

ПЕРЕОСМИСЛЕННЯ РОЛІ ТА МІСЦЯ ПРАВОВОГО ПРЕЦЕДЕНТА СЕРЕД ДЖЕРЕЛ ПРАВА УКРАЇНИ

RECONSIDERATION THE ROLE AND PLACE OF LEGAL PRECEDENT AMONG OTHER SOURCES OF UKRAINIAN LAW

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Анотація: Метою статті є проаналізувати та переосмислити юридичну силу і значення правового прецеденту, а також з'ясувати його роль і місце серед інших джерел права в Україні.

Більшість наукових досліджень з даної теми засвідчує, що юридична сила джерел права в цілому і місце юридичної прецеденту серед них завжди знаходилися в центрі уваги вітчизняних і зарубіжних вчених.

Слід зазначити, що правова система України переживає певну реінтеграцію в романо-германську правову сім'ю. Крім того, останнім часом з'являється все більше наукових робіт, які широко трактують поняття «джерело права». Що стосується країн Європи, так і України переосмислюється юридична сила джерел права загалом, та правового прецеденту зокрема.

У цьому контексті актуальним є питання визначення правової природи рішень Європейського суду з прав людини, які, безсумнівно, впливають на розвиток національного права європейських держав, оскільки їх судові та адміністративні органи керуються ними у своєму повсякденному житті.

Слід зазначити, що правовий прецедент - це загальне поняття, оскільки в юридичній діяльності можна виділити різні види прецедентів. Сама потреба прецедентного регулювання заснована на різноманітності соціального життя.

В даний час, як уже зазначалося, глобалізація соціальних процесів, інтеграційні тенденції привели до переосмислення значення прецеденту в правових системах країн романо-германської правової сім'ї, доктрина якої раніше заперечувала саму можливість наявності правових норм у формі, відмінній від офіційного нормативного-правового акта або його положеннях.

Зміна правової дійсності, різноманітність причин виникнення права, форм його об'єктивації дозволяє зробити висновок про те, що перелік джерел права не може бути обмежений тільки законодавством, що підтверджується визнанням юридичної сили певних типів прецедентів як джерела права в Україні.

Потрібен час, щоб трансформувати правову свідомість суспільства, підвищити рівень довіри до представників судової та виконавчої влади, змінити рівень правової культури суспільства.

Ключові слова: юридичне зобов'язання, правовий принцип, юридична практика, судовий прецедент, правовий прецедент, правове обґрунтування.

Abstract: The purpose of the article is to analyze 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 of it among the others source of law in Ukraine.

Most of the scientific researches on this topic indicates that legal force of sources of law in general and the place of the legal precedent among them have always been in the focus of attention of domestic and foreign scientists.

It should be noted that the legal system of Ukraine is undergoing a certain reintegration into the Romano-Germanic legal family, which entailed joining the traditional legal system for our legal system - a normative legal act and a normative agreement. In addition, in recent years there are more and more scientific works, widely used, the concept of "source of law" is interpreted. As for the countries of Europe, so for Ukraine, the legal force of the sources of law is being rethought.

In this context, the issue of determining the legal nature of decisions of the European Court of Human Rights, which undoubtedly affects the development of the national law of European states, is relevant, since their judicial and administrative bodies are guided by them in their daily activities.

It should be noted that a legal precedent is a generic concept since in legal activity it is possible to distinguish judicial, administrative, and other precedents. The very need for precedent regulation is based on the diversity of social life.

At present, as already noted, the globalization of social processes, integration trends have led to a rethinking of the meaning of precedent 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 form different from the official normative legal act or its position. The change in legal reality, the variety of reasons for the emergence of law, the forms of its objectification allows us to conclude that the list of sources of law cannot be limited only by legislation, as evidenced by the recognition of the legal force of certain types of precedents as the source of law in Ukraine.

It takes time to transform the legal consciousness of society, increase the level of trust in the representatives of the judicial and executive authorities, change the level of legal culture of society.

Key words: legal obligation, legal principle, legal practice, judicial precedent, common law adjudication, interpretative legal reasoning

Formulation of the problem. The issue of the creation and formation of a precedent as a source of law is not new for legal science. However, it requires research, since the clarification of the historical aspects of the entry of a full-fledged source of law by the precedent will make it possible to establish its importance and necessity for legal systems, where it is not yet officially recognized, although it is used, as it is, particularly, in Ukraine.

Analysis of recent research and publications. The problem of including a precedent in the system of sources of law in the continental legal family is not new, both domestic and foreign scientists riced this question. In particular, T. Allan, P. Devlin, S. Perry, E. Jenks, R. Walker, J. Baker 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 and others.

The purpose of the article is to analyze 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 of it among the others source of law in Ukraine.

Most of the scientific researches on this topic indicates that legal force of sources of law in general and the place of the legal precedent among them have always been in the focus of attention of domestic and foreign scientists.

Presentation of the main material. Analysing the legal force of precedent and law, scholars note that “In reflecting on the relationship between law and justice, we are confronted by opposing views. If we are unwilling to identify the law with its social sources, regardless of their moral merit, we may be tempted, instead, to regard it as the moral consequences of those sources. While, on one view, the law consists in the rules or rulings that derive their authority from an officially acknowledged source, on another view the law consists in the moral obligations arising in response to such rules or rulings” [1, p. 269].

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 a normative legal act and a normative treaty, although this statement at the present stage is no longer. Determining the place of precedent among the sources of law in countries of continental law, it should be noted that the Romano-Germanic legal family includes countries in which positive law developed based on 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. indisputable.

As it was noted by the Professor of Jurisprudence and Public Law University of Cambridge T.R.S. Allan “A proposition of law is sound or true only when derived from a general theory of law capable of showing not only which features of our practice are important – authentic instances of practice when correctly understood – but also how they reflect or embody the principles of justice we affirm as a matter of political morality” [1, p. 270].

Modern transformations both in public life and in the legal field, associated with rapprochement and assimilation, create preconditions today for studying the strengthening of the role of legal precedent in the system of sources of law. In turn, this can explain the fact that among scientists in the countries of the continental legal system, the source of law is increasingly understood as the material, spiritual and cultural conditions of society [2].

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 the binding character of a court decision in a particular case was recognized in states that are not part of the family of “common law”, for example, Germany and France, whose legal systems are to a certain extent “reference” 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, particularly, 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 obligatoriness (only advisory character), while in common law countries the process of publication of court reports itself is at best semi-official, but the generally binding legal precedent is recognized private reports have been replaced by modern ones [3, p. 167].

It should be noted that the legal system of Ukraine is undergoing a certain reintegration into the Romano-Germanic legal family, which entailed joining the traditional legal system for our legal system - a normative legal act and a normative agreement. In addition, in recent years there are more and more scientific works, widely used, the concept of “source of law” is interpreted. As for the countries of Europe, so for Ukraine, the legal force of the sources of law is being rethought.

The judicial precedent in Ukraine 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. We 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 the court decision in Ukraine is significantly different from those in the countries of “common law”. The elements of the *ratio decidendi* can be found in the reasoning and operative parts of the decision of the Ukrainian court. In the decisions of the plenary sessions of the highest courts, which are not acts of justice, one should look not so much for a *ratio decidendi*; it is necessary to delineate and highlight those parts of law enforcement acts that contain certain legal provisions and those that are auxiliary. So we can say that the modern Ukrainian judiciary, represented by its higher bodies, contributes to the formation of precedent practice.

In this context, the issue of determining the legal nature of decisions of the European Court of Human Rights, which undoubtedly affects the development of the national law of European states, is relevant, since their judicial and administrative bodies are guided by them in their daily activities, and the member states of the European Union are adjusting their legislation and administrative practice under their influence.

After the adoption of the Law of Ukraine “On the implementation of decisions and the application of the practice of the European Court of Human Rights”, in Art. 17 of which it is stated 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 [4]. With the adoption of this law, the practice of the European Court, that is, its case-law has been 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 a precedent of interpretation is becoming increasingly relevant for Ukraine.

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.

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 the process of protecting human rights, in Western science it is called “the rule of judges”, and universalism in general with Western countries understanding of the legal nature of human rights and fundamental freedoms - in “transnational judicial communication” or “judicial globalization”, as it happens in the modern world [5, p. 35-36].

Scientists note that in the countries of the Anglo-Saxon legal family based on case law, the judge when considering the latest case is obliged to consider the norms and principles created in solving the previous case, while in other legal systems they only serve as material. At the same time, the question of the mandatory or formal recommendatory meaning of precedent rules for certain countries does not allow us to speak about the absence of this phenomenon as such. Moreover, before the courts interpreted the legal norm, did not apply it in a specific case, it is an unverified social experience of the declaration [6, p. 18]. At the present stage of development of public relations, it is necessary to state the importance and necessity of lawmaking of a precedent nature, since many complex legal problems do not have a clear legislative solution.

Common law rules, at least, must be understood as summary generalisations only – working approximations to justice, as currently perceived [7, p. 215]. As T.R.S. Allan noted: “If, moreover, we acknowledge the legitimacy of our practice – we honour it as an acceptable basis for continuing dialogue – we must remain within it as we determine

our moral response to official state action in specific instances. We cannot consistently maintain our allegiance, treating practice as a proper basis for cooperation, while acknowledging certain, anomalous, requirements as valid, yet grievously unjust.” [1, p. 273].

Legal scholars recognize that the practice and theory of precedent in common law countries to the greatest extent reflects the complexity and versatility of real-life; attempts to regulate all possible situations by law are inevitably doomed to failure [8, p. 117]. One should agree with this thesis and acknowledge that the precedent exists in the countries of the continental legal family, albeit with certain peculiarities. Moreover, at this time, two interrelated trends are observed: the intervention of law and legislative culture in the sphere of common law, on the one hand, and the growing role of judicial activity and practice in civil law, on the other. Legislation and precedent are primary and competing sources of law. Each of them is to a certain extent independent, although the precedent is subject to the law in the sense that the law can always annul it.

Conclusion. It should be noted that a legal precedent is a generic concept since in legal activity it is possible to distinguish judicial, administrative, and other precedents. The very need for precedent regulation is based on the diversity of social life.

At present, as already noted, the globalization of social processes, integration trends have led to a rethinking of the meaning of precedent 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 form different from the official normative legal act or its position. The change in legal reality, the variety of reasons for the emergence of law, the forms of its objectification allows us to conclude that the list of sources of law cannot be limited only by legislation, as evidenced by the recognition of the legal force of certain types of precedents as the source of law in Ukraine.

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REFERENCES:

1. T.R.S. Allan. Cambridge Law Journal, 77(2). July 2018. P. 269–297
2. Правова ідеологія як засадничий принцип консолідації українського суспільства : наук.-аналіт. доп. : до 100-річчя НАН України / Шемшученко Ю.С., Скрипнюк О.В., Оніщенко Н.М. (керівник) та ін. Інститут держави і права ім. В.М. Корецького НАН України. Київ. 2018. 86 с.
3. Devlin P. The judge. Oxford. 1979. 207 p.
4. Про виконання рішень та застосування практики Європейського суду з прав людини : Закон України від 23.02.2006. № 3477-IV. URL: <http://www.zakon.rada.gov.ua>
5. Шевчук С. Судовий захист прав людини: практика Європейського суду з прав людини у контексті західної правової традиції. Київ : Реферат, 2006. 848 с.
6. Національні тенденції та міжнародний досвід сучасного праворозуміння / Ю. С. Шемшученко, Н. М. Оніщенко, О. В. Зайчук та ін.; за заг. ред. Н. М. Оніщенко. К : Юридична думка, 2013. 480 с.
7. S.R. Perry. “Judicial Obligation, Precedent and the Common Law”. 1987. O.J.L.S. P. 234–57
8. Devlin P. The judge. Oxford. 1979. 207 p.