JUDICIAL PRACTICE AS A PRE-CONDITION FOR PREVENTING CONTRADICTORY JUDICIAL DECISIONS

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ABSTRACT

The article is devoted to the study of the judicial practice essence as a pre-condition for preventing contradictory judicial decisions. It is made the analysis of recent publications and researches on the specifics of judicial practice, classification of judicial practices, advantages and risks of the judicial practice existence as a source of law. It is released the features of the judicial practice use in the activity of the European Union Court, the European Court of Human Rights, noted at the same time the feasibility of a systematic updating of the judicial practices, which is associated with the society development, the change of the legal regulation of social relations. It is noted that States that have ratified the Convention for the protection of human rights and fundamental freedoms have undertaken to use the practice of the European Court of Human Rights as a judicial practice. It is established that one of the potential innovations of the judicial reform of Ukraine is the introduction of the Institute of exemplary decisions to reduce the burden on judges, ensure the unity of law-enforcement practice, rapid and uniform solution of similar cases, which also indicates the possible use of judicial practice in Ukraine. It is noted that the primary questions that require answers are still determining the subject authorized to create judicial practices, establishing the legal bases for the existence of judicial practice, since ignoring these aspects will lead to the fact that judicial practice as a source of law negatively affect the quality of justice, will slow down the development of the state as democratic and legal.

Keywords: Practice, Judicial Practice, Court, Judicial Decision, Source of Law.

INTRODUCTION

Historically, each state has long had the position on judicial practice, but today begun the process of actively rethinking the role essence of practice as a source of law in the legal systems of states belonging to the Romano-German legal family. This is due to:

1. Significant volume of judicial practice, which requires the search for instruments to ensure the unity;
2. The annulment by the courts of appeal instance of lower courts decisions through different application of the legal norms:

3. The existence of gaps and conflicts in the legal regulation of public relations, which indicates existing problems in the legal systems of states. Effective justice is an important feature of a modern democratic legal state at the same time.

The development of public relations leads to the complexity of the legal regulation, and in some cases leads to the lag of legal norms from the requirements and needs of the time, which negatively affects the implementation of justice, provokes conflicts between the court and public, and consequently requires states to rethink the essence of individual sources of law as possible instruments to address these problems. One of these sources of law is the judicial practice, which is traditionally applied by the states of the Anglo-Saxon legal family, while for countries of other legal families it can become a pre-condition for preventing the courts from making contradictory decisions and solving other legal problems. Judicial practice for the legal system of Ukraine as a source of law is also not peculiar, but law enforcement practice requires the research.

LITERATURE REVIEW

The relevance of rethinking the role of judicial practice as a source of law is confirmed by the special attention of scientists to this issue. First of all, it should be emphasized that according to John Bell, the source of law is usually used to provide a "*legal basis*" or justification for an argument or decision. The judge who decides the case does not just indicate the legal basis at the same time, but also gives the interpretation in order to provide an adequate justification (Bell, 2018).

Turning to the concept of "*practice*" it is worth noting that for Bahadir Kilinc, practice is broadly defined as:

1. Rule first established by the court;
2. Judgment in a particular case, which is used as a principle for resolving similar cases in the future (Kilinc, 2014).

Murtala Ganiyu Murgan, Garba Umaru Kwagyang, Shafi Abdul Azeez Bello note that there are various classifications of judicial practice, but one of the most common is the division into: original, derivative, declarative, persuasive, assigned practice. Accordingly, the original practice sets a new norm of law and usually occurs in cases where there is no existing practice, although such practice is infrequent. Derivative practice is one that extends the boundaries of an existing practice to other cases. Declarative practice helps to justify the decision. Persuasive practice is practice, which should be taken into account by the court if it is applied by another court, including foreign. Assigned practice is considered a practice that is binding when the lower court is required to comply with the decision of the higher court where it is used (Murgan et al., 2015).

But I.S Boiko divides the judicial practices of international judicial bodies into mandatory (vertical) and persuasive (horizontal). There refer to mandatory practices decisions of the European Union Court, adopted as a result of a pre-judicial procedure, since the European Union Court clarifies the norms of European law at the request of a National judicial institute, creates new norms of obligatory nature. The precedent-setting decisions of the Grand Chambers of the European Court of Human Rights, the European Union Court and the Appeals Chambers of international criminal tribunals are mandatory on other vertically related bodies (Boiko, 2019).

Alberto F. Garay concludes that the practice allows dealing with a number of issues related to the decision-making by the court, which is really relevant for the development of civil society. According to scientist, precedent law provides an opportunity to analyze:

1. Ways of thinking about legal problems;
2. Ways to justify court decisions:
3. Use of reasons that were the basis for justifying decisions in the past, in cases requiring a decision today (Garay, 2019).

Despite the fact that the scientific doctrine has paid considerable attention to the definition of the concept of "*judicial practice*" at the same time, the classification judicial practice, the justification of the importance for modern society, not aspects remain unaddressed.

METHODOLOGY

The research is based on the issue of judicial practice as a pre-condition for preventing contradictory judicial decisions, which are based on logical-semantic, comparative-legal methods and the method of critical analysis. The logical-semantic method allowed revealing the concept of "*source of law*", "*practice*", as well as the types of judicial practices and the content. The comparative-legal method makes possible the comparison of experiences of the European Union Court, the European Court of Human Rights, as well as separate foreign states (India, Germany, USA) and Ukraine in the sphere of use of judicial practice as a source of law, in turn, the method of critical analysis was the basis of a critical examination of the provisions of the previous researches on the advantages and reservations about judicial practice as a source of law, the formation of the author's vision of the existence possibility of judicial practice as a pre-condition for preventing contradictory judicial decisions in Ukraine and foreign countries.

FINDINGS AND DISCUSSIONS

Continuing to consider the judicial practice essence as a source of law, it is advisable to pay attention to the position of Pantaliienko who emphasize that the judicial practice will have a positive effect on the general status of the judicial authority, in particular, will increase the weight of the judicial authority. In addition, the introduction of a judicial practice will certainly introduce greater requirements for the quality of judicial decisions and help to deepen the perception of the users of the judicial authority as prescriptions that make up the law (Pantaliienko, 2016). Supports the idea of introducing a judicial practice as well V.V Sakhniuk since the practice for scientist can become an effective instrument that will regulate new social relations, to which the legal system does not have time to adapt and eliminate the imperfection, inconsistency and ambiguity of legislation (Sakhniuk, 2017).

The also interesting position of Berlemann Michael and Christmann Robin who emphasize that when considering civil cases the presence of a judicial practice significantly simplifies the consideration of the case in particular, the problem of delaying the hearing by the parties immediately disappears, as well as the absence of the need for the latter to spend resources on justifying the position. The same cannot be said for the solution of criminal cases at the same time, where the application of judicial practice is significantly limited (Michael & Robin, 2017).

Perhaps, precisely these advantages of judicial practice that have led to the fact that the precedent law of the Court of Justice of the European Union (CJEU) is one of the important sources of law of European Union. Although, as noted by Derlén, Mattias and Lindholm, Johan, the role is ambiguous, since the Court of Justice of the European Union performs different functions from "*confirmation of violations*" to "*constitutional arbitrator*" and therefore the use of practice in cases consideration of confirmation of violations is limited (Mattias & Johan, 2015).

Another court that cites the practices as a source of law is the European Court of Human Rights. Kanstantsin Dzehtsiarou emphasizes that the European Court of Human Rights is not officially tied to previous decisions; it has repeatedly recognized that in the interests of legal certainty, it is not necessary to depart from the jurisprudence without good causes. The status of the precedent law of the European Court of Human Rights as an appropriate source of law was also reinforced by Protocol 14, which introduced a simplified judicial procedure in cases where the issue in question was covered by clearly established case law (Dzehtsiarou, 2018).

Also, this approach to solving cases contributes to the unity of the judicial practice of the European Court of Human Rights, but it is advisable to agree with Alastair Mowbray, who draws attention to the fact the readiness of the European Court of Human Rights should be encouraged before reviewing and updating the judicial practice in accordance with current circumstances and requirements. Since ignoring the effectiveness consideration of the court's judicial practice may lead to the uselessness (Mowbray, 2009).

Szabados Tamás also draws attention to the need to review and update judicial practice. Moreover, the scientist notes that the judicial practice over time still reduces the discretion of the courts in a case similar to the one the decision of which has already been made, and the application respectively, is a guarantee of legal certainty and equal attitude of the court to such cases. Although, due to certain circumstances, the court should still go beyond the limits of judicial practice for the correct decision of the case on the merits. Moreover, the social and economic situation in the state and legal regulation may change, and therefore judicial practices should adapt to such changes (Tamás, 2015).

Turning from the institutions of the European Union for which judicial practice is generally acknowledged source of law for the States which legal systems are based on judicial practice let us turn our attention to India. According to article 141 of the Constitution of India the "declared law" established by the Supreme Court of India is mandatory on all courts in India. Declared law in India refers to the principle that follows from a court decision or the interpretation of the law or decision of the Supreme Court of India on which the case is decided, that is, as noted by B S Chauhan in India judicial practice is the source of law (Chauhan, 2018).

The classic representative of the Romano-German legal family, where judicial practice is not the source of law, is German legal system. Berger K.P. notes that previous decisions of the same court, other or higher courts are not legally mandatory, but considered as an authoritative example of correct interpretation of the legal norm, accordingly, the judicial practice of the German Supreme Court is taken into account in the lower courts activity (Berger, 2016).

Judicial practice as a source of law requires answers to some questions at the same time, in some states. In particular, Mary Whisner has studied the judicial practice in the United States, emphasizes that they are created by courts of various instances. Therefore, if the case is considered in a lower court instance, then should be applied the practices of the state higher court instance as well as Supreme Court of the United States. Only such practices are mandatory on

lower courts instance. In other words, it is already common for the United States to consider the hierarchy of courts when applying judicial practices, but how can we decide to use judicial practice to decide a case when the courts are at the same level? (Whisner, 2015).

As for Ukraine, according to article 17 of the Law of Ukraine *"About implementation of decisions and application of practice of the European Court of Human Rights"* from February 23, 2006, Ukrainian courts apply in cases consideration Convention for the protection of human rights and fundamental freedoms and practice of the European Court of Human Rights as a source of law (The Law of Ukraine 2006).

However, the use of judicial practice does not go beyond this norm, although within the framework of judicial reform, which is still in fact ongoing, it is proposed to give the Supreme Court of Ukraine as a court of first instance the powers to consider exemplary cases and make exemplary decisions. The conditions for consideration of such cases and making such decisions by the Supreme Court of Ukraine are as follows:

1. The presence of at least 10 standard cases in the proceedings of the administrative court;
2. The record of this administrative court reasoned submission to the Supreme Court of Ukraine on consideration one of the standard cases as a court of first instance;
3. Providing the Supreme Court of Ukraine, together with a particular submission of the case materials.

According to the Ukrainian legislator opinion, the introduction of such procedure will contribute to:

1. Reducing the burden on judges;
2. Ensuring the unity of law enforcement practice;
3. Quickly reviewing a large number of similar cases, because lower courts instances will have to take into account such exemplary decisions.

However, there is also a risk that these changes will lead to a significant workload of the Supreme Court of Ukraine, to which all administrative courts of Ukraine will simultaneously apply with relevant submissions which threatens to surfaced consideration of cases by the Supreme Court of Ukraine. In addition, it is contradictory to claim that such procedure facilitates the rapid consideration of large number of similar cases, since the transfer of exemplary case to the Supreme Court, the decision to open proceedings against it, and the direct consideration require a lot of time (Council of Europe, 2017).

Given the debatable nature of this proposal, we believe it is necessary to pay attention that according to I. Borshchevskyi solution to the issue of the court decisions recognition of judicial practices requires the definition and place of judicial practice in the system of sources of law, the relationship with law, custom, other sources of law, the mechanism of creation and functioning of judicial practice, and to complete to introduction of judicial practice institute in the law of Ukraine, it is necessary to determine the subjects of practice creation, in particular, it will be the prerogative of the higher judicial instance or appeal courts, regulatory- required and non-required parts of a judicial practice, the conditions for the action in time, among the circle of people, application procedure, modification and cancellation, etc (Borshchevskyi, 2016).

RECCOMENDATIONS

Despite the fact that modern challenges to the development of society and state raise the question of reviewing the positions of legal systems of states regarding judicial practice as a source of law we consider appropriate both in Ukraine and other countries of the world, to focus primarily on creating conditions for ensuring the effectiveness of such a source of law. First of all, it is necessary to identify the entity authorized to create judicial practices, as well as the bases for the existence, since if these issues are ignored, judicial practice will only reduce the quality of justice and slow down the development of states as democratic and legal, which is one of priorities in the modern world.

CONCLUSIONS

Thus, the judicial practice is not only one of the sources of law in the States of the Anglo-Saxon legal family, but also an instrument for improving the effectiveness of justice, ensuring the unity of judicial practice, solving legal issues in the event of gaps in legislation or conflicts of legal regulation of public relations, respectively, states, where judicial practice is still not a source of law, review the attitude to it. However, the judicial practice is not the same for the European Union Court and the European Court of Human Rights, although scientists note the expediency of systematically updating the database of judicial practices, which is associated with the development of society. Moreover, Ukraine and other States having ratified the Convention for the protection of human rights and fundamental freedoms have undertaken to use the practice of the European Court of Human Rights as judicial practice. One of the potential innovations at the same time of the judicial reform of Ukraine is the introduction of the Institute of exemplary decisions in order to reduce the burden on judges, ensure the unity of law enforcement practice and most importantly, the same solution of similar cases. Such trends indicate the possibility of using judicial practice in Ukraine at the same time the priority issues that need to be addressed is still the definition of the entity authorized to create judicial practices, the legal bases for the existence of a judicial practice since if they are ignored, judicial practice as a source of law will negatively affect the quality of justice, slow down the development of the state as democratic and legal.

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