ТЕОРІЯ ТА ІСТОРІЯ ДЕРЖАВИ І ПРАВА

Semenihin Igor Victorovych,
PhD in Law, Assistant of the Department of Theory of State and Law, Yaroslav Mudryi National Law University, Ukraine, Kharkiv
e-mail: igsemenihin2009@yandex.ru
ORCID 0000-0001-9692-9276

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THE USE OF LEGAL DOCTRINE IN JUDICIAL REASONING

This article is primarily concerned with investigating whether and to what extent legal doctrine actually influences judicial decision-making process in Ukraine and others countries. It is concluded that legal doctrine not only assists judges, but somehow restricts their exercise of discretionary power.
Keywords: citation practice; judicial opinion; judicial decision; legal doctrine; source of law.

Семенихин И. В., кандидат юридических наук, ассистент кафедры теории государства и права, Национальный юридический университет имени Ярослава Мудрого, Украина, г. Харьков.
e-mail: igsemenihin2009@yandex.ru ; ORCID 0000-0001-9692-9276

Использование правовой доктрины в судебной аргументации

Исследованы особенности влияния правовой доктрины на процесс принятия судебных решений в Украине и других странах. Сделан вывод, что правовая доктрина не только помогает судьям, но также определенным образом ограничивает их при реализации дискреционных полномочий.
Ключевые слова: практика цитирования; позиция судьи; судебное решение; правовая доктрина; источник права.

One may pay attention to theses developed in legal writing
not only because of the quality of the reasons proffered therein,
but also due to the authoritative position that legal writers occupy.
A. Peczenik

Problem setting. Implementation of the proclaimed course of integration into the European Union, full-scale inclusion of Ukraine into the family of European

nations presupposes the application of European and international principles and standards of a law-governed democratic state. This in turn requires improvement, modernization, and in some cases, the adoption of fundamentally new statutory rules and regulations, implementation of the best European practices. Following the Euromaidan rallies and the «Revolution of Dignity» (2013–2014) the social demand of Ukrainian society for such changes and reforms has significantly increased. This is especially true for those segments of social life and state policy, which on the one hand, are systemically important, and on the other – comprise ineffective archaic elements that are largely inherited from the Soviet past, and are inconsistent with democratic institutions, principles and values. A complete implementation of the latter into the state policy, in various areas of legal practice is complicated by the lack of professionalism and the dominant political, private, corporate interests (with different intensity and in different forms) in the work of many decision makers, and even those senior officials, who are authorized to modernize Ukraine's legal, political, economic systems. The human factor in these processes sometimes is crucial in fact. The updating of the basic mechanisms of social and political development is rather slow; structural reform initiatives are not always put into life. Along with this, conservatism of the political system, lack of effective so-called «social elevators» are significant barriers for rapid and far-reaching reforms that were introduced, for example, in Singapore. Under these conditions in Ukraine, the appearance of a figure, comparable with Lee Kuan Yew, who is often mentioned in Ukraine as an example of a successful reformer, at the moment seems rather illusory.

Today, hopes are high that the judiciary establishment will be reset within the framework of the judicial reform. Not just new people – honest and not corrupt – should put on the judges' robes, but lawyers with new ideas, innovative approaches to the administration of justice. In 2016 an international conference was held, where Ukrainian judges, legal scholars and international experts discussed the topical issues of judicial lawmaking in the mechanism of ensuring the rule of law in modern conditions of reforming justice in Ukraine. In his speech, the Supreme Court of Ukraine Chairman Y. Romanyuk said that the dynamic development of Ukrainian society and changing social conditions in our country are obvious. These circumstances call for not just the development of the legal system of the country, but also for reconsidering the role of courts and judges in the application of both national and international legislation when resolving legal conflicts. Therefore, the lawyers will have to face new challenges and work in the new conditions of legal consciousness and law-enforcement. It has become crucial in practical terms to find and draw on valuable experience of developed countries in regards to judicial lawmaking. Y. Romanyuk also added that «we finally have to acknowledge that there is an objective enlargement of sources of law» [3]. What place does the legal doctrine occupy in the legal system? How do the Ukrainian judges use the legal doctrine, and do they use it at all? Perhaps the judges should change their attitude to legal doctrine? Our picture of the nature of legal doctrine and its genuine influence on the Ukrainian legal system should be updated.

Paper objective. The original views on the phenomenon of legal doctrine can be found in the works of A. Peczenik, F. Shecaira, M. Van Hoecke, N. Jansen, F. Parson, N. Duxbury and others. In the context of our study we will try to describe in general terms the views of Ukrainian researchers on legal doctrine, present them to foreign readers and to lay out our own priorities and accents in the relevant scientific discourse. The specific features of applying legal doctrine in judicial practice in Ukraine, particularly in the context of judicial reasoning will also be covered.

Paper main body. Ukrainian legislation is not perfect – both Ukrainian and foreign experts admit that. For example, many acts adopted during the Soviet period are still in use. For example, the Housing Code is still called the Housing Code of the Ukrainian Soviet Republic (adopted in 1983). The Code contains references to «the October Socialist Revolution», «importance of putting Lenin's ideas on building the communist society into practice» etc. The Soviet Union, Lenin and his ideas have been sent to the museum of history long ago, but the preamble of the Code has not been changed. This is not an isolated case. For example, the current Labor Code of Ukraine, which was passed back in 1971, is also massively outdated. Such acts are out of line with the public mood and expectations, the present state of society; they are in conflict with the policy of European integration of Ukraine and European standards. W. Miller rightly notes that such «outdated legislation» and slow legal change have a negative impact on the country more generally and on the social interests of the population in particular. Ukraine is in a permanent political crisis and necessary legislation is therefore not passed. As regards quality, Ukrainian laws are «poorer» nowadays than they were in the past [9, p. 71]. Frequently changes in the national political climate, acute confrontation between different political forces, low levels of the MPs' expertise become an obstacle in maintaining a clear and balanced legislative policy. Furthermore, in reality all the Ukrainian presidents positioned themselves as reformers. The same applies to the government, with its format changing almost every year. Every new government tried to introduce something new in the life of the society and the state. They have often ignored (consciously or unconsciously) such important principles of reforms as consistency, continuity, systematic and balanced approach.

As a result of such activities, about four thousand statutes have been passed since Ukraine declared independence in 1991, two thirds of which introducing changes to the legislation in force. In addition, tens of thousands of acts were passed at the level of departments, ministries, local authorities, which turn legislation into impenetrable morass, where even experienced professionals can get lost, not to mention average citizens. At the same time, quantitative changes are not transformed into quality. In this regard, it is instructive to recall a statement by a famous philosopher Voltaire: «A multitude of laws in a country is like a great number of physicians, a sign of weakness and malady». As a result, the proportion of shortcomings in the Ukrainian legislation – «gaps», «loopholes» and «collisions» – is constantly growing and sometimes seems to exceed all the reasonable limits, especially in tax law, commercial law, intellectual property law. This situation significantly complicates things for Ukrainian businessmen and foreign investors. At the same time, inordinate

complexity and poor quality of law clash with a core principle of the rule of law – law should be predictable, stable and clear. Still we are not in favour of dramatizing the situation and confining ourselves to criticism. In our view, a more useful approach is to find solutions, work out suggestions and recommendations with due regard to criticisms. Moreover it is not fair to place all the blame on politicians or parliamentarians. Another aspect of this problem is that virtually every day there are new situations in life that the lawmakers objectively are not able to foresee and deal with at the level of statutory law. A good example is the annexation of Crimea and known tragic events in eastern Ukraine (Donbass region), which gave rise to a range of problems and issues, not covered by the Ukrainian law.

Due to the increasing number of legislative acts, respectively, the scope of judicial lawmaking is expanding; the role and importance of judge-made law in making abstract legal provisions more specific and filling in the gaps in statutory law is increasing. Modern Ukrainian law develops in line with the general acceptance of the concept of judicial lawmaking, which was officially denied in the Soviet period, but actually (albeit in the latent form) was applied in practice. Today officially it is recognized that the courts can not refuse to administer justice, on the pretext of lack of relevant legal norms, their ambiguity or inconsistency. When the courts hear cases, which can not be resolved by the mechanical application of statutory rules, they sometimes create new (different from the classic legislative norms) specific legal provisions. Thus they «complete» the law, modernize it, and to some extent correct mistakes made by the legislators. This work of the court is really difficult and complex. In forming their position in the case, the court should take into account and reconcile different interests and values, focus on the principles of justice, wisdom, morality, balancing between them. The court has to opt for a particular decision, not expressly provided for in the legislation in force. Such choice is neither obvious nor mechanical, nor arbitrary. This choice and, in fact, the position of the court should be duly reasoned, since the court's decision should be accepted and assessed positively not only by the parties to the trial, but the legal community and society as a whole.

In the course of search and selection of the relevant arguments, the subjective qualities of a judge – including his/her level of professional training, experience, personal preferences, and even specific intuition – become crucial. The analysis and evaluation of the complex process of administration of justice from the purely formal position through the prism of abstract and depersonalized court is simplistic and can not present a broad picture. Therefore, these factors should be taken into account, as well as those that are external and independent of the judge's personality. They exert considerable influence on shaping the position of the court in the case and, in fact, on the final decision. It is not just about positive law (legislation, precedents and legal customs). The specific features of the judicial hierarchy and professional subculture, the level of public trust in the judicial system, the existing traditions of justice etc. also matter. It is clear that judges do not work in the absolute vacuum. As A. Peczenik has said, "the examples of factors which exert causal influence over law-applying officials but *do not usually qualify as formal sources of law* are views

disseminated by the media, views expressed by private organizations, the intentions of government and other political agents, values widely accepted in civil society, and views expressed by international organizations lacking the formal authorization of international law» [11, p. 14]. In this sense, legal doctrine is a powerful factor, which holds a special place in the puzzle of judicial behavior.

Legal doctrine is also called «legal dogmatics» (Italian «scienza giuridica», German «Rechtswissenschaft», Spanish «ciencia juridical»). The term «legal scholarship» is the most common in the Anglo-American law. As introductory remarks, we should point out that we understand legal doctrine as the views (in the broad sense it also includes ideas, hypotheses, theories, legal constructions, concepts etc.) of known legal scholars, which primarily by virtue of their credibility, persuasiveness are supported by most lawyers. We can find them in various sources: monographs, legal encyclopedias, legal dictionaries, law articles published in legal journals and law reviews etc (so-called «law in books» – this is often the case in continental jurisprudential style). A. Peczenik also noted that legal doctrine (scientia iuris) consists of professional legal writings, e.g., handbooks, monographs, etc., whose task is to systematize and interpret valid law. By production of general and defeasible theories, legal doctrine aims to present the law as a coherent net of principles, rules, meta-rules, and exceptions, at different levels of abstraction, connected by support relations [10, p. 75]. Some of this legal writings (textbooks, monographs) are well respected and frequently cited by other scholars. What is their value to judges?

Legal doctrine – a useful and reliable aid? Let us cite a lengthy quote from the works of an American author M. Radin: «Where does the court find its law? Where does any one find law? That part which is not found in the judge's breast, in the kind of person he is, in his sense of justice, in his education and his environment, must be found in books. Courts rely for guidance not merely on their understanding of the statutes, not merely on precedents in their own and other jurisdictions, but also on books, on treatises written by persons whose only authority was the learning they displayed» [13, p. 415]. Of course, it does not make much sense to spend valuable time searching for relevant literature, to delve into scientific discussions on the pages of academic writings, if the legislation gives direct answers to questions that are brought before the court. However this is not always the case. Moreover, this situation is quite rare.

The courts take the leading role in defining the scope of privacy protection. In this matter, legislation usually defines the general principles that are specified, filled with content by judicial practice. The courts should apply them, taking into account cultural and religious backgrounds, national traditions, customs, social values and more. Scholarly writings are the sources from which judges can draw profound knowledge in these subject matters. Some scientists devote a lifetime to a detailed study of these issues. Their research contribution comprises dozens, and sometimes hundreds of works. Of course, their study is an overwhelming task for the judges. There is no need for this, because the long-term scientific research (as a rule) gets a logical conclusion and implementation in the form of a fundamental scientific work (or several works)

that receives general recognition among lawyers (we must admit that it does not always happen – not all monographs and law articles acquire the status of doctrinal writings). These works are kept in the personal libraries of judges, and are not covered by dust. Legislation cannot give a clear and comprehensive list of information (types of information) on individuals which falls in the category of personal data, and also methods and forms of its protection. Rapid and dynamic changes in social, economic, technological spheres of public life do not allow doing this. If a judge decides a case which is somehow related to these issues, he/she actually has to turn to academic writings where these issues are thoroughly investigated to find information necessary to support legal decision-making – it is difficult to find a judge who is an expert in the sphere of Internet Technologies or Telecommunication Systems. *Thus, legal doctrine is a kind of convenient labor saving device.*

A judge, due to the specifics of his/her work, is immersed in the world of facts, particular dispute and life situations. Therefore, legal studies which suggest solving fairly specific legal problems are especially valuable for judges. Why is a certain behavior pattern allowable (or unallowable)? Is it allowed to listen to private telephone calls or track someone's personal correspondence on the Internet? Who is authorized to do this? How? Under what conditions? Scholars perform a systematic analysis of the existing statutes and general principles of law, international legal standards, the norms of public morality, existing social values etc., and (often by the example of some model cases) give well-reasoned answers to such questions.

In this respect, the work of judges and scholars has a lot in common, which was stressed by a Ukrainian writer N. Gredeskul (1864–1941). We support his statement, that intellectual activities of judges and scientists in the sphere of legal research are very similar. Moreover, N. Gredeskul comes to a conclusion that in terms of logics judges and scholars in fact do the same work. Judges interpret law for applying it in life. If he/she encounters ambiguous norms, he/she gives them the certainty they need. If judges find loopholes, they will fill them by creativity. In essence, dogmatic jurisprudence does the same. Such work of legal scholars is often very authoritative. Often this work is done by remarkable intellectuals. In this respect the work of scholars is probably more important than that of judges. Anyway, judges often turn to academic research results as to authoritative sources. It is not infrequent that court practice is inspired by scholars. Nearly always scientific research goes before court practice regulating new legal issues [2, p. 233]. Thus, judges and scientists, taking joint actions, make an obvious and significant contribution to the development of law. Similar views were expressed by other scholarly writers. S. Dnistrianskyi (1870–1935), Iu. Hambarov (1850–1926), L. Petrazhytskyi (1867–1931) are among them. They considered the scientific field of law, namely dogmatic legal research, as a specific source of law. They considered the scientific field of law, namely dogmatic legal research, as a specific source of law. For this purpose special terms such as «scholar-made law», «scientific law», «the law of approved in science opinions», «bookish law» are used.

It is believed that a judge may support or reject certain scientific ideas and opinions, if they seem absurd or meaningless to him. Scholars can not gain the upper

hand. They can convince – their influence on the minds and will of judges depends primarily on the quality of suggested arguments. Thus, legal doctrine appears in the form of a source of the content-dependent reason for action. The relevance of scholarly writings depends entirely on their persuasiveness. Is it possible to challenge these seemingly unequivocal statements?

On the basis of historical data, we can clearly see that in the life of nations there were periods when the views of scientists were binding on judges. This binding obligation was given to public authorities. In this regard, we should mention a famous Valentinian «Law of Citations» (426 a.d.), which established the list of Roman jurists whose views should be used, as well as their application in court practice. A similar approach was used also during the Middle Ages. Later, because of its purely mechanistic nature this approach was subjected to sharp criticism, as it interferes with making reasonable and fair decisions. Just critical remarks (in a broader context) regarding mechanical jurisprudence can be found in the works of R. Pound. «Legal systems have their periods», said Pound, «in which science degenerates, in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence» [12, p. 607]. Conclusions were made from this negative experience. In particular, the role of judges as machines, which mechanically take decisions, based on statutes (M. Weber) was dismissed. As well as their role as the mouths of passive creatures, who speak the words of the law (Montesquieu). The voices of O. Holmes, B. Cardozo, E. Ehrlich and others (who consistently opposed the abuse of formal logic and conceptual formalism in law) were also heard. Archaic views on jurisprudence, its purpose and functions, particularly in the sphere of adjudication, were also revised. Today, even the works of recognized authors (like Hart, Fuller, Dworkin or Holmes) are not seen as *ratio scripta*. They do not have the status, that the legal treatises developed by Irnerius, Bartolus or Accursius had in the Middle Ages in Europe. A famous phrase of the time «Chi non ha Azzo non vada a Palazzo» today looks a bit strange, and even bizarre. The ghosts of departed masters do not cause awe in today's lawyers.

However, *the modern law can not escape from the scientific character*. In Pound's words, «law is scientific in order to eliminate so far as may be the personal equation in judicial administration, to preclude corruption and to limit the dangerous possibilities of magisterial ignorance» [12, p. 605]. The sound methods and conclusions of competent scientists undoubtedly influence judges and their professional activities. Such influence is not always obvious, but taking no notice or ignoring it – is comparable with denying judicial lawmaking. This effect is assessed primarily in terms of the results it achieves. If it is not helpful in the context of taking a reasonable and fair decision, or alternatively, leads to the opposite results, then, figuratively speaking, the judge can always show any scientist a red card (but an experienced judge will think twice, before sending famous players off – football history, for example, knows examples when during important matches such behavior caused extremely violent reaction of fans, and even led to riots in the stands). So, doctrine is not merely an institution of the legal academy, it is a significant institution of the modern Western legal systems, which is closely related with its various components and exercises considerable influence on them (including judicial practice).

Unlike mechanical jurisprudence, there is jurisprudence that recognizes an active and creative role of the judge in applying the law and its development. For this jurisprudence, judicial activism, judicial discretion, the concept of «hard case» are not abstract notions, devoid of any meaning and practical significance. As it has been mentioned above, relevant ideas and approaches are gaining recognition and support in Ukraine. Without going into discussions on judicial discretion and judicial lawmaking, we will briefly note that the main reasons that force judges to use their discretion, is the lack of certainty and ambiguity in statutory language as well as the presence of statutory lacunas. It is important to note that judges in civil law systems, facing theses defects do not create fundamentally new legal rules (judges rather work out specific legal provisions, which are like benign neoplasms on the body of legislation) – judicial lawmaking (as a rule) takes place in a hidden form. Judges in one way or another refer to legislative acts and implement their interpretations (using different approaches and methods), filling legislative norms with new content corresponding to the realities of today. When there is no relevant statutory norm for a particular case, the interpreter may find in the legislation a norm issued for a similar matter and, by anologia legis, apply it to the case. This activity is not mechanical; it is definitely creative by nature, which is even more evident in the application of general principles (analogia juris). At the same time, the so called creativity can not be unlimited. Judicial discretion can never mean the arbitrary will of the judge. It is a legal discretion, founded upon conditions which call for judicial action, as distinguished from mere individual or personal view or desire. Accordingly, discretion imports the exercise of judgment, wisdom, and skill, as contradistinguished from unthinking folly, heady violence, and rash injustice [5, p. 1024]. Can legal doctrine not only assists judges, but somehow restrain, restrict their exercise of discretionary power?

As we know, statutory norms are fully authoritative in most legal systems and judges see themselves as normally bound to apply such norms regardless of the desirability of the results they prescribe. Legislation is something that can not casually be ignored. The situation regarding the legal doctrine (along with other permissive sources of law) is different. Among the plethora of views and ideas of legal scholars, a judge can easily find among them those that appeal to his reason.

If they seem reasonable and wise in a moral, political or prudential sense, the judge uses them (admittedly he has the ability to choose whether or not to use it) primarily as additional support for his decision. Appeal to one's reason, more often than not, «amounts to a confirmation and a strengthening of one's own opinion rather than a shaping of that opinion» [7, p. 516]. Indeed, from this perspective, we can conclude that judges are absolutely free to resort to scholars considerations in the justification of their decisions. But why does the number of legal scholars reach tens of thousands, and their scientific works make hundreds of thousands scholarly writings, while the list of authors whose works are cited by judges comprises only a few dozens?

In every area of law you can find several works that make a real difference – they were written in by known authors, they are studied by university students,

often cited by other scholars. Ideas, generated in these works get recognition and support of the legal community. They acquire this status not because they are made by persons who occupy leading positions at universities or research institutions (although it also matters), but for other reasons: 1) because in scientific discussion (that take place on the pages of legal journals, at conferences etc.) they were not rejected as unsound; 2) the reasoned position of the author meets certain logical criteria (systematic character, completeness, consistency); 3) correlation with the social context – scientific ideas and views, completely detached from real life, are unlikely to receive support and recognition. It should be pointed out that we have just suggested our vision and understanding of the issue. It may be imperfect or incomplete, but hardly completely wrong – in any case, we invite everyone to join the discussion. As a general rule, the strength of original views (ideas, hypotheses) regarding certain phenomena of state and law initially is tested by means of scientific discussions. Some of them command respect (including high citation rates) among other legal scholars, and (as a rule) only after some time among practitioners.

D. Merritt and M. Putnam present such an example. R. H. Coase's leading 1960 article on The Problem of Social Cost did not gather any judicial citations for the first eight years after its publication, although it gained forty-three scholarly citations in journals indexed by Social Sciences Citation Index («SSCI») during that period. The article earned just one judicial citation during the 1960s, and only five more judicial citations during the 1970s (a total of just six judicial citations over two decades), but was cited in at least 630 scholarly articles during the same twenty years. Coase's work finally achieved judicial popularity during the 1980s, winning twenty judicial citations during that decade [8, p. 881].

Sometimes the contribution of individual authors in the development of scientific thought is so significant, that their views not just become well-known, but in fact change our understanding of law, develop new approaches to the legal regulation of social relations. As a striking example we can mention a law review article «The Right to Privacy», published in 1890 by Harvard Law School alumni S. D. Warren and L. D. Brandeis, which is considered as one of the best-known, authoritative and influential publications that have ever appeared in the world. R. Pound after the article's publication noted, that Warren and Brandeis were responsible for nothing less than adding a chapter to our law. Today this article is constantly referred to as the best example of the influence of law journals on the development of the law. The article continues to be a touchstone of modern discussions of privacy law. According to an online legal research service Westlaw, it has been cited more than 3,000 times. In Cox Broadcasting Corp. *v.* Cohn 420 US 469 (1975) the central thesis of the root article by Warren and Brandeis – the press was overstepping its prerogatives by publishing essentially private information, and that there should be a remedy for the alleged abuses – was estimated by the Court as a «*powerful argument*».

Such «powerful arguments» (which can be found in other prominent legal writings – «Introduction to the Study of the Law of the Constitution» by Albert V. Dicey is among them) are not just the views of individual authors – they are much more. These legal writings have reached such level of recognition and support, that they are

included in the list of references, compulsory for university students. The fact that they are recognized by the legal community has profound influence on judges, as they are an integral part of it. Thus, a German author L. Ennektserus in the «Course of German civil law» states that «a judge will not light-heartedly reject what is considered right by everyone» [4, p. 154]. Though we agree with this statement, we still believe it is necessary to raise a point of clarification – the situation implies a self-adequate wise judge. It is the judge who is aware that his decisions are open to analysis and criticism from the legal community and the general public. So he wants to convince others of the correctness and relevance of his position. Charles A. Johnson also discusses the theory that courts use citations to confer «legitimacy» on their decisions [6, p. 510–511]. A judge, referring to S. D. Warren and L. D. Brandeis' views, seems to say: «Look, I know them and I also think they are wise. I have decided the case in accordance with these views, so there is no reason to criticize me».

Justice Landau reminds us that judging through the use of discretion must not become arbitrary judging. There is no better tested way of avoiding this danger than the full explanation of the judgment. This kind of explanation trains the judge to think clearly and to raise his reasons – including his intuitive thoughts, to which Pound referred above his subconscious, to the light of day, in order that they should stand the test of criticism by the appeals court, by professional, and by the general public [1, p. 33]. For this reason in the US and many European countries judicial decisions are usually lush and include a detailed analysis of the evidence, a neat arrangement of arguments regarding disputed facts, the true motives that prompted the decisions taken.

Conclusions of the research. In Ukraine a different situation has become common at the level of theory and practice. The decisions of Ukrainian courts are usually very short and non-transparent. This opens the way to manipulation and abuses when judges exercise their discretionary authority. Often judges refer only to the statutory norms, without giving proper motives of their application or non-application of other provisions, which were relied upon by the party in substantiating their claims. Only in some judgments one can find references to legal doctrine (academic writings and positions established by scholars). Non-legal sources are not used at all. The positions of many Ukrainian legal scholars and even judges are based not on the objective study of this issue, but on the axiomatic statement that is not questioned: Ukrainian legal system does not have such tradition. At the same time another statement cannot be denied: customs and traditions are not eternal – they change over time; new views, approaches and practices emerge in jurisprudence. Maybe it is time to review conservative approaches and start new traditions? Will it improve the quality of justice and increase public confidence in the judiciary, which is diminishing nowadays? We strongly believe this to be the case.

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Семеніхін І. В., кандидат юридичних наук, асистент кафедри теорії держави і права, Национальный юридичний університет імені Ярослава Мудрого, Україна, м. Харків.

e-mail: igsemenihin2009@yandex.ru ; ORCID 0000-0001-9692-9276

Використання правової доктрини у судовій аргументації

Досліджено особливості впливу правової доктрини на процес ухвалення судових рішень в Україні та інших країнах. Зроблено висновок, що правова доктрина не тільки допомагає суддям, але також певним чином обмежує їх при реалізації дискреційних повноважень.

Ключові слова: практика цитування; позиція судді; судове рішення; правова доктрина; джерело права.

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