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**Review Paper**

# The Legal Nature of the ECHR Judgements and Their Place in the System of Sources of Economic Law of Ukraine

Liliia Oliinyk

V.K. Mamutov Institute of Economic and Legal Research of the National Academy of Sciences of Ukraine, Kyiv, Ukraine

*Corresponding author: liliia_ol@ukr.net (**ORCID ID:** 0000-0002-5946-7524)

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**ABSTRACT**

The purpose of the work concerned the study of the legal nature of the ECHR practice, as well as their place in the sources hierarchy of law of Ukraine, which regulates economic relations. For this, the work used the method of analysis and synthesis, comparison and formal and legal method. As a result of the study, it was established that the status of ECHR judgements as a source of law is determined and consolidated by Ukrainian legislation. It was proved that such regulation allows avoiding conflicts in national legal norms and to achieve unambiguity in the context of the application of the ECHR practice by the courts of Ukraine. In addition, such legislative consolidation ignores a separate sector of economic relations, which concerns compensation for moral damage to economic entities. Thus, the conducted study made it possible to establish that the place of the ECHR judgements in the system of sources of economic law of Ukraine is determined by legislation and is binding for implementation. The practical value of this work was revealed in the possibility of using obtained conclusions by scientists to continue the study of this topic, as well as by judges in the course of solving economic cases.

**HIGHLIGHTS**

- It was proved that such regulation allows avoiding conflicts in national legal norms and to achieve unambiguity in the context of the application of the ECHR practice by the courts of Ukraine.

**Keywords:** Law enforcement, precedent, judicial practice, legislation, European integration

Changes to the legislation usually provoke a violent reaction in scientific circles among lawyers. Certain issues in scientific discourse can provoke discussions for a significant amount of time. One of these is the question of establishing the legal nature of the European Court of Human Rights (ECHR) judgements, as well as consolidating its place among the sources list of economic law of Ukraine. Despite the fact that providing the above mentioned documents binding properties as a result of the adoption by the Verkhovna Rada of Ukraine of Law of Ukraine No. 3477-IV "On Implementation of Decisions and Application of Practice of the European Court of Human Rights" (2006), this issue is still relevant. This is especially evident in the conditions of European integration and active interaction of Ukraine with the European Union (EU), including in the context of bringing the legislation of Ukraine into compliance with the EU (Denysova *et al*. 2021).

A. Donald and A.K. Speck (2019) studied this issue from the perspective of the international experience of using ECHR judgements. In their work they analysed the legislation and approaches of various states regarding the binding obligation to use the ECHR practice in the course of judicial proceedings. L.M. Nikolenko (2021) managed to consider the general system of sources of economic law of Ukraine. The conclusions that they reached by it

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make it possible to establish a certain hierarchy between the components of the above mentioned system, as well as to use it when determining the place of ECHR judgements in it. In addition, the researcher established the characteristic features of the sources of law directly for the economic relations area. In turn, M. Erdoğan (2021) described approaches to the interpretation of the ECHR practice, as well as the priority of its use within the national judicial proceeding. They studied the methods and means on the basis of which the ECHR judgements are systematised, and also allowed determining their characteristic features. As a result, it was possible to reveal the priority of using such practice in different states with the aim of regulating social relations, including economic ones. V. Reshota *et al*. (2022) stated the opposite position, because in their work they proved that the ECHR judgements should not be referred to the system of sources of law, nor should their binding obligatory implementation be legally consolidated. The researcher believes that this practice is not perfect and contributes to the development of conflicts and gaps in national legislation. The author substantiated the idea of using the ECHR practice, but not binding during the judical proceedings.

## MATERIALS AND METHODS

The analysis method was used to classify the general issue of scientific study into several separate independent parts, namely "sources of law", "sources of economic law" and "precedent". They were studied and their main properties and characteristics were considered. The relationship between their concepts and essence was analysed. The synthesis method became the basis of the object development of this scientific work, because it allowed considering the above mentioned terms in unity and totality. In addition, at this expense, it was possible to establish the dependence between them, which made it possible to achieve the set purpose in the study. The comparison method was applied during establishing common and distinctive features between the categories "source of law" and "source of economic law". It made it possible to characterise the role and place of ECHR judgements in the system of sources of economic law in Ukraine due to their comparison with other elements. Also, the comparison method played an important role in the establishing the legal nature of ECHR judgements due to the study of different types of precedents and their features of use.

The formal and legal method became the basis of regulatory documents study, as well as judgements, in particular the ECHR. Among them, Law of Ukraine No. 3477-IV "On Implementation of Decisions and Application of Practice of the European Court of Human Rights" (2006). Accordingly, their content was studied, as well as provisions regulating the binding obligation of the ECHR position and other judicial instances (the Supreme Court of the United States) for the court.

The study was divided into three stages. At the first stage, the author established the legal force of ECHR judgements for national courts, and also revealed the theoretical meaning of the "precedent" concept. In addition, a study of the legal nature of the ECHR practice was initiated, which was carried out due to the analysis of various precedents types, both in the Anglo-Saxon and Romano-Germanic legal systems. At the second stage, some provisions of the ECHR judgements, as well as the Supreme Court of the United States and United Kingdom were studied. In addition, the place of the ECHR judgements in the system of sources of economic law of Ukraine was determined based on which recommendations were developed for its development and improvement. A discussion was also held within which different positions and ideas of scientists regarding this issue were considered, as well as compared with the results obtained by the author. At the third stage, the main frameworks and provisions of the conducted scientific study were distinguished and consolidated in the conclusions. In addition, an attempt to model priority directions for future scientific developments connected with this topic was made.

RESULTS

The legal force of ECHR judgements in the legislation of Ukraine was determined in 2006, as a result of the adoption of Law of Ukraine No. 3477-IV "On Implementation of Decisions and Application of Practice of the European Court of Human Rights" (2006). The analysis of the abovementioned regulation made it possible to note that it does not provide for the limits of application of the ECHR precedent, in particular, it does not describe an exhaustive list of relations to which it should be

applied. The legislator noted that the regulatory scope of this law is determined by the relations developed with the aim of avoiding Ukraine's violation of the current ECHR provisions, as well as protocols to it. Thus, the purpose of this regulatory legal act is revealed in the Europeanisation of the Ukrainian national judiciary and administrative practice, as well as the development and provision of conditions for reducing the part of applications received by the ECHR against Ukraine.

The analysis of the first article of Law of Ukraine No. 3477-IV "On Implementation of Decisions and Application of Practice of the European Court of Human Rights" (2006) states that its provisions provide for the consolidation of the ECHR judgements, both in cases against Ukraine and others in the system of sources of law. Based on this, it becomes necessary to establish which part of such judicial practice belongs to the above mentioned system and should obligatory be taken into account by the national courts of Ukraine. For this, it is expedient to establish the legal nature of ECHR judgements, which is most often referred to as precedent (Says, 2021).

The essence of the "precedent" concept is revealed in the systematisation and generalisation of judicial practice in a specific relations area, which is characterised by the biding obligation for lower courts. This term represents the resolution of a certain court case in the past, which is an example for the use and resolution of similar issues in the judicial proceeding in the future. In addition, a distinction was established between legal and interpretive legal precedents, because their meaning is not identical. The first one is an external expression of an objective legal rule, and the second one refers to acts of casual official interpretation of the legal rule essence that gains binding properties for its future use by subjects.

Since the number of possible precedents classifications is significant, this determines the use of different criteria for their development. This factor should be changed, in particular, the establishment of a unified approach and features based on which judicial practice will be divided by types. Because of this, the author developed a criteria system that would be appropriate to use during the precedents classification. First of all, they include the type of legal system, as it determines certain features of national legislation, for example, regarding the possibility of using precedents in judicial proceedings. The next criterion, according to the author, is the binding consideration of judicial practice, in particular the precedents division into binding, non-binding and binding-conditional. Another classification criterion can be the originality of the judgement, namely, whether it is the first time that it concerns the consideration of a certain social issue or whether it repeats the previous position. The last criterion that the author distinguishes is the subject matter that refers to the precedent essence, which in turn can be rule-making or interpretive. At the same time, it should be emphasised that the suggested list is not exhaustive, because social conditions are dynamic due to which the number of features based on which it is possible to classify precedents only increases. To establish the legal nature of the ECHR judgements, the work studied the main aspects and features of the precedents, which are characteristic of the Anglo-Saxon and Romano-Germanic legal systems. Such choice is not accidental, because they are the most common among other systems, and also because Ukraine, whose legislation is studied in this study, belongs to the second one.

Characterizing the Anglo-Saxon legal system, it should be noted that it is based on the stare decisis doctrine, the content of which is the courts hierarchy, as well as the dependence of the lower court on the judgements of the higher court. Taking into account the rapid development of social relations, this doctrine began to cause discussions around it. To a greater extent, they concerned two directions for the courts work, namely the observance of established practice (which may sometimes even be incorrect), which allows ensuring the judicial system stability or to change it, if there is such right.

Moving to the analysis of judicial practice in the Romano-Germanic legal system, which is called "jurisprudence constant", it refers to precedent, which is a means for law-making by courts in continental law countries. The difference between the Anglo-Saxon and continental types of precedent is that the Anglo-Saxon type is formed at the expense of one judicial judgement, and the continental type is based on a system of such judgements. It was noted that for the development and spread of the continental precedent there is a need for a

qualitative perception of its legal position by a wide circle of representatives of the legal community. Another precedent type is a persuasive precedent. An important feature of it is that it occurs in both Romano-Germanic and Anglo-Saxon legal systems, while not being established for either of them. It was proved that the authority of the body that made the judgement (usually a court) is inherent to it, which in turn is not binding.

To determine the legal nature of the ECHR judgements, it was investigated what meaning this judicial body provides to its positions. The first judgement dated January 18, 2001 reveals the ECHR's position that during disputes resolution, it should not unreasonably ignore its own precedents, as this would be contrary to the interests of legal certainty, predictability and equality before the law. In addition, the dynamism of social relations in the Contracting States (those that have ratified the ECHR), which can provoke disputes regarding the practicability of using previous judicial practice. In such case, the ECHR should take into account probable social transformations to reach a consensus on certain provisions (Stiansen and Voeten, 2020). In the second judgement dated September 27, 1990, the ECHR established that it is not connected or dependent on the positions it expressed in the past, which comes from the provision of point 51 paragraph 1 of the Rules of Court (2022). It was noted that in its activities it tries to rely on its own precedents to adhere to the frameworks of legal certainty, as well as the development and qualitative interpretation of the ECHR. At the same time, it was emphasised that if there are good reasons, the ECHR can ignore its own previous practice to resolve disputes taking into account modern social changes (Omelchuk, 2021).

The conducted analysis made it possible to establish that the issue regarding the use of judicial practice, as well as its compliance with modern social conditions is characterised by a high degree of sensitivity and uncertainty. In turn, the ECHR puts forward a position based on the fact that although the ECHR is an established document, it is not static which allows taking into account active socio-political changes in states when using its regulations (Collenette *et al.* 2020). Particular attention was paid in the work to the issue connected with the legal nature of ECHR judgements. It was analysed from three sides, namely as interpretive acts, judicial precedents, a combination of the two abovementioned options. The position of S.I. Shimon *et al.* (2020) was also analysed as they studied the concepts of "legal position" and "ratio decidendi". Based on this, it was noted that the first term embodies the study of the arguments and practice of the ECHR, which as a result develop the legal content of the the legal judgement. It was emphasised that such a comparison should be made based on the features of a specific legal system, which may differ among themselves and affect the terms interpretation (Madsen, 2020).

For a thorough analysis of the "legal position" concept, the legal positions of the Supreme Court were studied. In this context, it was established that the decisions of such a collegiate body regarding the application of a certain legal provision are binding for all authorities, as well as courts that use its provisions in their activities. In other provisions, the concept of "the conclusion regarding the application of the legal provision" is found. During the consideration of cassation appeals, the panel of judges of the Supreme Court usually develops a reference to a certain number of legal provisions, provided that there is no need for their additional interpretation (Petrov, 2020).

## DISCUSSION

I. Boyko (2021) in their work analysed the precedence of the ECHR practice for the Ukrainian judicial proceeding. In their study, they came to the conclusion that the legal nature of the ECHR is due to the fact that its decision is an element of judicial practice. In turn, the latter is a unique legal source called a precedent. They proved that Ukraine's ratification of the ECHR has a positive impact on both its international legal status and procedural relations within the country. The researcher drew attention to the fact that for a more effective interpretation of the above mentioned regulatory document, it is expedient to define and foresee the process of using its provisions at the legislative level, in particular during judicial proceedings. In turn, T.A. Danylenko (2021) focused attention on the general issue concerning the role and position of precedent in the system of sources of law in Ukraine. In author's opinion, the legislative process lags behind the development of law, which

provokes the acceleration of the development of legal reality. In this context, this refers to the precedent spread in dispute resolution processes in the Ukrainian judicial proceeding. N. Ivanyuta and N. Zago (2020) paid special attention to the sources of economic procedural law, namely to their development. They managed to establish that such sources include both traditional and non-traditional sources that play a quite important role. To the first one they included established regulatory legal acts and international agreements that are characterised by their static and long-term nature. Analysing the system of sources of law, namely its transformation, an attention should be paid to quasi-sources, which include economic agreements, judicial practice, and legal customs.

W. Mingelen and J. Uzman (2022) drew attention to such type of ECHR decisions as advisory opinions. They noted that the essence of such regulatory legal acts is revealed in the interpretation and correct understanding of the content of the ECHR provisions and the protocol to it. Systematic analysis of the legislation made it possible to note that at the moment there is no legislative consolidation of the advisory opinion's status of the ECHR, as well as its legal force in the system of legal sources of Ukraine. E. McClean (2020) investigated the experience of using the ECHR practice in the United Kingdom. They established that despite the use of Anglo-Saxon precedent in this country, the ECHR practice does not play a significant role there. This is expressed in the fact that in the event of conflicting provisions between one and the other precedent, the higher court of England will prevail. Based on this, the researcher attributes the ECHR judgement to a persuasive precedent, considers it appropriate not to recognise the binding nature of their provisions for the national courts and judicial systems of those states that are the defendants. A special attention was paid to the study of R.A. Miller (2022), who managed to consider the probable obstacles during the implementation of ECHR decisions, as well as approaches to overcome them based on the experience of Germany. Such choice is due to the fact that this state is characterised by one of the highest indicators among European countries regarding the observance and use of the ECHR precedent. M.R. Madsen (2021) studied the experience of implementing ECHR judgements in France, which has common features with Ukraine. There are no specialised institutions and algorithms that would be responsible for compliance with the above mentioned process. Despite this, France is characterised by a high success rate in the implementation of ECHR judgements, which is due to the developed legal status of court judgements in the national legal system of the state. Based on this, the researcher established that judicial acts are an important source of law in France, as they allow qualitative interpretation and analysis of the content of laws and other regulatory legal acts.

The discussion shows that there is no unanimous opinion among scientists about the legal nature of the ECHR practice, as well as the expediency of its attribution to the system of sources of law, in particular economic law. However, the author considers it expedient to adhere to a position based on the binding nature of ECHR judgements for national courts of Ukraine, because such provision is consolidated in legislation. In addition, the discussion made it possible to describe international approaches to the use of the ECHR precedent, which mostly have features with the current vectors of legislative development of Ukraine, which are due to the European integration and Euro-Atlantic processes. This testifies to the success and effectiveness of the approaches currently used by Ukrainian legislators that allows stating about the priority of their use of ECHR judgements in the future.

## CONCLUSION

The conducted study made it possible to establish that legal precedent began to occupy a place and an active role in the system of sources of law not only of the Anglo-Saxon legal system, but also of the Romano-Germanic one to which Ukraine belongs. This conclusion was obtained due to the study of the legal nature of the judicial practice of the ECHR, as well as its role in the system of economic legislation. The study established that out of all the legal precedent, only the part of the ratio decidendi should be taken into account, which reveals its essence, that is, the legal position of the Court. In addition, the work classified legal precedent according to various characteristics, namely, the type of legal system, the binding to take into account judicial practice, the originality

of the court judgement and subject matter It should be noted that in scientific discourse, the division of judicial practice into types is a common issue, which is why the suggested list is not exhaustive. Two approaches were studied in the work, namely stare decisis on which the Anglo-Saxon legal system is based, and jurisprudence constante, which defines the Romano-Germanic legal system. Thus, the legal precedent of the United States, in the judgements of the Supreme Court, the precedent of the United Kingdom, in the judgements of the Supreme Court, as well as the ECHR practice were considered. This made it possible to establish that the precedents are not unambiguous, because the approaches in solving the same area of relations in different time periods have differences. The author believes that this is an advantage of judicial practice, because it is in this way that acute social changes are taken into account, which in turn allows the use of the ECHR provisions in different social conditions.

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