REVISTA RELAÇÕES INTERNACIONAIS DO MUNDO ATUAL

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THE PRACTICE OF LEGAL INTERPRETATION BY JUDICIAL AUTHORITIES IN UKRAINE: THEORETICAL AND ORGANIZATIONAL PRINCIPLES

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ABSTRACT

Judicial interpretation occupies a special place among other types of interpretation, because it is carried out by people with a high level of professional training, who have thorough theoretical knowledge and practical experience. Also, judges quite often have to interpret those provisions of normative or individual legal acts, regarding which there is a dispute among other legal entities. Interpretations of legal texts, which are carried out by judges of higher courts, determine approaches to solving special legal problems that always take place in legal practice. The purpose of this article is: firstly, to highlight the main approaches to understanding judicial interpretation and to define and characterize its main types; secondly: the analysis of the provisions of the current Ukrainian legislation to identify the general approaches embodied in it regarding the implementation of judicial legal interpretation activities. To achieve the goals determined during the research, the authors used a system of general scientific and special scientific methods of cognition. The authors justify the special role and importance of judicial interpretation for the legal system of Ukraine. Considerable attention is paid to improving the quality and efficiency of judicial interpretation. Based on the analysis of the regulatory material,

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recommendations are provided on ways to improve this type of interpretation and take into account its results in the work of the government legislative branch. Considering the analysis of the source base and current legislation, the authors identify the main problematic aspects of the theoretical and legislative foundations of judicial interpretation.

Keywords: legal interpretation, judicial interpretation, legal positions of the court, official casual interpretation, judicial legal interpretation mistake.

1 INTRODUCTION

When examining the peculiarities of legal interpretation, considerable attention is traditionally paid to the issue of subjects of interpretation. The subjective factor of interpretation is important because it affects both the immediate content of the interpretation result and its legal force. Interpretation of legal texts is carried out by certain subjects with different levels of professional training, individual experience, legal awareness, and personal value orientations. Elucidating the content of the object is often a difficult task and requires the knowledge of law enforcement subjects of the main provisions of legislation, legal doctrine, the practice of applying the relevant norm, the rules of interpretation techniques, and developed critical thinking. Interpreters can also have different purposes of interpretation, which is determined by the specifics of a case, in connection with the resolution of which the content of the corresponding object of interpretation is clarified. In the domestic legal tradition, established views regarding approaches to the classification of subjects of interpretation were formed, according to which a special place quite rightly belongs to judicial bodies in this activity. Indeed, it is difficult to imagine a person who can interpret a legal text better than a judge, especially of a higher court, because he will draw on both the development of legal doctrine and practical experience. In addition, the interpretations made by judges personally or collegially, as a rule, determine approaches to solving special legal problems that always take place in legal practice.

Judicial practice is the most important form of law enforcement activity, in the process of which the violated rights of participants in social relations protected by law receive jurisdictional protection. The application of law is impossible without revealing the true meaning of legal norms. In turn, the results of legal interpretation are reflected in court

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acts, which makes them available for perception and borrowing when solving similar cases. This determines the expediency of the analysis, generalization of court practice and provision of a common approach to the interpretation of certain mandatory legal provisions.

If several courts under similar circumstances on the basis of the same norms, having interpreted them differently, making opposite decisions, then the principle of legality is nullified, the meaning of court proceedings is lost, and trust in the judiciary and the state as such decreases. That is why one of the main functions of the Supreme Court (hereinafter referred to as the Supreme Court) is the formation of a mechanism that will ensure the equal application of legal provisions by all branches of the judicial system.

The method of philosophical dialectics, the system of general scientific and special scientific methods of cognition is used to fulfill research tasks. The regularities of the process of judicial interpretation of legal texts were studied using the method of philosophical dialectics. The hermeneutic method was used for the interpretative study of provisions of national legislation and scientific works. The historical-legal method provided a study of the development of the institute of judicial interpretations in Ukraine during the last 40 years. The formal-legal method is used to identify signs, study the internal content and external form of judicial interpretation.

2 THEORETICAL FOUNDATIONS OF JUDICIAL INTERPRETATION IN UKRAINE

The unity of judicial practice is of undeniable importance for the functioning of the country's legal system, because it not only reduces the risk of judicial mistakes, but also contributes to the predictability of court decisions, compliance with the principle of equality before the law and the court, stability of legal regulation, reduces the corruption component and increases the level of trust in the court (Savchin , 2016). Practice shows that the activity of judicial bodies in the clarification of legal acts is significant. We support the opinion of K. Karaschuk that, compared to other types of interpretation, the judicial one allows to react rather quickly to the uncertainties that arise when solving various situations (Karaschuk, 2008).

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Approaches to the essence of judicial interpretation in Ukraine have undergone significant transformation over the past half century. In the Soviet period, judicial interpretation was considered by the majority of scientists as a type of official interpretation carried out by judicial bodies based on the generalization of decisions on certain legal cases. At the same time, at the end of the 80s of the XX century isolated opinions of individual scientists began to be heard about the possible formation through the generalization of judicial practice of legal provisions, that is, so-called “clots” of legal matter, which are close to the norms of law. And already in the 90s of the XX century it was said that in the process of judicial interpretation “ambiguous” norms are produced: the first are legal provisions (norms) created by courts in relation to a specific case through interpretation or by analogy; the second – regulatory provisions developed as a result of the generalization of judicial practice (Kostsova, 2016). In the end, the permanent judicial reform in Ukraine and changes in the legislation aimed at increasing the efficiency of the judiciary and strengthening the guarantees of the rights and freedoms of citizens, rethinking methodological approaches to many issues in jurisprudence, intensified the implementation of new mechanisms for ensuring the sustainability of judicial practice through the unity of approaches, timeliness and certainty in the interpretation of legal prescriptions (Graham, 2009).

Forms of judicial interpretation can be divided into several types depending on the level of the judicial instance: governing, which can exist in the form of official explanations of the courts of higher instances based on the generalization of judicial practice; precedent, embodied in the form of legal conclusions, positions; current, namely court decisions in specific cases (Savchenko, 2019).

In the Law of Ukraine “On the Judiciary and the Status of Judges” dated June 2, 2016 No. 1402-VIII (hereinafter - the Law), Article 6 defines the foundations of the administration of justice - the Constitution, the Laws of Ukraine, the rule of law (Law of Ukraine No. 1402-VIII “About the judiciary and the status of judges”, 2016). Article 13 of the above-mentioned Law contains a rule regarding the bindingness of conclusions on the application of legal norms contained in the resolutions of the Supreme Court for all subjects of power. This provision of the Law is extremely important, but, unfortunately, it does not have a real mechanism for its implementation and enforcement. There is also a

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provision on taking into account conclusions regarding the application of legal norms set forth in Supreme Court resolutions by other courts when applying the same norms.

So, what does the legislator mean by the conclusions of the application of legal norms (legal conclusions, legal positions). In scientific sources, we can find the following approaches to understanding legal conclusions: these are generally binding legal guidelines that are formed by the Supreme Court in the process of its official casual interpretation of normative legal acts, carried out during the review of court decisions. At the same time, it is noted that the peculiarity of the specified form of official interpretation is that it is carried out when solving real disputed cases, and not just when analyzing and interpreting concepts (Didyk & Besaga, 2018).

Giving his definition of the legal position of the Supreme Court, D.O. Skrypnyk notes that this is a conclusion on the application of a legal norm, which is mandatory for the application of all subjects of power that apply in their activities a normative legal act containing the relevant legal norm, as well as for consideration by the courts of the first and appellate instances , including when adopted by investigating judges in similar legal relations, the form of expression of which is the corresponding resolution (Skrypnyk, 2018). So, the first definition emphasizes the mechanism of formation of the specified conclusion, in the second, the author focuses on the order of its application and external expression. The legal opinion is in the motivational part of the decision, while it does not include the text that is a reproduction of the law, literal or approximate, because the identification of implicit meaning, clarification of ambiguously understood provisions is the main thing (Hrystova, 2004).

Scientists draw attention to the fact that, as a rule, the countries of the Romano-Germanic legal family have a special, defining status of legal conclusions made by higher courts. Such a thesis can also be applied in relation to decisions of the Supreme Court on specific cases containing a relevant casual interpretation. The main arguments for its consideration by lower level courts are persuasiveness, reasonability, and not obligation (Slotvinska, 2017). At the same time, in the scientific community, all of the above-mentioned provisions of the legislation intensified the discussion regarding the emergence of the new term “precedent law” for the Ukrainian legal system (Marchenko, 2013; Bobrovnyk, et al., 2019). Thus, in his work devoted to the consideration of judicial acts in

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the regulation of tax relations, K.G. Karpushova expresses an opinion about the appearance in the legal system of our country of another source of law, namely – judicial precedent in the form of an interpretation precedent. The scientist refers to it: 1. resolutions of the Supreme Court containing conclusions on the application of legal norms; 2. decisions of the Supreme Court, adopted based on the results of consideration of an exemplary case. In her opinion, this is a reflection of a general European trend in the countries of the Romano-Germanic system, a departure from Soviet traditions in Ukraine to the use of judicial precedent as a source of law in the legal system (Karpushova, 2019).

At the same time, some legal scholars propose to attribute court precedents (national and international court decisions) to derivative (secondary) sources of law (Maidanyk, 2013). Instead, K.Yu. Savchenko offers his vision of this issue. She says that the judicial precedent contains the following acts of the courts: 1. decisions of the Supreme Court, made in the order of review of court decisions; 2 decisions of the European Court of Human Rights; 3. decisions of the Constitutional Court of Ukraine, which are characterized by it as a judicial precedent of a legal interpretation nature (Savchenko, 2019). The above allows us to say that the current legislation is gradually creating conditions for the application of court precedent, but this process must be properly formalized within the framework of the further reform of the judicial system. The legal literature also covers the issue of the legal force of the relevant legal positions (interpretations) of judicial institutions. So, O.V. Remizova speaks of the following types: universally binding, contained in the decisions of the Constitutional Court of Ukraine; limited mandatory, which is contained in the decisions of district courts of all instances; of a recommendatory nature - available in the Conclusions of the Grand Chamber of the Supreme Court; debatable - separate opinion of the judge (Remizova, 2019).

Deserving of special attention in the context of the topic of research are the statements regarding the legal conclusions of the Supreme Court of M. Shumylo. He rightly points out that the courts of lower levels did not need to know about the change in the opinion of the Supreme Court regarding the solution of a certain legal problem. In order for judges to successfully solve similar cases in the future, it is important for them to understand the logic and algorithm of decision-making, approaches to the use of certain methods of interpretation by the Supreme Court. The scientist points to rare cases when

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the name of a certain method of interpretation is specified in the decrees. At the same time, he rightly points out that it is not enough to cite only the name of the method itself in the text of the court decision, it is necessary to show how the application of this particular method and method of interpretation led to the achievement of a certain conclusion, the formulation of a certain conclusion for judges who are guided by the Supreme Court. The scientist also focuses on the duality of Supreme Court decisions as a legal conclusion and expression of methodological approaches that allow to track how precisely such a result was achieved during the consideration of the case (Shumylo, 2017).

Therefore, legal conclusions are formed by specialists in the field of law with the help of interpretation and specification of norms, overcoming gaps by applying the analogy of law, are objectified and made public in the form defined by law, are a kind of “model” for the interpretation of legal prescriptions for judges and can be considered as an independent object of interpretation. Article 46 of the Law is interesting from the point of view of the research topic, which contains provisions on the generalization of the practice of the application of substantive and procedural laws by the plenary session of the Supreme Court, systematization and provision of publication of the legal positions of the Supreme Court with reference to the court decisions in which they were formulated. It is also noted that SC are provided with advisory clarifications on the application of legislation based on the results of the analysis of court statistics and the generalization of court practice (Golovatyi, 2017).

3 LEGISLATIVE FOUNDATIONS OF JUDICIAL INTERPRETATION IN UKRAINE

On the official website of the Supreme Court, in the “Activities” section, in particular, there are “Digests of the judicial practice of the Grand Chamber of the Supreme Court” classified by periods of adoption. They state the main theses regarding the consideration of specific cases and a proposal to familiarize yourself with the text of the Supreme Court’s decision regarding this case in the Unified State Register of Court Decisions. According to the same principle, relevant blocks of information are formed - “Reviews of the judicial practice of the courts of cassation”, “Legal positions regarding certain categories of

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cases". In this way, the publication of legal conclusions of the Supreme Court is ensured. According to the provisions of the Law, the plenum of the Supreme Court must provide an explanation of a recommendatory nature (an explanation of a more general nature, when a conclusion or recommendation is provided on the basis of the study and generalization of practice regarding a certain category of cases), but it does not specify how the specified legal interpretation acts should be formed.

Let us turn to the definition of interpretative acts in judicial practice, which is provided in the scientific literature. In particular, S. Paleshnyk notes that these include written acts-documents with a specific structure, content, form and purpose, which are issued by the Constitutional Court or courts of general jurisdiction of a higher level (Paleshnyk, 2013). D. Luspenyk, judge of the Supreme Court, explains the Supreme Court's position on the issue of generalizing explanations and the formation of such legal interpretation acts. He emphasizes that part of the Supreme Court judges today consider it impossible to return to the practice of adopting explanatory resolutions of the plenum, because these are abstract conclusions regarding the correct application of legal norms, when issuing which violates the principle of separation of powers, the principle of independence and impartiality of the judge, etc. (Antoshkina, et al., 2022; Oliinyk, et al., 2021).

It is necessary to highlight another relatively new mechanism designed to ensure the unity of judicial practice and interpretation, namely "exemplary and typical" cases in administrative proceedings. The legal definition of the concept of "model decision" is contained in Article 4 of the Code of Administrative Procedure of Ukraine - it is a decision adopted by the Supreme Court as a court of first instance in typical administrative cases. That is, they have the same subject of authority, the same norms are applied, the dispute arose on similar grounds, the plaintiffs have stated similar demands. Therefore, the court should take into account the legal conclusions of the Supreme Court when making a decision in a typical case, which facilitates the process of legal interpretation and ensures the predictability and transparency of the judicial system (Shevchenko, et al., 2020).

The need to take into account in the activity of the courts also a significant number of documents that contain "samples" of the legal prescriptions understanding, actualizes the problem of developing an effective mechanism for informing potential users of such

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provisions, introducing a mechanism for ensuring general awareness. The problem of systematizing a large number of judicial acts, simplifying access to their content, ensuring simplicity and efficiency in the processing of court decisions in our country is obvious.

As rightly noted by K.Yu. Savchenko, the need of the hour is the introduction of intelligent systems for the analysis of court decisions in our country, which allows to increase legal certainty. Such systems are used by developed countries, in particular the USA, thanks to which they ensure the search for cases of the appropriate category, and also predict with a certain degree of probability the adoption of a certain decision regarding a certain legal dispute (Savchenko, 2019). It is appropriate to cite the example of China, where artificial intelligence (smart court SoS system of systems) was fully integrated into the legal system. It is now connected to the computer of every judge in China. Thanks to the program, numbers of similar court cases, legislation and rulings on them are automatically suggested, drafts of legal documents are drawn up, and human errors in decisions are corrected (In China, artificial intelligence…, 2022).

The gradual introduction of software similar to the one mentioned above for the work of courts in domestic realities can be one of the factors not only to increase the efficiency of the judiciary, but due to its objectivity and impartiality, it will protect against certain abuses, make the work of the judicial system more transparent and predictable. The same things as the availability of the Unified State Register of Court Decisions and the publication of the legal positions of the Supreme Court on the official website are a necessary, but absolutely insufficient step in modern conditions for Ukraine. Since the implementation of the above-mentioned system is a rather complicated and long-term step, for a start it is possible to introduce at least the use of an automated program for the analysis and selection of materials for solving a specific case - decisions of the European Court of Human Rights; decisions of the Supreme Court issued in the order of review of court decisions; decisions of the Constitutional Court of Ukraine. This will allow to reduce the number of annulled (amended) judicial acts due to incorrect interpretation of legal norms, to monitor all changes made to the texts of legal interpretation acts; will contribute to the effectiveness of law enforcement activities (Dutchak, et al., 2020).

In this subsection, it is appropriate to consider one more issue, which N.D. Slotvinska reveals in his work “Court practice as a source of law”. The scientist

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emphasizes the need for a clear legislative definition of the issue of interaction between the executive and judicial authorities in the field of information exchange on the state of legislation when making changes, additions, cancellations and adoption of new legal norms (Slotvinska, 2017). Analyzing the above-mentioned issues in his work “Court practice as an element of the legal system of Ukraine”, K.Yu. Savchenko also tells about the necessity of mandatory consideration of the results of generalizations of court practice in the rule-making activity of the Verkhovna Rada of Ukraine and other state authorities. It proposes to legislatively determine the peculiarity of the legal status and procedural points that relate to the specified results (Savchenko, 2019).

Since the Supreme Court summarizes judicial practice and reviews court decisions, it has information about the main problematic points that arise when applying individual legal prescriptions, and can offer professional advice on correcting legislative mistakes and miscalculations. The above-mentioned comments and proposals will provide feedback between law-making and law enforcement, will allow to quickly eliminate gaps and conflicts in the current legislation, and as a result – will reduce the importance of such a subjective reason for interpretation as the vagueness and inconsistency of current regulations.

Summarizing everything indicated in this section, it is appropriate to give opinions from the researched issues of the prominent legal researcher R. Dworkin regarding the fact that a judge should use three basic, agreed principles in the search for the correct answer - justice, honesty and appropriateness of the procedure. If these three principles are accepted, then any judge can try to find the right answer. The judge’s task is to find the only correct moral answer and justify it with the help of a normative legal act (Dworkin, 1986). If the judge did not find the correct decision (answer) regarding a specific case, this may be due to a legal interpretation mistake. Thus, by this term we understand a deviation from the rules of legal interpretation, the consequence of which is a legal result that contradicts the criteria of the truth of the interpretation and entails negative consequences. The reasons for such mistakes can be: inadequate level of professional training of judges, insufficient knowledge of substantive and procedural law norms; moral and psychological characteristics of judges; dishonesty and formal attitude of judges to the exercise of

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powers; ignoring explanations of higher judicial bodies on the application of legislation; bias, etc.

4 THE PRACTICE OF USING DECISIONS OF THE ECTHR IN CONDUCTING JUDICIAL PROCEEDINGS IN UKRAINE

When studying the issue of judicial interpretation, it is impossible to ignore the legal interpretation activity of the European Court of Human Rights (hereinafter the ECtHR) given its importance for the administration of justice in our country (Marochini, 2014). The Convention (more precisely, the practice of the European Court on its application) absorbed the European experience of ensuring human rights and established uniform European standards in this area, which increasingly influence the development of national legal systems (Shevchenko & Kudin, 2019). Ukraine ratified the 1997 Convention on the Protection of Human Rights and Fundamental Freedoms (Law of Ukraine No 475/97-VR "On the ratification…, 1997).

The European Court of Human Rights plays an important role in the protection of human rights and interests at the international level, and its decisions allow increasing the effectiveness of the protection of citizens' rights on the territory of Ukraine. Many provisions of the Convention are as broad and flexible as possible, they contain a lot of evaluative concepts, which provides for the possibility of acting at the discretion of national law enforcement bodies. This gives rise to the complexity of the interpretation of the specified legal act, which is why there is a need to develop clear rules for this. Since the European Court of Human Rights has exclusive powers to interpret and apply the provisions of the Convention (Article 32 of the Convention), its interpretation without taking into account its practice and approaches cannot be considered appropriate and correct (Synytsyn, 2016).

At the same time, Ukrainian scientists consider the question of determining the legal nature of ECtHR decisions, where the most common positions are the understanding of decisions as interpretive acts and judicial precedents (Ismailov, 2011). Moreover, V.A. Zavhorodnyi calls the decision of the ECtHR a unique source of precedential law, the basis of which is the legal position (Zavhorodnii, 2015). If we analyze the current

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legislation, then according to Art. 17 of the Law of Ukraine of February 23, 2006 No 3477-IV “On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights”, courts apply the Convention and the practice of the ECHR as a source of law during the consideration of cases. This provision entails the obligation of the courts to apply the practice of the ECtHR during the consideration of each case on the merits.

In this regard, there is a need to rethink and evaluate the above-mentioned provisions in the context of the doctrine of the sources of law and the relevant normative prescriptions of the Basic Law of our state. These debatable issues are discussed by jurists, who rightly point out that the concept of “source of law” does not have its own legislative definition, and question the correctness and expediency of using this term in legislation. The analysis of the norms of the Basic Law does not provide an answer to the question of the possibility of regulating by laws the status, types, features of the action of the sources of law or the type, status of other law sources, except for normative acts. Therefore, there is a question regarding the legal principles of applying not only legislation, but also other sources of law in the administration of justice, which causes the need for rulemakers to solve this by clarifying the list and status of the existing sources of law in Ukraine in the Constitution (Nevzorov & Lazarev, 2019).

In the context of the above-mentioned issues, the question of wording and approaches used in industry legislation arises. Thus, in Part 1 of Art. 9 of the Criminal Procedure Code dated 04/13/2012 No 4651-VI states that during criminal proceedings, the court, the investigating judge... are obliged to strictly comply with the requirements of the Constitution of Ukraine, the Criminal Procedure Code, international treaties, the binding consent of which has been given by the Verkhovna Rada of Ukraine, requirements of other legislative acts. Separately, part 5 of the specified article contains provisions on taking into account the practice of the European Court of Human Rights when applying the criminal procedural legislation of Ukraine (Law of Ukraine No 4651-VI “Criminal Procedure Code of Ukraine”, 2013).

Having analyzed the national judicial practice of applying the Convention and decisions of the ECtHR, A.A. Yakovlev determined that national courts make a textual reference to the decision of the ECtHR and indicate its name in their decisions, although

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the mechanism of reference to the precedent practice of the ECtHR by domestic judges remains not fully developed (Yakovlev, 2009). As N. Kulchytsky rightly points out, since 1996, the ECHR in its acceptance and understanding by society and the legal community has gone through stages from denial and aggression to “unsystematic” application. Today, everyone agrees that the Convention should be applied, but there is no common vision of how to do it correctly, so that it is meaningful and not formal in nature (Kulchytskyi, 2020). The above is confirmed by the “Analysis of the results of an anonymous survey of judges of Ukraine on the problems of applying the principle of the rule of law and the provisions of the Convention “On the Protection of Human Rights and Fundamental Freedoms” in court decisions. This is evidenced by the fact that the overwhelming majority of judges refer to the same “popular” decisions and give the same reasoning for their application. (Von, et al., 2016). Another difficult issue is the high-quality and accurate translation of ECtHR decisions into the national language (Butkevych, 2017).

The global transformations characteristic of the legal system of Ukraine, the permanent reform of justice in recent decades, necessitate the rethinking of approaches to judicial interpretation, which has important scientific and practical significance. This issue is addressed by legal theorists who highlight the problems of legal interpretation, in particular, such authors as: P.M. Rabinovych, Yu.L. Vlasov, I.L. Samsin, S.I Paleshnyk (2013), N.D. Slotvinska (2010), K.Yu. Savchenko (2019), O.V. Remizova (2019). At the same time, there are currently no unified established approaches to this legal phenomenon, which actualizes scientific research in this area.

5 CONCLUSION

The activity of judicial authorities on the clarification of legal acts is significant and can be carried out through: a) adoption of court decisions on certain court cases; b) formation of legal conclusions in the process of official casual interpretation by higher courts; c) adoption of interpretive acts of a recommendatory nature based on the generalization of judicial practice by higher courts.

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Judicial interpretation and practice become the source of law, regardless of whether or not they are officially recognized as such. Judicial interpretation in all its forms performs a large functional load, contributing to streamlining and increasing the efficiency of the process of legal regulation, improving the legislation system. The judicial body becomes the central subject of law enforcement work, the protection of the rights and interests of individuals and legal entities depends on its ability to perform legal interpretation competently, professionally, and on a scientific basis. It is necessary to define a clear position in the legislation regarding the application of judicial precedent, which is important in the framework of further reforming the judicial system.

When considering judicial interpretation, it is important to take into account the influence of the ECHR's practice on the functioning of the domestic justice system, which is characterized by the following aspects: 1. our state fully recognizes the jurisdiction of the European Court of Human Rights on its territory in all matters related to the interpretation and application of the Convention; 2. the decisions of the European Court of Human Rights are official interpretations of the Convention, and therefore, the application of the decisions of the European Court is simultaneously the application of the Convention, which is reflected in the procedural legislation of Ukraine.

The main task of subjects of human rights protection in Ukraine, and especially judges, is to master the "specificities of legal thinking", which is produced and affirmed thanks to the European Court of Human Rights. The mechanism of reference to the precedent practice of the European Court of Human Rights requires improvement, which requires the development of complex approaches – both the appropriate training of judges and the creation of technical and organizational capabilities for this.

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