

## Features of Judicial Law-Making in the Russian Federation and Its Acts: General Theoretical Aspect

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### **Abstract:**

*The scientific article analyzes various features of judicial law-making from the perspective of its supporters, as well as the objective and subjective reasons for its occurrence in the Russian Federation. In the context of this article, the controversial issue of acts of judicial lawmaking is considered. Particular attention is focused on the concept and features of the legal positions of the Constitutional Court of the Russian Federation.*

### **Keywords:**

*judicial law-making, features, reasons for occurrence, decisions, resolution, legal positions of the Constitutional Court of the Russian Federation*

## I. Introduction

The question of the judicial authority's ability to create law in the Russian Federation is a contentious issue in the theoretical study of the legal sources of contemporary Russian law. Roman Zinovievich Livshits once expressed the position that "state power is exercised through three main branches: legislation, administration, and justice. The means by which this power is exercised are, first and foremost, norms. Therefore, the primary types of legal norms should be considered legislative, administrative, and judicial acts" [1].

In this regard, the arguments of Vladimir Nikolaevich Sinyukov are highly relevant: "The notion of the social value of law as a form that is practically capable of solving all problems by itself, as soon as its share in the legal system is increased in one fell swoop, is an old and beloved prejudice of our theory, which it still refuses to abandon, but which, in practice, only fuels unbridled production, inflation, and the rapid devaluation of laws" [2]. It seems that against the background of the above theoretical provisions, judicial lawmaking is becoming more relevant.

## II. Research Methods

When preparing a scientific article, the following methods were used:

### **General Philosophical**

General philosophical (dialectical-materialistic), which is used in all social sciences;

1. General scientific (analysis and synthesis, logical and historical, comparisons, abstractions, etc.), which are used not only by the theory of state and law, but also by other social sciences;
2. Special methods (philological, cybernetic, psychological, etc.), developed by special sciences and widely used for the knowledge of state and legal phenomena;
3. Private scientific (formal legal, interpretation of law, etc.), which are developed by the theory of state and law.

### III. Result and Discussion

#### 3.1 Features of Judicial Lawmaking

While recognizing judicial lawmaking as one of its types, it is necessary to point out a number of its features: 1) it is not the primary task of judicial bodies, whose primary purpose is the administration of justice; 2) judicial lawmaking is characterized by the recognition of a legal norm as invalid or inoperative. Courts rarely create legal norms, except through judicial precedents. The court is a negative legislator; it is characterized by such a function as the function of norm control.

Thus, in accordance with Part 6 of Article 125 of the Constitution of the Russian Federation, "acts or individual provisions recognized as unconstitutional shall lose force; international treaties that are inconsistent with the Constitution of the Russian Federation shall not be put into effect and applied. Acts or individual provisions thereof, recognized as constitutional in the interpretation given by the Constitutional Court of the Russian Federation, shall not be subject to application in a different interpretation"; 3) the courts adopt various law-making acts, which are not limited to judicial precedents, since there are other law-making acts.

Mikhail Nikolaevich Marchenko, believing that "the law-making activity of the courts differs significantly from the similar activity of the Russian parliament and, by virtue of this, cannot replace it, much less duplicate it"[3], to some extent repeating the features of judicial lawmaking outlined above, nevertheless, named the following [3], appealing to the scientific achievements of various scholars: 1) it "is always a by-product of the act of law-making"[4]; 2) it is "not independent" in the sense that it is tied to the main function of the judiciary - the administration of justice; 3) it is carried out within the framework of the law and on the basis of the law emanating from the highest legislative authority of the country; 4) the law-making activity of the court is largely connected with the interpretation (concretization) of the law and filling in gaps in the law; 5) judicial legal provisions are developed by judges only on the basis of "existing norms and legal principles, and not by their own subjective will"[5]; 6) these legal provisions must not contradict existing laws, and first of all constitutional laws; 7) they cannot, by themselves, change or repeal the law; 8) there are certain boundaries or limits of judicial lawmaking, provided by law, which represent "the core of the doctrine and practice of case law, covering the essence of the relationship and competence of the judicial and legislative authorities, guarantees against the usurpation of the rights of the latter"[6].

#### 3.2 Reasons for the Emergence of Judicial Lawmaking

When discussing the reasons for the emergence of this type of lawmaking, one must agree with those authors who, based on the experience of lawmaking in modern Russian courts, categorically assert that currently, courts are often forced and must "create (make) law, otherwise their activities will not only become ineffective, but will lead to results opposite to those that society has a right to expect from them: they will not protect rights, but rather facilitate their violation" [7].

In addition to objective reasons, court lawmaking in modern Russia, according to Mikhail Nikolaevich Marchenko, is also conditioned by subjective factors. The scholar, noting that among these, a significant role is played by the very weak, and in most cases, completely absent, legal training of domestic legislators—State Duma deputies and senators—emphasizing that "good legislation requires a good, professional, and not amateurish approach" [3].

### 3.3 Acts of Judicial Law-Making

The issue of acts of judicial law-making is debatable. Vera Ivanovna Anishina believes that the law in its historical and substantive understanding in modern social and state development cannot be formed without judicial influence, the judicial component and judicial law-making. In her opinion, the acts adopted by the courts when considering specific cases using law-making procedures have certain features that distinguish them both from ordinary acts of law enforcement adopted by the courts when considering cases and applying current legislation, and from normative acts that are adopted by government bodies vested with law-making powers. According to the author, these acts: 1) create, formulate a new legal provision, creates a new approach to resolving a legal situation for a specific case, i.e. are of a casual nature; 2) implement the powers of the court as an independent authority in the state system; 3) are based on law as a system of current legal values and regulators of social relations; 4) acquire the character of a repeated and repeatedly valid rule subsequently and not by virtue of a special order, but being recognized by other law enforcement agencies as an appropriate way of resolving a legal conflict; 5) are developed on the initiative of interested parties, and not the court; 6) are adopted as a result of the “silence of the legislator”, that is, the absence of legitimate (or rather, legal. - Vladimir Valentinovich Kozhevnikov) regulation of controversial legal relations; 7) are aimed at developing a unified legal approach to resolving certain categories of cases, that is, they implement the principle of certainty of law, stability of legal regulation [8].

It's easy to see that, from the author's perspective, judicial lawmaking acts are viewed as hybrid acts, possessing both a normative and a casual nature.

In contrast, Roman Leonidovich Ivanov argues that lawmaking acts are normative in nature, i.e., they are formal legal sources of law. The author believes that courts can adopt normative lawmaking acts in the form of normative legal acts and normative decisions. According to Roman Leonidovich Ivanov, normative legal acts include, firstly, resolutions of the Plenums of the highest judicial authorities, containing clarifications on matters of judicial practice; secondly, regulations intended to independently regulate certain issues of the organization and activities of the relevant courts, i.e., they contain organizational and procedural norms (for example, the regulations of the Constitutional Court of the Russian Federation, arbitration courts of the Russian Federation, etc.).

From the author's point of view, normative decisions of the courts are divided into two types: firstly, normative decisions that are not precedents (for example, decisions of constitutional justice bodies considering the constitutionality of their jurisdiction of legal acts, containing interpretative norms formulated by the courts in the form of legal positions - decisions of the Constitutional Court of the Russian Federation and decisions of constitutional (charter) justice bodies of the constituent entities of the Russian Federation; secondly, judicial precedents [9].

If we evaluate this point of view critically, it should be said that the position of the author, who identifies normative legal acts and decisions of the Plenums of the highest judicial instances, raises great doubts, even despite the following characterization of the latter: “they have all the essential features of normative legal acts both in terms of their content and form; they enshrine rules of conduct of a general nature, are generally binding on lower courts, are structured in accordance with the rules of legal technique of normative legal acts: they are divided into paragraphs, have preambles, and sometimes "significant in volume"[9].

We believe that, despite some similarities between the resolutions of the Plenums of the highest judicial authorities and normative legal acts, this does not constitute grounds for their identification.

It seems that Sergei Sergeevich Alekseev was more precise in this regard, believing that we should be talking about interpretative acts of lawmaking, which "have a 'double' legal nature: being an organic part of the system (subsystem) of interpretative acts, they are at the same time the result of the lawmaking activity of competent bodies and represent sources of law containing concretizing legal norms (while simultaneously retaining their interpretative qualities, in particular their dependent nature on the interpreted norms)"[10].

Valery Vasilyevich Lazarev and Sergey Vasilyevich Lipen, analyzing the clarifications of the Plenum of the Supreme Court of the Russian Federation, note that, when generalizing the practice of applying a particular norm, the Supreme Court of the Russian Federation often comes to the conclusion that it is necessary to specify it and formulates a more specific rule of a general nature in its ruling or includes in such an act an individual specifying legal provision created earlier by law enforcement agencies during the consideration of legal cases, thereby giving this provision a legally general character. In their regulatory properties and the mechanism of their formation, normative specifying legal provisions are identical to specifying legal norms created in the process of lawmaking [11]. The scholars note that in the process of generalizing the practice of lower courts based on legal principles, the Supreme Court of the Russian Federation "overcomes" the imperfections of the normative act with its guidelines.

Resolutions of the Plenum of the Supreme Court of the Russian Federation necessarily contain general rules of conduct that apply to all judicial instances and to an indefinite number of individuals in connection with their ability to appeal to judicial bodies. A single application of a legal rule never exhausts the content of a guiding instruction. The Plenum's clarifications (instructions), although temporary, fill gaps in legislation and introduce a new element into legal regulation. The Court's rulings are distinguished by sufficient clarity and contain normative provisions with legal force. Many of the legal provisions formulated by it are based on judicial practice in resolving disputes by analogy of law and analogy of law. They are subsequently enshrined in current legislation [11].

Overall, the authors conclude, the legal provisions established in the Plenum's clarifications regulate social relations regardless of whether they are enshrined in law. In other words, an important form of legislative concretization are judicial legal provisions, which at the same time, to a significant extent, perform an interpretative role, i.e., they are acts of interpretation of legal norms [11].

In our view, classifying regulations as acts of lawmaking is unfounded, as they have no direct relationship to justice.

Vladimir Mikhailovich Baranov believes that "...legal provisions and legal positions of legal practice are nothing more than case law"[12], despite a different position, according to which "legal provisions are legal positions developed by legal doctrine and confirmed by standard decisions of judicial practice, concretizing, supplementing, and clarifying the law"[13].

### **3.4 Legal Position**

Legal position, a legal category that entered academic discourse only in the early 1990s, is invariably associated with constitutional law, constitutional doctrine, and, accordingly, the

Constitutional Court [14]. It was legislatively enshrined in the Russian Federation's "Legal Position of the Constitutional Court," Article 73 of which established that if a majority of the Constitutional Court's judges participating in a chamber session conclude that a decision is necessary that is inconsistent with the Court's legal position, as expressed in its previous decisions, the case is referred to a plenary session of the Constitutional Court [15].

Despite the fact that the category "legal position of the Constitutional Court of the Russian Federation" (hereinafter, legal position) came into force relatively recently, there are differing positions regarding its concept and content. According to some authors, a legal position is nothing more than "the Court's attitude toward the content of a constitutional norm as a result of its interpretation," and that it is "primarily a highlighting of those numerous potential possibilities, those rich legal layers, which are contained in concentrated form in constitutional norms[16]."

According to other authors, a legal position is "the Court's attitude toward significant constitutional and legal phenomena, reflected in its decision(s) by which it is guided when considering relevant cases"[17].

According to the views of the third group of authors, the legal position is a set of legal arguments, legal provisions, general legal guidelines, "legal ideas (conclusions) of a general nature of the Constitutional Court", which arise as a result of its interpretation and identification of the "constitutional meaning of the provisions of laws and other normative acts" and which "remove constitutional and legal uncertainty", and also serve as "the legal basis for the final decisions (judgments) of the Constitutional Court of the Russian Federation" [18; 19].

Despite the different views of the authors on the legal position, concerning mainly its individual aspects and aspects, in general the opinions of theoretical scholars and practitioners coincide. This concerns, first of all, the understanding of the legal position, manifested in the form of "a generalized set of such concepts as the essence of the decision, conclusions, arguments of the Constitutional Court, or as a synonym for each of them" [20. p. 371]. It is crucial to emphasize that the Constitutional Court's legal position does not arise spontaneously, "arbitrarily," but only as a result of its official interpretation of constitutional norms and the identification of the constitutional meaning of the provisions of ordinary (current) laws and other normative acts.[21] The subject of the legal position is considered to be "the Court's understanding of the applicable norm of its law concerning the Court itself, or the norm being reviewed by it, the constitutionality of which is being challenged in a particular case, and the content of the constitutional provisions used as the criterion for evaluation or the subject of interpretation." [20] The Constitutional Court's legal position is expressed through its decisions, such as rulings and determinations. The legal positions of the Constitutional Court are formulated directly in the operative and reasoning parts of its decision. Mikhail Nikolaevich Marchenko clarified that "a legal position, no matter how it is formulated and where it is contained, is never identified with the decisions of the Constitutional Court and always acts as an integral (operative or reasoned) part of a particular decision"[14].

It is also true that a legal position cannot be identical to a Constitutional Court decision as such, if only because each decision may contain not one, but "several different legal positions to justify one or different conclusions of the Court"[20].

When speaking of the legal content of the Constitutional Court's legal position, researchers refer to the norms, conclusions, and judicial provisions that "fill" it as such[14].

According to Mikhail Nikolaevich Marchenko, the most important features of the legal positions of the Constitutional Court are the following. Firstly, the formation and development of legal positions occurs solely through the consideration of specific cases, based on the constitutional procedure. The scholar, clarifying, wrote that, due to the fact that a legal position is finally formed and officially enshrined only at a plenary session of the Court, it is invariably considered the position of a collegial body. From a legal and logical perspective, a legal position is not a final conclusion or a final decision (ruling) of the Constitutional Court, but merely the basis for such a decision [14].

Secondly, it is possible to subdivide legal positions into a wide variety of types, varying in nature and content. Mikhail Nikolaevich Marchenko believed that the most important subdivision of legal positions is into the following main types: a) legal positions of the Constitutional Court, which developed in the process of interpreting constitutional norms and resolving disputes over jurisdiction provided for by the Law on the basis of relevant constitutional provisions; b) legal positions that developed in the process of identifying the constitutional meaning of sectoral legislation, as well as domestic and international treaties [14].

Third, the possession of special legal force and the existence of a special legal nature in the legal positions of the Constitutional Court. Noting this particularity of legal positions, it was noted that it is necessary to proceed from the premise that their legal force and legal nature are directly dependent on and conditioned by the corresponding, correlated characteristics of the Constitutional Court itself, on the one hand, and the final decisions it makes, on the other.

The essence of the most important characteristics of the Constitutional Court boils down to its dual character and nature, meaning that, while being a judicial body, it simultaneously acts as the highest body of judicial review, performing the functions assigned to it on the same level as other federal government bodies. As for the peculiarities of the legal force and nature of the final decisions of the Constitutional Court, they are as follows: a) they are final in nature, since there are no judicial or other authorities above the Constitutional Court that makes these decisions that could challenge or "correct" its decision; b) they are general and binding in nature; c) they have legal force equal to the legal force of the Constitution itself [14].

Nikolai Vasilyevich Vitruk's viewpoint appears fundamental. He believed that the legal force and nature of the Constitutional Court's legal positions are characterized by the fact that they "acquire the character of constitutional-legal norms, principles, and concepts (depending on the object of consideration)," and that in judicial or other law enforcement practice, legal positions "acquire the character of precedent in their legal force, but are not such by their nature"[22].

Fourth, an important feature of legal positions is their general nature, which is directly reflected in the fact that, having been developed on the basis of the consideration of specific cases, they simultaneously extend their effect to other similar cases[14].

Finally, fifth, one of the most important features of legal positions is their binding nature.

Mikhail Nikolaevich Marchenko noted that legal positions, as well as its decisions, are binding not only with respect to bodies and organizations, as well as citizens and officials, but also with respect to the Constitutional Court itself. Moreover, the importance and significance of the legal positions previously formulated in the decisions of the Constitutional Court for the Court itself and for its subsequent decisions are determined by the following two provisions of

the federal constitutional law "On the Constitutional Court of the Russian Federation": a) the fact that the Court does not have the right to accept for consideration a matter on which it has already issued a decision that retains its legal force. Consequently, it is also binding for the Court; b) the fact that under certain conditions, including procedural conditions (requiring consideration of the issue at a plenary session of the Constitutional Court), a complete change or partial adjustment by the Court of its previous legal positions is permitted, without, however, changing the corresponding decisions of the Constitutional Court issued by it on a particular previously considered specific case [14.].

#### IV. Conclusion

We believe that this article, analyzing judicial lawmaking and its acts, is a work that will deepen the general theory of lawmaking, which has often been associated only with the activities of legislative (representative) and executive bodies that adopt normative legal acts.

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