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INTERPRETING UKRAINIAN LEGISLATION IN LIGHT OF INTERNATIONAL LAW AND JURISPRUDENCE

Ukraine has signed several international human rights treaties, but her courts to date have not effectively implemented the guaranties contained in them. This is in part due to Ukrainian judges and legal practitioners not applying the case law of the international tribunal and United Nations committee that interpret those treaties. Ukrainian jurists and judges fail to apply relevant international human rights case law for three reasons: (J) the erroneous belief that case law is irrelevant in legal systems that follow the civil law tradition; (2) translation issues involving the words «case law» and «jurisprudence»; and (3) too few translations of international human rights case law into Ukrainian. Overcoming these obstacles will result in more effective implementation of international human rights law in Ukraine, as well as helping Ukrainian legal practitioners adapt to working with case law as it is used in modern civil law systems.

A critical challenge that Ukraine faces is the implementation, in fact as well as on paper, of international legal standards concerning the rule of law and human rights. Although the Constitution of Ukraine and much of Ukraine's national legislation reflect appropriate international legal norms, many Ukrainian citizens do not believe that those norms are actually respected in practice. This disconnection between the written law and actual practice is continued in the arena of international conventions. Ukraine has signed key treaties ensuring respect for human rights and the rule of law, but reports of those treaties' monitoring bodies demonstrate that there are serious areas of non-compliance, especially in the fields of equality for women, protection of minorities against discrimination, and treatment of individuals by law enforcement officials [1].

The jurisprudence of regional and international tribunals also reflects the issues that Ukraine must deal with if it wishes to harmonize its national legislation with the treaties it has signed. The case *Sovtransavto vs. Ukraine* [2], decided by the European Court of Human Rights (hereinafter - ECHR) in July 2002, highlighted three problems that continue to plague Ukraine's legal system: interference by executive authorities into judicial decision making, inconsistent application of law by national courts, and appeal procedures that allow even finished court cases to be endlessly reopened. A recent decision of the United Nations Human Rights Committee concerning a communication from Ukraine also illustrates how the treatment of persons in pretrial detention can violate obligations to respect the human dignity [3].

A key to moving from rights on paper to rights in practice is to understand the crucial role played by courts in engaging in statutory, constitutional, and treaty interpretation. Further, judges, legal practitioners, and legal scholars must recognize the vital importance of case law, otherwise known as jurisprudence, in the implementation of regional and international treaties. To put flesh on the skeleton of conventions, international tribunals have long and intensively applied principles of case law. The European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Prevention of Torture, and the Treaty of the European Economic Community are just a few of the conventions that are interpreted by bodies, either judicial and quasi-judicial, to help ensure effective compliance. Decisions of the ECHR, the European Court of Justice, and the various committees that hear and decide communications under human rights conventions are critical sources of understanding what those treaties mean and how they should be applied. Understanding the substance of these decisions, and understanding the case law approach that they represent, is vital for effective and full implementation of the conventions.

One obstacle to Ukrainian jurists understanding and applying the case law of international tribunals in national courts lies in the popular belief that, as a country that follows the Romano-Germanic, or civil law tradition, case law can have no place in Ukrainian courts. However, this reflects a misunderstanding of the role of case law in modern civil law systems. Although nineteenth century doctrine in civil law jurisdictions such as France and Germany emphasized that court decisions were not a source of law, the theory has not reflected practice [4]. Although the common law system of stare decisis does not exist in civil law jurisdictions, the comparable doctrines *of jurisprudence constante* and *Rechtsprechung,* are firmly entrenched [5]. *Jurisprudence constante,* the French doctrine of applying case decisions, states that [a] court should give great weight to a rule of law that is accepted and applied in a long line of cases, and should not overrule or modify its own decisions unless clear error is shown and injustice will arise from continuation of a particular rule of law [6].

Tribunals that hear disputes under regional and inter-national conventions and statutes, such as the ECHR, the European Court of Justice, and the International Court of Justice, accept and apply this doctrine. Therefore, for Ukrainian judges and jurists to properly implement international conventions to which their country is a party, they must understand and know how to work with principles of case law.

Another problem in integrating principles of international case law into Ukraine's legal system is that of translation. The Ukrainian word, *yurisprudentsiya,* essentially means the philosophy of law, and in that sense it is comparable to its English and French counterparts *jurisprudence* and *Ia jurisprudence*. However, *yurisprudentsiya* does not include a second meaning of the English *jurisprudence* and the French *Ia jurisprudence* - that of judicial precedents considered collectively, or caselaw [7]. Often translators, in trying to find an equivalent for this second meaning of jurisprudence in Ukrainian, use the term *yurisdichna praktika*. However, such a translation is misleading because, at least on the level of legal doctrine, *yurisdichna praktika* in Ukrainian law is meant only to be descriptive, and, for practitioners, informally predictive; it has no formal weight or legal authority. The closest analogue to case law in Ukraine are the Supreme Court's Plenum Resolutions, which set out obligatory guidelines for lower courts to follow in applying selected laws or statutes. Plenum resolutions are binding on courts without being a source of law; however, they are different from traditional civil law case law, or jurisprudence, because they do not arise out of any single legal dispute brought before the court for adjudication.

A third obstacle is to the integration of international case law in Ukrainian courts is a practical one - the lack of translations of decisions by international courts and human rights monitoring bodies into Ukrainian or Russian. Many of the decisions of international courts or tribunals are issued only in English and, in the case of the ECHR, sometimes only in French. It then requires initiative on the part of either the government of Ukraine, scholars, or sometimes the media to produce a translation of the decision so that it is available to wider audience. The Ukrainian government to date has not taken that initiative, and there are no Ukrainian translations, official or unofficial, of international court decisions produced by a governmental body. Either private enterprise or non-governmental organizations must take the lead here, and, thankfully, that is beginning to happen. The case *Sovtransavto vs. Ukraine,* which the ECHR issued in French, is accessible to the Ukrainian public, legal scholars, and jurists, only because the weekly newspaper *Yurisdichiskaya Praktika* translated it into Russian and published the translation [8]. The Organization for Security and Cooperation in Europe recently sponsored publication of Stanislav Sevchuk's *Precedent Law and Human Rights* [9], which includes translations of excerpts from leading ECHR decisions, as well as commentary by the author/translator. Finally, the Ukrainian Legal Foundation has issued several volumes of a quarterly journal *Case Law of the European Court of Human Rights: Judgments, Commentaries* [10], containing translations of many ECHR decisions.

Ukrainian judges, legal practitioners, and scholars, in order to effectively integrate the norms of regional and international instruments into its own legal system, must begin to study, analyze, and apply the international conventions as they has been interpreted by international and regional courts and tribunals. This will become easier once there is broader dissemination among the legal community in Ukraine of the texts of international conventions, especially human rights conventions, as well as broader dissemination of the decisions interpreting those conventions by international courts and monitoring bodies. Of course, even with easier availability of treaty texts and case decisions from international courts and human rights monitoring bodies, Ukrainian jurists will still need practice adapting themselves to working in a case law environment. They will, probably, have to battle outdated prejudices against the study of case law in their legal system. Those who persevere, however, in mastering the techniques of case law analysis, and who apply it to legal problems before them, can take pride that by doing so they are moving into the mainstream of legal practice in the modern civil law tradition.

1. See, for example, *Concluding Observations of the Human Rights Committee: Ukraine. 12/11/2001,* United Nations Office of the High Commissioner on Human Rights, CCPR/CO/73/UKR, Seventy-third session, November 12, 2001; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ukraine.September 24, 2001,* United Nations Office of the High Commissioner on Human Rights, E/C.12/lAdd.65, Twenty-sixth (extraordinary) session, September 24, 2001; *Conclusions and Recommendations of the Committee against Torture: Ukraine. 21/11/2001.* United Nations Office of the High Commissioner on Human Rights, CAT/C/XXVIII/Concl.2, November 21, 2001.
2. *Sovtransavto vs. Ukraine,* European Court of Human Rights, July 25, 2002.
!,.*Communication No. 726/1996: Ukraine. 06/12/2002.* Human Rights Committee, United Nations office of the High Commissioner on Human Rights, CCPR/C/76/D/726/1996, December 6, 2002.
4. *Merryman J.* The Civil Law Tradition.- Stanford Univ Press: Stanford, 2nd edition.- 1985- pp. 46-47.
5. *Glendon M. A., Gordon M. W, Osakwe C.* Comparative Legal Traditions/ - 2nd edition, West Group: St. Paul, 1994- P. 207-209.
6. Black's Law Dictionary, Ed. Bryan Gamer, 7th ed., 2001- P. 859.
7. Black's Law Dictionary, Ed. Bryan Garner, 7th ed., 2001- P. 858.
8. Yurisdichiskaya Praktika, No. 32, 7 August 2002, No. 33, 14 August 2002, No. 34, 20 August 2002.
9. *Шевчук С.* Порівняльне прецедентне право з прав людини (реферат).- К., 2002.
10. Практика Європейського суду з прав людини: рішення, коментарі.- Українська правнича фундація.- Київ, 2000.

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ІНТЕРПРЕТАЦІЯ УКРАЇНСЬКОГО ЗАКОНОДАВСТВА В СВІТЛІ МІЖНАРОДНОГО ПРАВА ТА ЮРИСПРУДЕНЦІЇ

Україна ратифікувала кілька міжнародних договорів з прав людини, але її суди досі ефективно не застосовують передбачені ними гарантії. Це частково відбувається через те, що українські судді та юристи не застосовують судову практику міжнародних трибуналів та Комітету ООН, які тлумачать ці договори. Українські юристи та судді не використовують відповідну міжнародну судову практику щодо прав людини з трьох причин: J) помилкове переконання в тому, що судова практика не може застосовуватись у правових системах, що дотримуються цивільно-правової традиції.; 2) проблеми перекладу термінів «case law» та «jurisprudence» і 3) занадто мало перекладів справ щодо прав людини міжнародних органів в Україні. Подолання цих перешкод приведе до ефективнішого впровадження міжнародних норм із прав людини в Україні, а також допоможе українським правникам застосовувати судову практику, як це відбувається в інших сучасних цивільно-правових системах.