

# Case Law of the Supreme Courts in Post-Soviet Legal Systems

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The article is dedicated to introduction of case law of the supreme courts in post-Soviet legal systems and the issues thereof. The author analyzes the means of unifying judicial practice by regulatory explanations of the supreme courts in Soviet legal systems. The thesis that such practices negatively affected the independence of the judiciary and generated formalism and passivity of the judiciary was justified. The author clarifies, which post-Soviet countries still have such regulatory explanations, and which ones have refused them and how that was done. The legal provisions, which introduced case law in such post-Soviet legal systems as Azerbaijan, Armenia, Estonia, Georgia, Latvia, Lithuania, Moldova and Ukraine are analyzed. The author states the necessity of further research of mechanisms for ensuring case law practice in post-Soviet legal systems.

**Keywords:** case law, judicial precedent, unification of judicial practice, separation of state power, Soviet law, post-Soviet law.

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## Introduction

In Soviet legal systems, unification and development of judicial practice were carried out by means of regulatory explanations of the supreme courts on the basis of summarizing the judicial practice. Such regulatory explanations not only unified the judicial practice, but also realized the control and supervision under the judiciary of the Soviet Union. Such practices negatively affected the independence of the judiciary and generated formalism and passivity of the judiciary.

The practice of regulatory explanations of the supreme courts on the basis of summarizing the judicial practice is not known for common and civil law systems. In these systems, the unification of judicial practice is carried out by giving decisions of the supreme courts in specific cases the value of an example, a model for resolving similar and analogous cases, which have the nature of case law.

In this regard, preparatory materials<sup>1</sup> and the last Opinion No. 20<sup>2</sup> of the Consultative Council of European Judges (CCJE) entitled “On the role of courts with respect to uniform application of the law” are significant and interesting.

All post-Soviet legal systems proclaimed the principle of separation of the state power and thus the independence of the judiciary. In this regard, several questions arise – which post-Soviet countries still retain regulatory explanations on the basis of summarizing of judicial practice; which post-Soviet countries have refused from such regulatory explanations; in what post-Soviet countries was the case law of the supreme courts introduced; what are the peculiarities and differences in the case law of the supreme courts in post-Soviet legal systems? The current article is dedicated to answering these questions.

## 1. Regulatory Explanations of Supreme Courts and Judicial Precedents in Soviet Period

As it is known, in Soviet period the judicial precedent and case law were challenged and not recognized. It was justified by the fact that they contradicted the principle of socialist legality and was caused by the need for ideological opposition to bourgeois legal systems.

As it is noted in the textbook “Marxist-Leninist General Theory of State and Law”, “...socialist states do not recognize such a source of law as a judicial precedent, which leads to a departure from the principle of legality and undermines the role of representative bodies of the state in legislative activity. Socialist judicial bodies administer justice as one of the forms of application of the law, which is not related to the law-making authority of the court in resolving specific cases”<sup>3</sup>.

Hence, in Soviet times the unifying judicial practice was carried out by means of regulatory explanations of plenum of the supreme courts on the basis of summarizing the judicial practice. Such regulatory explanations based on summarizing the judicial practice were an invention of Soviet legal systems and were not used in civil and common law systems.

Therefore, immediately after the formation of the USSR in 1923, the Regulation on the Supreme Court of the USSR was adopted. Its competence in the field of general supervision and supervision of the legality anticipated “the provision

<sup>1</sup> See: Compilation of replies to the questionnaire for the preparation of the CCJE Opinion No. 20 (2017) entitled “The role of courts with respect to uniform application of the law”. Available: <https://rm.coe.int/compilation-of-replies-to-opinion-no-20/1680764112> [last viewed 16.12.2017].

<sup>2</sup> See: Opinion No. 20 “On the role of courts with respect to uniform application of the law”. Available: <https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3> [last viewed 16.12.2017].

<sup>3</sup> Marksystsko-lenynskaya obshchaya teoriya hosudarstva y prava. Sotsyalysticheskoe pravo [Marxist-Leninist General Theory of State and Law. Socialist law] / Redkol.: *Lukasheva E. A.* (Otv. red.), *Mytskevych A. V.*, *Samoshchenko Y. S.*, *Farberov N. P.*, *Shebanov A. F. M.*: Yuryd. lyt., 1973, p. 325

to the supreme courts of the Union republics of regulatory explanations and interpretations of the all-Union legislation<sup>4</sup>.

The Soviet legal doctrine engendered discussions about the nature of such regulatory explanations of the supreme courts – whether they were sources of law, whether they were concretization, detailing or interpretation of laws, whether they had normative nature, and if that was a form of judicial practice.

For instance, in some literary sources the regulatory explanations were considered as subordinate normative acts, by which the Supreme Court of the USSR managed the activities of all judicial bodies in the country, and interpretation of legal norms that contained in them was recognized as official normative interpretation.<sup>5</sup>

Other literary sources noted that “the regulatory explanations contain provisions concretizing and detailing the legal norms within the law,” and “the value of regulatory explanations was assessed as a form of judicial practice,” it was called “generalized judicial practice”, “secondary judicial practice”.<sup>6</sup>

Instead, S. L. Zivs considered that “the resolutions of the Plenum are not “judicial practice” or “part of judicial practice”. Decisions are made on the basis of generalization and analysis of judicial practice. Thus, the regulatory explanations of the plenum are a certain generalized conclusions from a set of similar decisions in homogeneous court cases”<sup>7</sup>.

However, despite the doctrinal discussions concerning nature, the role and importance of regulatory explanations and their mandatory nature were established at the constitutional and legislative levels of the Soviet Union and the Union’s republics. The Constitution of the USSR of 1924 reproduced the provisions of the Regulation on the Supreme Court of the USSR of 1923 that “the Supreme Court of the USSR, with the aim of asserting revolutionary legality, provides the supreme courts of the Union republics with regulatory explanations on issues of the all-Union legislation” (p. 41),<sup>8</sup> and in accordance with the Constitution of the USSR of 1936<sup>9</sup> and the Constitution of the USSR of 1977<sup>10</sup>, the Supreme Court of the USSR continued to oversee the judicial activity of all judicial bodies of the USSR and the Union republics.

The Law on the Supreme Court of the USSR of 1979 also envisaged that he “has to study and generalize judicial practice, analyze judicial statistics, and provide

<sup>4</sup> Postanovlenye Prezydyuma TsYK SSSR [decree of the presidium CEK USSR] “Polozhenye o Verkhovnom Sude Soyuza Sovetskykh Sotsyalisticheskyykh Respublyk” [Regulation on the Supreme Court of the USSR] ot 23.11.1923. Available: <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=ESU&n=16293#0> [last viewed 16.12.2017].

<sup>5</sup> O yurydycheskoy pryrode rukovodyashchykh ukazanyy Plenuma Verkhovnoho Suda SSSR [On the legal nature of the regulatory explanations of the Plenum of the Supreme Court of the USSR]. Sovetskoe gosudarstvo y pravo [Soviet state and law]. M.: Nauka, No. 8, 1956, pp. 13–15

<sup>6</sup> Sudebnaya praktika v sovetskoy pravovoy sisteme [Judicial practice in the Soviet legal system]. Otv. red.: Bratus’ S. N. M.: Yuryd. lit., 1975, pp. 55–57

<sup>7</sup> Zyvs S. L. Ystochnyky prava [Sources of Law] / Otv. red.: Kazymyrchuk V. P. M.: Nauka, 1981, p. 184

<sup>8</sup> Konstitutsyya (Osnovnoy Zakon) Soyuza Sovetskykh Sotsyalisticheskyykh Respublyk [Constitution (Basic Law) of the Union of Soviet Socialist Republics] (31.01.1924). Available: [http://constitution.garant.ru/history/ussr-rsfsr/1924/red\\_1924/5508661/chapter/7/#block\\_700](http://constitution.garant.ru/history/ussr-rsfsr/1924/red_1924/5508661/chapter/7/#block_700) [last viewed 16.12.2017].

<sup>9</sup> Konstitutsyya (Osnovnoy Zakon) Soyuza Sovetskykh Sotsyalisticheskyykh Respublyk [Constitution (Basic Law) of the Union of Soviet Socialist Republics] (05.12.1936). Available: [http://constitution.garant.ru/history/ussr-rsfsr/1936/red\\_1936/3958676/chapter/9/#block\\_1900](http://constitution.garant.ru/history/ussr-rsfsr/1936/red_1936/3958676/chapter/9/#block_1900) [last viewed 16.12.2017].

<sup>10</sup> Konstitutsyya (Osnovnoy Zakon) Soyuza Sovetskykh Sotsyalisticheskyykh Respublyk [Constitution (Basic Law) of the Union of Soviet Socialist Republics] (07.10.1977). Available: [http://constitution.garant.ru/history/ussr-rsfsr/1977/red\\_1977/5478732/chapter/20/#block\\_2000](http://constitution.garant.ru/history/ussr-rsfsr/1977/red_1977/5478732/chapter/20/#block_2000) [last viewed 16.12.2017].

regulatory explanations to courts on the application of legislation arising in the course of judicial proceedings. The regulatory explanations given by Plenum of the USSR Supreme Court are mandatory for the courts, other bodies and officials who apply the law of which the interpretation is given. The Supreme Court of the USSR exercises control over the implementation by the courts of regulatory explanations of the Plenum of the USSR Supreme Court”.<sup>11</sup>

It should be noted that these provisions were reproduced in the legislation of the Union republics.

And although in Soviet legal systems the supreme courts largely had been unifying the judicial practice by means of regulatory explanations, they were insufficient and often did not resolve problematic issues of judicial practice in a timely and effective manner. Problematic issues of judicial practice very often appeared during the resolution of a specific case and required timely and subsequently similar resolution in similar and analogous cases. The regulatory explanations were adopted on the basis of study and summary of the judicial practice, and it often required a long time. Therefore, timely solutions of problematic issues of judicial practice in such cases required an increase in the role and importance for similar and analogous cases of the decisions of the Supreme Courts in specific cases, which resolved such issues. In this regard, Soviet legal systems inevitably needed a case law nature pertaining to the decisions of the supreme courts in specific cases.

Thus, a judicial decision well-known in Soviet times, which was essential for resolving similar cases and development of judicial practice, was the decision of the Supreme Court of the USSR in the case of Martsyniuc (1940).<sup>12</sup>

In Soviet times, there were also other confirmations of the need to take into account the decisions of the supreme courts in similar cases, and their factual nature of case law. Thus, the Supreme Court of the USSR itself, in the Resolution of the Plenum of June 30, 1964, “On Measures for the Improvement of the Systematization of Legislation and Judicial Practices in the Judiciary”, proposed to systematize and take into account in the judicial activity not only the regulatory explanations but also the decisions of the courts on issues having a principled nature.<sup>13</sup> Also, the Supreme Court of the USSR in specific cases provided its decisions with legal force of regulatory explanations and expressly stated this legal force in such specific decisions. For example, on November 13, 1962, the Supreme

<sup>11</sup> Zakon Soyuza Sovetskykh Sotsyalystrycheskykh Respublyk o Verkhovnom Sude SSSR [Law of the Union of Soviet Socialist Republics on Supreme Court of USSR] (30.11.1979). Available: <http://pravo.levonevsky.org/bazazru/texts25/txt25726.htm> [last viewed 16.12.2017].

<sup>12</sup> “Martsyniuc suffered a personal injury, saving, on his own initiative, state property from the fire in one of the railway stations on the route of the train in which Martsyniuc was traveling. The victim claimed a compensation for property damage occasioned by causing injury to him. The lower courts dismissed Martsyniuc’s claim on the grounds that the law provided the liability for causing harm by another person, but did not know the cases of liability for the harm that the victim himself had caused by taking certain actions. In the Martsyniuc case, the Supreme Court pointed out that although the Civil Code did not provide for “direct liability of the enterprises in such cases, however, the denial of Martsyniuc’s suit on this formal basis is incorrect. ... Therefore, the court had to impose the obligation on the railway, whose property Martsyniuc acted to protect, to reimburse Martsyniuc for personal property damage suffered by him.”

<sup>See more:</sup> Yoffe, O. S. *Yzbrannye trudy* [Selected Works]. Tom II [Volume II]. Yurydycheskyy tsentr Press; Sankt-Peterburh; 2004, p. 45

<sup>13</sup> *Sudebnaya praktika v sovetskoy pravovoy systeme* [Judicial practice in the Soviet legal system]. Otv. red.: Bratus', S. N. M.: Yuryd. lyt., 1975, p. 59.

Court of the USSR granted the force of regulatory explanations to the ruling in the specific case of Talanov, as explicitly noted in this ruling.<sup>14</sup>

The Soviet legal doctrine began to react to the needs and demands of the judicial practice in increasing the value of the decisions of the supreme courts in specific cases. Thus, already in 1975 in the collective monographic work “Judicial Practice in the Soviet Legal System”, the authors noted that “in order to ensure the unity and legality of judicial practice, fundamental rulings and decisions of the highest judicial bodies in specific cases are of a great importance. Separate judicial clarifications of the law issued by the Supreme Court of the USSR and the supreme courts of the Union republics and published in the journals have a serious impact on the application of the law by other courts in the resolving of other cases”.<sup>15</sup>

In connection with the questions of judicial practice in the Soviet legal doctrine, new theoretical terms and constructions began to be introduced into scientific circulation, in particular the “precedent of the interpretation” and “legal provisions”.

S. M. Bratus and O. V. Vengerov, paying attention to the role of the fundamental decisions of the highest judicial bodies in specific cases, suggested to mark them as “peculiar precedents of the interpretation of legal norms”. At the same time, as noted by the scientists, “the difference between such a precedent from the judicial precedent was that the judicial precedent leads to the formation of a new legal norm by the courts, at the same time the precedent of interpretation is related to the interpretation of the existing legal norm, is connected with the development of a already established, “stable” application of the norm in similar cases”.<sup>16</sup>

However, at the same time, the scientists were forced to return to the postulates of the denial of the judicial precedent in Soviet law and to repeat that “Of course, this perception does not occur because the precedent of judicial interpretation is mandatory. Then it would be a judicial precedent – a phenomenon that is not typical of the Soviet legal system. The perception of the precedent of interpretation is carried out in other basis, because of the persuasiveness, argumentation of the fundamental decision”.<sup>17</sup>

Therefore, despite the doctrinal denial of the judicial precedent and extension of the scope of application of the regulatory explanations of the supreme courts in judicial practice, decisions of the supreme courts in specific cases were, in fact, binding in similar cases. The Soviet legal doctrine was forced to react to such an actual state and request of the court practice in increasing the significance of the decisions of the supreme courts for similar cases.

However, the judicial practice in the Soviet legal systems was unified by means of regulatory explanations, and, above all, the control and supervision were carried out under the judicial bodies of the Soviet Union and the Union republics. And this, in the absence of recognition of the principle of power division, significantly and negatively influenced the independence of the judiciary and the fairness of justice.

Such regulatory explanations under conditions of the principle of strict observance of socialist legality, gave rise to passivity and formalism of judicial

<sup>14</sup> Sudebnaya praktika v sovetskoj pravovoj sisteme [Judicial practice in the Soviet legal system]. Otv. red.: Bratus', S. N. M.: Yuryd. lit., 1975, p. 57.

<sup>15</sup> Sudebnaya praktika v sovetskoj pravovoj sisteme [Judicial practice in the Soviet legal system]. Otv. red.: Bratus', S. N. M.: Yuryd. lit., 1975, p. 58.

<sup>16</sup> Sudebnaya praktika v sovetskoj pravovoj sisteme [Judicial practice in the Soviet legal system]. Otv. red.: Bratus', S. N. M.: Yuryd. lit., 1975, p. 58.

<sup>17</sup> Sudebnaya praktika v sovetskoj pravovoj sisteme [Judicial practice in the Soviet legal system]. Otv. red.: Bratus', S. N. M.: Yuryd. lit., 1975, p. 64–65.

activity. Courts, while resolving complicated trials, expected prescriptions from above, and without a proper guidance could not depart from the letter of the socialist law, hence, judicial activism was inadmissible and restricted.

Such a long Soviet practice of formalism and passivity of the judiciary also has implications in post-Soviet times – many older judges are accustomed to the previous order, and passively awaiting explanations from the supreme courts to resolve complicated cases, rather than actively and effectively serve justice. It manifests in conserving institute of explanations.

## 2. Conserving and Abandonment of Explanations Based on Summarizing of Judicial Practice in Post-Soviet Legal Systems

After collapse of the Soviet Union and proclamation and restoration of the independence, all post-Soviet states declared the principle of separation of the state power and recognized the independence of the judiciary.

In this regard, the following questions arise: 1) which post-Soviet countries still retain the explanations based on summarizing the judicial practice; 2) which ones have abandoned them and in what way?

The answers to these questions will be better demonstrated in the relevant table.

**Table 1. Explanations of supreme courts based on summarizing judicial practice**

No.	Post-soviet legal systems	Conserving		Abandonment
		Regulatory (mandatory, binding)	Recommendatory (not binding)	
1.1	Azerbaijan	-	+	-
1.2	Armenia	-	-	+ 2007
1.3	Belarus	+	-	-
1.4	Estonia	-	-	+
1.5	Georgia	-	-	+ 2009
1.6	Kazakhstan	+	-	-
1.7	Kyrgyzstan	+	-	-
1.8	Latvia	-	-	+ 2003
1.9	Lithuania	-	-	+ 2006
1.10	Moldova	-	+	-
1.11	Russia	-	+	-
1.12	Tajikistan	+	-	-
1.13	Turkmenistan	+	-	-
1.14	Uzbekistan	+	-	-
1.15	Ukraine	-	+ 2017	+ 2010, 2015

What follows from the above data?

Out of 15 post-Soviet states, the explanations based on summarizing the judicial practice still exist in 10 countries, in 6 – Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan – such explanations are mandatory, in 4 – Azerbaijan, Moldova, Russia, Ukraine – recommendatory.

It is noteworthy, that in Azerbaijan<sup>18</sup>, Kazakhstan<sup>19</sup>, Kyrgyzstan<sup>20</sup> and in the Russian Federation<sup>21</sup> such explanations are set at the constitutional level. In Belarus<sup>22</sup>, such explanations according to the Law on normative legal acts are classified as an independent kind of normative legal acts. In Kazakhstan, the nature of explanations is clarified in decision of the constitutional court.<sup>23</sup> An interesting provision on such explanations is held in Moldova – according to the Law on the Supreme Court of Justice, they “do not have the character of the interpretation of laws and are not binding on judges”.<sup>24</sup> The draft of the constitution of the Russian Federation originally contained the wording “regulatory explanations”, however, the current constitution of the Russian Federation simply says “explanations”. Therefore, the discussions continue in the Russian legal doctrine – are such explanations mandatory or recommendatory?

Concerning the cancellation of such explanations, 6 out of 15 post-Soviet states renounced them – Armenia, Georgia, Estonia, Latvia, Lithuania and Ukraine. Such refusal and cancellation took place at different times and in different ways.

Latvia is one of the first legal systems in the post-Soviet space, which abolished such explanations. In February 4, 2003, the Constitutional Court of Latvia passed the decision, in which it noted, “not denying the importance of a uniform court practice in ensuring legal stability, it is not admissible that the Plenum of the Supreme Court becomes similar to the legislator and determines generally binding (mandatory) instructions from which the judge, who is reviewing the case, is not allowed to deviate”.<sup>25</sup> “Thus, the challenged norm, which authorizes the Plenum of the Supreme Court to pass binding on the courts decisions on application of laws, is at variance with the principle of separation of power and limits the independence

<sup>18</sup> See part 1 of the Article 131: Konstitutsiya Azerbaydzhanskoj Respubliki [Constitution of the Republic of Azerbaijan] (12.11.1995). Available: <http://ru.president.az/azerbaijan/constitution> [last viewed 16.12.2017].

<sup>19</sup> See Article 4: Konstitutsiya Respubliki Kazahstan [Constitution of the Republic of Kazakhstan] (30.08.1995). Available: <http://www.constitution.kz/> [last viewed 16.12.2017].

<sup>20</sup> See part 2 of Article 96: Konstitutsiya Kyrghyzskoj Respubliki [Constitution of the Kyrgyz Republic] (27.06.2010). Available: [http://www.gov.kg/?page\\_id=263&lang=ru](http://www.gov.kg/?page_id=263&lang=ru) [last viewed 16.12.2017].

<sup>21</sup> See Article 126: Konstitutsiya Rossyjskoj Federatsii [Constitution of the Russian Federation] (12.12.1993). Available: <http://www.constitution.ru/10003000/10003000-9.htm> [last viewed 16.12.2017].

<sup>22</sup> See Article 2: Zakon Respubliki Belarus' O normativnykh pravovykh aktakh Respubliki Belarus' [Law of the Republic of Belarus on normative legal acts of the Republic of Belarus] (10.01.2000) <http://pravo.by/document/?guid=3871&p0=h10000361> [last viewed 16.12.2017].

<sup>23</sup> See: Postanovlenye Konstitutsionnogo Soveta Respubliki Kazahstan [Regulatory decision of the Constitutional Council of the Republic of Kazakhstan] (06.03.1997). Available: <http://www.ksrk.gov.kz/rus/resheniya?cid=11&rid=166> [last viewed 16.12.2017].

<sup>24</sup> See p. d) of the Article 2: Zakon Respublika Moldova o Vysshey sudebnoy palate [Law of the Republic of Moldova on Supreme Court of Justice] (26.03.1996). Available: <http://lex.justice.md/viewdoc.php?action=view&view=doc&id=346405&lang=2> [last viewed 16.12.2017].

<sup>25</sup> See p. 2.3.: Reshenye Konstitutsionnogo Suda Latvyskoj Respubliki № 2002-06-01 [Judgment of the Constitutional Court of the Republic of Latvia No. 2002-06-01] (04.02.2003). Available: [http://www.satv.tiesa.gov.lv/wp-content/uploads/2002/06/2002-06-01\\_Spriedums\\_RU.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2002/06/2002-06-01_Spriedums_RU.pdf) [last viewed 16.12.2017].

of judges (courts)".<sup>26</sup> "Court decisions, which are reached by observing only the interpretations of legal norms presented in Plenum decisions, may turn out to be unjust, especially in cases when multiform and constantly changing living conditions are not taken into consideration or when the judge experiences no right of deviating from the provisions of the Plenum decisions".<sup>27</sup> "Thus, court decisions, which have been passed by applying binding to courts interpretations by the Supreme Court may come into collision with the principle of fairness (justice), which is incorporated into Article 1 of the *Satversme*".<sup>28</sup>

In other post-Soviet countries (Armenia, Georgia, Estonia, Lithuania and Ukraine), revoking of explanations of the supreme courts on the basis of summarizing the judicial practice took place through adoption of new laws on judiciary and abolition of the corresponding authority of the supreme courts.

In Ukraine, in 2010, at first the Supreme Court of Ukraine was deprived of the authority to accept explanations in the form of Plenum resolutions, and in 2015 higher specialized courts were also deprived of such an authority. However, on 03.10.2017, inconsistently and unfoundedly, the Plenum of the Supreme Court was returned the authority to provide recommendatory explanations on the basis of summarizing judicial practice.<sup>29</sup>

### 3. Introduction of Case Law of Supreme Courts in Post-Soviet Legal Systems

In those post-Soviet legal systems, where such explanations were abolished or became recommendatory, the need for unifying the judicial practice became acute. This need for unifying the judicial practice began to be addressed by introducing case law of the supreme courts.

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<sup>26</sup> See p. 2.4.: Reshenye Konstitutsyonnoho Suda Latvyskoy Respublyky № 2002-06-01 [Judgment of the Constitutional Court of the Republic of Latvia No. 2002-06-01] (04.02.2003). Available: [http://www.satv.tiesa.gov.lv/wp-content/uploads/2002/06/2002-06-01\\_Spriedums\\_RU.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2002/06/2002-06-01_Spriedums_RU.pdf) [last viewed 16.12.2017].

<sup>27</sup> See p. 3.: Reshenye Konstitutsyonnoho Suda Latvyskoy Respublyky № 2002-06-01 [Judgment of the Constitutional Court of the Republic of Latvia No. 2002-06-01] (04.02.2003). Available: [http://www.satv.tiesa.gov.lv/wp-content/uploads/2002/06/2002-06-01\\_Spriedums\\_RU.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2002/06/2002-06-01_Spriedums_RU.pdf) [last viewed 16.12.2017].

<sup>28</sup> See p. 3: Reshenye Konstitutsyonnoho Suda Latvyskoy Respublyky № 2002-06-01 [Judgment of the Constitutional Court of the Republic of Latvia No. 2002-06-01] (04.02.2003). Available: [http://www.satv.tiesa.gov.lv/wp-content/uploads/2002/06/2002-06-01\\_Spriedums\\_RU.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2002/06/2002-06-01_Spriedums_RU.pdf) [last viewed 16.12.2017].

<sup>29</sup> See 10<sup>2</sup>: Law of Ukraine On the Judiciary and Status of Judges N.1402-VIII (02.06.2016) with amendments and supplements by Law of Ukraine On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine and other legislative acts No. 2147-VIII (03.10.2017) Available: <http://zakon2.rada.gov.ua/laws/show/1402-19/print1509617263889479> [last viewed 16.12.2017].



**Table 2. Introducing case law of the supreme courts**

No.	Post-Soviet legal systems	In legislation	In judicial decisions	Areas case law use	
				In all categories of cases	In some categories of cases
2.1	Azerbaijan	+ 2009	-	-	admin.
2.2	Armenia	+ 2007	-	+	-
2.3	Estonia	+ 2003, 2005	+	+	crimin. civil.
2.4	Georgia	+ 2010	-	+	-
2.5	Latvia	+ 1999	+	+	civil. admin.
2.6	Lithuania	+ 2002, 2008, 2016	+	+	-
2.7	Moldova	+ 2012	-	-	crimin.
2.8	Ukraine	+ 2010, 2011, 2015	-	+	-

What follows from the above data?

Case law is observed in 8 post-Soviet countries: Azerbaijan, Armenia, Estonia, Georgia, Latvia, Lithuania, Moldova and Ukraine. The binding nature of the decisions of the supreme courts in similar cases has been established in these countries either through the provisions of legislative acts, or decisions of the constitutional or supreme courts.

The binding nature of the Supreme Court decisions in similar cases is directly enshrined in the legislative acts of Azerbaijan, Armenia, Estonia, Georgia, Latvia, Lithuania, Moldova and Ukraine.

This recognition of case law in these post-Soviet legal systems is coming about gradually, at different times. The Baltic States (Estonia, Latvia and Lithuania) were the first in the post-Soviet legal space to recognize the binding nature of the decisions of the supreme courts in similar cases at the legislative level.

In 1998, the Civil Procedure Law in Latvia established that “in applying legal norms, the court shall take into account the case law”.<sup>30</sup>

In Lithuania, a new version of the Law on Courts (24.01.2002) indicated that “interpretation in respect of the application of statutes and other legal acts in the rulings published in the Supreme Court Bulletin shall be taken into consideration by courts, state and other institutions, as well as by other persons, when applying these statutes and other legislation”,<sup>31</sup> in accordance with the amendments adopted on July 03, 2008, “the courts of lower instance, when taking decisions in cases of

<sup>30</sup> See section 5, Civil Procedure Law of Republic of Latvia (03.11.1998). Available: <http://vvc.gov.lv/image/catalog/dokumenti/Civil%20Procedure%20Law.docx> [last viewed 16.12.2017].

<sup>31</sup> See part 2 of the Article 23, New Version of the Law of the Republic of Lithuania on Courts (31.05.1994). Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.338141?jfwid=-wd7z8ezyc> [last viewed 16.12.2017].

appropriate categories, shall be bound by the rules of interpretation formulated in analogous or conceptually similar cases”,<sup>32</sup> and in accordance with the amendments adopted on June 02, 2016, “the interpretations of the laws and other legal acts contained in the Supreme Court rulings shall be taken into account by the state and other institutions, as well as other persons, by applying the same laws and regulations”.<sup>33</sup>

In Estonia, according to the provisions of a new Code of Criminal Procedure (12.02.2003), “the sources of criminal procedural law are decisions of the Supreme Court in the issues, which are not regulated by other sources of criminal procedural law but which arise in the application of law”.<sup>34</sup>

The case law of the supreme courts was introduced in new codes and laws on judiciary in Armenia in 2007, Azerbaijan – in 2009, Georgia – in 2010, Moldova – in 2012, Ukraine – in 2010 (2011, 2015, 2016).

Hence, in Armenia (21.02.2007) “the reasoning of a judicial act of the Cassation Court ... in a case with certain factual circumstances (including the construal of the law) is binding on a court in the examination of a case with identical/similar factual circumstances, unless the latter court, by indicating solid arguments, justifies that such reasoning is not applicable to the factual circumstances at hand”.<sup>35</sup>

In Azerbaijan (30.07.2009), “the decision of the Plenum is made in the form of ruling and is binding upon all court composition of the administrative-economic collegium of the Supreme Court”.<sup>36</sup>

In Georgia (10.12.2010), “legal interpretations (interpretation of a norm) by the Grand Chamber of the Supreme Court shall be binding upon the common courts of all instances”.<sup>37</sup>

In Moldova (05.04.2012), “decisions of the Criminal College of the Supreme Court of Justice issued as a result of hearing a cassation in the interest of the law shall be mandatory for the courts to the extent to which the de facto and de jure situation in the case remains the one existing at the moment of examining the cassation”.<sup>38</sup>

In Ukraine, firstly, there were amendments brought by the Law On the Judiciary and Status of Judges (07.07.2010) in all procedural codes of such content: “the decision of the Supreme Court of Ukraine, adopted on the basis of the results of consideration of the application for review of the court decision on grounds of unequal use by the court (courts) of the cassation instance of the same substantive legal norm in similar legal relations, is binding for all subjects of authority that apply in their activities normative legal act that contains the specified legal norm,

<sup>32</sup> See part 4 of the Article 33, Law on Courts of Lithuania (31.05.1994). Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.338141?jfwid=-wd7z8ezyc> [last viewed 16.12.2017].

<sup>33</sup> See part 3 of the Article 23, Law on Courts of Lithuania (31.05.1994). Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.338141?jfwid=-wd7z8ezyc> [last viewed 16.12.2017].

<sup>34</sup> See part 4 of the Article 2, Code of Criminal Procedure of Estonia RT I 2003, 27, 166 (12.02.2003). Available: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/513072017002/consolide> [last viewed 16.12.2017].

<sup>35</sup> See part 4 of Article 15, Judicial code of Republic of Armenia (21.02.2007). Available: <http://www.parliament.am/legislation.php?sel=show&ID=2966&lang=eng> [last viewed 16.12.2017].

<sup>36</sup> See part 4 of Article 98, Administrative Procedural Code of the Republic of Azerbaijan (30.07.2009). Available: <http://www.legislationline.org/documents/id/17124> [last viewed 16.12.2017].

<sup>37</sup> See part 5 of Article 17, Organic Law of Georgia on Common Courts No. 2257-IIS (04.12.2009). Available: <https://matsne.gov.ge/en/document/download/90676/13/en/pdf> [last viewed 16.12.2017].

<sup>38</sup> See p. 9 of the Article 7, Criminal Procedure Code of the Republic of Moldova No. 122-XV (14.03.2003) <http://www.legislationline.org/documents/section/criminal-codes/country/14>.

and for all courts of Ukraine. Courts are obliged to bring their judicial practice in line with the decision of the Supreme Court of Ukraine”.<sup>39</sup>

Then (20.10.2011) there were amendments to all procedural codes of such content “to decide what legal norm should be applied in regard to particular legal matters, court is obliged to take into the consideration the conclusions of the Supreme Court of Ukraine, set in the decisions, issued as the result of the judicial review of statements requesting the review of the court decision ...”.<sup>40</sup>

And finally, a new Law of Ukraine On the Judiciary and Status of Judges (21.02.2015, 02.06.2016) enshrined that “conclusions regarding the application of legal provisions specified in resolutions of the Supreme Court shall be mandatory for all government entities that use in their activity the normative legal act containing the respective legal provision”, “Conclusions regarding application of the legal provisions specified in resolutions of the Supreme Court shall be taken into account by other courts in the application of such legal provisions”.<sup>41</sup>

It is also worth to consider the fact that among the post-Soviet countries, which recognized the case law of the supreme courts, the Baltic states occupy a special place. In these countries, the binding nature of the decisions of the supreme courts in similar cases is established not only in laws but it is also justified in the decisions of the constitutional and supreme courts.

For instance, in a well-known decision of the Constitutional Court of Lithuania dated March 23, 2006, it is indicated that “the courts of general jurisdiction of lower instance, which adopt decisions in cases of corresponding categories are bound by decisions of the courts of general jurisdiction of higher instance (precedents in cases of such categories) inevitably imply that the said courts have to follow such a concept of the content of corresponding provisions (norms, principles) of law, as well as the application of these provisions of law which were formed and followed when applying these provisions (norms, principles) in the previous cases, *inter alia*, when previously deciding on analogous cases. Disregarding the maxim that the same (analogous) cases have to be decided in the same way what arises from the Constitution would also mean disregarding the provisions of the Constitution on administration of justice as well as the constitutional principles of a state under the rule of law, justice, equality of people before the court and other constitutional principles”.<sup>42</sup>

At the same time, there are differences in introducing the case law of the supreme courts in the post-Soviet legal systems: in the areas, where case law is used; in the wording of the character of bindingness; in the wording on the subject of bindingness; in the addressees of case law.

In Armenia, Georgia, Lithuania and Ukraine, the case law of the supreme courts was introduced at once in all categories of court cases – civil, criminal, administrative, etc. On the other hand, in Azerbaijan, Estonia, Latvia, and Moldova

<sup>39</sup> See Transitional provisions, Law of Ukraine On the Judiciary and Status of Judges No. 2453-VI (07.07.2010). Available: <http://zakon3.rada.gov.ua/laws/show/2453-17/ed20100707/parao2751#o2751> [last viewed 16.12.2017].

<sup>40</sup> See: Law of Ukraine On Amendments to Certain Legislative Acts of Ukraine on the consideration of cases by the Supreme Court of Ukraine No. 3932-VI (20.10.2011). Available: <http://zakon2.rada.gov.ua/laws/show/3932-17/ed20120115> [last viewed 16.12.2017].

<sup>41</sup> See pp. 5–6 of the Article 13, Law of Ukraine On the Judiciary and Status of Judges N.1402-VIII (02.06.2016). Available: [http://vkksu.gov.ua/userfiles/doc/Law\\_on\\_Judiciary\\_and\\_Status\\_of\\_Judges\\_16%2007%202016\\_ENG.pdf](http://vkksu.gov.ua/userfiles/doc/Law_on_Judiciary_and_Status_of_Judges_16%2007%202016_ENG.pdf) [last viewed 16.12.2017].

<sup>42</sup> See p. 3.3.: Ruling of the Constitutional Court of the Republic of Lithuania in Case No. 33/03 (28.03.2006). Available: <http://lrkt.lt/en/court-acts/search/170/ta925/content> [last viewed 16.12.2017].

the introduction and application of case law of the supreme courts began in separate categories of court cases and subsequently spread onto other cases.

Thus, in Azerbaijan, case law is applied only in administrative matters, in Estonia, the recognition and formation of case law began in criminal cases and was extended to civil and administrative cases, in Latvia – first in civilian cases, and later in administrative ones, in Moldova – only in criminal cases. Such a difference in the use of the case law practice of the supreme courts in some countries – in all categories of court cases, and in others – only in some categories of cases, can be explained by the fact that in the first group of countries the judicial practice experienced a request for it in all the categories of cases, and the legislator resolutely and promptly institutionalized the case law, in contrast to others, where its introduction took place in those areas, where the need of the judicial practice was felt most acutely, and the legislator approached the introduction and formation of the case law practice with caution and prudence.

It is also necessary to draw attention to the fact that in various legislative acts of the post-Soviet countries the wording of the character and subject of bindingness of case law differ. For instance, in some legal systems (Azerbaijan, Armenia, Georgia, Moldova) the mandatory nature is formulated by direct reference to binding, in others (Latvia, Lithuania) – by means of such wording as “shall take into account”, “shall take into consideration”, “shall be bound”, in Estonia – by referring to the sources of law, in Ukraine – the wording “shall be mandatory” and “shall be taken into account” is simultaneously used.

The subject of bindingness of case law in post-Soviet legal systems is different. For example, in Armenia “the reasoning of a judicial act of the Cassation Court (including the construal of the law)” is binding, in Georgia – “legal interpretations (interpretation of a norm) by the Grand Chamber of the Supreme Court”, in Estonia – “decisions of the Supreme Court in the issues which are not regulated by other sources of criminal procedural law but which arise in the application of law”, in Latvia – “judicature (case law)”, in Lithuania – “interpretation in respect of the application of statutes and other legal acts”, “rules of interpretation”, in Moldova – “decisions of the Criminal College of the Supreme Court of Justice”, in Ukraine – “conclusions regarding the application of legal provisions specified in resolutions of the Supreme Court”.

Besides, in post-Soviet legal systems the addressees of case law vary, as well. In Azerbaijan only “all court compositions of the administrative-economic collegium of the Supreme Court” are addressed; in Armenia – the “court” is addressed; in Georgia – “the common courts of all instances”; in Estonia – “other persons applying the law”; in Latvia – the “court”, in Lithuania – the “courts”, “the state and other institutions, as well as other persons”, in Moldova – “the courts”, in Ukraine – “all subjects of authority”, “other courts of general jurisdiction”.

Particular attention should be paid to the fact that in the legal systems of Armenia and Lithuania the bindingness of decisions in similar cases is mandatory for lower courts not only by the supreme courts, but also by lower courts' own decisions in similar cases. The Law on Courts of Lithuania anticipates that “the courts of lower instance, when taking decisions in cases of appropriate categories, shall be bound by their own rules of interpretation formulated in analogous or conceptually similar cases”, and in the Ruling of the Constitutional Court of the Republic of Lithuania it is set down that “the courts of general jurisdiction, when adopting decisions in cases of corresponding categories, are bound by their own

created precedents – decisions in the analogous cases”. Thus, in Armenia and Lithuania, the vertical case law is supplemented by the horizontal case law.

## Conclusions

1. In Soviet period, the case law was rejected and not recognized. This was justified by the fact that it contradicted the principle of socialist legality, and was brought about by the need for ideological opposition to bourgeois legal systems. However, it was due to the fact that case law allows for the activity and independence of the judiciary.

Courts in the Soviet legal system were under control and supervision of the supreme courts. One of the means for control and supervision was the regulatory explanations of the supreme courts based on summarizing the judicial practice. Such regulatory explanations were the invention of the Soviet legal system and also carried out the function of unification of judicial practice. At the same time, they diminished and reduced the role and significance of the decisions of the supreme courts in specific cases.

However, in judicial practice, the decisions of the supreme courts in complex and problematic cases were actually used as examples, samples and models for resolving similar and analogous cases. Consequently, in judicial practice, the need was felt for a greater importance of the decisions of the supreme courts for similar and analogous cases, that is, in nature of case law. Attention was also paid to the role and significance of the decisions of the supreme courts in complicated and problematic cases, but their case law was officially denied and not recognized.

2. After the proclamation and restoration of independence, all post-Soviet countries proclaimed the principle of the separation of power and thus the independence of the judiciary. Accordingly, the unification of judicial practice should be carried out not by the regulatory explanations of the supreme courts, which violate the independence of the judiciary but by other means, in particular, granting the decision of the supreme courts the value of an example, a model for resolving similar and analogous cases.

However, in part of the post-Soviet legal systems, the explanations based on the generalization of judicial practice remain. They are mandatory and binding in Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan, and recommendatory – in Azerbaijan, Moldova, Russia, Ukraine.

In those post-Soviet legal systems, which abolished the regulatory explanations of the supreme courts on the basis of summarizing the judicial practice, the decisions of the supreme courts in specific cases were given the value of an example, of a model for the resolving similar and analogous cases, that is, case law practice was introduced.

3. Case law is observed in Azerbaijan, Armenia, Estonia, Georgia, Latvia, Lithuania, Moldova and Ukraine. In different legislative acts, in particular in special laws on courts (Armenia, Georgia, Latvia, Lithuania, Ukraine), code of administrative procedure (Azerbaijan), codes of civil procedure (Estonia, Latvia, Lithuania, Ukraine), codes of criminal procedure (Georgia, Estonia, Moldova, Ukraine), provisions and mechanisms for direct or indirect ensuring of the binding force of the supreme court decisions in analogous cases are provided.

Such a recognition of case law in these post-Soviet legal systems came about gradually and at different times.

Among the post-Soviet countries which recognized the case law of the supreme courts, the Baltic states occupy a special place. In these countries, the binding nature of the decisions of the supreme courts in similar cases is established not only in laws but also justified in the decisions of the constitutional and supreme courts.

At the same time, there are differences in the introducing the case law of the supreme courts in the post-Soviet legal systems: in the areas, where the case law is used; in the wording of the character of bindingness; in the wording of the subject of bindingness; regarding the addressees of case law.

In those post-Soviet legal systems, which introduced the case law of the supreme courts, the mechanisms are also being formed for ensuring it, including the means of creation, ensuring bindingness and unity of the case law of the supreme courts, and the change and development of case law. The scope of this article does not permit to consider these issues, therefore a further discussion is required.

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