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REVISITING THE RELATION BETWEEN JUDICIAL LEGISLATION AND COURT ORGANIZATION

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Abstract

The author of the article with the title: “Revisiting the relation between judicial legislation and court organization: the research of Russian legal reality” proposes and substantiates the conclusions of a practical legal research aimed at the solution of the following urgent tasks posed to the judicial power of the Russian Federation as the main official law enforcer. Also these tasks are posed to judicial power in the context of the formation of the architectonics of the judiciary, able to most effectively implement their functions. Some of them are the study of organizational and legal mechanisms of provision of the unity of law enforcement by the judicial system; the study of the human rights function of the court and the practice of judicial law-making in Russia; the study of the peculiarities of the interpretation and application of the norms of administrative and civil law as the most important task of the law-making activities of the courts in Russia; the study of the prospects and main directions of development of judicial law-making in Russia. The author compares the court decision with the legal rule in the context of the changes in the judicial system that has already occurred, and concludes that judicial law-making is the interpretation of the law by each judge of each instance, and justice is the final stage of the law, its final institution. The author concludes that a key common feature of a court decision and legal rule is the introduction of certainty in public relations.

Keywords: Court organization, judicial legislation, judicial power, jurisdiction.

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1. Introduction

In 2018, the reform of the judicial system of the modern Russian Federation in terms of the creation of cassation courts of general jurisdiction and appeal courts of general jurisdiction received its continuation. At the same time, the term “jurisdiction” was removed from procedural laws along with the final solution of the problem of “denial of justice”. Taking into account significant shifts in the infrastructure of the judiciary, the following question remains open: has the problem of ensuring the unity of law enforcement and legal interpretation of the norms of civil and administrative law been resolved by arbitration courts and courts of general jurisdiction? The posed question determines the relevance of further research on the nature of judicial activity and key ontological characteristics of the judiciary, including issues of judicial lawmaking.

2. Problem Statement

We consider judicial lawmaking from the point of view of the judicial system of the Russian Federation. In other words, it is judicial law-making of the judicial system, which has subsystems. Judicial law-making and the formation of the judicial system are diverse concepts. However, they intersect in the sense that if the judicial system is simple and does not consist of various components (subsystems), then the risk of various judicial law-making, that is, inconsistency, is less (Grebnev, 2016). And even if all judicial subsystems have one highest judicial instance, but each of them is engaged in judicial law-making (especially at the cassation level), then there is a risk that this law-making will lead to uncertainty in law, that is, to a difference in law-making.

Why can it really be important for research of the Russian judicial system? - because in his address to the Federal Assembly of the Russian Federation (Putin, 2013), V.V. Putin, the President of the Russian Federation directly explained the need to unite the two highest courts: the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation, in that they differed in the interpretation and application of the law. The President believed that in the judicial system there should be no discordant (different) interpretation and application of the law, and in order to ensure proper justice, that is, in order to ensure a uniform interpretation at the top, he came to the conclusion that there is a need to combine The Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation. The author of the article believes that conceptually this is a valid statement of the problem and its solutions. However, the fact that in the resolution of a dispute, each judge of each instance takes into account all the factual circumstances of the case, i.e. interprets the law. The inconsistency in interpretation can arise not only at the level of higher instances.

The question is how the types of legal proceedings relate to the judicial system. The Constitution establishes in the Article № 118 four types of legal proceedings - constitutional, civil, administrative and criminal, and so these 4 types of legal proceedings can be distributed and carried out by subsystems in different ways. It is possible to imagine such an ideal judicial system: there are four types of legal proceedings, and the judicial system consists of four components, namely: courts conducting constitutional justice, courts conducting civil proceedings, courts conducting administrative proceedings, and courts conducting criminal proceedings. Then in the judicial system of the Russian Federation there would be four

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subsystems, and each of them would carry out specific and only one type of legal proceedings. In our country it can be applied only in relation to the Constitutional Court of the Russian Federation. No court except the Constitutional Court can exercise constitutional justice. However, two other subsystems, the courts of general jurisdiction and arbitration courts, conduct not one type of legal proceedings, but several. Moreover, these types of proceedings coincide for these two subsystems. The problems of inconsistency arise in civil and administrative proceedings, since these two types of proceedings are conducted by two different subsystems. It means that these two subsystems may interpret and apply the same rules of law in different ways, that is, there is a risk of introducing uncertainty in public relations through different judicial law-making.

3. Research Questions

In order to present the results of the research on the stated topic, it is necessary to give the concept of the term “judicial lawmaking”. Thus, there is a law and there is law enforcement, so justice is the most important type of law enforcement, because ultimately only the court has the right to give a final interpretation of the applicable law (Gressman, 1989), and the interpretation given by the court acquires the force of law. Why? The main purpose of the right to introduce certainty in public relations and to introduce certainty in public relations with the help of law is possible only if the official interpretation of the law by the courts coincides, there is not inconsistency and it means that different official interpretations of the law do provoke certainty in public relations. Law and right are the basis of justice. Justice is the official application of law by a body (court), which is the only body authorized to do this, only it has the right to interpret it officially so that interpretation becomes compulsory, that is, the right. Therefore, justice is not just the resolution of a dispute. It is a basic official enforcement. And law enforcement is always the interpretation of right, because the rule of law cannot be applied without interpreting it. In the process of the application of the law, it is interpreted, that is, there is the disclosure of the content of the rule of law, the clarification of the content of the rule of law (Hart & Sacks, 1994), the specification of the content, the binding to specific circumstances. It is a right is in its action (Potapenko, 2006). It was right that the ancients said that a judge is a speaking law. Therefore, the judicial lawmaking is understood as the interpretation of the law by each judge of each instance.

Further, it seems reasonable to consider the history of the formation of judicial law-making in the Russian Federation at the level of higher instances, in order to trace its evolution and understand its nature. In general, when not one, but two or more judicial subsystems conduct the same types of legal proceedings, in these cases two significant problems arise, and these problems arose before the unification of the two highest courts of Russia:

1. The delimitation of the jurisdiction over a case. According to Iakovlev (2003) in his work, for example, when they created a system of arbitration courts, he, as the chairman and initiator of the creation of a system of arbitration courts, was concerned about a clear or indistinct division of jurisdiction. Why? It can be explained by the fact that the vague delimitation of jurisdiction carries a great risk, much greater than the unequal interpretation and application of the law (Iakovlev, 2003). What is the risk? - denial of justice. The denial of justice is completely unacceptable, because it violates the constitutional right to judicial protection, and denial of justice occurs when a citizen applies to a court of general jurisdiction, and

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the representatives of a court of general jurisdiction say that they do not accept a claim because it is under the jurisdiction of arbitration courts. A citizen applies to an arbitration court, and an arbitration court also does not accept a claim because a case is under the jurisdiction of the courts of general jurisdiction. Thus, the two judicial subsystems deny accepting a statement of claim of a citizen. It means that they deny justice. It was according to this issue that the first joint decree of the plenums of the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation was taken, because refusing to accept the application is the biggest sin of the judicial system, absolutely unacceptable, direct violation of the Constitution by courts.

2. The second problem is the inconsistency in the interpretation and application of the same legislation, administrative or civil.

There was a need to solve two problems at once, and this was done with one hit. The first thing was that the Supreme courts tried to help the courts to clearly delineate the jurisdiction of cases, disputes, and most importantly, to prevent the court from not accepting the claim by both judicial subsystems. Therefore, it was explained how to differentiate jurisdiction in the first joint Resolution of the plenums of the Supreme courts, and thus, they contributed to the solution of the first task. Since that time Russia has developed a judicial practice that if one judicial subsystem refused to accept a claim, then another judicial subsystem does not have the right to refuse to accept and it is obliged to accept and consider the application. Therefore, the procedure was graded by explaining to courts how, firstly, to properly delimit the jurisdiction of cases, and secondly, most importantly, to prevent the refusal to accept a claim.

And the second question is devoted to the uniformity of judicial practice. Since a joint resolution of the plenums was chosen to solve the first task, it became clear that a mechanism was also found to solve the second task, that is, to continue not to take separate resolutions of the plenary sessions according to those norms of law and those sources of law that are used by both another judicial subsystems (Potapenko, 2006). This practice was extended not only to the adoption of joint resolutions. It was used in preparing the resolution of the plenum of one of the Supreme courts on matters that do not require joint consideration, they must send a draft resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation to the Supreme Court of the Russian Federation and vice versa in order to prevent a possible contradiction in the interpretation of the rules that are common to both courts, that is, applicable both by the courts of general jurisdiction and by the arbitration courts.

Therefore, even if only the resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation was adopted, that is, it concerned only entrepreneurial activity, it was an economic dispute, however, draft resolutions were sent to the Supreme Court of the Russian Federation. Then the draft resolutions are investigated and compared the projects of the Supreme Arbitration Court of the Russian Federation Federations with their practice, and if they would find a contradiction, they would notify that they have a different view on the interpretation of this provision of the Civil Code. And then the effort would be made to remove this contradiction. This practice of interaction between the Supreme Arbitration Court of the Russian Federation and the Supreme Court of the Russian Federation was adopted (Iakovlev, 2003). Thus, the Supreme courts achieved agreement on the interpretation and application of civil and administrative law, at least through explanations of the plenary meetings of the Supreme courts, regardless

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of whether the joint resolution or incompatible was taken. The Supreme courts entered into the discussion and created a common position.

Unfortunately, later this practice has ceased to be so modified. In this regard the contradictions appeared between the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation regarding the interpretation of some particular categories (Mikhaleva, 2000). As an example of the appearance of contradictions in the positions of the Supreme judicial instances, it is possible to cite the resonant Resolution of the Plenum of the Supreme Court of Arbitration of the Russian Federation № 61 "On ensuring transparency in the arbitration process" (Federal Arbitration Courts of the Russian Federation, 2012). This Resolution received a resonance not only in connection with the contradiction with paragraph 8 of Article № 11 of the Arbitration Procedure Code of the Russian Federation, but also with the principle of publicity in civil proceedings, which met with criticism in the system of courts of general jurisdiction.

In turn, the author associates the appearance of these contradictions with different approaches to the organization of justice in general and the nature of judicial law-making in particular, which were adopted in the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation under the chairmanship of Ivanov (2010). He wrote:

> *if we look at our judicial system from the point of view of the filter and its role in setting precedents, we find that only the Supreme Court of the Russian Federation actually works according to the old civil model, with the addition of the decisions of the Plenums, which are retreat from the civil model. The court connects all instances - first, cassation and supervisory, and the supervision is multi-stage. However, the main thing is that this court does not pursue the purpose of creating precedents, although its organizational structure gives them a possibility to be formed.* (Ivanov, 2010, p. 6)

4. Purpose of the Study

The purpose of legal research is to search for the paradigm of judicial lawmaking as a method of the formation of a special judicial order, secondary to the fundamental legal order, along with which the certainty is introduced into social relations through judicial lawmaking.

5. Research Methods

The methodological basis of the research is presented by theoretical and empirical methods of scientific knowledge. The authors used the following ***types of theoretical methods of scientific knowledge*:**

Law (in terms of proving a connection, finding common properties between a court decision that has entered into force and the rule of law, as well as the substantiation and explanation of the existing - despite the general connections - regulatory and semantic differences between the rule of law applicable to an indefinite number of persons and legal force by a court decision, which is valid only for participants in the process);

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Abstraction (in terms of the understanding of the nature of the judiciary, which complements (prolongs) the work of the legislative power, since the courts are the final stage of the implementation of the rule of law adopted by the legislative bodies);

Deduction (in terms of the fact that the proper implementation of the principles of independence of judges will contribute to the strengthening and development of the regulatory freedom of judicial enforcement).

The researchers used the following types of empirical methods of scientific knowledge:

Scientific (applied) research (in terms of studying the special legal status of the Supreme court in the structure of judiciary).

The methods that are used at the level of theoretical and empirical scientific knowledge are:

Analogy (in terms of comparison of a court decision (judicial law enforcement and interpretation) with the rule of law);

Historical method as a research method based on the study of the occurrence, formation and development of objects in chronological order;

Logical method as the way of studying the essence and content of objects, based on the research of patterns and the disclosure of objective laws on which this essence is based;

The use of a formal legal method of research allowed processing and analyzing the current legal and regulatory array which regulates the organization of the judicial system of the Russian Federation and judicial activities.

6. Findings

The view of the author on judicial law-making is in its inseparable connection with the institutional structure of the judiciary and is understood as an interpretation of the right by a particular judge of a particular instance. The peculiarities of the construction of the judicial power of modern Russia, which consists of various subsystems that implement related types of legal proceedings, even though they are governed by one Supreme Court, entail risks in terms of different judicial law-making at the level of lower instances. The author concludes that the sources of judicial law-making are not only the decisions of the Plenum of the Supreme Court of the Russian Federation, but each judicial decision that has entered into legal force. The purpose of judicial lawmaking is to ensure the unity of the interpretation and enforcement of the norms of the branches of law that form the basis of legal proceedings conducted by various subsystems of judiciary. The article considers the history of the delimitation of jurisdiction of cases between the subsystems of judiciary that implement related types of legal proceedings, as the most vivid in the history of modern Russia. The author also reflects the history of the solution of the problem of ensuring the rights of citizens to “jurisdiction”, access to justice. After the unification of the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation in 2014, the most important task assigned to the courts was to ensure the unity of interpretation and application of law by the courts of all instances and levels, which was inextricably linked to the issues of judicial law-making in the broader sense.

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7. Conclusion

From the point of view of civil law, a court is not the primary source of law, but the court is the final stage in the application of law (Gressman, 1989). The legislator formulated the norm, and then the rule should be applied in infinitely diverse human relations and every time to answer the question: are these relations governed by this particular norm or not? If so, then it is necessary to disclose and interpret this rule already, because it should serve as the basis for the resolution of this conflict, for a judicial decision. Therefore, the task of a court is not to create the right, but to implement the right in real life, if possible, following exactly the spirit and letter of the law (Mikhaleva, 2000; Fokina, 1999). A court is not free to choose in interpreting law; it is bound by the spirit and letter of the law. That is how we defined the term judicial lawmaking earlier.

The judicial system of modern Russia guarantees the uniformity of the interpretation and enforcement of civil and administrative law at the supervisory level. The legislator has predetermined the further approximation of courts of general jurisdiction and arbitration courts. The creation of 9 cassation courts in the system of courts of general jurisdiction is the result of studying the positive experience of the organization of economic justice in the Russian Federation. It means that the next logical stage in the evolution of the judicial power in the Russian Federation is to ensure the unity of application of administrative and civil law at the level of cassation, which, is necessary to summarize, clarify and disclose the content of legal norms in order to eliminate further contradictions in law enforcement.

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