

ТЕОРІЯ ДЕРЖАВИ І ПРАВА



Semenihin Igor Victorovich,
*Candidate of Legal Sciences,
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*

doi: 10.21564/2414–990x.134.78782
UDC 340.143

THE USE OF LEGAL SCHOLARSHIP BY THE COURTS OF UKRAINE

The specific features of the use of legal scholarship by the courts of Ukraine have been analyzed in the paper. The reasons of lack of the established practice of scholarly writings citation in court decisions have been considered.

Keywords: citation practice; judicial opinion; judicial decision; legal doctrine; legal scholarship.

Семенihin 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 судебными органами Украины

В статье анализируются особенности использования правовой доктрины судебными органами Украины. Охарактеризованы основные причины отсутствия устоявшейся практики цитирования в судебных решениях научных работ.

Ключевые слова: практика цитирования; позиция судьи; судебное решение; правовая доктрина; юридическая наука.

Problem setting. The recognition and implementation of democratic principles, human rights doctrine associated with the fall of the «socialist camp» led to significant changes in various fields – economics, politics, law and others. Along with this, the intensity and effectiveness of transformational changes is quite heterogeneous. This

seems to be conditioned by the existing traditions and culture, which have been developed by the peoples for centuries under the influence of various economic, ideological, political and religious factors. For this very reason in some countries (Poland, the Baltic States) the democratic principles, values, institutions are positively taken at the level of public consciousness, as they are not totally alien to the peoples of these countries. Moreover, the negative Soviet influence on them was relatively short-term and did not result in irreversible consequences.

At the same time in Ukraine, Russia, Belarus, the situation is much more complicated. The obstruction of the reforms in Ukraine and complexity in the perception and implementation of democratic values and institutions to a large extent is related to the fact that Ukrainian society for centuries was developing in the framework of socio-cultural space and political regimes that existed in the Russian Empire (until 1917) and the Soviet Union (until 1991). Ukrainian society for a long time was developing in the system of coordinates of the paternalistic state that was not part of European culture and civilization. The name of the state changed, but the principles of relations between the public authorities and society, the scientific community, the intelligentsia did not change significantly. Lawyers in that state did not protect the rights and freedoms of citizens, but were mostly the tools of repressive penal policy of the authoritarian political regimes. Rene David noted in that regard that lawyers were to a greater extent servants of the king and state, than servants of the law – they had no spirit of corporate solidarity [2, p. 134]. To the full extent this applies to the Soviet judges, whose main task was to promote implementation of the state policy, and not to find fair solutions of social conflicts and establish the principle of the rule of law, as it is the case in any law-governed democratic state.

Paper objective. The main purpose of the article is determination of peculiarities of the legal science achievements using in the activity of the Ukrainian court instances.

Recent research and publications analysis. Works by A. Vasiliev, R. David, M. Emelin, S. Maksymov, S. Poljakov, R. Puzikov, L. Petherbridge, F. Schauer, F. Shecaira, K. Stanton are noteworthy among modern domestic and foreign scientists researching this problem [1–6; 9–12].

Paper main body. Today, the legal system of Ukraine is developing in the context of European integration and globalization processes. Ukraine's active participation in these processes, including close and fruitful cooperation with non-governmental organizations (the International Association of Lawyers among them), opens the way to the study and implementation of the achievements of the Western legal tradition. The legal doctrine which according to Rene David's concise definition was and remains a «very important, living source of law», is an integral part of it [2, p. 121]. Legal 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. Representatives of the scientific and expert community, politicians have repeatedly stressed the unsatisfactory quality of acts adopted in Ukraine by the law-making bodies and the courts. In this regard, the importance and necessity of a more active

use of the legal doctrine (achievements of the legal science) has been emphasized by decision makers. So, it is important to determine the optimal approaches and forms of such use in the lawmaking and judicial practice.

There are two main forms of applying the legal doctrine in the legal practice. First, when the doctrinal provisions are part of lawyer's consciousness in the course of studying scholarly writings. This is an indirect impact of the legal doctrine on the process of taking a decision by the lawyer. Secondly, on condition that the practice of applying norms of law is quite controversial, there are gaps in legislation, conflicts of legal rules, judges and lawyers use legal doctrine as a means of additional reasoning, referring in their decisions to the competent works of scholarly writers. At the same time, in the post-Soviet regions (including Ukraine) these issues have not been purposely studied by jurists, hence the relevance of our research. We believe that this subject matter is more complex and difficult than it might seem at first glance. Many important issues and related problems that need research are not obvious in the light of statistics.

The concept of legal doctrine in civil law systems is characterized by such terms as: «*legal science*», «*legal theory*», «*jurisprudence*», «*legal writing*», «*legal principle*», «*influential body of teachings*», «*legal dogmatics*» etc. Legal doctrine is also used in the sense of results of scientific research – treaties, legal encyclopedias, legal dictionaries, law articles published in legal journals and law reviews. The term «*legal scholarship*» is the most common in the Anglo-American law. In the US, the UK, Canada, Australia many works were published, which studied the specific features of applying legal scholarship in the judge's decisional process. The content analysis of court decisions shows that the judges use not only statutes and precedents for the decision making. When dealing with complicated cases in the interpretation of statutes, changing precedents, in constitutional proceedings, judges often use persuasive authorities (including legal scholarship), directly referring to them in their judicial decisions, making their legal position more reasonable and convincing. In the US, this practice is prevailing.

In fact, no decision of the Supreme Court of the United States can be taken without this kind of citation. It's no secret that in every area of law, there are several works (usually no more than three or four works mainly in the form of monographs), which have the status of doctrinal and are most often cited by judges and legal scholars. Their authors have made a significant contribution to the development of certain institutions of law and enjoy great respect among lawyers. These works are cited by them on the exclusive (only specific authors and no others) or priority basis. Their distinguishing features are: a) fundamental and encyclopedic nature – the author is trying to look into each «corner» of the area of law, which is studied; to analyze every aspect in detail, often providing insights into history and considering how a particular legal problem was solved in different legal systems; b) periodic re-edition of an updated version by the writing staff, as a rule by a student of the original author, his followers or fellow-thinkers. Among these works we can name the following: Benjamin's Sale of Good; Paget's Law of Banking; Clerk & Lindsell On Torts; Megarry & Wade: The Law of Real Property etc.

In the Soviet legal literature the term «doctrine» was used mostly in a negative sense, in particular in the context of condemning the state legal policy of bourgeois states. The eloquent publication titles of the Soviet scholars speak for themselves: *Bourgeois democracy: the crisis of the institutions, the futility of doctrines* (1970), *The Illegality of the US doctrine of nuclear war* (1985), *Criticism of American doctrines and practices in international cooperation on human rights* (1983) etc.

In our view, there are no fundamental differences between the concepts «*legal doctrine*» and «*legal scholarship*», but you can find them if desired. Fábio Shecaira also noted that legal scholarship and the doctrine (the latter being the preferred phrase in many civilian jurisdictions) refer to the same things, namely, formalist academic works concerning the law [11, p. 75].

In our study, we use these terms as synonyms in the meaning recognized in the legal community, relying on the views of legal writers (mostly scholars) and their legal writings, which can be described as doctrinal (most influential and authoritative). We used The Unified State Register of Court Decisions¹ to study the influence of legal scholarship on court decisions. Of the total number of judgments found in the database (more than 57 million decisions) only several hundred comprise citations to legal scholarship. On the basis on these figures, it may be concluded that in Ukraine (by the way as in other post-Soviet countries) such citation practice is almost non-existent. This can be explained by several reasons.

In our view, first of all the reason for that is *existing judicial traditions* which largely determine the specific character of court's argumentation. The Soviet period had the most notable consequences in the formation of those traditions. Because of the prevalence of legal positivism in the Soviet jurisprudence and system of legal education (so-called narrow-normative understanding of law – «all law is to be found in the legal norms issuing from the State») and the principle of «socialistic legality», the references to the views of scholarly writers and non-legal information in the form of direct citation in court decisions was actually forbidden. Today in Ukraine we can observe positive changes in this area. Approaches to justice, its philosophy and methodology are changing. Judges are becoming more «open» in the course of making decisions; they try to take into account economic, political, cultural and religious aspects of the case that had been submitted to court, and go beyond rigid statutory norms in search of more flexible legal solutions that are in line with the complex and changing realities of life. Judges no longer rely solely on the legislation and refer to the principles of law, precedents and legal scholarship. This is most noticeable as in the case of the body of constitutional jurisdiction (The Constitutional Court of Ukraine). Although, this is just the beginning of a long and hard path of changes and reforms, which brings many challenges and obstacles. The ghosts of the past and still haunt the minds. Rephrasing F. Maitland's famous saying, let's remark here, that legal principles, rules, notions of the nature and the role of law

¹ The Unified State Register of Court Decisions is the electronic database. Here you will find decisions of Ukrainian courts of all jurisdictions (criminal, commercial, administrative etc.) adjudicating since 2006. Available at: <http://www.reyestr.court.gov.ua>.

prevalent in the Soviet period that we have buried, still rule us from their graves. They can be seen today (albeit usually veiled) in some textbooks on jurisprudence and in the activities of decision makers, especially those who were educated and started their professional careers in the Soviet times.

A congested operating schedule of the courts. This is one of the key problems of the Ukrainian judicial system. First of all this is the case of the first-instance local courts, which decide the vast majority of cases heard by the bodies of judicial power in Ukraine. Moreover, the total number of cases heard by Ukrainian courts is increasing every year. In this regard, the judges literally do not have enough time and energy to work at detailed reasoning and thorough study of the legal position that they suggest. It is also one of the important reasons why judicial decisions are usually rather short and nontransparent.

The quality of the academic writings is rather low. The problem is that practicing lawyers do not always see scholars as reliable partners, because they often produce airy-fairy provisions or ideas, devoid of any practical significance or do not develop any problems really relevant to the legal practice. This issue will be studied specifically in our next publications. Let's remark here that such a problematic situation is not unique to Ukraine. Chief Justice of the United States John G. Roberts recently explained that he does not pay much attention to law review articles, reportedly stating that they are not particularly helpful for practitioners and judges [9, p. 996]. And Chief Justice Roberts is not alone in his criticism; he is also supported by many other American judges. I heard similar views and statements (even in more radical forms) as part of my personal contacts with Ukrainian judges and advocates. «If the academy does want to change the world», federal Judge Reena Raggi said at one of the conferences, «it does need to be part of the world» [8]. These calls are currently mainstream and they can be addressed to Ukrainian scholar writers. They should publish their works on current issues in a simple-to-understand form.

Another feature of the use of legal scholarship in court decisions is that Ukrainian judges rarely cite specific works of scientists. Instead, reasoning their opinion, judges tend to use such structures, «according to the views, established in the legal literature», «in accordance with recognized approaches in legal science», «in line with the general doctrinal approach», «in the legal doctrine it is widely acknowledged that» etc. What is the reason for that?

In our view, this somewhat cautious attitude of judges can be explained by the much *too «young age» of the Ukrainian legal science*. The declaration of independence of Ukraine in 1991 was the starting point for a qualitatively new stage of development of Ukrainian society as a whole, and for legal science in particular; entirely new subject matters, methodological approaches emerged, which were actually banned in the Soviet times. A real opportunity to use the achievements of foreign legal science arose. However, 25 years is probably too short a period for the views of scholars to acquire the status of doctrinal and enjoy undisputed authority in Ukrainian legal community. Of course, in every area of law you can find several works that make a real difference – they were written in Ukraine by known authors, they are studied by university students, often cited by other scholars. However, these works have not

received recognition and do not have so much authority as, for example, the works by Holmes, Dworkin, Pound, Fuller, Posner and Wigmore in the US.

As we know, this process is lengthy and multistage, and begins as a rule with producing original views (ideas, hypotheses) regarding certain phenomena of state and law, or validation of new approaches to solving the urgent problems of legal practice. In the process of scientific discussions that take place on the pages of magazines, at conferences, scientific ideas and provisions are refuted or find support in legal circles and are improved further. Also effective ways and mechanisms of their implementation in various areas of legal practice are developed. This may even be accompanied by the emergence of a new trend in the legal thought or development of scientific schools. It may take more than one decade before the views (arguments, the original legal concepts and constructions) of a scientist and his books are universally recognized.

Conclusions of the research. In our view, citation to legal scholarship should be relevant and made in the proper form. In our view, it is necessary not just to refer to specific scientific papers or citations of names of prominent scholars in court decisions. Judges should cite specific position of authors that they associate themselves with. This makes the position of the court in the case more clear and understandable. Citation to legal scholarship is relevant when considering the so-called «hard-cases», which can not be resolved by the mechanical application of statutory rules and regulations, or cases involving issues of social importance, or causing heated debates in society (legalization of abortion, soft drugs, euthanasia, etc.).

Court decisions in these cases should be accepted and positively assessed by the public. So in fact the judges have to use different arguments. We believe that Ukrainian judges should change their conservative approaches to law enforcement. They should more actively use arguments suggested by scientists while reasoning their positions in cases. We should also pay our attention to another important aspect of this issue. If the judge decides contrary to the conventional approach to solving some legal problems, set out in doctrinal writings, then most likely his/her decision will not be accepted by the legal community and (probably) approved by the general public. Moreover, such decisions may cause loss of confidence in the judiciary as a whole and undermine the authority of justice.

Список літератури:

1. Васильев А. А. Правовая доктрина: вопросы теории и истории / А. А. Васильев. – Москва : Юрлитинформ, 2009. – 272 с.
2. Давид Р. Основные правовые системы современности / Р. Давид, К. Жоффре-Спиннози ; пер. с фр. В. А. Туманова. – Москва : Междунар. отношения, 2009. – 456 с.
3. Емелин М. Ю. Правовая доктрина в системе источников общего права: на основе анализа правовой системы Соединенных Штатов Америки : дис. ... канд. юрид. наук : 12.00.01 / Михаил Юрьевич Емелин ; Пензенский гос. ун-т. – Пенза, 2015. – 201 с.
4. Максимов С. І. Правова доктрина: філософсько-правовий підхід / С. І. Максимов // Право України. – 2013. – № 9. – С. 43–54.
5. Поляков С. Б. Юридическая наука, практика, политика / С. Б. Поляков // Lex russica. – 2014. – № 4. – С. 413–420.
6. Пузиков Р. В. Юридическая доктрина в сфере правового регулирования (проблемы теории и практики) : дис. ... канд. юрид. наук : 12.00.01 / Руслан Владимирович Пузиков ; Тамбов. гос. ун-т. – Тамбов, 2003. – 213 с.

7. Садохина Н. Е. Развитие источников российского права в советский и постсоветский период : дис. ... канд. юрид. наук : 12.00.01 / Наталия Евгеньевна Садохина ; Тамбов. гос. ун-т. – Тамбов, 2005. – 186 с.
8. Liptak, A. When rendering decision, judges are finding law reviews irrelevant / A. Liptak // New York Times. – 2007. – № 19.
9. Petherbridge, L. An Empirical Assessment of The Supreme Court's Use of Legal Scholarship / L. Petherbridge, D. Schwartz // Northwestern University Law Review. – 2012. – Vol. 106. – P. 995–1032.
10. Schauer, F. Authority and Authorities / F. Schauer // Virginia Law Review. – 2008. – Vol. 94. – P. 1931–1961.
11. Shecaira, F. Legal scholarship as a source of law : a thesis ... for the degree of doctor of philosophy / F. Shecaira ; McMaster University. – Hamilton. – 2011. – 157 p.
12. Stanton, K. Use of Scholarship by the House of Lords in tort cases / K. Stanton // From House of Lords to Supreme Court / ed. by J. Lee. – Oxford. : Hart Publishing, 2011. – P. 201–226.

References:

1. Vasiliev, A.A. (2009) Pravovaja doktrina: voprosy teorii i istorii [The legal doctrine: *theoretical and historical questions*]. Moscow: Jurlitinform [in Russian].
2. David R., Zhoffre-Spinozi, K. (2009). Osnovnye pravovye sistemy sovremennosti [Major Legal Systems in the World Today]. Moscow: Mezhdunarodnye otnosheniya [in Russian].
3. Emelin, M.Ju. (2015). Pravovaja doktrina v sisteme istochnikov obshhego prava: na osnove analiza pravovoj sistemy Soedinennyh Shtatov Ameriki [The legal doctrine in the system of legal sources of common law: based on analysis of the United States legal system]. Penza [in Russian].
4. Maksymov, S.I. (2013). Pravova doktryna: filosofs'ko-pravovyj pidkhid [Legal doctrine: philosophical and legal approach]. Pravo Ukrainy [Law of Ukraine]. Is. 9, pp. 32–54 [in Ukrainian].
5. Poljakov, S.B. (2014). Juridicheskaja nauka, praktika, politika [Legal science, legal practice, state policy]. Lex russica. Is. 4, pp. 413–420 [in Russian].
6. Puzikov, R.V. (2003) Juridicheskaja doktrina v sfere pravovogo regulirovaniya (problemy teorii i praktiki) [The legal doctrine in the sphere of legal regulations: theoretical and practical problems]. Tambov [in Russian].
7. Sadohina, N.E. (2005). Razvitie istochnikov rossijskogo prava v sovetskij i postsovetskij period [Evolution of legal sources of Russian law in Soviet and post-Soviet periods]. Tambov [in Russian].
8. Liptak, A. (2007). When rendering decision, judges are finding law reviews irrelevant. New York Times, 19.
9. Petherbridge, L., Schwartz, D. (2012). An Empirical Assessment of The Supreme Court's Use of Legal Scholarship. Northwestern University Law Review. Vol. 106, pp. 995–1032.
10. Schauer, F. (2008). Authority and Authorities. Virginia Law Review. Vol. 94, pp. 1931–1961.
11. Shecaira, F. (2011). Legal scholarship as a source of law. Extended abstract of candidate's thesis. Hamilton: McMaster University.
12. Stanton, K. (2011). Use of Scholarship by the House of Lords in tort cases. From House of Lords to Supreme Court / ed. by J. Lee. Oxford : Hart Publishing, pp. 201–226.

Семенihin I. В., кандидат юридичних наук, асистент кафедри теорії держави і права, Національний юридичний університет імені Ярослава Мудрого, Україна, м. Харків.
e-mail: igsemenihin2009@yandex.ru ; ORCID 0000-0001-9692-9276

Використання правової доктрини судовими органами України

У статті аналізуються особливості використання правової доктрини судовими органами України. Охарактеризовано основні причини відсутності усталеної практики цитування в судових рішеннях наукових праць.

Ключові слова: практика цитування; позиція судді; судові рішення; правова доктрина; юридична наука.

Надійшла до редколегії 05.09.2016 р.