

The Concept of Judicial Practice: Constitutional and Legal Dimensions

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ABSTRACT

This article examines the concept of judicial practice through the prism of constitutional and legal aspects. It reviews the existing literature on the topic and highlights the main ways, in which judicial practice affects the legal system. The authors also reveal the main axiological features of judicial practice as a form of the administration of law and provide a definition of judicial practice from a constitutional and legal standpoint. Judicial practice encompasses the judicial activities in the administration of law, carried out by judicial institutions on the grounds of their statutory competence and authority, combined with relevant generalizations of the outcomes and experience, resulting from such activities. The authors come to the conclusion that judicial practice appears to be the most effective way of making legal reality more harmonious and balanced, and it may also be capable of reconciling different systems of values.

Keywords: *judicial practice, legal practice, legal positions, legal reality, justice*

1. INTRODUCTION

Judicial practice is one of the popular research areas of legal science in both Russia and other countries. Such popularity of the topic may be attributed to a number of legal and social circumstances: the judiciary's role in the creation and further development of the government machinery and the state as a whole; important tasks of judicial practice, from the protection of the ruling elite in the early stages of state development to protection of rights and interests of different groups of people and the resolution of legal conflicts among them in a modern society; the influence of judicial practice on the application of law, which in the continental European tradition leads to a special form of treatment and enforcement of general law depending on a particular situation and individual, etc.

The relevance of the research on judicial practice also stems from the objectives of modern legal studies, i.e., to adequately explain the legal reality and the place of the individual in it. It should be noted that judicial practice not only acts as the object of research but also actively participates in the actual construction of legal reality.

We would like to emphasize that by adopting new methodological advances of the last decades in philosophy, sociology, anthropology, and other social sciences, modern legal science seeks to develop new

knowledge about legal phenomena and to provide new definitions, and judicial practice is an important part of that process.

In our view, it is necessary to consider the fact that the concept of judicial practice belongs not only to legal studies but also social sciences in general, since it may be examined as a universal philosophical category. Besides, in philosophy and sociology, there is a concept of social practice, which already incorporates the law and judicial practice. We should also bear in mind that judicial practice develops and functions not only in a legal dimension but also in a social one, which results in its being heavily influenced by external and internal factors that accompany its genesis and evolution. Thus, we propose taking a holistic approach toward exploring judicial practice. In other words, it is more reasonable to investigate this concept not only from a legal standpoint but also from a sociocultural perspective.

In this regard, the research on judicial practice appears highly relevant to a wide range of disciplines, including philosophy, legal sciences, and the humanities.

2. MATERIALS AND METHODS

Research on various issues of judicial practice from the standpoint of the constitutional and legal dimension requires a comprehensive methodological approach and

the use of relevant legal frameworks and concepts. The importance of judicial practice in the legal sphere can hardly be overestimated. Therefore, in this paper, the authors employed a number of special legal methods (such as the method of interpreting the norms of constitutional law, normative dogmatic and formal legal methods) in order to fully explore the concept of judicial practice through the prism of a constitutional perspective. A broad methodological approach and the use of an extensive body of literature made it possible to reach scientifically sound conclusions and enabled us to make inferences that have practical and theoretical significance. A thorough review of the relevant literature discusses some fundamental studies on the theory of constitutional law, among many others.

3. RESULTS

3.1. Literature Review

The concept of legal practice has been studied in Russia's legal sciences since the 1960s. Among the most prominent scholars were I. Duryagin, Yu. Grevtsov, and I. Kozlikhin, who believed that legal practice was synonymous to legal activities. S. Alekseev and S. Vilnyansky viewed legal practice as the result of legal activities. S. Bratus, A. Vengerov, V. Kartashov, and E. Palagina argued that legal practice was a combination of legal activities and their results.

Judicial practice was directly addressed in the research, conducted by S. Vilnyansky, in which the author considered judicial practice as the summary of all previous court rulings on a particular type of case. Other scholars that investigated this topic were A. Mitskevich, A. Pigolkin, A. Shebanov, who viewed judicial practice as the main tendencies toward the resolution of legal cases. P. Orlovsky defined judicial practice as the conclusions and generalizations of the Plenum of the Supreme Court of the USSR, which were formulated on the basis of court rulings of a similar kind. I. Novitsky believed that there was a distinction between the general judicial practice and its different varieties depending on the type of cases. A. Bezina and M. Marchenko clearly defined the broad (general) and narrow (specific) approaches toward understanding judicial practice, emphasizing the importance of the latter. S. Boshno, P. Guk, T. Kashanina, V. Lazarev, I. Minnikes, W. Solovyov, A. Cherdantsev, etc., followed the narrow approach and devoted their research to the problems of different spheres and components of judicial practice. A collective study, *Judicial Practice in Russia's Modern Legal System*, draws on the previous literature to investigate judicial practice in a holistic way both at the general theoretical level and at the level of specific areas of law.

3.2. Analysis of the Concept of Judicial Practice

A comprehensive analysis of judicial practice and the sociocultural context of the judiciary's development requires careful consideration of this concept not as an independent system but as an integral part of legal practice, and, consequently, part of social practice, being a complex social system [1, p.19]. I. Chestnov rightly emphasizes that legal practice is a type of human activity, which is located at the intersection of personal and collective interests (which almost never align with each other) and mutual expectations, reflecting different views between individuals or organizations and other socially significant groups [2, pp.164-168].

In addition to the legal system and legal awareness, legal practice is one of the most important elements, regulating society. It guarantees the consistency of legal regulation by maintaining a clear relationship between normative legal acts and law enforcement, thus, minimizing the gap between what is nominally written in the law, and how human rights and legal obligations are actually protected in reality. Thanks to legal practice, it is possible to make legal reality more harmonious.

That is why the analysis and interpretation of judicial practice should be carried out, taking into account the general social context of legal practice. However, before analyzing the essence of judicial practice, it is crucial to formulate its precise definition, since the name of a phenomenon conveys its meaning and brings up necessary ideas and associations in the mind of the reader.

In philosophy, the concept of practice has been of interest to scholars since ancient times. From a philosophical perspective, practice as a term may be used in several contexts. It may be viewed as the opposition between the work of an intellectual, creative mind and pure speculation. Alternatively, it may be seen as the embodiment of a practical mind, combining will and power, or the attitude of man toward the world and the possibility of its transformation. The last idea that we mentioned dates back to the philosophical thought of Ancient Greece, where Aristotle was one of the first philosophers who explored practice in a teleological sense [3]. At the same time, the ancient school of thought assumed the dominance of theory over empirical knowledge. Empiricism was even looked down upon. In agnosticism, the latter trend manifested itself particularly vividly [4, p.99].

Christianity, in turn, changed the attitude toward human work. Practice was considered to be a way of religious education and achieving asceticism, which was in line with creationism, suggesting the participation of man in the fulfillment of the creative will of God [5, p.167]. Protestants started to regard practical activity in any professional field as pleasing to God.

The era of Renaissance saw the emergence of science in the modern sense of the word. It was the time that contributed to the idea of classical rationality, which suggests that the properties of the subject and its

preferences are not taken into account when interpreting the results of the study. As we can see, over time, the concept of practice was increasingly being seen in a technical and instrumental sense as a way of human domination over nature. Practice gave humans an opportunity to interpret and analyze the world around them [6, p.68]. According to R. Descartes, conclusions, drawn from mental reasoning, can be observed in practice, which confirms the arguments of reason and logic [7, p. 482].

In classical German philosophy, the category of practice also found some development. For instance, Kant regards practice as an activity of the practical mind, whose focus is reflected in the will [8, p. 326]. Hegel examines practice in the context of the metamorphosis of the absolute spirit, which follows the path of self-understanding and self-positing, interpreting practice as a stage of the conceptualization of spirit [9, p.287]. At the same time, he separates practice from ethics and politics but adds it to the sphere of real life, law, and economics.

Marxist philosophy introduced practice to epistemology, making practice the main criterion that determines the truth of scientific knowledge. Practice is often viewed as an empirical source and the basis of scientific knowledge. Marxism defined practice as the active, motor and sensory, material activities of people, aimed at transforming the surrounding reality. The types of practice, according to Marxist philosophy, traditionally include material production (labor) and the transformation of nature and existence. Also, other types are social action, aimed at changing existing social structure and relations, and scientific experiment [10, p.61].

Marxist broad understanding of the concept of practice as an activity, aimed to transform the surrounding reality, led to the opportunistic overuse of such interpretation to ideologically justify any arbitrary political decisions. However, the transformation of reality is a relative and subjective idea, and it cannot be considered a reliable test that validates knowledge and truth. Furthermore, the Marxist view also left room for the ideological explanation of any adverse or negative phenomenon that could arise. Thus, it is clear why such an overly broad interpretation of practice eventually resulted in its own elimination from the scientific discourse. At the same time, it is obvious that the Marxist vulgarization of practice does not belittle its significance in the sense of transformation, discussed above.

We should highlight that dialectical materialism originally examined practice (including judicial practice) as a purely objective phenomenon, not taking into account the factors such as subjective preferences of actors, or the influence of individuals' consciousness and feelings on the content of practice (judicial practice). More recent philosophical and sociological methodologies, which appeared in the second half of the 20th and the 21st century, have reached an agreement that law is a complex sociocultural phenomenon, determined not only by the basic social and economic factors as Marxism claims, but also by a large number of other variables such as cultural, religious, political factors, etc.

We follow the concept hierarchy, the basic level of which is practice in a general scientific sense. A component of general practice is social practice. Then goes legal practice as an element of social practice. The subcategory of legal practice is law enforcement practice, and finally comes judicial practice as a type of law enforcement practice.

Social practice, as a concept of sociology and social studies in general, encompasses various aspects of human activity, related to serving the interests of individuals, social groups, and society as a whole. It also involves the formation and implementation of numerous social norms. The main types of social practice include political, cultural, economic, legal, and other categories. It is worth mentioning that in sociology, social practice may also be defined in a different way, i.e., as a tool that reflects the features of a wide range of social phenomena and events. In other words, it is viewed as a system of norms and existing patterns of behavior, both conscious and unconscious ones. Thus, this concept may be quite helpful for identifying a variety of trends in social development [11, pp.276-280].

As we noted earlier, there are several ways of understanding the concept of legal practice. We believe that the most reasonable way is to follow the integrative approach, which defines legal practice as a combination of legally significant activities and the experience, resulting from them.

Legal practice is a meeting point of lawmaking, law enforcement, and legal behavior, which are all elements of legal reality. It is based on the interpretation of legal norms in a way that corresponds to the actors' system of values. Therefore, legal practice reflects not only the effectiveness of law but also its legitimacy.

Besides, the nature of legal practice is a good indicator of the level of legal culture in society. On the one hand, the realization of legal practice demonstrates the degree of similarity between the interpretation of the content of law and its implementation at different levels of legal reality [12]. On the other hand, legal practice itself, especially when it is transparent, can influence the values of actors and contribute to the formation of the legal culture in society as a whole [13, pp.8-10].

Legal practice, as a subcategory of social practice, is intertwined with other types of practice, and it represents a specific form of legal interaction, in which actors, standing at the same or different levels of social hierarchy, exchange both legal information and the results of legal activities. It is through legal practice that the accumulated legal experience in society gains a legally significant role, affecting the interpretation of an individual's behavior at different levels of the legal system.

The purpose of legal practice is the transformation of legal reality, determined by the values of actors. However, the degree of influence, which the actors may have on legal reality, depends on their role in legal communication. In horizontal communication, actors are simultaneously senders and receivers. They have equal rights and responsibilities during the exchange of legal information, including its value component that determines their legal behavior in the future. In the case of vertical

communication, senders are able to impose their system of legal values on receivers, regardless of whether such communication takes place within one group or between different groups. Thus, we can assume that the behavior of actors is directly related to their values, i.e., when an individual perceives the legal system and the judiciary more positively, his or her legal interaction with other actors or state representatives becomes less confrontational.

It is also important to specify the relationship between legal and juridical practice. We believe it depends on a particular methodology that is taken as a basis of research. Legal positivism and the normative theory essentially do not make any distinction between those two categories. In other legal theories, juridical practice concerns only the process of creating and implementing normative legal acts, whereas other areas are covered by the concept of legal practice.

Due to the skeptical attitude of lawyers toward purely methodological research, which is considered overly philosophical and lacking relevant empirical arguments, there have been few methodological advancements in the Russian jurisprudence. That has led to a clear gap between the postulated philosophical foundations of legal science and the practical methodology that is used in reality.

As a result, judicial practice began to be interpreted in different ways, broad and narrow ones (as discussed earlier), with the latter approach becoming much more common. According to A. Bezina, judicial practice, in a broad sense, may include all activities of the judiciary at different levels, whereas the narrow meaning of the concept refers only to the specific tendencies in the application of certain norms and laws [14, pp.11-12]. And while the broad understanding of judicial practice is partially based on the scientific tradition of developing concepts in a consistent and coherent way, that is not the case with the narrow sense of judicial practice.

Even in the broad interpretation of legal practice as a lawmaking activity, based on the accumulated experience [1], we can see the limitations of that definition, since not all types of legal activities result in the actual development of legal regulations. From our point of view, it seems unreasonable to separate the types of legal activities, which do not directly lead to the creation of new regulations, from the broad concept of legal practice, since they also belong to the legal domain and may result in legal consequences.

Moreover, as far as judicial practice is concerned, most of the arguments only examine court rulings, whereas other aspects of the legal process are typically not considered. Sometimes, the scope of research on judicial practice is limited only to the acts of interpretation issued by the Supreme Court of the Russian Federation. We posit that a wide variety of court rulings and aspects of the legal process may contain information that is relevant to the development of both the judicial proceedings and the legal system as a whole. Therefore, the limitations mentioned earlier, do not seem appropriate.

It is important to bear in mind that not only legal documents and court rulings may influence the

development of legal reality but also the actions of the persons, involved in the proceedings. In this respect, actions also represent an integral part of judicial practice. We should also distinguish between the material understanding of judicial practice as a system of legal documents, issued as a result of judicial activity, and the procedural view, which focuses on the lawmaking and legal decision-making as a process.

A narrow understanding of judicial practice was originally formed in the Soviet legal science. Back then, it was quite common to consider not all court rulings but only special legal provisions, which clarified the meaning and content of the norms, making them more specific and detailed.

Given the fact that judicial practice is inextricable from many concepts, such as general scientific, social, and legal types of practice, it appears illogical to single out a stand-alone concept of judicial practice, covering not all aspects of this phenomenon, but only those that are deemed ostensibly the most relevant to further development of the legal and judicial system. Since social practice encompasses diverse phenomena, why would judicial practice be unable to include, for example, the acceptance of statements of claim, the decisions to call a witness to testify, and many other legally significant actions in court? Of course, such actions may not necessarily be sufficient for resolving a legal case, but they are, nevertheless, related to the application of relevant rules and regulations. Thus, in court, there is a wide range of legal actions and trial participants that are all legally significant, to a certain extent. In general, judicial practice covers various aspects, including logical, intellectual, organizational, formal, and pragmatic activities. All of them, in one way or another, have a certain influence on the course of court hearings and resolution of legal cases. The aspects of judicial practice that we mentioned earlier should not be considered as its forms, in a strict sense. According to dialectical materialism, a form is a way of organizing content; however, logical, intellectual, and other aspects of practice do not organize content but rather reflect its essence. In fact, the examination of judicial practice only in a narrow sense, focused on making legal generalizations and clarifications that are based on legal precedents, substantially limits the scope of future research on its other understudied facets, such as legal communication, problems of organization of court hearings, logical and intellectual activities of judicial staff, etc.

In this respect, we agree with A. Bezina, who points out that judicial practice in a narrow sense does not fully reflect the general purpose of judicial practice in a broad understanding, i.e., to achieve justice through the resolution of the legal cases and disputes [15, p.73]. Moreover, attempts to find common patterns in the court rulings and comments, which would serve as guidance for the resolution of similar cases in the future, often seem rather subjective, and it may be difficult, if not impossible, to reach the consensus on this issue. In fact, such legal summaries, based on the legal precedents, may include both the court rulings and the commentary on the interpretation of rules and regulations, which, if provided by the courts of the highest level, obtain a general legal

significance, not being restricted to a particular case. As for the decisions of the Constitutional Court of the Russian Federation on cases that investigate the conformity of normative legal acts with the Constitution of the Russian Federation, they also have a general effect and come into legal force in accordance with a constitutional law “On the Constitutional Court of the Russian Federation”.

The exact place of such generalizations in the legal system is still not entirely clear. There is no doubt that they are growing in popularity for the resolution of legal cases and are becoming an important element of the legal system. However, some legal theories do not view any court rulings as a legitimate source of law [16, pp. 86-87].

We believe that such legal generalizations, based on court rulings, are related to the following concepts. First of all, we should examine the so-called legal position, which was mentioned in a number of articles of Russia’s Federal Constitutional Law “On the Constitutional Court of the Russian Federation” (arts. 29, 73, 79), which have been edited over time. In the existing literature, there is such a diversity of opinions on the concept of legal position that it would be impossible to make a comprehensive analysis of this topic in this article. We would like to briefly mention some of the most frequent definitions: the court rulings and commentary; regulatory interpretative provisions and statements; the court’s position toward legal issues and the result of its arguments and conclusions that form the intellectual and legal basis of the ruling; a system of legal arguments; a legal precedent; general legal guidelines.

The concept of legal position, like the above-mentioned legal generalization, also raises some doubts about its legitimacy. Indeed, conceptually, it belongs to legal phenomena, however, it typically includes argumentation, the use of logical rules, and intellectual conclusions that go beyond the content of the law itself. In this regard, the term, court’s position, seems more preferable.

In addition to legal position, other related concepts are the so-called micro-norms, individual behavioral patterns, interpretive norms, and instructions. The above-mentioned terms essentially denote close or overlapping concepts, which are typically based on the court’s well-argued judgment, as well as on the norm application and/or interpretation, aimed at resolving a particular legal case (with or without a casual interpretation of existing legal rules), or at finding the most effective way to generalize the applicability of rules for resolving a wide range of legal cases (e.g., the rulings and clarifications, provided by the Constitutional Court of the Russian Federation, concerning the conformity of normative legal acts with the Constitution of the Russian Federation; the decisions and statements of the Plenum of the Supreme Court of the Russian Federation and the former Supreme Arbitration (Commercial) Court of the Russian Federation; reviews of the court presidiums, etc.).

Considering the arguments above, we can point out the main ways, in which judicial practice affects legal reality:

1) Judicial practice contributes to the creation of uniform guidelines for the resolution of similar cases, i.e., it ensures a consistent approach to justice and the rule of law [17, pp.21-38], with the aim of reducing conflicts and

disputes among members of society and making the legal dimension more balanced and harmonious.

2) Judicial practice facilitates the specification and concretization of legal norms for individual life circumstances. [18, pp.43-57]. That leads to a convergence of lawmaking and actual legal behavior.

3) Judicial practice, based on a unified doctrinal approach to the interpretation of legal norms, promotes a uniform understanding of legal instructions by all legal entities, which should make rules and regulations more definite and clear, and lead to the convergence of the legal consciousness of ordinary people and legal professionals, and doctrinal interpretation [19, pp.19-36]. In the end, it ensures that court rulings are in line with social expectations, which guarantees the effectiveness and legitimacy of legislation and the judiciary as a whole;

4) Judicial practice contributes to filling the gaps and eliminating contradictions in legal regulation [20, pp.132-134]. The generalizations of individual court rulings, proposed by the Plenum of the Supreme Court of the Russian Federation, create a common approach to the resolution of legal cases and eliminate gray areas or contradictions in legislation. Thus, we can observe a feedback effect in judicial practice, forming a loop between normative and individual regulation, i.e., in judicial practice, courts examine previous similar cases, which leads to creating guidelines, based on existing legal norms, and making generalizations; the Supreme Court solidifies them, and they become part of judicial practice, used by courts in the future.

5) Judicial practice essentially forms new behavioral patterns of legal entities [21, pp.25-29] provided that the current legislation does not already contain direct instructions and gives some leeway [22, pp.123-128]. However, those new patterns of behavior will have legal significance only if they are frequently considered in the resolution of legal disputes. This becomes particularly evident if we are to examine the way, in which courts of lower jurisdiction refer to the statements and decisions, made by the Plenum of the Supreme Court of the Russian Federation.

By applying positive law, judicial practice ensures that behavior of legal entities complies with the state’s requirements, and, at the same time, it also aims to protect the rule of law and the safety of citizens, as well as contributing to the satisfaction of their collective and individual needs and interests. Thus, judicial practice should be examined in three interrelated contexts, namely, state, social, and psychological ones. Although Russia’s current legal framework is heavily dominated by the state context, the Constitution of the Russian Federation and the national legal traditions, in essence, allow for the consideration of other contexts as well. It is reflected in the protection of rights and legitimate interests of legal entities, and, also, in the creating and maintaining law and order in a way that corresponds to the interests of the Russian citizens [23, pp. 26-42]. Judicial practice, as a form of justice pursued by the state, enables individuals to exercise their right for judicial protection and ensure their safety.

At the same time, Russia's traditional paternalistic legal culture, which is characterized by a high level of state involvement, may explain why judicial practice is often perceived by society in a special way. Since the administration of justice is carried out solely by the state, judicial practice and the individuals, who are involved in performing it, are viewed as legitimate agents of the state that act as senders and receivers of legal information. Such a position requires particular attention to compliance with not only legal rules but also ethical norms, and involves taking necessary measures to project the right image of the fair legal process and the judiciary, as acting on behalf of the state to protect the constitutional values. Thus, in other words, the legal culture of individuals, who are involved in judicial practice, implies not only full compliance with legal rules and judicial ethics but also the performance of certain rituals, such as space planning and furnishing, the presence of symbols [24, pp.69-73], special procedures, and strict order of activities [25, pp.123-127]. Social perception of judicial practice is often more influenced by its symbolism rather than its actual results.

From an anthropological standpoint, the purpose of judicial practice is to synthesize legal regulation of social interactions with the interests of individuals. Judicial practice should actively contribute to the legal awareness and legal culture of the persons, involved in a court hearing. By such persons, we understand not only the direct participants of the legal process (e.g., judges, opposing parties, members of the jury) but also those who act as spectators, observers, i.e., do not directly participate in the legal proceedings. Their understanding of judicial practice may not be comprehensive, and it largely depends on whether the legal process they observe and the court decision corresponds to their expectations, i.e., generally speaking, it demonstrates the relationship between the formal administration of law, based on legal norms, and legal traditions that reflect the mentality of people. Thus, when legal traditions and mentality are in line with the existing legal system and legislation, it ensures the rule of law and increases the legitimacy and effectiveness of the judiciary as a whole [26].

4. CONCLUSION

Judicial practice, in our view, encompasses the judicial activities in the administration of law, carried out by judicial institutions on the grounds of their statutory competence and authority, and combined with relevant generalizations of the outcomes and experience, resulting from such activities. It may be examined from various angles, e.g., procedural, organizational, logical and intellectual, formal and legal aspects, etc. We should mention that scholars are often focused not on the big picture but rather on the distinct ideas, which they believe to be the most crucial to the development of judicial practice itself and the judiciary as a whole, such as conclusions, generalizations, courts' positions on the correct interpretations of legal norms and on the most

effective ways of the application of norms with due regard to the current situation in society (in a functional sense).

Despite the high importance of generalizations and courts' positions, we argue that it is irrational and unreasonable, from different points of view, to limit the scope of judicial practice only to the above-mentioned categories. A court's position only contains the gist; it is a clear and concise distillation of a wide spectrum of judicial activities.

As a form of the administration of law, judicial practice aims to ensure the rule of law and the safety of legal entities, to resolve conflicts and disputes in society, and, ultimately, to facilitate a uniform treatment of legal and public policies at all levels of the legal system. Judicial practice appears to be the most effective way of making legal reality more harmonious and balanced, and it is also capable of reconciling different systems of values, shared by legal entities, regardless of their legal status and social role.

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