UDC 349.41
DOI https://doi.org/10.32849/2663-5313/2024.2.03

Volodymyr Paliichuk,
Postgraduate Student at the Department of Labor, Land and Economic Law, Leonid Yuzkov Khmelnytskyi University of Management and Law, Heroiv Maidanu street, 8, Khmelnytskyi, Ukraine, postal code 29000, paliychuk.vb@gmail.com
ORCID: *orcid.org/0000-0002-5533-8039*

Paliichuk, Volodymyr (2024). The legal nature of the ECtHR case law as a source of land law in Ukraine. *Entrepreneurship, Economy and Law*, 2, 16–22, doi https://doi.org/10.32849/2663-5313/2024.2.03

THE LEGAL NATURE OF THE ECTHR CASE LAW AS A SOURCE OF LAND LAW IN UKRAINE

Abstract. ***Purpose.*** The study aims to analyze the concept of "case law of the European Court of Human Rights" and explore its legal nature as a source of land law in Ukraine. It also seeks to determine the place of the ECtHR case law in the hierarchy of sources of Ukrainian land law. ***Research Methods.*** The study employs general scientific and specialized methods of legal research. ***Results.*** Legislative approaches to defining the concept of "ECtHR case law" are analyzed. International experience in regulating the relevant issue, particularly some legal acts of the United Kingdom and Ireland, is examined. The study assesses the recognition of the European Commission of Human Rights' case law as a source of Ukrainian land law. Additionally, key doctrinal approaches regarding the legal nature of the ECtHR case law are identified. The author compares it with the classical precedent in English law. Based on legislative norms and works of Ukrainian legal scholars, conclusions are drawn about the place of the ECtHR case law in the system of land law sources. ***Conclusions.*** The legal force of the ECtHR case law as a source of Ukrainian land law is often diminished due to insufficient study of the relevant legal concept and a lack of understanding of its place in the hierarchy of legal sources. It is recommended to amend certain Ukrainian legal norms to explicitly define what constitutes "ECtHR case law" and to regulate the status of the European Commission of Human Rights' case law as a legal source. A comparison of the ECtHR case law with classical judicial precedent indicates that they share many common features, and the ECtHR case law can be considered as a special type of international precedent. The case law of the European Court of Human Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms form a unified whole and should not be analyzed separately when determining their place within the system of sources of Ukrainian land law.

Key words: case law of European Court of Human Rights, precedent, European Commission of Human Rights, sources of land law in Ukraine.

1. Introduction. Numerous problems with applying the case law of the European Court of Human Rights (hereinafter – "ECtHR", "the Court") to resolve land disputes, in particular, irrelevant and "ritualistic" references to case law, are primarily related to the insufficient theoretical study of this legal institution. Despite the legislative consolidation of the ECtHR case law as a source of law in Ukraine, questions often arise concerning the basic understanding of the concept of "ECtHR case law" and its legal nature. For example, the place of the ECtHR case law in the hierarchy of law sources in Ukraine and the rules for applying the ECtHR ruling in resolving land disputes in Ukraine, are debatable.

The issue concerned has been studied by such scholars as N. Blazhivska, T. O. Kovalenko, A. M. Ivanitskyi, R. B. Sabodash, D. V. Sannikov, M. Sannikova, and others.

The purpose of the present article is to analyze the legal nature of the case law of the European Court of Human Rights as a source of land law in Ukraine, compare it with the classical judicial precedent, and determine the place of the case law in the hierarchy of land law sources.

2.1. The concept of "ECtHR case law". A partial definition of the concept is provided by the Law of Ukraine "On the Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights". Pursuant to Article 17, courts refer both to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the Protocols thereto (hereinafter referred to as the "ECHR" or "Convention") and the "case law of the Court" as a source of law. The Law also defines the concept of "case law of the Court" involving the case law of the European Court of Human Rights and the European Commission of Human Rights (The Law of Ukraine "On the Enforcement

of Judgments and Application of the Case Law of the European Court of Human Rights").

In this context, a set of research concerns arise. For example, the Law does not define the concept of "case law of the European Court of Human Rights". According to Article 1 of the Law, it only defines a "judgment of the ECtHR". Part 2, Article 18 of the Law also marks that "to refer to the Court's judgments and rulings and the Commission's rulings, courts shall use translations of the texts of the Court's judgments and the Commission's rulings" (The Law of Ukraine "On the Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights"). Accordingly, it can be assumed that the legislator implied the Court's judgments and rulings in the concept of "ECtHR case law". At the same time, according to Art. 47 of the Convention, the Court, at the request of the Committee of Ministers, give advisory opinions on the legal questions concerning the interpretation of the Convention (Convention for the Protection of Human Rights and Fundamental Freedoms).

If we analyze international experience, the Human Rights Act 1998, adopted by the British Parliament to harmonize the Convention and the local legal system, foresaw such a situation. Thus, Art. 2 states: "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights (...)" (Human Rights Act, 1998). The British Parliament enshrined a list of decisions, judgments, or other documents, including advisory opinions adopted by the ECtHR, which should be taken into account by the court in resolving disputes concerning the rights provided for in the Convention. A similar provision is evident in the Irish European Convention on Human Rights Act 2003 (Art. 4) (European Convention on Human Rights Act, 2003).

2.2. The case law of the European Commission of Human Rights. The case law of the European Commission of Human Rights (hereinafter – the "Commission") raises further questions. The Commission operated from 1954 to 1998 and carried out preliminary consideration of complaints about violations of the Convention. As a result of the 1998 reform, the Commission effectively ceased to exercise its powers.

As noted above, the Law provides that the "case law of the Court" includes the case law of the European Commission of Human Rights. At the same time, procedural codes no longer provide for the Commission's case law as a source of law (Civil Procedure Code of Ukraine).

Consequently, a conflict arises because different legal acts of equal legal force differently regulate the sources of law to be applied in Ukraine to resolve land disputes. To address the mentioned problem, the rule of using a newer legal act to resolve a conflict can be applied. In such circumstances, the Civil Procedure Code, which does not provide that the Commission's case law may be applied by courts to resolve land disputes, should be employed to resolve the issue of relevant sources.

At the same time, following the prompt of the European Commission of Human Rights, the Unified State Register of Court Decisions currently contains more than a thousand court decisions in cases considered by appellate and cassation courts in civil and commercial proceedings related to land issues. Based on the analysis of more than a hundred decisions, it is evident that in most cases the Commission is mentioned exclusively in the context of Art. 17 or 18 of the Law (provisions regulating the use of ECtHR case law as a source of law). In these judgments, the courts continued referring to the ECtHR case law rather than the Commission's. However, the court referred to the Commission's case law in about fifteen court decisions. In all cases, judges refer to the judgment in the case of "Leo Zand v. Austria" (application no. 7360/76, report of the European Commission of Human Rights of October 12, 1978). Such court decisions include the Resolution of the Civil Court of Cassation of the Supreme Court of Ukraine of October 26, 2020, case No. 700/1068/16-ц; the Resolution of the Supreme Court of Ukraine of November 28, 2018, case No. 536/158/16-ц; the Resolution of the Civil Court of Cassation of the Supreme Court of Ukraine of December 18, 2019, case No. 296/3876/19.

The text of all references is almost identical: " 'court established by law' in Article 6, paragraph 1, of the Convention means "the entire organizational structure of the courts, including [...] matters within the jurisdiction of certain categories of courts [...]" (Resolution of the Civil Court of Cassation of the Supreme Court in case No. 296/3876/19, 2019).

In all the above cases, the reference to the Commission's case law is driven by the judgment in the case "Sokurenko and Strygun v. Ukraine" considered by the ECtHR (para. 24 of the judgment of July 20, 2006), which also cited this Commission's decision (Case of Sokurenko and Strygun v. Ukraine, 2006).

As a result, it can be concluded that although the Law regards the Commission's practice as

a source of land law, courts usually either do not refer to it at all or do so by citing references to the Commission's conclusions made within ECtHR judgments. Another problem is the heterogeneity of legislation on whether the Commission's decisions are a source of law.

The above analysis shows that Ukrainian legislation is ambiguous as to what constitutes "Court case law" and "ECtHR case law". The legislative branch should regulate this issue to establish when particular judgments can be applied and when they cannot, otherwise it will be resolved in practice ad hoc.

3. The ECtHR case law – recommendation or precedent? Although the concepts of "case law of the Court" and "ECtHR case law" are ambiguous, they still give us a sufficient understanding that allows for applying ECtHR judgments in practice when resolving land disputes, and the establishment of the legal nature of the ECtHR case law is a more complex issue.

Although the CAP of Ukraine stipulates that domestic courts shall follow the rule of law given the Court's case law, this still does not indicate the exclusively recommendatory nature of the case law (Code of Administrative Procedure of Ukraine). This does not negate a significant set of other legal provisions that directly provide for the ECtHR case law as a source of land law.

Thus, it can be unequivocally stated that the ECtHR case law is a source of land law in Ukraine. However, can these judgments be applied as a kind of international precedent? Opponents of the ECtHR case law as precedent often argue that the Ukrainian legal system is not characterized by judicial precedent, and the precedential force of decisions of a supranational judicial body is impossible.

In order to analyze the relevant issue, it is necessary to first clarify the content of judicial precedent in its classical sense. The doctrine of stare decisis is a cornerstone of common law, which essentially means that courts of limited jurisdiction must adhere to the rules established by courts of superior jurisdiction (Pattinson, S. D.). The system of Ukrainian land law and judicial precedents are usually perceived as categories from different legal worlds, but the practice of land dispute resolution and some legal acts demonstrate that some precedent-setting features are characteristic of Ukrainian court decisions and land legislation.

3.1. Ratio decidendi in the ECtHR case law. For further analysis, it is necessary to specify the characteristic features of classical judicial precedents. Usually, the key element of judicial precedents is ratio decidendi – reasoning that is the basis for a court decision and is binding on courts of limited jurisdiction.

In ECtHR judgments, some rationes decidendi could be analogous to the ratio decidendi of common law. Although the Court makes decisions based on the provisions of the Convention, it often interprets it so broadly that it creates new rules of conduct for states that must take them into account to avoid potential disputes in the ECtHR (Sabodash R.B., 2013, p. 141). An example of such a broad interpretation is the criteria for the legality of interference with land ownership. Protocol 1 to the Convention stipulates that such interference must be carried out in accordance with the law and exclusively in the public interest (Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1952). Based on these rather general rules, the Court then developed a set of requirements that must be met in order to comply with the principle of legality and also provided numerous criteria for the proportionality of interference with a person's property right, including land, i.e., the need to balance the interests of society and the owner (Case of Sporrong and Lonnroth v. Sweden, 1982). It also enshrined that the principle of legality includes "the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application" (Case of Lekic v. Slovenia, 2017). The same legal reason was cited in the case of Zelenchuk and Tsytsyura v. Ukraine, 2018 (Case of Zelenchuk and Tsytsyura v. Ukraine, 2018).

The relevant legal rules are often mentioned in other judgments and are well-established. In its judgments, the Court frequently separates them into the category of "general principles", emphasizing the stability of such rules. Therefore, we can conclude that even though the Convention's provisions are general, the Court forms case law within its law-making.

As for the ECtHR, it has repeatedly commented the nature of its case law. Thus, in the case of Cossey v. the United Kingdom, the court noted that the ECtHR is not obliged to follow its previous legal rules. At the same time, the Court emphasized "it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law" (Case of Cossey v. the United Kingdom, 1990). Accordingly, the Court considers its decisions as precedents.

3.2. Hierarchy of courts. An auxiliary characteristic feature of precedents is the binding nature of legal rules for courts of lower jurisdiction. For example, British lawyers Rupert Cross and J. Harris note: "Every court is bound

to follow any case decided by a court above it in the hierarchy and appellate courts (other than the House of Lords) are bound by their previous decisions (Cross R., Harris J.W, 1991). Such hierarchy is much more difficult to prove in the case of the ECtHR, which is a supranational international judicial institution.

If we analyze the national judicial hierarchy, we can conclude that some procedural norms of Ukrainian legislation still show precedent features of domestic judicial practice. For example, part 5 of Art. 13 of the Law of Ukraine "On the Judiciary and the Status of Judges" stipulates that the Supreme Court's conclusions on the application of law rules are binding on power entities who use them in their activities. The next part of the same article states that the conclusions of the Supreme Court are "taken into account" by other courts when applying these rules of law (The Law of Ukraine "On the judicial system and the status of judges"). However, an obligation to "take into account" legal conclusions is not an obligation to use them and resolve land disputes in the same way as the Supreme Court did.

Comparing the English and French legal systems, Rupert Cross pointed out that "case law is not a source of law in France because a judge is not obliged to consider it when coming to a decision". He also believed that in almost any jurisdiction, judges are inclined to resolve particular disputes in the same way as another judge did in a similar case. But there is a significant difference in the degree of obligation to act in this way: to voluntarily adhere to the agreed approach or consider it as part of their responsibilities (Cross R., Harris J.W, 1991).

Given the above-mentioned norms of the Law of Ukraine "On the Judiciary and the Status of Judges", one may state that Ukrainian courts have a positive obligation to take into account the position of the Supreme Court on some legal rules when resolving land disputes. Moreover, the procedural codes of Ukraine also enshrine the mechanism of so-called "cassation filters". Thus, part 2 of Art. 389 of the CPC of Ukraine provides for restrictions on the grounds for cassation appeal of court decisions, which narrow down such an option to cases when:

– a court of appeal applied a legal rule without considering the Supreme Court's position on the application of the rule of law in such legal relations;

– a complainant substantiated the need to derogate from the conclusion on the application of the rule of law in such legal relations, which was set out in the resolution of the Supreme Court;

– the Supreme Court's conclusion on the application of a legal norm in such legal relations is currently absent (Civil Procedure Code of Ukraine).

Although lower court judges just "take into account" the conclusions of the Supreme Court because of legislative norms, cassation filters make them significantly reduce the options of canceling their decisions in the courts of cassation by relying on the legal conclusions of the Supreme Court.

As for the ECtHR "hierarchy, as mentioned above, it is more difficult for supranational judicial institutions to build a direct judicial hierarchy with a national judicial system, but procedural codes also provide that already resolved land disputes can be reviewed by the court under exceptional circumstances. For example, according to para. 2, part 3, Art. 423 of the CPC of Ukraine, courts review court decisions under exceptional circumstances in the event that an international judicial institution whose jurisdiction is recognized by Ukraine (in fact, the ECtHR) establishes a violation by Ukraine of international obligations in resolving a particular case by the court (Civil Procedure Code of Ukraine).

Thus, the Ukrainian legislator assumes that the opinion of the international judicial institution (the Court) is a sound argument to review the court decision, which has already entered into force and was made by the national judicial system, which indicates a certain hierarchical significance of the ECtHR. Moreover, the above rules on the use of ECtHR case law as a source of land law by courts in resolving land disputes emphasize the mandatory use by courts of the legal rules and their hierarchical superiority, since domestic courts would not have to use someone's conclusions as a source of law if they were lower in the hierarchy than these courts. As a result, it can be argued that the Ukrainian national judicial system is characterized by a certain precedent hierarchy, and the ECtHR judgments have a corresponding significance. At the same time, it is worth emphasizing that it is Art. 17 of the Law, which provides for the ECtHR case law as a source of land law as, for example, in Ireland or the United Kingdom, their acts claim that local courts must "take into account" the ECtHR case law when resolving disputes (Human Rights Act, 1998; European Convention on Human Rights Act, 2003). The Convention itself does not stipulate that the case law of the Court should be a source of law in the Contracting States (Yurchyshyn V.D., 2012, p. 49).

3.3. Option of changing the rules of law. In addition, the English judicial precedent also

allows the court to change the established rules of law under some circumstances (for example, a discrepancy in the factual circumstances of the case). Thus, such an option in the ECtHR case law cannot contradict the idea that it is a form of precedent. According to scientist Sabodash R.B., a departure from previous precedents is usually "followed by an open discussion in the Court about the reasons for abolishing judicial practice" (Sabodash R.B., 2013, pp. 143-144). Moreover, no matter how much lawyers strive to maintain the uniformity of legal conclusions and the stability of the legal system as a whole but the modification of some legal rules under the influence of time is inevitable – otherwise, lawyers would now use the "Code" of Hammurabi to resolve land disputes.

In support of the above view, it is essential to draw attention to the words of former ECtHR judge Christos Rozakis that the text of the Convention requires the specification of its concepts, and the fleeting situation in the world requires that these concepts be specified in such a way as to be acceptable to European societies at the moment (Rozakis C., 2009, p.2).

As for the standpoint of domestic scientists, they approach the ECtHR case law as a precedent differently. Thus, in T.O. Kovalenko's opinion, the ECtHR case law is an interpretative legal precedent, which should be understood as an official explanation of the legal norm that becomes generally binding upon its further application (Kovalenko, 2016, pp. 83-84). In his contribution, Sabodash R.B. came to a similar conclusion that the ECtHR case law is a "special form of precedent", which is created by a supranational judicial body and is binding on the ECtHR itself and the Contracting Parties to the Convention (Sabodash R.B., 2013, p. 144). At the same time, Ivanytskyi A.M. does not agree that the ECtHR case law is a classic precedent and believes that it is the only source of dynamic interpretation of the Convention, which is a new type of law source that does not fall under the classical classification (Ivanytskyi, 2020, p. 26).

In view of all the above, it can be concluded that the ECtHR case law is a form of common law arising while interpreting the Convention and leads to the creation of new rules regulating land legal relations, which are at least taken into account by the national courts of other states when resolving land disputes, and sometimes directly considered as sources of law.

4. Place of the ECtHR case law in the hierarchy of land law sources. The lack of a well-defined place of the ECtHR case law in the hierarchy of land law sources significantly devalues its value, as it is impossible to get it straight whether the ECtHR legal rule can gain a legal advantage over a rule contained, for example, in a by-law that does not comply with the principles provided for by the Convention.

To determine the place of the ECtHR case law within the system of sources of land law, it is necessary to refer to the legislation. In the context of land law sources, the Land Code of Ukraine is limited to a general phrase in part 1 of Art. 3: "land relations are regulated by the Constitution of Ukraine, this Code, as well as the regulations adopted in accordance with them" (Land Code of Ukraine).

Pursuant to Article 9 of the Constitution of Ukraine, international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine (Constitution of Ukraine). The Civil Code of Ukraine establishes that if the current international treaty provides for rules other than those provided for by an act of civil law, the rules of the international treaty of Ukraine (Civil Code of Ukraine) shall apply. Moreover, part 8 of Art. 10 of the CPC of Ukraine notes that "in case of inconsistency of a legal act with an international treaty, the consent to be bound by which was given by the Verkhovna Rada of Ukraine, the court shall apply the international treaty of Ukraine" (Civil Procedure Code of Ukraine).

Accordingly, it can be argued that the legislation adheres to the concept of the rule of international law over national law. Given the above, we can say that although the Convention often contains fairly general rights in its description, in the event of a conflict between the requirements of national law or regulations and the rights provided for by the Convention, priority shall be given to the Convention in resolving land disputes.

If the Convention's legal force is more understandable, the issue of the ECtHR case law in the hierarchy raises questions. The legislation does not establish a direct similar rule on the ECtHR, which would provide for the application of the Court's case law if national legislation contradicts the legal positions of the European Court of Human Rights.

At the same time, a similar conclusion can be reached if the issues are analyzed more comprehensively. The Convention and the ECtHR case law are inseparable. The Court interprets the Convention's provisions and often develops and improves them. As pointed out by Yurchyshyn V.D., the ECtHR case law in the hierarchy of legislation is next after international treaties (Yurchyshyn V.D., 2012, p. 52). A similar conclusion was reached by Ivanytskyi A.M., who pointed out that

the ECtHR case law should be perceived as a source of law applied in conjunction with the Convention since they constitute a "holistic" living organism (Ivanytskyi, 2020, p. 27).

Relying on the findings of the above analysis and opinions of the Ukrainian scientists, it should be recognized that the ECtHR case law and the Convention are parts of one whole and cannot be considered separately from each other, and therefore have the same legal force as a source of land law.

Conclusions. Ukrainian legislation currently imperfectly regulates the definitions of "Court case law" and "ECtHR case law". Approaches of some other states in this regard seem to be better and can be borrowed. The case law of the Commission deserves special attention because it is considered differently by different legal acts as a source of land law, which also needs to be clarified at the legislative level.

Being a form of precedent, the established ECtHR case law is an organic extension of the Convention and, therefore, it is placed high in the hierarchy of sources of land law in Ukraine. At the same time, poor theoretical study of the relevant issue leads to frequent depreciation of the importance of this source of land law. It should be recognized that the Convention's norms and the legal rule of the ECtHR case law are general enough, which is probably a contributory cause for the devaluation of the importance of the relevant source of land law. At the same time, human rights and freedoms determine the content and focus of the State's activities. Thus, if any special land law norms contradict the fundamental principles of the Ukrainian State and European standards of human rights, they should be brought into line with such principles and standards, and the rights of subjects of land relations – protected.

References:

Case of Cossey v. the United Kingdom (European Court of Human Rights September 27, 1990). Retrieved from https://hudoc.echr.coe.int/ukr?i=001-57641.

Case of Lekic v. Slovenia (European Court of Human Rights February 14, 2017). Retrieved from https://hudoc.echr.coe.int/eng?i=001-171087.

Case of Sporrong and Lonnroth v.s Sweden (European Court of Human Rights September 23, 1982). Retrieved from https://hudoc.echr.coe.int/eng?i=001-57580.

European Convention on Human Rights Act 2003. Retrieved from https://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/pdf.

Human Rights Act 1998. Retrieved from https://www.legislation.gov.uk/ukpga/1998/42/contents.

Ivanytskyi A., (2020). Znachennya praktyky Yevropeys'koho sudu z prav lyudyny dlya vdoskonalennya natsional'noho tsyvil'noho zakonodavstva Ukrayiny [The significance of the practice of the European Court of Human Rights for the improvement of the national civil legislation of Ukraine]. Pidpryyemstvo, hospodarstvo i pravo – Entrepreneurship, Economy and Law, #6, 24. Retrieved from https://doi.org/10.32849/2663-5313/2020.6.05 [in Ukrainian].

Kodeks administratyvnoho sudochynstva Ukrayiny [Code of Administrative Procedure of Ukraine]. (n.d.). zakon.rada.gov.ua. Retrieved from https://zakon.rada.gov.ua/laws/show/2747-15 [in Ukrainian].

Konstytutsiya Ukrayiny [Constitution of Ukraine]. (n.d.). zakon.rada.gov.ua. Retrieved from https://zakon.rada.gov.ua/laws/show/254к/96-вр [in Ukrainian].

Konventsiya pro zakhyst prav lyudyny i osnovopolozhnykh svobod [Convention for the Protection of Human Rights and Fundamental Freedoms]. (n.d.). zakon.rada.gov.ua. Retrieved from https://zakon.rada.gov.ua/laws/show/995_004 [in Ukrainian].

Kovalenko T. Praktyka Yevropeys'koho sudu z prav lyudyny yak dzherelo zemel'noho prava Ukrayiny [The practice of the European Court of Human Rights as a source of land law in Ukraine]. Yurydychna Ukrayina – Legal Ukraine, #11-12. pp – 82-88. Retrieved from http://nbuv.gov.ua/UJRN/urykr_2016_11-12_13 [in Ukrainian].

Pattinson, S. D. (2015). The Human Rights Act and the Doctrine of Precedent. Legal Studies, 35(1), 142-164.

Postanova Kasatsiynoho tsyvil'noho sudu Verkhovnoho Sudu vid 18 hrudnya 2019 roku u spravi № 296/3876/19 [Resolution of the Civil Court of Cassation of the Supreme Court of December 18, 2019 in case No. 296/3876/19]. Retrieved from https://reyestr.court.gov.ua/Review/86565462 [in Ukrainian].

Protokol do Konventsiyi pro zakhyst prav lyudyny i osnovopolozhnykh svobod [Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms]. (n.d.). zakon.rada.gov.ua. Retrieved from https://zakon.rada.gov.ua/laws/show/994_535 [in Ukrainian].

Protokol N 11, yakyy peredbachaye perebudovu kontrol'noho mekhanizmu, stvorenoho Konventsiyeyu pro zakhyst prav i osnovnykh svobod lyudyny [Protocol No. 11, which provides for the restructuring of the control mechanism established by the Convention for the Protection of Human Rights and Fundamental Freedoms]. (n.d.). zakon.rada.gov.ua. Retrieved from https://zakon.rada.gov.ua/laws/show/994_536 [in Ukrainian].

Rozakis C., (2009). The Interaction between the European Court of Human Rights and the Other Courts. Retrieved from https://www.venice.coe.int/wccj/Papers/ECHR_Rozakis_E.pdf.

Sabodash R.B., (2013). Praktyka yevropeys'koho sudu z prav lyudyny yak dzherelo tsyvil'noho prava Ukrayiny [Practice of the European Court of Human Rights as a source of civil law of Ukraine].

Nashe pravo – Our Right, #9, pp. 140-145. Retrieved from http://nbuv.gov.ua/UJRN/Nashp_2013_9_27 [in Ukrainian].

Sir Cross R., Harris J.W (1991). Precedent in English Law (Clarendon Law Series).

Sprava "Sokurenko i Stryhun proty Ukrayiny" [Case of Sokurenko and Strygun v. Ukraine]. (European Court of Human Rights July 20, 2006). Retrieved from https://zakon.rada.gov.ua/laws/show/974_115 [in Ukrainian].

Sprava «Zelenchuk i Tsytsyura proty Ukrayiny» [Case of Zelenchuk and Tsytsyura v. Ukraine]. (European Court of Human Rights May 22, 2018). Retrieved from https://zakon.rada.gov.ua/laws/show/974_c79 [in Ukrainian].

Tsyvil'nyy kodeks Ukrayiny [Civil Code of Ukraine]. (n.d.). zakon.rada.gov.ua. Retrieved from https://zakon.rada.gov.ua/laws/show/435-15 [in Ukrainian].

Tsyvil'nyy protsesual'nyy kodeks Ukrayiny [Civil Procedure Code of Ukraine]. (n.d.). zakon.rada.gov.ua. Retrieved from https://zakon.rada.gov.ua/laws/show/1618-15 [in Ukrainian].

Yurchyshyn V.D. (2012). Praktyka Yevropeys'koho sudu z prav lyudyny yak dzherelo prava: koliziyi u natsional'nomu zakonodavstvi ta shlyakhy yikh vyrishennya [Practice of the European Court of Human Rights as a source of law: conflicts in national legislation and ways of their resolution]. Naukovi pratsi Natsional'noho universytetu "Odes'ka yurydychna akademiya – Scientific works of the National University "Odesa Law Academy", #11. pp. 47-55. Retrieved from http://nbuv.gov.ua/UJRN/Nponyua_2012_11_8 [in Ukrainian]

Zakon Ukrainy "Pro sudoustriy i status suddiv" [The Law of Ukraine "On the judicial system and the status of judges"]. (n.d.). zakon.rada.gov.ua. Retrieved from https://zakon.rada.gov.ua/laws/show/1402-19 [in Ukrainian].

Zakon Ukrainy "Pro vykonannya rishen' ta zastosuvannya praktyky Yevropeys'koho sudu z prav lyudyny" [The Law of Ukraine "On the Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights"]. (n.d.). zakon.rada.gov.ua. Retrieved from https://zakon.rada.gov.ua/laws/show/3477-15 [in Ukrainian].

Zemel'nyy kodeks Ukrayiny [Land Code of Ukraine]. (n.d.). zakon.rada.gov.ua. Retrieved from https://zakon.rada.gov.ua/laws/show/2768-14 [in Ukrainian].

Володимир Палійчук,
аспірант кафедри трудового, земельного та господарського права, Хмельницький університет управління та права імені Леоніда Юзькова, вулиця Героїв Майдану, 8, Хмельницький, Україна, індекс 29000, paliychuk.vb@gmail.com
***ORCID:** orcid.org/0000-0002-5533-8039*

ПРАВОВА ПРИРОДА ПРАКТИКИ ЄСПЛ ЯК ДЖЕРЕЛА ЗЕМЕЛЬНОГО ПРАВА УКРАЇНИ

Анотація. ***Мета.*** Аналіз поняття "практика Європейського суду з прав людини", дослідження правової природи практики ЄСПЛ як джерела земельного права України. Визначення місця практики Європейського суду з прав людини у ієрархії джерел земельного права України. ***Методи дослідження.*** Робота виконана із використанням загальнонаукових та спеціальних методів наукового пізнання. ***Результати.*** Проаналізовані законодавчі підходи до визначення поняття "практика ЄСПЛ". Досліджено міжнародний досвід щодо врегулювання цього питання, зокрема певні нормативно-правові акти Великої Британії та Ірландії. Здійснено аналіз ситуації, що стосується визнання практики Європейської комісії з прав людини як джерела земельного права України. Також встановлено основні доктринальні підходи, які стосуються правової природи практики ЄСПЛ. Здійснено порівняння із класичним англійським судовим прецедентом. На підставі законодавчих норм, а також праць вітчизняних теоретиків права здійснені висновки щодо місця практики ЄСПЛ у системі джерел земельного права. ***Висновки.*** Юридична сила практики ЄСПЛ як джерела земельного права України часто нівелюється у зв'язку із недостатнім вивченням цього правового інституту, а також нерозумінням його місця у ієрархії джерел права. Рекомендується внести зміни в певні норми українського законодавства, щоб більш чітко передбачити, що саме є "практикою ЄСПЛ", а також врегулювати питання практики Європейської комісії з прав людини як джерела права. Порівняння практики ЄСПЛ із класичним судовим прецедентом свідчить, що у них є багато спільних рис і практику Суду можна розглядати як особливий вид міжнародного прецеденту. Практика Європейського суду з прав людини та Конвенція про захист прав людини і основоположних свобод є частиною одного цілого, а тому не можуть розглядати окремо при аналізі їхнього місця в системі джерел земельного права України.

Ключові слова: практика Європейського суду з прав людини, прецедент, Європейська комісія з прав людини, джерела земельного права в Україні.

The article was submitted 13.11.2024
The article was revised 04.12.2024
The article was accepted 24.12.2024