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LEGAL PRECEDENT AS A SOURCE OF LAW IN EUROPEAN COUNTRIES

Abstract

The purpose of the article *is to analyze and rethink the legal force and significance of the legal precedent for regulating legal relations arising in the field of public and private law, as well as clarifying its role and place as a source of law at the present stage of development of the legal systems of European counters, with an emphasis on Romano-Germanic legal family, by analyzing legislation and researching the views of scientists from different states.*

A review of scientific researches on this topic indicates that in different periods the problem of the legal force of sources of law in general and the place of legal precedent among them, in particular, have always been in the focus of attention of domestic and foreign scientists. However, considering the precedent as a source of law, scientists focused on the judicial precedent – judicial law making, as a result of considering specific cases containing a rule of conduct, that can be extended to other similar cases, and this fact in its turn led to a certain one-sidedness of the study of the problems of legal precedent.

Scientific novelty*. The theoretical provisions and practical recommendations on using the legal precedent in countries where it is not recognized as an official source of law have been developed, and the position on the need to recognize the legal precedent as a source of law in countries of the Romano-Germanic legal family is substantiated.*

The legal precedent was defined by the author as a legal regulation formulated in an act of an authorized state body in the process of solving a specific legal issue in the absence or uncertainty of its legislative regulation, which contains a legal principle (stare decisis) that is mandatory for use in solving similar cases in the future.

Conclusions. *The variety of reasons for the emergence of law, forms of its objectification lead to the conclusion that the list of sources of law cannot be limited only by legislation, and the practical application of a legal precedent becomes a necessary form of lawmaking, ensures the adaptability of law to the needs of society and the dynamics of its development.*

The need for precedent regulation is based on the dynamism of social life and the needs of the adaptability of the law. It should be noted that the legal precedent is a general concept, since in legal activity it is possible to distinguish judicial, administrative and other precedents. That is, «legal precedent» is a complex concept that contains the result of a decision of a case by a law enforcement body, which contains a legal principle (stare decisis) that is mandatory for use in solving similar cases in the future, that is, in fact, it is a kind of model for regulating subsequent similar legal relations.

Now, scientists and practice lawyers are rethinking the meaning of precedent in the legal systems of the countries of the Romano-Germanic legal family, including in Ukraine, whose doctrine previously denied the possibility of the existence of legal norms in a different form, except for an official normative legal act or an authorized provision

Key words*: source of law, legal precedent, law, legal force, legal family.*

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ПРАВОВИЙ ПРЕЦЕДЕНТ ЯК ДЖЕРЕЛО ПРАВА В КРАЇНАХ ЄВРОПИ

Анотація

Метою статті є *аналіз та переосмислення юридичної сили та значення правового прецеденту для регулювання правовідносин, що виникають у сфері публічного та приватного права, а також з'ясування його ролі та місця як джерела права на сучасному етапі розвитку правових систем європейських держав, з акцентом на романо-германській правовій сім'ї, шляхом аналізу законодавства та дослідження поглядів науковців різних країн.*

Огляд наукових досліджень з даної тематики засвідчує, що в різні періоди проблематика юридичної сили джерел права в цілому і місця правового прецеденту серед них, зокрема, завжди були у фокусі уваги вітчизняних та зарубіжних вчених. Проте розглядаючи прецедент як джерело права, основна увага науковцями акцентувалась саме на судовому прецеденті – судової правотворчості, в результаті розгляду конкретних справ, що містить правило поведінки, може поширюватися на інші аналогічні випадки, і це, в свою чергу, зумовило певну однобічність дослідження проблематики правового прецеденту.

Наукова новизна. *Розроблено теоретичні положення та практичні рекомендації щодо особливостей використання правового прецеденту в країнах, де він не визнається офіційним джерелом права, обґрунтовано позицію щодо необхідності визнання правового прецеденту джерелом права у країнах романо-германської правової сім'ї .*

Правовий прецедент було визначено автором як правоположення сформульоване в акті уповноваженого державного органу у процесі вирішення конкретного правового питання за відсутності або при невизначеності його законодавчої регламентації, яке містить юридичний принцип (stare decisis) обов'язковий для застосування при вирішенні однорідних справ в майбутньому.

Висновки*. Різноманіття причин виникнення права, форм його об'єктивації приводять до висновку, що перелік джерел права не може обмежуватися тільки законодавством, а практичне застосування правового прецеденту стає необхідною формою правотворчості, що забезпечує адаптивність права до потреб суспільства та динаміки його розвитку.*

Необхідність прецедентного регулювання базується на динамічності суспільного життя та потреб у адаптивності права. Слід зазначити, що правовий прецедент є родовим поняттям, оскільки в юридичній діяльності можна виокремлювати судові, адміністративні та інші прецеденти. Тобто «правовий прецедент» – це комплексне поняття, що означає результат вирішення справи правозастосовчим органом, який містить юридичний принцип (stare decisis) обов'язковий для застосування при вирішенні однорідних справ в майбутньому, тобто фактично є своєрідним зразком для регулювання наступних аналогічних правовідносин.

Нині, науковцями та практиками відбувається переосмислення значення прецеденту в правових системах країн романо-германської правової сім'ї, в тому числі і в Україні, доктрина яких раніше заперечувала саму можливість існування правових норм в іншій формі, крім офіційного нормативного правового акта або санкціонованого положення.

Ключові слова*: джерело права, правовий прецедент, право, юридична сила, правова сім'я.*

Formulation of the problem. Modern political, economic and social integration processes in the world cause tendencies of rapprochement of legal families, therefore, the issue of the legal force of various sources of law in modern conditions, clarification of the role and place of the legal precedent among them require a corresponding comprehensive study.

Basically, scientists considered precedent as a legal phenomenon inherent only to those countries whose legal systems developed under the influence of English law within the Anglo-Saxon legal family, while ignoring the actual existence of a legal precedent as a source of law in other legal systems of the world, where it was *de jure* not recognized source of law from the state, but de facto applied.

Analysis of recent research and publications. The problem of including a precedent in the system of sources of law in the countries of the Romano-Germanic (continental) legal family is not new; discussions on this topic have been going on for a number of years, both among domestic and foreign scientists. In particular, E. Jenks, R. Walker, J. Baker, B. Cardozo and others made a significant contribution to the development of this issue. Among the domestic scientists deserve special attention the works of T. Andrusyaka, L. Luts, N. Onishchenko, N. Parkhomenko, P. Rabinovich, S. Shevchuk.

However, in connection with the ever-increasing dynamics of social relations in our time, the constant convergence of legal families, the strengthening of the position of the legal precedent among other sources of law in the countries of the continental legal family, there is a need to rethink traditional legal structures and clarify the role and place of precedent in the countries of the Romano-Germanic legal family in general and the legal system of Ukraine in particular.

The purpose of the article is to analyze the legal force and significance of the legal precedent for the regulation of legal relations arising in the field of public and private law, as well as clarify its role and place as a source of law at the present stage of development of the legal systems of European states, with an emphasis on the Romano-Germanic legal family, by analyzing legislation and researching the views of scientists from different countries.

In addition, the historical aspects of the entry of the precedent into a source of law require research, which will make it possible to establish importance and necessity of the legal precedent for legal systems, where it is not yet *de-jure* recognized, although de-facto used.

Presentation of the main material. Now there is a rethinking of the importance of the role of precedent as a source of law in the legal systems of the countries of the Romano-Germanic legal family, the doctrine of which previously denied the very possibility of the existence of legal norms in a different form other than an official normative legal act or an authorized norm.

The well-known scientist G. Demchenko, considering the issue of the legal force of the precedent, noted that the possibilities of law making of the courts are at first very wide, but their strength is determined by the legality of the earlier decision [1, p. 167].

Integration processes in the world cause a tendency for legal families to converge, in connection with which in the countries of «common law» there is a tendency for the role of legislation to grow, in the formation of continental law the role of judges is increasing, who develop and supplement the norms of written law.

Benjamin Cardoso at the beginning of the 20th century noted the fact that the analogy between the function of the judge and the function of the legislator can be drawn everywhere: while the legislator establishes the general regulation of an abstract situation, the judge bases his decision on the conditions of a specific life situation [2, p. 119].

It should be noted that England is traditionally considered the birthplace of precedent. The law of this country is associated with the formation of the principle of *stare decisis* (the initial words of the Latin expression *stare decisis et not quetta movera* – «to stand on the decision and not violate the established order»), which testifies, on the one hand, to the recognition of the precedent by the state as sources of law and, on the other hand, it determines the mandatory nature of the principle underlying the decision, and thus gives it the character of a generally binding rule of conduct. In the scientific literature it is noted that in England the common law begins the process of its formation after the Norman conquest, although there is no unanimity among scientists in this [3, p. 162; 4, p. 13; 5, p. 259].

Determining the place of precedent among the sources of law in countries of civil law, it should be noted that the Romano-Germanic legal family includes countries in which formal (positive) law developed on the basis of Roman law. In this system, abstract norms of law come to the fore as norms of social behaviour that meet the requirements of justice and morality. The civil law system is a closed system in which the rule of law is established by the legislature. The dominant role is played by the law, and the traditional sources of law are the normative legal act and the normative treaty, although this statement at the present stage is no longer indisputable.

However, modern transformations both in public life and in the legal field, associated with rapprochement and assimilation, today create the prerequisites for studying the strengthening of the role of legal precedent in the system of sources of law [6, p. 402]. In turn, this can explain the fact that among scientists in countries of the continental legal system, the source of law is increasingly understood as the material, spiritual and cultural conditions of society; and the way of expressing political will in the form of generally binding rules of conduct and materials through which the law is learned; and the contribution of internal and external law to the creation of any legal system [7, p. 14].

Thus, in modern conditions, the law in the countries of the Romano-Germanic legal family consists not only of legal norms formulated by the legislator, but also includes their interpretation by authorized bodies, since the legislator, for objective reasons, is not able to foresee all the realities of law enforcement. This pushes bodies capable of a prompt response (courts, executive bodies) to the adoption of legal provisions that fill in the gaps in the legal regulation of public relations. At the same time, the prescription acquires a precedent nature, due not to the judge's own initiative, by analogy with the adoption of acts by the legislator, but arises from specifically existing legal relations.

The universal nature of the precedent and its certain degree of specificity for the countries of the Romano-Germanic legal family is confirmed by numerous historical evidence, that at different times showed the binding character of a court decision in a particular case which was recognized by the states that are not part of the family of «common law», for example Germany and France, whose legal systems are to a certain extent sample for the Romano-Germanic legal family.

Of course, in civil law there have always been peculiarities associated with the boundaries of the precedent, which were determined by the nature of the political, socio-economic, cultural and legal environment formed by statutory law, and although the term «legal precedent» itself was not used, its actual existence cannot be denied. This can be confirmed by the official generalizations of judicial practice in most countries of the Romano-Germanic legal family, in particular, the publication of individual decisions of the highest courts and generalizations of practice, similar to the Ukrainian decisions of the Plenum of the Supreme Court. The specific of these publications is predominantly official in nature, although this does not provide precedents obligatory (only advisory character), while in common law countries the process of publication of court reports itself is sometimes semi-official, however, the generally binding legal precedent is recognized. Completely private records have been replaced by modern ones. The most authoritative records of the decision of the highest courts, the Law Report, are published by the Council, legalized in 1870 as the Joint Council of Judicial Records of England and Wales. The Law report is not an official publication. In the USA, Canada, Australia, New Zealand, there are also official and unofficial series of judicial reports [8, p. 167].

In this sense, it can be said that the country of the continent law simply does not have a publication system necessary to establish the doctrine of the precedent. However, it is also possible that the more significant role of the courts in the selection of material for publication, on the contrary, is a feature of civil law, which is reflected in the development of the precedent. For the formation of the doctrine of the precedent, a transformation of legal consciousness must take place, the authority of the judiciary must grow, and these processes take a long time, now we can only state that in continental law there are only prerequisites for this.

As for the legal system of Ukraine, it should be noted that due to the fact that it is experiencing a certain reintegration into the Romano-Germanic legal family, the legislation

has been updated, which entailed the accession to the traditional sources of law for our legal system – a normative legal act and a normative agreement, a legal custom. In addition, in recent years, more and more scientific works have appeared that broadly interpret the concept of «source of law», referring to the theoretical base and practical experience of European legal systems [9; 10].

Scientists note that in comparison with the system of socialist law, the role of precedent in the Romano-Germanic legal system is much more noticeable; decisions of the highest courts are gradually acquiring the features and significance of a precedent [10; 11]. Although the judicial precedent is not recognized as a source of law in Ukraine, it plays an important role. According to jurists, judicial precedents exist in all countries and differ only in some peculiarities that depend on the justice system, the hierarchy of bodies, and decision-making procedures. The flexible nature of case law allows it to adapt to various conditions [1, p. 236].

The modern Ukrainian judiciary, represented by its higher bodies, actually contributes to the formation of precedent practice. So, you can find the *ratio decidendi* in the acts of the Constitutional Court of Ukraine and on this basis refer them to legal precedents. At the same time, one should not forget about the fact that the structure of a court decision in Ukraine differs significantly from similar ones in countries of «common law» The elements of the *ratio decidendi* can be found in the motivation and resolution parts of the decision of the Ukrainian court. In the decisions of the plenary sessions of the highest courts, which are not, in fact, acts of justice, one should not search so much for a *ratio decidendi*, it is necessary to clearly delineate and highlight those parts of law enforcement acts that contain certain legal provisions and those that are auxiliary.

As noted by the Ukrainian scientist S. Shevchuk, the judicial authorities, when establishing the content of rights and freedoms in the process of carrying out legal proceedings, act as a «positive legislator» if their decisions should be of generally binding (precedent) nature [12, p. 33].

After the adoption of the Law of Ukraine on the Fulfilment of Decisions and Application of Practice of the European Court of Human Rights, in Art. 17 of which it is stipulated that the courts apply the Convention for the Protection of Human Rights and Fundamental Freedoms and the practice of the Court as a source of law when considering cases, the situation regarding the recognition of a precedent as a source of law in Ukraine began to change [13]. As noted by S. Pogrebnyak, with the adoption of this law, «the practice of the European Court, that is case law, is officially recognized as the source of Ukrainian law. Besides, recently, in connection with the development of their legal positions by the Constitutional Court of Ukraine and the higher courts of general jurisdiction, the concept of the precedent interpretation is becoming increasingly relevant for Ukraine» [14, p. 56].

However, the lack of a clear position regarding the recognition of a legal precedent as a source of law may cause difficulties in law enforcement, if the position of the European Court of Human Rights and the Ukrainian legislator in the context of the regulation of a certain type of legal relationship will differ [15–19].

Of course, it is still too early to stress on the recognition of a precedent as a typical source of law for the countries of the Romano-Germanic legal family in general and, in particular, in Ukraine, but it may well be attributed to atypical (non-traditional) sources of law. It is important to bear in mind that the indicative decisions of the European Court of Human Rights have long been recognized and called precedents, the legal force of which is currently not clearly defined, but they significantly affect the development of the national law of European states; and the members of the Council of Europe are constantly adjusting their legislation, judicial and administrative practice under the influence of these decisions.

According to S. Shevchuk, the perception of the Western concept of human rights in Ukraine will inevitably lead to a more active role of the judiciary in protecting human rights. In Western science, it is called «the rule of judges», while the universalism of understanding of the legal nature of human rights and fundamental freedoms with Western countries – «transnational judicial communication» or «judicial globalization», which happens in the modern world [12, p. 35–36].

Conclusions. The need for precedent regulation is based on the dynamism of social

life and demand for adaptability of law. It should be noted that the legal precedent is a generic concept since in legal activity it is possible to distinguish judicial, administrative, and other precedents. «Legal precedent» is a complex concept that denotes the result of a decision of a case by a law enforcement agency, which contains a legal principle (*stare decisis*) that is mandatory for use in solving similar cases in the future, that is it is a kind of model for regulating subsequent similar legal relations.

Now, as noted, there is a rethinking of the meaning of precedent in the legal systems of the countries of the Romano-Germanic legal family, including Ukraine, the doctrine of which previously denied the possibility of the existence of legal norms in a different form other than an official normative legal act or an authorized provision.

The variety of reasons for the emergence of law, forms of its objectification lead to the conclusion that the list of sources of law cannot be limited only by legislation, and the practical application of a legal precedent becomes a necessary form of lawmaking, ensures the adaptability of law to the needs of society and the dynamics of its development.

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