

PRECEDENT IN THE MODERN UKRAINIAN LEGAL SYSTEM:  
REALITY OR ASPIRATION?

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## ABSTRACT

The main purpose of this work is to explore the emergence of precedent in the modern Ukrainian legal system. In particular, I set out to assess whether a precedent-based system is indeed emerging, what form it is taking, whether it should be considered an official source of law in the country, and how to regulate it properly for the effective system functioning with a new phenomenon.

In order to achieve this objective, I apply the method of comparative legal research, which involves a comparison of legal doctrines, legislation, and foreign laws. Since I am going to analyze and compare the Ukrainian legal system and other legal systems of different countries, to study the modern changes ongoing nowadays, this method highlights the cultural and social character of law and how it acts in different settings. This method of reasoning encompasses logical and inductive reasoning, and it holds value in its ability to highlight the pros and cons of various approaches, procedures, and institutions<sup>1</sup>, so it is very useful in developing, amending, and modifying the law using the *lex lata* and *lex ferenda*.

As a result of the conducted research, it is proven that a correctly codified case law system with high-quality and consistent court decisions will improve the whole legislative mechanism and procedural apparatus, giving more chances to a fair and equal justice administration in Ukraine.

### Key-words

Binding precedent. Interpretation precedent. Persuasive precedent. Ukrainian legislation. Decisions of the Supreme Court. Resolutions of the Supreme Court. Sources of law.

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<sup>1</sup> P Ishwara Bhat, 'Comparative Method of Legal Research: Nature, Process, and Potentiality' in P Ishwara Bhat (ed), *Idea and Methods of Legal Research* (Oxford University Press 2020) <<https://doi.org/10.1093/oso/9780199493098.003.0009>> accessed 15 June 2023.

## INTRODUCTION

In Soviet, and then in Ukrainian jurisprudence, for a long time existed a stigma and absolute denial of precedent as a source of law. Starting from Roman law, and through its incorporation in the codification acts of Kievan Rus, Ukrainian law traditionally was thought to be a purely civil law system, where the main sources of the law were only legal acts consisting of laws, codes, and constitutions. In addition, in Soviet times, it was noted that only in the countries of the Anglo-American legal system, as the countries of common law, precedent was officially recognized as a source of law. This point of view was dominant for a long time in Ukrainian legal doctrine.<sup>2</sup>

Over the last few years, however, very interesting metamorphoses have occurred in the way Ukrainian researchers, scholars, and practitioners see precedent, going from absolute denial of court precedent in modern Ukrainian law to a serious dispute about its role in various spheres of legal fields and opportunities of integrating it into Ukrainian civil system.

The first steps towards the recognition of precedent in Ukraine were made in the framework of the harmonization of the Ukrainian legal system with the EU, which started in 1994 with the ratification of an Agreement on partnership and cooperation between Ukraine and the European Communities and their member states.<sup>3</sup> According to the Article 46 of the Convention on the Protection of Human Rights and Fundamental Freedoms of 1950, the participating states undertake to comply with the decisions of the European Court of Human Rights<sup>4</sup> in any cases

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<sup>2</sup> S. Seryogin, 'Judicial precedent as a source of law in Ukraine — Legalitas' (29 October 2015) (in Ukrainian) <<https://legalitas.com.ua/ua/ukr-s-serogin-sudovij-precedent-yak-dzherelo-prava-v-ukra%dl%97ni/>>.

<sup>3</sup> 'Agreement on partnership and cooperation between Ukraine and the European Communities and their member states' (in Ukrainian) (*Official web-portal of the Parliament of Ukraine*) <[https://zakon.rada.gov.ua/go/998\\_012](https://zakon.rada.gov.ua/go/998_012)> accessed 23 January 2023.

<sup>4</sup> 'European Convention on Human Rights - Official Texts, Convention and Protocols' <<https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=>>> accessed 15 June 2023.

in which they are parties, and in Article 17 of Ukraine's Administrative Law "On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights" of February 23, 2006, it is emphasized that the courts of Ukraine apply the Convention and the practice of the European Court of Human Rights as a source of law when considering cases.<sup>5</sup> The ratification of the convention laid the foundation for the emergence of the first signs of precedent in Ukraine, since the decisions of the European Court of Human Rights (hereinafter, "the ECtHR") began to be used as precedent by Ukrainian lawyers and considered as a source of law.

The next step towards the emergence of de jure precedent in the legal system of Ukraine was the implementation of certain legislative changes as part of the new Judicial Reform initiated in 2016. The purpose of this Reform was to strengthen public trust in the courts and enhance the qualifications of the subjects of the judiciary. As part of the Reform,<sup>6</sup> amendments were made to specific articles of the Constitution concerning justice, new institutions were created, and the Law on Judiciary and Status of Judges was updated (hereinafter, "the JSSJ")<sup>7</sup>. These changes brought about an irreversible process of transforming the legislative system and paving the way for the use of official precedent in judicial practice.

The JSSJ defines the legal principles for organizing judicial power and administering justice in Ukraine. It establishes the system of general jurisdiction courts, the status of professional judges, lay judges, jurors, the system and procedure for judicial self-governance, and the

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<sup>5</sup> 'Law of Ukraine on the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights' (in Ukrainian) (*Official web-portal of the Parliament of Ukraine*) <<https://zakon.rada.gov.ua/go/3477-15>>. accessed 15 June 2023

<sup>6</sup> President Decree About the Strategy for Reforming the Judiciary, Judiciary and Related Legal Institutions for 2015-2020. Now superseded by Presidential Decree No. 231/2021 dated 06/11/2021 (in Ukrainian) (*Official web-portal of the Parliament of Ukraine*) <<https://zakon.rada.gov.ua/go/276/2015>> accessed 15 June 2023.

<sup>7</sup> 'Law of Ukraine on the Judiciary and the Status of Judges' version as of December 23, 2022. (in Ukrainian) (*Official web-portal of the Parliament of Ukraine*) <<https://zakon.rada.gov.ua/go/1402-19>> accessed 30 April 2023.

general framework for ensuring the functioning of the courts, as well as regulating other aspects of court organization and the status of judges.<sup>8</sup>

The amendments introduced to the articles of the JSSJ hold significant importance in my research since Article 13, which was added in 2017 during the implementation of the reform, establishes that the Supreme Court, based on the circumstances of a specific case, the content of claims, and the nature of the dispute, provides an authoritative interpretation of normative prescriptions.<sup>9</sup> This interpretation becomes obligatory for lower courts to consider when deciding similar cases. This can be considered as the birth of *de jure* precedent incorporated in official form in the legislative act.

In this research, I will analyse the Supreme Court decisions, as well as Article 13 of the JSSJ, in order to establish the emergence of precedent usage in court decisions and its underrated role for lower courts as an Acts of the Supreme Court. This research will be also based on books, articles, guidelines, cases, different materials from Ukraine and countries with common law legal system, and an interview I conducted with Professor Borys Malyshev of the Taras Shevchenko National University of Kyiv.

In legal theory, the so-called interpretation precedent is distinguished from other forms of precedent. There is no single opinion in the scientific community on whether such an interpretation acquires peculiarities of “real” precedent or should be considered as one to create a new normative prescription. But practitioners affirm lately, that the Ukrainian Supreme Court, giving a narrowing or expanding interpretation of a normative prescription, creates a

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<sup>8</sup> *ibid* 7

<sup>9</sup> ‘Law of Ukraine on the Judiciary and the Status of Judges’ (in Ukrainian) (*Official web-portal of the Parliament of Ukraine*) <<https://zakon.rada.gov.ua/go/1402-19>> accessed 30 April 2023.

new rule that was not formalized in this form before, which gives a right to talk about the interpretation precedent creation.<sup>10</sup>

These abovementioned changes started the convergence of Ukrainian legislation and brought it to the point when specialists began to question the possibility of implementing the decisions of national courts as an official source of law. The introduction of the officially recognized system of case law and its appropriate systematization of it should solve the problem of a large number of gaps in the legislation that exists at the moment, as well as fix the issue of the dualism of legal norms, contradictions between legal norms and moral norms and the issue of their interpretation.

Chapter 1 will focus on defining the term "precedent" and establishing the principles from the theory of law that will be employed to support the research objective. In Chapter 2, attention will be given to the initial steps taken toward official recognition of precedent within the Ukrainian legal system. The chapter will delve into the factual and historical background of its emergence, considering the timeline and political context in which the definition has evolved. Chapter 3 will involve an analysis of Article 13 of the JSSJ, aiming to ascertain the current de jure utilization of precedent as stipulated in the legislative act. The fourth chapter will address the interpretation of precedent, exploring how Ukrainian scholars define it, as it forms a significant aspect of the existing precedent theory. Lastly, the concluding chapter will offer recommendations and insights from contemporary researchers and practitioners on resolving the issue of accurate and systematic use of precedent as an official legal source in the modern Ukrainian legal system.

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<sup>10</sup> `Court Precedent and Its Place in the Legal System of Ukraine: Discussion Involving Judge of the Supreme Court Dmytro Gudyma` / Publications / Judicial Authority of Ukraine <<https://sud.ua/ru/news/publication/136643-sudoviy-pretsedent-ta-yogo-mistse-v-sistemi-prava-ukrayini-diskusiya-za-uchasti-suddi-vs-dmitra-gudimi>>.

## CHAPTER 1. DEFINITION OF PRECEDENT IN MY WORK

Since the first day Ukraine proclaimed its independence, leaving its oppressive Soviet past behind, and with every year now, Ukrainian lawmakers focus more and more on the legal experience and legal theories of other continental countries, borrowing some innovations and principles of legal making, implementing them in Ukraine's own system. And it is a question not only of codes and laws themselves but also of hundreds of court decisions. Present continental European contract, banking, and tax law are formed especially in the form of precedents, considering not only the decisions of superior but also regional and municipal courts.<sup>11</sup>

Analysis of modern European judicial practice demonstrates that global convergence processes are accelerating. Characteristics of "pure law systems" are starting to dissolve and become more dual in new realities with the new world's evolution and progression of technologies.<sup>12</sup> Some of the Anglo-Saxon legal family systems are beginning to acquire certain features of Romano-Germanic legal tradition countries and vice versa. The clearly defined, unequivocal, and normative methodology for the establishment of sources of law has outlived its usefulness, being replaced by perspective projection.

For further research purposes, I will elaborate on the definition of a precedent in my work. I will take the characterization provided by Professor Malyshev, whom I have had a chance to interview in pursuit of the goals outlined in this research, as one of the leading professionals in studying problems in the theory of law and state, judicial law-making, and legal tools. Professor Malyshev suggests the following interpretation of judicial precedent: it is a legal act manifested

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<sup>11</sup> S. Seryogin, 'Judicial precedent as a source of law in Ukraine — Legalitas` (29 October 2015) (in Ukrainian) <[https://legalitas.com.ua/ua/ukr-s-serogin-sudovij-precedent-yak-dzherelo-prava-v-ukra%D1%97ni/](https://legalitas.com.ua/ua/ukr-s-serogin-sudovij-precedent-yak-dzherelo-prava-v-ukra%20%D1%97ni/)>.

<sup>12</sup> Vernon Valentine Palmer, 'Mixed Legal Systems` in Mauro Bussani and Ugo Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge University Press 2012).



as a recorded decision in a court report, issued by one of the higher-level courts in relation to a specific case. The legal principle employed in resolving the case becomes a general legal norm. The influence of the precedent relies on the court's position in the hierarchy of the judicial system that establishes the precedent, as well as the handling of similar cases by subsequent courts.<sup>13</sup>

As mentioned in the literature about the theory of law and English law legal systems, there are various types of precedents. One of them is binding precedent. The concept of binding precedent entails that when a current case exhibits significant similarities to a previous decision rendered by a higher or equivalent court, the lower court is obligated to adhere to the ruling of the higher court. Saying simply, the inferior court must follow the decision of the superior court when handling similar cases.<sup>14</sup>

A legal principle (the ratio decidendi) that serves as precedent. The ratio decidendi must be applied in a subsequent case if three conditions are met: (1) the facts of the subsequent case are substantially identical to those of the earlier case; (2) the earlier case was decided by a court within the same judicial hierarchy as the court or tribunal handling the subsequent case; and (3) the court that rendered the earlier decision holds a higher position in that hierarchy than the court or tribunal handling the subsequent case.<sup>15</sup>

Another type of precedent elaborated on in this work is interpretation precedent. In countries of the Anglo-Saxon legal system, precedent provides for the creation of a new law, then when

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<sup>13</sup> B.V. Malyshev, 'Judicial precedent and style of legal thinking. Problems of the philosophy of law', p. 142 (in Ukrainian) <<http://dspace.nbuv.gov.ua/bitstream/handle/123456789/9671/16-Malyshev.pdf?sequence=1>> accessed 15 June 2023.

<sup>14</sup> 'Doctrine of Precedent in English Legal System' (Lawteacher.net, May 2023) <<https://www.lawteacher.net/free-law-essays/constitutional-law/doctrine-of-precedent-in-english-legal-system-constitutional-law-essay.php?vref=1>> accessed 15 June 2023.

<sup>15</sup> 'Australian Law Dictionary', Oxford University Press., 2017 <<https://www.oup.com.au/books/higher-education/law/9780190304737-australian-law-dictionary>> accessed 15 June 2023.

applying precedent of "interpretation", a new rule of law is not created, but a position is interpreted and formulated, which serves as a basis for consideration of similar disputes.<sup>16</sup>

An important role in legal reasoning is playing also cases that are based on considerations such as obiter dicta and persuasive precedents that are not binding on a court. In common law legal systems one of the great examples of non-binding but relevant considerations is obiter dicta. Obiter dicta refer to legal statements made by a court that was not crucial to the decision reached in a particular case. While these statements are not legally binding on future courts, they are frequently mentioned in arguments before those courts and relied upon by judges when forming their conclusions. Furthermore, courts cite previous judgments to provide insights into the reasoning behind legal doctrines and to establish the presence of legal principles. They may also consider judgments from courts outside their own jurisdiction as persuasive precedents.<sup>17</sup>

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<sup>16</sup> LHS Discussion Hub `Precedent Case: Does It Really Exist?` LegalHighSchool, 25.02.2019 (in Ukrainian) <<https://lhs.net.ua/ua-lhs-discussion-hub-pretседentnyi-vypadok-chy-isnuie-vin-vse-taky-ru-lhs-discussion-hub-pretседentnyi-sluchai-sushchestvuet-ly-on-vse-taky/>> accessed 20 January 2023.

<sup>17</sup> Grant Lamond, `Persuasive Authority in the Law` The Harvard Review of Philosophy volXVII 2010 p. 16 <[harvardreview 2010 0017 0001 0016 0035.pdf \(pdcnet.org\)](https://www.harvardreview.org/2010/0017/0001/0016/0035.pdf)> accessed 15 June 2023.

## CHAPTER 2. FIRST STEPS TOWARDS THE “PRECEDENT” IMPLEMENTATION

Significant initial steps towards the introduction of judicial precedent in Ukraine were taken during the amendments made to procedural legislation in accordance with the changes introduced by the JSSJ dated July 7, 2010, No. 2453-VI.<sup>18</sup> These amendments aimed to establish a framework for the development and application of judicial precedent in the Ukrainian legal system. They provided a legal basis for courts to consider and refer to precedents set by higher courts in their decision-making process as the initial period of convergence. It is important to note that the decisions of the Supreme Court and resolutions of the Plenum of the Supreme Court began to play such a significant role in the administration of justice long before the implementation of the Judicial Reform in 2016.

The Criminal Procedure Code, as well as the Commercial Code of Ukraine, the Civil Procedure Code of Ukraine, and the Administrative Procedure Code of Ukraine were amended in 2010 to stipulate the binding nature of the decisions of the Supreme Court of Ukraine, including an article that stipulates that:

decisions of the Supreme Court of Ukraine rendered as a result of considering an application for the review of a court decision due to the inconsistent application by the court(s) of the cassation instance of the same norms of substantive law in similar legal relations, are binding on all subjects of governmental authority applying a regulatory legal act containing the mentioned legal norm in their activities, as well as on all courts of Ukraine. Courts are obliged to bring their judicial practice in line with the decisions of the Supreme Court of Ukraine.<sup>19</sup>

Since the entry into force of the changes to procedural laws mentioned above, many court decisions have been reviewed due to inconsistent application of legal norms by courts in similar

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<sup>18</sup> S. Seryogin, ‘Judicial precedent as a source of law in Ukraine’ — Legalitas (29 October 2015) (in Ukrainian) <<https://legalitas.com.ua/ua/ukr-s-serogin-sudovij-precedent-yak-dzherelo-prava-v-ukra%201%97ni/>> accessed 20 January 2023.

<sup>19</sup> ‘The Civil Procedural Code of Ukraine’ version as of December 30, 2010. (in Ukrainian) (*Official web-portal of the Parliament of Ukraine*) <<https://zakon.rada.gov.ua/go/1618-15>> accessed 15 June 2023.

legal relationships. As a result of this review, higher courts generalize the judicial practice of the Supreme Court of Ukraine and form legal positions that are then made known to lower courts.<sup>20</sup>

But what is interesting to note is that the mentioned provisions were subsequently removed through further amendments starting in 2017 and were replaced by new articles such as Paragraph 5 of Article 242 of the Code of Administrative Procedure of Ukraine, Paragraph 6 of Article 368 of the Criminal Procedure Code of Ukraine, Paragraph 4 of Article 263 of the Civil Procedure Code of Ukraine, and Paragraph 4 of Article 236 of the Commercial Procedure Code of Ukraine providing that when choosing and applying a legal norm to disputed legal relations, the court must take into account the conclusions regarding the application of legal norms contained in the rulings of the Supreme Court.<sup>21</sup> These provisions are still in force today.

It is possible to speculate that these changes were made as part of judicial reform or as one of the elements of bringing legislative acts into a clear, unified, and systematic form. Since, as I will explain further, the definition and specific goals of the judicial reform conducted from 2015 to 2022 do not suggest that these changes were prompted by this reform, as the main focus was on the requalification of judges and instilling greater public trust in the judiciary. Procedural legislative acts were not supposed to be affected, but the fact that these important provisions were removed remains a fact and a question that currently lacks a definitive answer, only conjecture. But it is hard to deny the fact that these changes were one of a few factors which entailed the whole movement of the Ukrainian legislative system convergence.

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<sup>20</sup> S. Seryogin, Judicial precedent as a source of law in Ukraine` — Legalitas (29 October 2015) (in Ukrainian) <<https://legalitas.com.ua/ua/ukr-s-serogin-sudovij-precedent-yak-dzherelo-prava-v-ukra%dl%97ni/>> accessed 20 January 2023.

<sup>21</sup> L. M. Nikolenko, Determination of the place of judicial precedent in the system of sources of Ukrainian law. Newsletter of NTUU "KPI". Politology. Sociology. Right. Issue 3(51) 2021 p. 64 (in Ukrainian) <[VPSP2021-3\\_63-68.pdf \(kpi.ua\)](#)> accessed 15 June 2023.

Furthermore, apart from the aforementioned modifications, it is crucial to delve into one more aspect of the contextual circumstances that contributed to the emergence of precedent in Ukraine - the resolutions of the Plenum of the Supreme Court.<sup>22</sup> At the current stage of Ukraine's development and its legal system, the resolutions of the Plenum of the Supreme Court, as well as the rulings and explanations of higher judicial bodies, have not lost their significance and have started to play a more substantial role in the administration of justice. This is due to the substantial gaps in legislation and the presence of ambiguous formulations in laws, which can be interpreted in different ways. The resolutions of the Plenum of the Supreme Court essentially interpret and supplement the content of normative legal documents at all levels - from departmental instructions to the constitutional law of Ukraine - without being, at least officially, a source of law.<sup>23</sup>

Even during the Soviet era, the leading role of resolutions of the Supreme Court of the USSR in the administration of justice was recognized. These resolutions were issued with the aim of ensuring the consistent application of legal norms by courts.<sup>24</sup> Similar concepts are elaborated in the resolutions of the Plenum of the Supreme Court of Ukraine.

The core of judicial precedent is to provide a normative character to court actions. Consequently, judicial precedent often refers to a specific court decision that becomes obligatory when similar cases are reviewed in the future. However, not all court decisions are binding on other courts; only the underlying legal position on which the decision is based holds

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<sup>22</sup> The Plenum of the Supreme Court of Ukraine is a collegial body composed of all judges of the Supreme Court of Ukraine. It is the highest judicial and organizational-methodological authority within Ukraine's general jurisdiction courts system. (cited in: Legal encyclopedia: [in 6 vols.] / ed. col.: Yu. S. Shemshuchenko) The Plenum performs organizational functions and does not administer justice but ensures the courts' correct and consistent application of laws. It provides explanations and interpretations of legal norms through the adoption of resolutions.

<sup>23</sup> `S. Seryogin, `Judicial precedent as a source of law in Ukraine` — Legalitas (29 October 2015) (in Ukrainian) <<https://legalitas.com.ua/ua/ukr-s-serogin-sudovij-precedent-yak-dzherelo-prava-v-ukra%201%97ni/>> accessed 20 January 2023.

<sup>24</sup> *ibid*

that authority. Upon analyzing the existing judicial practice, it becomes apparent that the acts of the Supreme Court of Ukraine have long served as something like “judicial precedents” for lower courts. The consolidation of judicial practice and explanatory guidelines on the application of legislation represent the legal position regarding a specific interpretation of the law. While these guidelines are not officially acknowledged as sources of law, they carry binding force for courts at all levels. In practice, it is not uncommon for judges to make references to the acts of the Supreme Court of Ukraine in their rulings.<sup>25</sup>

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<sup>25</sup> “The Legal System of Ukraine and Judicial Precedent: The Possibility of Coexistence” “Legal Week” © 2006-2013 Weekly informative and legal newspaper. (in Ukrainian) <<http://legalweekly.com.ua/index.php?show=news&&newsid=120593>> accessed 14 June 2023.

### CHAPTER 3. ANALYSIS OF THE ARTICLE 13 OF THE LAW OF UKRAINE ON THE JUDICIARY AND THE STATUS OF JUDGES

Taking into account the convergence processes mentioned in previous articles, the historical background of precedent development in Ukraine is gradually shaping the picture of the conditions of its emergence and its establishment on the path to official recognition.

In order to establish the presence of precedent in the modern Ukrainian Law system and to identify its characteristics and the current state in which it is used, it is important to start with the analysis of one of the newest modifications of Ukrainian legislation that happened recently that can show the possible shift of focus to the adoption of some of the characteristics of Anglo-Saxon legal traditions.

The judicial reform, which began in 2016, became the most extensive in Ukraine's independent history. As the policy report analysis shows, the state as for the anniversary of the Revolution of Dignity of the level of public trust in the courts was only 7%, which was considered the lowest score in Europe and one of the lowest in the world.<sup>26</sup> Hence, by the Decree of the President of Ukraine in 2015 the Strategy for Judicial Reform was set in motion.<sup>27</sup> New amendments to the Constitution were made, as well a few new institutions were created in order to ensure the judiciary's independence, boost the level of public trust in the courts, and increase public responsibility.<sup>28</sup> It also has changed significantly the content of the Law altering the power and obligations of the Supreme Court of Ukraine, creating an entirely new one. The

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<sup>26</sup> Mykhailo Zhernakov, 'Judicial Reform in Ukraine: Mission impossible?' Policy Report, Kyiv, Ukraine December 2016 <[https://rpr.org.ua/wp-content/uploads/2017/02/Renaissance\\_A4\\_5JURIDICIAL-REFORM.pdf](https://rpr.org.ua/wp-content/uploads/2017/02/Renaissance_A4_5JURIDICIAL-REFORM.pdf)> accessed 15 June 2023.

<sup>27</sup> President Decree About the Strategy for Reforming the Judiciary, Judiciary and Related Legal Institutions for 2015-2020. Now is invalidated based on Presidential Decree No. 231/2021 dated 06/11/2021. (in Ukrainian) (*Official web-portal of the Parliament of Ukraine*) <<https://zakon.rada.gov.ua/go/276/2015>> accessed 15 June 2023.

<sup>28</sup> 'Judicial Reform in Ukraine: A Brief Overview' (in Ukrainian) <<https://dejure.foundation/library/sudova-reforma-v-ukraini-scho-zminylos-za-try-roky>> accessed 29 April 2023.

context of Article 13 of the JSSJ has likewise been changed by the amendment that was caused by the Reform in 2017.

The provisions of the mentioned Law define the legal principles governing the organization of the judiciary and the administration of justice in Ukraine in order to protect the rights, freedoms, and legitimate interests of a person and citizen, the rights and legitimate interests of legal entities, and the interests of the state on the basis of the rule of law, defines the system of courts of general jurisdiction, the status of a professional judge, a people's assessor, jurors, and the system and procedure for exercising these rights and liberties.<sup>29</sup>

### **3.1. Supreme Court decisions are obligatory to consider for lower courts.**

Article 13 of the JSSJ contains provisions regarding the binding power of court decisions. I have analyzed the text of the mentioned article and have discovered some interesting occurrences. As the conducted research shows, Paragraph 6 of Article 13<sup>30</sup> was revised by Law on Amendments to Legislative Acts<sup>31</sup> of 3 October 2017 within the scope of the Reform. The previous wording of the Article included the part in the below-described appearance:

“Conclusions on the application of legal norms set forth in rulings of the Supreme Court shall be taken into account by other courts when applying such legal norms. The court has the right to deviate from the legal position set forth by the Supreme Court only with the simultaneous giving of relevant reasons.”<sup>32</sup>

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<sup>29</sup> `Law of Ukraine on the Judiciary and the Status of Judges` version as of December 23, 2022. (in Ukrainian) (*Official web-portal of the Parliament of Ukraine*) <<https://zakon.rada.gov.ua/go/1402-19>> accessed 30 April 2023.

<sup>30</sup> *ibid*

<sup>31</sup> `Law on Amendments to the Economic Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts` No. 2147-VIII of 3 October 2017 (Chapters 4-6) (*Official web-portal of the Parliament of Ukraine*) <<https://zakon.rada.gov.ua/go/2147%D0%B0-19>> accessed 30 April 2023.

<sup>32</sup> `Law of Ukraine on the Judiciary and the Status of Judges` version as of November 29, 2017. (in Ukrainian) (*Official web-portal of the Parliament of Ukraine*) <<https://zakon.rada.gov.ua/go/1402-19>> accessed 30 April 2023.



The new revision of the referred Article does not contain anymore the right of the court to depart from the legal position expressed by the Supreme Court, leaving the obligation of lower courts to apply Conclusions on the implementation of legal norms outlined in Supreme Court decisions<sup>33</sup>.

What lawmakers were guided by when they decided to modify the provision is not known yet, as there are no records, articles or other information regarding what exactly prompted them. However, one can come up with a suggestion that replacing this way the right of lower courts to depart from Supreme Court decision was an attempt to give more power to the Supreme court ruling when considering case by case.

Courts, guided by the rulings of the Supreme Court, take into account the conclusions regarding the application of legal norms contained in these rulings<sup>34</sup>. Other courts have the right to use such conclusions when applying existing legal norms, which allows the Supreme Court to establish a model for their application. This position is confirmed by the provisions of Article 17, Part 4 of the JSSJ which stipulate that the unity of the judicial system is ensured, in particular, by the unity of judicial practice.<sup>35</sup>

As judge of the Grand Chamber of the Supreme Court of Ukraine, Gudyma Dmytro noted in his discussion within the framework of the educational platform Legal High School:

“One of the types of judicial precedents in the theory of law is *the interpretation precedent*. Thus, the Supreme Court, based on the circumstances of a specific case, the essence of the disputed legal relationship and the content of the claims, provides a sample interpretation of the normative prescription. This sample,

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<sup>33</sup> `Law of Ukraine on the Judiciary and the Status of Judges` version as of December 15, 2017. (in Ukrainian) (*Official web-portal of the Parliament of Ukraine*) <<https://zakon.rada.gov.ua/go/1402-19>> accessed 30 April 2023.

<sup>34</sup> `Law of Ukraine on the Judiciary and the Status of Judges` version as of December 23, 2022. (in Ukrainian) (*Official web-portal of the Parliament of Ukraine*) <<https://zakon.rada.gov.ua/go/1402-19>> accessed 30 April 2023.

<sup>35</sup> L. M. Nikolenko, `Determining the place of judicial precedent in the system of sources of Ukrainian law.` Bulletin of "KPI". Politology. Sociology. Right. Issue 3(51) 2021. p. 64 (in Ukrainian) <[VPSP2021-3\\_63-68.pdf](https://kpi.ua/VPSP2021-3_63-68.pdf) (kpi.ua)> accessed 15 June 2023.

according to the principle of stare decisis, is mandatory for consideration by courts of lower levels when deciding similar cases. “<sup>36</sup>

Before the appearance of these provisions, scholars and practitioners in Ukraine were referring to decisions of the Supreme Court as the source of legal norms for lower courts but there were no legally established obligations to adhere to the legal conclusions of the higher court generated divergent opinions regarding the existence of de facto and de jure precedents, as well as the issues surrounding the practical application and use of such decisions in practice and within academic circles. Now these provisions give real power to the Supreme Court decisions, as official precedent.

In the conducted interview with Professor Malyshev, the scientist highlighted certain characteristics found in Article 13 that can be considered similar to a classic judicial precedent. Firstly, there is the formulation of "conclusions regarding the application of legal norms." In a judicial precedent, the legal norms, as a mandatory element, are contained in the reasoning part. According to the scholar, the formulation in the article is quite broad and includes legal positions found in the motivational part, not only in the operative part, as in the resolutions of the Supreme Court's Plenum.<sup>37</sup> Professor recognized this feature as comparable to a classic judicial precedent.

Secondly, another similarity to a precedent is that the article specifically mentions "expressed in Supreme Court rulings," rather than being stated in generalizations of judicial practice or clarifications. It refers to a specific ruling, which is similar to the principle applied in the Anglo-

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<sup>36</sup> `Judicial Precedent and Its Place in the Legal System of Ukraine: Discussion With the Participation of Supreme Court Judge Dmytro Gudyma` / Publications / Judicial and Legal Newspaper (in Ukrainian) <<https://sud.ua/ru/news/publication/136643-sudoviy-pretседent-ta-yogo-mistse-v-sistemi-prava-ukrayini-diskusiya-za-uchasti-suddi-vs-dmitra-gudimi>> accessed 20 January 2023.’

<sup>37</sup> Anastasiya Karpovska, Interview with Professor Malyshev B.V., 22 March 2023, Kyiv, Ukraine

Saxon system of precedent law, where a decision of a higher court has general significance for lower courts dealing with cases with similar essential circumstances.

However, the interviewee noted that he does not see such a strong position regarding the binding nature in paragraph 6 of the studied article due to the problematic formulation of "should be taken into account," unlike paragraph 5, which I will elaborate on further.

As an argument in support of his position, Professor points out that in American or English law, when the essential circumstances of a case do not coincide or do not fully coincide, the corresponding judicial precedent does not apply. If the circumstances are similar, whether the judge wants it or not, he is bound by precedent. In our situation, "a strange concept is embedded, whether they fully or partially coincide - the decision of the Supreme Court should only be taken into account", diminishing the binding power of those decisions.

In my view, the obligations imposed on lower courts by the paragraph under analysis do not fully meet the criteria of "binding" precedent, but they do establish a form of "persuasive" precedent. Referring back to the definition of persuasive precedent mentioned in Chapter 1, it can be considered as such when a court has the discretion to consider the precedent but is not obligated to do so. Considering the information presented in this subchapter and Professor Malyshev's factual reasoning on the characteristics of classical precedent and taking into account the non-binding language used in the paragraph, which nevertheless carries strong recommendation, it can be concluded that paragraph 6 of Article 13 of the JSSJ itself constitutes persuasive precedent.

According to Judge Dmytro Gudyma of the Grand Chamber of the Supreme Court, the justification of "horizontal" precedent interpretation by appellate courts becomes more

important than the justification of "vertical" judicial precedent interpretation created by the highest court, for Ukrainian legal science and practice after changes to procedural legislation.<sup>38</sup>

As an example of a current problem that requires a solution beyond what modern legislation can provide, there is the issue arising in the resolution of minor cases by appellate courts where it is not possible to file a cassation appeal. As a recommendation for addressing this problem, the judge proposes the implementation of a unified and structured judicial practice, where appellate courts should take into account previous decisions of courts at the same level as guiding principles. In effect, this does not have a formal binding force but it creates a persuasive precedent.<sup>39</sup>

### **3.2. The binding power of the Supreme Court decisions for subjects of authority**

If we go further to analyze the whole context of Article 13 of the JSSJ, we can find a few other provisions that suggest the same approach or maybe even more persuasive in terms of the power of Supreme Court decisions. As was suggested by Professor Malyshev in his interview Paragraph 5 of Article 13 of the JSSJ provides a more compelling argument in favor of the theory of existing precedent.

The precise wording of the provision stipulates that:

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<sup>38</sup> `Judicial Precedent and Its Place in the Legal System of Ukraine: Discussion With the Participation of Supreme Court Judge Dmytro Gudyma` / Publications / Judicial and Legal Newspaper (in Ukrainian) <<https://sud.ua/ru/news/publication/136643-sudoviy-pretседent-ta-yogo-mistse-v-sistemi-prava-ukrayini-diskusiya-za-uchasti-suddi-vs-dmitra-gudimi>> accessed 20 January 2023.`

<sup>39</sup> *ibid.*

“the conclusions regarding the application of legal norms, set forth in the Supreme Court's rulings, are binding for all subjects of authority<sup>40</sup>, which apply in their activities a regulatory legal act containing the relevant legal norm.”<sup>41</sup>

The term “binding” according to Professor Malyshev, holds greater strength than the formulation discussed in the previous investigated paragraph. It obligates subjects of authority on a higher level to apply in their practice the Supreme Court’s judgment. This paragraph has greater binding force than mentioned before paragraph 6 of Article 13, under which the courts can deviate from the Supreme Court’s decision as the wording of the paragraph constitutes “shall be taken into account”, which does not give too much certainty to the Court’s powers. In this particular scenario within the context of paragraph 5 of the mentioned Article and “binding” term, the situation can remind one of when a superior court within the hierarchy of courts sets a precedent and it becomes "binding" for lower courts. Except here the provision sets the obligation for Supreme Court conclusions to be per se considered by the subjects of authority.

However, according to Professor Malyshev, there are currently no "clear" signs of the presence of precedent, as the analyzed articles are rather "weak" to officially establish the existence of precedent. He also notes that there are no auxiliary rules and principles by which the court is empowered to create law, as well as guidelines for the proper functioning of the legal system.

The scholar also points out that due to the strong wording of Article 13 regarding the binding nature of Supreme Court decisions, the Supreme Court itself, as an appellate body, may or may not overturn a decision if it contradicts precedent.

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<sup>40</sup> The subject of authority is a state authority (including without of the status of a legal entity), a local self-government body, their position or an official, another entity in the exercise of their public authority management functions on the basis of legislation, including on performance of delegated powers, or provision of administrative powers services. Clause 7 of Part 1 of Article 4 of The Code of Administrative Proceedings of Ukraine.

<sup>41</sup> `Law of Ukraine on the Judiciary and the Status of Judges` version as of December 23, 2022. (in Ukrainian) (*Official web-portal of the Parliament of Ukraine*) <<https://zakon.rada.gov.ua/go/1402-19>> accessed 30 April 2023.

Dmytro Hudyma, when discussing the binding nature of the Supreme Court's conclusions regarding the application of normative provisions, drew attention to the fact that a judge, by establishing significant differences between the case being considered and the one in which the Supreme Court formulated a certain conclusion, may reach a different conclusion and render a different decision. The latter should not be considered a deviation from the Supreme Court's conclusion. However, the differences in the circumstances of the case, the nature of the disputed legal relations, and the subject of the dispute must be significant and well-founded.<sup>42</sup> As the Supreme Court's decision demonstrates an understanding of normative provisions in the specific circumstances of a case (casual interpretation), such a judicial decision cannot be a "template" for resolving any case regardless of the established facts, the nature of the disputed legal relations, and the content of the claims.<sup>43</sup>

It is also important to note that in cases where two situations may seem similar but the court has arrived at different conclusions, the Grand Chamber of the Supreme Court<sup>44</sup> has established a practice of identifying the distinctions between the current case and the one in which a previous conclusion was reached regarding the application of a legal provision. This practice is carried out by the judges of the Grand Chamber to provide guidance on the application of the Supreme Court's conclusions. The objective of this practice is to clarify the reasons behind the divergent decisions.<sup>45</sup>

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<sup>42</sup> `Judicial Precedent and Its Place in the Legal System of Ukraine: Discussion With the Participation of Supreme Court Judge Dmytro Gudyma` / Publications / Judicial and Legal Newspaper (in Ukrainian) <<https://sud.ua/ru/news/publication/136643-sudoviy-pretседent-ta-yogo-diskusiya-za-uchasti-suddi-vs-dmitra-gudimi>> accessed 20 January 2023.`

<sup>43</sup> *ibid*

<sup>44</sup> According to Article 45 of the Law on the Judiciary and the Status of Judges, the Grand Chamber is a permanent collegial body of the Supreme Court of Ukraine that administers justice and judicial proceedings, analyzes court statistics, studies judicial practice, and generalizes judicial experience.

<sup>45</sup> `Judicial Precedent and Its Place in the Legal System of Ukraine: Discussion With the Participation of Supreme Court Judge Dmytro Gudyma` / Publications / Judicial and Legal Newspaper (in Ukrainian) <<https://sud.ua/ru/news/publication/136643-sudoviy-pretседent-ta-yogo-diskusiya-za-uchasti-suddi-vs-dmitra-gudimi>> accessed 20 January 2023.`

In my opinion, this type of procedure is more practical and functional rather than the precedent overruling that is common for typical common law jurisdictions countries. In the Anglo-Saxon legal tradition systems, the later court's decision is limited by a precedent case when the rule established in that precedent is applicable to the factual circumstances faced by the later court. When a later situation aligns with a precedent rule, a court facing that situation essentially has two options: it can either abide by the precedent rule or, if authorized, overturn the precedent. This established practice doesn't give much freedom and flexibility to courts when applying binding precedents. While many authors agree with the general concept, some propose a more adaptable interpretation of the rule model, wherein subsequent courts possess the authority to shape the law by modifying precedent case rules without completely overturning them.<sup>46</sup>

In turn, presented earlier process conducted by the judges of the Grand Chamber of the Supreme Court of Ukraine, in my opinion, is more supple and adjustable to the needs and problems of modern legal reality.

Based on the foregoing analysis, I suggest that, by making substitutions to the above-mentioned legislative acts, lawmakers implied consciously or unconsciously, but a first step to the implementation in the Ukrainian legal system of the Anglo-Saxon legal tradition's main feature – precedent. We cannot deny the fact that the rulings of the Supreme Court possess normative significance as they incorporate legal provisions.<sup>47</sup> The decisions of the Supreme Court can be regarded as the conclusive outcome and the Court's stance on resolving a particular disputed situation. They serve as an illustration of how legal norms should be applied, and lower courts as well as government authorities are obliged to adhere to them.<sup>48</sup>

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<sup>46</sup> John F Harty, 'Rules and reasons in the Theory of Precedent' (2011) 17 Legal Theory 1 <<https://www.cambridge.org/core/journals/legal-theory/article/abs/rules-and-reasons-in-the-theory-of-precedent/3B7697D8BD95470F3A814ACA72C5A2F9>> accessed 15 June 2023.

<sup>47</sup> Y.M. Romanyuk, 'Unity of judicial practice: theoretical foundations and improvement of the legislative provision.' Bulletin of the Supreme Court of Ukraine. 2012. No. 5. p.37-42. (in Ukrainian)

<sup>48</sup> I.S Ivanyura, D.V., Shevchenko and A.S Sivets, 'Legal Nature and Place of Judicial Precedent in the System of Sources of Law of Ukraine' (2021) 64 Uzhhorod National University Herald. Series: Law 26. (in Ukrainian)

These paragraphs set a new approach to the perception of precedent in Ukrainian legal reality. As interpretation precedent that I will mention further is considered a typical source of law in Romano-Germanic countries by not being considered a source of legal norms, at the same time, paragraphs 6 and 5 of Article 13 of the law constitute statutory obligations of the subjects of authorities and lower courts to take the decisions of the Supreme Court into account, which does constitute the elements and the nature of precedent itself.

Now if we come back to the three conditions mentioned in Chapter 1 that should be met in order for *ratio decidendi* to be implemented in a particular case, these are: (1) the facts of the later case closely resemble those of the earlier case; (2) the earlier case was decided by a court within the same judicial hierarchy as the current court or tribunal; and (3) the court that issued the earlier decision holds a superior position in that hierarchy compared to the current court or tribunal.<sup>49</sup>

Applying these three factors to the procedure of adhering by the lower courts and subjects of authority to the decisions of the Supreme Court in Ukraine, considering the specifics of an individual case, the nature of the disputed legal relationship, and the substance of the claims, the courts identify resemblances between the cases; the decision of the Supreme Court aligns with the judicial hierarchy of the lower court or governing body, with the Supreme Court holding a superior position within this hierarchy. With regard to mentioned, I come to the conclusion that under paragraphs 5 and 6 of Article 13 of the Law, the Supreme Court decisions in Ukraine have all the mandatory characteristics to be considered binding precedent in its meaning.

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<sup>49</sup> `Australian Law Dictionary` <<https://www.oup.com.au/books/higher-education/law/9780190304737-australian-law-dictionary>> accessed 15 June 2023.



### 3.3. Binding power of international institutions' decisions.

Another important for the purposes of my research paragraph of the analyzed article is paragraph 8 of Article 13 of the Law. The paragraph states that:

judicial decisions of other states, decisions of international arbitrations, decisions of international judicial institutions, and similar decisions of other international organizations regarding dispute resolution are binding and enforceable on the territory of Ukraine under the conditions determined by law, as well as in accordance with international agreements, the consent to the binding nature of which has been granted by the Verkhovna Rada of Ukraine.

While the text of the cited article manifests the binding nature of decisions made by international institutions rather than the obligation of Ukrainian courts to take them into account, an analysis of the content of several international legal documents signed by Ukraine indicates the recognition of precedents created by the European Court of Human Rights as a source of law. According to Article 46 of the European Convention on Human Rights and Fundamental Freedoms, the decisions of the European Court are binding on the states that are parties to the Convention.<sup>50</sup>

To clarify the terminology and definition of the term “binding” that is used in the Convention for the purposes of the conducted analyses further, the power of binding decisions of the ECtHR in Ukraine has another level of application and enforcement than the usual one used by other member states. The ECtHR decisions must be referred to and reaffirmed by Ukrainian courts while dealing with similar scenarios in its practice, bearing the characteristics of de facto precedent in these specifics of the process.

As I mentioned earlier, as one of the initial stages of harmonizing Ukrainian legislation with EU law, the ratification of the Convention officially recognized the jurisdiction of the European

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<sup>50</sup> `European Convention on Human Rights - Official Texts, Convention and Protocols` <<https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=>> accessed 15 June 2023.

Court for the interpretation and application of the Convention and its protocols, initiating the convergence of Ukrainian legislation towards the application of precedents.

The Law of Ukraine "On the Execution of Judgments and the Application of the Case Law of the European Court of Human Rights" recognizes the case law of the European Court of Human Rights as a source of law at the legislative level since 1997. According to Articles 17 and 19 of this law, courts apply the Convention and the case law of the Court as a source of law in the examination of cases. Ministries and agencies ensure systematic control over compliance with the administrative practices corresponding to the Convention and the Court's case law within the scope of their respective subordination.<sup>51</sup>

Thus, cases of the European Court of Human Rights are used in the Resolutions of the Plenum of the Supreme Court of Ukraine, its judgments, as well as by lower courts, applying them to emphasize their positions, establish standards, and interpret specific norms, case circumstances, and legal conclusions of the Court. As an example, I can mention a Resolution of the Plenum of the Supreme Court where the Court refers to similar conclusions presented in the Venice Commission's Opinion and supports its legal position by citing the judgment of the European Court of Human Rights in the case "BAKA v. HUNGARY,"<sup>52</sup> where similar conclusions regarding the legal situation were drawn.<sup>53</sup>

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<sup>51</sup> 'Law of Ukraine on the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights' (in Ukrainian) (*Official web-portal of the Parliament of Ukraine*) <<https://zakon.rada.gov.ua/go/3477-15>>. accessed 15 June 2023

<sup>52</sup> BAKA v. HUNGARY Application no. 20261/12 (2016)

<sup>53</sup> Resolution of the Plenum of the Supreme Court dated 08.10.2021 No. 9 'On applying to the Constitutional Court of Ukraine with a constitutional submission regarding the verification of the compliance of the Constitution of Ukraine (constitutionality) with the provisions of the thirteenth paragraph of paragraph 23-1 of Chapter III "Final and Transitional Provisions" of the Law of Ukraine dated December 21, 2016 No. 1798-VIII "On the High Council of Justice", paragraphs one, six and eleven of Clause 4 of Chapter II "Final and Transitional Provisions" of the Law of Ukraine dated July 14, 2021 No. 1635-IX "On Amendments to Certain Legislative Acts of Ukraine Regarding the Election Procedure (appointment) to the positions of members of the Supreme Council of Justice and activities of disciplinary inspectors of the Supreme Council of Justice"' (Official web portal of the Parliament of Ukraine) (in Ukrainian) <<https://zakon.rada.gov.ua/go/v0009780-21>> accessed 15 June 2023.

When discussing the implementation of precedent in the legal system of Ukraine, it is important to note that Judge Volodymyr Gudyma states in his speech during the conducted discussion on the topic "Court Precedent and Its Place in the Legal System of Ukraine" that it appears quite feasible, given the current level of development of the Ukrainian legal system and the status and legal standing of decisions of the Supreme Court, Constitutional Court, and clarifications of the Supreme Court, to also apply an approach borrowed, to some extent, from the European Court of Human Rights.<sup>54</sup>

This refers to situations where specific conclusions of the European Court of Human Rights regarding the interpretation of certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms may be extended to cases with different circumstances, but where those conclusions are applicable. When applying such pre-formulated conclusions to different cases where the circumstances are not identical, the principle of *mutatis mutandis* is employed, taking into account the relevant differences.<sup>55</sup>

The significance of such legal precedents in interpreting legal norms in Ukraine's foreign economic activities is undeniable. It is increasing due to the expansion of the jurisdiction of international courts and tribunals, such as the International Court of Justice, the International Commercial Arbitration Court at the International Chamber of Commerce, the International Centre for Settlement of Investment Disputes, the European Court of Human Rights, and the International Centre for Settlement of Investment Disputes (ICSID), over Ukraine.<sup>56</sup>

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<sup>54</sup> `Judicial Precedent and Its Place in the Legal System of Ukraine: Discussion With the Participation of Supreme Court Judge Dmytro Gudyma` / Publications / Judicial and Legal Newspaper (in Ukrainian)  
<<https://sud.ua/ru/news/publication/136643-sudoviy-pretседent-ta-yogo-mistse-v-sistemi-prava-ukrayini-diskusiya-za-uchasti-suddi-vs-dmitra-gudimi>> accessed 20 January 2023.

<sup>55</sup> `Judicial Precedent and Its Place in the Legal System of Ukraine: Discussion With the Participation of Supreme Court Judge Dmytro Gudyma` / Publications / Judicial and Legal Newspaper (in Ukrainian)  
<<https://sud.ua/ru/news/publication/136643-sudoviy-pretседent-ta-yogo-mistse-v-sistemi-prava-ukrayini-diskusiya-za-uchasti-suddi-vs-dmitra-gudimi>> accessed 20 January 2023.

<sup>56</sup> O. B. Chornomaz, `Legal precedent as a source of law in Ukraine`, Scientific Bulletin 1, 2016, Lviv State University of Internal Affairs 42. (in Ukrainian)

## CHAPTER 4. THE INTERPRETATION PRECEDENT IN UKRAINE

In theoretical and historical discourse, it is interesting to trace the dynamics and evolution of the theory of the origin and inherent characteristics of the precedent of interpretation. Many scholars who worked in the theory of law during Soviet times developed their concepts of this phenomenon in the Ukrainian legal system. If we analyze various scientific works on this topic, it is very difficult to find a unanimous opinion regarding a clear definition of its characteristics. In principle, disputes about what form the precedent of interpretation should take so that courts and entities with powers take them into account, and whether they can be considered judicial precedents at all, continue to this day in the world of legal sciences. Therefore, I will try to systematize the gathered information from old sources and compare it with new approaches to defining this term.

In 1939, the Ukrainian scholar S. Vilynansky was the first in the Soviet Union to emphasize the importance of court decisions in individual cases. Later, he expanded on this idea and argued that when similar decisions accumulate on a specific issue, a legal position is formed that becomes part of objective law.<sup>57</sup> T. N. Dobrovolska, for his part, highlights that the interpretation of a legal norm in a higher court's decision on a significant case has implications not only for that particular case but also for resolving similar cases in lower courts<sup>58</sup>.

A. B. Vengerov identified three distinctive characteristics of a precedent for interpreting a legal norm. First, although a "precedent for interpretation" is tied to a specific case, it only emerges when it is repeatedly applied in similar cases, signifying its acceptance and verified nature in judicial practice. Second, a "precedent for interpretation" presents a reasoned position on the

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<sup>57</sup> S. Vilynanskyi, To the question about sources of Soviet law // *Sotsialisticheskaya zakonnost*. — 1939. — No. 4/5. — p. 71. (in Ukrainian)

<sup>58</sup> T. N. Dobrovolskaya, The concept of supervision of judicial activity and its importance for improving the work of the Soviet judiciary // *Uchenye zapiski VNIISZ*. — 1964. — No. 1/18. — p. 86. (in Ukrainian)

interpretation of a norm, encompassing a specific principle or general rule (legal position). Third, a "precedent for interpretation" should be publicly available<sup>59</sup>.

The authority of a "precedent for interpretation" is rooted in the higher court's credibility, as it convincingly applies a particular norm, withstanding the test of time and becoming a model for lower courts. For instance, H. Shmelova noted that a "precedent for interpretation" gains normative and legal significance when its content is explained in the Plenum of the higher court.<sup>60</sup>

However, A. Pigolkin highlights the importance of published decisions from higher courts in complex cases. These decisions act as informal guidelines for resolving similar cases. Therefore, the scholar appropriately concludes that although courts cannot explicitly refer to arbitrary interpretations or rely on them in their decisions, such interpretations play a crucial role in harmonizing judicial practice and enhancing the functioning of the courts.<sup>61</sup>

According to Professor Malyshev, as stated in his work, "precedents for interpretation" do not impose an official obligation on courts to decide on similar disputes, and thus, they are not judicial precedents. He explains that "precedents for interpretation" do not contain legal norms (instead, they include legal positions that lack the characteristics of legal norms) and, therefore, do not have the status of a source or form of law. In contrast, a judicial precedent contains a legal norm (*ratio decidendi*) and, as such, is a source (form) of law, representing an indisputable act of law-making.<sup>62</sup>

<sup>59</sup> A. B. Vengerov, On the precedent of interpretation of legal norms // *Uchenye zapiski VNIISZ*. — 1966. — Vol. 6. — p. 3–19. ch. 6 (in Ukrainian)

<sup>60</sup> H. G. Shmeleva, Concretization of legal norms in legal regulation. — Lviv: Lviv State Publishing House. University, 1988. — p. 108 (in Ukrainian)

<sup>61</sup> A. S. Pygolkin, Interpretation of normative acts in the USSR. — M.: Legal literature, 1962. — 167 p., p. 153 (in Ukrainian)

<sup>62</sup> B. V. Malyshev, Judicial Precedent in the Legal System of England. Kyiv, 2008, p. 266-267. (in Ukrainian)

However, if we return to the context of Article 13 of the JSSJ and analyze the text: "Conclusions on the application of legal norms set out in the rulings of the Supreme Court are binding on all subjects of governmental authority and must be taken into account by other courts when applying such legal norms." Following the enactment of this article, it became mandatory for lower courts and subjects of governmental authority to consider such conclusions. While the wording "taken into account" may not instill the same level of confidence as "are binding," these paragraphs establish an obligation to consider similar cases.

Similarly, there are possible reasons to take issue with Professor Malyshev's assertion that "precedents for interpretation" do not contain legal norms when the article itself specifies "conclusions on the application of legal norms," positioning the presence of legal norms in the assessments per se. When rendering rulings, the Supreme Court incorporates elements such as formulating the exclusive legal issue that requires resolution, relevant case circumstances, and the legal norm to be applied in that situation. Therefore, summarizing the points mentioned above, it is not possible to agree with the statement that a precedent of interpretation contains a legal position rather than a legal norm.

As an example, the components of judicial legislation can be found in the judgments made by the Supreme Court related to resolving disputes over jurisdiction. When there is no explicit guidance in the law indicating which court is responsible for settling a specific disagreement, the Grand Chamber of the Supreme Court establishes a guideline, through its conclusion on applying the normative directive, on which jurisdiction the courts should use to adjudicate similar disputes.<sup>63</sup> This action aims to ensure legal transparency and a uniform methodology in the implementation of judicial procedures.

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<sup>63</sup> `Judicial Precedent and Its Place in the Legal System of Ukraine: Discussion With the Participation of Supreme Court Judge Dmytro Gudyma` / Publications / Judicial and Legal Newspaper (in Ukrainian)

## **CHAPTER 5. SUGGESTIONS OF MODERN RESEARCHERS AND PRACTITIONERS ON SOLVING THE PROBLEM OF CORRECT AND SYSTEMATIC USE OF A PRESIDENT AS AN OFFICIAL SOURCE OF LAW**

The question of the legal recognition of judicial precedent remains quite relevant to this day. Along with proposals for its official recognition, there arises the question raised by many practitioners and researchers regarding the possibility of introducing precedent as a recognized source of law and the problems stemming from it.

There is no consensus in the scientific community regarding whether the dynamics of change will be positive when precedent is introduced at an official level. The analysis conducted for this work and the interview carried out indicate that the majority of researchers are not particularly enticed by the idea of using the new phenomenon of precedent in Ukraine's legal system, let alone recognizing it in legislative acts loudly and unreservedly. At the same time, practitioners, who work with the law day in and day out, viewing it not as something abstract or confined to textbooks and scholarly works, but as a more tangible entity that they apply, are more inclined towards the opposite point of view. They see the use of precedent in contemporary Ukrainian judicial practice as a means to improve the legal system and ensure the observance of rights and freedoms of legal subjects. Whether this fear among researchers is linked to the word "precedent" and associated with a reluctance towards significant changes, or perhaps it arises from the competition of ideas on the battlefield of great thinkers, or simply reflects a lack of desire to explore something new, remains a fact. Therefore, I will now consider several opinions of Ukrainian legal scholars and practitioners regarding the

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<<https://sud.ua/ru/news/publication/136643-sudoviy-pretseident-ta-yogo-mistse-v-sistemi-prava-ukrayini-diskusiya-za-uchasti-suddi-vs-dmitra-gudimi>> accessed 20 January 2023.'

recognition of "precedent" as a source of law, the pros and cons of such action, and approaches to solving the problems that may arise from this process.

One of the first arguments addressed regarding the issue of introducing precedent in Ukraine is the question of whether, upon its implementation, legislators and judges will likely face the demand to completely reconsider or significantly transform the entire legal system of Ukraine.

For example, Arseniy Milyutin, an expert and lawyer from the law firm "Magisters," points out that in legal systems where the doctrine of *stare decisis* is applied, it does not consider *dicta* and *rationes decidendi*, meaning it does not necessarily take into account "what was said" and "how it was justified." Thus, in a situation with a specific legal consequence arising from a particular set of facts, the doctrine is only important for the decision itself and consequently, a significant portion of legal systems do not recognize this doctrine, as it contradicts the distinction between the right of judges to interpret the law and the right of legislators to create the law.<sup>64</sup> The researcher suggests that introducing this doctrine may contradict the Constitution of Ukraine, particularly Article 8, which establishes the supremacy of the law in the country's judicial system. The expert also comments that a contradiction may arise with Article 129 of the Constitution of Ukraine, which states that judges, in exercising justice, are independent and subject only to the law.<sup>65</sup>

Another open question that points out Professor Malyshev in our interview with him is the criticism of specific judges who selectively apply the doctrine, using only the precedents they agree with and ignoring those they disagree with.

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<sup>64</sup> 'Legal System of Ukraine and Judicial Precedent: Possibility of Coexistence' 'Legal Week' © 2006-2013 Weekly informative and legal newspaper' (in Ukrainian) <<http://legalweekly.com.ua/index.php?show=news&&newsid=120593>> accessed 20 January 2023.

<sup>65</sup> *ibid.*



Milyutin also notes that to avoid unnecessary legal debates and legal collapses that may arise due to the contradiction of the doctrine with the domestic legal system and its unfamiliarity to many lawyers, it is recommended not to blindly borrow mechanisms from another legal culture, but to develop alternative methods to achieve unity in judicial practice within Ukrainian realities.<sup>66</sup>

Professor Malyshev has also brought up the concern of potential issues arising from the incorporation of precedent into the Ukrainian legal system, explicitly stating that not everyone will be adequately prepared for these modifications. I concur with this assertion for two primary reasons. Firstly, not all judges and lawyers will possess the readiness to alter their legal understanding and mindset. Secondly, there is no assurance that they will possess comprehensive knowledge of all relevant cases or possess the correct approach to applying precedents, given the varying levels of professional skills and knowledge among certain participants in the legal process at present.

As an alternative to the introduction of a purely precedent-based system for regulating interests, the expert Milyutin proposes considering the development of the concept of jurisprudence constante at the legislative level, which provides that a long sequence of decisions applying a certain legal norm becomes decisive for all subsequent decisions. This concept is recognized and applied by many civil law systems. For example, in some countries like France, these "precedents" are established by higher courts such as the Cour de cassation and Conseil d'État, which have quasi-legislative functions. Milyutin argues that it might be appropriate to improve the existing practice of providing explanations by higher courts within the framework of the

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<sup>66</sup> `Legal System of Ukraine and Judicial Precedent: Possibility of Coexistence Week` `Legal Week` © 2006-2013 Weekly informative and legal newspaper. (in Ukrainian) <<http://legalweekly.com.ua/index.php?show=news&&newsid=120593>> accessed 20 January 2023.

concept of jurisprudence constante, rather than completely changing the legal approach, which is still unfamiliar in Ukraine.<sup>67</sup>

In turn, Oleksiy Kot, Managing Partner at Antika Law Firm, a member of the Council on Judicial Reform under the President of Ukraine, and a Doctor of Law, unanimously stated in response to the question of whether Ukraine needs precedent that it is necessary to consider the factor that Ukraine operates on the principle of the division of powers between branches of government. Courts should not create legal norms but should interpret and take into account judicial practice.<sup>68</sup>

Judge of the Supreme Court of Ukraine<sup>69</sup> and Honoured Lawyer of Ukraine Bohdan Poshva notes that implication of precedent can ensure transparency and predictability for both the judicial system and law enforcement activities since any organization or official cannot deviate from the rules established in the corresponding court decision.<sup>70</sup> In the conditions that judges are bound by a case law and they don't have an opportunity to withdraw from the case with similar essential circumstances, this pressure on the court and officials could prevent the possibility of corruption and reduce the number of complaints.

The specialist believes that it will obligate judges at all levels to constantly enhance their professional level and prevent abuses of power, as any change or reversal of a court decision automatically raises questions about the reasons for errors and may lead to disciplinary responsibility.<sup>71</sup>

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<sup>67</sup> *ibid.*

<sup>68</sup> LHS Discussion Hub 'Precedent Case: Does It Really Exist?' LegalHighSchool, 25.02.2019 (in Ukrainian) <<https://lhs.net.ua/ua-lhs-discussion-hub-pretседentnyi-vypadok-chy-isnuie-vin-vse-taky-ru-lhs-discussion-hub-pretседentnyi-sluchai-sushchestvuet-ly-on-vse-taky/>> accessed 20 January 2023.

<sup>69</sup> As of 2018

<sup>70</sup> B. Poshva, Judicial precedent: problems of implementation in Ukraine. Cited in: Serohin S. (2015) Sudovyi pretседent yak dzherelo prava v Ukraini. Judicial precedent as a source of law in Ukraine (in Ukrainian) <<http://legalitas.com.ua/ua/ukr-s-serogin-sudovij-pretседent-yakdzherelo-prava-v-ukra%D1%97ni/>>

<sup>71</sup> *ibid.*

On the other hand, there are opinions and concerns that the doctrine allows judges who were not elected through popular vote to make law, and that the doctrine protects wrongly decided cases. Professor Malyshev also mentions in his interview some arguments regarding the problematic nature of precedent in Ukraine within the context of corruption. Until now, being among the top countries with corruption, there exists a high level of bribery of Supreme Court judges, and basically, with the introduction of precedent, judges would be obligated to utilize decisions that were reached not based on the principles of judicial procedure and would contradict the establishment of justice in the country.

However, minimalists hold the position that the legislature, if it wishes, can change precedent through legislation.<sup>72</sup> An advocate Eugene Shmarov, in turn, believes that judicial precedent already exists in the Ukrainian legal system: "Despite the fact that judicial precedent as a source of procedural law does not officially exist in Ukraine, judges, when making decisions in complex cases, refer to previously adopted decisions or clarifications of higher-instance courts." However, the researcher points out that often contradictory decisions of judges can be found on the same issue, and in such cases, these decisions are used as a tool to justify the "desired" position. It is evident that the benefit of courts relying on the specific practice of higher courts will only be realized if the higher courts make all their decisions in accordance with a unified judicial stance, rather than based on personal beliefs.<sup>73</sup>

During the LegalHighSchool Discussion Hub on "Precedent Case: Does It Really Exist?", experts reached the conclusion that judicial practice should be predictable and stable. The majority of experts believe that when court decisions are of high quality, consistent, and

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<sup>72</sup> `System of Ukraine and Judicial Precedent: Possibility of Coexistence Week` `Legal Week` © 2006-2013 Weekly informative and legal newspaper. (in Ukrainian) <<http://legalweekly.com.ua/index.php?show=news&newsid=120593>> accessed 20 January 2023.

<sup>73</sup> E. Shmarov, The prospect of introducing judicial precedent as a source of law in Ukraine. cited in 'The Prospect of Introducing Judicial Precedent in Ukraine as a Source of Law / News / Legal Week (in Ukrainian) <<http://legalweekly.com.ua/index.php?show=news&newsid=120594>> accessed 14 June 2023.

coherent, the authority and role of judicial practice in Ukraine will be strengthened accordingly.<sup>74</sup>

“In Ukraine, precedent of "interpretation" already exists and is being applied”, Valeriya Ryadinska, the head of the research laboratory of the State Research Institute of the Ministry of Internal Affairs of Ukraine confirmed. The lecturer is convinced that when a new source of law is introduced, it is necessary to officially publish it and ensure its proper systematization. She also expressed her opinion regarding the state of “precedent” in current legal system, stating that the procedural innovations implemented in Ukraine are intended to promote the development of a consistent jurisprudential doctrine and the establishment of a stable judicial practice, pointing out that while this represents a step towards approaching "case law," it does not inherently establish case law in its entirety.<sup>75</sup>

Professor Malyshev, in an interview, stated that he believes the coexistence of generalizations of judicial practice by the Plenum of the Supreme Court and the powers granted to lower-level courts and authorities by Article 13 of the Law on Judicial System and Status of Judges is impossible. The professor argues that "according to the logic of those who claim that there is something like precedent in the country, why do we need generalizations?" I can agree with this statement. However, it is also important to note that if, as mentioned above, judicial practice is organized, structured, and of high quality, it would be sufficient to fill the gaps in legislation and eliminate the dualism of legal norms back and forth. In that case, there would be no need for generalizations of judicial practice. The presence of a "Ukrainianized," adapted system of precedent utilization, without completely overhauling the entire system of

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<sup>74</sup> `LHS Discussion Hub "Precedent case: does it still exist?" (LegalHighSchool - Higher School for Lawyers and Advocates, 25 February 2019) (in Ukrainian) <<https://lhs.net.ua/ua-lhs-discussion-hub-pretседentnyi-vypadok-chy-isnuie-vin-vse-taky-ru-lhs-discussion-hub-pretседentnyi-sluchai-sushchestvuet-ly-on-vse-taky/>> accessed 20 January 2023.

<sup>75</sup> *ibid*

constitutional law in the country, would be enough to address the current problems of lawmaking that we are facing.

Recognizing the significant importance of acts of the Supreme Court of Ukraine for the administration of justice, scientists still try to avoid using the phrase "source of law" in relation to them, since as was mentioned before, the court in Ukraine is not formally endowed with a law-making function, and therefore cannot engage in law-making.<sup>76</sup> However, in response to the question of whether precedent is a source of law in Ukraine, Yaroslav Romaniuk, a retired judge of the Supreme Court of Ukraine and former chairman of the Supreme Court of Ukraine, made a too-loud statement. He constituted that "classical precedent initially emerged due to the insufficiency of the normative legal framework, and the courts took on the role of regulating legal relationships. However, Ukraine has an adequate framework of legal regulations."<sup>77</sup>

I cannot agree with this claim, since anyone who has worked with legislative acts of Ukraine applying the law to the circumstances of the cases faced problems caused by the dualism of legal norms, contradictions between legal norms and moral norms, and gaps in legal acts. As lawyers correctly point out, it is "precedent" that can and is able to eliminate such problems of law enforcement. After all, despite the legislative unsettledness and ambiguity of this issue, the importance of resolutions of plenums of the Supreme Court of Ukraine only grows with constant changes in the Ukrainian legislative system within our country's transformation and growth.

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<sup>76</sup> `Legal System of Ukraine and Judicial Precedent: Possibility of Coexistence Week` `Legal Week` © 2006-2013 Weekly informative and legal newspaper.` (in Ukrainian) <<http://legalweekly.com.ua/index.php?show=news&&newsid=120593>> accessed 20 January 2023.

<sup>77</sup> `LHS Discussion Hub "Precedent case: does it still exist?" (LegalHighSchool - Higher School for Lawyers and Advocates, 25 February 2019) (in Ukrainian) <<https://lhs.net.ua/ua-lhs-discussion-hub-pretседentnyi-vypadok-chy-isnuie-vin-vse-taky-ru-lhs-discussion-hub-pretседentnyi-sluchai-sushchestvuet-ly-on-vse-taky/>> accessed 20 January 2023.

Therefore, it is necessary at the scientific level to thoroughly investigate the possibilities and limits of the application of court precedents as sources of law in Ukraine; determine their impact on law enforcement activities; to predict the possible advantages and disadvantages of giving acts of the highest courts of Ukraine the status of sources of law. And as practitioners and scholars suggest, after weighing everything, we can gradually introduce appropriate changes, perhaps as an experiment (for example, first it would be possible to grant the status of a source of law to the resolutions of the Plenum of the Supreme Court, having previously introduced an effective procedure for their adoption), and then see, if we get a positive result.

## CONCLUSION

During the conducted research, it has been proven that the initial steps towards the emergence of precedent have already begun since the first days of Ukraine's independence, starting from the moment of ratification of the Convention as part of harmonizing legislation with EU law. Commencing from that point, certain procedural changes have been introduced into the legislation, granting more powers and authority to the decisions of the Supreme Court. This includes amendments made to procedural acts in 2010, which provided a legal basis for courts to consider and refer to precedents set by higher courts in their decision-making process. These amendments have been removed in the future, starting from 2017, due to reasons that are currently difficult to find in archives, and the answer to the question of what exactly prompted such a decision by the authorities.

Taking into account the resolutions of the Supreme Court, which do not constitute binding precedent as *stare decisis*, but essentially interpret and supplement the content of normative legal documents at all levels, they significantly improved the judicial process as something like “judicial precedents” for lower courts.

I have also identified the forms of precedent that currently exist in the modern legal system of Ukraine. Such as binding precedent contained in Paragraph 5 of the JSSJ and the binding power of international institutions' decisions according to paragraph 8 of Article 13 of the JSSJ, precedent of interpretation engraved already in the obligations of the Supreme Court and that can be found in the resolutions of the Plenum of the Supreme Court, and persuasive precedents which paragraph 6 of the mentioned-above Law contain.

When considering whether Ukraine should adopt a precedent system, it is important to highlight that based on an analysis and the perspectives of contemporary and post-Soviet scholars, as well as practitioners, it can be deduced that the implementation of a stable justice system incorporating precedent can have positive effects on the quality of judicial decision-making and the expertise of judges. This, however, necessitates that the system is characterized by consistency, predictability, clarity, and proper organization. Furthermore, it is imperative to establish a mechanism for holding courts and law enforcement agencies accountable in order to effectively combat corruption.

Additionally, it should be emphasized that if Ukraine were to adopt a precedent system, it must be tailored to the specific legal and political realities of the country to ensure its successful integration.

In our interview, Professor Malyshev emphasized the need to build trust in the judiciary and the court system, especially when implementing precedent in order to alleviate strong doubts about the integrity of the judicial apparatus in society. In my opinion, it is crucial to prioritize the requalification and reassessment of judges and court personnel, as well as conducting integrity checks and investigating corrupt practices in their work and behavior. Only after these steps we can start discussing society's trust in judicial authority and the introduction of precedent into our legal system. As long as Supreme Court judges continue to engage in bribery and misconduct, as unfortunately still occurs, even during times of war, it is impossible to advocate for such radical changes, especially considering the resistance of the older generation to innovations and strong systemic changes.

As past experience has shown, attempts by the previous government to enhance the nation's trust in the judiciary and the holders of governmental authority were not successful. Whether the ongoing war will change this or lead us down the same path remains uncertain. However,



it remains a fact that the proper implementation of precedent in our system, along with elevating the knowledge, qualifications, and integrity of judges, can shift the lever of change towards a better process and quality of justice.

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