UDC 347.95.001.8

R. S. Pritchenko
Senior teacher
Odessa I. I. Mechnikov National University,
The Department of General Juridical Disciplines and International Law
Frantsuzskiy boulevard, 24/26, Odessa, 65058, Ukraine

NOTION OF JUDICIAL PRACTICE

The issues of understanding of judicial practice are analyzed. Different approaches to the conception are considered. The members of judicial practice are distinguished and the nature of their relationship is established.

Key words: judicial practice, judicial activities, enforcement experience, legal provisions.

Problem statement. Judicial practice as one of the basic types of judicial practices embodies all the potential that is peculiar to its generic category, so the nature of judicial practice, in its place, the notion and role in judicial system are relevant both among scientist and among legal practitioners. There has been a shift to expand the interest of scientist to the issue of judicial practice in native legal science in the last decade. This category has begun to fix in the minds of legal practitioners as a source of law.

The judicial practice can be understood as the activity of courts with respect to the application of laws in the resolution of specific cases. Another comprehension could be as a tendency in court's resolution of certain categories of cases that takes into consideration the court decisions, primarily of the higher courts, that acquired the force of law. In several states judicial practice is regarded as a source of law and acts as the creator of new norms, for example, in the form of precedent.

However, a palette of diametrically opposed views on the essence and the essential components of judicial practice do not allow express it as a source of law.

Analysis of recent researches and publications. Today, the analysis of special researches of Ukrainian and Russian scientists suggests that, despite the criticism, the debate about the nature of judicial practice that still revolves around the perception of judicial practice as the unity of the court's operations and results of such activities, even if a certain part of the work and some of its results. Among them it is worth mentioning the studies of V. Y. Solovyov, D. Y. Khoroshkovskaya, V. A. Kryzhan, S. S. Zmiyvska.

So, V. Y. Solovyov considers jurisprudence as «the unity of the judiciary in the implementation of justice and the outcome (the experience) this activity, objectified in the form of court decisions that have come into force» [2, p. 8].

D. Y. Khoroshkovskaya considers judicial practice as mutual unity «activities of the courts and the results of this activity expressed in new legal pro-

visions worked out by the judicial authorities and set out in decisions on specific cases and / or acts on the specific set of similar court cases» [3, p. 32].

V. A. Kryzhan in judicial practice combines both certain legal activities of all the judicial organs to implement the tasks entrusted to them, and all the results of this activity [4, p. 6].

S. S. Zmievskay suggests that the jurisprudence reflects the unity of the various activities of the courts and different results (experience) of this activity [5, p. 22].

From these points of view, it is clear that, despite their validity, the issue is of determining the scope of judicial activities and the results that assemble the essence of jurisprudence.

Paper purpose. The purpose of this article is to analyze the main points of view on the issue of understanding of judicial practice as a legal phenomenon, linking together lawmaking process and implementation of law.

In addition, the article includes an attempt to build a logical chain of the development of understanding of elements of the legal system of a state as social practice, practice of law and jurisprudence.

Also, the target direction of our study involves the analysis of main essential characteristics of judicial practice: judicial activities, experience in the application of law and result of judicial activity, which is transformed into a rule of legal provisions.

Paper main body. Currently, there are three basic approaches to the determination of essential elements of judicial practice.

The first of them is to ensure that the jurisprudence is seen in the «broad sense» and represent the judiciary to administer justice.

Criticizing such a statement, we note that understanding of judicial practice only as legal activity divorced from the realities of everyday life and professional legal capacity.

Appearing on the shelves of bookstores, in libraries, online collections of jurisprudence contain just the results of Court activity (enactment, decisions, sentences, etc.), which indicates the absence of one-sidedness and methodological validity of the conclusions.

In addition, understanding of judicial practice only as judicial activity violates the principle of similarity species concept with the generic concept, in which the essential components required to turn on formalized result.

The second of existing approaches is the judicial practice in the «narrow sense» as a fixed outcome of judicial activities.

In our view, the reduction of judicial practice as the concept of species, only to the results and the resume of the judiciary does not correspond to its generic concept — category of «legal practice», where one of the essential components is proceeding (activities). In addition, this understanding of judicial practice, as a philosophical category, can not be interpreted in a narrow, simplistic sense, no matter how convincing arguments to justify such a simplistic interpretation.

Thus, the third and essentially «complete» understanding of the judicial practice, as the unity of judicial work of justice administration and the spe-

cial result of this activity, perceived logical conclusion and methodologically verified.

It should be noted that the criticism of the statement was to ensure that «this understanding of judicial practice does not give a complete picture of the main objectives of courts and the basic principles of functioning of judicial activity, the influence of the subject and the means of such activities on its main results, i.e. does not bring to light specifics of judicial practice as a variety of legal and social practices [1, c.11].

In our opinion, the jurisprudence can be considered that part of the judiciary, which is associated with a specialization applied by the court of law to the circumstances of a particular case. On the other hand, judicial activity, characterized as judicial practice, takes place in the event when the court overcomes the absence of standards set by the state, which allows to resolve a particular dispute, i.e., in the case of overcoming the «gap of law».

By establishing such a framework of judicial activity, we can not help delve into the sphere of legal reality, which is characterized by a high degree of creativity and subjectivity.

For example, in the case of specificity of court's provisions of common legal standards (perhaps to a lesser extent), and in the case of overcoming the gap in law (probably more) there is such a legal action as court's discretion.

In general, the regulation of public relations (including the proceeding) can be carried out by strict regulation of behavior of agents and providing them with a certain freedom of choice. In modern conditions there is a trend towards greater flexibility in the use of methods of legal technique. In this context, the problem of discretion of the court is entering a qualitatively new level of understanding.

In this study, we consider the existence of court's discretion, as a confirmation that the work, which is one of the essential components of the judicial practice is not detached from reality and based on the experience of applying the rule of law, without which the implementation of court's options for legal solutions, is not possible in principle.

Thus, the dynamic development of public relations sometimes so overtakes the current legislation that sooner or later it ceases to meet the challenges of today. In turn, the court, considering specific cases, can not respond to such challenges, in connection with which the rule of law in its application can be specified either the norm should be formulated by the court within the meaning of rules, or on the basis of general legal principles, i.e. the court must bridge the gap in law.

There is no doubt that this situation can be corrected by the adoption of regulations (regulations for quick filling a gap in law, or of more detailed nature, if required by life), but that, logically, does not run out of specification requirements of established norms and probably it will not eliminate all gaps in legislation.

Therefore, the result of the judicial activity, which is characterized by us as jurisprudence, is of such a kind that the court is to develop specific rules

(regulations), specifying a legal provision and allowing to overcome a gap in law.

In the legal science such special rules are called legal provisions. They are necessary link, mediating the application of law in the case of dispute. Thus, there is a settlement under the law of a particular individualized relationship. Without the mediation of court enforcement activities in vast majority of cases, would have been impossible.

The problem of understanding of the category of «legal provisions» lies in the fact that the understanding of this category is far from uniform, and is reinforced by the problem of sometimes confusion of «legal provisions» in comparison with the legal rule, judicial precedent, or just as a source of interpretation of the law.

First we should explain that, with all the gravitas, this term is not a substitute for the rule of law and does not apply to lawmaking, and, in fact, is worked out in the course of enforcement of the rule.

Secondly, it's correct to compare the legal provisions with the judicial precedent only if we accept the latest official recognition of the sources of law in the domestic legal system. The mechanism of development of the classical judicial precedent is very specific [6, p. 181–250] having little in common with process of legal provision creating.

Thirdly, the issue of legal provision giving to it force and weight of law source of course lies in the relationship of both theoretical developments and practical implementation, but denies adjudication of similar cases and the final decision, even suspended sentence, but with the type, you can not.

Fourthly, the name of object is not decisive for its understanding. There is the main assessment of elements of essence and content of the object. So, the name of «legal provisions» does not carry the full meaning and can be transformed into the term «judicial custom», for example.

Fifth, we believe that there are no restrictions for parts of the judicial system, which could in its activity work out a particular legal provision.

Sixth, regarding the legal provisions as a result of a special judicial practice, giving it the features of novelty, positivity and progress of regulation of public relations, is not always the case for the creation of a legal rule. This position is shared by some modern scholars [6, p. 92].

Legal provisions, as a result of concentrated jurisprudence, are able to compensate for a natural lag of law on the dynamics of public relations, and can eliminate the contradictions between «conservative» law and variability of social life. Ultimately, the judicious use of legal provisions ensures the stability of law and order, strengthening the rule of law, gives stability to the state's policy.

Conclusions. Assessing the analysis of essential characteristics of the phenomenon under investigation, it can be concluded that the jurisprudence is based on the law enforcement of judicial experience, the result of which is the development of legal provisions.

This definition is consistent with a philosophical understanding of the category of practice, covering all the main components of the judicial practice

and the ability to serve as a research content, social purpose and functions of jurisprudence system ties in which it is located with other events of legal reality.

References

1. Безина А. К. Судебная практика в механизме правового регулирования трудовых отношений [Текст] / А. К. Безина — Казань : Изд-во Казанского ун-та, 1989. — 183 с.
2. Соловьев В. Ю. Судебная практика в российской правовой системе [Текст] : дис. … канд. юрид. наук : спец. 12.00.01 «Теория и история права и государства; история правовых учений» / В. Ю. Соловьев. — М. : РГБ, 2003. — 188 с.
3. Хорошковська Д. Ю. Роль судової практики в системі джерел права України: теоретико-правове дослідження [Текст] : дис. … канд. юрид. наук : спец. 12.00.01 «Теорія та історія держави і права; історія політичних і правових учень» / Д. Ю. Хорошковська. — К. : ІДІП НАНУ, 2006. — 194 с.
4. Крыжан В. А. Правовой обычай и правовой прецедент как источники права [Текст] : автореф. дис. … канд. юрид. наук : спец. 12.00.06 «Природоресурсное право; аграрное право; экологическое право» / В. А. Крыжан. — Пермь : Изд-во ПГУ, 2006. — 19 с.
5. Зміївська С. С. Судова практика як джерело формування та розвитку права (загальнотеоретичний аналіз) [Текст] : дис. … канд. юрид. наук : спец. 12.00.01. «Теорія та історія держави і права; історія політичних і правових учень» / С. С. Зміївська. — Х. : НУ ЮАУ, 2012. — 208 с.
6. Малишев Б. В. Судовий прецедент у правовій системі Англії [Текст] / Б. В. Малишев. — К. : Праксіс, 2008. — 344 с.
7. Лічман Л. Г. Правоположення як форма судового тлумачення цивільно-правових норм [Текст] / Л. Г. Лічман // Науковий вісник Херсонського державного університету. — 2013. — Вип. 3. — Том 1. — С. 90–92.

Р. С. Притченко
Одеський національний університет імені І. І. Мечникова,
кафедра загальноправових дисциплін та міжнародного права
Французький бульвар, 24/26, Одеса, 65058, Україна

ПОНЯТТЯ СУДОВОЇ ПРАКТИКИ

Резюме

В юридичній науці немає єдиної точки зору щодо визначення поняття «судова практика», а також у визначенні її ролі, значення та місця в правовій системі України. Визначення судової практики як видового поняття не повинно суперечити своєму родовому та типовому поняттю — юридична і соціальна практика. Судова практика являє собою певну діяльність судових органів по напрацюванню і закріпленню в своїх рішеннях правоположень, яка здійснюється на підставі набутого правозастосовного досвіду.

Ключові слова: судова практика, судова діяльність, правозастосовчий досвід, правоположення.

Р. С. Притченко
Одесский национальный университет имени И. И. Мечникова,
кафедра общеправовых дисциплин и международного права
Французский бульвар, 24/26, Одесса, 65058, Украина

ПОНЯТИЕ СУДЕБНОЙ ПРАКТИКИ

Резюме

В юридической науке нет единого подхода к определению понятия «судебная практика», а также в определении ее роли, значения и места в правовой системе Украины. Определение судебной практики как видового понятия не должно противоречить своему родовому и типовому понятию — юридическая и социальная практика. Судебная практика представляет собой определенную деятельность судебных органов по наработке и закреплению в своих решениях правоположений, осуществляемую на основе приобретенного правоприменительного опыта.

Ключевые слова: судебная практика, судебная деятельность, правоприменительный опыт, правоположение.