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Judicial precedent and practice of the ECHR in criminal law

Судовий прецедент та практика ЄСПЛ в кримінальному праві

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Written by:

Habib Rahim Jafarov⁸⁶<https://orcid.org/0000-0002-4631-9469>**Dmytro Tsekhan**⁸⁷<https://orcid.org/0000-0001-6503-6985>**Vasyl Lutsyk**⁸⁸<https://orcid.org/0000-0002-0974-4714>**Dmytro Baranenko**⁸⁹<https://orcid.org/0000-0002-9626-9607>

Abstract

The source of law, the case-law of the European Court of Human Rights (hereinafter – the ECtHR), is playing an increasingly significant role in the practice of judicial proceedings in Ukraine. The activities of the ECtHR significantly affect the implementation of the principle of the rule of law in Ukraine in criminal proceedings. Therefore, the phenomenon of judicial precedent and the application of ECtHR practice in criminal law requires comprehensive analysis. The work aims to study the case law and practice of the ECHR in criminal law, problems of theory and practice of application of court precedents by national courts, and ways to solve them. The research methodology consists of such methods as historical and legal; comparative law; formal and logical; empirical; cognitive; method of analogy; synthesis method; method of analysis. The value of ECtHR decisions is that such decisions, more quickly than other criminal procedural means, make adjustments to the law enforcement process of public authorities, thus improving the mechanism of criminal procedural regulation to guarantee conventional and constitutional human rights. In addition, the recognition of the case law of the ECtHR as a source of law is necessary for the adaptation of national legislation of Ukraine to the legislation

Анотація

В практиці судочинства України все більш вагому роль відіграє джерело права – прецедентна практика Європейського суду з прав людини (далі – ЄСПЛ). Діяльність ЄСПЛ суттєво впливає на забезпечення реалізації принципу верховенства права на теренах України в кримінальному процесі. Тому, феномен судового прецеденту та застосування практики ЄСПЛ в кримінальному праві потребує комплексного аналізу. Метою роботи є дослідження судового прецеденту та практики ЄСПЛ в кримінальному праві, проблем теорії та практики застосування судових прецедентів національними судами та шляхів їх вирішення. Методологією дослідження складають такі методи як історико-правовий; порівняльно-правовий; формально-логічний; емпіричний; пізнавальний; метод аналогії; метод синтезу; метод аналізу. Цінність рішень ЄСПЛ полягає в тому, що такі рішення більш швидко, ніж інші кримінальні процесуальні засоби, вносять корективи у процес правозастосування державних органів, удосконалюючи тим самим механізм кримінального процесуального регулювання щодо гарантування конвенційних та конституційних прав людини. Крім того, визнання практики Європейського суду з прав

⁸⁶ Ph.D. in Law, Associate Professor of the Department of Criminal Law and Criminology, Baku State University, Baku, Azerbaijan Republic.

⁸⁷ Doctor of Legal Sciences, Associate Professor of the Department of Criminalistics of National University «Odesa Law Academy» (Ukraine).

⁸⁸ Ph.D. in Law, Associate Professor, Head of the Department for the Protection of Whistleblowers and Corruption Reporting of the Department on Prevention and Detection of Corruption in the National Agency on Corruption Prevention, Ukraine.

⁸⁹ Doctor of Legal Sciences, Associate Professor, Head of the Department of Theory and History of State and Law of Admiral Makarov National University of Shipbuilding (Ukraine).

of the European Union. Although legal precedent is not officially recognized as a source of law in Ukraine, the decision of the ECtHR recognizing case law can be considered in Ukraine as a rule of law.

Keywords: precedent, sources of law, ECHR, case law of the ECHR, criminal law.

Introduction

The dynamic development of information technology, the spread of the Internet, the global scale of communications contributes to the creation of new social orders, which dictate new strategies. The introduction of judicial precedent in the criminal law of Ukraine began with the implementation in the system of national law of legal positions and case law of the ECtHR.

The ECtHR is an international European court that operates based on and following international law, to ensure the rule of law, protect human rights and freedoms by considering individual or collective complaints from nationals of States parties to the Convention and interstate affairs and the establishment of fair compensation, the decisions of which are binding and precedent-setting.

Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) and its Protocols has placed international obligations on Ukraine, including bringing the legislation and practice of its application into line with the provisions of the Convention.

On the one hand, these commitments are necessary for Ukraine to become a full member of the European Community. On the other hand, the application of the Convention is impossible without taking into account the case-law of the ECtHR, especially on issues of protection of a person whose rights are subject to restrictions due to criminal proceedings.

Provisions of item 3 of Art. 6 Conventions are general in nature and have a high level of abstraction using a number of evaluation categories, such as "immediately and in detail informed", "interests of justice", etc. (Council of Europe, 1950). At the same time, the specific content of these provisions is disclosed in the

людини джерелом права є необхідним для адаптації національного законодавства України до законодавства Європейського Союзу. Хоча в Україні правовий прецедент офіційно не визнається джерелом права та рішення Європейського суду з прав людини, що визнає прецедентне право, можуть розглядатись в Україні як норми права.

Ключові слова: прецедент, джерела права, правозастосування, Європейський суд з прав людини, практика Європейського суду з прав людини, кримінальне право.

relevant decisions of the ECtHR adopted as a result of the application of the provisions of the Convention. Thus, the decisions of the ECtHR make it possible to understand the content and scope of the right to protection guaranteed by the Convention and to ensure the possibility of effective exercise of this right, i.e. "the provisions of the Convention act as interpreted by the Court".

The act determining the fundamental provisions for the application of the case-law of the ECtHR is the Law of Ukraine "On Enforcement of Decisions and Application of the Case Law of the ECtHR". In particular:

- 1) decisions of the ECtHR are recognized as binding;
- 2) courts should use the case-law of the ECtHR as a source of law when considering cases;
- 3) The state legislature (representative body) must represent and verify existing laws and regulations for compliance with the Convention and the case-law of the ECtHR (Law No. 3477-IV, 2006).

Therefore, the jurisdiction of the ECtHR under this Law extends to Ukraine. Moreover, in modern conditions, the practice of the ECtHR plays a significant role in improving the legal systems of the states parties to the Convention, but its place in the national legal system, given the precedent, is quite controversial. Given the peculiarities of the Romano-Germanic family, it is impossible to recognize the case-law of the ECtHR as a source of law, as judicial precedent in Ukraine has traditionally not been recognized as a source of law. Therefore, the recognition of judicial precedent as a source of national law and the unequivocal confirmation of its mandatory application can provide a basis for a radical change in the judicial law-making system.

Given the above, it is necessary to analyze the role and place of the case law and practice of the ECtHR in the criminal law of Ukraine.

Theoretical Framework or Literature Review

Scholars such as Bushchenko (2017), Voloshanivska (2017), Voloshyna (2019), Zavydnyak (2019), Kyrychenko (2010), Klymenko (2014), Kozyubra (2016), Marchenko (2013), Mykhaylenko (2019), Petrenko (2016), Piddubna (2021), Pogrebnyak (2013), Podlegaev (2019), Ryabchynska, & Ivanina (2016), Sakhnyuk (2017), Sobol, & Yuzheka (2020), Soroka (2014), Strezhnev (2021), and Tertyshnyk (2016) studied the place of judicial precedent and practice of the ECtHR in criminal law.

In his work, Bushchenko (2017) drew attention to the application of ECtHR practice by national courts, including the issue of judicial practice – standard (or stereotypical) detention decisions, because, according to the author, judges, working out a formula in one case, then copy it in all other decisions, without even trying to fit it into the context of a particular case.

The issue of application by the courts of Ukraine of the case-law of the ECtHR to ensure effective protection of criminal proceedings was the subject of a study by Voloshanivska (2017). According to the researcher, the right to effective protection in criminal proceedings is one of the international standards in this area, which can be fully determined only taking into account the practice of applying the ECtHR Article 6 of the ECHR. Such decisions of the Court are endowed with all the features of judicial precedent, and therefore the courts of Ukraine (when deciding whether a person was guaranteed the right to efficient protection) should refer to the criteria developed in ECtHR practice, which should be reflected in the reasoning of their decisions. Also, the right to sufficient protection in criminal proceedings through the application of the case law of the ECtHR was studied by Voloshyna (2019).

Zavydnyak's (2019) work describes the introduction of judicial precedent in the criminal process of Ukraine and analyzes the historical development and world experience of the introduction and use of judicial precedent as one of the full sources of law, defines the legal basis of meaning and content of judicial precedent in criminal proceedings in Ukraine. Prospects for the introduction of judicial precedent in Ukraine have been identified

Kyrychenko (2010) considered the case-law of the ECtHR and the issue of its application in criminal proceedings in more detail. Klymenko (2014) explored the issue of recognizing the case law of the ECtHR as a source of law and the peculiarities of its application in criminal proceedings in Ukraine.

Judicial lawmaking became the subject of Kozyubra's (2016) research. The author believes that the strengthening of the law-making role of courts is one of the manifestations of a noticeable trend towards "legalization" of public, especially political, life, which is characteristic of not only common but also continental law, and all other developed countries. The author also explored the historical retrospective of the formation of judicial lawmaking and drew attention to the problematic aspects of the application of ECtHR practice by national courts.

Marchenko (2013) investigated the precedent nature of ECtHR decisions through the prism of the Law of Ukraine "On Enforcement of Decisions and Application of the Case Law of the ECtHR" in the Legal System of Ukraine. The author came to the conclusion that the precedents of the ECtHR are a source of interpretation of the Convention, in view of this, the Ukrainian judicial system should apply the decisions of the ECtHR.

Mykhaylenko (2019) considered the peculiarities of the application of the ECtHR practice in criminal proceedings to implement the rule of law.

According to Petrenko (2016), the case-law of the ECtHR in the form of its legal positions can be recognized with certain remarks as a special source of law that can be used by the court as an additional source of law, because its legal force and importance in law enforcement and Resolutions of the Plenum of the Supreme Court of Ukraine.

Researcher Piddubna (2021) drew attention to the practical aspects of the application of ECtHR practice by the courts of Ukraine. The author notes that when applying the ECtHR Convention and practice as a source of law, Ukrainian courts face difficulties in legally understanding the terminology and texts of decisions due to the lack of an official qualified translation of ECtHR decisions into the state language in cases where Ukraine was not a party. Also, the researcher points out that judges in most decisions, referring to the Convention and the case-law of the ECtHR: are limited to generalized phrases,

mention its provisions, without explaining the meanings and rationale for their application, apply them inappropriately, without understanding, make mistakes in the names of ECtHR decisions and modify their texts, etc.

Gaps in legislation and means of overcoming them through the use of ECtHR practice in his work were considered by Pogrebnyak (2013).

Moreover, Podlegaev (2019) considered the problems of realization of the legal positions of the ECtHR and the case-law of the Supreme Court in criminal proceedings. According to the author, in the current realities of judicial and legal reform, the case-law of the ECtHR and the Supreme Court of Ukraine, becoming part of the procedural law system, requires consolidating the quality of legal sources of law, as well as systematic analysis, systematization, codification and integrative implementation. national criminal procedure legislation.

Besides, Ryabchynska and Ivanina (2016) assessed the subtleties of taking into account the case-law of the ECtHR in the process of criminal-legal qualification. The study examines the possibility and expediency of taking into account the positions of the ECtHR in the process of criminal law qualification and concludes that the application of the practice of this court in the administration of justice is determined by the recognition of its jurisdiction in all matters concerning the interpretation and application of the Convention.

Additionally, Sakhnyuk (2017) evaluated the role and place of judicial precedent in the system of sources of national law. According to the author, recognizing judicial precedent as a source of law at the legislative level is still impractical, but when making changes in the legislation it is necessary to take into account existing case law. Sobol and Yuzhek (2020) studied the current impact of ECtHR decisions on the development of Ukrainian legislation and case law. Researchers have concluded that the legal positions of the ECtHR occupy a special place among the sources that currently guide national courts and other public authorities in their work, and the national law enforcer is not deprived of some discretion and choice of legal positions. decisions of the ECtHR.

To add, Soroka (2014) viewed some issues of application of ECtHR practice by national courts and concluded that the use of the term “case law” is conditional, as the latter has its own features,

combined with both elements of case law and precedent interpretation.

Strezhnev's (2021) article analyzes the problems of determining the possible limit of law-making powers of judicial bodies in the conditions of criminal procedure law of Ukraine on the example of the ECtHR, the practice of which is binding on national courts and decisions are directly enforceable. Determining the nature of the law-making activity of the judiciary and its role in the national legal system is an important element in optimizing the process of applying the rule of law and humanizing the law. Judicial law-making, as a legal mechanism, can provide a solution to a wide range of legal problems facing Ukraine today. The analysis of judicial lawmaking should be based on the case-law of the ECtHR, which is closest in its characteristics to the precedent, given that the role of precedent has not yet been finally resolved in the debate on sources of national law.

Problems of ensuring legal certainty and development of criminal procedure law of Ukraine, taking into account the legal positions and case law of the ECtHR revealed Tertyshnyk (2016). According to the author, the case-law of the ECtHR, becoming part of the system of procedural law, requires codification and implementation in certain institutions of national criminal procedure law. Taking into account the practice of the ECtHR, the system of principles of a criminal procedure needs to be expanded, and the institutions of preventive measures and investigative (search) actions need to be improved immediately. Inclusions in the CPC of Ukraine make sense only in those cognitive measures, the procedure of which must be transparent and public to be able to conclude on the legality of the procedure for their implementation, the admissibility and reliability of the evidence obtained. In general, this means that every measure included in the system of investigative actions must receive a perfect procedural form of proceedings, and comply with the principles of legal certainty, proportionality, and the rule of law.

Some aspects of the application of case law in other areas of legal regulation, in particular in the field of sports and other fields of social relations, are analyzed in the scientific works of Kharytonov, Kharytonova, Kostruba, Tkalych, and Tolmachevska (2020), Kharytonov, Kharytonova, Tkalych, Bolokan, Samilo, and Tolmachevska (2021), Pavlova, Polunina, Tkalych, Mankovskyi, and Zubair (2020).

Thus, scholars study the precedent and practice of the ECtHR in Ukrainian law enforcement practice from various aspects, but no unified approach to the place of precedent and practice of the ECtHR in criminal law has been formed.

Methodology

The following methods were used in criminal law in the study of judicial precedent and the practice of the ECtHR: historical and legal; comparative law; formal and logical; empirical; cognitive; method of analogy; synthesis method; method of analysis.

Historical-legal and comparative-legal methods were used to determine the state of research of judicial precedent and practice of the ECtHR. These methods allowed us to understand the formation and development of case law in Ukraine and the world. The comparative law method helped to specify the number of general and special methods, although the use of the comparative law method used techniques such as the collection and study of facts, analysis, abstraction, comparison, evaluation, and generalization. That is, the use of the comparative law method was carried out comprehensively. Also, the comparative-legal method made it possible to analyze the consolidation of judicial precedent as a source of law in different countries, and compare it with such consolidation in Ukraine.

The formal-logical method was used in the process of defining the concept of judicial precedent and the practice of the ECtHR and interpretation. The formal-logical method is a method that occupies a special place among the methods of legal sciences, as it is directly related to the laws and forms of thinking. Based on the principles of the formal-logical method, definitions of legal concepts were formulated, and their classification was carried out. This method has become valuable for expressing brief definitions of the versatility and richness of state and legal phenomena, has gotten rid of the unnecessary description of details, and created great opportunities for free orientation on individual phenomena. Analysis of the sources of law, the order of systematization of normative material, and the rules of legal technique is a manifestation of this use of the method. With the help of this method the definition of the concept of precedent was given, as well as the existing definitions were analyzed and attention was paid to their problematic issues and inconsistencies.

The empirical method helped to clarify the problematic issues of legal practice regarding the role of judicial precedent and the case-law of the ECtHR in the national system of sources of law. Given this method, the specifics of the use of ECtHR practice by national courts in criminal cases were clarified.

To study the place of practice of the ECtHR in criminal law, and the peculiarities of the application of precedents in law-making and law enforcement activities of the competent authorities of Ukraine, the cognitive method was used.

The method of analogy was used to formulate proposals for improving the legislation on the use of judicial precedent. This method has facilitated ways to reform domestic legislation to use the case-law of the ECtHR in criminal proceedings. Comprehensive research on this topic has become possible through the use of analysis and synthesis. The analysis helped to identify internal trends and opportunities for the development of the object of study. Instead, the synthesis method allowed to expand the already existing experience of using the case law of the ECtHR and to consider the possibilities for the use of case law and the case-law of the ECtHR in criminal law. A distinctive feature of the synthesis method is that this method realizes itself beyond the existing framework, while the analytical method is a tool for careful study of the features and specifics of intra-system interaction and contains the results of abstraction, simplification, and formalization.

These methods have been used in conjunction to ensure the persuasiveness and reliability of scientific results.

Results and Discussion

The concept of "source of law" has no universal definition and common understanding in legal science. In a general sense, the source of law is understood as a way of external expression and consolidation of law.

Basic external forms (sources) of law:

1. legal act;
2. legal agreement;
3. legal custom;
4. legal precedent;
5. principles of law;
6. legal doctrines, and;
7. religious sources (Sakhnyuk, 2017).

Legal precedent is more common in the Anglo-Saxon legal system, and in the Romano-Germanic legal system most often plays a supporting role. The notion "legal precedent" is general and includes judicial precedent and administrative precedent. Judicial precedent is considered to be a decision made by the highest judicial body in a particular case, which is considered binding on other courts in similar cases.

The Convention defines not only fundamental human rights and freedoms but also establishes a rule that obliges states to take into account the interpretation of the ECtHR (Council of Europe, 1950). This indicates that the case-law of the ECtHR is becoming a source of criminal procedure law in Ukraine.

The same position, as already mentioned, is traced in the Law of Ukraine "On the implementation of decisions and application of the case-law of the ECtHR." Simultaneously, in this context, the question arises as to whether the above-mentioned article refers to the recognition as binding of all the case-law of the European Court, or only that which is formed in cases involving Ukraine.

The issue of recognizing the case-law of the ECtHR as a source of law is resolved both at the legislative level, by ratifying the Convention, and at the scientific level, by forming a special case law of the ECtHR. Evidence of this is the obligation of State parties to the Convention to recognize the case-law of the ECtHR as a full-fledged source of national law.

In general, the case-law of the ECtHR contributes to the improvement of criminal procedural law enforcement acts to ensure conventional human rights to life, prohibition of torture, liberty and security of person, fair trial, respect for private and family life, and effective remedies. Taking into account the decisions of the ECtHR on these conventional human rights is aimed at improving the effectiveness of the mechanism of legal regulation in criminal proceedings.

At the same time, the case-law of the European Court of Justice on the case-law of Ukrainian courts serves as a convincing precedent in which the Supreme Court is obliged to take into account the case (legal position), the Supreme Court is obliged to take into account the cases already decided by them (if they reconsider the case under the established procedure) subject to the ability to take this decision into account without

violating national law. As for the case-law of other courts, they are obliged to take into account the legal positions of the ECtHR set out in its decisions, as they are, in fact, an interpretation of the Convention (Soroka, 2014).

Despite the legal requirement to use the case-law of the ECtHR, the issue of setting a precedent for sources of criminal law is acute in Ukraine, which is part of the continental legal system, where the main source of law is the law and court decisions are law enforcement rather than right.

That is, there is a situation where the case-law of the European Court is essentially a source of law, and the decisions of national courts do not belong to the system of legal sources, because, as a general rule, they do not create new rules, but only apply existing law. In other words, ECtHR cases are not officially considered precedents but are the only source of dynamic interpretation of the Convention. The heterogeneity of views on the legal nature of European Court decisions has led to the assertion that the so-called case law is a cross between case law in its traditional sense and has become a continent-based tradition of case law as a definite, uniform, consistent, established position of courts. issues of law enforcement (Tertyshnyk, 2016).

Simultaneously, the norms of the Constitution of Ukraine have the highest legal force and are applied as norms of direct action if other legal norms contradict it or incompletely regulate the relevant legal relations. The provisions of an international agreement that does not contradict the Constitution of Ukraine, and the decisions of the ECtHR, apply if the provisions of this Code contradict the requirements of these sources of law or incompletely regulate the relevant legal relationship. The case-law of the Supreme Court is applied taking into account its compliance with the principles of the Constitution of Ukraine, international legal acts, and decisions of the ECtHR and laws of Ukraine, if these sources have gaps in legal regulation or incomplete regulation.

From the above we can conclude that precedent is a special source of law. But you need to take into account the peculiarities of judicial lawmaking.

According to Kozyurbra (2016), judicial lawmaking cannot violate the unity of the legal system, i.e. it must be consistent with the general goals of law and the values enshrined in the legal system, embodied in a democratic society is primarily the Constitution. Adherence to these

values, which ensure the end-to-end unity and integrity of the legal system, is one of the main goals of judicial lawmaking. In addition, judicial lawmaking should not go further than necessary to ensure the stability of the law. Hence the relevant requirements for the following component of judicial lawmaking:

- human rights and freedoms cannot be restricted by interpretation in the process of judicial practice;
- interpretation can not lead to a narrowing of the content and scope of rights and freedoms, distort the understanding of their essence;
- all doubts that arise in the process of interpreting the rules governing relations between the state and the citizen must be interpreted in favor of the citizen, and;
- all permits for citizens must be interpreted either literally or broadly, but by no means restrictive. Restriction of permits is an exclusive area of the legislature, not the court.

In addition, the author emphasizes that the exclusive sphere of the legislator is also to eliminate certain gaps in the law, and the main principle of such activities should remain the principle of self-restraint. Human rights – this is the basic criterion – the guideline that determines the boundaries of judicial lawmaking.

Some scholars believe that precedent is necessary for the national legal system, as it aims to ensure dynamism and improve efficiency, detailing the legal regulation of protection of human rights and interests by the court (Strezhnev, 2021). We agree with the position of those scholars who believe that precedent has always existed in the national legal system, and the lack of securing the status of a source does not mean its denial in modern legal thought. Judicial precedent in Ukraine is, in fact, a precedent of interpretation, which develops and details the provisions of legislation, interprets contradictory or unclear content of legal norms, i.e. makes the law convincing and helps to develop a unified approach to the application of legislation.

In Ukraine, there are several problematic issues regarding the application of ECtHR practice that need to be addressed. Thus, according to the requirements of Art. 18 of the Law of Ukraine "On Enforcement of Judgments and Application of the Case Law of the ECtHR" courts must use the official translation of the ECtHR decision, which is published in a legal publication

circulating among lawyers or, in the absence of translation, the original text. There are difficulties due to the lack of relevant skills and philological training of judges. Also, in case law, there are cases when due to the lack of official translation of the ECtHR decision, the court refuses to take into account the arguments of the parties based on the provisions of the Convention and the case-law of the ECtHR. Therefore, there is a need to create a Unified electronic database of ECtHR decisions in the state language, and to develop proposals and relevant recommendations on the application of ECtHR practice by national courts.

Conclusions

Recognition of the case law and case law of the ECtHR as a source of criminal law is an inevitable natural process of adaptation of the national legislation of Ukraine to the legislation of the European Union. In addition, the provisions of the Law of Ukraine "On Enforcement of Judgments and Application of the Case Law of the ECtHR" confirm that the state has officially recognized the case-law of the ECtHR as a source of law.

The use of ECtHR practice strengthens the already established mechanism of protection of rights and interests protected by law under international standards, which in turn brings the legal system of Ukraine closer to the legal system of EU countries and provides an opportunity to systematize Ukrainian and European legislation. The practice of the ECtHR is derived from the Convention, although it significantly expands and complements its content in law enforcement in criminal proceedings.

Concerning further research, it is important to clarify the role of judicial precedent in criminal law through the prism of the principles of the law of individual institutions of criminal proceedings.

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