Administrative and legal status of decisions of the supreme court through the prism of the development of case law in Ukraine

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In recent years' modernization and reform of the judiciary has become one of Ukraine's key tasks. The events of 2013-2014, called the Revolution of Dignity, exacerbated the existing problems of judicial and legal reform, as well as slowed down effective reform measures in this area. Under such conditions, the executive and legislative bodies had to act in the direction of reforming and adapting the judicial system to generally accepted European norms and standards. Since 2014, a number of progressive laws on the functioning of the judiciary and the administration of justice in the state have been approved. And in 2016, the judicial system in Ukraine was reformed: the Supreme Court of Ukraine, the Supreme Administrative Court of Ukraine, the Supreme Economic Court of Ukraine, and the High Specialized Court of Ukraine for Civil and Criminal Cases were terminated and subsequently liquidated. Instead, all functions, tasks and powers to consider the case as a court of cassation were assigned to the newly created Supreme Court. One of the preconditions for judicial reform in Ukraine was the overburdening of the Supreme Court of Ukraine and higher specialized courts, which violates the right to a fair trial within a reasonable time, which is enshrined and guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. In accordance with Art. 17 of the Law of Ukraine "On the Judiciary and the Status of Judges", the judicial system in Ukraine consists of the Supreme Court, appellate courts, local courts. At the same time, the highest court in this system is the Supreme Court. Along with such innovations in the structural and functional characteristics of the judiciary in Ukraine, there is a tendency to the possibility of future recognition of decisions of the Supreme Court – the official source of law in the country.

The article reveals the issue of determining the administrative and legal status of decisions of the Supreme Court in Ukraine, outlining key theoretical and practical conclusions over the years of judicial reform. Emphasis is placed on the development of the peculiarities of the Anglo-Saxon legal system in the state and the development of case law.

Keywords: decisions of the Supreme Court, status of decisions of the Supreme Court, judicial precedent, development of case law, exemplary cases, typical cases.

Introduction

Judicial reform has laid the formal foundations for the development of case law in Ukraine. However, it left some issues unresolved. Theorists and practitioners of the legal sphere have not found a single approach to determining the administrative and legal status of decisions of the Supreme Court. In this article, we will outline the key positions on this issue and define our own position on this issue.

Analysis of recent research and publications has shown that the issue of determining the administrative and legal status of decisions of the Supreme Court is extremely relevant, because the precedent nature of such decisions directly affects the judiciary in Ukraine.

Purpose of the article: based on the analysis of the results of general theoretical and sectoral studies of the current state of determining the administrative and legal status of Supreme Court decisions in the context of case law in the country to identify existing problems and gaps in legislation, including conceptual and terminological ones, and also to suggest directions of their decision.

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The main material

In accordance with the provisions of the Law of Ukraine “On the Judiciary and the Status of Judges”, the main acts of the Supreme Court are resolutions on cases of review of court decisions and clarification of the Supreme Court Plenum. Thus, until July 2002, the Law of the Ukrainian SSR “On the Judiciary” stipulates that explanations of the Supreme Court Plenum had the status of mandatory acts for judges of all instances, public authorities, officials who apply the law or other regulatory-legal act in respect of which an explanation has been provided.

The vector of binding explanations of the Supreme Court was directed towards recommendation in the Law of Ukraine “On the Judiciary and the Status of Courts” dated 07.07.2010. In fact, this law removed all reservations about the binding nature of such acts for the courts of all instances, as well as reduced the powers of the Supreme Court. Thus, the Supreme Court Plenum no longer had the right to provide clarifications on law enforcement on the basis of generalization of case law [1, P. 40]. The court itself reduced its functions to the review of court decisions on the grounds of unequal application by the court of cassation of the same substantive law in similar legal relations [2, P. 123].

After the adoption of the Law of Ukraine “On the Judiciary and the Status of Judges” on July 7, 2010, the Supreme Court of Ukraine did not have sufficient means and powers to effectively ensure the uniform application of legal norms by the courts of Ukraine. In addition, there was an imbalance in the distribution of functions to ensure the unity of judicial practice between the Supreme Court of Ukraine and higher specialized courts [2, P. 124].

The 2016 law stipulates that the Supreme Court is the highest body of the judiciary with functions to ensure uniform application of legislation and ensure the unity of judicial practice. Currently, the acts of the Supreme Court are of paramount importance.

An absolute novelty in 2016 also was the rethinking of the importance of decisions of the Supreme Court by introducing the institutions of “exemplary case” and “typical case”, which are now at the centre of the debate on the emergence of real signs of case law in Ukraine. These institutions are designed to ensure efficiency, uniformity and predictability in decision-making and application of case law in certain legal relationships. According to the head of the Supreme Court Valentyna Danishevska, since the enactment of the provisions of the legislation on the functioning of the institute of exemplary cases, the decisions in only 10 cases have come into force. However, the chairman of the court is optimistic about this trend and claims that in this case several problems have been resolved: a unified approach to resolving relevant cases in lower courts has been developed and ensured; the number of appeals and the workload of the court was reduced [3].

Thus, court decisions in exemplary cases acquire the characteristics of a carrier of objectively existing information and a source of law. And hence the introduction of the institutes of standard and exemplary cases is a step towards the action of judicial precedent in Ukraine and the unification in the legal system of our state of the features and peculiarities of both legal families, Anglo-Saxon and Romano-Germanic.

Some researchers are quite sharp about expressing the possibility of developing case law in Ukraine by equating the decisions of the Supreme Court to precedent. Thus, N.D. Slovinska emphasizes the violation of the constitutionally enshrined principles of separation of powers, independence of judges, the principles of administration of justice and ensuring the right to a fair trial. In this case, we cannot agree with the researcher, because the Supreme Court does not create and has no right to create regulations [2, P. 129]. The decision of the Supreme Court is just an example of strict adherence to the Constitution of Ukraine and legislative acts. Publication of normative legal acts is the exclusive prerogative of the Verkhovna Rada of Ukraine. At the same time, we note the existence of an imperfect legislative field in the country, a significant number of duplications, gaps and conflicts. As the practice of the Verkhovna Rada of Ukraine has shown, it has not been able to cope with these shortcomings in the regulatory sphere during all the years of independence. Therefore, Ukraine must look for new ways to solve problems and streamline the basic sphere of relations in society. Such a new way was the beginning of the traditions of case law in Ukraine.

Legal science expresses a position on equating the decisions of the Supreme Court to a convincing precedent. Thus, Y. Y. Popov notes that in the countries of the Romano-Germanic legal family there are separate decisions of higher courts, which become the basis for the formation of established case law and become the basis for decision-making in similar cases [4, P. 356]. This precedent is characterized by the fact that the relevant court decisions do not serve as court precedents in the classical sense of this category in both legal families, but given the authoritative status of the judicial body that made such a decision, the latter affect the practice of other courts (lower courts). However, such decisions are not binding on such courts.

In fact, every judge of any court cannot ignore the legal position of the Supreme Court in relation to the relevant category of cases. However, the basis for making a new decision, the position of the Supreme Court is only on the basis of the legality of the decision of the Supreme Court, and not on the basis of mandatory adoption. Thus, according to Part 6 of Art. 13 of the Law of Ukraine “On the Judiciary and the Status of Judges” dated 02.06.2016 No.401402-VIII, the conclusions on the application of law, set out in the decisions of the Supreme Court, are taken into account by other courts in applying such law [5]. Thus, the decisions of the Supreme Court are not binding by the Law of Ukraine “On the Judiciary and the Status of Judges”, but only “taken into account when applying the rules”. A similar disposition, for example, is enshrined in Part 6 of Art. 368 of the Criminal Procedure Code of Ukraine: choosing and applying the norm of the law of Ukraine on criminal liability to socially dangerous acts when passing a sentence, the court takes into account the conclusions on the application of the relevant rules of law set out in the decisions of the Supreme Court [5].

Following the results of the III International Judicial and Legal Forum “Judicial Reform in Ukraine: the European vector” (Kyiv, March 19-20, 2015) the recommendations were formulated, which pay special attention to determining the legal status of judicial practice and acts of the Supreme Court. In accordance with paragraph 5 of these recommendations, it is rightly stated that “the Supreme
Court in its activities must ensure the efficiency and stability of the domestic legal system and the rule of law. The unity of judicial practice can and should be achieved not only by correcting the mistakes that the judicial system has already made during all the years of Ukraine’s independence, but also by directing judicial practice in the right direction and providing for such procedural mechanisms of preventive influence as preliminary or advisory request, providing for appropriate procedures in the procedural codes of Ukraine’ [6].

Regarding the execution of the decisions of the Supreme Court, a certain constant has been established, according to which the decisions of the Supreme Court are binding on all subjects of the court process. According to the Constitution of Ukraine, court decisions are law enforcement acts and are binding throughout Ukraine.

Any non-compliance with a court decision is closely linked to a violation of a fundamental principle of legality. H. Z. Ohnevich points out that non-compliance with the decision of both the Supreme Court and the lower court levels the work of the court and law enforcement agencies, violates the existing legal order in society, causes direct and indirect damage to human rights, freedoms and legitimate interests. Failure to comply with the court decision causes significant harm to the public interest [7, P.172].

Ukraine’s choice of a pro-European vector of development set our country the task of bringing the justice system to European standards, which led to the implementation of judicial reform and comprehensive reform of legislation. Particular attention in such reform was paid to updating the system of execution of court decisions, including decisions of the Supreme Court. The institute of enforcement of court decisions is based on the functioning of the Law of Ukraine “On Enforcement Proceedings” and the Law of Ukraine “On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies”. In fact, these normative-legal acts enshrine the administrative and legal mechanism of execution of decisions of the Supreme Court by state executors of the State Executive Service of Ukraine or private executors. This mechanism is absolutely identical to the mechanism defined for the execution of court decisions of lower courts, except for the period of entry into force of the decision of the Supreme Court – from the moment of disclosure of the decision [8, P. 93].

In accordance with Part 7 of Art. 56 of the Law of Ukraine “On the Judiciary and the Status of Judges”, a judge is obliged to fairly, directly and timely consider and resolve court cases in accordance with the law in compliance with the principles and rules of procedure. One of the basic principles of domestic justice is the binding nature of court decisions.

In Ukraine, the decisions and conclusions of the CCU and the Supreme Court are binding at the legislative level for judges of appellate and local courts: 1) in accordance with Part 1, Art. 2 of the Law of Ukraine “On the Constitutional Court of Ukraine”, the CCU carries out its activities on the basis of binding decisions and conclusions adopted by it; 2) in accordance with Part 7 of Art. 56 of the Law of Ukraine “On the Judiciary and the Status of Judges”, a judge is obliged to fairly, directly and timely consider and resolve court cases in accordance with the law in compliance with the principles and rules of procedure. One of the basic principles of domestic justice is the binding nature of court decisions. According to Part 5, Art. 6, 13 of the Law of Ukraine “On the Judiciary and the Status of Courts” stipulates that the conclusions on the application of the rules of law set out in the decisions of the Supreme Court are binding on all subjects of power who apply in their activities a legal act containing the relevant rule of law. Conclusions on the application of the rules of law set out in the decisions of the Supreme Court are taken into account by other courts in the application of such rules of law.

Thus, before making a decision in the case, the judge of the appellate and local courts must first refer not only to the provisions of regulations, but also to the existing decisions of the CCU and the Supreme Court. It is on the basis of their legal positions that the judge must further formulate his own vision of the relevant conclusion in the case. Regarding the legal positions of judges of appellate and local courts, the legislator has not specified any clarifications and specifics. In addition, neither the theory of law nor the legislative level enshrines such a category as “the legal position of judges of the appellate or local court”. Therefore, it is impossible to speak on the precedent nature of such decisions, because any reference to the decision of the appellate or local court is the sole initiative of the judge.

Today in Ukraine there is a problem in the use of legal positions of the Supreme Court of Ukraine, which ceased to operate on 14.12.2016. It should be noted that in this regard there is a gap in the legislation, because in the wording of the procedural codes, which were in force until 15.12.2016, the provision was defined as follows: “the conclusion on the application of the rules of law set out in the decision of the Supreme Court of Ukraine must be taken into account by other courts of general jurisdiction when applying such rules” (Art. 214, 360-7 of the Civil Procedure Code of Ukraine). A similar position with a similar content is set out in the new versions of the codes, only the name of the court has been changed – the Supreme Court. Thus, at the legislative level, the fate of the legal positions of the Supreme Court of Ukraine is not directly determined.

The only decision that was found and in which the judge substantiates the illegality and inexpediency of applying the legal positions of the SCU, which “are no longer relevant due to the liquidation of the SCU”, is the decision of Zaporizhzhya District Court of Kharkiv region, registered in the Unified State Register of Court Decisions (USRCD) under number 72690501. At the same time, the Supreme Court in a number of its court decisions refers to the existing legal positions of the Supreme Court of Ukraine (for example, registered in the USRCD under the numbers 71860748, 71828881, 72073867, 72253385, 72367026, 72605130) [9].

Conclusions

XX-XXI centuries are extremely important for legal science and the judiciary, because currently there is a tendency to reduce the clear boundaries between the Anglo-Saxon and Roman-Germanic legal families. Modern jurisprudence is characterized by the convergence of national legal systems – a combination of tools and mechanisms of precedent and legislative regulation of public relations within one country. Ukraine is no exception, as the
category of “judicial practice”, which has begun to be interpreted as “judicial precedent” in the last few years, is becoming more and more relevant every year.

Analysing scientific research on the relationship between “judicial practice” and “judicial precedent”, we note that in Ukraine they are represented at a low level. Although the Law of Ukraine “On the Judiciary and the Status of Judges” uses such concepts as “generalization of judicial practice”, “uniform application of law”, “unified judicial practice”, it does not provide a clear understanding. Even more questions about the relationship between the concepts of judicial precedent, case law and the action of each of them within Ukraine, are raised by the position of national experts on the draft opinion of the Advisory Council of European Judges № 20 2017 on unification of law, according to which the case law, although not enshrined in domestic law, but is actually used.

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