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Judicial decisions as a source of law

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Abstract

The article deals with the question of the legal nature and essence of the judicial acts of the Ukrainian courts as a source of law. It also analyzes the notion and characteristics of the sources of law according to academics. Particular attention is paid to the investigation into whether the decisions of the Ukrainian courts can be defined as a precedent and whether they have, in turn, binding force for all people. Therefore, the analysis of the legal nature of the decisions of the European Court of Human Rights, the Constitutional Court of Ukraine, the Supreme Court, and the administrative courts was of interest. The study used general and special scientific methods, the basis of which is the application of the results of theoretical research and other generalized information on the sources of law in Ukraine. The authors conclude that these decisions have a different nature than the judgments of the common law system. Although some judicial decisions of Ukrainian courts tend to possess some elements of precedent and are binding, not only for the parties to the case but for all people. This makes it possible to characterize these judicial decisions as complementary sources of law.

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Las decisiones judiciales como fuente de derecho

Resumen

El artículo trata la cuestión de la naturaleza jurídica y la esencia de los actos judiciales de los tribunales ucranianos como fuente de derecho. Analiza también la noción y las características de las fuentes del derecho según los académicos. Se presta especial atención a la investigación sobre si las decisiones de los tribunales ucranianos pueden definirse como un precedente y si tienen, a su vez, una fuerza vinculante para todas las personas. Por lo tanto, interesó el análisis de la naturaleza jurídica de las decisiones del Tribunal Europeo de Derechos Humanos, el Tribunal Constitucional de Ucrania, el Tribunal Supremo y los tribunales administrativos. El estudio utilizó métodos científicos generales y especiales, cuya base es la aplicación de los resultados de la investigación teórica y otra información generalizada sobre las fuentes del derecho en Ucrania. Los autores concluyen que estas decisiones tienen una naturaleza diferente a las sentencias del sistema de derecho común. Aunque algunas decisiones judiciales de los tribunales ucranianos tienden a poseer algunos elementos del precedente y son vinculantes, no solo para las partes del caso sino para todas las personas. Esto permite caracterizar estas decisiones judiciales como fuentes complementarias del derecho.

Palabras clave: precedente; fuente de derecho; tribunal administrativo; decisión judicial; relaciones jurídicas en Ucrania.

Introduction

The world's legal systems are not static, they are developing all the time, interacting with each other. The Anglo-Saxon legal system does not recognize the precedent as the sole source of law. Statues and acts of legislation play an essential role in the regulation of social relations, thus creating a numerous group of law sources. New precedents might also emerge based on legislative provisions. Therefore, the Continental legal system, applied in most European countries, is paying more attention to judicial precedents as sources of law. In this way, it becomes an important source for judicial application and interpretation in other cases.

The convergence of Roman-German and Anglo-Saxon law systems makes them closer. This interpenetration allows them to combine their characteristics to create effective normative regulation, protection of rights and freedoms of individuals. Hence, it is important to research the role, which the precedent plays in the Ukrainian legal system, its influence on other sources of law and the scope of its application by Ukrainian courts.

One of the most important tasks of all modern states is to establish obligatory legal rules to provide order and regulation of relationships between the subjects of law. For this reason, it is necessary to make them clear and accessible to everyone. The sources of law are a form of legal rules existence, their formulation for further application and usage in everyday life. Hans Kelsen stated that state creates law to obey it (Kelsen, 1967). This is also known as a self-reliance concept of a state.

1. Literature overview

The term "source of law" is believed to have been introduced by a Roman historian Titus Livius, who formulated the Law of the Twelve Tables as "*fons omnis publici privatique iuris*" (from Latin – the source of both private and public law). Later it has been widely used as "*fontes juris*" (the source of law) (Hearn, 1883: 31); (Scott, 2001: 213).

There is no common understanding of the term "source of law" because of different approaches to its understanding (Mikhaylovskiy, 1914: 237). The theory of law describes the source of law as an external form of legal norm expression (Parkhomenko, 2008). A. Scott in his paperback in 1885 stated that this term has two meanings: firstly, it is the source law derives from, secondly, it is the source of our knowledge of law and its reflection (Hearn, 1883).

Under the sources of law, we understand a set of obligatory legal provisions, contained in the act of the competent subject or a few subjects, which create, amend, postpone or abolish a legal norm. Hence, the source of law is characterized by the following features:

1. It is a written act.
2. It is adopted by an officially empowered public body or its official.
3. Obligatory for all subjects.
4. Normativity, which means its ability to regulate relations between all the subjects in the state.
5. Numerous applications.
6. All sources create a single system.

7. Limitation of its validity in time, space and concerning the persons covered.

Among all sources of law, applied in Ukraine and other civil law states, legislative acts and international treaties play the most significant role. Therefore, judicial precedent as the law enforcement act becomes an important source of law establishing judicial unity in all cases solved by courts. At the same time the judicial precedent, which is a result of judicial activity, increases its influence on all spheres of public life. Thus, the article aims to research whether the judicial precedent may be regarded as a source of law and its role as a normative regulator.

2. Legal nature of judicial decisions, judicial practice, and judicial precedent

The issue of judicial acts as a source of law is not new in legal literature, but we should focus more on legal practice to research this issue. Today the importance of judicial acts might be experienced more in practice, as there still prevails a position in the scientific literature, that judicial acts are the only source of law in the Anglo-Saxon countries. That approach was typical for the Soviet law researchers. For example, R. Livshytz argues that:

> The Soviet state has never known such a source of law as a judicial precedent, which leads to the deviation from the principles of law and undermines the role of the representative bodies of the state in legislative activity. Socialist judiciary administers justice as a form of application of law unrelated to the law-making power of the court in the resolution of specific cases (Livshitz, 1997: 49).

Indeed, the role of justice in a totalitarian state cannot be significant. Courts were obliged to obey normative acts and were to make decisions in their scopes. Even today many scholars state that there is no ground for judicial precedents to be acknowledged as the source of law. And, even when the court decisions overturn regulations, O. Konstantyy (2005) notes, "it cannot be said that such decisions contain rules of law and are legally binding in similar situations" (Konstantyy, 2005: 68-69). A well-known scholar of the administrative law of Ukraine emphasizes that judicial precedent cannot be regarded as a source of law in the legal system of Ukraine. Thus, special attention shall be paid to decisions of the Constitutional Court of Ukraine, which tend to be sources of law in the future. He also argues that this issue requires some further research (Averyanov, 2004).

At the same time, we should answer the question whether there is a necessity of determination of the legal nature of judicial decisions? Do they influence other cases, solved by courts? Is there a practical need for

the legalization of the precedent in the countries with the continental law system following the example of Ukraine? To answer these questions, we should do some research on the legal conclusions of the Supreme Court in an exemplary case when deciding a typical administrative case; consideration of findings, set out in rulings of the Supreme Court, regarding the application of legal norms of law; application of the decisions of the European Court of Human Rights (ECHR): decisions and conclusions of the Constitutional Court of Ukraine and application of court decisions abolishing normative acts or their provisions.

In these cases, in our opinion, judicial decisions might acquire a binding effect on all subjects of law. Hence, the following issue arises: can we regard the above-mentioned types of judicial decisions as judicial precedents?

In the theory of law, a judicial precedent is classified as a source of law. It is defined as:

> The method of external expression and consolidation of the individual rule of conduct, which is established by the competent authority of the State for the settlement of a specific situation, which becomes obligatory in the regulation of similar specific life situations (Lutz *et al.*, 2003: 77-78).

Historically judicial precedent is one of the most important sources of law. That is the judicial decision, not only of the highest courts, but it becomes binding on all other similar cases in the future. Here arises the question, what is the difference between the judicial precedent and judicial decision in continental law countries? Firstly, the precedent is the result of the law-making process, performed by a judge, instead of civil law systems, where judges make decisions based on legislative acts.

These decisions, in general, are not obligatory for other similar cases. Secondly, a judicial decision in common law legal systems has a different structure. It consists of *ratio decidendi* and *obiter dictum*. *Ratio decidendi* is the essential part of the judgement as it is legal reasoning of judge's ruling, while *obiter dictum* is a Latin phrase which means "that which is said in passing", a passage in a judicial opinion which is not necessary for the decision of the case before the court (Encyclopaedia Britannica).

Under Ukrainian legislation, there are four parts of judgement: introductory, descriptive, explanatory, and operative (Code of Administrative Proceedings of Ukraine, 2005). The Supreme Court in Ukraine often separates different parts of their decisions: the chronology of the case, the position of the parties, relevant sources of law and acts of their application, the opinion of the Supreme Court (Ruling of the Supreme Court, 2019). It should be stressed that the last one is very similar to the *ratio decidendi* in the common law systems.

The denial of the possibility of imposing binding judicial decisions in Ukraine has often been justified by the provisions of Article 129 of the previous edition of the Ukrainian Constitution, which determined that judges in the administration of justice are independent and are the subjects to legislation only. At the same time, the legislator eliminated this "atavism" of legal positivism, having accepted changes to the Constitution of Ukraine in 2016. Now the Constitution states "the judge, while administering justice, is independent and is guided by the rule of law". This allows judges to apply not only legislative acts but also other sources of law. Does that mean a deviation from what Francis Bacon said about judges of civil law systems, that judges should remember that their case is "*jus dicere*" and not "jus dare" (Bacon, 1978: 476)?

In other words, they shall rather apply and interpret the law, than establish a new legal rule. Benjamin Cardozo wrote that the judge creates a law where there are no legal acts, precedents, or other formal sources of law (Cardozo, 1921). In any event, an abstract legal norm cannot regulate all aspects of life and the judge, solving a case, applies it from his internal conviction. Application of law is not a mechanical work but requires deep understanding and interpretation of a legal norm.

Some Ukrainian scholars offer to reject the idea of introducing the judicial precedent in Ukrainian law, for example, V. Belianevych suggests that this idea should be abandoned due to the ambiguous approach to it by scholars and judges. Instead, he proposes to pay more attention to the judicial practice as a source of law (Belianevych, 2014). This requires that we should make further research on what is a judicial practice and whether it may be regarded as a source of Ukrainian law. According to the Ukrainian "Legal Encyclopedia" it is defined as a practice of judicial bodies in the administration of justice.

This means it is a set of separate judgements creating together a unified approach of case resolving in different areas. Therefore, a single judgment does not become a pattern for all other cases. And even if there are hundreds of equal decisions it does not have a binding effect on other courts. Hence, we cannot define some judgements in similar cases as a judicial precedent. In fact, the judicial practice reveals the specifics of judgements in common spheres, the unity in the judicial system and the similarity of approaches in filling gaps and other defects of the legislation. The only exception from this is the judicial practice of ECHR, which is directly defined in Ukrainian law as a source of law. Though this question requires some further research.

In France and other countries of the civil legal system, the doctrine of "*jurisprudence constante*" got wide dissemination. This term is translated as a well-established practice, namely these are some decisions which in their interconnection create a certain sequence of cases. It is not mandatory for the application but may be used with the authority it has acquired (Reshota,

2015: 99). In our opinion, "jurisprudence constante" is a synonym to what in Ukraine is known as the "judicial practice".

The next issue to be answered in this article is whether separate judgements have a binding effect on all subjects of law in Ukraine?

Considering a specific case, the administrative court may "recognize the legal act unlawful and invalid completely or in its certain part of" (Article 264 of the Code of Administrative Proceedings of Ukraine, 2005). The loss the legal force of the act affects not only the parties of the proceeding but also an undefined range of law subjects. That is, a court may interfere with the existence of a "defective" legal act based on the application of interested persons and resolve the issue under such an act or individual provisions thereof. In this case, the decision of a court will be generally binding, affecting an undetermined number of persons. This leads to the conclusion that some judgements may be attributed to sources of law. Although, it should be underlined, that these judgements have a derivative (subsidiary) nature from the primary sources of law (legislative acts, international treaties) since it must remedy the defect of the existing rule of law rather than regulate social relations on its initiative.

We would like to highlight the following features of judgements as sources of law:

- They are derivative (subsidiary) from primary sources of law (legislative acts, international treaties).
- They intend to fill legal gaps, conflicts of law and other regulatory deficiencies, including the application of the analogy of law.
- Maybe also applied in other similar legal relations.
- Specify the legal norm, «inhaling life in it», when applied in a specific case.
- May affect the operation of legal acts or their provisions.
- Are binding in the application by both the courts and the public administration.
- They are published in official publications, on the Internet and the Single State Register of Judicial Decisions (Single State Register of Judicial Decisions).

Therefore, not every single judgement will have a binding effect on an indefinite range of persons. For this reason, it is important to specify these judicial decisions to determine their relevance to sources of law.

3. The practice of the European Court of Human Rights as a source of law in Ukraine

When the Code of Administrative Proceedings of Ukraine was adopted in 2005 it created a legal basis for Ukrainian courts to apply the case law of the ECHR. The provision of Article 6 of the above-mentioned Act enabled courts to apply the rule of law considering the case-law of the European Court of Human Rights. At first, it was very unusual for judges to apply judgments as a source of law instead of a legislative act.

That is the reason why later it became a usual practice and nowadays the application of the case-law of the ECHR is common. In 2016 the Ukrainian and Helsinki Human Rights Union together with the Higher Court of Ukraine researched the best application of the practice of the ECHR by Ukrainian judges (Precedent UA – 2016, 2017).

Legal frameworks for the application of not only the European Convention on Human Rights but also of the ECHR case-law was established by the Law of Ukraine "On the execution of decision and application of the practice of the European Court of Human Rights" (2006). Article 17 of this Law specified the essence of the ECHR case law. It states that courts in Ukraine apply both the Convention and practice of the ECHR as sources of law. The practice of ECHR is significant in the application and interpretation of the Convention.

It helps to understand some provisions of the Conventions, it broadens them, makes them applicable for modern living conditions. Nevertheless, the ECHR case law is based on the Convention and hence has subsidiary nature. We should stress the fact that not a single ECHR judgment is recognized as a source of law by the Law, but as its practice in general. Hence, courts shall apply the decisions of the ECHR, considering all the decisions on the subject, including new ones, which might overrule the previous Court position.

It is necessary to stress the fact, that not only the decisions where Ukraine is a party are recognized as the source of law, but all decisions of the ECHR. The Law of Ukraine "On the execution of decision and application of the practice of the European Court of Human Rights" defines the practice of the ECHR as the whole practice of the European Court of Human Rights and the European Commission on Human Rights (On execution of decision and application of the practice of the European Court of Human Rights, 2006).

Nevertheless, sometimes judges refuse to apply the practice of the ECHR in the cases, where Ukraine was not a party to the case. For instance, in court decision of the former Supreme Court of Ukraine, ruled on April 21, 2016, the Court refused to apply cases "Podbielski and PPU Polpure v. Poland", "Kreuz v. Poland" and "FC Mretebi vs. Georgia" due to their non-

obligatory character as Ukraine was not a party in those cases and they cases weren't officially published in Ukraine (Decision of the Supreme Court of Ukraine, 2016). Therefore, this decision contradicts Article 18 of the above-mentioned Law, which states that courts shall apply official translations of the ECHR and the Commission, but in case of their absence they shall apply the original text. At the same time, this provision might create problems for judges who are not fluent in the English or French languages.

4. Decisions of the Constitutional Court of Ukraine

The Constitutional Court of Ukraine is a single body providing supremacy of the Constitution of Ukraine, official interpretation of the Constitution and conformity with the Constitution of Ukraine, the laws of Ukraine and other acts. The Law of Ukraine "On the Constitutional Court of Ukraine" defines the following acts of the Court: decisions, conclusions, court rulings, interim orders and orders relating to all other matters not related to the constitutional proceedings, among them, the decisions of the Constitutional Court of Ukraine on the constitutionality of the laws of Ukraine and other acts of the Supreme Council of Ukraine, the President of Ukraine, the Cabinet of Ministers of Ukraine and the Supreme Council of the Autonomous Republic of Crimea are of great importance; official interpretation of the Constitution of Ukraine; constitutional complaints. As a result of the recognition of the unconstitutional nature of a normative act or its certain provisions thereof, they lose their force.

In such a case, the judgement of the Constitutional Court will be binding not only on the parties of the case but will also affect the operation of the act and in this way shall be obligatory for all subjects who apply the act. In this case, the Constitutional Court is named by some scholars as a «negative legislator» (Shevchuk, 2002: 238). Besides that, the former head of the Constitutional Court of Ukraine S. Shevchuk states that the Court becomes a "positive legislator" exercising a normative control, in which the interpretation of the relevant legal norms to be applied is extended and additional argumentation is provided», that is the official interpretation of the Constitution of Ukraine. We should also stress that acts of the Constitutional Court of Ukraine are obligatory for execution and cannot be appealed. This makes judgements of the Court often binding on all subjects and courts in other related cases. Except that, the Court in his decisions often refers to his previous judgements, which resembles a precedent practice of the ECHR. The Law "On Constitutional Court of Ukraine" stresses the formal part of the Court decision, which is called a juridical position of the Court and resembles *ratio decidendi* in common law countries.

5. Acts of the Supreme Court and administrative courts as a source of law

First of all, we should highlight that the Supreme Court in Ukraine was created in 2017 instead of its predecessor the Supreme Court of Ukraine. It was the result of a judicial reform and a restart of the judiciary in Ukraine. All judicial proceedings codes got many amendments, and this allowed to look on the role of the Supreme Court acts from a new perspective. This reform aimed to establish unity of the judicial practice in the law enforcement process.

Previously the highest Court of Ukraine tried to unify its practice in special plenary resolutions, which were of recommendatory nature for lower courts. We can reveal its legal nature better on a practical example. In 2011 one person appealed to administrative court asking to abolish some provisions of Supreme Court plenary resolution on judicial practice on property crimes. In this case, the court decided that the resolution was recommendatory regarding the application of legislation by the courts in the administration of justice and did not determine the rights and obligations of the participants of the process; did not create any legal consequence and was not binding on the claimant (Decision of the District Administrative Court of Kyiv, 2011).

A judicial reform in Ukraine, which was implemented in 2016-2017 has changed the legal nature of the Supreme Court decisions. Firstly, we should understand the role of rulings of the Supreme Court.

According to the Part 5 and Part 6 of Article 13 of the Law of Ukraine "On Judiciary and Status of Judges": "The conclusions on the application of legal norms, outlined in the rulings of the Supreme Court, are binding on all subjects of power, who apply in their activity a legal act. At the same time, these rulings are considered by other courts when applying corresponding norms of law" (On the Judiciary and the Status of Judges, 2016).

Therefore, the Supreme Court rulings are binding on public administration bodies, which reinforces their importance as a source of law. It should be stressed that these rulings are binding on public administration, but courts should only take them into account when applying the relevant rules of law.

At the same time, there are no legal consequences for both the court of the first instance and the appellate court when they are even unreasonable or without any motives and do not consider the legal position of the Supreme Court. This underlines the "limited binding effect" of the Supreme Court rulings. Moreover, subjects of the private law are not obliged to obey the Supreme Court decisions, where they are not the parties to the case.

This leads us the conclusion that rulings of the Supreme Court in Ukraine might be defined rather as a law-enforcement precedent than a precedent in common law countries. They are more an example for other courts on how to apply legal norms in specific cases rather than a new legal ruling.

Surprisingly, the Supreme Court often finds a way to avoid legislative provisions. For example, the Cassation Administrative Court of the Supreme Court in its ruling held on 19 July 2018, stated that the court of appeals, applying the rule of the proceeding code, found excessive formalism and disproportion between the means of used and the intended purpose. In this case, the court of appeal returned the appeal complaint as it was submitted directly to the appeal court instead of the procedure underlined in the paragraph 15.5 of Section XIII "Transitional Provisions" of the Civil Proceedings Code of Ukraine (Decision of the Supreme Court of Ukraine, 2018).

This paragraph obliges all persons to submit appeal complaints through the court of the first instance before the day the Unified Judicial Information and Telecommunication System starts functioning. But the court of cassation claimed that a person may submit an appeal complaint either directly to the court of appeal or through the court of the first instance.

The next kind of Supreme Court acts are exemplary judgements in administrative cases. The institute of typical and exemplary cases is a new one in the judicial process of Ukraine. It was established in 2017 after the amendments to the Code of Administrative Proceedings of Ukraine (2005).

The main purpose of typical and exemplary proceedings is to expedite and simplify the process of similar cases before the court. Unlike the conclusions on the application of legal norms outlined in the rulings of the Supreme Court, the exemplary decision has certain peculiarities. While the rulings of the Supreme Court containing conclusions on the application of the law may be considered by the courts when deciding a case, exemplary rulings provide a model in the following rulings of typical administrative cases. It would be incorrect not to take into account the conclusions contained in the model decision of the Supreme Court may be challenged in appeal and cassation proceedings (Article 291 of the Code of Administrative Proceedings of Ukraine, 2005).

It is crucial to note that the Supreme Court makes an exemplary decision under certain conditions. First, there should be a few similar administrative cases in one or different administrative courts. In that case, lower administrative courts submit cases to the Supreme Court, and it determines if they are typical. Otherwise, the Supreme Court resolves the case as the court of the first instance and takes an exemplary decision, which shall be applied in all typical cases.

Hence, judgements in typical and exemplary administrative proceedings have a big impact on other similar court cases. It may be regarded as a step towards the legalization of the judicial precedent in Ukraine. This means that a court does not just consider the position of the Supreme Court, but it is obliged to apply its rulings in all the cases defined by the Supreme Court as typical. If it refuses to do so, its decision might be abolished by the court of a higher instance.

Although the lawmaker did not intend to introduce the judicial precedent in the Ukrainian judicial system, it has many features of it. Therefore, it is necessary to underline that this step was caused by some practical needs. In particular, the courts have simultaneously dealt with thousands of similar claims, expending their time and resources on the parties, but often have developed divergent and contradictory practices. But later the Court of Cassation issued its own decision, which became the point of reference for the lower courts, and only then it became clear that all efforts of lower courts were just in vain.

By contrast, the institution of exemplary decision becomes both a guide and a safety-guard against excessive expenditure by the parties and the court itself. These results offer compelling evidence for the special nature of the Supreme Court exemplary decisions as a source of law.

The next kind of Supreme Court decision we should take into consideration are the decisions of the Cassation Administrative Court of the Supreme Court as the court of the first instance recognized decisions, actions or inactions of the Supreme Council of Ukraine, the President of Ukraine, the High Council of Justice, and the High Qualification Commission of Judges of Ukraine fully or partially illegal and invalid.

Thus, the Supreme Court may decide on their compliance with the legislative acts, but not their constitutionality as it is the competence of the Constitutional Court of Ukraine. As a result, the corresponding normative act or some of its provisions may lose validity. In such a case, the decision of the Supreme Court will have its binding force not only on the parties of the judicial case but on all persons, to whom this act could be applied. In this way, the Supreme Court gets the so-called "negative" legislative power to abolish the normative act. The same situation concerns the lower administrative courts which may find an act, decision or inaction of any public body or their officials illegal. Hence, the decisions of all administrative courts, not only those of the Supreme Court may have a binding effect.

Conclusions

We would like to stress the fact that allowing courts to form binding legal opinions may have some threats or negative consequences in an unstable judicial system. This could lead to contradictory, opposed positions on the similar issues of different or even the same court. The evidence from this study leads to the conclusion that the decisions of Ukrainian courts are not the source of law in its classical sense. The article states that such decisions are derived from the legal norm, but at the same time they shall be considered in law judicial enforcement. The recognition of public administration body acts, actions, or inactions as illegal and invalid is at the same time mandatory for all persons, including the persons of private law.

Unlike the common law system, courts in Ukraine are not empowered to create new rules of law. This leads to the conclusion that they cannot be attributed to the judicial precedent in its classical sense. Nevertheless, they may be defined as the law enforcement and interpretative precedents because the courts may specify, supplement, generalize the rule of conduct contained in the relevant source of law.

Therefore, court decisions in Ukraine should be considered as a complementary source of law, the application of which is derived from the main source of law. The concretization of the legal norm is a form of judicial interpretation of an existing rule, but not the creation of a new one. The so-called "negative law-making" process of the Constitutional Court of Ukraine and administrative courts means the abolition of the existing rule of law, but not the formation of a new rule of conduct. Thus, we believe that today it is worth defining the derivative (auxiliary) role of a court decision as a source of law in Ukraine.

This also leads to the reconsideration of the classical concept of the source of public law and defining it as a set of mandatory regulations contained in a written act of a competent subject or several subjects that create, change, suspend or terminate the legal norm.

It's necessary to conclude that not all judicial decisions would become a source of law, but only those which change, suspend or terminate the legal norm, stated in the legal act. The following should be added to these decisions: the practice of the European Court of Human Rights, decisions and conclusions of the Constitutional Court of Ukraine, rulings of the Supreme Court containing legal opinion, exemplary decisions of the Supreme Court and judgements of administrative courts abolishing normative acts or their provisions.

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