application and interpretation of legal norms, also engage in law-making activities, restoring justice to violated rights and freedoms.

In practice, of course, both in England and in the United States, it was the courts that created the law, and they did so, like their counterparts on the continent, largely setting the achievement of justice as their primary goal.

Judicial lawmaking in the Ukrainian legal system is reflected in the decisions of the Constitutional Court, which contain legal positions, as well as in the judicial practice of the Supreme Court.

Therefore, no matter how much respect we have for the law (the primary source of Ukrainian law), legal ambiguities will always arise, and one way to address this is through judicial lawmaking, since certain difficulties emerge during the application of legal norms that require practical refinement by the courts.

In such situations – which arise throughout the entire existence of the law – judicial precedent and judicial practice, as concentrated forms of judicial lawmaking by higher courts, help resolve the problem.

Therefore, recognizing judicial practice as a source of law does not diminish the powers of the legislative and executive branches. Courts exercise only those powers inherent to them, which cannot be exercised by other bodies. The growing role of the courts in society inevitably leads to judicial practice performing a rule-making function. This is precisely what is happening in our reality.

Thus, the legislative recognition of judicial lawmaking in the Ukrainian legal system, in our opinion, will allow for more prompt resolution of gaps in normative legal acts, the effective judicial protection of the rights, freedoms, and legitimate interests of citizens and legal entities, and the uniform application of legal norms to disputed legal relationships and the establishment of legal facts; serve as a regulator of balance (through a system of checks and balances) in relations between the executive and legislative branches, and contribute to the formation of the rule of law in Ukraine.

2. Transformation of the judicial function: from law enforcement to ship rule-making in the modern realities of Ukraine

Throughout the entire period of the Basic Law's existence and the evolution of the regulatory framework, the gradual expansion of the courts' law-making activity allows us to analyse fundamental transformations in the field of legal science. Law is a product of society's life, designed to ensure its security and comfort, as it is objectified in two key dimensions: through lawmaking and through the activities of the justice system. One of the most controversial issues in the interaction between these institutions is judicial law-making, which has long been denied both at the legislative level and in academic circles. Contemporary jurisprudence faces an ambitious task: not only to recognise this legal phenomenon, but also to clearly determine its role in the general theory of law and the structure of legal regulation.

This general theoretical task also defines the objectives of this article: to use classical scientific methods to study the relevant results of law enforcement rule-making activities that go beyond traditional judicial interpretation, to determine the nature of the normative material created by the courts and its role in legal regulation.

The issue of interaction between law-making processes and the functioning of judicial bodies is of particular importance for the modernisation of the Ukrainian legal system, which was largely dictated by the start of systemic reform of the judicial branch of government in 2010. The scientific interest in this issue is explained by the long-standing absence of a

comprehensive analysis of the institution of justice in domestic jurisprudence. Until recently, the law-making role of the court was on the periphery of academic research, and only recently has it begun to be considered as an independent and fundamental object in the theory of state and law.

The creation of special legal rules by the court is not only and not so much a well-known feature of common law systems as an inevitable stage in the development of law, including for the family of Roman-Germanic law. Within the Anglo-American legal tradition, the phenomenon of judicial rule-making is inextricably linked to the institution of classical precedent. In Great Britain, the source of law is understood as a specific mechanism by which a particular rule acquires legal force and becomes binding for application in judicial practice. English precedent, formed in the process of law-making activity of higher courts, is a basic source of law on a par with legislative acts (statutes). The foundation of this doctrine is the principle of hierarchy: the decisions of higher courts are binding on all lower courts. At the same time, the higher courts themselves, although not bound by a strict obligation to adhere to their own decisions, usually rely on them in their arguments. A characteristic feature is that judges in England are often forced to follow previously established precedents, even when there are compelling reasons to deviate from them.

Ukrainian law enforcement officials and legislators have unleashed the creative energy that had been restrained during the socialist period. Domestic judicial practice, expressed mainly in the acts of higher judicial bodies, has rapidly developed into an independent regulatory and legal reality. And these are no longer just «legal provisions» that do not relate to legal norms, but rules of a generally binding nature (at least within the judicial system). The specific legal substance of law enforcement acts and norms is an objective element of legal reality. The task of modern jurisprudence is not to recognise or deny the normative nature of the results of judicial activity, but to study this new phenomenon and determine its types, content, functions and place in domestic legal doctrine in general and in the mechanism of legal regulation in particular.

The opinions of legal scholars in legal science are divided into two camps. Some researchers believe that legal precedent cannot be a source of law in our country at all because Ukraine belongs to the Romano-Germanic legal family, which means that the main source of law is the law. Other researchers emphasise that our legal system must adapt to modern society and that legal precedent has a right to exist, since the practice of judicial rule-making has a positive impact on the development and updating of legislation.

Yes, L.M. Nikolenko has his own view of this situation and notes that Ukraine is a country governed by statutory law, therefore «courts do not have the right to set precedents. The Constitution of Ukraine enshrines the principle

that judges are independent in the administration of justice and are subject only to the law (Article 129). If a court obeys the decision of another court (precedent), it thereby deviates from this principle»³.

In contrast, in contemporary academic discourse, many legal experts tend to believe that judicial rule-making has de facto transformed into an autonomous source of law. This thesis is supported by several fundamental factors: the growing role of judicial practice in regulating legal relations, as well as a review of the conceptual views of scholars and practitioners on the nature of precedent in Ukraine. In particular, S. V. Shevchuk argues for the need to implement precedent mechanisms into the national legal system. The researcher emphasises that the legal positions of the Supreme Court should be binding, extending to an indefinite circle of subjects, and not limited only to participants in a specific court proceeding⁴. L. A. Lutsyk notes that «the decisions of the Constitutional Court of Ukraine and the Supreme Court of Ukraine can become judicial precedents»⁵.

Thus, according to D. M. Yasnok, «judicial law-making is a complex procedural and legal category that combines the professional knowledge and skills of judges, their intellectual and legal experience, practical thinking and existing philosophical and legal views on the problem from the point of view of social and moral values and logical reasoning, which makes it possible to create a procedural and legal formula whose content could fill a legislative gap, enabling civil, administrative or commercial cases to be considered on their merits; such a legal formula, if formed by the court of first instance during the consideration of a civil, administrative or commercial case, can be verified in terms of both its substantive legal and socio-legal quality at the level of both appeal and cassation proceedings»⁶.

Indeed, legal precedent is not officially a source of law in Ukraine, since courts in our country do not have legislative functions in accordance with the Basic Law of the state, they are not vested with the right to create new legal norms (rules of conduct). However, it is impossible for domestic doctrine to ignore this legal phenomenon (judicial rule-making) at the present stage. In this coordinate system, a court decision is viewed as a formalised

³Ніколенко Л.М. Про визначення судового прецеденту в Україні. *Науковий вісник Ужгородського національного університету. Серія «Правознавство»*. Випуск 27. Том 2. 2014. С. 11.

⁴Шевчук С.В. Рішення Верховного Суду України як джерело права (деякі аспекти застосування прецедентного права в Україні). *Вісник Центру судових досліджень*. 2006. № 6. С. 17.

⁵Луць Л. Сучасні правові системи світу: підручник. Львів: *Львівський національний університет імені Івана Франка*, 2003. С. 104.

⁶Ясинюк Д.М. Уніфікація процесуального законодавства у сфері судової нормотворчості та її межі. *«Київський юридичний вісник»*. 2021. № 3. С. 102.

manifestation of the real legal fabric, where an abstract prescription is filled with concrete meaning through the prism of hermeneutic interpretation. Legal reality encompasses not only textual norms, but also the acts of their implementation. The result of such interaction is always in motion, acting as a link between the theoretical ideal of the legislator and the practical plane of social relations.

We would like to emphasise that the autonomy of judicial activity is essential and stems from the principle of separation of political powers. In our opinion, the court and the legislator do not oppose each other, but mutually enrich law-making and law enforcement activities, which depend equally on the economy, ideology and politics. The reasons for the «inappropriate» perception of legal science by the courts may not stem from law enforcement practice at all, but from the traditional «lag» of jurisprudence behind rapidly changing legal matters in academic methodology.

However, it should be emphasised that, in our view, only the highest judicial institutions – the Supreme Court of Ukraine and the Constitutional Court – can engage in law-making.

V.O. Serdyuk rightly notes in this regard that «over the past two decades, Ukraine has seen the development of an institution known as «judicial rule-making». It should be noted that this issue is part of the pan-European process of strengthening the role of court decisions as a source of law in countries with a Romano-Germanic legal system, which traditionally includes Ukraine. The rule-making activity of courts in Ukraine is developing mainly in the following areas: the application of the law (legal norms) by analogy when considering a specific case; the creation of judicial precedent; the formation of legal decisions of the Constitutional Court of Ukraine; the publication of explanations on issues of judicial practice by the Supreme Court of Ukraine»⁷.

Despite the scepticism that has long prevailed in domestic scientific discourse regarding the recognition of judicial rule-making as a full-fledged source of law, today it is impossible to ignore the intensive development of the law-making functions of higher courts. One of the priority vectors of modern jurisprudence should be a comprehensive and systematic study of the nature of legal standards generated by courts. It should be emphasised that the issue of the normative activity of judicial bodies has remained acute for more than twenty years, remaining at the centre of legal discussions.

Yes, most legal scholars tend to believe that the results of the court's regulatory activity are limited to precedent acts and other phenomena identical in their legal nature. In this context, it is worth mentioning that the scope of

⁷ Сердюк В.О. Роль судової правотворчості в процесі судової реформи в Україні. *Наукові записки Тернопільського національного університету імені В.І. Вернадського. Серія: Юридичні науки.* Т. 28 (67). № 1. 2017. С. 73.

these results in legal literature is expanding to include a set of judicial practices, precedent decisions, and the mechanism of judicial discretion as an instrument of law-making. In modern legal doctrine, the issue of classifying the results of the normative activity of courts remains controversial. In particular, S. Shevchuk offers a broad interpretation, including not only precedents and practice, but also legal positions, legal provisions, and explanatory acts of higher courts⁸. Another vision is offered by B. Malyshev, who focuses on precedents, quasi-precedents and normative acts⁹.

Researchers agree that rules generated by the highest judicial branch (interpretations, normative conclusions, etc.) should be considered self-sufficient components of the legal system. There is also no objection to classifying the results of this activity according to their functional purpose: from filling gaps to exercising powers in the field of regulatory control. However, dynamic discussions continue around the parameters of official recognition of such rules as full-fledged legal norms. In particular, scientific research focuses on: 1) formal ways of consolidating the results of judicial activity; 2) the relationship between the legal force of judicial norms and legislative acts; 3) the integration of judicial prescriptions into the existing mechanism of legal influence.

1. Ukrainian jurisprudence is dominated by a positivist approach that focuses on the formal parameters of a normative act and its legal force. Although courts are guided by established practice in considering similar conflicts, such a body of decisions is not identified as an independent source of law. The reason for this is that judicial acts do not meet the criteria of normativity: they do not have the required level of abstraction and formal certainty. Only the acts of the Plenum of the Supreme Court meet the essential and external requirements for sources of legal norms, as they have a coherent normative and systemic structure. The legitimisation of new forms of sources of law in national legal doctrine is a lengthy and gradual process. It should be noted that in terms of their key parameters – such as universal applicability, state guarantee, normative structure and official publication – the resolutions of the Plenum of the Supreme Court actually duplicate the characteristics of a normative legal act. Although judicial precedents or customs are not officially identified as sources of norms, actual practice shows otherwise.

2. According to some researchers, normative acts of plenums of higher courts belong to subordinate legal acts. In our opinion, this is not about qualifying these resolutions as judicial precedent, but about classifying them

⁸ Шевчук С. Судове правотворення: світовий досвід та перспективи в Україні. Київ: «Реферат». 2007. С. 57.

⁹ Малишев Б.В. Судовий прецедент у правовій системі Англії. Київ: «Праксис». 2008. С. 30.

as a completely different type of source of law – subordinate normative acts. This approach is probably based on a reasonable understanding of the linear hierarchy of normative legal acts. The literature emphasises that the acts of the plenums of higher courts are acts adopted by a competent state body that establish abstract rules of conduct for an unlimited number of persons, designed for repeated application and subject to mandatory publication. Of course, it is incorrect to classify normative acts of plenums of higher courts as classic normative legal acts issued by legislative or executive authorities due to their special nature. A norm issued by a higher court is also a norm of law, but due to its nature, it exists and is applied «in parallel» with traditional normative legal acts of any kind (with the exception, of course, of the Constitution). Both the legal force and the level of a judicial norm are, at a minimum, equal to the force and level of the normative legal act that is involved in the specific case of application of the law.

3. Recognition of the law-making potential of the judiciary is inevitable provided that the norms it generates acquire the status of a substantive element of the law-regulating mechanism. The proposed scientific concept provides for the differentiation of the results of such activity in order to more accurately determine their functional place. In particular, fundamental norms enshrined in the resolutions of the plenums of higher courts and secondary forms of judicial influence – legal interpretation prescriptions, the results of interpretation of norms and legal conclusions arising from the elimination of gaps through the use of analogy – are distinguished.

The legal norms of the first group are included in the initial link of the legal regulation mechanism – normative regulation. Such norms occupy an ‘equal place’ with traditional rules that originate from the legislative and executive branches of normative legal acts, perform the same function and complement each other, ensuring the effectiveness of the legal regulation mechanism. Other results of judicial activity belong to the elements of the final link in the mechanism of legal regulation – the implementation (application by the court) of the law. The interpretative results of the judicial activity of the second group are the most important element of law enforcement and the entire mechanism of legal regulation, ensuring the completeness, objectivity, comprehensiveness and stability of domestic justice.

N. Stetsyk's position seems reasonable in that, within domestic legal systems, the status of rule-making entities should be reserved only for the highest levels of the judiciary. This is justified by two key factors. First, higher courts are able to give their decisions binding force. Secondly, they have a full cycle of law-making powers – from the introduction and amendment of norms

to their complete annulment, while lower courts are usually limited to the function of repealing acts¹⁰.

Modern domestic jurisprudence can no longer ignore this significant legal phenomenon. A judicial act adopted in the process of law enforcement acts as an external objectification of «living» law – that is, the content that a norm acquires in the context of real circumstances through the tools of legal hermeneutics. Since law is a component of social existence, it is embodied not only in legislative prescriptions, but also in the practical activities of subjects and official documents. This process of transformation is dynamic in nature, filling the space between the static model of positive law and its actual implementation in social relations.

We agree with the position of N. M. Savetchuk, who notes that «officially, judicial precedent is not recognised as a source of law in Ukraine, however, given the introduction of the institution of exemplary cases and the obligation obligation for public authorities and courts to take into account the conclusions on the application of legal norms enshrined in the resolutions of the Supreme Court, there are grounds to assert that there are prerequisites for recognising judicial precedent as an additional source of law in Ukraine»¹¹.

The creation of special legal rules by the court is not only a well-known feature of common law systems, but also an inevitable stage in the development of law, including for families of Roman-Germanic law. Ukrainian law enforcement officials and legislators have unleashed the law-making energy that was restrained during the socialist period. Domestic judicial practice, expressed mainly in the acts of higher judicial bodies, has rapidly formed into an independent regulatory and legal reality. And these are no longer just ‘legal provisions’ that do not relate to legal norms, but rules of a generally binding nature (at least within the judicial system). The specific legal substance of law enforcement acts and norms is an objective element of legal reality. The task of modern jurisprudence is not to recognise or deny the normative nature of the results of judicial activity, but to study this new phenomenon and determine its types, content, functions and place in domestic legal doctrine in general and in the mechanism of legal regulation in particular.

We believe that the restrained and rational position of the domestic legal school regarding the granting of normative status to court decisions is due to historical fears of subjective, emotional factors in justice, which could potentially lead to abuse and arbitrariness. After all, «as is well known, the

¹⁰ Стецик Н.В. Судове законотворчість: загальна характеристика. *Журнал Української асоціації адвокатів*. 2010. № 8. С. 2.

¹¹ Савічук Н.М. Поняття та суть судового прецеденту як джерела права: загальні теоретичні засади. *Актуальні проблеми вдосконалення чинного законодавства України*. 2020. № 52. С. 188.

Ukrainian people are characterised by legal nihilism. This manifests itself in a poor understanding of their rights and opportunities, an arrogant, dismissive, sceptical perception of the law, viewing it not as a basic, fundamental idea, but as a secondary phenomenon in the scale of human values, and a lack of faith in the potential, possibilities and necessity of the law»¹². In contemporary discussions, researchers also focus on other barriers that hinder the legitimisation of the law-making potential of courts. In particular, this refers to a certain «autonomisation» of the judiciary – its distancing from the academic community, the prevailing ideology and political processes, which is perceived as excessive and uncontrolled independence. Thus, Judge D. Lylak of the Constitutional Court of Ukraine once emphasised the «recognition of judicial law-making and pointed out that its recognition is hindered by positivist attitudes that prevail in Ukrainian legal science»¹³.

The institutional independence of the judiciary stems from the fundamental principle of separation of powers. At the same time, the judicial and legislative spheres are not in conflict; on the contrary, they complement each other within a single legal space, which is shaped by socio-political and economic processes. The problem of the weak link between the practical activities of the courts and legal theory often lies not in the practice itself, but in the traditional lack of mobility in jurisprudence. Science often demonstrates retrospectiveness, failing to keep up with the vector of rapid changes in regulatory regulation.

We are convinced that the courts and the legislature do not oppose each other, but rather mutually enrich law-making and law enforcement activities, thereby updating legislation and closing gaps in the law.

The state of the judiciary is one of the main, key issues in the development of the Ukrainian state in the current conditions. It is a circumstance that allows us to judge the level of democracy in the country. In this case, we agree with V.O. Serdyuk's opinion that «over the past two decades, an institution known as «judicial rule-making» has been developing in Ukraine. It should be noted that this problem fits into the general European process of strengthening the role of court decisions as a source of law in countries with a Romano-Germanic legal system, to which Ukraine is traditionally attributed. The rule-making activity of courts in Ukraine is developing mainly in the following areas: the application of the law (legal norms) by analogy when considering a specific case; the creation of judicial precedent; the formation of legal

¹² Кобко-Одарій В.С. Правова ментальність українського народу: історичні корені та сучасні трансформації: монографія / В.С. Кобко-Одарій. Одеса: Видавництво «Юридика», 2025. С. 87.

¹³ Лілак Д.Д. Судовий процес та проблеми судової правотворчості. *Вісник Верховного Суду України*. 2003. № 3. С. 68.

decisions of the Constitutional Court of Ukraine; the publication of explanations on issues of judicial practice by the Supreme Court of Ukraine»¹⁴.

«Judicial law-making is permissible within the framework of the main function of judicial bodies in the administration of justice and consists in the creation, improvement (amendment) and repeal of legal norms by judicial bodies in officially recognised forms. The specificity of judicial law-making in comparison with the law-making of other state bodies lies in the fact that it takes place in the process of judicial bodies performing their main function of administering justice: resolving specific legal cases; constitutional control; protecting the rights of citizens in their relations with executive bodies; establishing legally significant facts and circumstances»¹⁵.

Without having a legally established rule-making function, the Constitutional Court of Ukraine and the Supreme Court of Ukraine actually perform these functions, and this activity in no way restricts the rights and freedoms of citizens or legal entities, does not violate their interests, but rather protects their violated rights, freedoms and legitimate interests in cases of gaps, defects in normative legal acts or recognition of a normative act (norm) as inconsistent with the Constitution of Ukraine.

In this regard, Judge V. Y. Pogrebnyak of the Constitutional Court of Ukraine rightly notes that «from the point of view of the nature of the solution to the problem raised at the level of legislative acts, a situation arises in which the conceptual provisions contained in the Constitution of Ukraine and the Law of Ukraine «On the Judicial System and Status of Judges», which is fundamental for determining the legal status of the court and establishing the legal nature of its activities, do not comprehensively reveal the essence of the concept of «justice» and do not fully outline the mechanism or comprehensive tools for its implementation. At the same time, these same provisions do not contain a clear prohibition on the court's exercise of certain forms of rule-making activity in terms of the full diversity and range of such activity»¹⁶.

The issue of judicial rule-making is a subject of ongoing debate in the domestic scientific community, periodically becoming particularly acute. Despite the lengthy controversy, the status of this phenomenon in the

¹⁴ Сердюк В. О. Роль судового законотворчості в процесі судової реформи в Україні. *Наукові записки Тернопільського національного університету імені В. І. Вернадського. Серія: Юридичні науки*. Т. 28 (67). № 1. 2017. С. 73.

¹⁵ Бовсунувська І. Г. Конституційний Суд України як суб'єкт законотворчості. Конституційне право та конституційний процес в Україні. *Журнал Київського університету права*. № 1. 2014. С. 105.

¹⁶ Погребняк В. Я. Проблема судового нормотворення в контексті законодавчого регулювання діяльності судової гілки влади в Україні. *Київський юридичний вісник*. 2024. № 3. С. 42.

Ukrainian legal system remains unclear. In our opinion, there is an urgent need for official legitimisation of the rule-making powers of higher courts by enshrining them in a special legislative act. Such regulation should clearly define the competence, limits, procedural forms and time frames for the implementation of this function. The introduction of judicial rule-making into the legal field is a much more constructive approach than concealing its actual existence, which is an innovative vector for the development of the rule of law.

In our opinion, the positive experience of the development and existence of judicial rule-making in international legal systems can contribute to the formation and development of national judicial rule-making, but taking into account the peculiarities inherent in our legal system, established doctrine and practice of forming legal positions by higher judicial bodies.

Thus, in foreign law, active law-making by courts is not considered a violation of the principle of separation of powers. Judicial rule-making exists because it is simply impossible to avoid. The inevitability of judicial rule-making is due to the existence of gaps in the law and the inherent uncertainty and ambiguity of many legal norms, as well as the impossibility of denying justice in the absence of a clear positive norm applicable to the dispute. The rule-making of higher judicial bodies, by the very nature of judicial power and its activities, is aimed not only at resolving legal disputes and protecting the rights, freedoms and interests of subjects based on the law, but also at 'formulating judicial norms,' which, in turn, improves legislation and acts as a regulator of social relations.

It should be noted that judicial practice and judicial precedent in each legal system have their own characteristics and patterns of development. «The differentiation in the level of legal development of national legal systems in the modern world is due to the heterochrony of their formation and development, as well as a complex of other factors, including national specifics, cultural traditions, and the state of society and the economy. This differentiation manifests itself in varying degrees of integration of general legal principles and provisions into national legal systems»¹⁷. This allows us to note that judicial practice and precedent directly influence the regulation of relations in the legal system, and the more stable the legal system, the more perfect the judicial rule-making.

It should be noted that the Constitution of Ukraine, the fundamental law and basis of the legal system, identifies the judiciary as one of the branches of state power. The judiciary exercises the function of justice through constitutional, civil, administrative and criminal proceedings. Justice in the

¹⁷ Кобко-Одарій В.С. Взаємозв'язок понять «правова сім'я», «правова система» та «система права». *Електронний науковий журнал з права*. 2025. № 3. С. 29.

Ukrainian legal system is administered only by the courts; the creation of special courts or any other state bodies or public organisations that could make binding decisions on legal disputes and other matters subject to the jurisdiction of the courts is not permitted. The judiciary has a legislative monopoly on resolving legal disputes, forming judicial practice and ensuring its uniform application. This state of judicial practice as a form of judicial rule-making should contribute to the innovative search for progressive scientific approaches and research into this legal phenomenon, its improvement in the Ukrainian legal system, which will bring it to a new level of development, formation and application in the judicial system.

Although judicial norms have a certain normative character, they should not be compared with legal norms (laws), as they contain normative rules relating to specific cases, apply only to similar cases, and are valid only until a new legal norm is adopted. This understanding of rule-making by the higher judicial authorities in no way violates the principle of separation of powers, as each branch of government has its own clearly defined rule-making functions. The legislative branch amends, repeals and adopts laws, the executive branch enforces them and develops subordinate acts of a normative nature, and the judicial branch applies normative legal acts, creating judicial norms where necessary and performing the function of rule-making.

The court may refuse to hear a case due to the absence of a law regulating the relations between the parties in the dispute, its ambiguity or inconsistency, as this would be tantamount to a denial of the right to a trial. Therefore, the rule-making of the court in such cases can be assessed as publicly necessary. The exercise of rule-making activities by the judiciary within its competence does not go beyond the limits of its jurisdictional function and is entirely permissible.

The function of judicial rule-making by higher judicial bodies is actually implemented in judicial activity, and therefore it would be extremely wrong to deny its existence, since for the mechanism of legal regulation it is one of the ways of regulating legal disputes concerning the national legal system. In Ukraine, judicial rule-making has not yet received official recognition, but given the practical significance of general rules of a precedential nature created by higher courts, the question of its recognition inevitably arises.

O.A. Lynnyk argues that «courts are capable of expanding the boundaries of the exclusive function of justice, and therefore their law enforcement activities acquire noticeable signs of law-making»¹⁸. According to M.I. Kozubra, «the process of judicial interpretation of the Constitution, laws

¹⁸ Линник О.А. Судова правотворчість як важлива гарантія захисту прав людини. *Альманах права*. № 11. 2020. С. 341.

and other normative acts, which is as integral a feature of justice as law-making, cannot do without elements of law-making»¹⁹.

As Y. M. Romanyuk rightly notes, «the formation of judicial practice also consists in the law-making activity of judges. According to the scholar, this manifests itself in the presence of gaps in legislation and law, in the search for legal norms to be applied when conflicts or competition between norms are identified, and in a certain degree of discretion in the process of interpreting legislation»²⁰.

In countries where the legal force and normative nature of court decisions are not only recognised but also enshrined in law, objective and favourable conditions are created for the formation of theory and the development of the practice of applying judicial precedent and judicial practice, as well as their legal positions. In contrast to the traditional doctrine of judicial precedent, characteristic of the Anglo-American legal model, a different approach prevails in the countries of the Romano-Germanic legal family. Here, the law enforcement activities of the courts are based on the principle of strict compliance with the provisions of substantive law, which effectively excludes the possibility of justifying a court verdict by direct reference to similar decisions made earlier. According to O. F. Skakun, «in countries of the Romano-Germanic legal family, judicial practice plays the role of an auxiliary source of law. However, the scholar notes that today the role of judicial precedent in the law-making activity of the state is growing due to the emergence of judicial clarification norms, which have become legal provisions of judicial practice»²¹.

With regard to the legal system of Ukraine, the practical existence of judicial rule-making is currently rarely disputed, but practical necessity requires its legislative consolidation and the development of a general concept of judicial rule-making. In our opinion, forms of judicial rule-making in the form of precedent and the judicial practice of higher judicial bodies, which effectively act as regulators of social relations, overcome legislative gaps and contribute to the implementation of the constitutional principle of judicial protection.

It should be recognised that the development of the legal system is closely linked to the activities of judicial bodies, which give life to normative acts through their decisions and, in some cases, supplement and fill in the gaps in the law with judicial norms created in the course of these activities. Judicial

¹⁹ Козубра М. Судове законотворчість: аномалія чи невід'ємна риса правосуддя. *Право України*. № 10. 2016. С. 41.

²⁰ Романюк Я. Судова законотворчість у контексті реформи правосуддя: постановка проблеми. *Право України*. № 10. 2016. С. 12.

²¹ Скакун О. Ф. Теорія держави і права: підручник. Київ: «Алерта»; «КМТ»; «ТУЛ», 2009. С. 231.

rule-making has become a special activity of the higher courts, which in modern conditions allows for the creation of judicial norms that are capable of regulating socio-legal situations prior to the adoption of a normative act. The implementation of this proposal is a generalised experience of scientific and judicial doctrines, both at the international level and in the Ukrainian historical and legal development of this phenomenon, which has made it possible to develop general provisions applicable to the national judicial system with regard to judicial rule-making. The lack of legislative recognition of judicial rule-making allows us to note the innovative development of this phenomenon in the legal system with the help of a scientifically based doctrine that develops the ideas of judicial rule-making by higher courts, which actually create judicial norms containing new rules, in cases of gaps in normative legal acts, interpretation and concretisation of norms and principles of law.

We agree with the point of view of researcher D. Yu. Khoroshkovska, who notes that «the actual law-making function of the judiciary is closely linked to law enforcement and interpretation, and the explanations contained in the resolutions of the Plenum of the Supreme Court are not judicial precedents in the classical version of common law, however, this does not mean that they are not sources of law that do not contain new legal provisions»²².

Thus, the official legitimisation of judicial practice as a fundamental source of domestic law inevitably leads to institutional recognition of the norm-creating functions of the court. Contemporary Ukrainian realities demonstrate that the judiciary is de facto engaged in «legal supplementation» in cases where legislative gaps or contradictions are identified. The Supreme Court plays an important role here, ensuring the uniformity of law enforcement through generalisation mechanisms. At the same time, the Constitutional Court of Ukraine implements a specific model of «negative rule-making», depriving acts that contradict the Basic Law of legal force.

We believe that «the modern state and legal policy of Ukraine should be based on the continuity and development of leading mental attitudes, the preservation of legal traditions and values in law,» but with a modern upgrade of the legal system in line with today's realities and living conditions, thanks to current trends in globalisation and the convergence of legal systems, particularly in terms of judicial rule-making²³[23, p. 69].

²² Хорошковська Д. Роль судової практики в системі джерел права в Україні: теоретико-правове дослідження: дисертація... на здобуття наукового ступеня кандидата юридичних наук: 12.00.01.К., 2006. С. 127.

²³Кобко-Одарій В.С. Розвиток державної політики України в контексті правової ментальності України: проблеми та перспективи. *Актуальні проблеми держави та права* . 2020. С. 69.

After all, the official implementation of judicial precedent in the Ukrainian legal field, in our opinion, requires the formation of an adequate legislative basis, the creation of a body of consistent court decisions, as well as the ability of parliament to quickly adapt to changing social processes. The expansion of the Supreme Court's powers, primarily by granting it the status of a legislative initiative entity, could be a catalyst for these transformations. Despite the potential risks of such a step, the current dynamics of social relations are forcing the state to abandon dogmatic positivism in favour of progressive international standards. This implies the legitimisation of judicial law-making with clearly defined limits, where the effective protection of individual rights remains a priority.

CONCLUSIONS

Finally, it should be noted that the active rule-making and interpretative activities of the judiciary over a short historical period have formed a special normative body (most intensively and extensively in the field of private law). Court decisions and acts, unified by resolutions of the plenums of higher courts, are accepted by legal science as judicial precedents, norms of law and other results of law-making judicial activity. The place and functions of the court's rule-making activity in the relevant links of the legal regulation mechanism, as proposed in the formulation of the problem, currently require further in-depth study.

Thus, the conducted research on the transformation of the judicial function and the theoretical and methodological principles of determining judicial precedent in the system of sources of law allows us to conclude that the modern development of the legal system of Ukraine is characterized by a gradual expansion of the role of the judiciary in the formation of legal regulators. Under contemporary conditions, the court is no longer solely an institution of law enforcement but increasingly acts as a subject that forms legal positions which have normative and guiding significance for further judicial practice.

The transformation of the judicial function from traditional law enforcement to elements of judicial rule-making is обусловлена a number of factors, including the increasing complexity of social relations, the need to ensure the unity of judicial practice, the growing importance of the rule of law principle, and the influence of European legal standards and the practice of international judicial institutions. In this context, judicial precedent is gradually being integrated into the national system of sources of law, acquiring the status of an important instrument for ensuring legal certainty, stability, and predictability of legal regulation.

The theoretical and methodological analysis of judicial precedent makes it possible to consider it as a complex legal phenomenon that combines elements

of legal interpretation, law enforcement, and law-making. Within the Ukrainian legal system, it manifests primarily through the legal positions of higher courts, which form standards for the interpretation and application of legal norms. At the same time, the integration of precedent-based elements into the system of sources of law requires further scholarly reflection, clear normative consolidation, and coordination with the principles of the continental legal tradition.

Therefore, the modern legal system of Ukraine demonstrates a tendency toward the formation of a mixed model of legal regulation, in which judicial practice and the legal positions of courts are gaining increasing importance alongside normative legal acts. Such evolution contributes to increasing the effectiveness of legal regulation, ensures the flexibility of the legal system, and creates the prerequisites for its harmonization with European legal standards.

SUMMARY

In summary, the theoretical and legal determination of judicial precedent and the mechanisms of judicial rule-making in the modern legal system of Ukraine acquire particular importance in the context of the transformation of the national legal order and its gradual integration into the European legal space. Although the Ukrainian legal system traditionally belongs to the continental legal family, judicial practice – particularly the legal positions of the Supreme Court – as well as the application of the case law of the European Court of Human Rights, effectively form elements of precedent-based regulation.

Under modern conditions, judicial precedent functions not only as an instrument for interpreting legal norms but also as an important mechanism for ensuring the unity of judicial practice, legal certainty, and the predictability of court decisions. Through mechanisms such as the formation of legal positions, the generalization of judicial practice, and the mandatory consideration of conclusions of higher courts, the judiciary performs an indirect rule-making function that complements legislative activity.

Thus, judicial rule-making in Ukraine manifests itself in the development of legal positions that have guiding or binding significance for further judicial application. This contributes to the development of the national legal system, increases the effectiveness of law enforcement, and ensures the adaptation of legal regulation to new social challenges. At the same time, it remains essential to maintain a balance between the legislative and judicial branches so that judicial practice does not substitute the legislative process but functions as a mechanism for clarifying, developing, and ensuring the effective implementation of legal norms.

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