JUDICIAL DECISIONS IN THE SYSTEM OF ADMINISTRATIVE LAW SOURCES IN UKRAINE

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Abstract. The article deals with the essence and legal nature of judicial decisions as sources of administrative law in Ukraine. It is argued that judicial decisions do not contain legal norms within and are not intended to regulate social relationships. Although in some cases these acts can influence on legal norms by abolishing them fully or partially. It is underlined that judicial decisions also broader interpretation of legal norms and apply in different circumstances while solving legal disputes.
Keywords: *judicial decision, source of law administrative law, legal norm, judiciary.*

Introduction

Attention to the court acts regarding the attribution of them to sources of law and in particular to administrative law is constantly increasing. Many researches are being conducted on the role of the judiciary in regulating public relations, the importance of which is the decision of the courts to the national legal system. Despite this in jurisprudence still dominates a position that judgments cannot be a source of law in the continental legal system.

The aim of the research. The article aims to investigate role and place of judicial acts in the system of sources of administrative law in Ukraine.

Main result of the research. However, "it is necessary to depart from established approach that judgment, which was given the official interpretation formulated a new legal principle or judicial precedent is not a form of law and is the compulsory only for the parties to the case" [1]. Today in the scientific literature prevails the position according to which the sources of law only are what is defined by law, because it "does not correspond to the realities of life, does not affect the legal nature of this phenomenon" [2]. In addition, Ukraine has no law that would define a list of all sources of law or denied the opportunity to address the court decision as sources of law. Thus, the nature of a judgment depends on the subjects of judicial decisions, for example, the practice of ECHR law is directly identified as a source of law in Ukraine. Therefore, the issue of bringing court decisions to sources of administrative law requires a thorough and comprehensive study. Within the scope of this section, the term "judicial decision" is used in the broad sense as an act of the judiciary, and not only a specific decision on the outcome of the proceedings.

Legal systems of the world are not in a static position and are constantly changing, interacting with each other. Today, the Anglo-Saxon system of law is not limited to a judicial precedent as the sole source of law. Significant role in this regard is played by statutes and other legislative acts. The formation of a new judicial precedent is based on the application of normative acts. Contrary to this, the continental legal system pays more attention to judicial decisions and precedent. As a result of the convergence of continental and Anglo-Saxon legal systems, their gradual approximation, interpenetration, which allows to combine their characteristic features, to ensure an effective regulation of social relations, the protection of human and

civil rights and freedoms, allows them to eliminate and compensate for the shortcomings of one source of law by others. Therefore, it is important to explore the place of judicial decisions in the system of sources of administrative law and their interdependence links with other elements of the system.

Among the researches of administrative law on this subject, there is also a significant change in views and approaches regarding the role and significance of the court decision in the system of sources of administrative law. O. Constantyy in the book "Sources of administrative law of Ukraine" (2005) noted that there is no need in recognition of judicial precedent as a source of law, except cancellation of illegal regulations. And even in cases where court decisions supersede the provisions of the regulations, the researcher states that "you cannot say that such decisions contain legal norm and is the compulsory for application in similar situations" [3]. Certainly, such decisions do not create legal norms, but in the case of abolishing regulation, the court affects indefinite range of subjects concerning its possible applications. Therefore, this provision is disputable.

In modern studies on administrative law judgments are considered as part of the system of sources of administrative law [4], albeit with certain reservations about the impossibility of replacing the legislator and the original nature of this source. However, research in this area in general are abstract, without detailed coverage of the characteristics and specific kinds of judgments which may be a source of administrative law. For example, V. Kurylo and P. Pantaliyenko supports scientific proposals for the introduction of legal precedent in Ukraine as a source of law through the consolidation at the level of legal doctrine, which must be defined as "public need in legalization of the judicial precedent as a source of law", delineate its scope, establish relationships with other sources of law etc. [5]. We believe that first of all there should be not a doctrine but relevant legal regulations, based on scientific researches, that will define the legal nature of certain court decisions as sources of law and their interdependence with other sources of law. We consider the introduction of judicial precedent in Ukraine as not constructive today. It is not clear its legal nature and whether it will have a practical purpose. The introduction of precedents in "certain areas" which are not clearly defined is counterproductive. We believe in this case it should be based on the needs of the judicial practice of law and legalize what is really necessary for the proper administration of justice, unity and integrity of the judicial system, not reform for the sake of reform.

It should also be noted that as a result of judicial reform (2016) the new edition of the Code of Administrative Procedure of Ukraine (2017) was adopted. There are significant changes in legislation including the judgments. This emphasizes the urgency and importance of the issues under study.

Strengthening the significance of the decisions of the ECHR, consolidating it as a source of law in the Law of Ukraine "On the implementation of decisions and applying the practice of the European Court of Justice of human rights", promoted a new approach to the value of court decisions on the impact on social relations, not only in specific cases, but also the spread of such rules to other similar legal relationships. Using the practice of the ECHR, judges felt the value of court decisions as sources of law, as well as their influence on judgments in court cases. Apparently, examples of the application and interpretation of the rules of law by the highest judicial authorities could not fail to take into account the judges of local and appellate courts.

The need to apply court decisions as sources of administrative law in the Ukrainian legal system is generally due to the need to take into account the legal conclusions of the Supreme Court in the exemplary case when making a decision in a typical administrative case; the compulsory account of conclusions on the application of the rights set out in regulations The Supreme Court, as well as decisions of the previous Supreme Court of Ukraine, until they are reviewed by the Grand Chamber of the Supreme Court, which is especially important in cases of legal conflicts, gaps in law and other defects of a legislation; application of ECHR practice; the use of judgments, which abolished the legal acts. Thus, judicial decisions may be obligatory in some cases and thus become a source of law.

However, to justify the above positions necessary to thoroughly consider the nature of judicial precedent and its relationship with the notion of "judgment" to determine what

we can attribute to the sources of administrative law Ukraine.

The legal precedent as a source of law, defined as "the way of external expression and consolidation of individual rules of conduct that set by the competent authority of the state to resolve specific life situations is omitted in the regulation of similar specific life situations" [6]. There are distinguished judicial and administrative legal precedents. The great importance in the regulation of social relations plays a judicial precedent, which is determined as the main source of law in Anglo-Saxon legal system.

Judicial precedent is a court decision on a specific case, which contains a legal norm and is mandatory in resolution of all subsequent similar cases [7]. That is, according to the doctrine of the judicial precedent, the decision taken when considering and resolving a particular case becomes mandatory for the court of the same instance or lower instance, in resolving all similar cases in the future.

Judicial precedent is applied based on the principle of "stare decisis", which literally translates from Latin as "to stand by things decided", and the phrase "stare decisis" is abbreviated from Latin words "stare decisis et non quieta movere", which means " follow the decision and do not disturb the previously resolved cases. "The essence of the doctrine is to ensure that the same or similar cases should be decided alike" [8].

The decision of the Anglo-Saxon legal system has different structure from the decisions of the courts in the continental legal system. Thus, in the decisions of the Anglo-Saxon system, it is necessary to distinguish two components: the necessary part (ratio decidendi), that contains a legal norm, and a derivative (obiter dictum), which justifies the decision. The application is subject only ratio decidendi judgment containing a code of conduct and reasoning for its decision.

Instead, for the countries of the continental legal system, the adoption of legal rules by the parliament and public administration bodies is common, the general nature of such norms, that is, the extension of their actions to all social relations and general - mandatory nature, mandatory application by all subjects of law, reference to the law in substantiating a judgment immediacy of use and so on. That judgment when considering each case apply legal rules contained primarily in legal acts, legal treaties and other sources of law specific to a particular sphere of civil law countries.

In Ukrainian legal science there is no unity in understanding of a term "judicial precedent". H. A. Huralenko defines the precedent as formed on the previous experience of cognition with the help of rationally - intuitive style of legal thinking, the result of the lawmaking activity of one of the higher courts, which contains a mandatory law, which specifies, complements or replaces the normative regulation of certain social relations and serves as the basis for further law-making activity" [9]. Determining this definition is that legal precedent can be formed only one of the higher courts, although the Anglo-Saxon legal system actually Court of any level can create an appropriate precedent and the courts of higher levels can change them. Although the decisions of the highest judicial authorities are definitely decisive.

According to T. M. Anakin, the judicial precedent is a "judgment in a particular case, which is binding in deciding subsequent cases concerning similar or close enough for (the circumstances), and thanks to the decisive importance aimed at ensuring the integrity, consistency and continuity the legal system within which it applies " [10]. We agree with such a wording, which is typical for the countries of the Anglo-Saxon legal system and can serve as a definition for the countries of the continental legal system.

There is also a perception that judicial precedent can only be a decision a higher court containing rule of conduct [11]. However, this position can be applied to the precedent in the countries of the Anglo-Saxon legal system, where precedent can be created by any court - whose instance. L. M. Nikolenko argues that "all supporters of recognition of the precedent in Roman and Germanic legal system indicate that the bodies of their creation are the highest judicial authorities" [12].

D. O. Vasiljevic offers the following conditions under which the judicial precedent can be a source of law: complete or partial lack of regulation of certain social relations manifest during dispute resolution; optimal use of court to institute similar rationale solutions appropriate for justice; the existence of a court of law, that is, general rules, established by the higher courts on the basis of a generalization of judicial practice,

officially published for general familiarization; presence decision a higher court, which points to the need to fill gaps in the law the authority to act detected this gap is [13].

Of course, these features are noteworthy both judgments diversity makes it difficult to provide their common features that have concerned all these decisions. At the same time we should pay attention to the latest sign of the decision of the court addressed to a particular body required for its' connection of elimination of the gap in the law. Such a provision is contained in the Code of administrative proceedings of Ukraine, in particular, in accordance with article 245 of the Code if the court finds the legal act illegal and void and found insufficient legal regulation of the rights and freedoms of unspecified persons, the court may require the subject of authority to adopt a new regulatory act instead of an illegal act. However, we believe that such a court order will be individual and relate only to a specific body and its obligation to adopt a new legal act. Not an indication regarding the need to take act in indefinite range of public relations, regulatory, it also will not have an impact on other people and therefore cannot be considered as a source of law. Instead recognition of unlawful and invalid legal act concerns of unlimited range of subjects the objects to which it could extend its effects. In this case, we have a clear impact on the judicial act on regulation of social relations.

Denying the possibility of introducing required obligatory force in various judgments often reasoned by the provisions of Art. 129 of the Constitution of Ukraine, which provided before that the judges of justice are independent and subject only to the law [14]. However, the legislator removed this "throwback" of legal positivism, adopting amendments to the Constitution of Ukraine in 2016. The new version of Article 129 of the Constitution states that a judge, making justice is independent and is governed by the rule of law" [15]. Hence, it eliminates any restrictions on the use of other sources of law than normative acts.

F. Bacon noted that judges should remember that their case is "jus dicere", instead of "jus dare" that is, to interpret laws, and not to create and publish them [16]. Although the Court does not have the standard-setting functions, but abolishing the rule of law, it "creates new rights and obligations bandages participants of public relations, in fact, this decision is certainly lawmaking" [17]. Such "negative lawmaking" affects not only members of specific relationships in this case, but in general in all subjects when it comes to cancellation or even suspension of the regulation as a measure to ensure the claim.

Specification of law in the operation of the court is that the court, applying the relevant legal provisions, it embodies in a specific situation. In this case, the court may identify the shortcomings of the legislator, the shortcomings of legal regulation, gaps in the law. Cardoso wrote that the court creates a right, where there are no laws, precedents and other formal sources of law [18]. Lazarev states "the law-enforcement activity of judicial bodies cannot be called as law-making" [19]. Indeed, the courts do not create a law, but they can eliminate gaps, supplement it with extended interpretations of the procedure for its application, for example, taking into account the findings of the Supreme Court.

Publication of texts of court decisions, which brings them closer to normative acts, is of great importance. It is necessary to accept that "publication of the judgment turns it into a foundation of precedent" [17].

In the scientific literature there a position, that "Administrative Court during the administrative proceedings in a particular case has the authority to interpret and cancel a law" [20]. We believe such a statement is disputable, as the Administrative Court, considering the case abolishing legal does not have a power to create a new one. His interpretation of a legal norm is unofficial.

At the same time, the Administrative Court is not deprived of the opportunity to influence on the validity of regulations. Following the consideration of this category of cases an administrative court may "recognize legal act illegal (illegal or so, that does not meet the legal act of higher legal force) and invalid in whole or in part" under article 264 of the Code [21]. In this case, the loss of force regulation will be important not only for the parties to the case, but also to the indefinite range of subjects. That is, if the existence of "defective" legal act the court can intervene at the request of interested parties and decide into force of this Act or some of its provisions. In this case, the judgment will take a compulsory nature, that affect indefinite circle of persons. This suggests, that in this case

such a judgment should be referred to the original sources of administrative law nature, as derived from the need to eliminate the defect existing legal norms.

Based on the research it can be highlighted the following features of judgments as sources of administrative law Ukraine as the following:

- derive from the legal acts and international agreements;
- fill legal gaps, eliminate legal conflicts and other defects of legal regulation, including by applying analogy of law and analogy of the law;
- can be applied in other similar legal relationships;
- specify the legal norm, "breathe life into them" when applied in particular cases;
- could affect the legal acts or their provisions;
- are brought to the attention of the public by their publication in relevant publications, official internet pages, in the Unified State Register of Judgments.

Conclusions

Thus, if the Anglo-Saxon court, deciding a particular case, can formulate a new rule of conduct with no legal basis for this, this decision may be obligatory for the next time deciding similar cases. In Ukraine or the findings of the Supreme Court, or specification of the existing norms, even indication administrative court to take this or that regulation cannot be regarded as creating of a new compulsory code of conduct, if is not based on other sources of law. The court even with the existence of gaps in the law, using the analogy of law or the law may specify, complement, compile rule of conduct, contained in the source of law. Thus, judicial decisions in Ukraine certainly may be regarded as complementary source of law, based on the existing legal norms. The specification of the rule of law is to interpret the existing norm of the court, and not to create a new one. The so-called "negative lawmaking" of the Constitutional Court of Ukraine consists in the abolition of the existing law of law, rather than the formation of a new rule of conduct. Therefore, we believe that it is now necessary to determine the derivative (auxiliary) role of the court decision as a source of law in Ukraine. However, it should be referred to the sources of administrative law, as court rulings are subject covered by the definition of sources of administrative law namely, not only as a form of external expression and consolidation of administrative law, but as other regulators of administrative relationships, on the basis of which the norm of administrative law arises, is being changed, stopped or loses the action.

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