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**INTERPRETATION ACTIVITIES
COURTS AS A PROBLEM OF LEGAL SCIENCE**

The article shows that in the process of clarifying the meaning of legal norms in the context of a specific case, co-authorship (or construction) of their own individual meaning of the norm, which unites both the will of the legislator and the will of the law in the will of the interpreter, is imperceptible to the interpreter. Therefore, the court decision can only partly be predicted, and the effectiveness of law and the judiciary depends (to a greater extent) on the moral qualities of its staff than on the perfection of legislation.

All these conclusions make it possible to critically rethink the concept of separation of powers, as well as a discussion about the recognition of judicial practice as a source of law.

In article it is shown that in the course of explanation of sense of rules of law in a context of a concrete case there is a co-authorship imperceptible for the interpreter, or designing of own individual sense of the norm uniting both will of the legislator, and will of the law in an ox of the interpreter. Therefore, the judgment only partly can be predicted, and efficiency of the right and judicial authority depends in a greater degree on moral qualities of its personnel structure, than from perfection of the legislation. All these conclusions allow rethinking critically the concept of division of the authorities, and also discussion of a recognition of judiciary practice by a right source.

Key words: court, legal technique, legal structure, law, lawmaking, legal implementation, legal means.

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One of the most acute and lively discussed theoretical and practical issues related to the functioning of the judiciary is the problem of judicial lawmaking. The question is whether the court, along with the interpretation and application of law, can also be engaged in the creation of new legal norms, or, which is the same, whether the judicial practice in Russia can act as a source of law.

The most polar points of view continue to be expressed on this issue. There remains a fairly large group of authoritative specialists who deny the possibility of considering court decisions as sources of law. Their arguments boil down mainly to the fact that this would contradict the principle of separation of powers, that law-making powers are not granted to courts in the Russian legal system.

So, according to V.S. Nersesyants, "this unambiguously follows from the constitutional concept of Russian legal statehood and the constitutional regulation of the principle of separation of powers into legislative, executive and judicial ... The main meaning of the separation of powers is such a delineation of functions, powers and spheres of activity of these authorities so that each of them does its own thing. The necessary interaction of authorities (as well as the corresponding system of checks and balances) can and should be carried out only in strict and consistent compliance with the requirement of the principle of separation of powers. Otherwise, the recognition of the principle of separation of powers will turn out only in words, but in fact. mixing of their functions, powers and spheres of activity, endowing, for example, the judiciary also with legislative powers "[1, p. 34-35].

However, these statements remain largely controversial, since neither the Constitution of the Russian Federation, nor the current legislation provide a clear scheme for securing certain types of legal activity (lawmaking, interpretation, law enforcement, etc.) for individual branches of government; as a rule, there is a "cross", mixed model, when each of the branches of government (in one volume or another) is given the right to carry out all these types of

activities. Therefore, there is no reason to deny the court the law-making powers with references to the principle of separation of powers. According to Article 10

Конституции Российской Федерации, государственная власть в Российской Федерации осуществляется на основе разделения на законодательную, исполнительную и судебную. Органы законодательной, исполнительной и судебной власти самостоятельны. Из этих конституционных положений нельзя сделать никакого вывода относительно возможности или невозможности осуществления судами правотворческой деятельности. Хотя правотворчество традиционно «закрепляется» в качестве основной функции за органами законодательной власти, речь не идет ни о какой монополии в данной сфере. В частности, органы исполнительной власти занимаются правотворческой деятельностью не менее, если не более интенсивно (по крайней мере, в количественном измерении), нежели законодательные органы. Однако подобное положение дел давно уже рассматривается как естественное и само собой разумеющееся и не становится поводом для обвинений в нарушении принципа разделения властей. Следовательно, нет веских оснований применять этот аргумент и в отношении судебной власти.

If we turn to the theoretical model of the separation of powers, then it also does not provide an unambiguous solution to this problem. The founder of the theory of separation of powers Sh.L. Montesquieu generally distinguished not "branches" of power, but three "kinds" of power: "By virtue of the first power, the sovereign or institution creates laws, temporary or permanent, and corrects or abolishes existing laws. By virtue of the second power, he declares war or concludes peace, sends or receives ambassadors, ensures security, and prevents invasions. By virtue of the third power, he punishes crimes and resolves clashes between individuals. The last power can be called judicial, and the second - simply the executive power of the state "[2, p.291]. The combination of different "kinds" of authorities in the same hands, according to Montesquieu, is extremely undesirable for the state, but it is not at all impossible, but, on the contrary, quite often in practice. Actually, the case under consideration, namely the possibility of the courts creating legal norms, cannot be considered a "combination in the same hands" of different kinds of power, if only because the court does not claim to issue laws. It is interesting that England became the standard of separation of powers for Montesquieu - exactly that state in which the tradition of judicial lawmaking has always been the most developed among all European countries.

Proponents of the opposite opinion, recognizing judicial practice as a source of law, basically point out that judicial decisions have already actually acquired this status, regardless of official recognition, since the courts, when considering specific cases, use earlier decisions and sentences in similar cases as models, as well as relevant explanations of the higher courts. For example, N.N. Voplenko points out that court decisions "in their actual status perform the functions of sources of law, while they are not officially recognized as such ... They help law enforcement agencies to correctly qualify public relations that are the subject of law enforcement, to consider and resolve a legal case in a regime of combining law and justice ... "[3, p.22].

However, such arguments also do not look flawless, since the very fact of using something in justice to develop or substantiate a court decision, strictly speaking, is not yet a criterion for the source of law. After all, the source of law, according to the generally accepted definition, it is an external way of expressing and consolidating a legal prescription, and not just something that is used in a legal process. Thus, in order to substantiate that a court decision or any other phenomenon is a source of law, it is necessary to demonstrate that it acts as a form for such content that meets the characteristics of legal norms (prescriptions).

Outwardly, the differences between law-making and interpretive activities seem quite obvious, since they follow from the terms themselves. Indeed, creativity is a process during which, thanks to the activity of the subject, something new is created, something new that did not exist before. Lawmaking in the Russian theory of law is traditionally defined as "a form of state activity aimed at creating legal norms, as well as at their further improvement, change or abolition" [4, p.307]. Thus, creativity in the field of law includes not only the creation of legal

norms, but also activities "with the opposite sign", as a result of which the norms, on the contrary, cease to exist.

Interpretation as an intellectual activity is aimed at finding the meaning inherent in some object. Therefore, it assumes that this object already exists and is available for cognition, in contrast to creativity, which itself constructs its object. Therefore, interpretation is understood most often as "activities to establish the content of a legal act for its practical implementation" [5, p.290].

It would seem that the question of the relationship between these phenomena is clear enough. They have different directions and represent quite separate stages in the mechanism of legal regulation. Lawmaking always precedes the interpretation of law, since for the interpretation of a text it is necessary that this text has already been created by someone. The interpretation of law, in turn, is a necessary intermediate stage between lawmaking and law enforcement, since in order to bring one's actions in accordance with the requirements of law, it is necessary, first of all, to understand the meaning of these requirements. The question of the possibility of mutual "overlap" of these two phenomena remains unresolved, that is, whether there can be situations in the legal life of society when the interpretation of law is at the same time lawmaking. It should be noted right away that the general ideas about creativity and interpretation as socio-cultural phenomena do not at all exclude such a coincidence, since interpretation can simultaneously be creativity, moreover, this is most often what happens. The possibility that in the process of interpretation a new legal norm may arise is not officially (formally legal) fixed, but it cannot be concluded from this that such an option is excluded. The fact is that the very concepts of "legal norm", "source of law", "law-making", etc. are doctrinal in nature (and for the most part) do not occur at all in official legislative texts. The application of the term "law-making" to the legislative process itself also exists only in the scientific language, and is absent in the official normative texts. since interpretation can be at the same time creativity, moreover, more often than not, this is exactly what happens. The possibility that in the process of interpretation a new legal norm may arise is not officially (formally legal) fixed, but it cannot be concluded from this that such an option is excluded. The fact is that the very concepts of "legal norm", "source of law", "law-making", etc. are doctrinal in nature (and for the most part) do not occur at all in official legislative texts. The application of the term "law-making" to the legislative process itself also exists only in the scientific language, and is absent in the official normative texts. officially (formally and legally) it is not fixed, but it cannot be concluded from this that such an option is excluded. The fact is that the very concepts of "legal norm", "source of law", "law-making", etc. are doctrinal in nature (and for the most part) do not occur at all in official legislative texts. The application of the term "law-making" to the legislative process itself also exists only in the scientific language, and is absent in the official normative texts. officially (formally and legally) it is not fixed, but it cannot be concluded from this that such an option is excluded. The fact is that the very concepts of "legal norm", "source of law", "law-making", etc. are doctrinal in nature (and for the most part) do not occur at all in official legislative texts. The application of the term "law-making" to the legislative process itself also exists only in the scientific language, and is absent in the official normative texts.

In this regard, arguments, according to which acts of judicial interpretation of law are not officially recognized as sources of law in Russia, lose all meaning. In this case, it is unclear what is meant by official recognition, since not a single legal phenomenon at the level of normative texts is generally declared a source of law - this also applies to the laws themselves, bylaws, international treaties, etc. For example, the Constitution of the Russian

Federation defines its own status as follows: "The Constitution of the Russian Federation has supreme legal force, direct effect and is applied throughout the territory of the Russian Federation" (part 1 of article 15). The generally binding nature of the laws is enshrined in the following way: "State authorities, local self-government bodies, officials, citizens and their associations are obliged to comply with the Constitution of the Russian Federation and laws" (part 2 of article 15). As you can see, neither the Constitution nor the laws are directly declared sources of law.

The same applies to a similar argument: "Neither the Constitution of the Russian Federation, nor the Federal Constitutional Laws" On the Judicial System of the Russian Federation, "" On the Constitutional Court of the Russian Federation, " function "[6, p. 155]. Familiarization with these and other Russian laws will show that not only the judicial, but also no other state bodies are directly endowed with a "law-making function." there is no such term in the legislation.

Does this mean that law-making in Russia is not carried out at all? Consequently, it cannot be considered that acts of judicial interpretation are not sources of law solely on the basis of the absence of "official recognition".

While there was a clear reluctance to recognize acts of official interpretation as a special type of sources of law, it was, of course, difficult to ignore the significant similarities between them. As a kind of compromise to characterize clarifications on judicial practice issued by the highest courts, it was proposed to use the concept of "legal status". "Legal regulations, in contrast to the norms of law, are more closely and directly related to legal practice, they are" operational "or" qualification "rules expressing the need for a uniform understanding and application of current legislation. By virtue of their persuasiveness, informational character and repeated application of the Legal Regulations, they contribute to the correct resolution of legal cases, contain a concretized idea of the legality of law enforcement in cases of the same type "[7, p.106].

It is worth noting that it is precisely the combination of lawmaking and interpretation of law that characterizes the modern model of case law in Anglo-Saxon countries: "Currently, in common law countries, judges are mainly engaged in the interpretation of statutes, and their activities are thus related to law enforcement. The judicial reading of the statute becomes, in turn, a precedent, only the so-called "precedent of interpretation." Precedents of interpretation differ in that they are based on law. Thus, modern case law, in the main, develops through precisely the precedents of interpretation, and not "pure" precedents "[8, p.8].

So, the ratio of judicial interpretation of law and lawmaking can appear in three main versions:

1) law-making in all cases precedes judicial interpretation, since the norm that has already been created, is applied and has legal force is subject to interpretation;

2) law-making can follow the judicial interpretation if, as a result of the interpretation, gaps, conflicts and other shortcomings of legal regulation are revealed, which are subsequently eliminated in the course of the law-making process;

3) lawmaking may coincide with judicial interpretation in the case when the judicial authority carries out an official normative interpretation of legal prescriptions.

Thus, in a number of cases, the judicial interpretation of law can simultaneously perform the functions of lawmaking (the so-called "lawmaking interpretation"). Merging the interpretation of law and lawmaking does not contradict the essence of justice, since these two types of activities are not really mutually exclusive. As a result of clarification of a particular legal norm, it may be necessary to issue an explanatory document, which, on the basis of direct instructions from the current Russian legislation (Article 6 of the Federal Constitutional Law "On the Judicial System of the Russian Federation", Part 2, Article 13 of the Federal Constitutional Law "On Arbitration Courts in the Russian Federation") itself has the properties of legal obligation and normativity.

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