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РОЛЬ ВЕРХОВНОГО СУДУ В МЕХАНІЗМІ ЗАБЕЗПЕЧЕННЯ СТАЛОСТІ ТА ЄДНОСТІ СУДОВОЇ ПРАКТИКИ: ОКРЕМІ АСПЕКТИ

Анотація. Одним із засобів забезпечення сталості та єдності судової практики є рішення Верховного Суду, в яких здійснюється відступ від висновку щодо застосування норми права у подібних правовідносинах. Чинне кримінальне процесуальне законодавство України чітко регламентує порядок здійснення такого відступу, який в цілому відповідає практиці Європейського суду з прав людини та міжнародним рекомендаціям у цій сфері. Проте вказаному порядку іманентні істотні особливості, що потребують наукового аналізу чинної процесуальної форми в даному її сегменті з точки зору її адекватності потребам у забезпеченні права кожного на справедливий суд та очікуванням суспільства щодо розумної прогнозованості судових рішень. З огляду на це, в межах даної наукової роботи здійснено дослідження категорій «єдність» та «сталість» судової практики як предмету забезпечення Верховним Судом. Для досягнення поставленої мети авторами використано комплекс сучасних загальнонаукових та спеціальних правових методів. У роботі розглянуто процесуальний порядок відступу Верховним Судом від висновку щодо застосування норми права в подібних правовідносинах; проаналізовано правову природу питання ієрархії правових позицій Верховного Суду. Встановлено, що ключовою ідеєю, яка втілена законодавцем у нормативну модель порядку відступу від висновку щодо застосування норми права, є те, що можливість такого відступу від висновку залежно від складу суду, в якому його було прийнято, надається суду у складі більшої кількості суддів Верховного Суду, що й зумовлює «вищий ступінь значення» такого висновку та застосування саме його в подальшій судовій практиці. Дослідження вказаних напрямів здійснено з урахуванням рекомендацій Консультативної ради європейських суддів, а також релевантної практики Верховного Суду.

Ключові слова: *правова позиція; Касаційний кримінальний суд, сталість та єдність судової практики, ієрархія правових позицій Верховного Суду, висновок щодо застосування норми права.*

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THE ROLE OF THE SUPREME COURT IN THE MECHANISM OF ENSURING THE SUSTAINABILITY AND UNITY OF JUDICIAL PRACTICE: SOME ASPECTS

Abstract. *One of the means of ensuring the stability and unity of judicial practice is the decision of the Supreme Court, which deviates from the conclusion on the application of the rule of law in such legal relations. The current criminal procedural legislation of Ukraine clearly regulates the procedure for such a derogation, which is generally in line with the case law of the European Court of Human Rights and international recommendations in this area. However, this procedure has immanent significant features that require scientific analysis of the current procedural form in this segment with regard to its adequacy to the needs of ensuring the right of everyone to a fair trial and society's expectations for reasonable predictability of court decisions. In view of this, within the framework of this study, the categories "unity" and "sustainability" of judicial practice as a subject of provision by the Supreme Court was carried out. To achieve this purpose, the authors used a set of modern general and special legal methods. The study considers the procedural order for the Supreme Court to deviate from the conclusion on the application of the rule of law in such legal relations; the legal nature of the issue of the hierarchy of legal positions of the Supreme Court is analysed. It is established that the key idea embodied by the legislator in the statutory model of the procedure for deviating from the opinion on the application of the rule of law is that the possibility of such a deviation from the opinion, depending on the composition of the court in which it was adopted and determines the "higher degree of significance" of such a conclusion and its application in further judicial practice. These areas were studied with the consideration of the recommendations of the Advisory Council of European Judges, as well as the relevant practice of the Supreme Court.*

Keywords: *legal position; Criminal Court of Cassation, sustainability and unity of judicial practice, hierarchy of legal positions of the Supreme Court, conclusion on the application of the rule of law.*

INTRODUCTION

Traditionally, in most states governed by the rule of law, the Supreme Court has a leading role in shaping the stability and unity of judicial practice. It is no coincidence that the legislator of Ukraine has determined the functional purpose of the Supreme Court in the judicial system of Ukraine precisely because of ensuring the stability and unity of judicial practice. Thus, in accordance with Part 1 of Art. 36 of the Law "On the Judiciary and the Status of Judges"¹, the Supreme Court is the highest court in the judicial system

¹ Law of Ukraine No 31 "On the Judiciary and the Status of Judges". (2020, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1402-19#Text>.

of Ukraine, which ensures the stability and unity of judicial practice in accordance with the procedure prescribed by procedural law. For the practice of the Supreme Court to be an example of law enforcement and fulfil its functional purpose, admittedly, the decisions of the Supreme Court must be of high quality (legal, reasonable, and fair) and demonstrate a unified approach of the highest judicial body to resolve disputes [1-9]. In this regard, it should be noted that the Opinion of the Advisory Council of European Judges (ACEJ) No. 20 "On the role of courts in ensuring the uniform application of the law" (Strasbourg, November 10, 2017) [10] (hereinafter referred to as "the ACEJ Opinion") emphasises the need of the existence of mechanisms within the Supreme Court capable of correcting inconsistencies in the practice of that court. Thus, paragraph 24 of this ACEJ Opinion states that the availability of tools to ensure uniformity of practice in one court is particularly relevant for supreme courts. This issue becomes extremely important in cases where the Supreme Court itself is a source of uncertainty and conflicting case law instead of ensuring its unity. Thus, the existence of mechanisms within the Supreme Court that can correct inconsistencies in the practice of this court is of paramount importance. Relevant instruments may include, for example, appealing to the Grand Chambers or convening larger chambers in cases where the case law of the Supreme Court becomes different, or where it is possible to review and reverse a precedent [10].

It is at solution of this problem that is the mechanism created by the national legislator is aimed – the institution of "overruling" (a special procedure for changing the legal position of the highest judicial body on a particular issue used by the highest courts of the Anglo-Saxon legal tradition). The current criminal procedure law makes provision for the transfer of a case by a panel of the Supreme Court hearing in cassation to a chamber, joint chamber or Grand Chamber of the Supreme Court, if the court hearing the case in cassation deems it necessary to depart from the conclusion on application of rules of law in such legal relations, set out in a previously adopted decision of the Chamber, the Joint Chamber or the Grand Chamber of the Supreme Court (Articles 434-1, 434-2 of the Criminal Procedural Code of Ukraine (CPC))¹.

The introduction of this mechanism has proved effective as a means of overcoming differences in the practice of the Supreme Court. At the same time, the existence of opposing legal positions of a higher judicial body is not uncommon, which negatively affects law enforcement and disorients lower courts in resolving similar legal issues, and thus reduces the functional role of the Supreme Court in the overall mechanism of stability and unity of judicial practice. The above requires a scientific search towards studying the existing mechanism for resolving differences in judicial practice and assessing the existing legal situation to ensure its sustainability and unity.

During the study, it was stated that theoretical and applied issues of sustainability and unity of judicial practice were investigated in the articles of many experts of different times, all of whom studied the legal status of the Supreme Court (Ukraine) and covered issues of ensuring the unity of judicial practice, including N. Bakaianova, I. Beitsun, N. Bobechko, Ye. Bondarenko, S. Bratus, S. Vasyliiev, M. Vilhushinskyi, V. Horodovenko,

¹ Criminal Procedural Code of Ukraine. (2020, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

O. Hotin, M. Demenchuk, Ye. Dodin, V. Dolezhan, A. Drishliuk, O. Zhydkov, L. Zuievich, N. Zozulia, S. Kashkin, O. Kibenko, S. Kivalov, M. Kosiuta, V. Kravchuk, N. Slotvinska, O. Kot, N. Krestovskaya, N. Kuznietsova, L. Luts, B. Malyshev, V. Marochkin, L. Moskvych, P. Muzychenko, V. Musievskiy, I. Nazarov, L. Nesterchuk, N. Nor, I. Olender, P. Orlovskiy, L. Ostafichuk, N. Pylgun, M. Popovych, Yu. Polianskyi, S. Pohrebniak, S. Prylutskyi, B. Potylchak, B. Poshva, M. Rudenko, D. Radysh, O. Romanov, Ya. Romaniuk, T. Rosik, O. Svyda, M. Siryi, O. Skakun, V. Serdiuk, V. Sukhonos, Yu. Fidria, L. Fesenko, O. Uvarova, S. Shevchuk, O. Sheredko, V. Shyshkin, etc. Among foreign scholars, the problem of ensuring the unity of judicial practice by the supreme (higher) courts was studied by A. Bonica, M. J. Woodruff [11], M. Marietta, T. Farley, [12], Yu. A. Dzepa [13], E. P. Parera [14], R. S. Davies [15], J. L. Torres [16], T. Pryor [17], E. Pons Parera [18], and others.

1. MATERIALS AND METHODS

The methodological framework of the study was a set of modern general scientific and special methods used in legal science. Therewith, the study primarily proceeded from the fact that the system of methods should be associated with the recognition of the objectivity of existence and the necessity of developing the legal phenomena – unity and sustainability of case law, Supreme Court decisions resolving existing differences in law enforcement as one of the key means of ensuring the unity and sustainability of judicial practice, social and legal expectations from the quality of judicial practice of the Supreme Court at the present stage of development of society, etc. Discrepancy in law enforcement should be understood as the existence of different legal positions of law enforcers regarding the application of the same legal provision in similar legal relations. In this case, the legal position can be both expressed and formalised in the structure of the content of a particular court decision, and such that is developed in the minds of law enforcement officers only at the stage of a court decision based on the assessment of a legal situation in particular criminal proceedings.

The general level of methodology is represented by the method of materialist dialectics, which has not lost its relevance, as it requires comprehensiveness and objectivity to the knowledge of real phenomena, as well as their links with practical activities in criminal proceedings. The choice and use of specific methods of the research process depended on the stage of cognition and the objective that was set at a particular stage of cognitive activity. Thus, the dialectical method suggested that the unity and stability of judicial practice are closely related to ensuring the right of everyone to a fair trial, creating the necessary basis for this, which is to implement the principle of legal certainty and ensure reasonable predictability of court decisions. Therewith, the use of the dialectical method allowed to conclude that the consistency of judicial practice reflects the constant state of uniform law enforcement. In other words, it is a "rooted" unity of the same legal issues as a direct indicator of the transition from quantity to quality.

A set of methods of theoretical cognition was used to generalise and develop a holistic vision of the mechanism for resolving differences in judicial practice. The systematic method allowed to consider the sustainability of the practice of the Supreme Court as an important element of the system of legal means to ensure the unity of judicial

practice, which is interconnected and interdependent, used to solve a particular problem – ensuring the unity and sustainability of judicial practice in criminal proceedings. In fact, it acts as an integrative quality that describes the very system of these means. The method of abstraction was used to present the relevant legal positions of the Supreme Court in schematic language, to determine the main and reject the insignificant to demonstrate the existence of opposing decisions of this body, and thus the lack of unity of its practice on a particular issue.

The formal legal method was used to clarify the framework of categories and concepts of this study (in particular, with regard to the concept of sustainability of judicial practice); to formulate the existing statutory mechanism for overcoming the conflict of legal positions of the Supreme Court in the way the court directs criminal proceedings for consideration by a chamber, joint chamber or the Grand Chamber of the Supreme Court, depending on who formulated the conclusion on application of law in such legal relations; to determine the position of the legislator on the hierarchy of legal positions of the Supreme Court. The logical method (methods of analysis, synthesis, and induction) allowed to analyse the problematic issues of uniform application of the provisions of law by the Supreme Court in similar legal relations and to determine legal means to ensure the unity of judicial practice, which is a necessary condition for overcoming the problem of diametrically opposed judicial positions.

The comparative legal method was used to study the vision of the phenomenon of sustainability and unity of judicial practice of the highest judicial body at the international level. The method of idealisation and modelling allowed to develop an ideal theoretical model of the mechanism for resolving differences in judicial practice. In this case, all scientific research methods were used in the interrelation and interdependence, which contributed to the comprehensiveness, completeness, objectivity of the study and allowed to lay the foundation for further possible directions of development of theoretical ideas about the subject matter.

2. RESULTS AND DISCUSSION

2.1 *Regarding the sustainability of judicial practice*

As noted in the introduction, Part 1 Article 36 of the Law of Ukraine "On the Judiciary and the Status of Judges"¹ stipulates that the Supreme Court is the highest court in the judicial system of Ukraine, which ensures the stability and unity of judicial practice in accordance with the procedure prescribed by procedural law. In contrast to the current version of the law, prior to 2016 amendment, Part 1 Article 38 of the Law of Ukraine "On the Judiciary and the Status of Judges"² stipulated as follows. The Supreme Court of Ukraine is the highest judicial body in the system of courts of general jurisdiction of Ukraine, which ensures the unity of judicial practice in the accordance with the procedure prescribed by procedural law. Thus, apart from the unity of judicial practice, which means its identity, uniformity, the subject of the Supreme Court, in accordance with current legislation of Ukraine, is the consistency of judicial practice.

Paragraph 14 of the above-mentioned ACEJ Opinion [10] states that in the

¹ Law of Ukraine No 31 "On the Judiciary and the Status of Judges". (2020, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1402-19#Text>.

² *Ibidem*, 2020

countries of continental law, as a rule, a consolidated and coordinated number of court decisions on a certain issue (jurisprudence constant) is required for a certain position to be relevant. Admittedly, this does not preclude a decision from having legal force when the Supreme Court adopts it for the first time in a corresponding legal matter, the practice of which has not yet been established. A common fact is the lack of a formula according to which it is possible to determine the moment when the case law can be considered as established. Many supreme courts in continental law are currently empowered to select cases to set standards to be applied in future cases. Therefore, in these cases, even a single decision of the Supreme Court, which was adopted to set a precedent, can be considered as authoritative case law. Analysis of the concept of "established case law" by S. Shevchuk points out that in most legal systems of countries there are different doctrines to justify the binding force of case law. The Anglo-Saxon doctrine of obligation is based on the stare decisis doctrine, according to which judges are bound by precedents in previous cases, while in Romano-Germanic countries doctrines similar to the French jurisprudence constant are applied, according to which a set of previously adopted and agreed court decisions are considered as convincing evidence of the correct interpretation of the legal provision [19].

Although the countries of continental law do not officially recognise the judicial precedent a source of law, the European Court of Human Rights (hereinafter referred to as "the ECHR"), upon analysing the existence of grounds for restriction of the right under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms¹ (hereinafter referred to as "the CPHRFF"), in accordance with French law (Kruslin v. France) stated that the relevant established case law cannot be disregarded. Paragraph 2 Article 8 of the Convention and other similar provisions have always interpreted the Court not as "formal" but as "substantive"; in the Court's view, it covers both regulations of a lower category than legislation, and unwritten law. It is undisputed that decisions in the cases of De Wilde, Ooms, and Versip concerned the United Kingdom, but, as the Government rightly pointed out, it would be wrong to exaggerate the discrepancy between countries with a legal system based on common law and continental countries. Statutory law, admittedly, is also important in a country with a common law system. Conversely, in continental countries, case law has traditionally played a major role, to such extent that entire branches of positive law have largely emerged from court decisions. The Court has repeatedly taken into account the case law of such countries. If the Court had disregarded the case law, it would have undermined the legal system of the mainland States, almost as the judgment in the Sunday Times of 26 April 1979 would have the legal system of the United Kingdom "shaken to its foundations" if the Court had excluded the common law from the concept of law (paragraph 29) [20].

Considering the etymological content and statutory context in which the concepts of "sustainability" and "unity" of judicial practice are used, it appears that the stability of judicial practice reflects the constant state of uniform law enforcement. In other words, it is the "rooted" unity of the same legal issues as a direct indicator of the transition from

¹ Convention for the Protection of Human Rights and Fundamental Freedoms. (2013, October). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004#Text.

quantity to quality; the more identical court decisions on a disputed legal issue, the more grounds there are to describe such law enforcement as permanent. The unity and permanence of judicial practice are closely linked to ensuring the right of everyone to a fair trial, creating the necessary basis for this, which is to implement the principle of legal certainty and ensure reasonable predictability of court decisions.

2.2 Regarding ensuring the sustainability and unity of judicial practice by a decision (ruling) of the Supreme Court, which resolves the existing differences in judicial practice

A separate means of ensuring the sustainability and unity of judicial practice are decisions (rulings) of the Supreme Court that resolve differences existing in judicial practice. Notably, there have recently been many cases of contradictory and even polar legal opinions of the highest judicial body on the application of certain provisions of law. One of the clearest examples of controversy in law enforcement is the resolution of the issue of the legal consequences of the absence of a resolution on the appointment of an investigator or prosecutor in the materials of criminal proceedings. Thus, in the decision of the Supreme Court of Cassation of 19.05.2020 in the case No. 490/10025/17 the position of the court on the non-binding nature of the decision to appoint a particular investigator or prosecutor, in connection with which its absence in the criminal proceedings per se does not mean that the investigator or prosecutor did not have the appropriate authority. After analysing the current legal regulation of this issue, the court noted in that based on the rule *casus omissus pro omissis habendus est*, it sees no grounds for amending the text of the law with the requirement that is not stated in it and considers that the lack of relevant provisions directly related to regulation this issue, mentioning the need for a resolution, means that such a resolution is not necessary to determine the particular investigator or prosecutor who is entrusted with the exercise of relevant powers in a particular case. The court also noted that information on which investigators were conducting the pre-trial investigation and which prosecutors were conducting the proceedings had been entered into the Unified Register of Pre-Trial Investigations. Prolonged pre-trial investigation, use of resources by investigators and prosecutors and other factors of proceedings indicate that the investigation and procedural management of these persons was carried out according to the respective decisions of their managers¹.

However, in the decision of the Supreme Court of Cassation of 17.06.2020 in case No. 754/7061/15 the court of cassation reached the opposite conclusion on this matter. It emphasised the mandatory nature of the duly executed decision on the appointment of a prosecutor, which empowers a particular prosecutor to supervise compliance with laws during the pre-trial investigation in the form of procedural guidance of the pre-trial investigation in a particular criminal proceeding. Therefore, it is necessary to deviate from the conclusion on the application of the rule of law in such legal relations, set out in the previously adopted decision of 19 May 2020 (proceedings No. 51-6116km19) of the Supreme Court in the panel of judges of the First Judicial Chamber. In these circumstances, to ensure the unity of judicial practice, the criminal proceedings against PERSON_1 is subject to transfer to the joint chamber of the Criminal Court of Cassation

¹ Resolution of the First Judicial Chamber of the Criminal Court of Cassation of the Supreme Court No 490/10025/17. (2020, May). URL: <http://www.reyestr.court.gov.ua/review/89621459> (access date: 25.05.2020).

of the Supreme Court based on Part 2 Article 434-1 of the Criminal Procedural Code of Ukraine¹.

It should be added that the latter position of the Supreme Court on the obligation to issue a decision on the appointment of an investigator or a prosecutor was also formulated in several other earlier decisions (in particular, the decisions dated 19.04.2018 in the case No. 754/7062/15-к; dated 17.12.2019 in the case No. 235/6337/18; dated 05.02.2020 in the case No. 676/5972/17, etc.). This example not only demonstrates the existence of opposing decisions of the Supreme Court, and hence the lack of unity of its practice on this matter, but also necessitates an analysis of the mechanism of ensuring the unity of case law by the Supreme Court, because in one case, as shown above, a decision made is contrary to the current practice of the Supreme Court on this issue, in another – if necessary to deviate from the position of the panel, the court decides to transfer criminal proceedings to the joint chamber of the Criminal Court of Cassation of the Supreme Court. This also raises the question of the obligation of the court of cassation to refer to the procedure of transfer of criminal proceedings stipulated by Article 434-1 of the CPC of Ukraine², if it deems it necessary to depart from the conclusion on the application of law in such legal relations. Furthermore, the problem of the existence of opposite decisions on the application of the rule of law decisions of the Criminal Court of Cassation in the Supreme Court is clearly illustrated in many recent articles, in particular, the lawyer O. Gotin's study [21; 22].

As already mentioned, the current criminal procedure legislation makes provision for the transfer of a case by a panel of the Supreme Court hearing in cassation to a chamber, joint chamber, or Grand Chamber of the Supreme Court, if the court hearing the case in cassation deems it necessary to deviate from the conclusion on the application of the rule of law in such legal relations, set out in a previously adopted decision of a chamber, joint chamber or Grand Chamber of the Supreme Court (Article 434-1). Since the adoption of these legislative provisions, this institution (which, in fact, is the essence of the above-mentioned institution of "overruling") is actively used in practice and has proven to be an effective means of ensuring the unity of judicial practice.

Analysing the issue of the quality of the law in the context of Article 1 of Protocol No. 1 to the Convention, the ECHR in its judgment in *Serkov v. Ukraine* dated 07.07.2011 noted: The Court recognises that, indeed, there may be compelling reasons to reconsider the interpretation of the legislation to be followed. The Court, applying dynamic and evolutionary approaches in the interpretation of the Convention, may, if necessary, depart from its previous interpretations, thus ensuring the effectiveness and relevance of the Convention. However, the Court sees no justification for changing the legal interpretation encountered by the applicant. In fact, the Supreme Court did not put forward any arguments to explain the corresponding change in interpretation. Such a lack of transparency was bound to affect public confidence and faith in the law. In the

¹ Criminal Procedure Code of Ukraine. (2020, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>. Resolution of the Third Judicial Chamber of the Criminal Court of Cassation of the Supreme Court No 754/7061/15. (2020, June). Retrieved from <http://www.reyestr.court.gov.ua/review/89929110>

² Criminal Procedural Code of Ukraine. (2020, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

circumstances of the present case, the Court considers that the manner in which the domestic courts interpreted the relevant provisions of the law adversely affected their predictability (paragraph 39, 40 [23]. In paragraph 49 of Opinion No. 11 (2008) of the Advisory Council of European Judges to the Committee of Ministers of the Council of Europe on the quality of judgments states that judges must generally apply the law consistently, but when a court decides to depart from previous practice, this should be clearly stated in its decision [24].

In the context of considering the issue of the mechanism stipulated by national legislation for the Supreme Court to ensure the sustainability and unity of its own practice, it makes sense to address the statutory structure of Article 434-1 of the CPC of Ukraine¹, imperatively makes provision for the need to refer the case to a chamber, a joint chamber or the Grand Chamber of the Supreme Court, if the court deems it necessary to depart from the conclusion on the application of the rule of law in such legal relations. In other words, the procedure established by Article 434-1 of the CPC of Ukraine² for overcoming the legal position previously formulated in the relevant opinion of the Supreme Court does not provide the court's decision with the opposite position, but directs the court to use another procedural way – transfer consideration of a chamber, a joint chamber or the Grand Chamber of the Supreme Court. Observance of this procedure excludes the situation of diametrically opposed legal positions of the Supreme Court panels on the same issue, which has a negative impact on law enforcement practice, creating a situation of legal uncertainty and grounds for possible abuses in this area. It is important to emphasise that the initiator of the deviation from the conclusion on the application of the rule of law can be not only the court but also the parties to the criminal proceedings (who in adversarial criminal proceedings bear the burden of proving cassation claims), citing the grounds for this complaint, although only the court decides on the need to resort to the procedure stipulated by Article 434-1 of the CPC of Ukraine³, if it considers this derogation justified.

In view of the above, experts fairly point out that in this way the legislator has created a procedural mechanism for overcoming differences in the legal approaches of the Court by creating extended panels for "trial over court" [7]. Continuing this thesis, it is logical to assume that if the only way to overcome the conflict of legal positions of the Supreme Court is to direct criminal proceedings by a court, a joint chamber or the Grand Chamber of the Supreme Court, depending on who actually formulated the conclusion on the application of law in such legal relations, the legislator has thus established a certain hierarchy of legal positions of the Supreme Court, which must be followed in law enforcement. Therefore, the position formulated by the panel of judges of the Supreme Court of Cassation in the decision of 13.02.2019 in the case No. 130/1001/17, namely – based on teleological (target), logical and systematic interpretation of the provisions of Articles 434-1 – 434 -2 of the CPC of Ukraine⁴ and Articles 13, 36 of the Law of Ukraine

¹ Criminal Procedural Code of Ukraine. (2020, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

² *Ibidem*, 2020

³ *Ibidem*, 2020

⁴ *Ibidem*, 2020

"On the Judiciary and the Status of Judges"¹, it can be concluded that the criminal procedural law defines procedural mechanisms to ensure the unity of judicial practice, which lies in the application of a special procedure for derogating from the rules of law in previously ruled decisions of the Supreme Court. The logic of construction and purpose of the existence of these procedural mechanisms indicates that to apply the law in such legal relations in the presence of opposing legal conclusions of the court of cassation should be based on the fact that the conclusions contained in court decisions of the Criminal Court of Cassation take precedence over the conclusions of the panel of judges, the conclusions of the joint chamber of the Criminal Court of Cassation – over the conclusions of the chamber or panel of judges of this court, and the conclusions of the Grand Chamber of the Supreme Court – over the conclusions of the joint chamber, chamber and panel of judges of the Court of Cassation².

The above conclusion of the court fully complies with the statutory structure of Article 434-1 of the CPC of Ukraine³ and, in fact, reflects the basic idea laid down by the legislator in this legal provision:

a) deviation from the conclusion on the application of the rule of law in such legal relations in view of the specific circumstances is quite justified;

b) such derogation should be carried out only in accordance with the procedure established by law;

c) the possibility of deviating from the opinion, depending on the composition of the court in which it was adopted, is given to a court composed of a larger number of judges of the Supreme Court, which determines the "higher degree of significance" of such an opinion.

A more detailed consideration of these provisions implies the need to address the following. Firstly, the deviation from the previously formulated legal position of the court in some cases is quite natural, considering the existence of circumstances that directly affect such a legal position. According to V. Kravchuk, a judge of the Administrative Court of Cassation of the Supreme Court, different decisions constitute the immanence of practice that is inherent in all judicial systems. The unity of judicial practice aims to ensure the same interpretation, in other words, to give a template, which will then find practical application in such cases [25]. Paragraph 30 of the above-mentioned ACEJ Opinion states that ensuring equality, uniform interpretation and application of the law should not lead to inflexibility of the law and the emergence of obstacles to its development. Thus, the requirement "such cases should be treated similarly" should not be taken as absolute. The development of judicial practice as such should not run counter to the proper administration of justice, as the failure to develop and adapt judicial practice will create a risk of impeding the reform or improvement of the law. Changes in society may necessitate a new interpretation of the law and thus lead to the abandonment of a precedent that already exists. Moreover, decisions of national

¹ Law of Ukraine No 31 "On the Judiciary and the Status of Judges". (2020, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1402-19#Text>.

² Resolution of the Second Judicial Chamber of the Criminal Court of Cassation of the Supreme Court No 130/1001/17. (2019, February). Retrieved from <http://reyestr.court.gov.ua/Review/79957847>.

³ Criminal Procedural Code of Ukraine. (2020, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

courts and bodies established under international treaties (such as the Court of Justice or the ECHR) often also have the effect of adjusting national case law [10].

Secondly, deviation from the court's conclusion on the application of the rule of law in such legal relations in accordance with current legislation should be carried out only by transferring criminal proceedings in which the court deems it necessary to transfer the case for the consideration of a larger number of judges. Such a derogation is stipulated by law only for the Supreme Court, in connection with which Articles 434-1, 434-2 of the CPC of Ukraine¹ introduced grounds and separate procedures for the transfer of criminal proceedings from the court panel to the chamber, the joint chamber and the Grand Chamber of the Supreme Court. In accordance with Part 3 Article 434-2 of the CPC of Ukraine, the issue of transferring criminal proceedings to the Chamber, the Joint Chamber or the Grand Chamber of the Supreme Court may be resolved before the decision of the court of cassation.

This approach appears to be a fairly clear guide for the law enforcer, who must make a decision in the presence of different conclusions of the Supreme Court on the application of the rule of law in such legal relations. Finally, the issue of applying the legal positions of the Grand Chamber of the Supreme Court in case of deviation from the conclusion on the application of the rule of law was resolved in the decision of the Grand Chamber of the Supreme Court of 30.01.2019 in case No. 755/10947/17. According to this ruling, regardless of whether all rulings setting out the legal position from which the Grand Chamber of the Supreme Court has departed are listed, the courts must take into consideration the last legal position of the Grand Chamber of the Supreme Court upon resolving identical disputes².

CONCLUSIONS

1. One of the legal means of ensuring the stability and unity of judicial practice is the decisions of the Supreme Court, which resolve the existing differences in law enforcement.

2. The unity and permanence of judicial practice are closely linked to ensuring the right of everyone to a fair trial, creating the necessary basis for this, which is to implement the principle of legal certainty and to ensure reasonable predictability of judicial decisions. Therewith, the constancy of judicial practice reflects the constant state of a single law enforcement, in other words, it is a "rooted" unity of the solution of the same legal issues as a direct indicator of the transition from quantity to quality.

3. In accordance with the current criminal procedure legislation of Ukraine, deviation from the conclusion on the application of the rule of law in such legal relations is allowed only under the procedure stipulated by Articles 434-1, 434-2 of the CPC of Ukraine, i.e. for judges of the Supreme Court.

4. The performance of the functional role of the Supreme Court in ensuring the sustainability and unity of judicial practice presupposes the requirement of stability and unity of its own practice, which excludes the existence of differences in its legal

¹ *Ibidem*, 2020

² Resolution of the Grand Chamber of the Supreme Court No 755/10947/17. (2019, January). Retrieved from <http://reyestr.court.gov.ua/Review/79834955>.

positions. That is why Articles 434-1, 434-2 of the CPC of Ukraine clearly define the mechanism for resolving such differences, imperatively making provision for the necessity of transferring criminal proceedings from the Supreme Court considering the case in cassation to the Chamber, the Joint Chamber, or the Grand Chamber of the Supreme Court, if the court hearing the case in cassation deems it necessary to depart from the conclusion on the application of the rule of law in such legal relations set out in a previously adopted decision of the Chamber, the Joint Chamber, or the Grand Chamber of the Supreme Court. Observance of this order excludes the situation of diametrically opposed legal positions of the panels of the Supreme Court on the same issue, which has a negative impact on law enforcement practice, creating grounds for legal uncertainty and possible abuses in this area.

5. This legal mechanism for resolving differences in the practice of the Supreme Court reflects the position of the legislator on the hierarchy of legal positions of the Supreme Court. The key idea is that the possibility of deviating from the opinion on the application of the rule of law, depending on the composition of the court in which it was adopted, is given to a court composed of more judges of the Supreme Court, which determines the "higher degree of significance" of such a conclusion and its application in further judicial practice.

6. Another type of ruling of the Supreme Court that resolves existing differences in judicial practice is the decisions of the Grand Chamber, which are aimed at resolving an exclusive legal problem and ensuring the development of law and the development of a unified law enforcement practice. Only the Grand Chamber of the Supreme Court has the power to resolve disputes over legal positions in this area. Considering the specifics of the procedure for transferring criminal proceedings to the Grand Chamber of the Supreme Court and the criteria for establishing the exceptional nature of the legal problem, this matter requires separate consideration.

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