

MALMÖ UNIVERSITY

## GLOBAL POLITICAL STUDIES

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COURT ON HUMAN RIGHTS



## TABLE OF CONTENTS

<b>CONTENTS</b>	<b>PAGES</b>
<b>1.0 Introduction</b> .....	2
<b>1.1 Background</b> .....	2
<b>1.2 Problem statement</b> .....	2
<b>1.3 Aim of Study</b> .....	2
<b>1.4 Rationale</b> .....	3
<b>2.0 Literature Review</b> .....	3
<b>3.0 Conclusion</b> .....	16
<b>4.0 Bibliography</b> .....	18



## 1.0 Introduction

### 1.1 Background

The European Court on Human Rights (ECHR) has a great role in protecting of human rights as a regional court in Europe and the court is considered the most effective regional institute on protection of human rights. Giving priority to human rights the European Court on Human Rights legally protects them in a clear and exemplary way. Besides, the ECHR causes to developing and spreading of precedent law by the referring its prevision decisions when the court came to decision on almost every cases. This estimably activity of the court is very important for the developing aspects of human rights issues. Consequently the case law process of the ECHR influences to domestic legal systems of member states and in results a lot of important changes arise in them.

The paper focuses on the “precedent law activity”, in other word “case-law activity of the Court” implied that Court’s arguments or positions on a case are used by itself and national courts of member states as well as when they make a statement on a case. Such activity is called “precedent law”, but in some resources it is called like as “case-law”. To understand precedent law of the European Court on Human Rights we have to study precedent law ideology whole as a theory. Therefore the paper focuses precedent law in also theoretical aspect.

Our focus should be the ideology of precedent law as theory and the ideology of precedent law of the European Court on Human Rights.

### 1.2 Problem Statement

Existence of notion of “precedent law of the European Court on Human Rights” from analytical aspect has been discussed among scholars for a long time. This problem related to several issues. Such as, Kuchin explain these like as below: “For a long time, notion of ‘precedent law of the European Court on Human Rights’ was not accepted as a theoretical trend by western scholars. Because they believed that notion of precedent law’ is belong to English common law (Anglo-Saxon legal system). Since the middle of 1990s scholars became to believe that if the European Court on Human Rights uses its case law as precedent, it means that courts’ precedent law activity should be theoretically



researched. (M.V. Kuchin, 2004: 13, in Russian language). I believe also the researching on the precedent law of the European Court on Human Rights is an innovation because of less researching on this topic. Literature resources (including books, articles etc.) regarding precedent law of the European Court on Human Rights are less. Consequently, the existence of the precedent law of the ECHR sparks the argument of this paper.

### **1.3 Aim of Study**

The object of the paper is to theoretically prove the existence of the precedent law of the ECHR and then argue that developing of the precedent law of the Court influence both to developing of precedent law and to developing of national law systems of the member states.

### **1.4 Rationale**

This study is significant to the discipline of precedent law of the European Court on Human Rights in four main aspects.

Firstly, “precedent law” is approached as a judicial ideology. In different legal systems notion of precedent law is perceived in various meaning. Their different and common signs will be formulated in context of this paper.

Secondly, both structures of precedent law ideology and in this context, the place of precedent law of the ECHR are also concentrate points. It is always important to associate a theory with established trends in a particular field of study.

The third importance of this study is that it explicitly shows that the developing of precedent law of the European Court on Human Rights is very essential for developing of national legal system of member states. Such as, “case law activity” of the ECHR influences to legal changes in legislature of national states. Most scholars do not explicitly tackle this idea. They are mostly explored separately.



Finally, the thesis of the paper is intentionally developed to spark further debates on the precedent law of the European Court on Human Rights and offers ground for the development of precedent law ideology of the Court.

## 2.0 Literature Review

This study is based on desk research and the literature used is available at Raoul Wallenberg Human Rights Library and Law Department Library of Lund University.

The research centers on several resources. Such as, about ideology of precedent law as a theory used a very useful material: Raimo Siltala, on “A Theory of Precedent: From Analytical Positivism to a Post-Analytical Philosophy of Law” (Oxford, 2000). Although the book was devoted to just precedent and its ideological theories and there is no thoughts about the European Court on Human Rights and its precedent law, anyway this book should be main resource of my researching. Another main book is Vladimir Kuchin’s “Precedent law of the European Court on Human Rights” (Ural, 2004). Last book mainly focused on practice of the Court.

To begin with, should be determined several question.

What is the meaning of ‘precedent’? What is and how is its ideology?

In law, a precedent is a legal case establishing a principle or rule which a court may need to adopt when deciding subsequent cases with similar issues or facts. The term may also refer to the collective body of case law which a court should consider when interpreting the law. When a precedent establishes an important legal principle, or represents new or changed law on a particular issue, that precedent is often known as a landmark decision. (<http://en.allexperts.com/e/p/pr/precedent.htm>).

Regarding with legal definition of the notion of precedent law, Raphael Akanmidu argued that “in order to assert the moral importance of precedent in law, it is incumbent on us to give useful estimation of the three dimensions through which morality can be understood. To this end, we shall recall the three dimensions of understanding morality which have been identified above; namely, the prescriptive, the relativistic and the evaluative dimensions. As noted above, the prescriptive understanding of morality does not enter into action but rather it



prescribes it, the upshot of the relativistic dimension requires human conduct, behaviour or character. The evaluative dimension is a step beyond the agent; it facilitates a reconciliation between values and the usefulness of a quality. The quest for the morality of precedent in law is in the purview of establishing that precedent as a factor in law or as a quality in law has moral values which characterize the principles of actions and imperatives of the Judiciary system. The implication of this point is that precedent, as a factor that has quality, has moral values in the process of law. To this extent, the evaluative dimension of morality provides a viable basis for the assessment of the morality of precedent in law. This is all that remains to be shown in this work” (R.Akanmidu 2001,246).

Marchenko noted that there are accepted that notion of “precedent” indicates two conception: the broaden meaning of precedent law and its narrowed meaning in the Russian legal literature. On the broaden meaning of precedent law, it is meant as both “precedent – one of the source of law” and “precedent – the result of law-making activity of court”. In this way, the narrowed meaning of precedent implies “precedent – trial statement which is used follow court”. (Marchenko, 1999,18).

Precedent, as it functions in law, provides a basis for reference to past decisions in law. This reference amounts to a search for what has been the case in the previous decision. This reference also makes for the search for objectivity. Objectivity, in this sense, represents an important platform for comparison of cases and also an important means to be reflective in an effort to determine or identify errors and the sequence of events to appropriate justice.

According to Alexy and Drier, in German legal system present usage of the term “precedent” and the definition of it like following: “Precedent” (Präjudiz) is usually taken to mean any prior decision possibly relevant to a present case to be decided. The notion presupposes some kind of bindingness, bur its use in legal discourse does not imply anything definitive about the nature or the strengths of the bindingness. Also it is not necessary that the decision court expressly adopt or formulate a decision to guide



future decision making in order to talk about it as a present. Being relevant for any future decision is sufficient. (R.Alexy and R.Dreier, 1996, 26).

The resulting binding force of a precedent is brought into effect by the mutual co-effort of two or more courts involved, for example, the prior court or courts and the subsequent court. But it is important to note there will be at least two cases involved: the previous case or a set of such cases (for example, when a national court makes a decision it notes "*according to opinion juris of the European Court on Human Rights*", it means the court uses the set of precedent cases), and the subsequent case with its new facts to be ruled upon.

According to Raimo Siltala, from an analytical point of view, a precedent comprises two elements: the *ratio decidendi* and the *obiter dicta* of a case. *Ratio decidendi* is equal with the binding element of a previous decision of *vis-à-vis* the subsequent court's legal discretion, extending the normative impact of the earlier case beyond the *res judicata* or the facts originally ruled upon by the first court. *Obiter dicta*, by contrast, is the argumentative context of the ratio decidendi. The criteria of distinguishing the ratio from the dicta in a case, and the degree of normative binding force ascribed to the ratio, is the core and essence of doctrine of stare decisis (Raimo Siltala 2000; 65).

According to Cross and Harris, *stare decisis* as follows: "When it is said that a court is bound to follow a case, or bound by the decision, what is meant is that the judge is under an obligation to apply a particular ratio decidendi to the facts before him the absence of a reasonable legal distinction between those facts and the facts to which it was applied in the previous case" (R.Gross and J.W.Harris 1991, 98).

According to Raimo Siltala, in practice, stare decisis is notified like that: "Stare decisis is the policy of the court to stand by precedent; the term is but an abbreviation of stare decisis et non quieta movere for the "what," not for the "why," and not for the "how." Insofar as precedent is concerned, stare decisis is important only for the decision, for the detailed legal consequence following a detailed set of facts. (United States Internal



Revenue Serv. v. Osborne (In re Osborne), 76 F.3d 306, 96-1 U.S. Tax Cas. (CCH) paragr. 50,185 (9th Cir. 1996)), (R.Siltala 2000, 67).

According to prof. MacCormick “a relations of precedent-following may be said to prevail between the two courts and the two cases, respectively, if the normal and material preconditions of the doctrine of *stare decisis* are duly satisfied. In the present treatise, the key terms *precedent* and *precedent-norm* will be employed in the legal technical and functional sense, as distinct from the specifically common law doctrine of *stare decisis*”. In other words the present notion of a precedent-norm, and the sheaf of concepts related thereto, are the equivalent to common law notion of ratio decidendi, while less laden with the specific doctrinal commitments and theoretical preconditions of a common law orientation which are likely to be accompanied by any discourse “why cases have rationes and what these are”. (N.MacCormick, 1991, 84).

According to prof MacCormik “in general meaning “the precedent” also consists of two elements which are *mandatory* and *persuasive* precedent. But I would like to note that in several literatures are believed mandatory precedent as ratio decidendi. By the same way, persuasive precedent conveys obiter dicta”. ((N.MacCormick, 1991, 88).

According to Raimo Siltala, “a precedent which must be applied or followed is known as mandatory precedent or binding authority”. By this meaning, under the doctrine of stare decisis, a lower court must have regard to mandatory precedent when deciding a case. Contrast, mandatory precedent is usually created by superior courts and is binding on lower courts. “By definition the decisions of lower courts are not binding on superior courts, although superior courts may often adopt the legal reasoning of lower courts. In extraordinary circumstances a superior court may overturn or overrule mandatory precedent, but will often attempt to distinguish the precedent before overturning it, thereby limiting the scope of the precedent in any event. In a case of first impression there is no mandatory precedent for the court to consider” (R.Siltala 2000, 45).



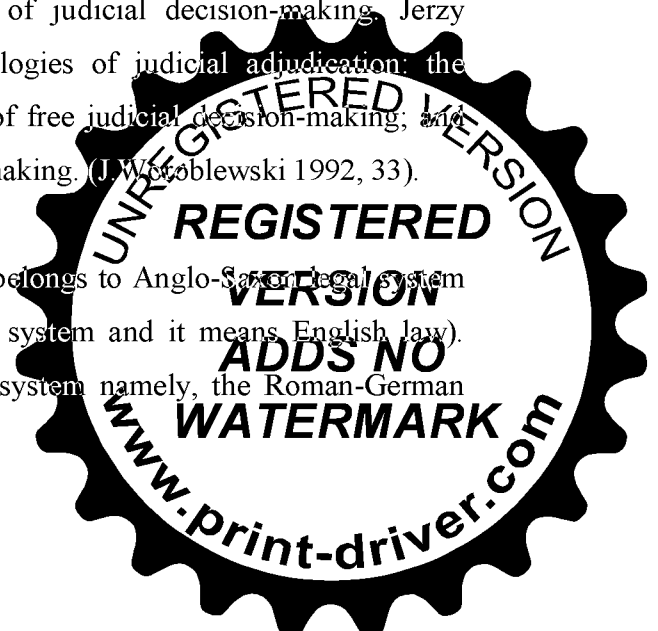
A precedent which is not mandatory but which is useful or relevant is known as persuasive precedent or advisory precedent. In a case of first impression, courts often rely on persuasive precedent from courts in other jurisdictions that have previously dealt with similar issues. Persuasive precedent may become binding through the adoption of the persuasive precedent by a superior court.

Other type of precedent is *case law*. According to prof Vladimir Kuchin, “this type of precedent is granted more or less weight in the deliberations of a court according to a number of factors. Most important is whether the precedent is "on point," that is, does it deal with a circumstance identical or very similar to the circumstance in the instant case? Second, when and where was the precedent decided? A recent decision in the same jurisdiction as the instant case will be given great weight. Next in descending order would be recent precedent in jurisdictions whose law is the same as local law. Least weight would be given to precedent which stems from dissimilar circumstances, older cases which have since been contradicted, or cases in jurisdictions which have dissimilar law” (V.Kuchin 2004, 102).

Precedents viewed against passing time can serve to establish trends, thus indicating the next logical step in evolving interpretations of the law. For instance, if immigration has become more and more restricted under the law, then the next legal decision on that subject may serve to restrict it further still. (<http://en.allexperts.com/e/p/pr/precedent.htm>).

In fact, the notion of precedent ties to the law-making activity of court. On other words, this activity is also called the ideology of judicial decision-making. Jerzy Wroblewski has distinguished three distinct ideologies of judicial adjudication: the ideology of bound decision-making; the ideology of free judicial decision-making; and the ideology of legal and rational judicial decision-making. (J.Wroblewski 1992, 33).

In common opinion, the term of “precedent” belongs to Anglo-Saxon legal system (this system is also named Anglo-American legal system and it means English law). Kuchin argued that “for the one of another legal system namely, the Roman-German



legal system, either the court precedents or precedent law have been traditionally believed as “outside” and they have been not accepted by domestic laws of the countries using the Roman-German legal system” (Kuchin 2004, 28). The impact of globalization and international co-operation between states and international organizations diffuses to international law and legal systems. In the result of such diffusion there are occurred new approaching between traditional legal system and are appeared new trends in law. In this aspect, the European Court on Human Rights is a unique regional institution for the developing of international law. Besides, the European Court on Human Rights helps to the approaching of traditional legal systems. Such as, the Court receives application through both Anglo-Saxon and Roman German legal system (It is important to note that excluding United Kingdom, other European States including former Soviet Countries use Roman-German legal system, but United Kingdom uses Anglo-Saxon legal system).

The notion of “Precedent law of the European Court on Human Rights” distinguishes from the notion of “traditional precedent law” by several features which are below:

First of all, in the legal systems (I mean here Anglo-Saxon legal system) where there are no concrete laws (or concrete legal norms) and there is traditional precedent law, the courts approach previous or another courts decision as “source of law” by refer it. Apart from this, the European Court on Human Rights refers concrete legal norm of both of the European Convention on Human Rights and Fundamental Liberties and its additional protocols when court makes a decision on the subsequent case.

Secondly, apart from the precedent law in Anglo-Saxon legal system, the European Court on Human Rights does not apply to whole text of any previous decision instead of it the Court applies only interpretations or “opinion juris” of the resembling decision. Such as, the European Court on Human Rights selects the legal norm from the Convention after it applies to the precedents just for strengthening itself argumentation.

Thirdly, the European Court on Human Rights applies to its previous precedents not only for strengthening its argumentation but also for explaining its positions to the sides of the case. This is very important point that national courts often apply to the case law of the European Court on Human Rights by this way.



Fourthly, in the European Convention on Human Rights and Fundamental Liberties regulating organizational and functional activity of the European Court on Human Rights is not given “law-making” authority to the Court. And I would like to note here that excluding United Kingdom, such authority is given also to none of the national courts of the European states including former Soviet Republics. Such as, I mean here just common courts of the contracting states and in this way, in some countries the giving “law-making” authority to the high court is possible by their constitutional system. For instance, in the constitution of Czech Republic there is intended that the Constitutional Court of Czech Republic has right to make new legal norm for arising contradictions between norms of different laws. The European Court on Human Rights only refers to the European Convention on Human Rights and Fundamental Liberties and its additional protocols (Kuchin 2004, 65).

The Precedent law that is applied on the activity of the European Court on Human Rights established as a regional human rights protection institute caused the alternation of thoughts about “precedent law” unlikely traditional trends. Such as, according to the “Convention on Human Rights and Fundamental Liberties”, the Court has to refer to the Convention and the Additional Protocols on subsequent decisions. Nevertheless, the Court has also right to refer to its previous decisions beside the Convention and the protocols. Particularly, it is important to note, the Court does not use its previous decisions as resource of law, by contrast, the Court uses them when it needs to interpretation of the Court’s point of view on subsequent decision. The last activity of the Court called “Precedent law”.

However, there are various thoughts on precedent law of the European Court on Human Rights. Such as, the terming “precedent law” of the such activity of the European Court of Human Rights is seriously discussed among scholars and there is no unique idea that the Court practice the precedent law when it uses previous case on subsequent decisions. Alekseev’s definition of the precedent law of the European Court on Human Rights is very important: “Of course referring to its decisions by the European Court on Human Rights on its activity is profiting of precedent law. But this referring or using



previous cases is new kind of precedent law. Such as, this has different features from traditional precedent law” (V.Abrashitova 2001, 2)

Of course, the being a very effective regional human rights protection mechanism, the European Court on Human Rights has great influences to developing of domestic legal systems of contracting members by its precedent law. This argument is also about non-member states. The European Convention on the Protection of Human Rights and Fundamental Freedoms also became a source for doctrinal borrowing by the emerging constitutional systems. In result, of such “communication” between the European Courts on Human Rights and domestic courts of the contracting states, courts of member states become to use the case-law of the European Courts on Human Rights on their subsequent decision. Anne-Marie Slaughter used the expression ‘transjudicial communication’ to describe this trend. In a much-cited article published in 1994, she described three different ways through which foreign precedents are considered – namely:

- Firstly, through ‘*vertical*’ means, i.e. when domestic courts refer to the decisions of international adjudicatory institutions, irrespective of whether their countries are parties to the international instrument under which the said adjudicatory institution functions. For example, the decisions of the European Court of Human Rights (ECHR) and European Court of Justice (ECJ) have been extensively cited by courts in several non-EU countries as well. This also opens up the possibility of domestic courts relying on the decisions of other supranational bodies in the future.
- Secondly, through ‘*horizontal*’ means, i.e. when a domestic court looks to precedents from other national jurisdictions to interpret its own laws. In common law jurisdictions where the doctrine of “stare decisis” is followed, such comparative analysis is considered especially useful in relatively newer constitutional systems which are yet to develop a substantial body of case-law.
- Thirdly, through ‘*mixed vertical-horizontal*’ means – i.e. when a domestic court may cite the decision of a foreign court on the interpretation of obligations applicable to both jurisdictions under an international instrument. For example, Courts in several European countries freely cite each other’s decisions that deal



with the interpretation of the growing body of European Community (EC) law. It is reasoned that if judges can directly refer to applicable international obligations, they should also be free to refer to the understanding and application of the same in other national jurisdictions.

In examining these three means of ‘transjudicial communication’ one can easily discern that references to foreign law contemplate both international and comparative law. (Anne-Marie Slaughter 1994, 29).

It is important to note that the European Convention on Human Rights and Fundamental Liberties has binding legal force over all contracting states and from this standpoint the conclusions of the European Courts that it applies to the norms of the Convention and the protocols, and interpretations of the Court are very essential for progress of the national court mechanism of the contracting states. On other side, according to the European Convention on Human Rights and Fundamental Liberties, the European Court on Human Rights could decide two kind of decision: the decision which is imply to pay subsequent compensation to the persons whose laws violated, and declaration decision. The Court of course underlines violation of law through both of these decisions. But how is this progression of national law occurred by the precedent law of the European Court on Human Rights?

Accroding to Kuchin, “first of all, there are two directions that can be taken in rendering human rights standards of the European Court on Human Rights into national law. The first of them is to incorporate them into constitutions. For instance, the constitution might stipulate that international human rights treaties including the European Convention on Human Rights and Fundamental Liberties must be recognized and respected. Or the constitution might mandate that interpretation and application of the constitutional human rights provisions accord with that the European Convention on Human Rights and Fundamental Liberties. Or the constitution might stipulate that the governmental bodies (or agencies) of the state must guarantee implementation of the case law of the European Court on Human Rights.



Another direction would be to establish a special law that would give a extraordinary status to the European Convention on Human Rights and Fundamental Liberties on the domestic law. And this direction is known as "domestication" of international human rights standards. This method is mostly popular in both countries that have a formal written constitution and that have unwritten constitutions” (Kuchin 2004, 126).

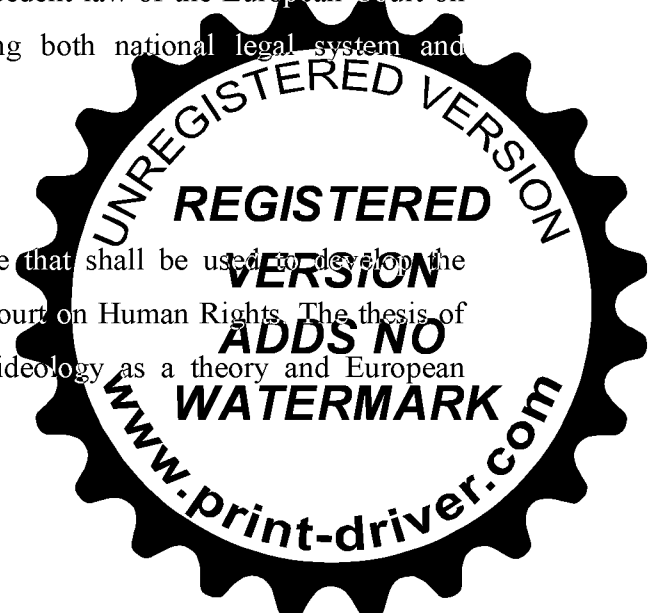
One example, is a recent law enacted by Norway: "Act of 21 May 1999 No. 30 Relating to the Strengthening of the Status of Human Rights in Norwegian Law" (the Human Rights Act). This law clearly stipulates that the European Convention on Human Rights (ECHR), the ICESCR, and the ICCPR (including its two protocols) carry the full effect of domestic law. (<http://www.gio.gov.tw/taiwan-website/5-gp/2002hr/hrp04.htm>).

Reforms in the domestic law usually are taken by the state that is a side of case of the European Court on Human Rights. In such cases, the Court adopts a declare decision on the side-state and notes what has state to reform for preventing the next violations. But a very interesting point is that another state also might to do reforms in its national legal system. In some cases, the states done a lot of change in their laws and court practices eventually they were not side of any case. For example, “after the decision of the European Court on Human Rights on case of Marckx vs. Belgium Netherlands made a lot of changes its national civil code” (L.Henkin, L.Gerald, D.F.Orentlicher, D.Libron 1999, 619).

Consequently, developing and spreading of precedent law of the European Court on Human Rights are very important for developing both national legal system and protection level of human rights.

### 3.0 Conclusion

In retrospect, the paper has reviewed literature that shall be used to develop the argument that the precedent law of the European Court on Human Rights. The thesis of the paper is organized around mainly precedent ideology as a theory and European



Court's precedent law analysis. Precedent law theory is the backbone of the arguments that will be developed to tackle the question of ideology in modern international law. The paper draws premises from precedent law of the European Court on Human Rights, particularly the precedent law ideology as theory. Precedent law of the European Court on Human Rights is developing by the Court and because of its influence into developing of national law system it is very important resource for researching.

Raimo Silata's and Vladimir Kuchin's books were main focus point of the paper. Apart from taking these books as primary text, the paper has also reviewed literature from several authors. Regarding precedent law point of view of authors, such as R.Gross and J.W.Harris, R.Alexy and R.Dreier, N.MacCormick, Anne-Marie Slaughter were reviewed too. In addition to advancing the argument of the paper, literature focusing on precedent law theory was also reviewed.

So far as the literature reviewed is concerned, I have enough evidence to assert that the precedent law activity of the European Court on Human Rights exists as a law theory influencing a lot of legal changes in legal system of national states. This influence gets better protection of human rights and liberties.



#### 4.0 Bibliography

Raimo Siltala, 2000. *A Theory of Precedent: From Analytical Positivism to a Post-Analytical Philosophy of Law*. Oxford: Oxford University Press.

Vladimir Kuchin, 2004. *Precedent law of the European Court on Human Rights*. Ural: Kragansk Press\*.

Raphael A. Akanmidu, 2001. *The Morality of Precedent in Law*, *Ratio Juris Journal* Vol. 14 No. 2. June 2001 pp. 244-251. [online] Available at <http://www3.interscience.wiley.com/journal/119022678/abstract?CRETRY=1&SRETRY=0>

R.Gross and J.W.Harris, 1991. *Precedent in English Law*. Oxford: Oxford University Press

R.Alexy and R.Dreier, 1993. *Precedent in the Federal Republic of Germany*. Leiden: Wolf Press

N.MacCormick, 1991 in L.Goldstein (ed.), *Precedent in Law*, Oxford: Oxford University Press.

J.Woroblewski, 1992. *Judicial Application of Law*. Kluwer: Meitz Press.

V.Abrashitova 2001. *Precedent characters of decisions of the European Court on Human Rights* [online]. Available at [http://www.whitecase.ru/articles/human\\_rights2](http://www.whitecase.ru/articles/human_rights2).

Anne-Marie Slaughter, 1994. *The typology of transjudicial communication*, *University of Richmond Law Review Journal*. 99-137

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\* The title was translated from Russian into English by author.

