JUDICIAL SUPREMACY IN THE PERIOD OF TRANSIT OF THE LEGISLATION OF THE COUNTRIES OF TRANSITIONAL JUSTICE BELONGING TO THE CONTINENTAL LEGAL SYSTEM

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Abstract: *The purpose of the study is to cover the judicial rule as a way to ensure the rule of law in the judicial activity of the countries of the continental legal system, which are in a transitional period of their development when the transit of legislation is relevant. Scientific research methods include comparative, dialectical, prognostic, as well as methods of modelling, and correlation, which allowed to develop the definition of judicial supremacy as a special type of judicial enforcement by the courts of cassation during the development of legal conclusions and legal positions on the application of substantive law. There is a definition that judicial supremacy in the countries of the continental legal system is considered as a special, closely related to the law-making role, law enforcement procedure of the Supreme Court on resolving conflicts between the ideal of a legal provision and a persuasive precedent of a specific law enforcement situation. Therewith, a categorical conclusion is made regarding the inadmissibility of tracing the approaches of common law countries, the development of judicial precedents in its pure form into the format of judicial law enforcement of the countries of the continental legal system. It was proven that the rule of law is the result of the privileged power of the Supreme Court during the review of court decisions on the interpretation of laws. However, this power is not the highest, because the interpretation of constitutional provisions is a unique function of the Constitutional Court of countries where there is a model of centralised constitutional control.*

Keywords: judicial rule, rule of law, judicial enforcement, justice, persuasive precedent, interpretation of the Constitution, transit of legislation.

In democracies, the rule of law is their key principle. "We state," says J.-L. Berzhel, – that in all developed countries the right for the most part, if not in all, comes from the law and judicial practice. Judicial practice recognises the "statutory power"[1]. Many European countries in transition aspire to become countries of sustainable democracy. Distinctive features of the latter, from the standpoint of legal analysis can be called: the presence of constitutional control, effective protection of human rights and the implementation of the rule of law in all spheres of public life. Admittedly, in each state, the principle of the rule of law is interpreted differently, but it always remains the

[1] Zh.-L. Berzhel, *General theory of law*, Izdat. dom Nota bena, Moscow, 2000; L.O. Korchevna, *The problem of multi-source law: an experiment in comparative jurisprudence*, Institute of State and Law V.M. Koretsky, Kyiv, 2005.

cornerstone of any modern legal system[2]. The rule of law is a universally recognised principle, inseparable from the constitution as such[3].

In a general sense, the principle of the rule of law appears as a denial of arbitrary power. S.P. Holovatyi emphasises that this idea serves as the basis of the doctrine according to which state power should be exercised in accordance with the law and which causes two main legally significant consequences. First, it means that the state as such, its authorities and officials must exercise their powers only on legal grounds, i.e. only within such limits, in such a way and to the extent as defined by the provisions of law. The point is that the state must have the permission of the law for all its actions[4]. Second, this doctrine requires that a person who has been directly oppressed or affected by the actions of the state, its organs or officials, be given the opportunity to appeal to the court against the legality of the authorities' actions. Furthermore, if the court finds (confirms) the illegality of such actions, then it is required that the state – its bodies and officials were subject to effective sanctions[5].

This study emphasises that the interpretation of the rule of law is constantly changing with the times and needs of a society that is constantly evolving or seeking to do so due to the considerable number of reforms implemented[6]. Such reforms naturally require legislative regulation and adjustment. Therefore, during the development of transition countries seeking to become countries of sustainable democracy, no legal system will be able to do without acts of transit law – laws that govern public relations for a certain period or for certain time.[7] This causes a special problem for the countries of the continental legal system, where the regulation is the main source of law. For example, with regard to Ukraine, the constitutional principle of the rule of law was officially established in 1996 in connection with the adoption of the Fundamental Law of Ukraine, but its interpretation and variability of

[2] I. Berestova, O. Khotynska-Nor, A. Biryukova, Yu. Prytyka, I. Lytvyn, "Preliminary requests of the courts on the constitutionality of the law regulations as an element of interrelations between civil and constitutional processes", in *Journal of Legal, Ethical and Regulatory Issues*, 2020, vol. 23, no. 3. Available at: https://www.abacademies.org/articles/preliminary-requests-of-the-courts-on-the-constitutionality-of-the-rule-of-law-as-an-element-of-relationship-between-civil-and-con-9334.html

[3] P. Gowder, *Rule of law in the real world*, Cambridge University Press, Cambridge, 2016.

[4] S. Holovatyi, "Rule of Law", in *Book three. Rule of law: Ukrainian experience*, Feniks, Kyiv, 2006; O.S. Turenko, B.V. Derevyanko, I.V. Ivanov, V.M. Hrudnytskyi, L.D. Rudenko, "The state – in interpretation of Jose Ortega Y. Gasset", in *Analele Universitatii din Craiova – Seria Istorie*, 2021, vol. 25, no. 2, p. 77–88.

[5] *Ibidem*.

[6] L. Alexander, F. Schauer, "On extrajudicial constitutional interpretation", in *Harvard Law Review*, 1997, vol. 110, no. 7, p. 1359-1387.

[7] M. McKoy, "Constructing a "Democratic" peace: Allied peacebuilding strategy in Germany and Japan", in *Democracy and Security*, 2021, vol. 17, no. 1, p. 30-47.

implementation continue to be a pressing problem, similarly in foreign legal science[8].

Modern statutory consolidation of the principle of the rule of law

Considering the countries of transition democracies, Ukraine will be singled out, which has currently expanded the constitutional consolidation of the rule of law.[9] First of all, Article 8 of the Fundamental Law of Ukraine explicitly states: "The principle of the rule of law is recognised and operates in Ukraine. The Constitution has the highest legal force. Laws and other regulations are adopted based on the Constitution of Ukraine and must comply with it. The provisions of the Constitution of Ukraine are the provisions of direct action. Going to court to protect the constitutional rights and freedoms of human and citizen directly based on the Constitution of Ukraine is guaranteed"[10]. "A judge administering justice shall be independent and governed by the rule of law" (Part 1 Article 129-1 of the Constitution of Ukraine). Also, the manifestation of the rule of law in the protection of human and civil rights and freedoms (guaranteed by Part 3 Article 8 of the Fundamental Law of Ukraine) can be traced in Article 151-1: "The Constitutional Court of Ukraine decides on the conformity of the Constitution of Ukraine (constitutionality) with the law of Ukraine on the constitutional complaint of a person who considers that the law of Ukraine applied in the final court decision in their case contradicts the Constitution of Ukraine. A constitutional complaint may be filed if all other remedies have been exhausted"[11].

Furthermore, indirectly, the principle of the rule of law is manifested in the content of Part 2 Article 6: "Bodies of legislative, executive and judicial power exercise their powers within the limits established by this Constitution and in accordance with the laws of Ukraine", as well as Part 2 Article 19 of the Constitution of Ukraine: "Public authorities and local governments, their officials shall be obliged to act only on the basis, within the powers and in accordance with the procedure prescribed by the Constitution and laws of

[8] V.Ya. Tatsiy, (Ed.). *Legal doctrine of Ukraine: in 5 volumes. Vol. 1: General theoretical and historical jurisprudence*, Pravo, Kharkiv, 2013.

[9] T. Avakyan, "The rule of law as a fundamental principle of state policy", in *Law Journal of the National Academy of Internal Affairs*, 2021, vol. 19, no. 2, p. 124-132.

[10] The Constitution of Ukraine of June 28, 1996 № 254k / 96-VR as amended by the Law of Ukraine of June 2, 2016 № 1401-VIII "On Amendments to the Constitution of Ukraine (concerning justice)", 1996. Available at: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/ed20160930#Text

[11] *Ibidem.*

Ukraine[12]. Also, before the amendments to the Constitution of Ukraine on justice in Article 129 the principle of legality was recognised as a key principle that judges should consider when administering justice (paragraph 1, part 3 Article 129). At the same time, Article 2 of the Law of Ukraine "On the Judiciary and the Status of Judges of Ukraine" No. 2453-VI of July 7, 2010 (hereinafter referred to as the Law No. 2453-VI) established the tasks of the court as follows: "The court, administering justice on the principles of the rule of law, ensures everyone the right to a fair trial and respect for other rights and freedoms guaranteed by the Constitution and the laws of Ukraine, as well as by international treaties, the consent to be bound by which has been provided by the Verkhovna Rada of Ukraine"[13].

Thus, Article 2 of the Law No. 2453-VI covers principles of administration of justice in more detail than the Constitution of Ukraine. Theoretically, this rule contradicted the Fundamental Law of Ukraine, but in practice – on the contrary, this article corresponded to it, because in accordance with Part 1 Article 9 of the Constitution of Ukraine "Current international treaties, the binding force of which has been approved by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine"[14]. International treaties include, in particular, decisions of the European Court of Human Rights (hereinafter referred to as the ECtHR) as a result of its activities carried out based on the Convention ratified by Ukraine[15].

In themselves, the decisions of the ECtHR are law enforcement in nature, and legal positions in their content are endowed with statutory nature. Apart from the general functions of sources of law, ECtHR decisions perform several specific functions: legal, the function of building experience in the application of the Convention and its protocols, improving legislation and law enforcement, improving justice, information, influence on legal awareness, interaction with science and legal doctrine[16].

As a reminder, the current Law of Ukraine "On the Judiciary and the Status of Judges" No. 1402-VIII of June 2, 2016 (hereinafter referred to as the

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[12] *Ibidem.*

[13] About the judiciary and the status of judges. Law of Ukraine of 07.07.2010 № 2453-VI (as amended), 2010. Available at: https://zakon.rada.gov.ua/laws/show/2453-17

[14] The Constitution of Ukraine of June 28, 1996 № 254k / 96-VR as amended by the Law of Ukraine of June 2, 2016 № 1401-VIII "On Amendments to the Constitution of Ukraine (concerning justice)", 1996. Available at: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/ed20160930#Text

[15] O. Pchelina, V. Sezonov, V. Myrhorod-Karpova, Y. Zherobkina, "Administrative and legal mechanism of execution of decisions of the European court of human rights as the basis of case law application in the judicial system of Ukraine", in *Asia Life Sciences*, 2019, no. 2, p. 117–134.

[16] R. Moskal, "Rule of law doctrine: the status of scientific study in Ukraine (2010-2020)", in *Scientific Journal of the National Academy of Internal Affairs,* 2021, vol. 117, no. 4, p. 100-111.

Law No. 1402-VIII), Article 2 left the tasks of the court unchanged. Thus, in this context, the rule of law and the primacy of law intersect at both the national and international levels. The legality and primacy of the law are highlighted as one of the main elements of the principle of supremacy in international instruments. For example, the importance of the rule of law is highlighted in the preamble to the Universal Declaration of Human Rights, which, inter alia, states that the purpose of the adoption of this document is the need for human rights to be protected by the rule of law in order to ensure that people are not forced to resort to rebellion against tyranny and oppression as an ultima ratio[17].

Furthermore, the rule of law is recognised as one of the fundamental principles of the European Community, enshrined in a number of regional acts. Thus, the Preamble to the Statute of the Council of Europe emphasises the commitment of governments to the spiritual and moral values that are the common property of their peoples and the true source of personal freedom, political freedom and the rule of law, the principles that underpin every true democracy. Instead, Article Article 3 of the Statute states that every member of the Council of Europe must recognise the principles of the rule of law and the enjoyment of human rights and fundamental freedoms by all persons under its jurisdiction. The Preamble to the ECtHR states that the governments of the Member States of the Council of Europe, signatories to this Convention, are determined as like-minded governments of European states with a common heritage of political traditions, ideals, freedoms, and the rule of law to take the first steps to ensure collective guarantee of certain rights proclaimed in the Universal Declaration of Human Rights[18]. The European Commission for Democracy through Law (Venice Commission) also states that "the rule of law is linked not only to human rights but also to democracy, the third fundamental value of the Council of Europe. Democracy means involving people in the decision-making process; the purpose of human rights is to protect people from arbitrary and excessive encroachment on their rights and freedoms, as well as to protect human dignity. The rule of law implies restrictions on power and independent control over the activities of state bodies. The rule of law contributes to the development of democracy by establishing the accountability of those exercising state power and by upholding human rights designed to protect the minority from the arbitrariness of the rule of the majority" (para. 33)[19].

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[17] O.S. Tkachuk, *Realization of judicial power in civil justice of Ukraine: Structural and functional aspect*, Kharkiv National University named after V.N. Karazin, Kharkiv, 2016; V.V. Sukhonos, S. Kane, G. Wilkinson, "Social basis of state power in the conditions of a Latin American-type state", in *Legal Horizons*, 2021, vol. 14, no. 2, p. 91-97.

[18] *Ibidem*.

[19] European Commission for Democracy through Law (Venice Commission). Rule of Law Assessment Checklist. Adopted at the 106th plenary meeting of the Venice Commission.

That is, legality is one of the leading, fundamental components of the rule of law. This was recognised by the creators of the concept of the rule of law, in particular A. Dicey. The attitude of modern followers of this concept remains the same, as well as international legal documents specifically dedicated to the rule of law, in particular the documents of the Venice Commission "Draft Report on the Rule of Law" and "Rule of Law Checklist", adopted by it respectively on March 25-26, 2011 and March 11-12, 2016[20]. In this context, S.V. Shevchuk argues that the principle of the rule of law is a formal characteristic, i.e. in the formal definition takes the form of laws[21]. Thus, the principle of the rule of law currently appears as a repeatedly and three-level legalised principle of the latest system of Ukrainian law, and therefore is mandatory for application in law-making, law protection, and law enforcement. The principle of the rule of law is a legally binding norm of the modern Ukrainian legal order[22].

Provisions of Article 8 of the Constitution of Ukraine serve as a universal legal regulator of the Ukrainian legal order. Other provisions of the Fundamental Law of Ukraine operate in conjunction with the provisions of positive legislation applied in the activity of courts (rule of law in judicial activity – 129-1) or act as a basis (Article 151-1) or a certain legal ideal, in accordance with which, inter alia, persons apply after the exhaustion of national remedies (Article 6, Part 2 Article 19). Thus, in Ukraine, in contrast to the original version of the Constitution of Ukraine, at the constitutional level (after amendments to the Fundamental Law of Ukraine on Justice in 2016) the principle of the rule of law is discussed in at least five articles, as well as various regulatory influences on society relations.

However, at the stages of judicial protection of public relations, the effect of the cited articles may intersect, given the specific case before the court. After all, the elements of the rule of law for building the state system and national law and order should be significantly broader than when considering a specific legal conflict (case)[23]. For example, in a specific dispute,

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Approved at the CMCE Meeting No. 1263 at the level of deputy ministers, 2016. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-rus

[20] M. Kozyubry, *Criteria for assessing compliance with the rule of law in Ukraine (Rule of Law Checklist for Ukraine)*, Center for the Study of the Rule of Law and its Implementation in the National Practice of Ukraine of the National University "Kyiv-Mohyla Academy", Kyiv, 2019; Dicey and the Rule of Law, 2019. Available at: https://www.lawteacher.net/free-law-essays/constitutional-law/dicey-rule-of-law-8355.php

[21] S.V. Shevchuk, *Fundamentals of constitutional jurisprudence*, Ukrayinskyy Tsentr Pravnychykh Studiy, Kyiv, 2001.

[22] S. Holovatyi, "Rule of Law", in: *Book three. Rule of law: Ukrainian experience*, Feniks, Kyiv, 2006.

[23] European Commission for Democracy through Law (Venice Commission). Rule of Law Assessment Checklist. Adopted at the 106th plenary meeting of the Venice Commission.

if the dispute concerns the protection of a fundamental right and concerns a conflict of jurisdictions, the case involves public authorities as third parties who make independent claims or without such claims, and the actual legal conflict can be resolved by overcoming various legal conflicts or by reference to the analogy of law or right. Admittedly, the simulated situation can simultaneously cause both constitutional and legal conflicts at the level of, in particular, the separation of functions, powers and responsibilities of state bodies and their employees in the daily professional activities of the latter. In such cases, there is usually a public interest or a public response, especially if there is a question of targeted use of budget funds, advocacy of state interests or the interests of the local community. A separate, but not secondary, place belongs to the violated, unrecognised or disputed fundamental (constitutional) rights and freedoms of human and citizen, which can be protected, restored or recognised initially and gradually only by the courts of the judiciary. When considering a case, a judge faces numerous legal issues that they must resolve proceeding from internal convictions based on their personal legal awareness, knowledge, experience, lack of external pressure, and the rule of law, which is also the basis of the case, the purpose, and vector of achieving such a goal (Article 151-1) or a certain legal ideal, in accordance with which, among other things, persons apply after the exhaustion of national remedies (Article 6, Part 2 of Article 19). Thus, in Ukraine, in contrast to the original version of the Constitution of Ukraine, at the constitutional level (after amendments to the Fundamental Law of Ukraine on Justice in 2016) the principle of the rule of law is discussed in at least five articles, as well as various regulatory influences on society relations.

Thus, currently Ukrainian science has more or less clearly developed two initial approaches to understanding the principle of the rule of law. These are, conditionally speaking, such approaches as: a) element-by-element; b) integral[24]. This study favours an integrated approach that also encompasses a substantive approach to understanding the rule of law. Its supporters are, for example, T. Bingham and R. Dworkin. According to T. Bingham, the following components of the rule of law are distinguished: 1) access to the law, the provisions of which must be clear, unambiguous, and predictable; 2) issues of legal rights should usually be decided based on law and not at discretion; 3) equality before the law; 4) power must be exercised in accordance with the law, fairly and reasonably; 5) human rights must be protected; 6) means must be provided for the settlement of disputes without undue delay or postponing; 7)

Approved at the CMCE Meeting No. 1263 at the level of deputy ministers, 2016. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-rus

[24] V.Ya. Tatsiy, *Legal doctrine of Ukraine: in 5 volumes. Vol. 1: General theoretical and historical jurisprudence*, Pravo, Kharkiv, 2013.

courts must be fair; 8) the state must comply with its obligations under both international and national law[25].

The rule of law as a basic principle of law enforcement activities of the court

The court, considering a specific dispute related at least to the provisions of such laws: 1) the law on the judicial system, which determines the status of the court, its functions and possible negative consequences in connection with the adoption of an illegal or unjustified court decision; 2) the provisions of the procedural act that determines the procedural actions and the procedural form of the activity of the court and other acts related to procedural; 3) the norms of the law, the provisions of which constitute the statutory basis of the considered court case.

At least such a triad of types of regulations differing in their scope influences a judge's decision. The rule of law is stipulated in each of these acts or can be traced in their prescriptions. Admittedly, one should point out the existence, including in the legislative body of Ukraine, of morally outdated, but valid acts of substantive law inherited by Ukraine from the USSR upon the proclamation of its independence. Courts apply existing legislation, and therefore, even when applying obsolete legislation (usually in the alternative), the court must always consider the compliance of laws with the rule of law principle. For example, in Ukraine, procedural codes currently enshrine a judge's right to apply the provisions of the Constitution of Ukraine as provisions of direct action: "If a court concludes that a law or other legal act contradicts the Constitution of Ukraine, the court does not apply such law or other legal act as provisions of direct action. In this event, after the decision in the case, the court appeals to the Supreme Court to resolve the issue of submitting a petition to the Constitutional Court of Ukraine on the constitutionality of a law or other legal act, the constitutionality of which belongs to the jurisdiction of the Constitutional Court of Ukraine" (Part 6 Article 10 of the Civil Procedural Code of Ukraine; Part 6 Article 11 of the Civil Procedural Code of Ukraine; Part 6 Article 7 of the Code of Administrative Judicial Procedure of Ukraine)[26].

In this regard, that the rule of law is primarily aimed at building a democratic state system and regulatory activities of legal entities: to exercise

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[25] T. Bingham, *The rule of law*, Penguin books, London, 2010; O.S. Tkachuk, *Realization of judicial power in civil justice of Ukraine: Structural and functional aspect*, Kharkiv National University named after V.N. Karazin, Kharkiv, 2010.

[26] On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and Other Legislative Acts: Law of Ukraine of October 3. 2017 № 2147-VIII, 2017. Available at: https://zakon.rada.gov.ua/laws/show/2147-19#Text

their rights in accordance with the Constitution of Ukraine, to perform their duties. In particular, according to P. Gauder, the rule of law is first of all equality, which has a double meaning. The moral value of the rule of law is conditioned by the fact that it contributes to the equal position of those who fall within the scope of such law. At the same time, only those states whose legal systems treat their citizens as equal subjects are capable of ensuring the functioning of the rule of law for a long period of time[27]. Thus, this constitutional principle applies to every participant in public relations of Ukraine. For example, participants in private legal relations may enter into any legal relationship not prohibited by law. And the key is that these relations do not contradict the general principles of civil law (Article 6 of the Civil Code of Ukraine).

Considering the rule of law in a practical context, such an element (component) of the principle of the rule of law as legal certainty is important for the court. This principle and component of the rule of law allows participants in public relations to be ready to change the legal regulation and anticipate the consequences of their actions. Violation of the principle of legal certainty is the cause of a significant number of court cases of administrative jurisdiction of the so-called social disputes: children of war, the rights of Chernobyl victims, pensions of servicemen and persons equated to them, the issue of severance pay to judges and other categories of employees that were entitled to such payment upon entering such service, problems of labour relations of public service, etc.[28]

The principle of legal certainty was first mentioned in the ECtHR judgment in Golder v. The United Kingdom of 21 February 1975 (albeit only in Judge Werdros's dissenting opinion and concerning the inadmissibility of an expanded interpretation of the Convention)[29]. The second judgment, which mentions that principle, is the judgment in Sandy Times v. The United Kingdom of 26 April 1979, in which the applicants referred to that principle[30]. In the third judgment, which contains a reference to the principle of legal certainty, in Marckx v. Belgium of 13 June 1979, the ECtHR has already proposed its interpretation as follows: "In those circumstances, the principle of legal certainty, which is inherent in the law of the Convention and Community, will allow Belgium not to reconsider judicial decisions or situations that took

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[27] P. Gauder, *The rule of law in the real world*, Pravo, Kharkiv, 2018; V. Chupyra, "Regional Alliances between states: historical review and future projections for Ukraine", in *Foreign Affairs*, 2021, no. 3-4, p. 9-14.

[28] I. Lutsiv, "Quality and availability of administrative services as an element of legal characteristics", in *Social and Legal Studios*, 2021, vol. 10, p. 48-55.

[29] Judgment on Case of Golder v. The United Kingdom of 21.02.1975, 1975. Available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57496

[30] Judgment on Case of Sunday Times v. The United Kingdom of 26.04.1979 § 47, 1979. Available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57584

place before this court decision"[31]. Thus, for the first time, the principle of legal certainty was interpreted by the ECtHR as a principle that does not allow retroactive effect of law. Subsequently, the ECtHR repeatedly reminded[32] that the principle of legal certainty "...is inherent in the law of the Convention and Community"[33], but is not directly enshrined in the text of the Convention. Legal certainty is a "component of the rule of law"[34], enshrined in Article 3 of the Statute of the Council of Europe[35] and the preamble to the Convention[36].

Analysis of statutory and doctrinal approaches to determining the rule of law in general theoretical and international aspects, as well as highlighting its criteria that are mandatory for a judge to consider upon making a court decision, will elaborate the nature of judicial rule, because it is through this rule that the rule of law reaches its practical embodiment in a particular court case during the judicial enforcement of the highest judicial body of the state.

Judicial rule as a way to ensure the rule of law in law enforcement

This issue seems important because the rule of law is closely linked to the law-making role of the courts. In particular, in Ukraine, the Supreme Court, upon developing legal conclusions or legal positions (Grand Chamber of the Supreme Court), always performs a law-making function. The rule of law is inherent only in the law enforcement activities of the highest court in the judicial system – the Supreme Court. Other lower courts contribute to the rule of law through their law enforcement activities in the administration of justice. Socio-political events in Ukraine over the past 15 years have significantly affected the courts and judicial practice. Completely new social relations are being developed, which in turn may not avoid violations by legal entities. In this case, it is the courts of first instance (sometimes the appellate court as the court of first instance) that take on the challenge of considering a case based on the rule of law, considering the balance of public and private interests and often gaps in law or poor legislation. However, judges must make decisions based on existing legislation.

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[31] Judgment on Case of Marckx v. Belgium of 13.06.1979 § 58, 1979. Available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57534

[32] B.L. Zimnenko, *International law and legal system of the Russian Federation*, Statut, Moscow, 2010.

[33] Judgment of the ECHR of 13.06.1979 "Marx v. Belgium", European Court of Human Rights. Selected solutions, 2000. Available at: http://www.index.org.ru/nb/2000/strasb.html

[34] "Judgment of the ECHR of 24.07.2003 in the case Ryabykh v. Russian Federation (complaint No. 52854/99) § 51", in *Bulletin of the European Court of Human Rights*, 2003. Available at: http://www.echr.ru/documents/doc/new/003.htm

[35] "Statute of the Council of Europe (ETS No. 1) (Adopted in London 05.05.1949)", in *Bulletin of international treaties*, 1997. Available at: http://base.garant.ru/2540600/

[36] A.L. Sidorenko, *Principle of legal certainty in judicial practice: implementation of decisions of the European Court of Human Rights*, Perm State National Research University, Perm, 2016.

Thus, the completion of a rule of law, the coverage of its content, and sometimes the search for its true meaning, in fact can be considered a judicial rule. Such a rule can serve as the basis for the emergence of a new law. In case of upholding such a court decision by higher courts upon its review, the decision acquires the nature of a precedent. This is a so-called persuasive precedent. The basis of this persuasive precedent is the relevant legal provisions underlying the legal opinion of the court, and in the case of law enforcement activities of the Grand Chamber of the Supreme Court – the legal position on the application of substantive (sometimes – procedural) law. Notably, the Constitutional Court of Ukraine (hereinafter referred to as the CCU) in its activities uses the term "legal position" (Article 92 of the Law of Ukraine "On the Constitutional Court of Ukraine"). This process of developing a position during judicial enforcement, in which the highest court in the judicial system actually creates a legal provision is called judicial supremacy – the Supreme Court.

First of all, the study covers the concept of "judicial supremacy" and formulates its definition in the context of the continental legal system, which appears different from the concept of judicial supremacy in common law countries[37]. In general, the term "judicial supremacy" has no canonical definition in common law countries, given that there is ambiguity in its application in different contexts[38]. The Ukrainian scientific community does not use the term "judicial supremacy". The situation is similar in the doctrines and regulations of continental law. Judicial supremacy is inherent in common law countries, which is a priority of the role of judicial practice[39].

In particular, L.O. Korchevna notes: "The constitutional principles of Western countries are based on the principles of the doctrine of natural law. That is why Western countries have extensive case law on the invalidation of laws that infringed on the fundamental rights of citizens enshrined in the constitutions. In Japan and many Latin American countries, any judge may, as in the United States, declare a law unconstitutional and refuse to apply it. Admittedly, the Supreme Court oversees such decisions. In several countries, the review of the constitutionality of laws is entrusted to constitutional courts that were specially created for this purpose: this state of affairs exists in Germany, Austria, Italy, Turkey, Monaco, etc. If an ordinary court has doubts

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[37] A. Harel, A. Shinar, "Between judicial and legislative supremacy: A cautious defense of constrained judicial review", in *International Journal of Constitutional Law*, 2012, vol. 10, no. 4, p. 950-975.

[38] S. Gardbaum, "What is judicial supremacy?", in: Jacobsohn, G. & Schor, M. (Eds.), *Comparative Constitutional Theory*, UCLA School of Law, Public Law Research Paper, 2018. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2835682

[39] M. Mahrelo, "Non-binding precedent: Some aspects of the substance of judgments of the European Court of Human Rights in the legal system of continental law", in *Bulletin of the Academy of Advocacy of Ukraine*, 2013, vol. 3, no. 28, p. 61-67.

regarding the constitutionality of a law, it can only adjourn the case and apply to the Constitutional Court. In Sweden, Denmark, and Norway, it is theoretically possible for a court to refuse to apply a law due to its unconstitutionality. But the practice has no examples of declaring the law unconstitutional"[40].

The doctrine of common law is based on the position that the classical precedent is a mandatory model of law enforcement, but this same doctrine knows the phenomenon of so-called "persuasive precedent" as optional, the sources of which are foreign court decisions, historical sources of law, in fact the doctrine itself, the individual opinions of judges, i.e. everything that can guide the judge in deciding the case, but is not mandatory to consider[41]. As is known, the legal system of Ukraine does not belong to the system of common law, but is included in the Romano-Germanic legal family by most scholars-comparativists[42]. Therewith, most scholars insist that the sources of family law in continental law are the regulation and the contract, thus denying the possibility of recognising precedent as a source of law. On the other hand, there are more and more warnings in the literature that the possibility of recognising judicial precedent as a source of law is unfounded. According to A.A. Marchenko, given the active globalisation, especeially in the legal field, it is worth noting the position that the Romano-Germanic legal system recognises the source of law and judicial precedent[43]. The above gives grounds to state the successful reception of the concept of persuasive precedent in the Ukrainian legal system and judicial practice. The specific feature of the review of court decisions in the cassation instance is that usually during such a review there is a conflict between the ideal of the rule of law and the ideal of future judicial supremacy, achieved during the development of a persuasive precedent.

Turning to the history of the development of a persuasive precedent, the opinion of S.V. Shevchuk is notable, according to whom a court decision as a source of law played a rather limited role[44]. Even in the only recorded biblical case, the scholar writes, the trial of the prophet Jeremiah, references to earlier court decisions were made to persuade the court, that is, in other words, these

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[40] L.O. Korchevna, *The problem of multi-source law: An experiment in comparative jurisprudence*, Institute of State and Law V.M. Koretsky, Kyiv, 2005.

[41] M. Mahrelo, "Non-binding precedent: Some aspects of the substance of judgments of the European Court of Human Rights in the legal system of continental law", in *Bulletin of the Academy of Advocacy of Ukraine*, 2013, vol. 3, no. 28, p. 61-67.

[42] I. Nikitchuk, "Precedent in civil law relations of Ukraine", in *Legal Journal*, 2004, no. 11, p. 16-25.

[43] R. David, K. Joffrey-Spinozi, *Basic legal systems of our time*, Mezhdunarodnyie Otnosheniya, Moscow, 1999; A.A. Marchenko, "Historical and legal digression of the genesis of case law", 2020. Available at: https://6aas.gov.ua/ua/proekty/articles/m/2211-istoriko-pravovij-ekskurs-genezisu-pretsedentnogo-prava.html.

[44] S.V. Shevchuk, *Judicial lawmaking: World experience and prospects in Ukraine*, Referat, Kyiv, 2007.

decisions were mentioned as persuasive but not binding precedent. After all, most of the rules of ancient law were customary, and the court decision, if perceived as a source of law, was considered only as proof of the existence of a particular custom. Shevchuk continues that this is typical of modern international law, in which the decisions of the International Court of Justice and its predecessor – the Permanent Chamber of International Justice – are considered from a formal standpoint as evidence of customary law and are not considered as a separate source of law [45].

With regard to the rule of law, the acquisition of this concept of common law also seems useful to be accepted into the national legal system, in particular in the context of the development of the doctrine of judicial law.[46] The study of monographs and other scientific publications allowed to find several extremely interesting works that differ in the depth of study of the concept, nature, and critique of the rule of law in common law countries, including the United States[47].

Applying dialectical and comparative research methods, the study covered the nature of judicial supremacy and adapt the development of US legal doctrine to the goals of this article. Interpretation of laws as well as the Constitution belongs to the US Supreme Court, which is endowed with the highest authority in matters of constitutional interpretation, which, in turn, has received the usual historically recognised "judicial supremacy" and unequivocal recognition in American society[48]. At the same time, there are positions on the critique of the rule of law from the angle of "people's constitutionalism" or "popular constitutionalism"[49]. However, the doctrine of the rule of law still

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[45] V.V. Komarov, T.A. Tsuvina, "International standard of access to justice and subject of civil procedural law", in *Journal of the National Academy of Legal Sciences of Ukraine*, 2021, vol. 28, no. 3, p. 197-208.

[46] S.I. Maksymov, N.I. Satokhina, "Rule of law and state of exception: The genesis of the problem", in *Journal of the National Academy of Legal Sciences of Ukraine*, 2021, vol. 28, no. 2, p. 47-54.

[47] B. Bird, "The unbroken supremacy of the Canadian Constitution", in *Alberta Law Review*, 2018, vol. 55, no. 3, p. 755-776; R.H. Jr. Fallon, "Judicial supremacy, departmentalism, and the rule of law in a populist age", in *Texas Law Review*, 2018, vol. 96, no. 487, p. 487-553; S.E. Lemieux, "Judicial supremacy, judicial power, and the finality of constitutional rulings", in *Perspectives on Politics*, 2017, vol. 15, no. 4, p. 1067-1081.

[48] K.E. Whittington, *Political foundations of judicial supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*, Princeton University Press, Princeton, 2007; L.D. Kramer, *The people themselves: Popular constitutionalism and judicial review*, Oxford University Press, Oxford, 2004b; R.H. Jr. Fallon, "Judicial supremacy, departmentalism, and the rule of law in a populist age", in *Texas Law Review*, 2018, vol. 96, no. 487, p. 487-553; S.E. Lemieux, "Judicial supremacy, judicial power, and the finality of constitutional rulings", in *Perspectives on Politics*, 2017, vol. 15, no. 4, p. 1067-1081.

[49] J.C. Gracia, "Popular constitutionalism and forms of democracy", in *Mexican Law Review*, 2019, vol. 11, no. 2. Available at: https://revistas.juridicas.unam.mx/index.php/mexican-law-

prevails in the US legal field and has significantly overshadowed the concept of the rule of law and approaches to constitutional interpretation by each branch of government, as well as the concept of popular constitutionalism[50]. The majority of the legal community emphasises that the law, when applied by courts, especially the Supreme Court, requires judicial supremacy, i.e. bringing the content of laws to the constitutional and legal content by interpreting (if necessary) the provisions of the Constitution[51].

In the practical context, the rule of law lies in that the highest ideal of law, such as the US Constitution, requires judicial interpretation in relation to the specific circumstances of the case, as well as in the context of changing the historical paradigm, ensuring basic human rights, state interests, etc[52]. This approach is quite similar to the Ukrainian one, except that the interpretation of the laws and provisions of the Constitution in Ukraine is carried out by different bodies, but in a similar (even common) way – guided by the rule of law and the rule of the Constitution. Thus, the disclosure of the content of the rules of law, finding their meaning, determining the will of the law in order to resolve the dispute and protect the subjective rights of the plaintiff or defendant is entrusted to the courts of the judiciary. Instead, the CCU, within the framework of its inherent constitutional function (to consider constitutional complaints), actually verifies the content of the law for compliance with the Constitution. Such activity cannot be carried out without disclosing the content of laws, but in another aspect – by establishing the constitutional and legal meaning of the law during its own jurisdictional activities. Thus, the jurisdictional activities of two state bodies – the Supreme Court and the Constitutional Court – in Ukraine are quite similar to the activities of the United States in the exercise of judicial supremacy, with one exception: in the United States such a function is performed by the Supreme Court. In this state there is a decentralised form of constitutional control.

The rule of law currently requires ethical commitments that go beyond politics, highlighting the emphasis on constitutional values that are enshrined in certain human and civil rights and freedoms[53]. Judicial supremacy as an orderly judicial activity of the highest judicial body can serve as an authoritative

review/article/view/13126/14691$; T. Donnelly, "Judicial popular constitutionalism", in *Constitutional Commentary*, 2015, no. 1097, p. 541-566.

[50] L.D. Kramer, "Popular constitutionalism, circa 2004", in *California Law Review*, 2004a, vol. 92, no. 4, p. 959-1011.

[51] R.H. Jr. Fallon, "Judicial supremacy, departmentalism, and the rule of law in a populist age", in *Texas Law Review*, 2018, vol. 96, no. 487, p. 487-553.

[52] S. Gardbaum, "What is judicial supremacy?", in Jacobsohn, G. & Schor, M. (Eds.), *Comparative Constitutional Theory*, UCLA School of Law, Public Law Research Paper, 2018. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2835682

[53] N.S. Kuznietsova, O.V. Petryshyn, D.S. Pylypenko, "The civil code of Ukraine - A reliable regulator of civil relations in civil society", in *Global Journal of Comparative Law*, 2021, vol. 10, no. 1-2, p. 5-15.

declaration of constitutional principles, limiting the judiciary in its discretion and the danger of unlimited judgement.[54]

The above allows to consider the rule of law as a result of the privileged power of the Supreme Court of Ukraine when reviewing court decisions on the interpretation of laws, but such power is not the highest. Interpretation of constitutional provisions is a unique function of the CCU. The Supreme Court is the bearer of the highest authority of the court in the justice system in judicial enforcement. Judicial enforcement of the Supreme Court ends with the adoption of rulings that contain legal opinions on the interpretation and specification of laws and regulations, and these conclusions, respectively, should be considered by lower courts. In this regard, the rule of law can take on the form of completeness in the process of appealing court decisions and, in general, be the answer to any important legal, empirical or practical question. In this case, the rule of law acquires the features of finality of court decisions, which are binding on the parties to litigation and on other branches of government as those that must authoritatively determine the rights of the parties in these cases (persuasive precedent)[55].

Judicial supremacy can become a prerequisite for achieving all practical goals of judicial enforcement. Furthermore, it can become a feedback loop between the courts and the legislator, provided that the limits of judicial discretion are observed without interfering with the legislature. In this context, the quality of laws and their compliance with the Fundamental Law of Ukraine should be emphasised. For this, it will be useful to develop an appropriate "standard" of constitutional legality. Such a standard, according to Thomas R. Lee, should consider and explain the reasonable differences[56] of social relations in the country. Adapting this statement to the Ukrainian realities, it is a matter of polarisation of the interests of the state and society, divergent private and public interests, the balance and primacy of which must be established by the judge during the case and law enforcement activities.

In the context of the application of the standards of constitutional legality, judges of the judiciary are assisted primarily by the decisions of the CCU senates, which consider constitutional complaints on the basis of the rule of law. This is another of the many manifestations of the principle of the rule of law in practice. The study of the summary of constitutional complaints on the official website of the Constitutional Court allows to state that the issue of compliance with the specific provisions of the laws applied in the final court

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[54] O.R. Kovalyshyn, O.A. Vivcharenko, U.P. Gryshko, "Legal borrowings in the area of civil rights and interests protection under the legislation of Ukraine and the EU", in *Rivista Di Studi Sulla Sostenibilita*, 2020, no. 1, p. 301-314.

[55] R.H. Jr. Fallon, "Judicial supremacy, departmentalism, and the rule of law in a populist age", in *Texas Law Review*, 2018, vol. 96, no. 487, p. 487-553.

[56] T.R. Lee, "Stare decisis in historical perspective: from the founding era to the Rehnquist court", in *Vanderbilt Law Review*, 1999, vol. 52, no. 3, p. 662-681.

decision against the applicant of Article 8 of the Constitution of Ukraine is referred to in each complaint, in particular through the lens of legal uncertainty and (or) legitimate expectations, etc. It will be recalled that the decisions of the CCU are binding and have a statutory nature.

Acts of judicial power of a statutory nature have the following common features: 1) they are adopted in the process of administration of justice; 2) statutory significance is not an act of the judiciary in general, but also its part (usually motivational), which contains judicial precedent (legal position, legal status, etc.); 3) are universally binding, i.e. their effect extends not only to the parties to the case, but also to other subjects of law; 4) their statutory force is necessary to meet the needs of justice in resolving similar cases and is based on legal positions that are developed in the process of application and interpretation of the law during the consideration of a particular case; 5) are provided by the state through the activities of the state executive service; 6) their statutory content is established based on the analysis in the court session of legal facts and life circumstances in the context of application of legal provisions; 7) depend on the professional legal awareness of judges and the level of development of legal doctrine; 8) in the conditions of the Romano-Germanic legal family have supplementary nature in relation to the main sources of law[57].

Applying the method of modelling the stated position of S.V. Shevchuk, which was expressed in the period when the CCU belonged to the judiciary, through the lens of today's realities, one can state that the illustrated common features can apply to both decisions of the CCU and decisions of the Supreme Court. However, with regard to the decisions of the Supreme Court – in a somewhat reduced form. After all, the Law No. 1402-VIII and the Procedural Codes currently make provision for a legislative provision to consider the conclusions of the Supreme Court by lower courts in their activities (rather than literally following the legal position). Also, lower courts should consider the usual approaches in the judicial system in general, when the decisions of the Supreme Court are adopted as a certain standard of law enforcement, despite the periodic conflicting positions of this court. Therewith, the statutory nature of court decisions of the CCU does not transform them into a statutory act in its pure form. Such decisions may serve as an additional argument for the level of law during the consideration/review of the case, but do not completely replace a statutory act.

This study attempted to solve the problem of practical rather than illusory manifestation of the rule of law as a guiding principle in judicial activity and ways to apply it in judicial law enforcement. In judicial activity, the rule of law has a double manifestation: 1) in the activity of each judge during law

[57] S.V. Shevchuk, "Normativity of acts of judicial power: From legal position to legal position", in *Bulletin of the Supreme Court of Ukraine*, 2008, no. 9, p. 23-27.

enforcement activity; 2) in the activities of the highest judicial body in the judicial system – the Supreme Court, when it draws conclusions, especially on the correct application of substantive law.

Concrete proposals were formulated for the effective provision of the principle of the rule of law as a basic principle in the law enforcement activities of judges. It is achieved through the rule of law, within which the highest court at the national level forms the relevant legal positions (Grand Chamber of the Supreme Court) and legal opinions (cassation courts of the Supreme Court). The legal opinions drawn up by the Supreme Court should be considered by lower-level courts in the administration of justice but not taken literally. The principle of the rule of law permeates every trial vertically and horizontally, when the case is reviewed by the courts of appeal and cassation after consideration by the court of first instance.

Conclusions

Judicial supremacy in the countries of the continental legal system is considered as a special, closely related to the law-making role, law enforcement process of the Supreme Court on resolving conflicts between the ideal of a legal provision and a persuasive precedent of a specific law enforcement situation. Persuasive precedent is determined by the result of judicial supremacy during the official interpretation of the correct application of substantive law (rarely – procedural) based on the rule of law, which is described by appropriate regulations. Judicial supremacy is issued as a result of the privileged power of the Supreme Court when reviewing court decisions on the interpretation of laws, but such power is not the highest, as the interpretation of constitutional provisions is a unique function of the CCU. Disclosure of the content of legal provisions, finding their meaning, determining the will of the legislator in order to resolve the dispute and protect the subjective rights of the plaintiff or defendant is entrusted to the courts of the judiciary. Instead, the CCU, within the framework of its inherent constitutional function (to consider constitutional complaints), actually verifies the content of the law for compliance with the Constitution by establishing the constitutional and legal meaning of the law during its jurisdictional activity.

With regard to Ukraine, such activities of the Supreme Court are still in the middle, if not at the beginning of this path, given the constant transit of legislation. The Ukrainian legal system and civil society are constantly creating certain challenges and an endless stream of both simple disputes and complex court cases, which judges must consider, guided by the rule of law. Moreover, among the modern community, in particular judges, hermeneutic suspicion is widespread, which lies in a polysemous interpretation of substantive law by both participants in the cases and by the courts. Courts may deviate from

previously accepted and systematically applied methodological principles, in particular in ideologically significant cases.