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CASE LAW IN UKRAINE: ON THE ISSUES OF ITS INTRODUCTION AND DEVELOPMENT IN THE ACTIVITY OF SUPREME COURT

1. INTRODUCTORY REMARKS

In the post-Soviet legal space there is a tendency according to which post-Soviet states refuse from the explanations of the supreme courts on the basis of summarizing the judicial practice. Such explanations of supreme courts on the basis of summarizing the judicial practice were not known for common law and civil law systems. Refusal from such general explanations by the Supreme Courts leads to an increase in the role and significance of the decisions of the supreme courts in specific cases for unifying judicial practice. This is done by giving the decisions of the supreme courts in specific cases the value of an example (sample) for the resolving of similar cases, that is, case law practice is introducing.

The issues of unifying judicial practice and the significance of the case law of supreme courts are also important for European legal systems. Preparatory materials¹ and the last Opinion No. 20² of the Consultative Council of European Judges (CCJE) entitled “On the role of courts with respect to uniform application of the law” are good confirmation of that.

In this regard, the experience of introducing and developing case law of the Supreme Court in Ukraine is interesting. There are observed various stages, each of which has certain features. This article is devoted to their highlights and analysis.

¹ See: Compilation of replies to the questionnaire for the preparation of the CCJE Opinion No. 20 (2017) entitled “The role of courts with respect to uniform application of the law”, <https://rm.coe.int/compilation-of-replies-to-opinion-no-20/1680764112> (accessed: 1.07.2018).

² See: Opinion № 20 “On the role of courts with respect to uniform application of the law”. Available at: <https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3> (accessed: 1.07.2018).

2. ISSUES OF THE PRECEDENT AND CASE LAW IN THE UKRAINIAN LEGAL DOCTRINE

The nature and the significance of the decisions of supreme courts traditionally has been researched by legal science with the considerable attention. However, there was formed an approach in the civil law doctrine according to which in these decisions does not see a precedential nature. Such decisions form the notion of “judicial practice” (“jurisprudence constante”, “rechtsprechung”, “settled jurisprudence”, “orzecznictwo”, “judicature”, “судова практика”). Also, in Soviet legal science categorically denied the precedent nature of the decisions of supreme courts, since it contradicted the principle of socialist legality.

Due to such doctrinal non-recognition and negation of the precedent nature of the decisions of supreme courts, judicial practice was forming and developing spontaneously without the scientific assistance in its requests. And the requests of the judicial practice were to develop scientific concepts, constructions and mechanisms that would ensure the binding nature of the decisions of the supreme courts in similar cases. They remain not developed enough until now.

In the Ukrainian legal doctrine, the issues of the precedent and case law practice are investigated in the writings of O. Dashkovska, N. Kuznetsova, L. Luts, M. Mazur, R. Maidanyk, B. Malyshev, O. Petryshyn, P. Rabinovych, Ya. Romanyuk, O. Svyatotsky, S. Shevchuk and others³.

In these researches, attention is drawn to the circumstances that cause the necessity and expediency of the functioning of a precedent in the legal system of Ukraine, in particular to the “low-quality system of legal acts (with gaps, duplications, collisions, etc.) and the need to preserve the essence of the judicial branch of power, which is intended not only to ensure the consideration of cases on justice, protection of the interests of the individual, but also to create a coherent, effective judicial practice with appropriate ensuring mechanism”⁴.

At the same time, positions about the inappropriateness and harmfulness of precedent and case law for Ukraine are also expressed, in particular, it is noted that “the introduction of a case law in Ukraine for the already established civil

³ For more details on doctrinal approaches to the normative nature of court decisions in the Ukrainian legal doctrine, see: S. Shevchuk, *Normative Acts of Judicial Power: The Evolution of Views in Ukrainian Jurisprudence*, “Law of Ukraine” 2013, issue 1, pp. 121–128, http://nbuv.gov.ua/UJRN/luk_2013_1_10 (accessed: 1.07.2018).

⁴ L. Luts, *Perspektyvy stanovlennia sudovoho pretsedentu yak dzhherela prava Ukrainy [Prospects for the formation of a judicial precedent as a source of law in Ukraine]*, “Visnyk tsentru suddivskykh studii” 2006, issue 6, p. 9, http://www.judges.org.ua/article/Vesnik_6.pdf (accessed: 1.07.2018); V. Kosovych, *Sudova praktyka yak zasib podolannia nedolikiv normatyvno-pravovykh aktiv Ukrainy [Judicial practice as a means to overcome the disadvantages of normative legal acts of Ukraine]*, “Visnyk Lvivskoho universytetu. Seriya yurydychna” 2015, issue 62, pp. 14–22, http://nbuv.gov.ua/UJRN/Vlnu_yu_2015_62_4 (accessed: 1.07.2018).

legal system, in the presence of detailed legislation, would lead to the emergence of a whole range of issues of a legal and doctrinal nature, in particular the correlation of the legal force of various sources of law. In Ukraine, as in other civil law countries, legal regulation is carried out by law, which can not be changed by court decisions⁵.

Legal scholars continue to contrast and differentiate between the concepts of “judicial precedent” and “judicial practice”. Judicial practice continues to be understood as “stable legal statements, developed by courts in the consideration of specific cases that become models for the application and interpretation of legal rules in the future when dealing with similar cases”⁶. According to N. Kuznetsova, “the influence of the results of judicial activity on the development of national legal systems is differently formalized: in the common law systems through precedents; in the civil law systems through judicial practice. In our legal literature, these forms fairly and substantiated do not identified equally”⁷.

We believe that the similarity of legal phenomena, which are termed “judicial practice” in civil law systems, and in common law systems – “precedent”, testifies to the expediency and necessity of using the unified concept of “case law practice” (“precedent practice”) to overcome their inadequately justified differentiation in modern reality.

In civil law countries, unlike common law, the nature of a court decision is manifested in the fact that it is adopted on the basis of legislative acts and is binding only to the parties in specific case. Other similar cases are solving on the grounds of the same legislative acts, the generality and abstractness of which allow to act on them. However, court decisions, especially of the highest courts, in complex cases that overcome the problems of legal uncertainty, are also taken into account and should be binding in dealing with similar cases.

Consequently, the use of the unified term “case law practice” will help to overcome the traditional distinction, according to which the precedent is unique to common law, and judicial practice – to the civil law systems.

On the grounds of the current trends of legal development, we can propose the following unified features of case law practice: its purpose is to unify judicial

⁵ Ya. Romaniuk, I. Beitsun, *Pravova pryroda oboviazkovosti rishen Verkhovnoho Sudu Ukrainy ta vdoskonalennia mekhanizmu zabezpechennia yednosti sudovoi praktyky* [The legal nature of the bindingness of the decisions of the Supreme Court of Ukraine and the improvement of the mechanism for ensuring the unity of judicial practice], “Pravo Ukrainy” 2012, issues 11–12, p. 128.

⁶ O. Petryshyn, *Sudova praktyka yak dzherelo prava v Ukraini: problemy teorii* [Judicial practice as a source of law in Ukraine: the problems of theory], “Pravo Ukrainy” 2016, issue 10, p. 21; B. Malyshev, *Sudova praktyka: poniattia, oznaky, struktura* [Judicial practice: notion, features, structure], “Chasopys Kyivskoho universytetu prava” 2005, issue 2, p. 26, http://kul.kiev.ua/images/chasop/2005_2/2005_2.pdf (accessed: 1.07.2018).

⁷ N. Kuznetsova, *Pravova pryroda rishennia Verkhovnoho Sudu Ukrainy* [The legal nature of the decision of the Supreme Court of Ukraine], “Pravo Ukrainy” 2016, issue 7, p. 66.

practice; is the result of the jurisdictional activity of courts; is created in specific court cases under conditions of legal uncertainty (gaps, vacuum, collision, rivalness, ambiguity, excessive abstractness and other legal defects); applies in such similar court cases where such problems of legal uncertainty occurs; its contents are legal positions (legal conclusions, “ratio decidendi”), which are examples of different degree of bindingness and persuasiveness; its forms are court decisions that are subject to official publication⁸.

It should be noted that the general theoretical researches of various legal phenomena, including case law practice, should not be scholastic and speculative, but rather – aimed at solving significant applied issues of judicial practice. Such significant applied issues are the research of a mechanism for ensuring of case law practice – a system of legal means that facilitate the realisation of its purpose, in particular, the means of ensuring the creation and development, means of ensuring bindingness and application of case law practice, means of ensuring unity case law practice, etc. The theoretical study of such a mechanism will promote and confirm the methodological and heuristic potential of the legal theory in the current conditions of legal development.

3. INTRODUCING AND DEVELOPMENT OF CASE LAW AT DIFFERENT STAGES OF ACTIVITY OF THE SUPREME COURT IN UKRAINE

An analysis of contemporary legislation and court practice of Ukraine makes it possible to distinguish certain stages in the introducing and development of case law in the activity of the Supreme Court in Ukraine. Such stages are primarily related to the adoption of appropriate amendments and supplements to the laws on the judiciary and the procedural codes of Ukraine.

Let’s consider consistently the peculiarities of the introducing and development of case law practice at these various stages⁹.

⁸ For more details, see: N. Stetsyk, *Pretsedentna sudova praktyka: teoretychni ta dydaktychni aspekty* [Case-law practice: theoretical and didactic aspects], (in:) *Problemy derzhavotvorennia i zakhystu prav liudyny v Ukraini*, Materialy XXIII zvitnoi naukovo-praktychnoi konferentsii (7–8 liutoho 2017) u 2-okh ch., 2017, Ch. 1, <http://law.lnu.edu.ua/wp-content/uploads/2016/03/Konferentsiya-2017-ч1.pdf> (accessed: 1.07.2018).

⁹ See the appendix to the article, which schematically describes these features at various stages.

3.1. IST STAGE – FORMALIZATION OF THE CASE LAW OF THE SUPREME COURT OF UKRAINE. INTRODUCTION OF CASE LAW IN ALL CATEGORIES OF COURT CASES

On 3 August 2010 came into force a new Law of Ukraine “On the Judiciary and Status of Judges” of 7 July 2010 № 2453-VI. By this law, decisions of the Supreme Court of Ukraine (here and after – SCU) in specific cases for the first time were given a binding and normative character. So, there was an supplement to all the procedural codes of Ukraine, according to which “the decision of the Supreme Court of Ukraine, adopted on the basis of the results of consideration of the application for review of the court decision on grounds of unequal use by the court (courts) of the cassation instance of the same substantive legal norm in similar legal relations, is binding for all subjects of authority that apply in their activities normative legal act that contains the specified legal norm, and for all courts of Ukraine. Courts are obliged to bring their judicial practice in line with the decision of the Supreme Court of Ukraine”¹⁰.

It should be noted that such a supplement of the new law on the judiciary and the status of judges to the procedural codes does not confirm the purposeful desire of the legislature to introduce case law. By the new law, the legislator in reality deprived the SCU of the powers to consider and resolve cases in cassation, an admission of court cases to the SCU was carried out on the initiative of the higher specialized courts through the appropriate filtration mechanism. At the same time, the SCU could only review cases of higher specialized courts in cases of unequal application of substantive legal norms, but not procedural legal norms. Thus, the SCU was essentially deprived of the authority to realise justice.

Therefore, in such circumstances, the formalization of bindingness and normativeness of the decisions of the SCU was intended to compensate for the essential deprivation of his powers and to demonstrate the importance of the SCU in the judicial system. Such processes were a manifestation of confrontation between the Administration of the President of Ukraine and the SCU and were criticized in the scientific and expert spheres.

However, despite this political component, the legal system of Ukraine for the first time formalized and officially recognized the case law nature of the decisions of the SCU.

The peculiarity of the introduction of case law in Ukraine was that it was immediately introduced in all categories of court cases, as opposed to some post-Soviet countries (Azerbaijan, Estonia, Latvia, Moldova), in which the introduction took place in separate types of judiciary.

¹⁰ *Pro sudoustrii i status soddiv* [On the Judiciary and Status of Judges], zakon Ukrainy vid 7 lypnia 2010 r. № 2453-VI, Ofitsiyniy visnyk Ukrainy 2010, № 55/1, stor. 7, <http://zakon5.rada.gov.ua/laws/show/2453-17> (accessed: 1.07.2018).

Thus, in Ukraine, case law has begun to emerge. In the official edition of the SCU, during this period, extracts from 87 court decisions from a total of 647 cases were published, including 20 extracts from 142 civil cases, 23 extracts from 268 administrative cases, 17 extracts from 19 criminal cases, 27 extracts out of 170 commercial cases¹¹.

In connection with such statistics, questions arise as to what criteria the relevant structural subdivisions of the SCU selected such extracts for their official publication? It is obvious that the decisions in complex court cases, in which raised issues of legal uncertainty and which would facilitate similarity of judicial practice, should have been officially published primarily.

However, the analysis of such extracts in relevant court cases suggests that not all of them contained provisions of a precedent nature. In the overwhelming majority of them, the SCU reproduced the relevant legislative provisions and stated a simple mistake in its application. Only in some decisions the SCU found problems of legal uncertainty and formed the corresponding legal positions, which were the content of its case law.

In this regard, we substantiate why and in what the precedent nature of the decisions of the SCU should be manifested. Precedential decisions of the SCU should be primarily decisions in complex cases, in which the problems of legal uncertainty are revealed and solved. Such complex court cases can be solved in different ways by different courts. Hence, the different solution of such complex court cases can lead to the adoption in similar cases different decisions with various legal consequences, that is, to a variety of court decisions, to the violation of the unity of judicial practice.

Therefore, the ground for solving a certain complex case should be relevant not only in this complicated case, in which the problem of legal uncertainty was resolved, but also for other similar complex cases, in which the same problems of legal uncertainty will be identified and resolved. Therefore, in order to prevent and overcome the differences in court decisions, and thus to unify courts practice, the ground for the solution of a complex court case should have a value of example (sample).

As an example of the precedential decision of the SCU, in which the problem of legal uncertainty was identified and the legal position that contributed to the unification of judicial practice, it should be noted the Resolution of 4 April, 2011 in case № 5-1cc11.

In this criminal case, the person was prosecuted for the manufacture and possession of narcotic drugs, and, in particular, additional sanction was imposed in the form of confiscation of property. Such confiscation of property was specifically foreseen by the sanction of Part 2 of Article 307 of Criminal Code of Ukraine

¹¹ *Rishennia Verkhovnoho Sudu Ukrainy [Decisions of the Supreme Court of Ukraine]*, Ofitsiine vydannia, 2011, № 1 (22); 2011, № 2 (23); 2012, № 1 (24), [http://www.scourt.gov.ua/clients/vsu/vsu.nsf/\(firstview\)/rish.html?OpenDocument&Count=1000](http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(firstview)/rish.html?OpenDocument&Count=1000) (accessed: 1.07.2018).

for this crime. However, Article 59 of the General Part of the Criminal Code of Ukraine provided that confiscation of property could be imposed only for selfish crimes. Consequently, similar criminal cases were resolved in different ways, in some, the courts used the provision of Article 59 as a general rule and did not impose the confiscation of property, while the other courts – applied the provision of Article 307 as a special norm and imposed the confiscation of property.

Consequently, the SCU stated in this case the collision between the provisions of the General and Special Parts of the Criminal Code of Ukraine and preferred the provision of the General Part of the Criminal Code of Ukraine. In the legal position, the SCU concluded that “the court when imposing a punishment must come not only from the limits of punishment of the sanction established in the relevant article of the Special Part of the Criminal Code of Ukraine, but also those norms of the General Part of the Criminal Code of Ukraine, which regulate the purposes, the system of punishment, the grounds, the procedure and peculiarities of the application of its separate species, as well as other issues related to the imposition of punishment are regulated, which may influence the choice (election) by a court of its certain types and extent, including those provisions provided for in part two of Article 59 of the Criminal Code of Ukraine”¹². Thus, the legal position was formulated as follows: “confiscation of property can not be applied as an additional punishment if the crime is not committed with selfish motives, even if the sanction of the article of the Criminal Code of Ukraine provides for such punishment to be mandatory”¹³.

It is worth noting that subordinate courts applied this legal position in similar criminal cases. Thus, for a similar crime, the Ivano-Frankivsk District Court in the case № 344/1427/13-c on 12 August 2013 did not impose additional punishment in the form of confiscation of property, taking into account the legal position set forth in the Resolution of SCU of 4 April 2011 in the case No. 5-1cc11, noted that the court did not appoint an additional punishment provided for in the sanctions article in the form of confiscation of property in cases when the crime was committed not for selfish motives¹⁴.

In connection with the introduction of case law in Ukraine, the issue of its addressees is important, that is, the circle of persons who are subject to binding decisions of the SCU. The legislative provision has established the addressees of the decisions of the SCU not only judicial bodies that will consider and solve similar

¹² Postanova Verkhovnoho Sudu Ukrainy vid 4 kvitnia 2011 u spravi № 5-1ks11, Yedynyi derzhavnyi reistr sudovykh rishen, <http://www.reyestr.court.gov.ua/Review/14887470> (accessed: 1.07.2018).

¹³ Postanova Verkhovnoho Sudu Ukrainy vid 4 kvitnia 2011 u spravi № 5-1ks11, Yedynyi derzhavnyi reistr sudovykh rishen, <http://www.reyestr.court.gov.ua/Review/14887470> (accessed: 1.07.2018).

¹⁴ Vyrok Ivano-Frankivskoho miskoho sudu vid 12 serpnia 2013 u spravi № 344/1427/13-k, Yedynyi derzhavnyi reistr sudovykh rishen, <http://reyestr.court.gov.ua/Review/32969386> (accessed: 1.07.2018).

cases, but all subjects of power. In this regard, doctrinal issues arise as to whether can be called as precedent decisions of supreme courts that apply to other non-judicial authorities that do not consider and can not solve similar cases?

Despite the fact that, according to the classical doctrine of the precedent, he matters to the judicial bodies in similar cases, we still believe that the precedential nature of supreme courts' decisions have to be manifested in their dissemination also to other non-judicial authorities. For example, the supreme court may reveal in the case at hand a problem of legal uncertainty, in particular an ambiguous legal provision, and in connection with the consideration of this case, to clarify its content. Other authorities and persons in other, non-court cases may also meet this legal provision, on which the supreme court has made an explanation.

Should such other authorities and persons apply the decision of the supreme court, which contains such clarification? We believe that the modern understanding of the precedent and case law should cover the necessity of its application by such other authorities and persons as well. It will promote both the legal certainty for the participants of social relations and the unity not only of the judicial practice, but also legal practice at all.

3.2. IIND STAGE – CONCRETIZATION OF THE ADDRESSEE AND THE SUBJECT OF CASE LAW. OFFICIAL PUBLICATION OF DECISIONS AND LEGAL CONCLUSIONS. INITIAL SYSTEMATIZATION OF LEGAL CONCLUSIONS

This stage of the development of case law begins on 13 November 2011, from the date of entry into force of the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on the Consideration of Cases by the Supreme Court of Ukraine” of 20 October 2011 № 3932-VI. By this law all procedural codes of Ukraine were amended and supplemented with the following provision: “to decide what legal norm should be applied in regard to particular legal matters, court is obliged to take into the consideration the conclusions of the SCU, set in the decisions, issued as the result of the judicial review of statements requesting the review of the court decision”¹⁵.

First of all, these legislative amendments were caused by public criticism of the previous law on the judiciary and the status of judges and aimed at demonstrating the restoration and enhancement of the status of the SCU in the judicial system.

¹⁵ *Pro vnesennia zmin do deiakyykh zakonodavchykh aktiv Ukrainy shchodo rozghliadu sprav Verkhovnym Sudom Ukrainy [On Amendments to Certain Legislative Acts of Ukraine on the Consideration of Cases by the Supreme Court of Ukraine], zakon Ukrainy vid 20 zhovtnia 2011 № 3932-VI, Ofitsiyniy visnyk Ukrainy 2011, № 89, stor. 11, <http://zakon3.rada.gov.ua/laws/show/3932-17> <http://zakon5.rada.gov.ua/laws/show/2453-17> (accessed: 1.07.2018).*

It is noteworthy that this legislative provision concretised the addressee and the subject of the case law of the SCU. So, if in the earlier provision the legislator has established the addressees of the case law to all subjects of power, in this legislative provision the addressee is detailed and more attention is already accentuated on the judicial authorities.

Also, if, in accordance with the previous provision, a whole decision of the SCU was established as binding, then, after the amendments introduced, the “conclusion, set in the decision” became binding.

In this regard, it should be noted that the subject of bindingness of precedent is the ground for resolving a complex case, its problem of legal uncertainty. Such a basis in the legal doctrine in different legal systems is called differently. In common law doctrine, it is named as the “ratio decidendi”, in Ukrainian legal doctrine it is generally called as a “legal position”, and less often as a “legal statement”. From where and why the legislator decided to establish the term “legal conclusion” is unknown, since this notion in Ukrainian legal science was not used at that time.

We believe that the term “legal position” is stable and habitual for legal science and is more in line with the nature of case law. Although the subject of the case law of the SCU had to be detailed, the introduction of the term “legal conclusion” seems unsuccessful.

Also, in accordance with this law, the publishing of decisions of the SCU was improved. They were to be published on the official website of the SCU no later than ten days after their adoption. Thus, on the official website of the SCU, there were introduced sections “Supreme Court decisions of Ukraine” and “Legal conclusions of the Supreme Court of Ukraine”¹⁶.

Thus, at the official website of the SCU during this period, 2942 decisions were published in various types of court cases, 657 of them – in civil cases, 1790 of them – in administrative cases, 367 of them – in commercial cases and 128 of them – in criminal cases. Since not all of these court decisions were of a precedential nature, in its separate section “Legal Conclusions of the Supreme Court of Ukraine” during this period, 107 legal conclusions were posted.

It should be noted that in this period of the development of case law of the SCU, the argumentation of its legal positions (legal conclusions) was mainly limited to a formal reference to the current legislation without the involvement of non-legal arguments.

For example, in one of civil cases, the SCU, justifying its legal position, as arguments only mentions the current legislation. This civil case concerned the refusal of the consumer of communal services to conclude an agreement

¹⁶ *Pravovi vysnovky Verkhovnoho Sudu Ukrainy [Legal Conclusions of the Supreme Court of Ukraine]*, Ofitsiyni veb-sait Verkhovnoho Sudu Ukrainy, [http://www.scourt.gov.ua/clients/vsu/vsu.nsf/\(documents\)/A041E3E563C3DF0DC2257B09003D4F29?OpenDocument&Type=2012&](http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/A041E3E563C3DF0DC2257B09003D4F29?OpenDocument&Type=2012&) (accessed: 1.07.2018).

on the grounds that its concluding is the subject to the principle of freedom of contract. The provider of communal services has appealed to the court about the obligation of the defendant to conclude the relevant contract. In court practice, there was a misunderstanding, in some cases – the courts refused to satisfy such a claim, justifying its contradiction with the principle of freedom of contract, while others – satisfied, referring to the fact that there are special acts of legislation, according to which the consumer has a duty to conclude such a contract.

The SCU on 10 October 2012 in the case № 6-110cc12 formed the legal position according to which “the conclusion of a contract for the provision of housing and communal services is the obligation of the consumer, provided the contract proposed by the executor is in line with the model contract. The consumer’s rejection from the conclusion of the contract of the service in this case is contrary to the requirements of the legislation”¹⁷. However, the argumentation in this case was limited only to the citation of the legislation without doctrinal justification of this problem of legal uncertainty.

It should be noted that, as in the first and in the second period of the introduction and development of the case law of the SCU, the nature of the formulation of the mandatory case law was established absolutely (rigidly) without the possibility of departing from previous decisions, as by the SCU itself, and by lower courts.

In the legal doctrine, attention is drawn to such a lack of case law, as opposed to legislation, as the complexity of finding the necessary positions in a large number of court decisions. Therefore, at a certain stage of the development of case law, there is an objective need for its systematic ordering for effective use and application.

Therefore, in the Ukrainian legal system the first attempts were made to systematize the legal conclusions of the SCU. Such systematization of legal conclusions was initiated by the Office for the Study and Analysis of Judicial Practice by type of jurisdiction, chronological and subject criteria. For example, legal conclusions in civil cases were organised in half a year from 2010 to 2017, herewith their incorporation was carried out under various institutes of civil law¹⁸. In each of the legal conclusions, the details of the relevant judicial decision were indicated. Such systematization of legal conclusions greatly facilitated the search for case law and was positively evaluated in legal practice.

¹⁷ Postanova Verkhovnoho Sudu Ukrainy vid 10 zhovtnia 2012 u spravi № 6-110tss12, Yedynyi derzhavnyi reistr sudovykh rishen, <http://reyestr.court.gov.ua/Review/26497408> (accessed: 1.07.2018).

¹⁸ Vysnovky Verkhovnoho Sudu Ukrainy u tsyvilnykh spravakh [Conclusions of the Supreme Court of Ukraine in civil cases], Ofitsiyniy veb-sait Verkhovnoho Sudu Ukrainy, [http://www.scourt.gov.ua/clients/vsu/vsu.nsf/\(documents\)/B3BAA698A76892E0C2257B7B004B2029](http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/B3BAA698A76892E0C2257B7B004B2029) (accessed: 1.07.2018).

3.3. THIRD STAGE – CHANGE OF CASE LAW FROM ABSOLUTE (RIGID) TO RELATIVE (SOFT). POSSIBILITY OF DEPART FROM PREVIOUS CASE LAW. INTRODUCTION OF THE NOTION OF “LEGAL POSITION”

This period of the development of case law practice starts on 28 March 2015, from the moment of coming into force the Law of Ukraine “On Ensuring the Right to a Fair Trial” of 12 February 2015 № 192-VIII, and then the adoption of the new Law of Ukraine “On the Judiciary and Status of Judges” of 2 June 2016 № 1402-VIII.

By these new laws restored the possibility for the SCU to review the decisions of the courts of cassation in the event of the unequal application of not only substantive, but also procedural legal norms.

It also provided for such an additional ground for reviewing the decisions of the cassational courts as their non-compliance with the conclusion set forth in the decision of the SCU. Such an additional ground was to ensure the implementation of the legal conclusions of the SCU.

The previous SCU during this period continued to exercise its powers and adopted a total of 3234 resolutions, of which 1193 – in civil, 1455 – in administrative, 125 – in criminal, 461 – in commercial cases. At the same time, only 30 legal opinions are posted on the official web site during this period.

The legislative novelty regarding case law was a the following provision “the court has the right to depart from the legal position set forth in the conclusions of the SCU, with simultaneous indications of the appropriate motives”¹⁹.

In this regard, we note that according to the legal doctrine, the “vertical” precedent can be as absolute (“rigid”), that is, the court, under no circumstances and exceptions, can not adopt another decision, and relative (“soft”), that is, under certain circumstances, the court may adopt another, different decision in a similar case.

However, in legal literature, the issue of the admissibility of the relative (“soft”) kind of the “vertical” precedent is discussed, because such relativeness of precedent depreciate the classic English doctrine of the precedent. This gives rise to many scholars to doubt in the precedential nature of court decisions that may not be binding for lower courts. According to this position, such court decisions can not be precedents, because they do not correspond to the strict doctrine of precedent – “stare decisis” which clearly means stand on resolved.

We believe that the nature of the precedent, which was formed primarily in English law, and which had absolute force, in modern conditions, is changing and should correspond to modern legal realities. In modern legal realities, the precedent acts not only in common law countries, but also in civil law countries,

¹⁹ *Pro zabezpechennia prava na spravedyvyi sud [On ensuring the right to a fair trial]*, zakon Ukrainy vid 12 liutoho 2015 r. № 192-VIII, Ofitsiyni visnyk Ukrainy 2015, № 17, stor. 24, <http://zakon2.rada.gov.ua/laws/show/192-19> (accessed: 1.07.2018).

and therefore its doctrine must take into account the current needs and demands of judicial practice. And modern needs and demands of the judicial practice require the flexibility of the precedent, which implies the possibility and the admissibility of its change and development under certain conditions not only by higher courts, but also by lower ones. Therefore, in modern conditions, the doctrine of “stare decisis” is not so rigid, but more flexible, and in the legislation of some post-soviet countries it is established that the court decisions of the supreme courts are not so binding, as are to be taken into account.

It should be noted that after the amendments and supplements to the procedural codes, there is a certain diversity in the use of some terms related to the functioning of case law, in particular “binding”, “taken into account”, “legal conclusion” and “legal position”.

For example, concerning the nature of legal conclusions, the legislator used several terms – “binding” and “take into account”. For all subjects of power, the conclusion of the SCU was established as a “binding”, and in relation to other courts of general jurisdiction, “to be taken into account”. Such a diversity in the use of terms in relation to the nature of legal conclusions can make ambiguity in understanding their nature.

It should be noted that the legislator also used the term “legal position” along with the term “legal conclusion”. Thus, the previous provision used the construction “conclusion contained in the decision of the Supreme Court of Ukraine”, and in this statement – “the legal position contained in the conclusions of the Supreme Court of Ukraine”.

From these formulations, it follows that the legal conclusion and legal position are different notions, while the legal conclusion is a broader notion, since it includes a legal position. We believe that the notions of “legal conclusion” and “legal position” are identical notions, since they denote the same legal phenomenon – the content of the court decision, on the basis of which solves the problem of legal uncertainty in a complex court case. This plurality of terms makes some ambiguity and confusion, since it makes unnecessary complication of legal terminology. Therefore, we consider it more expedient to use only the term “legal position”.

3.4. IVTH STAGE – FORMATION OF CASE LAW OF NEW SUPREME COURT. RETURN TO THE ABSOLUTE (RIGID) CASE LAW. INTRODUCTION OF ADDITIONAL CASE LAW MECHANISMS

The last period of the development of case law in Ukraine begins on 15 December 2017, since the entry into force of certain provisions of the Law of Ukraine “On the Judiciary and Status of Judges” of 2 June 2016 № 1402-VIII and the Law of Ukraine “On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine and other legislative acts” of 10 October 2017 № 2147-VIII.

The adoption of these laws was caused by the need for normative ensuring of the newly formed Supreme Court (in the official name without the word “Ukraine”, here and after – SC) and they introduced significant changes in the procedural codes of Ukraine and other legislative acts. Thus, the new SC began to work as the supreme court in the Ukrainian judicial system, which ensures consistency and unity of judicial practice. The changed composition of the SC now includes the Grand Chamber, the Administrative Cassational Court, the Civil Cassational Court, the Commercial Cassational Court and the Criminal Cassational Court.

In connection with such a new composition of the SC, the scope of his case law will now include not only the decisions of the Grand Chamber, which is essentially the equivalent of the former SCU, but also the decisions of the cassation courts in its composition. In such conditions, the scope of the case law of the new SC is greatly increased and will require proper unifying and systematization.

In the current versions of the Law of Ukraine “On the Judiciary and Status of Judges” and all procedural codes, the wording of the case law of the SC does not allow the possibility to depart from the case law, as was at previous versions. These provisions are formulated in the final form as follows: “the conclusions on the application of the legal norms, set forth in the decisions of the Supreme Court, are binding on all subjects of power, which apply in their activities a legal act containing the relevant legal norms” and “the conclusions regarding the application of the legal norms, set forth in the decisions of the Supreme Court, are taken into account by other courts in the application of such legal norms”²⁰.

It is also necessary to note that the Plenum to the SC has been reinstated to adopt explanations of the recommendatory nature by the results of the analysis of judicial statistics and the summarizing of judicial practice of the application of legislation.

The impossibility of departing of lower courts from the legal position of the new SC and returning him the power to explain the legislation on the basis of the summarizing of judicial practice is primarily due to the efforts of the new SC to eliminate corruption risks in the judicial system and an attempt to discipline lower courts. However, we believe that this goal should be achieved by other measures, and not by violating the principle of the independence of judges, which may indicate a return to the practice of the Soviet period.

²⁰ *Pro sudoustrii i status suddiv [On the Judiciary and Status of Judges]*, zakon Ukrainy vid 02 chervnia 2016 № 1402-VIII, Ofitsiyni visnyk Ukrainy 2016, № 56, stor. 9, <http://zakon3.rada.gov.ua/laws/show/1402-19> (accessed: 1.07.2018); *Pro vnesennia zmin do Hospodarskoho protsesualnoho kodeksu Ukrainy, Tsyvilnoho protsesualnoho kodeksu Ukrainy, Kodeksu administratyvnoho sudochynstva Ukrainy ta inshykh zakonodavchykh aktiv [On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine and other legislative acts]*, zakon Ukrainy vid 3 zhovtnia 2017 № 2147-VIII, Ofitsiyni visnyk Ukrainy 2017, № 96, stor. 11, <http://zakon5.rada.gov.ua/laws/show/2147-19> (accessed: 1.07.2018).

However, if the new legislation excludes the possibility of departing from the legal conclusions of the SC by other courts, then in relation to the departure from the legal conclusions by SC itself, such a possibility is foreseen. In particular, the court hearing the case in cassation as a member of the panel of judges, the chamber or the joint chamber shall refer the case to the Grand Chamber of the SC, if such a panel (chamber, the joint chamber) considers it necessary to deviate from the conclusion on the application of the legal norm in similar legal relations, set forth in the previously adopted decision of the Grand Chamber.

And in the practice of the Grand Chamber of the SC there are already court cases in which it departed from the previous legal position of the SCU. Thus, in a number of cases, the Grand Chamber of the SC has already adopted decisions, in which it departed from the previous conclusions. For example, in the decisions of the previous SCU, there was a legal position according to which the consumer was to pay a fee for lodging an appeal and was exempted from payment of court fees only for filing a claim to the court of first instance.

Instead, the Grand Chamber of the SC changed this legal position and substantiated that the consumer is also exempted from court fees for lodging a claim to the court of appeals, noted that “departing from the practice of the Supreme Court of Ukraine, the panel of judges of the Grand Chamber of the Supreme Court holds that the violated rights could be protected as by court of first instance (upon filing a claim), and as at subsequent stages of the civil proceeding, namely during an appeal review. These stages of judicial protection are the only civil proceeding, the task of which is the fair consideration and resolving of civil cases in order to protect the violated right”²¹.

One of the introduced novelties is also the introduction of the term “exceptional legal problem”. Thus, the reason for the transfer of the case to the Grand Chamber is the fact that it is an exceptional legal problem and if such a transfer is necessary for the development of law and the formation of a unified judicial practice. Although in the vast majority of cases the Grand Chamber is still refusing to review the case on the grounds of the absence of an exceptional legal problem, yet in several cases, such problem was revealed and overcome.

For example, in court practice, there was a misunderstanding about the possibility of appealing against the decisions of an investigator-judge, if it is not explicitly provided for in the Criminal Procedure Code. Some appellate courts were refusing to open an appellate proceeding, referring to Part 4 of Art. 399 of the CPC, while others, were opening, substantiating by the general principles of procedural law and the right to appeal (point 17 part 1 of Article 7, and Part 1 of Article 24 of the CPC). In this regard, the Grand Chamber in its decision of 23 May 2018, No. 13-19x18, stating the existence of an exclusive legal problem, decided that,

²¹ Postanova Verkhovnoho Sudu vid 21 bereznia 2018 roku u spravi № 14-57tss18, Yedynyi derzhavnyi reiestr sudovykh rishen, <http://reyestr.court.gov.ua/Review/73054749> (accessed: 1.07.2018).

in the case of the adopting by a investigator-judge of decision, which is not foreseen by the criminal procedural rules, referred to in part 3 Art. 309 of the CPC, the court of appeal has no right to refuse to verify its legality, referring to the requirements of Part 4 of Art. 399 CPC. The right to appeal against such a court decision shall be secured on the basis of point 17, part 1, Article 7 and part 1 of Art. 24 CPC that guarantee it²².

It is worth paying attention to the fact that the structure of decisions of the Grand Chamber of the SC has qualitatively changed. The clear placement of the text of the decisions, in which the clearly structured statements on the history of the case, the arguments of the participants in the case, the position of the SC, in particular, the assessment of the arguments of the participants in the case and the conclusions of the courts of the first and appellate instances, conclusions on the results of consideration of the cassation complaint, conclusions about the correct application of the law, etc., the legal analysis of the legal positions of the SC greatly facilitates.

Also worth paying attention to the improving the quality of the argumentation of legal positions, which is not only limited to indicating legislation provisions, but also involves the use of the principles of law and legal doctrine. Thus, in the review of the case in which the court of first instance adopted an extra-judicial decision in the absence of the defendant, and then in the appeal review he was refused to apply the claim limitations, the Grand Chamber of the Supreme Court used not only the legislative provisions. The Grand Chamber argued in particular that “the creation of equal opportunities for the participants in the proceeding for access to the courts and to realize and protect of their rights is part of the guarantees of fair justice, in particular the principles of equality and competition of the parties. A defendant who was not properly informed (in accordance with the requirements of the procedural law) of the time and place of the trial in the court of first instance has no equal opportunities with the claimant to submit evidence, to investigate and prove to the court their convictions, and can not equalize with the claimant to prove in the court of first instance those circumstances which he refers to as grounds for his objections”²³.

Also, the abovementioned laws introduced a number of novelties concerning the functioning of the case law of the Supreme Court, in particular, the plenum of the Supreme Court was given powers to systematize and promulgate legal positions, and in the administrative procedure, the institute of exemplary and typical cases was introduced.

²² Postanova Verkhovnoho Sudu Ukrainy vid 23 travnia 2018 roku № 13-19ks18, Yedynyi derzhavnyi reistr sudovykh rishen, <http://www.reyestr.court.gov.ua/Review/74475877> (accessed: 1.07.2018).

²³ Postanova Verkhovnoho Sudu Ukrainy vid 17 kvitnia 2018 roku № 14-59tss18, Yedynyi derzhavnyi reistr sudovykh rishen, <http://reyestr.court.gov.ua/Review/74963810> (accessed: 1.07.2018).

4. CONCLUSIONS

Summarizing the study and analysis of the introduction and development of the case law of the Supreme Court in Ukraine, it is worth noting some conclusions.

The issues of case law in the legal doctrine of Ukraine remain insufficiently developed. Traditional doctrinal delimitation and contrasting case law and judicial practice leads to refuse of taking into account the positive experience of the functioning of case law in common law countries. Taking into account such experience would help to satisfy the demands of the court practice in raising the significance of the decisions of supreme courts in similar cases.

In Ukraine, as in many post-Soviet countries, there is a tendency to refuse explanations of legislation on the basis of summarizing of judicial practice and in this connection increasing the importance and role of decisions of the supreme courts in specific cases for unifying judicial practice. This tendency in Ukraine was manifested in the formalization and official recognition of the binding and normative nature of the decisions of the supreme courts in specific cases.

Both the positive and the negative aspects are observed in the introducing and development of the case law of the Supreme Court in Ukraine.

Positive aspects include the official recognition of the actual impact of the decisions of the Supreme Courts on similar cases and, in this connection, the gradual development of a mechanism for the ensuring of case law. Means of its ensuring are gradually improving, in particular means of accessibility (publishing), of consistency (systematization), of realization and of development etc. All this effectively contributes to the unifying judicial practice in Ukraine.

Negative moments are observed in the spontaneity and inconsistency of the introduction and development of case law, which is manifested in particular in the frequent opposing amendments and supplements to the nature of case law (first rigid, then soft, and now rigid again), in the use of ambiguous terminology (“legal conclusion” and “legal position”, “taking into account” and “obligatory”), low quality of argumentation of legal positions etc.

The activity of the new Supreme Court confirms the gradual increase in the efficiency of its case law, the structure and content of its precedential decisions become more qualitative, its legal positions begin to be well argued and effectively applied by lower courts. At the same time, the problems encountered by the new Supreme Court are the consistency of its case law with the case law of the previous Supreme Court of Ukraine, as well as its consistency within the Supreme Court itself – its Grand Chamber and the relevant cassation courts.

TAB	INTRODUCING AND DEVELOPMENT OF CASE LAW IN THE ACTIVITY OF THE SUPREME COURT IN UKRAINE	
stages	content of the legislative provision	features at the appropriate stages
1st Stage from 3 August 2010	Law of Ukraine “On the Judiciary and Status of Judges” of 7 July 2010 № 2453-VI	
	<p><i>“The decision of the Supreme Court of Ukraine, adopted on the basis of the results of consideration of the application for review of the court decision on grounds of unequal use by the court (courts) of the cassation instance of the same substantive legal norm in similar legal relations, is binding for all subjects of authority that apply in their activities normative legal act that contains the specified legal norm, and for all courts of Ukraine. Courts are obliged to bring their judicial practice in line with the decision of the Supreme Court of Ukraine”.</i></p>	<ul style="list-style-type: none"> – formalization of the bindingness and normativeness of the decisions of the Supreme Court in specific cases; – introduction of case law in all categories of court cases; – the addressee of the case law has been established all subjects of powers and all courts; – the subject of bindingness of case law was established the decision of the Supreme Court of Ukraine in general; – there was no possibility of a departure from case law.
2nd Stage from 13 November 2011	Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on the Consideration of Cases by the Supreme Court of Ukraine” of 20 October 2011 № 3932-VI	
	<p><i>“To decide what legal norm should be applied in regard to particular legal matters, court is obliged to take into the consideration the conclusions of the Supreme Court of Ukraine, set in the decisions, issued as the result of the judicial review of statements requesting the review of the court decision”</i></p>	<ul style="list-style-type: none"> – concretization of the addressee of case law to the judicial authorities; – detailing of the subject of bindingness of case law to the “conclusions set forth in the decisions”; – the official publication of its decisions and legal conclusions on the website of the Supreme Court of Ukraine is foreseen; – initial systematization of legal conclusions.
3d Stage 28 March 2015	Law of Ukraine “On Ensuring the Right to a Fair Trial” of 12 February 2015, № 192-VIII, Law of Ukraine “On the Judiciary and Status of Judges” of 2 June 2016 № 1402-VIII	
	<p><i>“The conclusion on the application of the legal norm set forth in the decision of the Supreme Court of Ukraine should be taken into account by other courts of general jurisdiction in the application of such legal norms. A court has the right to depart from the legal position set forth in the conclusions of the Supreme Court of Ukraine, with simultaneous indications of the appropriate motives”</i></p>	<ul style="list-style-type: none"> – the possibility of departing from the case law in certain conditions is provided; – the term “legal position” is introduced; – the possibility of challenging and reviewing the decisions of the courts of cassation on the basis of their non compliance with the legal conclusions of the Supreme Court of Ukraine.

4th Stage 15 December 2017	<i>Law of Ukraine “On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine and other legislative acts” of 10 October 2017 № 2147-VIII</i>
	<p><i>“The conclusions on the application of the legal norms, set forth in the decisions of the Supreme Court, are binding on all subjects of power, which apply in their activities a legal act containing the relevant legal norms”</i></p> <p><i>“The conclusions regarding the application of the legal norms, set forth in the decisions of the Supreme Court, are taken into account by other courts in the application of such legal norms”</i></p> <ul style="list-style-type: none"> – the creation of the new Supreme Court consisting of the Grand Chamber and the relevant cassation courts; in this connection, the increasing of the extent of case law; – introduction of the notion of “exceptional legal problem” as the basis for the transfer of the case to the Grand Chamber of the Supreme Court; – the possibility of departing from the legal conclusions by the Supreme Court alone and the abolition of the possibility of departing from its legal conclusions from other judicial bodies; – the giving powers to the Plenum of the Supreme Court to systematize and publish legal positions; – the return to the Plenum of the Supreme Court of the power to explain legislation on the basis of summarizing of judicial practice; – the introduction in the administrative proceedings the institution of model and typical cases, similar to a case law practice.

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CASE LAW IN UKRAINE: ON THE ISSUES OF ITS INTRODUCTION AND DEVELOPMENT IN THE ACTIVITY OF SUPREME COURT

Summary

The article covers the doctrinal issues of judicial precedent and case law in the legal doctrine, substantiates the need for formalization and official recognition of the actual role of the decisions of the supreme courts in similar cases.

Traditional doctrinal delimitation and contrasting case law and judicial practice leads to refuse of taking into account the positive experience of the functioning of case law in common law countries. Taking into account such experience would help to satisfy the demands of the court practice in raising the significance of the decisions of the supreme courts in similar cases.

In Ukraine, as in many post-Soviet countries, there is a tendency to refuse explanations of legislation on the basis of summarizing of court practice, and at the same time formalization and official recognition of the bindiness and normativity of decisions of the supreme courts in specific cases.

In this regard, the peculiarities of the introducing and development of the case law of the Supreme Court in Ukraine at various stages are analyzed. Also highlighted their positive and negative aspects.

KEYWORDS

case law, precedent, judicial practise, supreme court of Ukraine, proceedings, unification of court practice, judicial reform in Ukraine

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orzecznictwo, precedens, praktyka sądowa, Sąd Najwyższy Ukrainy, postępowanie, ujednolicenie praktyki sądowej, reforma sądowa na Ukrainie