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Judicial lawmaking and judicial reform: Theoretical and practical aspects of the relationship

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Abstract
The intensification of legal development, increased interpenetration of legal systems, and transformation of legal and state phenomena in the context of globalisation and integration processes necessitate the investigation of the nature of judicial lawmaking and judicial reform and their correlation. The purpose of this study was to theorise the relationship between judicial lawmaking and judicial reform. This study was based on the historical, formal legal, and comparative methods employed in the context of natural law, positivist, sociological approaches, integrative type of legal understanding, theories of lawmaking and justice. The principal findings of this study lie in substantiation of a series of theoretical provisions on judicial lawmaking and judicial reform. It was found that the legal nature of judicial lawmaking is profound and multifaceted. Judicial lawmaking and judicial reform are closely interrelated. One of the manifestations of this interaction is that the introduction of judicial lawmaking is a task, vector, or result of judicial reform. The study proved that judicial lawmaking is a significant achievement of judicial reform, and not a side effect of the transformation of the judicial system. Judicial lawmaking is an essential factor that substantially affects judicial reform in material, procedural, and organisational aspects. Judicial reform, as an independent type of state transformation, is a crucial area of state-building and is aimed at transforming justice into a fair mechanism for resolving legal conflicts and disputes based on the rule of law. With each stage of judicial reform in Ukraine, the need for official recognition of judicial lawmaking becomes more urgent. The 2016 judicial reform did not positively resolve this issue. As of 2024, the need to introduce judicial lawmaking is mostly recognised at the doctrinal level, but the legislating body denies it, although there are various manifestations of the applied use of the lawmaking potential of courts in the national legal system of Ukraine. The practical value of the findings is that the highest authorities of Ukraine can use them to improve the efficiency of lawmaking, justice, and the transformation of the judicial system

Keywords:
justice; judicial practice; judicial law; reform; state reform; legal reform

Introduction
The justice system is an important and ongoing subject of transformation in countries around the world. At the beginning of the judicial reform in Ukraine in 1992, it was not fully comprehended what a tremendous set of changes needed to be made to get closer to the defined goal of fair, independent, and accessible justice. It was expected to be completed within one to two years. However, it turned out that the idea from proclamation to full implementation had to go through a lot of resistance from established views and many compromises. Social transformations have given rise to new challenges that had to be considered. As the standards

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of justice have risen, the course of judicial reform has been constantly adjusted. Overall, the transformation of Ukraine's judicial system is ongoing and has not always been consistent. Judges and the legal community as a whole believe that this reform should be completed (Stefanchuk, 2023).

The judicial reform has once again raised the issues of judicial lawmaking, lawmaking activity of judges, and the place and role of the court in the lawmaking system (Didych, 2021). The important quality of judicial institutions in societies, especially in difficult periods of social transformation, is that the main driver of such changes is their consistent and proper protection of human rights and freedoms. Courts, as a tool for ensuring human rights, create a legal platform for expressing and protecting the interests of various social groups, using the fundamental principles of democracy, according to which a person is recognised as the highest social value. Considering this, the need to understand the theoretical and practical, doctrinal and regulatory dimensions of the interaction between judicial lawmaking and judicial reform is becoming particularly relevant in modern legal science, due to the intensification of legal development, increased interpenetration of legal systems (families, types), and transformation of legal and state phenomena (Kryvytskyi, 2023).

The topic of lawmaking is a traditional issue that is comprehensively addressed in monographs, scientific articles, textbooks, and guidelines on general theoretical and sectoral legal science (Drinóczi & Cormacain, 2021; Kolodiy & Kolodiy, 2021). The theoretical framework of this study included the scientific findings of Ukrainian and foreign researchers. Thus, S. Shevchuk (2007) focused on judicial lawmaking as a phenomenon that has common features in most modern legal systems and is historically based on the concept of judicial precedent. Of scientific interest is the monograph by D. Yasynok (2024), which outlines the theoretical foundations of judicial lawmaking and its limits in civil proceedings in Ukraine, specifically focusing on the evolutionary development of the institution of judicial lawmaking in civil proceedings of both common and continental law.

Among the studies of foreign experts, the book by K. Sideri (2007) is noteworthy, which covers a sociological understanding of lawmaking in the European Union (EU). Sideri's research focuses on the general social function of law in the new governance structures, which promotes decentralised and flexible procedures, as well as encourages discussion, stakeholder participation, and public dialogue. The manifestations of judicial activism, in particular lawmaking, are the subject of the study by S. Grover (2020). This monograph argues that judicial activism in relation to the protection of human rights and due process is a key feature of the democratic rule of law.

A valuable source is the work by M. Florczak-Wątor (2020), which analyses the specifics of lawmaking activities of European constitutional courts. The main hypothesis of the researchers is that constitutional courts are now positive legislators whose place in the system of state bodies needs to be updated. The book examines the lawmaking of four constitutional courts in Western countries: Germany, Italy, Spain, and France; and six constitutional courts in Central and Eastern Europe: Poland, Hungary, Czech Republic, Slovakia, Latvia, and Bulgaria; and two international courts: The European Court of Human Rights (ECHR) and the Court of Justice of the EU. The authors investigate the interaction between national constitutional courts and international tribunals in terms of their lawmaking activities.

In turn, the collective study by E. Timothy *et al*. (2023) offers a wide, in-depth, and diverse range of philosophical studies of the role of precedent in law, justice, and morality. The monograph covers the legal nature and authority of precedent and the forms of argumentation it provides in the common law and continental law systems. The chapter "Precedent and Lawmaking Powers" provides a critical overview of the debate on the relationship between precedent-setting and the use of lawmaking powers.

Therewith, some dimensions of the judicial lawmaking phenomenon, specifically, its relationship with judicial and legal reforms, stay unaddressed by researchers, which determines the purpose of this scientific study, which is to theoretically examine the relationship between judicial lawmaking and judicial reform. To fulfil this purpose, the following tasks were formulated: firstly, to characterise the legal nature of judicial lawmaking with due regard for modern contextual and conceptual approaches to understanding the lawmaking potential of a court; secondly, to determine the significance of judicial lawmaking in judicial reform; thirdly, to investigate the specific features and vectors of international and domestic judicial lawmaking activism's impact on judicial reform and legal transformation, and to analyse the prerequisites and areas of application of judicial lawmaking in the national legal system of Ukraine following the reform of the judicial system in 2016.

Materials and Methods

Considering the post-non-classical image (type) of science (Pylypiv & Semykras, 2021), the methodological tools of scientific research are represented by a set of ideological and research foundations and approaches, methodological and fundamental principles, general methods of scientific search, philosophical, general scientific, and special scientific methods and research techniques, which helped to theorise the interaction of judicial lawmaking and judicial reform, as well as to provide reasoned and highly reliable conclusions and research findings.

The basis for choosing the strategy for conducting this study was the natural law, positivist, sociological

(legal pragmatism and realism), and integrative types of legal understanding (Boyko, 2021), as well as theories of lawmaking and justice (Yusuf & Merwe, 2021). The study of the theoretical and practical foundations of judicial lawmaking and judicial reform was based on such fundamental principles of methodology as pluralism, historicism, and reliability. Considering the specific features of the subject, the purpose, and objectives of this study, a series of other key research approaches were additionally applied which are worth mentioning separately, namely: activity-based – in the content and instrumental description of judicial lawmaking and judicial reform as a type of social activity, manifestation of social creativity with the allocation of subjects, objects, goals, means, and results of such activity; a systemic approach – in determining the place of judicial activism and the transformation of justice in the system of lawmaking and state reforms, their interconnection with each other and other legal and state phenomena, such as legal reform; an anthropological approach – in establishing the role of a person, their rights and freedoms in judicial lawmaking and judicial reform, determining their objectives, goals, and limits.

Furthermore, the use of a dialectical approach helped to understand the essence, content, and forms of judicial lawmaking and judicial reform in their motion and functioning, as well as in terms of development prospects (Rastorhuiev *et al*., 2021). The use of the historical method is aimed at reconstructing the genesis of judicial lawmaking and judicial reform in Ukraine and the world in a retrospective perspective. The formal legal method contributed to the investigation of the theoretical and practical foundations of judges' lawmaking activity and the transformation of justice through legal constructions and legal terminology. The comparative method helped to analyse the international and European experience of judicial lawmaking and judicial reform in the ratio of common and different, mass and individual.

The empirical framework of this study included regulations, contracts and laws, which, along with others, comprise the legal support of lawmaking judicial activism and judicial reform[1,2], as well as Ukrainian, German, and Polish judicial practice, case law, specifically the decision of the Supreme Court (SC) of Ukraine[3], of the Constitutional Court (CC) of Ukraine[4], the Federal Court (FC) of Germany and the Supreme Court (SC) of Poland (Decisions of the Federal Court of Justice, n.d.; Latest decisions, n.d.). The study analysed 200 cases, which were systematised in databases on the respective official websites.

Results and Discussion

The legal nature of judicial lawmaking. Judicial lawmaking is a phenomenon of the legal past and legal reality. The emergence and widespread use of the term 'judicial lawmaking' is associated with the scientific definition of the phenomenon of administration of justice, when, in deciding a case or summarising judicial practice, judges formulate new legal provisions that did not previously exist in the text of the law, "binding" the general rules of objective law to the requirements of real life and the challenges of modernity, which takes place during court consideration of a particular case. It is well-known that such a prohibition on judges' participation in the creation of legal norms dates to the periods of codification of law by the Emperor Justinian I of the Eastern Roman Empire and the French Revolution of the 18th century. Furthermore, this ban was supported by the ideological basis of the Soviet government, and thus the legal system of that historical era. However, the notion that judges should apply legal norms exclusively in their literal sense and not deviate from their meaning, especially in their interpretation, does not meet the needs of the latest legal development that has prevailed in states with established democratic regimes (primarily European countries, especially since the second half of the last century) (Shevchuk, 2007).

Judicial lawmaking by courts can be considered an independent type of lawmaking, which is quite controversial. During its genesis, judicial lawmaking has always served the primary purpose of direct protection of human rights and freedoms, and courts have been guided not only by constitutional norms, but also by principles, the main of which are justice, reasonableness, natural law, equality, compliance with deontological criteria, social necessity, and the goals of legal regulation of social relations (Plavych & Plavych, 2013).

The place of the court in lawmaking has been perceived differently throughout the historical development of legal systems. The spectrum of different approaches to understanding the role of the court ranged from complete equation of the court with the actual creator of law in the common law tradition to the state body that performed the honourable role of "the mouth that proclaims the words of the law", in other words, a mechanism of direct interpretation of the text of laws, the action of which excludes the slightest element of

[1] Law of Ukraine No. 1402-VIII "On the Judiciary and the Status of Judges". (2016, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1402-19#Text.
[2] Law of Ukraine No. 1401-VIII "On Amendments to the Constitution of Ukraine (Regarding Justice)". (2016, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1401-19#Text.
[3] Resolution of the Supreme Court of Ukraine No. 2-3897/10. (2021, May). Retrieved from https://verdictum.ligazakon.net/document/96498387.
[4] Decision of the Constitutional Court of Ukraine No. 1-p/2023. (2023, February). Retrieved from https://ccu.gov.ua/sites/default/files/docs/1-r2023_0.pdf.

lawmaking. This approach was typical for Europe during the period of legal etatism. In the 21st century, in the context of total and comprehensive globalisation, and as a result, the interpenetration and mutual influence of legal systems, such a wide range of differentiated approaches no longer exists, although there are quite noticeable differences in positions depending on the type of legal systems, approach to understanding law, historical tradition, etc. As a result, the role of the court in lawmaking is growing, and the features inherent in the common law and civil law systems are converging. The basis for the development of this process is the declaration and recognition of undeniable and inalienable human rights, the rule of law, and the doctrine of constitutionalism – the need to limit public power by law and entrust the function of protecting these values to the court (Bošnjak & Zajac, 2023).

According to the position of S. Shevchuk (2007), judicial lawmaking is a specific type of lawmaking activity that results from the implementation of lawmaking activity by judicial authorities together with their law enforcement and law interpretation powers in resolving a particular legal case, contained in the legal provisions defined by the court in the reasoning part of the judgement, which are binding not only on the parties to the case, but also on other subjects of law according to the law or by virtue of the principle of hierarchy of the judicial system or by virtue of their reasoning in consideration of comparable cases. The term "judicial lawmaking" is quite close to the term "judicial practice" in its narrow sense, which is often found in regulations and professional literature.

In general terms, judicial lawmaking is defined as a specific activity of the judiciary, which results in the establishment, amendment, or cancellation of legal norms. The key features of judicial lawmaking are, firstly, that the subject of judicial lawmaking is a court as a public authority on behalf of which judges who are members of a particular court function. Secondly, judicial lawmaking is an additional function of the court, since the main purpose of its activity is to consider legal disputes through law application and adoption of relevant individual legal acts, and not to create general rules of conduct through lawmaking. It is in this that the "specificity" of the judiciary's lawmaking activity is mostly manifested. Thirdly, judicial lawmaking requires authorisation from the highest representative body of public authority, usually by adopting a special law (alternatively, by "tacit consent" of the representative body and is a kind of legal custom, akin to the legal system of the United Kingdom).

Judicial lawmaking is divided into two types by subjects: 1) carried out by courts of general jurisdiction; 2) carried out by a court of constitutional jurisdiction (Florczak-Wątor, 2020; Musella & Rullo, 2024). Judicial lawmaking acts are quite diverse: a) judicial precedent; b) quasi-precedent; c) regulation of a judicial authority. They have in common their origin from a judicial authority and their generally binding nature, which confirms that these acts provide a general level of legal regulation, as opposed to law enforcement acts, which can only provide individual legal regulation. Notably, judicial lawmaking is not a specific feature of the functioning of individual legal systems or their creation. It has always been inherent in law at all historical stages of its development. The main purpose of law is to resolve legal conflicts and contradictions through the use of judicial procedures. Concrete legal arrays (or legal families, types, systems) have an impact exclusively on the forms and types, the actual technology of judicial lawmaking, and the legal significance of its results (Makhambetsaliyev *et al*., 2023). Judicial lawmaking in some legal systems is official, and therefore its results have the status of a full-fledged source of law (Saparbekova *et al*., 2024). In others, judicial lawmaking may be denied, for instance, at the level of legal ideology or legislation, but this does not deny its existence within these legal systems in the form of judicial practice (latent form), and thus be a lawmaking factor, still affecting social relations (Bihun, 2009).

According to O. Lynnyk (2020), judicial lawmaking is an exemplary activity of the judiciary to establish, amend, or repeal rules of conduct to fill gaps in legislation, increase the legal force of sub-legislative regulations, and eliminate contradictions between forms (sources) of law. Proceeding from the formulated definition, O. Lynnyk (2020) identified six key features of judicial lawmaking: 1) carried out by higher courts; 2) promotion of the principle of legal certainty; 3) derivative nature from the main judicial functions: administration of justice and application of law; 4) extension of the effect to all subjects of law; 5) embodiment of court decisions in the form of judicial legal provisions; 6) the content is the adoption of new rules of conduct, cancellation or improvement of existing ones. This position is a vivid example of understanding judicial lawmaking as a guarantee of human rights.

According to O. Kopytova (2020), the specific feature of judicial lawmaking is conditioned by a series of features that determine its role in the overall lawmaking mechanism. First of all, judicial lawmaking is an "additional" result of justice, since it is not, in essence, an independent form of judicial activity and cannot be separated from the main judicial function – the administration of justice. Furthermore, judicial lawmaking is carried out in the same procedural form. Judicial lawmaking as an additional function of the judiciary is closely intertwined with the administration of justice. Accordingly, judicial lawmaking differs from lawmaking carried out by the legislature in that lawmaking is the main and independent function of legislators. The presented point of view quite rightly reflects certain aspects of the nature of lawmaking judicial activism.

Judicial lawmaking is not a deviation from the norm, but a characteristic inherent in the nature of justice, which, albeit limited, cannot be excluded from the court's activities, as it lies in the very essence of justice. One of the key reasons for the need for judicial lawmaking is the need to clarify or detail the provisions of laws and other regulations adopted by official lawmakers, or, more precisely, to update them, in other words, to adapt them to new situations that become the subject of court proceedings, considering a wide range of factors that affect the court's decision. The process of interpreting the constitution, laws, and other legal acts cannot do without the use of certain elements of lawmaking, which is an integral feature of justice, just like lawmaking (in essence, it is its component) (Bošnjak & Zajac, 2023). Any judicial lawmaking, and especially lawmaking in so-called complex situations, when it is necessary to make a decision that may raise doubts about its compliance with the principle of separation of state powers, is carried out by the court on the basis of a comprehensive consideration and weighing of the arguments for and against, and the conclusion that the protection of the human right that is the subject of its consideration is impossible without the formation of a certain legal provision of normative content. In other words, these are situations when the arguments for ensuring human rights are higher in the list of values than the belief in the need to respect the principle of differentiation of branches of state power. According to L. Ayoub (2022) and R. Rodiyah *et al*. (2023), human rights are the basic criterion, in other words, the compass that defines the boundaries of judicial lawmaking technology. In support of the rationality of this conclusion, it is relevant to cite the statement that in the general nomenclature of humanitarian values, human rights, like the human being itself, occupy a key place and prevail over all others. Their authority and weight are unquestioned, and their role and purpose are clear.

The impact of international and national judicial lawmaking on the reform of the justice system. Justice, judicial lawmaking, and judicial reform are complex legal phenomena that exist and function both independently and in close interrelation with each other. In this regard, scholarly works emphasise the need to improve legal instruments in the field of case law. This should become one of the key tasks in the latest Ukrainian judicial reform, since the existing substantial differences and contradictions in law enforcement practice create the basis for instability in the justice system and impede the implementation of the principle of equality of all participants in the judicial process both before the law and the court, levelling the significance of such a fundamental and constitutionally consolidated principle as the rule of law (Shevchuk, 2007). The formation of the basis for the introduction of a unified judicial practice and ways to ensure its stability depend on the lawmaking activity of judges. The judicial reform has given the problem of judicial lawmaking a new emphasis and focus on terms of strengthening the role of decisions of the highest judicial body. As of 2024, the main task for the judiciary in particular and the legal system of Ukraine in general is to outline the path along which the doctrine of judicial lawmaking and key aspects of its practical implementation will develop (Didych, 2021). The implementation of judicial reform following the principle of separation of powers necessitates clarifying the role of judicial lawmaking in the performance of justice tasks in administrative proceedings (Rastorhuiev *et al*., 2021).

According to L. Moskvych (2011), the system of comprehensive measures to optimise the judicial system within the framework of the main directions of judicial reform in Ukraine should include, among other things, granting official precedent status to the decisions of the Supreme Court upon consideration of an application for review of a court decision due to unequal application of the same legal provisions by the cassation court in respect of analogous legal relations. This scientific position, which is substantiated within the framework of the development of the concept of judicial efficiency and the theory of judicial law, deserves support. The latest practice of convergence and interpenetration of the continental and Anglo-Saxon systems of law creates the need to make relevant amendments to national legislation. As a result, in certain categories of cases, higher judicial institutions will make precedent-setting decisions.

In the context of drafting an effective judicial reform (as opposed to bureaucratic (pseudo)reforms), it is reasonable to argue that the main cause of judicial corruption is the lack of uniformity in law enforcement and predictability of court decisions. Instead, the principle of uniformity of law enforcement will ensure the predictability of court decisions. In countries with little judicial corruption, the so-called case law is in place. When considering a case, a judge is obliged to be guided by the decisions made by a higher court in the past. The judge simply cannot make a different decision than the one that has already been made in an analogous case. Otherwise, the judge will be forced to bear full responsibility for their actions. Furthermore, the introduction of a case law system in Ukraine will also help to offset the effect of the mechanisms that functioned in the past and were lost (primarily prosecutorial supervision of the judiciary and the binding nature of the SC Plenum resolutions on the courts) (Boshytskyi, 2020).

The transformation of the judicial system of Ukraine, as well as other states, is substantially influenced by the conventional legal positions of the ECHR, which review the effectiveness of existing intrastate mechanisms for ensuring human rights and freedoms, branches of substantive and procedural law, and national models of the judiciary (Bošnjak & Zajac, 2023).

The ECHR judgments help to understand why an applicant to an international judicial body failed to properly obtain protection of its violated subjective rights within the framework of national justice, what gaps in the legal system indicate that the judicial reform is incomplete and needs to be improved, and what additional tools are needed to ensure the right to adequate judicial protection. The content analysis of the ECHR judgments delivered in cases against Ukraine and individual states parties to the Convention for the Protection of Human Rights and Fundamental Freedoms allows identifying the key areas of reform and vectors for improving the Ukrainian judicial system in terms of their correlation with European standards of justice (Fig. 1).

Development of the material dimension of the justice system:

- introduction of new principles and approaches to the functioning of the justice system;
improvement of the terminology used in the field of judicial protection of human rights and freedoms and their legal interests;
- enhancement of the quality of existing substantive and procedural law aimed at strengthening human rights guarantees and opportunities for their implementation;
- transformation of professional legal consciousness according to the "spirit" of the Convention, which is reflected in the awareness of the priority of protecting human rights and freedoms, and the use of the Convention rules and practice of the ECHR in law enforcement activities.

Improvement of the procedural form and progressive development of a series of procedural law institutions:

- the principles of judicial proceedings (public hearing, openness and transparency, impartial trial, legal certainty, reasonable timeframes for consideration of cases and binding nature of court decisions, etc.) and algorithms for their application;
- court procedures (optimisation and unification, improvement of certain stages);
- resolution of the problem of "competition between judicial jurisdictions" and development of an optimised model for the enforcement of court decisions.

Strengthening of the institutional components of the justice system:

- rationalisation and harmonisation of the judicial system;
- monolithic judiciary (elimination of duplication of powers and establishment of constructive interaction);
- improvement of the legal status of judges;
- increasing the significance of judicial self-government in the functioning of the justice system;
- optimisation of the forms of involvement of the population (civil society) in the judicial process

Figure 1. The primary areas of reforming and improving the justice system in Ukraine in terms of correlation with European standards of justice

Source: developed by the author of this study based on the findings of O. Khotynska-Nor (2016)

The primary task of justice – the search for law in a particular case – is fulfilled by applying and interpreting the law following certain prerequisites and further development of the law. Thus, not only national law, but also the law of the "old democracies" of continental Europe is being influenced by the Anglo-American legal family through the increasing spread of quasi-regulation by the ECHR, the Court of Justice of the EU, and the supreme and constitutional courts of a series of European states (Florczak-Wątor, 2020). As an example, let us turn to foreign practices, specifically, the case law of the highest courts in criminal cases in Poland and Germany. While German legal science fundamentally recognises the power of the judiciary to create new law, Polish legal theory generally rejects this notion. However, the study shows that in practice, the differences in the number and intensity with which these courts issue creative decisions are not as significant as the divergence in theoretical positions suggests. Considering the circumstances, both the German Federal Court and the Polish Supreme Court can create new rules of law, but the dimensions of judicial law represented by these judicial bodies differ from each other. In the research sample (100 judgments), the German Federal Court was more inclined to introduce legal institutions that were alien to the statutes[1] and to make decisions contrary to the will of the legislator[2]. On the other hand, the Supreme Court of Poland (the same number of judgments) used logical conclusions more often, but also did not refrain from ruling against the clear wording of the law[3], and was also ready to venture outside the wording of the law[4]. Notably, only the German Supreme Court

[1] Decision of the Federal Court of Justice of Germany No. BGH GSSt 1/04. (2005, March). Retrieved from https://www.hrr-strafrecht.de/hrr/3/04/gsst-1-04.php.
[2] Decision of the Federal Court of Justice of Germany No. BGH GSSt 1/23. (2023, May). Retrieved from https://www.hrr-strafrecht.de/hrr/2/23/gsst-1-23.php?referer=db.
[3] Decision of the Supreme Court of Poland No. II CZ 25/07. (2007, May). Retrieved from https://www.sn.pl/wyszukiwanie/SitePages/orzeczenia.aspx?ItemSID=12959-8dcfa950-a611-4756-8f8a-7df105220758&ListName=Orzeczenia2.
[4] Decision of a Seven-judge Panel of the Supreme Court of Poland No. I KZP 22/22. (2023, June). Retrieved from https://www.sn.pl/orzecznictwo/SitePages/Najnowsze_orzeczeniaIOZ.aspx?ItemSID=1796-301f4741-66aa-4980-b9fa-873e90506a11&ListName=Zagadnienia_prawne.

openly admits that it creates new rules of law[1], while the Polish Supreme Court does not consider its decisions to be lawmaking, especially when it applies the so-called "interpretation in a broad sense"[2] – which is essentially a "hidden" way of creating new rules of law.

Although the German supreme court is more open in its creativity and German legal science is potentially receptive to judicial lawmaking, it would be an exaggeration to claim that judge-made law plays a more significant role in German criminal justice than in Polish criminal justice. In practice, the frequency and depth of creative decisions made by the Criminal Chamber of the Supreme Court of Poland are higher than the Polish legal doctrine provides for (Table 1 number of decisions..., 2024). However, this is at least to some extent an indication of the reality of the cases that the courts have to decide, and among them, especially the higher courts. A principled position that completely prohibits courts from going beyond the written law is in fact impossible. Complete legal regulation that provides convincing solutions for all cases and keeps pace with social change may be an ideal to strive for, but it is ultimately unattainable. Judges may point out deficiencies in the statutes in the statement of reasons or even call on the legislature to act, but ultimately they must resolve the case in a satisfactory manner and cannot refrain from ruling on the merits simply because the legislature has not provided a convincing solution to a particular legal problem. It can be argued whether in a particular case the superior court has overstepped the boundaries of acceptable creativity and whether the judiciary is pushing the boundaries too far in its favour, but as long as statutory law is incomplete or flawed, judicial law, as M. Małolepszy & M. Głuchowski (2023) note, is a necessary mechanism in every legal culture.

Status and trends in the implementation of judicial lawmaking in the national legal system of Ukraine as a result of the judicial reform of 2016. The critical perception of judges involved in the formation of law, as well as the normative effect of decisions made by them, by some researchers (Serdiuk, 2017) and public officials, destroys the unity of judicial practice, uniformity of application of the law by courts, and, unfortunately, substantially slows down the establishment of an independent judiciary in Ukraine. As of 2024, the issue of granting the court lawmaking powers and recognising judicial precedent as a form (source) of law is on the agenda and may affect the system of separation of state power, which will affect the basic principles of a rule-of-law, democratic state, as well as the existing sustainable practice of lawmaking. Thus, according to N.M. Parkhomenko (2023), the chance of a judicial precedent entering the set of forms (sources) of Ukrainian law is determined, which should be a gradual process associated with strengthening the independence of the judiciary, increasing the level of professional requirements for judges, ensuring a suitable level of legal culture of the population, etc. This reasonable opinion reflects the essence of the evolutionary approach of introducing judicial lawmaking into the national lawmaking mechanism.

The current system of justice is a logical consequence of the reforms carried out in the judiciary, which purposefully (though not always effectively) implemented ideas and measures of a diverse nature, content, and scale, sometimes with rather contradictory results (relative to the stated purpose). Ukraine has often followed a "non-linear" path of judicial reform, ignoring political, economic, and cultural factors that came to the fore at different times of the rule of law. However, it did bring about qualitative changes in the judicial system, which become clearer in retrospect. These include, first and foremost, improving the position of judges, establishing judicial self-government, functioning of administrative proceedings, modernisation of court procedures to enhance competitiveness and judicial control over the observance of the lawfulness of pre-trial investigation in criminal proceedings (Khotynska-Nor, 2016).

On 2 June 2016, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On Amendments to the Constitution of Ukraine (Regarding Justice)" No. 1401-VIII[3] and, as its logical continuation, the Law of Ukraine "On the Judiciary and the Status of Judges" No. 1402-VIII[4]. The aforementioned laws came into force on 30 September 2016 and marked the next stage of the judicial system reform, which is characterised by substantial changes in its organisation. The reform of the justice system was aimed at bringing the judicial system in line with European standards and laying the groundwork for the renewal of the judiciary. The fundamental task of judicial reform is clearly to introduce such mechanisms that would ensure human rights and freedoms by providing everyone with access to impartial, effective, and independent justice, as well as guarantee that everyone receives a clear, reasoned, and substantiated court decision, in other words, a court service of proper quality (Bondar, 2018).

[1] Decision of the Federal Court of Justice of Germany No. BGH 4 StR 371/03. (2004, February). Retrieved from https://www.hrr-strafrecht.de/hrr/4/03/4-371-03.php3?referer=db.
[2] Decision of the Supreme Court of Poland No. I KZP 4/07. (2007, April). Retrieved from https://www.sn.pl/wyszukiwanie/SitePages/esprawa.aspx?ItemSID=7054-63787658-a27b-4a58-b387-bf1b4a34945&ListName=esprawa2007&Search=I%20KZP%204/07.
[3] Law of Ukraine No. 1401-VIII "On Amendments to the Constitution of Ukraine (Regarding Justice)". (2016, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1401-19#Text.
[4] Law of Ukraine No. 1402-VIII "On the Judiciary and the Status of Judges". (2016, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1402-19#Text.

Therewith, the judicial reform of 2016 did not meet the decade-long expectations of the progressive legal community regarding the official (legislative) recognition of judicial lawmaking. The current version of the new Law of Ukraine No. 1402-VIII[1] is quite conservative in this regard and does not say anything original about judicial lawmaking, limiting itself to authorising courts of various instances to study case law and generalise it. Such an approach of the legislative body to non-recognition of the institution of judicial lawmaking indicates that it fears that the judiciary will take over lawmaking or will indulge certain political forces, influencing the key issues of public administration, the electoral process or regulation of important social relations through lawmaking (Kravchenko, 2021).

At the same time, after the adoption of new versions of all Ukrainian procedural codes in 2017, except for the Criminal Procedural Code of Ukraine (which was amended), the legislative body prohibited courts from refusing to consider a case (justice) on the grounds of absence, incompleteness, vagueness (ambiguity), or contradiction of the legislation regulating the disputed relations (part 11 of Article 11 of the Code of Commercial Procedure of Ukraine dated 6 November 1991[2]; part 10 of Article 10 of the Civil Procedural Code of Ukraine dated 18 March 2004[3]; part 4 of Article 6 of the Code of Administrative Procedure of Ukraine dated 6 July 2005[4]). Thus, the legislative body, albeit indirectly, still empowers judges to resort to judicial lawmaking to overcome legislative gaps, solve an exceptional legal problem (Timchenko & Kotvyakovsky, 2022), deviate from the conclusion on the application of legal norms in comparable legal relations (Yasynok, 2023), make an exemplary decision (Shumylo, 2022), and ensure the development of law. In such circumstances, judicial lawmaking includes a mechanism for filling legislative gaps, which is always based on the substantive nature of a particular branch of substantive law to which the subject matter of the dispute belongs. It is in this way that it is advisable to carry out "legal repair" work by the court to eliminate from legal circulation an "exceptional legal problem" caused by incomplete, unclear, inaccurate or contradictory content of existing legal provisions or their gaps (Yasynok, 2024).

As of 2024, courts of all instances are factually "finishing building" the law in case of conflicts or lack of provisions in legislation, the Supreme Court, summarising case law, promotes uniform application of legal norms by courts, while the Constitutional Court of Ukraine implements negative lawmaking, recognising the unconstitutionality of legal acts and their individual elements, which entails their invalidation (e.g., the Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of 56 MPs of Ukraine on the compliance of the third paragraph of the second part of Article 22 of the Law of Ukraine "On Complete General Secondary Education" of 2023 with the Constitution of Ukraine (constitutionality)[5]. This activity of the judiciary of Ukraine has quasi-precedent-setting, law-interpreting, law-enforcing and, as a result, lawmaking nature (Lynnyk, 2020).

Fairness, reasonableness, efficiency, rationality, and the highest level of social generalisation constitute the deepest meaning of judicial lawmaking. On the other hand, judicial lawmaking acts as a procedural and legal safeguard that should always be triggered in case of the slightest gaps in legislation (Kravchenko, 2021). As of 2024, the authority and role of the Supreme Court's practice is extraordinary. Never before has the legal community's attention been so closely focused on the actions of the Supreme Court. It determines the vectors and is the foremost authority in shaping judicial practice and doctrinal research in the field of law. Certain rulings of the cassation instance resolve long-standing unresolved problems and formulate new questions that the legislature and legal scholarship are seeking to answer. The practice of forensic science is increasingly gaining momentum and weight, which is perceived not only in terms of the need to apply, but also in terms of the recognition and acceptance of such findings by the academic community (Shumylo, 2022). The ruling of the Civil Court of Cassation of the Supreme Court (dated 21 April 2021 in case No. 2-3897/10[6]) has stirred up professional circles in Ukraine, especially in the legal field, specialising in both family law and non-pecuniary damage (Kovalskyi, 2021). Undoubtedly, the aforementioned court decision will be analysed in both educational and scientific studies. Overall, this approach of the Supreme Court is modern, it is only at the beginning of the admission to law enforcement. The legislature should consider this legal opinion of the Supreme Court and make relevant amendments to the provisions of objective law, providing for such a possibility at the legislative level in the future. This, according to M.M. Shumylo (2021), will bring the national legal system of Ukraine closer to the requirements of anthropocentrism. It is worth supporting this opinion regarding the quasi-precedent-setting nature of the Supreme Court's decisions

[1] Law of Ukraine No. 1402-VIII "On the Judiciary and the Status of Judges". (2016, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1402-19#Text.
[2] Code of Commercial Procedure of Ukraine. (1991, November). Retrieved from https://zakon.rada.gov.ua/laws/show/1798-12#Text.
[3] Civil Procedural Code of Ukraine. (2004, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1618-15#Text.
[4] Code of Administrative Procedure of Ukraine. (2005, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2747-15#Text.
[5] Decision of the Constitutional Court of Ukraine No. 1-p/2023. (2023, February). Retrieved from https://ccu.gov.ua/sites/default/files/docs/1-r2023_0.pdf.
[6] Resolution of the Supreme Court of Ukraine No. 2-3897/10. (2021, May). Retrieved from https://verdictum.ligazakon.net/document/96498387.

(legal opinions), considering that quasi-legal regulation is primarily its additional, subsidiary function.

Conclusions

Based on the above, the conclusion of this study is that judicial lawmaking is a significant, immanent, and specific type of lawmaking activity. In the leading states of the modern democratic international order, lawmaking judicial activism is characterised as a reliable tool provided to the judiciary within the framework of its judicial powers, and this tool is used quite effectively. Judicial lawmaking and judicial reform are closely interrelated. One of the manifestations of this interaction is that the introduction of judicial lawmaking is a task, direction, or result of judicial reform, the essence of which, as a type of state reform, is reduced to the progressive transformation of the justice system. Judicial lawmaking is about enhancing the authority of the judiciary and promoting the unity and consistency of judicial practice. Justice and judicial lawmaking are not mutually exclusive. Lawmaking judicial activism is subordinated to the goal of justice (to resolve legal conflicts based on objective law and the requirements of the principles of justice, freedom, equality, and humanism), and is one of the ways to achieve it. Furthermore, only judicial lawmaking can fill law in its specific dimensions and aspects not only with ideas, but also with the concrete essence of these fundamental principles. It follows that judicial lawmaking should be a substantial achievement of judicial reform.

International and intrastate judicial lawmaking is a constitutive factor that substantially affects judicial reform in material (substantive), procedural, and organisational (structural) aspects. Furthermore, judicial lawmaking is the basis and prerequisite for legal reform, i.e., a qualitative, progressive transformation of law. In this context, judicial lawmaking contributes to the development of legal doctrine and is an indicator for the legislator that certain legal relations need to be harmonised, that social relations have changed, become more complex, and require urgent legal regulation, and unfortunately, the legislator is already late in regulating them. The theoretical and practical significance of the impact of judicial lawmaking activism on the reform of the judicial system and legal transformation is that judicial lawmaking is the basic, initial basis for the progressive transformation of the national justice system, judicial system, judicial authorities, and the system of law, especially the judicial branch of law.

Judicial reform, as an independent type of state transformation, is a significant area of state-building and is aimed at transforming justice into a fair mechanism for resolving legal conflicts and disputes based on the rule of law. For a long time, the Ukrainian state has been in a continuous state of change in the judicial system, the effectiveness of which is now a substantial indicator of Ukraine's readiness for integration with the EU. In the context of implementing the next stage of reforming the justice system in Ukraine, the need for regulatory consolidation of lawmaking judicial activism is of particular significance. The last transformation of justice in 2016 did not effectively address this problem. The need for wider use of the lawmaking potential of courts is mostly approved by lawyers, but denied by representatives of the legislature, although there are various manifestations of applied use of lawmaking activism of courts (primarily the Supreme Court and the Constitutional Court) in the legal system of Ukraine. The author of this study expresses hope that the recognition of judicial lawmaking in the national lawmaking system is only a matter of time.

It is promising to investigate the methodological, conceptual, practical, and comparative foundations of the theories of judicial lawmaking and judicial reform, the content and instrumental manifestations of interaction, the intersection of judicial lawmaking activity and the transformation of justice, and the distinction between judicial reform and judicial and legal reform.

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Conflict of Interest

The author of this study declares no conflict of interest.

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Судова правотворчість і судова реформа: теоретико-практичні аспекти взаємозв'язку

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Анотація
Інтенсифікація правового розвитку, посилення взаємопроникнення правових систем, трансформація правових і державних явищ в умовах глобалізаційних та інтеграційних процесів обумовлюють актуальність вивчення природи судової правотворчості й судової реформи, їх співвідношення. Мета наукової розвідки – теоретизація взаємозв'язку судової правотворчості та судової реформи. Методологічну основу статті становили історичний, формально-юридичний, компаративний методи, застосовані в контексті природно-правового, позитивістського, соціологічного підходів, інтегративного типу праворозуміння, теорій правотворчості й правосуддя. Основні результати наукового пошуку полягають в обґрунтуванні низки теоретичних положень про судову правотворчість і судову реформу. Було встановлено, що юридична природа судової правотворчості глибока та багатогранна. Судова правотворчість і судова реформа знаходяться в тісному взаємозв'язку. Один із виявів такої взаємодії зводиться до того, що запровадження судової правотворчості є завданням, напрямом або результатом судової реформи. Доведено, що судова правотворчість є вагомим здобутком судової реформи, а не побічним наслідком перетворення судової системи. Судова правотворчість є важливим чинником, що суттєво позначається на судовій реформі в матеріальному, процесуальному й організаційному аспектах. Судова реформа як самостійний вид державної трансформації є визначальним напрямом державотворення та спрямована на перетворення правосуддя на справедливий механізм вирішення юридичних конфліктів і спорів на основі верховенства права. З кожним етапом судової реформи в Україні актуалізується необхідність офіційного визнання судової правотворчості. Судова реформа 2016 року позитивно не вирішила це питання. Станом на 2024 рік потребу запровадження судової правотворчості переважно визнають на доктринальному рівні, але законодавець її заперечує, хоча наявні різні вияви прикладного застосування правотворчого потенціалу судів у національній правовій системі України. Практична цінність отриманих результатів дослідження полягає в тому, що вони можуть бути використані вищими органами влади України для підвищення ефективності правотворчої діяльності, правосуддя та перетворення судової системи

Ключові слова:
правосуддя; судова практика; судове право; реформа; державна реформа; правова реформа