JUDICIAL PRACTICE AS A SOURCE OF LAW ON ISSUES OF PARTICIPATORY DEMOCRACY

Nikitenko Liliia

DOI https://doi.org/10.61345/1339-7915.2023.4.9

Annotation. The article is devoted to an objective analysis of judicial practice as a source of law on issues of participatory democracy.

It is emphasized that the problem of recognizing judicial practice as a source of law has long existed in legal theory and continues to interest legal scholars. Issues of participatory democracy as a subject of consideration by courts at different levels are characterized by insufficient research and the presence of controversial aspects. The resolution of the dispute regarding the recognition of judicial practice as a source of law contributes to the closure of many more general questions of the theory of law in the direction of its modernization and approximation to the requirements of European legal understanding.

Arguments are given for recognizing judicial practice as a source of law, but it is noted that judicial practice is a secondary, formally optional source of law. A single reference to it is not enough, it must be combined with a reference to the corresponding formally binding source of law (legal act, legal contract, etc.). However, this thesis does not apply to cases where the state directly indicates the binding nature of the conclusions set forth in the relevant judicial acts.

It is emphasized that, despite the existing features and specifics of judicial practice and judicial precedent, the majority of scientists quite justifiably consider these phenomena as identical and interchangeable, and moreover use the same name «precedent» or use the terms «jurisprudence», «legal position».

It is emphasized that issues of participatory democracy, due to their widespread distribution and actualization in recent years, have become the subject of consideration by courts of various levels in many countries of the world. Today, a certain judicial practice has been developed on them, which complements the legal component of the concept of participatory democracy. In Ukraine, judicial practice can be attributed to the sources of law in the case of gaps, ambiguities, legal conflicts in normative legal acts. Only under the conditions of recognition of the possibilities of justice's participation in the creation of law will progress on the path to an effective system of justice, proper provision and protection of human rights, hence the establishment of the principles of participatory democracy, become possible.

Key words: participatory democracy, judicial practice, source of law, judicial precedent, legal rule.

1. Introduction.

International legal consolidation and the creation of global institutional mechanisms of participatory democracy influenced the standardization of its content to more or less clear basic features. Judicial practice plays a significant role in this process. Legal democratic statehood endows the judiciary with the features of a guarantor and defender of rights. Legislation alone cannot ensure compliance with law and order in civil society. A properly functioning judicial system «works» to maintain the democratic course of the state. The court is the instrument for ensuring human rights, which is designed to create appropriate conditions for the expression of everyone's interests, based on the fundamental principle

of democracy, which recognizes a person as the highest social value. Of particular interest to general theoretical science are those established legal provisions that are developed by courts during the consideration of specific cases and become examples of the application and interpretation of legal norms in the resolution of similar disputes in the future, that is, questions regarding judicial practice as a source of law.

2. Analysis of scientific publications.

The problem of recognizing judicial practice as a source of law has long existed in legal theory and continues to interest legal scholars. Issues of participatory democracy as a subject of consideration by courts at different levels are characterized by insufficient research and the presence of controversial aspects.

3. The aim of the work is an objective analysis of judicial practice as a source of law on issues of participatory democracy.

4. Review and discussion.

Judicial practice in the theory of law is understood as the objective experience of the individual legal activity of judicial bodies, which is formed as a result of the application of law in the resolution of legal cases. Another approach makes it possible to single out judicial practice in the system of sources of law and interprets it as a mutual unity of the activity of courts and the results of this activity, expressed in new legal provisions developed by the judiciary and fixed in decisions on specific cases and/or in acts from a set of specific court cases of the same type [1, c. 8].

The basis for recognizing judicial practice as a source of law are the following statements.

First, the legal doctrine emphasizes that one of the features of law is its general nature, which makes it difficult for legal norms to take into account all the diversity of life situations that fall under the scope of its regulation. Legal norms require a legal evaluation, since, regulating the relevant social relations, they allow a certain abstractness. In addition, many legal norms contain so-called evaluative concepts that must be interpreted. Often, the court needs to supplement the law when, when applied, the legal norm has several possible options for its interpretation. In these cases, the court deals with the «completion» of the law, specifies the provisions of regulatory acts.

Secondly, in practice there are situations that are not regulated by legal prescriptions, and when a dispute arises, the court determines the specific rule on the basis of which the dispute is resolved. In this case, the court fills the gaps in the law, and also offers models of behavior in those situations where the legislator deliberately left space for the autonomy of legal regulation, however, due to the repetition of controversial situations that arise in this connection, there is a need to develop an established model of behavior [2, c. 25].

Thirdly, the importance of judicial practice as a source of law is especially noticeable during the legal regulation of relationships regulated vaguely, incompletely or controversially at the legislative level, as well as when the courts apply the principles of law and human rights norms. Here we are talking about the fact that the court gives an unambiguous understanding of legal prescriptions that are not clearly formulated, or those that do not correspond to the value orientations of society and require dynamic interpretation.

Fourthly, judicial practice contributes to the formation of uniform decision-making rules in the same situations, that is, eliminates the situation when the same categories of cases are considered by courts differently, and therefore works to ensure legal certainty as one of the requirements of the rule of law. Judicial practice produces principled approaches as a kind of reference point when considering specific cases.

It should be emphasized that judicial practice is a secondary, formally optional source of law. A single reference to it is not enough, it must be combined with a reference to the corresponding formally binding source of law (legal act, legal contract, etc.). However, this thesis does not apply to cases where the state directly indicates the binding nature of the conclusions set forth in the relevant judicial acts.

The recognition of the normativity of acts of judicial power in various states caused the appearance in scientific circulation of the term «judicial law-making», which reflects the phenomenon of normativity of acts of judicial power in those cases when judges, in the process of application, interpretation of legal norms, filling gaps, solving conflicts, formulate new legal provisions (legal position) as part of the motivation of the judicial act [3].

– Among scientists, there is an opinion that the main form of expression of judicial practice as a specific source of law is judicial precedent (from the Latin «praecedens» -«freedom of expression is one of the important foundations of a democratic society and one of the basic conditions for its progress and self-realization of everyone» (cases «Jersild v. Denmark» 1994, «Janowski v. Poland» 1999, «Nilsen and Johnsen v. Norway» 1999 , «Fuentes Bobo v. Spain» 2000);

– «without the requirement of pluralism, tolerance and openness of opinions, a «democratic society» is impossible» («Perna v. Italy» case, 2003);

– «the press must play a vital role as the «watchdog of democracy»» («Thorgeir Thorgeirson v. Iceland» case, 1992);

– «freedom of the press provides the public with one of the best means of obtaining information and forming ideas and attitudes towards political leaders» (cases «Lindon, Otchakovsky Laurens and July v. France» 2007, «Pedersen and Baadsgaard v. Denmark» 2002 and 2004, «Thorgeir Thorgeirson v. Iceland» 1992, «Jersild v. Denmark» 1994, «Lingens v. Austria» 1986, «Incal v. Turkey» 1998);

– «interference with freedom of expression (restriction) is permissible if it is established by law and is necessary in a democratic society» (cases «Janowski v. Poland» 1999, «Nikula v. Finland» 2002, «Sunday Times v. the United Kingdom «1979, «Castells v. Spain» 1992, «Lingens v. Austria» 1986).

The ECHR and the European Commission on Human Rights were created in order to respond in time to the threat to democracy in one or another European country. However, it should be noted that today their cooperation is becoming more and more complicated due to:

increased burden on the ECHR, where, even when it comes to serious violations of human rights, it takes up to 5 years to be considered;

the evolution of the ECHR from a mechanism to fight totalitarianism to a mechanism that protects people from the actions of domestic authorities;

the impossibility of the Court to initiate cases on its own, because in many cases the natural persons applying to it do not have sufficient opportunities to initiate a case against the threat to democracy.

Ukraine's integration into the European community prompts us to adapt Ukrainian law to European legal standards. In our country, judicial practice was not officially recognized as a source of law for a long time, but lower courts always tried to follow the practice of higher courts when deciding similar cases, because otherwise their decisions could be overturned in an appeal or cassation procedure. Today, the legal system of Ukraine strives to be organized on the basis of participatory democracy, therefore, under such conditions, judicial practice naturally acquires a mandatory nature and the status of a source of law. The current state of social relations «forces» to recognize the legal force and necessity of court precedent - the adopted court decisions serve as a model for future court decisions, that is, the mechanism of court precedent is formed. In addition, the Law of Ukraine «On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights» of 2006 officially recognized the practice of the ECtHR as a source of Ukrainian law.

5. Conclusions.

Issues of participatory democracy, due to their widespread distribution and actualization in recent years, have become the subject of consideration by courts of various levels in many countries of the world. Today, a certain judicial practice has been developed on them, which complements the legal component of the concept of participatory democracy. The resolution of the dispute regarding the recognition of judicial practice as a source of law contributes to the closure of many more general questions of the theory of law in the direction of its modernization and approximation to the requirements of European legal understanding.

Among the legal sources of many foreign countries, judicial practice has long occupied a worthy place. It is a source of law not only in the states of the common law (Anglo-Saxon) family, but also in the states of the Romano-Germanic legal family, but it occupies a different position in the hierarchy of sources of law there, which is connected with legal traditions and ideology, traditional understanding of the sources of law and the law-making process, attitude to the judicial system, etc.

In Ukraine, judicial practice can be attributed to the sources of law in the case of gaps, ambiguities, legal conflicts in normative legal acts. Thus, the status of judicial practice as a source of law has: decisions of the ECHR on specific cases; decisions of the Supreme Administrative Court regarding unequal application of substantive and/or procedural law norms; the decision of the Constitutional Court of Ukraine regarding the official interpretation; decisions of other courts (in particular, higher specialized courts of Ukraine), which contain legal models of uniform and multiple application and interpretation of legal norms (acquire the status of a persuasive (authoritative) source of law, optional). It can be argued that there is a judicial precedent in our country, one of the main arguments in favor of it is responsiveness in responding to the variability of social relations. Only under the conditions of recognition of the possibilities of justice's participation in the creation of law will progress on the path to an effective system of justice, proper provision and protection of human rights, hence the establishment of the principles of participatory democracy, become possible.

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Liliia Nikitenko,
PhD in Law, Associate Professor
Associate Professor of the Department of Constitutional,
International and Criminal Law Faculty of Law,
Vasyl' Stus Donetsk National University
E-mail: lilya@donnu.edu.ua
ORCID ID: 0000-0002-2152-4255