JUDICIAL LAW MAKING MECHANISMS AS A SOURCE OF LAW

[a]AK-ADIL ALAIDAROV, [b]TOKIJAN AGDARBEKOV, [c]BALGABAI NAKIPOV

[a,c]Khoja Akhmet Yassawi International Kazakh-Turkish University, 161200, 29 B. Sattarkhanov Ave., Turkistan, Kazakhstan
[b]Almaty University, 050007, Aksay-3 microdistrict, 36 B. Momyshuly Str., Almaty, Kazakhstan
email: [a]akadil.alaidarov@ayu.edu.kz, [c]balgabay.nakyp@ayu.edu.kz

Abstract: The separation of powers into legislative, executive and judicial branches does not mean that the courts have no possibility of law making. A different position on this issue, if it is logically consistent, should argue that, with the separation of powers, only legislative acts can be sources of law and not only judicial but also executive power acts cannot be sources of law. Meanwhile, the strictest separation of powers between the legislative and the executive ones does not exclude the right of executive power to carry out law-establishing activities on the basis of and pursuant to the law. There is no reason to challenge the law making credentials of the executive power as such, and the discussion can only go about the nature of these credentials and the place of executive power acts in the system of sources of law.

Keywords: judicial law making, separation of powers, source of law, judicial discretion, court's explanations.

1 Introduction

Since the emergence of the State, enlightened human beings tried to find the best combination between the need for social regulation, the imperious claims of the state apparatus and the possibility of the free development of society. Theologians, philosophers, scientists sought the answer to one of the most difficult questions of social existence: how to reconcile the nature of state power with the need for individual freedom. The creation of several scientific concepts subsequently united in a single doctrine under the common name of "Theory of separation of powers" became some kind of answer to this question. This theory gradually evolved and transformed into a kind of imperative of modern statehood.

In this case, the position of V.S. Nersesyants (1), who, for reasons of separation of powers, does not challenge the law making of executive power but, for the same reasons, denies judicial law making, seems to be illogical. Moreover, this position is simply refuted by the fact that in common law countries in the context of separation of powers, judicial precedent is a source of law and was previously considered the main source of law.

In essence, the opinion that, in European Continental law countries, the judicial precedent is allegedly not recognized as a source of law, nothing changes in this matter. Even if the dominant doctrine in Continental law did not recognize precedent as a source of law, and even if it really was not such, the essence of the separation of powers cannot change depending on "juridical geography." In common law countries, the separation of powers does not interfere with the law-establishing activities of superior courts, and in continental law countries, the division of powers cannot interfere with judicial law making.

V.S. Nersesyants (1), in terms of the principle of separation of powers, is against the recognition of judicial practice as a source of law. He argues that the court deals exclusively with law enforcement, not law making. In his opinion, with the defectiveness of the legislation and with the complexity and the atypical nature of a case under consideration, the court only carries out the law enforcement (antilegist) interpretation of the law from the standpoint of the right itself.

Given the current desire of lawyers in all countries to rely on the law, the creative role of judicial practice always or almost always lays behind the interpretation of the law. (2,3) The reference to the general principles of law does not change anything in this matter. After all, the legislative and executive powers, as well as the judiciary, take into account and should take into account in their activities the general objective principles of law. Moreover, it does not follow from this that the parliament deals only with the interpretation of the constitution from the standpoint of the law itself and that the executive authorities only interpret the laws using the same general principles of law. In addition, the very concepts of justice, formal equality, and freedom that V. S. Nersesyants attached in the content of the law, imply a certain law-making the role of the court in a given law enforcement activity. After all, they pass through the legal awareness of a given judge, who is a carrier of a given legal culture. This does not mean that these principles of law may vary depending on the legal awareness and legal culture of a judge. The objective principles of law cannot be realized directly. They are always implemented via specific subjects in a specific socio-economic, cultural, and political environment of a given society and state. If these general objective principles of law always and everywhere were to have a strictly defined embodiment, then the legislation of the countries as a whole should have been the same. However, as we see, there is no such thing anywhere. Therefore, without being changed, the principles of law may have their own specificity with respect to the current law of a given country. Such specificity of the objective principles of law must be resulted by the equally objective conditions of life of a given society and state. This specificity is expressed not only in legislation but also in justice. It is justice that "launches" the mechanism of protection of legal values, i.e. genuine law becomes an effective regulator of social relations. According to Karpov (4), ultimately, it is an independent and strong justice that can make the law a sovereign and social institution regardless of the discretion and arbitrariness of state power including the discretion, and sometimes arbitrariness expressed in legislative and other legal normative documents.

The most important of all law enforcement practices is judicial one since the action or inaction of an official can be appealed in court. Even legal normative acts, which infringe upon the rights and legitimate interests of citizens and organizations, can be appealed. It is in court, during the consideration of specific cases and disputes that the legislation undergoes the most serious examination regarding its defectiveness, a reflection of the needs of social development, justice, rationality, compliance with fundamental human, civil rights and freedoms.

The court is an important element of the mechanism of law formation, its approbation and comparison with the primary source of law, i.e. real life and real relationships. The court creates living law, specifies it in relation to individual life situations, achieves the exact individual meaning of legal norms, and finds an individual measure of freedom and justice. The court measures the proportions, the harmony of the general prescriptions of legal normative acts and other sources of law (for example, customary law), rights, freedoms, and obligations of participants in legal relations. (5, 6)

2 Materials and Methods

Judicial discretion is based on two contradictions: first, there are various kinds of conflicts within the actual positive law system itself; second, a contradiction between positive law and social reality. The current positive law is in principle not capable of being fully adequate to a dynamically developing, infinitely diverse social practice. However, this contradiction serves as a powerful impetus for the development of law. Moreover, the first who should perceive, evaluate and respond to it is the court itself as an independent public institution of state power called to protect the rights and freedoms of citizens, to resolve various kinds of social and legal conflicts in society by legal means.

Judicial discretion has its limits. O.A. Papkova (7) identifies the following criteria for limiting judicial discretion:

1) statutory provisions;
2) rules of statutory interpretation;

3) specific circumstances of a case;
4) principles of expediency;
5) category of justice.

Statutory provisions are the first but far from the only criterion for limiting judicial discretion. A court cannot be absolutely bound by law since the independence of the judiciary allow it to interpret law from the standpoint of legal, in particular, constitutional principles on which justice is built. (8, 9)

What is the specificity of judicial law making different from the law-making activities of the legislative and executive powers?

First, it should be noted that the judiciary does not have a specific, well-defined scope of legal regulation. This is due to the fact that the judiciary does not extend to a specific, strictly limited range of social relations but to any legal relationship (with some exceptions, for example, cases and disputes that fall within the competence of the Constitutional Council in Kazakhstan, etc.) including those not regulated by the current law.

Secondly, judicial law making has a close relationship with judicial discretion, which means the judge's ability to choose between two or more legal alternatives. Such a relationship, according to Y.V. Semyanov (10), is that judicial law making is initiated via judicial discretion, the result of which is a new interpretation of the existing legal norms, which can later become universal. Judicial law making is based on the objective character of judicial discretion due to a number of reasons including gaps in law and statutes. In addition, a prerequisite of judicial discretion, its “legal basis” is the hypothesis of the legal norm, the content certainty of which impacts the extent of freedom of the judiciary establishing the factual circumstances and the meaning of the legal norm. (10, 6, 11)

The legislator’s discretion is a consequence of directly established law making competence. Judicial law making, on the contrary, is largely derived from the necessity and permissibility of judicial discretion.

Thirdly, judicial law making is not of a political nature. This apolitical nature has two aspects. The first one is that the judiciary is independent of political parties and movements. Their programs, which are not implemented in the legislation, do not (should not) have any significance for the court. As already noted, the court protects the interests of the law as an independent value and should not be subject to momentary changes in the political environment. Only when the program slogans of the party that won the elections were enshrined in the legislation, they serve as a basis for resolving court cases and disputes. The court must take into account political reasons that can be derived from logic, public confidence or statutes and while respecting the separation of powers, beware of applying considerations of economic and social policies that are usually the prerogative of parliament. (12)

The second aspect of the apolitical nature of judicial law making is connected with the fact that the court always deals with relations that already exist in reality, with certain facts and circumstances. Unlike parliamentary law making, which is directed to the future, the court is always connected with the affairs of the past. Judicial law making can only adequately reflect social realities, while legislators do not only reflect them but also order, direct and regulate their development, stimulate and promote the formation of new relations. Similar and other specific characteristics of parliamentary and judicial law making reveal various aspects and levels of their state and legal impact on social relations.

Fourthly, judicial law making is not connected with the court’s own initiative but with appeals of interested persons waiting for a lawful and reasonable resolution of a particular case. Thus, the court is deprived of the opportunity to independently choose the subject of legal regulation. In connection with this feature of judicial law making, V.I. Anishina (9) notes that a prescription becoming a precedent arises not from the judge’s own initiative but from existing legal relations. That is, the source of its nature is the need for legal regulation stemming from concrete vitally determined circumstances and not the theoretically justified need for the legal regulation of any legal relationship. In this regard, such regulation has one undoubted advantage over the legislative one: it is timely and does not allow social conflict to remain unresolved when awaiting the adoption of relevant norms by legislators. It is flexible because it allows taking into account the real circumstances of each specific case, whereas legislators’ prescriptions may not be a fair and acceptable way to resolve a conflict in given cases. (9, 13, 14)

Fifth, judicial law making is of subsidiary and compensatory nature. The judiciary does not have its own clearly defined scope of legal regulation. The executive power, however, issues regulations when the need for this is directly indicated in statutes, or in accordance with the general norm that defines the competence of the body as a whole. Judicial law making is usually not planned in advance. It receives legitimization not due to the fact that it is provided for by someone’s subjective will but by objective reality. Judicial law making, as a rule, takes place where there are gaps, collisions or other defects of the already existing regulatory material to be applied. If non-contradictory legislation adequately reflects the need for a legal resolution of a disputed case, then there can be no place for the judicial law making. It takes place only where it is necessary to go beyond the norms of the current positive law. According to O.N. Vasilenko (15), distributive interpretation, analogies (especially the analogy of law), judicial discretion, direct application of general provisions and principles of the constitution are the ways and forms of the exit of courts from the boundaries of positive law and the formulation of the so-called “living law.”

Judicial lawmaking is neither strictly subordinate nor equal to the law making of other branches of power. In this case, subsidiarity does not imply amendments to legal acts or by-laws. Judicial practice as a source of law can only compensate for defects in regulations of the legislative and executive powers; it complements the existing law as a whole and is its relatively independent segment.

Such a compensatory role of judicial law making does not mean that it can be completely eliminated by improving the quality of published legal acts and by-laws. This can significantly reduce the need and, accordingly, the prevalence and volume of judicial law making but it cannot be completely avoided. This is due to many reasons. The main reasons are as follows:

1) dynamism, volatility of social relations;
2) language of law; the multifunctionality of law enforcement and especially judicial practices.

Sixthly, another criterion for distinguishing judicial and parliamentary law making is the breadth and depth of the scope of legal regulation. These and other criteria will help in resolving the task of delimitation and determination of the roles of the court and parliament in the adequate legal regulation of all areas of social activity that need it.

It is generally recognized and objectively grounded that the norms in the Romano-Germanic legal system are more general in comparison with the norms in the countries of Anglo-American law. For an English court, statutory norms appear rather as some general principles than rules for a direct application when resolving specific cases and disputes. R. David (1964) stressed that statutes, according to the traditional English concept, was not considered a normal form of expression of law. The judges, of course, always applied statutes but the norms they contain were finally adopted and fully incorporated into the national legal system only after they were repeatedly applied and interpreted by the courts to the extent that the courts established. (16, 17, 18)

Modern legislation is characterized by the existence of the so-called normative framework (general provisions), which imply the regulation of a given issue only in general terms. Therefore, there is a need for judicial creation of concretizing norms, which

are a manifestation of both judicial discretion and judicial law making in general. All this allowed scientists to raise the topic of "delegation" of normative power to the court on the part of legislators. (15, 19)

3 Results and Discussion

Judicial law making is a certain level of concretization of law and its approximation to the needs of legal regulation of specific life cases. The general and abstract nature of legislative norms, especially the use of so-called “judgmental concepts,” initially imply their certain concretization in the course of law enforcement. Legislators, in turn, create rules not from scratch. Statutes are largely a concretization of the provisions of the constitution. Executive power issues by-laws on the basis and in pursuance of legislation; thereby it develops and specifies them. Final (definitive) acts in this chain of concretization are judicial acts. This is because only the court can change or cancel a judicial decision on the request of interested persons and not on its own initiative.

Unlike the court, legislators use induction when they search for commonly used rules, i.e. “law in general, for all occasions.” However, legislators do not have the unlimited ability to foresee and are unable to determine what is infinite. It is known that induction itself does not give reliable knowledge, and therefore, law making alone is not able to solve the problem of adequate legal regulation. (4)

A.I. Boytsov (20), when considering the advantages of judicial precedent, notes that in many respects, judges are better law makers than legislators are. While legislators solve thousands of cases at once, in bulk, without a special discussion of each of them individually, using only general ideas and considerations, judges systematically borrow their material from life and for life. Judges experienced in the current law, first, are competent specialists, the arbitrariness of whom, to a much greater extent than it concerns the legislative power, is limited by law as well as by cassation courts and supervisory authorities. Secondly, they make their decisions when discussing each issue in adversary processes. (20) One cannot demand from general statutes what it is unable to give, i.e. that it should embrace the entire legal life of society in its smallest details so that it would be able to oversee the living diversity and eternal variability of activities. To give general guidance, to enter the activities of the court into the necessary limits, to indicate the ways and means of action to it — this is what legislators can do. (21)

Law is formed not only by all three branches of power but also by society. Even the state as a whole is not a monopolist in law making. Law is an important component of society as a self-organizing and self-regulating system. (6, 22, 23) Society can express what is law but only state institutions (with the exception of the referendum) legalize such a right, give it the properties of formal certainty and normativity, and formulate it in final form. The judiciary is one of these institutions.

When forming legal norms, legislators should reflect in it the most significant social ties that exist in society. The source of legal norms cannot be only the will of legislators. Law making bodies build their activities on objectively emerging public relations. (19, 24)

The court acts as a buffer, a place of concentration and processing of legal information moving both from state to society and from society to state. When legal information moves from state to society, the court adapts it to the needs of resolving various social and legal conflicts, specifies this information related to subjective rights and obligations of the participants in a judicial process. According to E.V. Bogmatsera (19), the process of law formation does not end with the publication of legal acts and their entry into force. The final formation of legal norms, in his opinion, occurs after their socialization, their adaptation by public consciousness and their implementation in the behavior of participants in social communication. (19, 8)

During the reverse movement of legal information, from society to state, the judicial practice may foreshadow new legislative provisions, as initially the courts identify and develop new or unresolved legal issues that the legislature may subsequently enshrine in the form of legislative provisions.

In the case of separation of powers, which corresponds to a developed legal situation, neither legislators, nor the court, nor the administration has a monopoly to determine what law is in the context of a given relationship. Nevertheless, each branch of power must ensure legal freedom within its tasks and within the competence of the relevant authorities. In particular, the court cannot create statutes but it can claim them as law-violating and should give statutes an interpretation that is consistent with the principles of legal freedom. (8, 9) The court should not substitute legislators but legislators cannot force an independent judiciary to take an anti-legal position contrary to the provisions of the constitution. The judiciary has a real status of power from the moment when it receives the right to control the legal content of all regulatory legal acts issued not only by the executive but also by the legislative powers, i.e. when there is a real opportunity to actually show a system of checks and balances. (25-27)

Judicial law making, according to S.V. Lozovskaya (28), is an element of the system of checks and balances. Such a role of judicial law making is explained by the purpose of the judiciary and by the fact that it implements the abstract and concrete regulatory control in the course of the administration of justice. Y.A. Dmitriyev and G.G. Cheremnykh (29) even noted that the judiciary as a whole is part of the so-called system of checks and balances, a means of resolving disputes between government agencies.

In the authors’ opinion, judicial law making refers specifically to checks designed to keep the activities of other branches of power within the framework of the constitution and law. Counterbalances are more political in nature than checks and are ways of countering one branch of power by the other one to uphold their powers and interests. Their use is mainly limited to the area of interaction between the executive and legislative branches of power. The judiciary, unlike the others, does not have (should not have) political interests; it is intended to protect only the interests of law.

In the context of the decentralization of law enforcement activities, G. B. Yevstigneyeva (8) considers the judiciary as the formation of a certain competing center for law making. Judicial law making can be considered as competing for only where and to the extent that the law making of other branches of power deviates from the provisions of the constitution and law. In other cases, it will be not competing but only subsidiary and compensatory in nature.

Thus, judicial law making is not always a manifestation of the system of checks, although this aspect is more characteristic of judicial law making rather than the law making of other branches of power. This is related to the administration of justice as the main and exclusive function of an independent judiciary.

The degree of stability of the rule of law of any state depends largely on the observance of the principle of uniformity of judicial practice. In the case of Kazakhstan, the requirement of the need for the uniformity of courts’ considerations of cases is reflected in the Constitution of the Republic of Kazakhstan, according to which the Supreme Court (Article 81) is charged with exercising judicial review of lower courts’ activities and giving explanations on judicial practice. The explanations of the Supreme Court of the Republic of Kazakhstan given in regulatory decisions are a way to unify judicial practice. The purpose of their adoption is for similar cases to be resolved in a similar way by all courts of the country. (30, 31) Due to the systematic publications, regulatory decisions resolve the most pressing, unclear, and controversial issues of certain categories of cases. The activities of the Supreme Court in this area are not spontaneous but permanent and systematic. This enables the formation of a single court practice via the long-term

development of a monotonous judicial resolution of similar cases.

Despite the importance of the explanations of the Supreme Court for the legal system, some authors still propose banning the Supreme Court to provide explanations on judicial practice issues. Therefore, A.I. Boytsov (20) come to the above conclusion on the assumption of the following chain of judgments. The interpretation, which is an element of a law enforcement process, is significantly different from the interpretation included in the system of law making activities. From this point of view, the Supreme Court could be deprived of the authority to give explanations of a normative nature while retaining its functions of generalizing the practice of lower courts, identifying common mistakes and developing recommendations for their elimination. Another more radical way is depriving the Supreme Court of the authority to give any explanations of a general nature. Unforeseen changes that require new solutions and approaches would overlap with the speed of a legislative response that could ensure timely development of optimal responses to the demands of the changing life and the dynamism of the legal system. If necessary, the legislature could adopt interpretative acts of a regulatory nature. (20)

Karpov (4), when recognizing that the explanations of the Supreme Court play the role of the source of law, nevertheless notes that they are the most directive and least judicial acts in all judicial practice. The explanations do not contain a sentence or decision form typical for the court; they lack the specific circumstances of a particular case. Explanations look like a typical act of a legislative or administrative body. If desired, a hypothesis, a disposition or a sanction can be found in these explanations as in legal norms. The fact that the regulatory role of the explanations of the Supreme Court was recognized was rather an administrative impediment to judicial practice than the recognition of the independent role of judicial practice in regulating social relations. (4, 24)

Indeed, these explanations of the Supreme Court are somewhat inconsistent with the nature of the judiciary but it is at least a great exaggeration to still call them "an administrative impediment to judicial practice." After all, these explanations are not given by the Ministry of Justice as an administrative body but by the court.

The Supreme Court takes regulatory decisions not in connection with the resolution of a particular case and the administration of justice but on the basis of an analysis and generalization of the law-enforcement practice of the lower courts. According to G. B. Yevstigneyeva (8), the fact that superior courts give abstract and general explanations is not consistent with the nature of the judiciary. She does not favor the abolition of this right of the Supreme Court but makes certain demands on such explanations in view of the nature of the judiciary. G. B. Yevstigneyeva (8) believes that from the point of view of the separation of powers, judicial law making is permissible only within the framework of the exercise of its specific function, i.e. resolving disputes about violated law. Judiciary, in the person of superior courts, can make law-making decisions without replacing legislators and remaining within the limits of judicial jurisdictional tasks. Consequently, the separation of powers is not contradicted by judicial law making as such but only by the law making activities of superior courts carried out by means of an abstract normative interpretation of the constitution or law. It is contradicted by "quasi-normative" acts of the judiciary issued as abstract normative interpretation. The nature of the judiciary implies only a specific normative interpretation of the constitution or law in connection with the resolution of a particular dispute. In other words, from the point of view of the separation of powers, only a specific (incidental) normative interpretation of the constitution or law is permissible, which results in a precedent of interpretation. Even if a "quasi-normative" act is issued, as is customary in some post-Soviet countries, for example, the explanation of the Supreme Court, this should be an explanation not prior to judicial practice but generalizing legal positions already expressed via a specific regulatory interpretation. (8, 16)

Thus, the Supreme Court has the right to give explanations only on the issues of the already existing and not the intended law enforcement practice. For example, if the Parliament of Kazakhstan adopted a new legal act, which, in the opinion of the Supreme Court, may cause significant difficulties in its application by the courts, the Supreme Court is not entitled to explain this act until the generalization of relevant judicial practice for the courts. In addition, these explanations should concern only those issues of courts' application of statutes that have already arisen, e.g. in the cases when the courts interpret and apply the same rule of a new legal act differently during resolutions of similar cases.

Such an approach eliminates a certain discrepancy between the explanations of the Supreme Court and the nature of the judiciary. This approach is expressed in the following. First, explanations are given solely on issues that have arisen during law enforcement activities. Secondly, explanations are given on issues not of any law enforcement practice (such as prosecution, the practice of the agencies of the Ministry of Internal Affairs, etc.) but only on issues that arose during judicial practice when administering justice that is the main and exclusive function of the judicial branch of power. Thirdly, with this approach, the normative decisions of the Supreme Court will be aimed solely at clarifying past cases, and not at regulating eventual future contentious relations. Fourth, the role of the Supreme Court's own initiative in the issuance of regulatory decrees, which is not inherent in the nature of the judiciary, is diminishing. The explanations are given only as an adequate response to existing questions in judicial practice. The Supreme Court gives explanations as a judge resolving an atypical complex case in the context of defective legislation and has to execute law making when interpreting and applying such legislation to resolve a particular case that arose not at the initiative of the judge but at the request of the person concerned. Fifth, the Supreme Court does not develop explanations in view of its subjective will but in view of the existing norms and principles of law and taking into account the positions of lower courts. The Supreme Court issues normative decisions not on the basis of its own will alone, not in a self-governing manner, but by compulsory consideration of the already existing positions of lower courts. Thus, regulatory decisions are the result of the activities of the entire judicial system aimed at resolving legal issues that did not receive a direct answer from the law or were not affected by it at all. Of course, the explanations on the content are not a mechanical reflection of the provisions developed by judicial practice. On the contrary, explanations tend to prescribe solutions to legal problems that cause discrepancies in practice in order to bring them in uniformity. When reducing the disparities of lower courts' positions to a common denominator, the Supreme Court thereby develops its own position on a particular legal issue. The Supreme Court, which generalizes judicial practice throughout the country, has a much broader outlook than a court dealing with a specific, even if a typical, case. Sometimes, such analysis and synthesis reveal new semantic aspects of the applicable legal norms that may be overlooked by an individual judge resolving a particular case.

Unlike the law making of the legislative and executive branches of power, the law making of the Supreme Court is not purposeful. Such law making does not occur in connection with the desire of the Supreme Court to regulate certain relationships differently than the authorities of other branches of power did but due to defects of the current legislation, the dynamism and diversity of social relations. The Supreme Court does not carry out law making activity as such. It does not establish legal norms purposefully but within the framework of explanatory activities aimed at ensuring uniformity and due orientation of judicial practice.

Normative regulations are not a derived source of law. An act may not be derivative in the same manner as one branch of power is not derivated from another unlike the provisions

contained in this act. Normative regulations of the Supreme Court are of a subsidiary nature. The degree of novelty and of demand for normative regulations of the Supreme Court as a source of law is inversely proportional to the adequacy of legislation to the needs of society in legal regulation and to the internal consistency of the current positive law system. Also, it is directly proportional to the degree of reflection of these phenomena in judicial practice. Of course, not all flaws in the regulatory framework are reflected in judicial practice since only the most significant relationships for individuals are usually the subject of litigation. The important thing is the activity of citizens appealing to the court, their awareness of their rights, and the degree of their trust in the judicial system.

4 Conclusion

The main conclusions are presented below:

1) Judicial lawmaking does not contradict the principle of separation of powers. Judicial law making is based on the legal discretion of the court, the impossibility of the full adequacy of the legislation to the needs of resolving specific life cases, and the internal inconsistency of the system of existing positive law.
2) Characteristic features of judicial law making are:

- Lack of clearly defined scope of legal regulation;
- Judicial law making is largely derived from the necessity and permissibility of judicial discretion;
- The court in its activities should be wary of applying considerations of economic and social policy;
- Judicial law making is always connected with already existing facts of the past, and not with the formation of future new relations;
- The court does not create legal norms on its own initiative, i.e. it creates them not purposefully;
- Judicial law making is of a subsidiary and compensatory nature;
- Judicial law making has a smaller scope than parliamentary one but it gains in depth and specificity.

3) Judicial law making is an important condition for the effective dynamic functioning of society, for the creation of a self-developing and self-regulating system of civil society.
4) Judicial law making in the system of checks and balances refers specifically to checks designed to keep the activities of other branches of power within the framework of the constitution and law. Balances, on the other hand, are more political in nature than checks and are mostly limited to the area of relations between the legislative and executive branches of powers.
5) The normative provisions of the Supreme Court as a source of law can be divided into three types: 1) derivative provisions (those that only specify the existing legal norms); 2) competitive provisions (those that clarify the provisions of an act on the basis of a legal instrument with greater legal force); 3) provisions which fill gaps in positive law (those that precede an act and reflect the needs of society in the legal regulation). The first type of provisions is largely a reflection of the lawfulness of judicial activities, the second one is a reflection of the independence of the judiciary, and also acts as a manifestation of the system of checks via judicial law making. The third type is a manifestation of the court as an agent for the implementation of the law as a self-adjusting system. It should be noted that these components are not detached from each other. They affect each other in one degree or another.

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