NORMATIVE ACTS OF JUDICIAL POWER: THE EVOLUTION OF VIEWS IN UKRAINIAN JURISPRUDENCE

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The recent changes occurring in Ukraine, especially in the context of the realization of the 1996 Constitution of Ukraine and activities of the Constitutional Court of Ukraine in the process of the realization of its norms and principles, strengthening of the independence of judicial power and conducting judicial reform, and also the growing need to apply the practice of international jurisdictional agencies and especially the practice of the European Court for Human Rights in Ukraine, are compelling us to view the process of the application of norms of law by courts from a somewhat different angle of vision.

The assertion generally accepted in the theory of State and law is that acts of judicial power are acts of law-application and therefore cannot be normative legal acts. The noted theoretician of Soviet law, S. L. Zivs, believed judicial precedent created no law in the Soviet Union, and a significant number of identical judicial decisions are merely a simple act of the application of a norm.[1] He severely criticized Professor Vilinskii, who at the time had the courage to suggest that an «identical judicial decision which is repeated several times acquires normative significance».[2] The majority of post-Soviet scholars also took the position that acts of judicial power are simple law-application acts and do not have a normative character. The assertion that courts do not have law-making powers consolidated in the constitution or in laws, and the judge may not replace legislation, serves as an additional argument for this type of conclusion.[3] Therefore, acts of judicial power cannot be a source of law. We recall in this connection that the indicia of a source of law are formal certainty, bindingness, normativity, and being generally known.

In turn, the assertion that judicial precedent is a source of law in countries of the Anglo-American legal family generates no scientific discussions. However, judicial precedent by its content is nothing other than an element of the reasoned part of a judicial decision, that is, an act of judicial power.

[1] *S. L. Zivs*, Источники права [Sources of Law] (Moscow, 1981), p. 177.
[2] Ibid., p. 177.
[3] See, for example, *E. I. Kozlova*, Конституционное право России [Constitutional Law of Russia] (Moscow, 1998), pp. 20–23.

Although the term itself — law of precedent — has specific meaning inherent for countries of Anglo-Saxon law, therefore in the countries of the former Soviet Union judicial precedent is not deemed to be a source of law on the official level. A similar trend exists in the countries of continental Europe, only with regard to terminology, and not with regard to the emergence of normative acts of judicial power, which are seen, as a rule, to be *«de facto»*. Indeed, in these countries a judicial decision is not a source of law because the principal source of law is a law as an act of State political power, and a judicial decision is merely an act of law-application. In addition, the doctrine of *stare decisis* is not officially recognized. However, an analogue thereof is widely used — the doctrine of *jurisprudence constante*, in accordance with which «a number of earlier adopted and coordinated judicial decisions are regarded as convincing evidence of a correct interpretation of a legal norm».[1]

In other words, the reasoning of a law-application act should be coordinated with the reasoning of previously adopted analogous cases, and therefore judicial decisions which were adopted previously acquire a normative character. This the European Court for Human Rights noted in the decision in Kruslin v. France: «the law of precedent plays an important role in continental countries», namely in the context of «stable judicial practice».[2]

An analogous trend is beginning to be formed in the Ukrainian legal system with respect to recognizing for acts of judicial power the normative character thereof by analogy with the law of precedent («stable judicial practice»); that is, the presence in these acts of judicial power of unique rules of behavior sui generis which have regulatory potential and extend under certain conditions not only to the participants of a specific judicial proceeding.

The practical need to see this trend with respect to acknowledging the normativity of acts of judicial power of Ukraine is substantiated by the following reasons:

[1]. The strengthening of the independence of judicial power vis-à-vis legislative and executive and the gradual understanding that the judge cannot be a simple mechanical executor of the will of the «political limb of power».

[2]. The granting to constitutional norms and principles, and also constitutional norms on human rights and fundamental freedoms, of direct effect and their direct application in courts, irrespective of the existence or absence of respective «concretizing» legislation, in order to ensure which it is exceedingly essential to have a new creative role for judges in the process of law-application. In order to achieve this aim it is necessary to overcome, as the Judge of the Constitutional Court of Ukraine, D. D. Lylak, correctly observed, a positivist posture which dominates in the jurisprudence of Ukraine, and also that the judge is strictly dependent upon a law.[3]

[3]. The overcoming in the process of the effectuation of a court proceeding of problems connected with the inconsistencies and contradictoriness of legislation, existence of gaps, and ambiguous provisions, and the like. Recourse in this regard for assistance to the legislator is ineffective and may drag out the judicial process. In addition, a court cannot refuse to administer justice of the basis of the existence of these problems.

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[1] *M. Algero*, «The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation», Louisiana Law Review, LXV (2005), p. 783.
[2] Kruslin v. France (1990) 12 EHRR 547.
[3] *D. D. Lylak*, «Судочинство і проблеми суддівської правотворчості» [Court Proceedings and the Problem of Judicial Law-Making], Вісник Верховного Суду України [Herald of Supreme Court of Ukraine], no. 3 (2003), p. 68.

[4]. Further European integration of Ukraine and international cooperation assume the acceptance and application at the level of judicial power of the practice of the European Court for Human Rights, Court of the European Union, and other international jurisdictional agencies, and also an awareness of the methodological and value approaches in law-application activities of the courts and the courts of European countries. As noted on this occasion by the Chairman of the Supreme Rada of Ukraine, V. Lytvyn, tens of thousands of legal acts are in force in Ukraine, from which judges and law enforcement agencies select the norms of that act which they prefer and not that which is consistent with human rights in a specific situation, whereas in European countries they apply in priority the principles and then the law. Not one final decision of the European Court for Human Rights exists which does not begin with principles.[1]

[5]. The overloadedness of the Ukrainian judicial system with cases which arise because of the contradictions in the application by courts of legislation (for example, when one appellate court under identical factual circumstances adopts a decision which is contrary to the decision of another appellate court). The priority assignment in this connection for the Supreme Court of Ukraine is to ensure the uniform application of norms of law by the courts of Ukraine. The Law of Ukraine «On Court Organization and the Status of Judges» of 7 July 2010, where these powers have been consolidated for the Supreme Court of Ukraine (Article 38), is orientated towards this.

In addition, all procedure codes of Ukraine were augmented by an Article of identical content: the decision of the Supreme Court of Ukraine adopted as a result of the consideration of an application for the review of a judicial decision for reasons of the non-uniform application by a court(s) of cassational instance of the same norms of law in similar legal relations is binding upon all subjects of authoritative powers which apply in their activity a normative legal act that contains the said norm of law and for all courts of Ukraine. Judges are obliged to bring their judicial practice into conformity with decisions of the Supreme Court of Ukraine.

These reasons, which have become real ones in the legal system of Ukraine, gradually are leading to the acquisition of a normative character by law-application acts of judicial power, as a result of which a precise boundary is being «erased» between normative-legal and individual-legal acts.

By normative-legal act is understood an official act of law-making, legal acts-documents of empowered agencies of State power, agencies of local self-government, officials, and also acts adopted by the population at a referendum which establish, change, or repeal legal norms.[2] In accordance with the draft law on normative legal acts of 21 January 2008, a «normative legal act is an official document which is adopted (or issued) by a duly empowered subject in a form and procedure determined by a law which establishes the norms of law for an indefinite group of persons and is intended for repeated application».

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[1] *V. M. Lytvyn*, «Европейская Конвенция о защите прав человека и задачи юридической науки в Украине. Доклад Председателя Верховной Рады Украины Владимира Литвина на общем собрании Национальной академии правовых наук Украины 24 сентября 2010 года» [European Convention for the Protection of Human Rights and the Tasks of Legal Science in Ukraine. Report of the Chairman of the Supreme Rada of Ukraine, Vladimir Lytvyn, at the General Meeting of the National Academy of Legal Sciences of Ukraine, 24 September 2010], Голос Украины [Voice of Ukraine], no 179)2010), pp. 2–3.

[2] *A. V. Mitskevich*, Акты высших органов Советского государства [Acts of Supreme Agencies of the Soviet State] (Moscow, 1967), p. 22; *O. V. Shopina*, Система правовых актов в современной России: проблемы теории [System of Legal Acts in Contemporary Russia: Problems of Theory] (Saratov, 2002), p. 83 (abstract diss. kand. iurid. nauk).

Thus, a normative legal act is a legal act which contains norms of law, regulates a respective sphere of social relations, and extends its operation to subjects of law not determined beforehand. In turn, individual (non-normative) acts extend their operation only to those subjects of law to whom they are addressed, that is, are acts of application of norms of law, taking into account the specific factual circumstances. Acts of judicial power are acts of the application of norms of law; however in certain instances they acquire the indicia of normativity, that is, extend their operation not only to individually-determined subjects of law, but also a group of persons not determined beforehand. Under what conditions does this happen and what is the legal nature of this phenomenon?

When characterizing the legal force of decisions of the Constitutional Court of the Russian Federation, the Chairman of that Court, V. D. Zorkin, noted that because an autonomous law-making function appertains to the Constitutional Court, it is necessary to acknowledge that its decisions acquire the character of precedent and become sources of law.[1] Therefore, in his view, the legal force of final decisions of the Constitutional Court exceed the legal force of any law and, respectively, are equated to the legal force of the Constitution itself, which can never be applied separately from the final decisions of the Constitutional Court that concern respective norms and, moreover, contrary to those decisions.[2]

In fact, and here one must share the view of Baitin, this is not the creation of law in the form of judicial precedent, but a judicial interpretation of law by means of the adoption by the Constitutional Court of the Russian Federation of acts of official, generally-binding, normative interpretation.[3] However, these acts have the indicia of normativity, and this term (normativity of acts of judicial power») should be used when characterizing the legal force of acts of judicial power instead of the term «precedential character of decisions». This characterization of normative acts of judicial power should be taken into account in the historical context which is based on the distinctive nature of the effectuation of the administration of justice and the requirements of justness and the principle of supremacy of law, and also the requirements of a uniform application of norms of law and unity of judicial practice, which consists of the fact that analogous cases should be decided analogously. This leads to courts, when considering cases, taking into account the legal holdings which were formulated previously in analogous cases and that leads to these acts acquiring a normative character.

The normativity of these acts is based on legal holdings which have been formulated in the reasoned parts of the acts of judicial power and are manifest in their being binding not only on the parties in the case, but also for a group of subjects of law not determined beforehand, and also the repeated application of these legal holdings when adopting decisions in analogous cases. General normative characteristics appertain to these legal holdings reminiscent of the characteristics of normative legal acts which were formulated by the noted legal theorist of the Soviet period, Mitskevich: non-specificity of the addressee, possibility of repeated application of

[1] *V. D. Zorkin*, «Прецедентный характер решений Конституционного Суда Российской Федерации» [Precedential Character of Decisions of the Constitutional Court of the Russian Federation], Журнал российского права [Journal of Russian Law], no. 12 (2004), p. 4.
[2] Ibid., p. 5.
[3] *M. I. Baitin*, «О юридической природе решений Конституционного Суда РФ» [On the Legal Nature of Decisions of the Constitutional Court of the Russian Federation], Государство и право [State and Law], no. 1 (2006), pp. 5–11.

the prescription, retention of the operation of the prescription irrespective of the performance thereof.[1]

The same concerns explanations which are contained in decrees of the plenums of supreme courts and specialized courts. Lazarev noted in this regard: «Decrees of the Plenum of the Supreme Court always contained, do contain, and may not fail to contain rules of behavior of a general character which are applied not to a specific court, but to all judicial instances and to an indefinite group of persons in connection with their possibility to have recourse to judicial agencies. A one-off application of norms of law never exhausts the content of a guiding explanation. Guiding explanations or instructions of a plenum, however provisionally, fill gaps in legislation, and insert a new element in legal regulation. Decrees are distinguished by sufficient definitude and contain provisions of a normative character which have legal force».[2]

In turn, acts of judicial power adopted in concrete cases which have a normative character contain the following characteristics: (1) are adopted in the process of the administration of justice; (2) not the act of judicial power as a whole has a normative character, but that part thereof (as a rule, reasoned) where the legal holding is contained; (3) they have a generally binding character because their operation extends not only to the parties in the case, but also concerns other subjects of law not determined beforehand; (4) their normative character occurs from the need to ensure the interests of justice when considering analogous cases and is based on legal holdings which are formed in the process of the application and interpretation of norms of law in the process of the consideration of concrete cases; (5) are ensured by the State through the activity of agencies for the execution of judicial decisions; (6) their normative character is closely linked with legal norms and principles which are applied by a court on the basis of an analysis of legal facts (or factual circumstances of the case) and judicial interpretative activity; (7) depends upon the level of professional legal consciousness of judges and the level of development of legal doctrine; (8) in a Romano-Germanic legal family has a supplementary character relative to other sources of law and in an Anglo-Saxon legal family are an autonomous source of law.

It also is necessary to name the principal distinctions between acts of judicial power which have a normative character and those of normative legal acts:

[1]. The limited nature of the operation of an act of judicial power, namely those parts thereof which contain a legal holding: this is binding only for judges when considering analogous cases, and not for all subjects of law as in the operation of normative legal acts.

[2]. The binding nature of acts of judicial power of a normative character is established, as a rule, not by a law, but by judicial power itself with a view to ensuring the requirements of the administration of justice and the judicial protection of the principles of law of the constitutional level (equality, legal certitude, and confidence in law).

[3]. An act of judicial power as a whole does not have binding force, but that part thereof which contains the legal holding, which acquires the indicia of normativity in the event of the repetition of actual circumstances and legal relations during the judicial consideration of an analogous case. This legal holding has a lower level of formal certitude than a norm of law, and its location in the text of the act of judicial power

[1] *A. V. Mitskevich,* Акты высших органов Советского государства [Acts of Highest Agencies of the Soviet State] (Moscow, 1967), pp. 42–43.
[2] V. V. Lazarev (ed.), Теория государства и права [Theory of State and Law] (Moscow, 1999), p. 141.

depends upon special methodological approaches and is based on the approaches of the court itself or higher courts which must apply the legal holding a second time when deciding analogous cases. In addition, not all acts of judicial power have a normative character, but those in which, as a rule, the case is decided in substance. A normative legal act operates in its full plenitude irrespective of the circumstances of law-application and extends its operation to all subjects of law.

[4]. The normativity of an act of judicial power is closely linked with the factual circumstances of the case, and the differences between factual circumstances when deciding an analogous case (application of the so-called «technique of distinctions») materially reduce the legal force of these acts. Factual circumstances do not influence the legal force of normative legal acts.

The phenomenon of normativity of acts of judicial power was researched in Soviet legal doctrine. It is understandable that this normativity is recognized in the legal systems of many countries, but in the USSR this phenomenon was always treated with caution. With a view to the scientific qualification of normativity, Soviet legal doctrine relied on the concept of a legal holding, by which was understood general provisions which were formulated in the process of law-application activity of respective agencies having a subordinate character and containing clarifying legal norms relating to particular homogeneous factual constituent elements.[1] As Lazarev noted, «by its content, any legal holding is an official behest of an agency with regard to the understanding and use of law in connection with a certain life situation arising which falls under the operation of a law».[2]

Legal holdings, in Voplenko's view, are stable typical decisions with regard to the application of legal norms which in reality acquire the features of a legal norm and general rules, and by virtue of the typical nature of a law-application situation, acquire the significance of a precedent, a significance formulated in the process of the interpretation and application of general rules for subsequent legal practice and the authority of the law-application agency.[3]

Thus, the introduction by Soviet doctrine of the concept of a legal holding into scientific turnover was nothing other than a factual recognition of normativity for certain acts of judicial power. The characteristic indicia of a legal holding are:

— legal holdings are created in the process of judicial activity, in connection with which legal holdings are more closely connected with factual circumstances than are legal norms;

— legal holdings are a supplementary means of legal influence on social relations together with a legal norms; however, they cede to the last in force and significance;

— legal holdings have a subordinate character and cannot change or add to a law or, moreover, be contrary to the content thereof;

— compliance with legal holdings is ensured by vacating of a decision by a higher instance which contained a violation of a certain legal holding or by means of rectification of the decision by the instance which adopted it;

[1] See S. N. Bratus (ed.), Судебная практика в советской правовой системе [Judicial Practice in the Soviet Legal System] (Moscow, 1975), pp. 65–68.
[2] *V. V. Lazarev,* «Правоположения: понятие, происхождение и роль в механизме юридического воздействия» [Legal Holdings: Concept, Origin and Role in Mechanism of Legal Impact], Правоведение [Jurisprudence], no. 6 (1976), p. 8.
[3] *N. N. Voplenko,* Источники и формы права [Sources and Forms of Law] (Volgograd, 2004), p. 74.

— legal holdings have a general character, just as norms, do not relate to a personified group of persons and are addressed to all participants of social relations in the sphere of the administration of justice;

— legal holdings acquire their expression in certain forms — guiding explanations of Plenums of Supreme Courts (USSR and union republics),l and also in judicial decisions on important legal questions of principle.[1]

In the view of modern Russian researchers, the Soviet theory of legal holdings was nothing other than an attempt at a concealed analysis of the problems of judicial lawmaking under conditions of the official denial thereof.[2]

Soviet legal doctrine recognized for acts of judicial power the presence of the indicia of normativity when an act of application of law contained respective holdings which clarify norms of law.[3] Reutov even singled out three types of these holdings: (1) those which arise when filling in gaps in law; (2) those which clarify and elaborate the content of prescriptions of a general character; and (3) those which arise as a result of the clarification and elaboration of general provisions, concepts, and definitions of legislation.[4] In addition, even in the Soviet period the fact was recognized of the creation of a new provision unknown to legislation capable of serving to resolve specific cases as a consequence of the application of analogy by courts.[5] Doctrinal writings note that gaps in legislation are overcome by a law-application agency with the assistance of a special type of holdings which approximate a legal norm but do not become this.[6] Alekseev, on the contrary, believed that a holding is also a norm, in any event from the moment when the position created by courts begins to be applied by them as a type of resolution of a particular life situation.[7]

The very term «holding», which was formulated by Soviet legal doctrine, reflected in essence a law-making character of judicial practice in the Soviet legal system.

One may also see that the term «holding» is a synonym of the term «legal position», which is used to characterize the activity of constitutional courts in post-Soviet countries and reflects a worldwide trend towards the extensive recognition of the normativity of acts of judicial power. In addition, these holdings, in the view of Ukrainian scholars, as stable typical decisions of the application of legal norms which really acquire the indicia of general rules, by their significant and role in judicial practice approximate persuasive precedents well known to the Anglo-American legal systems.[8]

The concept of «holding» was first introduced in a scientific-practical situation which formed in the administration of constitutional justice, especially the phenomenon of «extensive» (law-making) interpretation of constitutional norms when substantiating a decision. They have the indicia of normativity, but they remain acts

[1] Bratus (ed.), Судебная практика в советской правовой системе [Judicial Practice in the Soviet Legal System] (Moscow, 1975), pp. 26–27.
[2] *P. A. Guk*, Судебный прецедент как источник права [Judicial Precedent as Source of Law] (Saratov, 2002), p. 51 (abstract diss. kand. iurid. nauk).
[3] *S. S. Alekseev*, Общая теория права [General Theory of Law] (Moscow, 1975), I, p. 341.
[4] *V. P. Reutov*, Юридическая практика и развитие законодательства [Legal Practice and Development of Legislation] (Sverdlovsk, 1968), p. 5 (abstract diss. kand. iurid. nauk).
[5] *S. P. Pohrebniak*, «Судова практика: поняття та функції» [Judicial Practice: Concepts and Functions], Бюлетень Міністерства юстиції України [Bulletin of the Ministry of Justice of Ukraine], no. 9 (2004), p. 56.
[6] *Lazarev*, «Правоположения: понятие, происхождение и роль в механизме юридического воздействия» [Legal Holdings: Concept, Origin and Role in Mechanism of Legal Impact], Правоведение [Jurisprudence], no. 6 (1976), p. 8.
[7] *Alekseev*, Государство и право. Начальный курс [State and Law. Elementary Course] (Moscow, 1994), p. 59.
[8] *Pohrebniak*, «Судова практика: поняття та функції» [Judicial Practice: Concepts and Functions], Бюлетень Міністерства юстиції України [Bulletin of the Ministry of Justice of Ukraine], no. 9 (2004), pp. 58–59.

of the application of law and not normative legal acts. Khrystova, who concluded that manifestations of normativity were present in decisions of the Constitutional Court of Ukraine, noted that the «normative nature of these acts for the most par tis determined by an exposition in the reasoned part of so-called holdings of the constitutional control agency, and decisions of the Constitutional Court of Ukraine concerning the constitutionality of legal acts have a quasi-precedential character».[1]

This term reflects the phenomenon of the normativity of acts of judicial power (constitutional courts) when a certain part of the reasoning of these acts in which the reasons are substantiated of the (un)constitutionality of laws, conclusions to which the court came when making an official interpretation, the judges' understanding of norms of law, and so on become binding not only upon the parties to the case, but also on the subject of the right to a constitutional submission and recourse, but, intermediately, upon all subjects of the right.

This also is explained by the fact that in the process of the practical activity of the Constitutional Court the need has emerged for recourse to interpretational conclusions set out in decisions previously adopted which have an objective character because, in adopting the decision in a new case, the Constitutional Court should take into account the understanding already formulated by it of norms or provisions of a law.[2] That is, the Constitutional Court becomes a «positive legislator» when effectuating norm-control, in the process of which an extensive interpretation is given of respective legal norms which underlie the application that accompanies legal arguments and conclusions of the court in a specific issue of law-application.

The term «holding» was consolidated for the first time at the legislative level in the Federal Constitutional Law «On the Constitutional Court of the Russian Federation» (Article 73), which established that when the majority of judges of the Constitutional Court who take part in a session of the chamber comes to a conclusion concerning the need to adopt a decision which is not consistent with the holding of the Court expressed in decisions previously adopted, the case is referred for consideration to a plenary session of the Constitutional Court.[3] The rule set out in this Article is reminiscent on the whole of Article 30 of the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms, that is, reflects a general European tradition in formation. In addition, in light of paragraph 40 of the Reglament of the Constitutional Court of the Russian Federation, a change of a legal holding when considering a new case be initiated either by chambers or by the Constitutional Court. This does not mean the change of the decision in which it was formulated and does not violate the requirements of a final judicial decision. However, the Constitutional Court will not be guided by this holding when rendering future decisions.[4]

This term is not normatively consolidated in Ukraine, but is used by the Constitutional Court itself when referring to the argumentation or reasons of decisions previously adopted.[5] For a doctrinal characterization of a holding, we turn to the defi-

[1] *G. O. Khrystova*, Юридична природа актів Конституційного Суду України [Legal Nature of Acts of the Constitutional Court of Ukraine] (Kharkov, 2004), p. 13 (abstract diss. kand. iurid. nauk).
[2] *P. Tkachuk*, «Правові позиції Конституційного Суду України» [Holdings of the Constitutional Court of Ukraine], Вісник Конституційного Суду України [Herald of the Constitutional Court of Ukraine], no. 1 (2006), p. 10.
[3] Translated in *W. E. Butler*, Russian Public Law (2d ed.; 2009), pp. 518–555.
[4] *L. V. Lazarev*, Правовые позиции Конституционного Суда России [Holdings of the Constitutional Court of Russia] (Moscow, 2003), p. 113.
[5] See, for example, the Decision of 25 December 2003. P. B. Evgrafov (ed.), Конституційний Суд України. Рішення. Висновки 2002–2003 [Constitutional Court of Ukraine: Decisions, Rulings. 2002–2003 (Kyiv, 2004), IV, p. 567.

nition formulated by Khrystova: «... holdings are the result of systematic interpretation by the Constitutional Court of Ukraine of laws and the Constitution of Ukraine and in concentrated form reflect not only the "letter", but also the "spirit" of the respective legislative provisions, have a generally binding normative character, and are contained in its acts of all types, except intra-organizational».[1] Although this term indicated a phenomenon of the activity of constitutional courts, it is not excluded that in the future it may be used to describe all types of the administration of justice.[2]

Many scholars equate *ratio decidendi* and a holding, especially the Judge of the Constitutional Court of the Russian Federation, G. Gadzhiev: «... in the world of legal phenomena, the holdings of the Constitutional Court are closest to *ratio decidendi* and, in light of this, holdings of the Constitutional Court should be considered a source of law».[3] For Serohyna, holdings formulated by the Constitutional Court of Ukraine have a general character and are binding upon courts, other State agencies, and officials.[4]

Gadzhiev also believes that a «holding of the Constitutional Court of the Russian Federation is the attitude of the court towards the content of a constitutional norm as a result of the construction thereof»[5] or «represents the principle of resolving a group of analogous cases which have been identified by the example of the investigation of the constitutional norm being contested».[6]

As Zorkin noted, «holdings of the Constitutional Court which are contained in decisions actually reflect law-making of a special type. Decisions of the Constitutional Court with the holdings contained therein occupy a special place in the general system of sources of law of Russia».[7]

Kriazhkov understands this term to mean the «logical-legal (especially constitutional) substantiation of the final conclusion of the Court contained in the decree part of its decision, which is formulated in the form of legal conclusions, guidance, having a generally binding significance».[8] In the view of Bogdanova, a holding is a theoretical construction with whose assistance the Constitutional Court, using the potential of doctrine, overcomes the legal incertitude of the content of a particular norm.[9]

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[1] *Khrystova*, Юридична природа актів Конституційного Суду України [Legal Nature of Acts of the Constitutional Court of Ukraine] (Kharkov, 2004), p. 14 (abstract diss. kand. iurid. nauk).
[2] *V. Iu. Solovev,* Судебная практика в российской правовой системе [Judicial Practice in the Russian Legal System] (Moscow, 2004) , p. 6 (abstract diss. kand. iurid. nauk).
[3] *G. Gadzhiev*, «Правовые позиции Конституционного Суда Российской Федерации как источник конституционного права» [Holdings of the Constitutional Court of the Russian Federation as a Source of Constitutional Law], Конституционное право: Восточноевропейское обозрение [Constitutional Law: East European Survey], no. 3 (1999), p. 82.
[4] *S. Serohyna,* «Використання практики Європейського суду з прав людини як перспективний напрям оптимізації конституційного судочинства в Україні» [Use of Practice of European Court for Human Rights as Promising Direction for Optimization of Constitutional Proceedings in Ukraine], Вісник Конституційного Суду України [Herald of Constitutional Court of Ukraine], no. 6 (2005), p. 42.
[5] *Gadzhiev* and *S. G. Pepeliaev*, Предпринимательство. Налогоплательщики. Государство. Правовые позиции Конституционного Суда Российской Федерации [Entrepreneurship: Taxpayers. State. Holdings of the Constitutional Court of the Russian Federation] (Moscow, 1998), p. 56.
[6] *Gadzhiev*, «Правовые позиции Конституционного Суда Российской Федерации как источник конституционного права» [Holdings of the Constitutional Court of the Russian Federation as a Source of Constitutional Law], Конституционное право: Восточноевропейское обозрение [Constitutional Law: East European Survey], no. 3 (1999), p. 83.
[7] *V. D. Zorkin*, «Прецедентный характер решений Конституционного Суда Российской Федеркции» [Precedential Character of Decisions of the Constitutional Court of the Russian Federation], Журнал российского права [Journal of Russian Law], no. 12 (2004), p. 4.
[8] *V. A. Kriazhkov,* Конституционное правосудие в субъектах Российской Федерации [Constitutional Justice in Subjects of the Russian Federation] (Moscow, 1999), p. 109.
[9] *N. A. Bogdanova*, «Конституционный Суд Российской Федерации в системе конституционного права» [Constitutional Court of the Russian Federation within the System of Constitutional Law], Вестник Конституционного Суда Российской Федерации [Herald of Constitutional Court of the Russian Federation], no. 3 (1997), p. 63.

Lazarev considered the holdings of the Constitutional Court to be a system of legal arguments, legal understanding, models, or rules of a precedential character, general legal orientators.[1]

P. Tkachuk, a member of the Constitutional Court of Ukraine, understands a holding as the result of the interpretative activity of the Constitutional Court in the form of conclusions, explanations, holdings, and doctrines contained the interpretation of the non-obvious meaning of a law, legal evaluation, or legal definition, aggregate of legal notions and knowledge relating to the resolution of a specific situation which is binding upon all subjects of legal relations.[2] In Tkachuk's view, the holdings of the Constitutional Court of Ukraine are the results of an interpretation of provisions of the Constitution of laws of Ukraine. He considers their legal nature in two aspects: (1) the holding is an exposition of the understanding of a particular norm of the Constitution or law, that is, it in essence is an interpretation of the position of the legislator and elements of the respective norms; (2) in other instances a holding is a generalization of the knowledge and understanding of the operation of constitutional law principles applicable to a concrete legal situation.[3]

Generalizing the various definitions of this term cited in doctrinal writings, Stepankov singles out basic characteristics: (1) the holding is a «quasi-norm», that is, a foundation which has generally binding significance; (2) instructions which have generally binding significance; (3) a logical and semantic link which enables the Constitutional Court to adopt coordinated decisions, which is important for forming a precedential and non-contradictory judicial practice; (4) has an element of official constitutional doctrine; (5) acts as a source of constitutional law because the character of constitutional legal norms is acquired; (6) contains the principle of resolving a group of analogous cases.[4]

Teslenko also noted that holdings are regarded as a system of legal arguments, models, or rules of a precedential character, legal orientators; both the identification of those numerous potential possibilities and strata rich in legal content, they are contained in concentrated form in constitutional norms; as legal conclusions and concepts of the Court as a result of the interpretation of laws and other normative legal acts eliminating lack of certitude of norms of law and as a system of arguments cited by the Constitutional Court to substantiate its decision.[5] Teslenko's conclusion that holdings are fully capable of filling gaps in legislation and resolving conflicts in accordance with the spirit and letter of the law and are a means of revealing values set out in the 1996 Constitution of Ukraine should be supported.[6]

As Teslenko believes, holdings are similar to ratio decidendi, and therefore may be considered to be a source of law, that is, she draws a direct analogy with judicial

[1] *V. V. Lazarev*, «Техника учета решений Конституционного Суда Российской Федерации в законодательной деятельности» [Technique of Taking into Account Decisions of the Constitutional Court of the Russian Federation in Legislative Activity], in V. M. Baranov (ed.), Законодательная техника современной России: состояние, проблемы, совершенствование: Сборник статей [Legislative Technique of Modern Russia: State, Problems, Improvement: Collection of Articles] (Nizhnii Novgorod, 2001), II, p. 48.
[2] *P. Tkachuk*, «Правові позиції Конституційного Суду України» [Holdings of the Constitutional Court of Ukraine], Вісник Конституційного Суду України [Herald of the Constitutional Court of Ukraine], no. 1 (2006), p. 21.
[3] Ibid., p. 16.
[4] *V. G . Stepankov,* Правовая позиция: общетеоретические и прикладные аспекты [Holding: General Theoretical and Applied Aspects] (Nizhnii Novgorod, 2003), pp. 13–14 (abstract diss. kand. iurid. nauk).
[5] *M. Teslenko,* «Юридична сила і значення правових позицій Конституційного Суду України» [Legal Force and Significance of Holdings of the Constitutional Court of Ukraine], Вісник Конституційного Суду України [Herald of Constitutional Court of Ukraine], no. 4 (2003), pp. 36–37.
[6] Ibid., p. 38.

precedent as a source of law.[1] This means that many methodological and practical aspects of the operation of the law of precedent of Anglo-Saxon countries must be studied for the purpose of the adequate use of this experience within the confines of the Ukrainian legal system. It is evident that holdings also may be reviewed in the course of time, but when effectuating such a review the courts must clearly formulate the reasons which conditioned this need.

The most important characteristics of holdings are the following:

[1]. Holdings are formed in the process of the consideration of specific cases on the basis of a constitutional court proceeding with the exercise by a constitutional court of its powers (norm-control, official interpretation, constitutional appeal, and so on). They officially are formulated and officially are consolidated only at a judicial session and are considered as a position of a collegial organ and do not represent a final decision, but are only the substantiation for this decision.[2] A decision of a court is based on the holding.[3] In other words, a holding for the most part is contained in the reasoned part of the decision of a court, that is, represents the procedure for the reason and acquires autonomous significance irrespective of whether it is reflected, or duplicated, in the resolutive part. Exceptions from this rule exist, for example, the formulation of a legal position in the ruling of a court to refuse to open a constitutional proceeding.

[2]. Lack of certainty of the law is eliminated by means of formulating a holding, which strengthens the level of legitimacy of the constitutional court and the quality of the administration of justice is strengthened, as is confidence in the law.

[3]. Holdings are divided on the basis of various criteria into various types: (1) holdings formulated on the basis of a verification of the conformity to the Constitution of the provisions of laws and other legal acts; (2) holdings formulated as a result of the official interpretation of the Constitution and laws. They also are classified on the basis of an object of a constitutional law problem (concerning concepts, norms, principles, institutes); the character of the subject-matter of regulation (material-law and procedural law); depending upon the sphere of social relations.[4]

[4]. The legal force of holdings is inextricably linked with the binding nature of decisions and conclusions of the Constitutional Court. In turn, the legal force of decisions and conclusions of the Constitutional Court lies in the following: (1) they are final, not subject to appeal, and likewise binding upon all subjects of law and enter into force after the reading out thereof; (2) they operate directly and do not require confirmation of the operation by other legal acts; (3) the legal force of decisions of the Constitutional Court deeming a legal act to be unconstitutional cannot be overcome by the adoption of an analogous legal act; (4) decisions of State agencies based on legal acts which were deemed to be unconstitutional cannot be execution and are subject to review in the established procedure.

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[1] *M. Teslenko,* «Юридична сила і значення правових позицій Конституційного Суду України» [Legal Force and Significance of Holdings of the Constitutional Court of Ukraine], Вісник Конституційного Суду України [Herald of Constitutional Court of Ukraine], no. 4 (2003), p. 38.

[2] *M. N. Marchenko,* Судебное правотворчество и судейское право [Judicial Law-Making and Judges' Law] (Moscow, 2007), pp. 135–136.

[3] *Tkachuk,* «Правові позиції Конституційного Суду України» [Holdings of the Constitutional Court of Ukraine], Вісник Конституційного Суду України [Herald of the Constitutional Court of Ukraine], no. 1 (2006), p. 21.

[4] *Teslenko,* «Юридична сила і значення правових позицій Конституційного Суду України» [Legal Force and Significance of Holdings of the Constitutional Court of Ukraine], Вісник Конституційного Суду України [Herald of Constitutional Court of Ukraine], no. 4 (2003), p. 37.

[5]. Holdings have a normative general (they extend their operation when analogous cases are decided) and binding character, that is, they are evidence of the existence of a law-making function in the Constitutional Court.

[6]. Holdings simultaneously have a concrete and general character.[1] The concrete character is manifest in the attitude of the court towards resolving a concrete legal question in accordance with the subject-matter of the proceeding, and the general character in the extension of its operation to an indefinite number of analogous instances in the future.

[7]. Acts of a constitutional court are published in official publications and in that form the holdings contained therein become generally accessible. A State agency has not been created in Ukraine whose purpose would be the official formulation of holdings, because this remains the assignment of the Constitutional Court itself, which determines the holdings in its previously adopted decisions and refers to them in subsequent analogous decisions.

Thus, the normativity of acts of judicial power is based on a holding, and this represents the legal conclusions of a court and the results of the interpretation of norms of law in the context of law-application which, in turn, are the basic reasons for the final judicial decision and acquire a normative character as a result of repeated law-application when an analogous case is considered. In this connection it is necessary to draw attention to the principle of Roman Law, *de similibus idem est judicium*. In turn, the principle of trust in the law is closely connected with the principle, when analogous decisions are adopted in analogous cases, the result of which may provide that judicial arbitrariness is materially reduced. The principal criterion is the level of similarity of court cases and their repeatability with regard to factual circumstances and norms of law which are subject to application. Repeatability, as Tsvik noted, is a principal indicator of law.[2]

The comprehensive recognition of the normativity of acts of judicial power in various countries had led to the use in doctrinal writings of the term «judicial law-making».[3] This term also reflects the phenomenon of the normativity of acts of judicial power and judicial activity with regard to the adoption of judicial precedents or forming of holdings in the process of the application and interpretation of norms of law.

The term itself originates in English-speaking legal sources. According to *Black's Law Dictionary*, the terms judicial law-making or judge-made, judicial, or case law encompasses the process of the exercise of judicial power of a law-making function through the adoption of judicial decisions in which the content of legislation is changed by means of interpretation, or a meaning established which the legislator never set out when adopting normative legal acts. In the first meaning, the term «judicial law» is used as the law which is established in a judicial precedent or as law which is contained in a judicial decision rather than in normative legal acts or administrative practice.[4]

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[1] *S. P. Cherednichenko*, Судебное правотворчество: сравнительно-правовое исследование [Judicial Law-Making: Comparative Legal Study] (Moscow, 2005), p. 145 (abstract kand. iurid. nauk).
[2] *M. V. Tsvik,* «Про сучасне праворозуміння» [On Modern Legal Understanding], Вісник Академії правових наук України [Herald of Academy of Legal Sciences of Ukraine], no. 4 (2001), pp.10–11.
[3] See *O. F. Skakun*, «Судова правотворчість у країнах континентальної Європи» [Judicial Law-Making in the Countries of Continental Europe], Державне будівництво та місцеве самоврядування [State Construction and Local Self-Government], no. 1 (2001), pp. 124–136; *M. N. Marchenko*, Судебное правотворчество и судейское право [Judicial Law-Making and Judges' Law] (Moscow, 2007).
[4] See B. Garner (ed.), Black's Law Dictionary (8th ed.; 2004), p. 858.

The Russian legal scholar, Popov, understood by the term «judicial law-making» a special variety of law-making, the activity of the highest agencies of judicial power, with the purpose of creating necessary conditions for the administration of justice which is not contrary to the constitution and generally-recognized principles and norms of international law directed towards making secondary (or auxiliary, additional) changes in the existing system of law which is conditioned by the need to eliminate uncertainty of the law, the result of which becomes norms consolidated in judicial acts.[1]

Cherednichenko believes that judicial law-making is a variety of State law-making, which he defines as a «special activity of judicial power, the result of which is the creation, repeal, or change of legal norms, and also the interpretation thereof and, accordingly, the legal regulation of certain social relations as a result of the need for a court to consider cases and for the court to adopt decisions, and also summarize judicial practice, which is effectuated within the established legal procedure and on the basis of legal principles existing in the particular society».[2]

One characteristic peculiarity may be noted in the definition of Russian legal scholars who research this phenomenon: they insist that legal norms are created, changed, or repealed in the process of judicial law-making. One cannot agree with this approach for the reason that this relates to the jurisdiction of the legislator in the process of «classical law-making». A court formulates a certain procedure of reasoning which is contained in the reasoned part of an act of judicial power and corresponds to a great extent to the term «holding».

In this author's view, judicial law-making should be understood as a special type of law-making which is a process of the exercise by judicial power of a law-making function jointly with its law-application and interpretative functions when a concrete case is considered, as a result of which holdings appear. They are contained in the reasoned part of an act of judicial power and have binding force not only for the parties in a case, but also for other subjects of law on the basis of the prescriptions of a law or by virtue of the operation of the principle of the hierarchy of the judicial system (decisions of higher courts are binding upon lower), or by virtue of their persuasiveness when analogous cases are considered.[3]

Attention must be drawn to the fact that judicial law-making differs significantly from other types of law-making because it is not linked with volitional State activity with regard to the establishment of norms of law. In accordance with views widely shared in legal doctrine, law-making should be understood as a form of State activity connected with the official expression and consolidation of norms of law,[4] their change and repeal, or the legal form of activity of the State with the participation of a civil society (in instances provided by a law) connected with the establishment (or sanctioning) by a change or repeal of legal norms,[5] or as «one of the forms of the activity of the State in the person of competent agencies, institutions, and organiza-

[1] *O. V. Popov*, Теоретико-правовые вопросы судебного правотворчества в РФ [Theoretical-Legal Questions of Judicial Law-Making in the Russian Federation] (Toliatti, 2004), p. 54 (abstract diss. kand. iurid. nauk).
[2] *Cherednichenko*, Судебное правотворчество: сравнительно-правовое исследование [Judicial Law-Making: Comparative Legal Study] (Moscow, 2005), p. 174 (abstract kand. iurid. nauk).
[3] Certain exceptions exist from this rule: decrees of the Plenum of the Supreme Court (holdings formulated as a result of the generalization of practice, that is, without reference to specific judicial decisions) and decisions with regard to an official interpretation of the Constitutional Court (holdings also are contained in the resolutive part).
[4] *V. S. Nersesiants*, Общая теория права и государства [General / Theory of Law and State] (Moscow, 2004), p. 415.
[5] *O. F. Skakun*, Теорія держави і права [Theory of State and Law] (2d ed.; Kharkov, 2005), p. 293.

tions which have been empowered (in instances provided by a law) to prepare, issue, or improve normative-legal acts».[1]

Law-making never reduces to the making of lex, which is the sole monopoly of the highest representative agencies of the State (in Ukraine — the Supreme Rada) or people (civil society) in the instances provided by a law (lex).[2] Vengerov defined law-making as an organizationally formalized, established procedural activity of State agencies relating to the creation of legal norms or deeming of rules of behavior to be legal which have been formed and operation in society.[3] Syrykh considers law-making as an activity of law-making agencies relating to the preparation and adoption of normative legal acts or decisions relating the repeal and change of operating norms of law.[4] Thus, when generalizing doctrinal definitions of law-making, one may conclude that this is volitional activity, or a process, of the State or other empowered agencies whose purpose it the establishment of generally-binding rules of behavior of a normative character to regulate social relations, that is, the development and adoption of legal norms within an established procedure which is contained in normative legal acts.

In turn, judicial activity with regard to forming holdings contained in acts of judicial power and binding by virtue of the doctrine stare decisis (judicial precedent) or by virtue of the operation of the principle of respect of the respect of a judge for his previously adopted decisions (trust in the law and equality before the law), or by virtue of legislative prescriptions of that such decisions are binding (judicial practice), one can hardly identify with the activity of a legislator, who created norms of law of the classical (hypothesis-disposition-sanction) or untypical structure (atypical normative prescriptions). Thus, because one can hardly use the classical definition to characterize judicial law-making, the principal features of judicial law-making should be distinguished from the law-making of the legislator (lex-creation) in more detail.

[1]. Judicial law-making always is effectuated within the context of judicial law-application activity and within the confines of material and procedural law, that is, on the basis of legal norms and principles established beforehand, which conditions the need for comprehensive and just consideration of cases in a court. Cherednichenko regards judicial law-making in this aspect as a «distinctive means of judicial consideration of cases».[5] A court does not form new norms of law by abstract means, as does the legislator, but applies and interprets already operating norms of law and principles.

Norms of law, in turn, which are adopted by the legislator have an abstract and more generalized character and, naturally, are not linked with the actual circumstances of a concrete case. Laws are adopted at the initiative of subjects of legislative initiative, factions, lobby groups, individual deputies and concern general issues of State policy. The legislator may not provide for all specific aspects and diversity of various life situations and adopts laws for an indefinite group of persons beforehand — subjects of law.

[1] *V. S. Kovalskyi*, Правотворчість: теоретичні та логічні засади [Law-Making: Theoretical and Logical Foundations] (Kyiv, 2005), p. 13.
[2] Ibid., p. 293.
[3] *A. B. Vengerov*, Теория государства и права [Theory of State and Law] (Moscow, 2000), p. 410.
[4] *V. M. Syrykh*, Теория государства и права [Theory of State and Law] (Moscow, 1998), p. 157.
[5] *Cherednichenko*, Судебное правотворчество: сравнительно-правовое исследование [Judicial Law-Making: Comparative Legal Study] (Moscow, 2005), p. 14 (abstract kand. iurid. nauk).

Judicial law-making is the necessary result of the application and interpretation of normative-legal acts when considering a concrete case and is directed towards the resolution of a concrete life situation. Exceptions also exist in the form of decrees of the Plenum of the Supreme Court (generalization of practice by abstract means and absence of lines to actual circumstances of a case) granting to agencies of judicial power the right of legislative initiative (then the court takes part in the legislative process by means of creating a draft normative-legal act), and also the autonomous adoption by courts of the rules of procedure (reglaments).

[2]. Judicial law-making is inseparable from the process of administering justice (judicial process) and is a concomitant result thereof. This is linked with the principal tasks of judicial power to administer justice. A court may not refuse to effectuate this on the basis of contradictoriness, incompleteness, and ambiguity of legislation, the existence of gaps in it, and so on. The law-making function of judicial power is secondary with respect to the basic one — the administration of justice, and the existence of this function is determined by the interests of justice. At the same time, the adoption of laws is the main function of the parliament.

Laws are adopted in the political process in compliance with the requirements of parliamentary procedure (reglament), and judicial law-making is effectuated within the limits of the judicial process in accordance with requirements of norms of procedure codes. In turn, a normative legal act may not be realized without an interpretation of its provisions and cannot be applied in practice without judicial activity. A judge with effectuating law-application and interpretation of laws is regarded as the «junior partner» of the legislator, but his role undoubtedly is a limited one,[1] and judicial law-making in countries of the Romano-Germanic legal family always is a derivative result from the normative act adopted.

[3]. Parliamentary law-making (lex-creation) is the process of a manifestation of political will, and laws or individual provisions thereof may be adopted without an explanation of the reasons for such adoption. Judicial decisions in which individual holdings are formulated as part of the reasoning are adopted only when administering justice in the process of considering a concrete case. In other words, a judge does not have the right to effectuate his subjective will and replace norms of law with his own subjective considerations.

Underlying this criterion is the distinction between policy and principle (in the understanding of a general legal idea or right which is «autonomous» with respect to policy). The content of this distinction is explained by Dworkin: «I call a "policy" that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community ... I call a "principle" a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality».[2] This type of view is a modification of the view of Alexander Hamilton, the author of *The Federalist*, who singled out «freedom» as the basic element of determining policy and a «court decision» as an act of justice which is based on the principle of reasonableness and justness. On these grounds he distinguished political and judicial activity and, respectively, parliamentary lex-creation and judicial law-making.

[1] *W. Popkin*, Statutes in Court: The History and Theory of Statutory Interpretation (Durham, 1999), p. 155.
[2] *R. Dworkin*, Taking Rights Seriously (1977), p. 22.

[4]. Judicial law-making has an additional character, that is, the purpose is not the change, repeal, or adoption of norms of law, but also a denial of existing legal norms or the adoption of decisions «against lex». By means of judicial law-making, norms of law receive further development. In addition, a court may not formulate holdings by abstract means before the commencement of the consideration of a case, that is, a judge has no «plan of legislative work», and therefore the law-making activity of a court is affected by the need to resolve a concrete case and by the interests of the administration of justice.

[5]. Judicial law-making is effectuated in the process of law-application and interpretation, concretization of value concepts and imprecise legal norms, application of analogy of lex and analogy of jus, deeming unconstitutional and, respectively, not operating those normative legal acts which do not conform to the constitution («negative law-making»), and also in the event of determining the content of constitutional principles and constitutional rights and freedoms when applying law («positive law-making»).

[6]. Judicial law-making is effectuated by professionals at a high level in the sphere of law — by judges, whereas whosoever wishes may engage in law-making (lex-creation). As a rule, courts of the highest level perform the law-making function — constitutional, supreme, and high specialized courts, whose decisions acquire the character of being final. In addition, these courts may exercise procedural control over inferior courts. Judges of the first and appellate instances also may adopt decisions in which holdings are contained distinctive for their novelty; however, these decisions may be appealed by way of appellate or cassational proceedings to higher courts. Accordingly, these holdings should undergo approbation in the high courts and may be overturned because of the use of procedural control methods.

[7]. Acts of judicial power which contain holdings relating to an interpretation of norms of law «share» the fate of those norms relative to which an interpretation has been given. An understanding of norms of law by other subjects of law in a rule-of-law State is effectuated in a coordinated manner by an understanding of these norms of law by courts, which is reflected in respective holdings. The results of judicial law-making may be repealed by the legislator through the adoption of new laws or repealed by legal norms relative to which holdings have been formulated (or interpretation provided). In turn, judges may refuse to apply certain legal norms if they do not conform to the constitution or are contrary to fundamental principles of the constitutional level. Limbach, former head of the Constitutional Court of the Federal Republic of Germany, emphasized in this connection the «formulation of law is the task of the politician, and the recognition of a right is a matter for the courts».[1] In other words, laws may remain «written in books» and have no practical meaning until they are deemed by courts to be law in force.

[8]. The procedure for the adoption, change, and repeal, and also for the proclamation and application of a normative legal act and the procedure for the operation thereof, differ materially from acts of judicial power, and the normative characterization of acts of judicial power based on holdings cannot be identified with the characteristics of legal norms.

[1] *J. Limbach*, Федеральний Конституційний суд як політичний фактор влади [Federal Constitutional Court as a Political Factor of Power] (1996), p. 5.

As Ebzeev notes on this occasion, the material law force of a law is peculiar to decisions of the Constitutional Court; however, these decisions are not normative acts or judicial precedents which have normative regulatory significance, although they actually act in this capacity.[1] In this connection, Bryntsev, a judge of the Constitutional Court of Ukraine, absolutely precisely noted that it is essential to cease attempts to substantiate decisions of the Court as a classical normative legal act because they have a completely different nature which differs from the classical legal norm with regard to structure, mechanisms of adoption, and entry into force, and to deem them to be a specific source of law — judicial law.[2]

Judge Tkachuk, also of the Constitutional Court of Ukraine, believes that judicial law is a law which is created by judicial practice, and that it operates in Ukraine, but with certain reservations: «... it has an interpretative character, that is, is formed as a result of the interpretative activity of the Constitutional Court and European Court for Human Rights».[3]

As Tumanov noted back in 1980 in this connection, the concept «judge-made law» is one of the concepts widespread in western European jurisprudence, not to mention the Anglo-Saxon "common law" countries. The subject-matter of this conception is the law-making role of the judge.[4] In his view, the «express purpose of this conception is not so much to elucidate the role of judicial practice in the historical formation of legal systems, mechanism of the operation of precedent, influence of judicial practice on legislation, as to overcome the principle "the judge is subject only to the law". Proponents of this conception proclaim the judge to be the more perfect "expressor» of law than the legislator, demand a significant expansion of his competence, especially granting to the judge the right to decide concrete cases "against the law" and assume a leading role on the whole in the sphere of law-making».[5]

The term «judge-made law» was common used by the English legal philosopher, Jeremy Bentham, in his works, referring to the common law in order to draw attention to those views in accordance with which a judge, nominally proclaiming existing law, in essence creates it.[6] He drew attention to this in a declaratory theory of judicial precedent as such, which substantiated judicial law-making and its roots in the Common Law. One should recall in this connection the pre-eminent English philosopher and Lord Chancellor, Sir Francis Bacon, who in his work «Of Judicature» noted that «judges should recall that their powers are *jus dicere*, and not *jus dare*; to construe the law, and not to create it».[7] However, under conditions of the development of modern legal systems, the view is widely accepted that the judge in the process of law-application and interpretation also engages in law-making, that is, law-making is inextricably connected with law-application and interpretation.

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[1] *B. S. Ebzeev,* Конституция. Правовое государство. Конституционный Суд [Constitution. Rule-of-Law State. Constitutional Court] (Moscow, 1996), p. 27.
[2] *V. Bryntsev,* Політико-правовий аналіз ролі Конституційного Суду України у законодавчому процесі [Political-Legal Analysis of the Role of the Constitutional Court of Ukraine in the Legislative Process], Вісник Конституційного Суду України [Herald of Constitutional Court of Ukraine], no. 1 (2007), p. 30.
[3] *P. Tkachuk*, «Конституційний Суд України: теоретико-правові питання діяльності» [Constitutional Court of Ukraine: Theoretical-Legal Questions of Activity], Вісник Конституційного Суду України [Herald of Constitutional Court of Ukraine], no. 4 (2006), p. 29.
[4] *V. A. Tumanov*, «К критике концепции "судейского права"» [Towards a Critique of the Conception «Judge-Made Law»], Советское государство и право [Soviet State and Law], no. 3 (1980), p. 111.
[5] Ibid., p. 111.
[6] *J. Barwick,* «Judiciary Law: Some Observations Thereon», Contemporary Legal Problems, no. 33 (1980), p. 240.
[7] *F. Bacon,* «Of Judicature», in Selected Writings of Francis Bacon (1955), p. 138.

Cappeletti saw two basic reasons for judicial law-making in modern legal systems: (1) the growing amount of normative legal acts, especially laws, which is an indication of the growing role of the modern State in society and this growth leads to a parallel expansion of judicial law-making during the application and interpretation thereof; (2) the adoption and realization of norms concerning human rights at the highest level (international and constitutional), which also assumes the existence of a creative role of the judge with a view to proper law-application.[1]

At the modern stage of development of State and law, the term «judicial law-making» or «judge-made law», which reflects the phenomenon of the normativity of acts of judicial power, is no longer perceived negatively and has the right to exist because it reflects the social trends in the application of norms of law by courts which have formed in the principal modern legal families.

Proceeding from an analysis of Ukrainian, Russian, and foreign doctrinal sources, those acts of judicial power which form judicial practice, *jurisprudence constante*, or those in which contain a judicial precedent or holding, have a normative character.

Taking into account the need to strengthen judicial power in Ukraine, and also the realization of the principles of legal certainty, equality, trust in the law, and unity or uniformity of judicial practice, it is necessary to strengthen the attention of legal doctrine towards the phenomenon of the normativity of acts of judicial power (law-application acts) not only with a view to escaping from the dogmas of formalism and illusions of the Soviet past, but for the effective practical resolution of problems of Ukrainian law-application.

Shevchuk S. Normative Acts of Judicial Power: The Evolution of Views in Ukrainian Jurisprudence

Abstract. The article describes at some other sight angle the application of the law by the courts, due to the changes that have taken place recently in Ukraine.

Key words: judiciary, source of law, judicial precedent, legal position, judicial law-making.

Шевчук С. В. Нормативність актів судової влади: еволюція думок у вітчизняному правознавстві

Анотація. У статті розглянуто процес застосування норм права судами під дещо іншим кутом зору, у зв'язку із змінами, які відбуваються останнім часом в Україні.

Ключові слова: судова влада, джерело права, судовий прецедент, правова позиція, судова правотворчість.

Шевчук С. В. Нормативность актов судебной власти: эволюция мнений в отечественном правоведении

Аннотация. В статье рассмотрен процесс применения норм права судами под несколько иным углом зрения, в связи с изменениями, которые происходят в последнее время в Украине.

Ключевые слова: судебная власть, источник права, судебный прецедент, правовая позиция, судебное правотворчество.

[1] *M. Cappeletti*, The Judicial Process in Comparative Perspective (1989), p. 4.