

# JUDICIAL LAWMAKING: A CONCEPTUAL EXPLORATION

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**Annotation.** The work aims to analyse the role of judicial lawmaking in the legal system of Ukraine and its impact on legal development. The study examines the extent of judicial authority in creating new legal norms, especially in comparison to the legislative branch.

The methodological basis of the study includes a comprehensive review of relevant legal literature, an analysis of Ukrainian legal provisions related to judicial lawmaking, and an examination of judicial decisions that have contributed to legal development.

The results of the study underscore the nuanced role of Ukraine's courts in the legal landscape. While Ukrainian courts face limitations in directly creating new legal norms, the research reveals their substantial impact on legal evolution through judicial interpretation and the establishment of precedents.

One key finding is the significant influence of judicial decisions on shaping legal practice in Ukraine. Through their interpretations of existing laws and legal principles, courts contribute significantly to the development of legal norms and standards. This process not only clarifies legal ambiguities but also ensures consistency and coherence in legal principles applied in various judicial proceedings.

The study also emphasizes the importance of precedents set by Ukrainian courts. By establishing precedents, courts provide guidance for future legal cases and contribute to the predictability and stability of the legal system. This aspect is crucial for legal practitioners, scholars, and the public in understanding the application of laws and legal principles in different contexts. Conclusions drawn from the study emphasize that Ukraine has a legal system where the legislative branch plays a predominant role in shaping and changing legal norms. The courts in Ukraine have limited authority in creating new norms, as their main task is to apply and interpret existing legislation to specific situations that arise in society. However, it should be noted that courts can influence legal development through judicial interpretation and establishing precedents. When a court decides on an issue that does not have a clear solution in the law, it can establish a new precedent that can then be used for similar cases in the future. This contributes to the development of legal practice and the establishment of stable and consistent principles of judicial decision-making. Therefore, although courts in Ukraine do not have as significant an impact on law formation as the legislative branch, they can still contribute to the development of the legal system through judicial interpretation and establishing precedents.

**Key words:** lawmaking, types of lawmaking, judicial lawmaking, administrative courts.

## 1. Introduction.

The modern judicial system plays a significant role in shaping and developing legal doctrine in countries with developed legal frameworks. One of the key aspects of this system is judicial lawmaking, defined as the ability of judicial bodies to create new legal norms or develop the interpretation of existing laws. This process not only reflects the importance of independent judicial authority but also has a significant impact on the legal system and legal application as a whole.

In this article, we conduct a conceptual exploration of judicial lawmaking to uncover the fundamental aspects and principles of this process. Additionally, we examine various approaches and theoretical concepts regarding the role of courts in shaping legal norms.

Our article aims to understand the essence and significance of judicial lawmaking in the context of the modern legal environment. We provide an analysis of concepts related to judicial lawmaking, discuss its role in addressing legal issues and ensure the development of legal application. Our goal is to highlight the key aspects of judicial lawmaking and contribute to further understanding and research of this important topic in the field of law.

## 2. Analysis of scientific publications.

In I.O. Shapovalova's publication, judicial lawmaking is not the central theme. Instead, the author explores the processes of legal formation in general, including legislation and norm-making, but does not focus on the specific role of courts in this process. Therefore, this publication may be useful for a general understanding of legal formation but does not directly address the topic of judicial lawmaking.

I.A. Serdiuk's publication conducts a methodological analysis of the concept of "lawmaking." It can clarify how scholars approach the theoretical analysis of judicial lawmaking and its methodology. However, it directly investigates judicial lawmaking rather than general lawmaking.

In the article "Lawmaking as a Type of Legal Activity: Praxeological Aspect" by V.I. Ryndiuk, lawmaking is explored as a separate type of legal activity, focusing on the praxeological aspect. It can provide insights into the practical aspects of judicial lawmaking, although it likely does not specifically analyze judicial lawmaking within the judicial sphere.

S.V. Chabur's publication examines various types of lawmaking based on subjective criteria. It can be beneficial for understanding different aspects of lawmaking, including judicial lawmaking, but does not directly focus on the role of courts in this process.

However, a comprehensive understanding of judicial lawmaking for contemporary administrative justice is not found in these articles. Therefore, the topic we have chosen remains relevant.

## 3. The aim of the work.

Based on a broad foundation of theoretical concepts, this article aims to uncover key aspects and approaches to understanding the essence of judicial lawmaking.

## 4. Review and discussion.

Legislation is a form of activity in which the state, together with civil society under specified legal conditions, establishes, modifies, or revokes legal norms. This process involves the creation, systematization, adoption, and publication of normative legal acts. The features of the legislation include the following:

- 1) conducted directly by the state or with its prior authorization, as well as with the participation of civil society and its entities.
- 2) involves the establishment of new legal norms or the modification/revocation of existing ones.
- 3) formally culminates in a written document called a normative legal act.
- 4) occurs in accordance with legal regulation, meaning it follows specified legal procedures [1, p. 2].

In modern general theoretical legal science, the following functions of legislation are distinguished:

- 1) the primary regulation of social relations involves the creation of new legal norms to regulate social relations that were not previously regulated by legislation.
- 2) updating the system of normative legal regulation, which includes changing existing norms or revoking "obsolete" norms to update the normative legal field.

3) improving legislation through codification and consolidation involves organizing normative legal material to improve the system of laws and legal acts [2, p. 70].

Based on the above, we can formulate a general concept of legislative activity as a process that takes place within the framework of public authorities, such as state authorities and local self-government bodies. The essence of this activity lies in the implementation of their powers to adopt binding decisions in the form of legislative and sub-legislative normative legal acts. This process is carried out using legislative techniques, has legislation as its object, and results in the creation of a new qualitative state of legislation regarding its content or form. The main goal is to create a proper legal order in society, and the condition for this is the presence of quality and effective legislation. Important directions for further scientific research include analysing the mentioned components of legislative activity [3, p. 40].

Regarding the types of legislative activity, they are traditionally distinguished based about implementation, namely:

- 1) popular legislative activity.
- 2) legislative activity of state bodies such as parliament.
- 3) legislative activity of individual officials such as the president and ministers.
- 4) legislative activity of local self-government bodies.
- 5) local legislative activity at the level of enterprises, institutions, and organizations.
- 6) Legislative activity of civil society organizations, including trade unions. [4, p. 35].

Considering Ukraine's affiliation with the continental legal system, these types of legislative activities have long been considered established. However, in the context of legal system convergence and harmonization of legislative norms amid globalization processes, courts are also often recognized as subjects of legislative activity. Traditionally, the court has always been a key entity in legal interpretation. Its role has been to interpret and apply laws, norms, and rules in practical situations arising in society. Judges, as representatives of the judiciary, are tasked with ensuring consistent and correct understanding and application of legislation in various situations that arise before them in judicial proceedings.

Nevertheless, one of the main functions of the court in the continental legal system is to resolve legal disputes, determine the scope of rights and obligations of parties in cases, and establish the correct understanding of laws in cases where they may be subject to ambiguous interpretations. Judicial interpretation is an important mechanism for ensuring stability, transparency, and fairness in the legal system.

The judicial interpretation of the law by judicial bodies can be considered as the final stage of the legislative process. According to the concept of concretization, the legislative process does not end with the publication of legislation. There is a need for harmonizing the abstract legislative text with the facts of the case through methods of interpretation within the framework of the Constitution or relevant law. In essence, this means that the judicial branch performs a "peripheral and subordinate legislative function" [5].

In addition, in the 21st century, courts also perform the function of creating legal precedents, which can be used as important grounds for further legal interpretation in similar cases. This allows the judicial system to adapt to new circumstances and evolve according to societal needs and demands.

The concept of "judicial lawmaking" was more characteristic of common law until recently, which originated in the English court system and spread to other countries such as the USA and Canada. In this system, judges use general societal concepts of fairness, moral values, customs, and traditions for the process of legal application and determine the law. This is known as common law, where judges become law creators based on their understanding of what is acceptable to the public. The basis of such lawmaking is not statutory norms but rather the judges' understanding of how legal cases should be resolved according to widely accepted values [5, p. 54].

Therefore, if in the field of common law, the institution of judicial lawmaking is an objective basis, then for continental law, this is an innovation, as here the process of legal interpretation and the application



of legal analogies are more common. Despite the contribution to new changes, they do not go beyond the substantive legal essence of norms that are interpreted at different levels. The tendency for Ukrainian jurisprudence is the convergence of common and continental law through the institution of judicial lawmaking, which can lead to expanding the source base and legitimizing judicial precedents, giving them an imperative character [7, p. 146].

Judicial lawmaking can contradict the principles of the rule of law in certain cases. For example, if a court makes a decision that is not based on legislation or precedents, it may violate the principles of legal certainty and predictability. Additionally, if a court uses its discretion to create new legal norms without sufficient legitimate basis, it can undermine the principle of separation of powers and blur the roles of legislative and judicial branches.

Therefore, judicial lawmaking needs to occur within constitutional and legal frameworks, ensuring the balanced development of the rule of law.

I. Ivaniura, D. Shevchenko, and A. Sivets argue that judges effectively create legal norms, which are defined as lawmaking and are an integral part of the judiciary. Even if this is not officially recognized, judges still intervene in the lawmaking process. Legislators cannot anticipate all situations, so courts are forced to address conflicts and gaps in the law arising from the rapid development of society. This discussion on judicial lawmaking continues, but it is important to acknowledge that judges contribute to lawmaking regardless of the type of legal system, as it is an integral part of their work [8, p. 297].

G. Tymchenko and Yu. Ryabchenko argues that judicial lawmaking is not solely a procedural and legal sphere based solely on the professional knowledge of judges, their practical experience, and their internal conviction of the correctness and truthfulness of their decisions. It represents a necessary procedural complexity that requires judges to resolve conflicts even if legal norms are absent or their application is complicated due to their inconsistency with the factual circumstances established by the court during the judicial proceedings. However, such lawmaking cannot be unlimited; its substantive legal significance must always be consistent with both the Constitution of Ukraine and the Universal Declaration of Human Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms [9, p. 157].

On the contrary, R. Dworkin believes that a judge should not act on their discretion even in difficult cases. If a judge struggles with interpretation, they should not engage in lawmaking. Instead, R. Dworkin developed the "theory of law," according to which a judge should be guided by principles that differ from rules in precedents or statutes. He is against judges making decisions based on discretion and believes that the main task of a judge in complex cases is to establish the rights of the parties involved rather than creating new legal norms. R. Dworkin emphasizes that a judge should apply existing laws without inventing new ones, ideally determining the rights of the parties in the case [10, p. 318].

In our view, judicial lawmaking is a process through which courts address legal issues that are not regulated by legislation or arise due to new situations or technological changes. Courts make decisions and establish new legal norms based on their interpretation of legislation, precedents, and legal principles. This is an important function of courts in ensuring legal stability and adapting the law to changes in society.

Judges as lawmakers act as translators, only making laws in difficult cases, and do so gradually. When making decisions, judges apply rules, standards, principles, concepts, and doctrines as part of their interpretation. If such authoritative sources are not applied, it can offend the community's sense of justice or contradict societal interests or policies, judges then look for new rules and refer to societal interests, in addition to the interests of the parties directly involved in the judicial process. The nature of the general law adopted by judges, the form of judicial review, and procedural requirements impose limitations on judicial lawmaking that do not apply to parliamentary lawmaking. Furthermore, judicial lawmaking is influenced by the needs expressed by society and other judges, both present and future. Judicial lawmaking complements legislative efforts in a democratic society, protects individuals and groups deprived of real access to the political process, and is typically exercised cautiously and based on relevant information [11, p. 120].

The general theoretical concepts of judicial lawmaking are important for understanding the essence of judicial activity and its impact on shaping the legal system. They define approaches to understanding and defining the role of courts in law formation and regulate the relationship between the judicial and

legislative branches. The main general theoretical concepts of judicial lawmaking include several key concepts.

O. Solomonyuk highlights the concept of cognition of reality [12, p. 156]. The concept of cognition of reality as a type of judicial lawmaking is aimed at the objective perception and analysis of the actual situation in society and nature. It is based on the scientific method, evidence-based approach, and logical arguments. In turn, judicial lawmaking describes the process of forming new legal norms and principles through judicial decisions and interpretation of legislation.

The essence of the concept of cognition of reality as a type of judicial lawmaking lies in the fact that courts not only decide specific cases but also establish precedents that can serve as the basis for forming new legal norms. This approach allows courts to have a more active influence on the development of the legal system and adapt it to changes in society. The advantages of this concept include:

- 1) Flexibility and adaptability: Courts can quickly respond to new challenges and situations in society by establishing new precedents and legal norms. The flexibility of judicial lawmaking involves judges making decisions based on previous court rulings and established legal interpretations. Being flexible, judicial precedent also ensures a certain level of consistency in legal decisions. Similar cases are usually handled similarly, providing a degree of predictability and fairness in the application of the law. Instead of inventing legal principles for each case anew, they can refer to existing precedents, saving time and resources.
- 2) Development of the legal system: This concept contributes to the continuous development of the legal system, allowing it to respond to contemporary needs and values. Although judicial precedent is based on past decisions, it also allows for legal evolution.
- 3) Over time, precedents may be reconsidered or overturned to better meet changing societal needs and perspectives.

However, this concept also has its drawbacks:

- 1) Insufficient stability: Changes in judicial practice can lead to instability and unpredictability in the legal environment.
- 2) Risk of subjectivism: Courts' interpretation of reality and establishment of new norms may be based on subjective views and preferences of judges.

Therefore, judicial lawmaking in legal literature is considered a special aspect of the law formation process. At the normative-legal level, Ukrainian higher judicial authorities do not have powers in the field of lawmaking. However, constitutional courts in countries such as Austria, Bulgaria, Italy, Germany, North Macedonia, Poland, Slovenia, have the right to adopt regulations regarding the organization of judicial activities. This aspect corresponds to regulatory judicial lawmaking [4, p. 35].

## **5. Conclusions.**

In our opinion, Ukraine has a legal system where the legislative branch plays a predominant role in shaping and changing legal norms. The courts in Ukraine have limited authority in creating new norms, as their main task is to apply and interpret existing legislation to specific situations that arise in society. However, it should be noted that courts can influence legal development through judicial interpretation and establishing precedents. When a court decides on an issue that does not have a clear solution in the law, it can establish a new precedent that can then be used for similar cases in the future. This contributes to the development of legal practice and the establishment of stable and consistent principles of judicial decision-making. Therefore, although courts in Ukraine do not have as significant an impact on law formation as the legislative branch, they can still contribute to the development of the legal system through judicial interpretation and establishing precedents.

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