JUDICIAL PRECEDENT, A LAW SOURCE

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Abstract

The role awarded to judge varies from one legal system to another. In the Anglo-Saxon legal systems, there is not a self-standing legislative body, so the judge is the one who creates the law; his mission consists in solving a specific case, given the existing judicial precedents; if he cannot find an appropriate rule of law, he has to develop one and to apply it.

In the continental system, creation of law is the mission of the legislature, so the creative role of jurisprudence still raises controversy. Evolving under the influence of Roman law, the continental law systems differ from the Anglo-Saxon by: the continuous receiving of Corpus iuris civilis; the tendency to abstraction, leading to the creation of a rational law; the rule of law, with the consequence of blurring the role of jurisprudence.

Underlining the creative force of jurisprudence, Vladimir Hanga wrote: "The law remains in its essence abstract, but the appreciation of the jurisprudence makes it alive, as the judge, understanding the law, taking into account the interests of parties and taking inspiration from equity, ensures the ultimate purpose of the law: suum cuique tribuere"[**].

Keywords: *jurisprudence, precedent, continental law system, creator role, anglo-saxon law system*

Introduction

In Anglo-Saxon law, the task of creating the law rests mainly with the judge. It was considered that „a law can rarely provide all cases in question; common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an Act of Parliament"[1]. The resolutions pronounced by the judge become mandatory in the future for all similar cases faced by the lower courts, by forming the so-called „case law". The Anglo-Saxon precedent is expressed by maxim „*stare decisis et non quieta movere*", namely „to stand by decisions and not to disturb the undisturbed".

Judicial precedent does not designate the judgment in its entirety, but the principle, the argument based on which the case was settled[2]. „Common law does not consist in the cases in question, but in the general

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[**] Vladimir Hanga, *Dreptul şi tehnica juridică*, Lumina Lex Publishing House, Bucharest, 2000, p. 80

[1] Lord Mansfield, cited by Philippe Malaurie, *Antologia gândirii juridice*, Humanitas Publishing House, Bucharest, 1996, p. 136.

[2] We believe that this matter is well represented by the judgments pronounced by the European Union Court of Justice. In this respect, see Roxana-Mariana Popescu, *Features of the unwritten sources of European Union law*, Lex et Scientia, International Journal, no.2/2013, p. 100-108. As example of the application of such „principles", see Roxana-Mariana Popescu, Influenţa jurisprudenţei Curţii de Justiţie de la Luxemburg asupra dreptului Uniunii Europene – case study: the concept of „charge having equivalent effect to customs duties, Revista de Drept Public, no.4/2013, Universul Juridic Publishing House, Bucharest, p. 73-81.

principles illustrated and applied by them"[3]. Therefore, *ratio decidendi* and *obiter dictum* are distinguished in the structure of the judgment. *Ratio decidendi* designates the essence of the legal reasoning, the principle which led to the respective ruling, and *obiter dictum* means the actual ruling pronounced by the judge. If the judge does not find appropriate principles for the case submitted to settlement, the judge can and must create a new rule of law. By creating a new *ratio decidendi*, the judge contributes to the development of the case law (in the doctrine there was the opinion according to which the system for the recruiting of judges for the Constitutional Court should be rethought and they should be persons from among judges, persons with impeccable moral probity, university professors[4]).

Paper content

Despite its creating nature, the continental literature assigns to the jurisprudential Anglo-Saxon system many difficulties which concern the great number of precedents, the impossibility of their systematization, as well as the subsistence of many obsolete precedents. This state of facts made Hegel to claim the following: „What a monstrous confusion prevails in that country, both in the administration of justice and in the subject-matter of the law".

The role awarded to the precedent in the Anglo-Saxon law is explicable if we take into account the historical factors, namely that England did not see the revival of the Roman law, it lacked of a complete set of rules, and therefore the creation of the law according to the needs of the respective era was required. In this context, *judge made law* seemed the most pertinent and handy ruling. „Common-law was the legal system of a feudal society on the patterns of which the content of the bourgeois law was laid", V. D. Zlătescu[5] noted. By characterizing the judicial precedent as being the „guiding star" of this system, the author states however that, currently, things are going so far that, even in the presence of the text of the law or of the rule of common law, the judges would rather rely on judgments that were previously implemented, than apply directly the text or the respective rule. Therefore, the rules are highly technical and formal, being accessible only to specialists. Furthermore, it is deemed that „the great malady of any legal system based on precedents is the obsolescence", as the law created in this way gets to be unreceptive to social impulses and hostile to society evolution, thus becoming a barrier which can result in considerable damage.

The Roman-Germanic system does not recognize *stare decisis* doctrine, the judicial precedent not being recognized as a formal source of law[6]. The judge is not allowed to decide based on general provisions or regulations, so that the judge cannot justify the decision, by referring expressly to the power of another judgment ruled in a similar case. Therefore, guidance decisions (*arrêts de règlement*), whereby the judge formulates a mandatory general rule for the courts of law are not admitted.

The judgment ruled by the judge in the settlement of a case produces effects only on

[3] Ibidem.

[4] Elena Emilia Ştefan, *Examen asupra jurisprudenţei Curţii Constituţionale privind noţiunea de „fapte grave" de încălcare a Constituţiei*, Revista de Drept Public no. 2/2013, p.92.

[5] Victor Dan Zlătescu, *Panorama marilor sisteme contemporane de drept*, Continent XXI Publishing House, Bucharest, 1994, p. 143 and the following.

[6] For a detailed analysis of the role of precedent in Roman-Germanic system, see Nicolae Popa, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, Edition no. 2, C.H. Beck Publishing House, Bucharest, 2014.

the parties of the lawsuit, having a relative power of res judicata. In what concerns the mandatory nature of the decisions of the Constitutional Court, the failure to comply with the decisions of the contentious constitutional court draws the overall liability[7]. Notwithstanding, it is sometimes considered that, in filling the gaps of law or in the absence of law, the courts of law „persists in a particular decision, given the independence of the judiciary power, this decision acquires the nature of a legal truth, the absolute power of res judicata"[8]. It is natural that, in what concerns the settlement of a case, the courts of law study the judicial practice in the field and draw from the judgments ruled by higher courts. Such a requirement lies in the need for unity, conformity, consistency and continuity of judicial practice. Furthermore, in the continental system, which is subject to the domination of rigid laws, the case law has also a compensatory function, its role being that of conferring certain elasticity to the law.

Therefore, more generally, we can say that that Anglo-Saxon law conserves the judicial precedent as a source of law as its power is general, it extends over other courts or similar cases, and the judge is called to distinguish between *ratio decidendi* and *obiter dictum*. Roman-Germanic law gives an interpretative value to the case law, being a mean for filling the gaps, an inspiration source for the lawmaker, but the judge is bound to rule only on the case.

In order to understand the power of the judicial precedent, despite the fact it is not a source of law in the continental system, we have to make a delimitation between jurisdictional activity, which consists in the issuing of judgments and jurisprudential activity, which creates reference regulations which law is based on.

From the etymologic point of view, *jurisdictio* is the result of joining two terms: *juris* abd *dictio*, which means to tell the law. Generally, the term covers both the prerogative of judging, of applying the law in an actual situation, and the authority vested with this power. We hereby point out that the term of jurisdiction is often misused as the equivalent of the term of justice. Strictly speaking, justice is performed exclusively by the judicial power, all the other entities endowed with the power to judge in certain fields which are strictly regulated, being broadly called jurisdictions. In order to remove the existent confusion, they are also called jurisdictional activity bodies or special jurisdictions, for example, constitutional jurisdiction. The result of the activity of all jurisdictional bodies is the jurisdictional act.

In the opinion of Mircea Djuvara, the jurisdiction act carries a wider meaning, designating an individual nature act whereby the state establishes general rules of positive law applicable in an individual case. The jurisdictional act simply finds, in the light of the positive law regulations, the legal relationships which have to be applied to an actual social fact. The difference between the two terms consist in the fact that „the case law broadly includes not the facts which were acknowledged as law at some point in time, but the facts which were applied, namely the facts which were executed based on the respective acknowledgment". Generally speaking, the jurisdiction act belongs to the organized courts of law, but it is also included in the area of the administrative or political acts; for example, the control of the government

[7] Elena Emilia Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ, ProUniversitaria Publishing House,* Bucharest, 2013, p.269.

[8] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *Teoria generală a dreptului,* C. H. Beck Publishing House, Bucharest, 2006, p. 148.

in the parliamentary regime is also a jurisdictional act[9].

Therefore, the jurisdictional activity of the judge consists in the settlement of the litigation. In this regard, the judge performs two tasks: that of telling the law (*jurisdictio*), by acknowledging from the claims in litigation the one corresponding to the legal regulations in force and that of ordering the fulfillment of the decision pronounced (*imperium*), by means of the coercive force of the state, if the case may be.

Etymologically speaking, Bergel notes that the jurisdictional act is the act by means of which the judge tells the law. Seemingly simple, the task of qualifying an act of the judge as being jurisdictional is difficult and entails multiple doctrinal controversies, the provided criteria being inexhaustible. Essentially, the jurisdictional act is considered the act whereby the settlement of the litigation is aimed[10].

According to Terré, two aspects are found in every judgment: individual, actual aspect, which claims the pronouncement of the settlement of the case and general principle, which the judgment is founded and substantiated on. These general principles are rather revealed to the judge than the directives of the law, which have a discreet nature, this is why, the Court of Cassation tends to grant a privileged attention to the generalizing function of the judicial act, to the detriment of the individualizing function. According to the author, certain patterns arise from these decisions of the Court of Cassation, which are designated to guide the future work of the judges of the merits, being capitalized based on two trends: law of imitation and law of continuity. Especially in private international law, but also in civil and commercial law, the judge substantiates the decision on general principles which the judge founds and establishes and the violation of which represents a ground of invalidation[11].

The author notes that in French law, Parliaments, as courts of law and the other sovereign courts had the power to pronounce guidance decisions12. We are drawn the attention on the fact that the use of term „decisions" is not exactly correct, as they were not pronounced on the settlement of a litigation between two parties, but they were genuine regulations. Guidance decisions were however limited under two aspects: in space, as their mandatory force was extended only on the division which the respective Parliament belonged to; in time, due to the fact that such decisions were temporary, being valid until the adoption of a law.

By means of the provisions of art. 5 of the French Civil Code, these guidance decisions were prohibited. According to Terré, this does not mean that the judge is prevented to issue decisions in principle, if a connection can be established between the expressed principle and the ruling pronounced in the case. In other words, the text of the law prohibits the judge to create rules, outside the litigation, but it does not exclude the creation of praetorian rules within the jurisdictional activity. In this way, the motivation and the ruling pronounced in a case can be adjusted to other similar cases. Furthermore, it is considered that, if the issuance of decisions in principle is allowed in the settlement of the litigation, there is nothing to prevent their modification in order to be used for the settlement of other cases.

[9] Mircea Djuvara, *Teoria generală a dreptului (Enciclopedie juridică)*, All Publishing House, Bucharest, 1995, p. 280.
[10] Jean-Louis Bergel, *Méthodes du droit. Théorie générale du droit*, 2nd edition, Dalloz Publishing House, 1989, p. 314.
[11] François Terré, *Introduction générale au droit*, 7th edition (Dalloz Publishing House, 2006), p. 285.
[12] *Idem*, p. 279.

Similarly, Djuvara notes that, if the legitimacy of a new regulation is acknowledged, the legitimacy of any other identical act is necessarily acknowledged, based on generalizing legal induction, which leads to a general regulation. But, „this general regulation was not previously established, but it is formed in mind only by acknowledging the individual regulations"[13].

Therefore, it is noted that the decisions „which the judges not only pronounce but also substantiate, lead to the occurrence of the gaps of the legislation in force, and to the rulings of actual and individual application, formulated as general rules of legal issues brought into the respective litigations"[14].

Given all the aforementioned, we conclude that the judgments are of two kinds: judgments in principle, defined by the fact that the ruling is substantiated on a general principle and case judgments, limited to the settlement of an actual case.

The Romanian Civil Code prohibits guidance decisions, but does not prohibit *decisions in principle*. The possibility of the judge to issue a decision in principle does not violate the rule provided by the Civil Code, as this decision only produces *inter partes* effects; the substantiation of the judgment is the one that it is based on a preexistent legal principle. Whenever the law is silent or insufficient, the judge, being bound to settle the case under the penalty of denial of justice, shall seek to found a general principle admitted by the law system. But, „the creation of law is naturally a continuous process where every step generates unforeseen consequences on what we can do and what we should do next"[15]. As the dynamics of social life continuously reveal new aspects, such as euthanasia, human cloning, artificial procreation, the judge often finds himself obliged to create innovative principles, consistent with the existent ones, based on which he can substantiate his ruling. The legislative changes that occur at some point in time raise serious issues for certain fields of law, in terms of interpretation and application of normative acts[16]. In this case, the judge pronounces a decision in principle which, without pretending to be imposed as mandatory, will influence rulings pronounced in similar cases.

The literature shows that the decisions in principle suggest „a potential rule to follow", therefore, the provisions of the Civil Code do not prevent the jurisprudential development of law, but only mandatory precedent[17]. The authors point out that, although the judge settles an actual case, the judge formulates a principle and his reasoning must be a general one, applied to the actual case, but which could be applied to any similar case. Such a decision is substantiated on the „internal logic of the legal system, but not in the sense that it has a generally binding value"[18].

Dimitrie Alexandresco noted that nothing prevented the judges, in motivating their decision, to present general considerations, to state principles of law, to make inductions or deductions. Notwithstanding, „the judges could not motivate their ruling, by simple reference to a previous sentence, although they could

[13] Mircea Djuvara, *op. cit.*, p. 495.

[14] I. Comănescu, D. Paşalega, I. Stoenescu, *Contribuţia practicii judiciare în dezvoltarea unor principii ale dreptului civil socialist*, in Justiţia Nouă 4/1963.

[15] F. A. von Hayek, cited by Philippe Malaurie, *op. cit.*, p. 348.

[16] Elena Emilia Ştefan, Contribuţia practicii Curţii Constituţionale la posibila definire a aplicabilităţii revizuirii în contenciosul administrativ, Revista de Drept Public no. 3/2013, p. 82-83.

[17] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *op. cit.*, p. 147.

[18] *Ibidem*, p. 326.

take into account their own case law or the case law of a superior court"[19].

Similarly, professors Demeter and Ceterchi wrote that, in socialist law, the lack of general-mandatory nature of the judgment did not exclude the possibility that the courts, in solving different cases, took into account previous decisions. The settlement of an actual case raises certain general aspects which, „if settled fairly and persuasively, can be a valuable guide for all state bodies, called upon to settle similar cases"[20]. Furthermore, it is shown that, given the hierarchy of courts, lower courts study the judicial practice of higher courts, without this practice being mandatory, but in order for the pronounced decisions not to deviate from the „general line of law interpretation and application".

Gh. Mihai acknowledges that the primary role of the judge is to apply the law, but „provided that the grounds of several cases are the same, they can be general inspirations derived from a series of previous decisions"[21]. Mircea Djuvara notes that, if a doctrinal opinion of a legal expert or a judgment is „established as mandatory for future disputes, they play the role of the law"[22].

The power of the case law, according to Vălimărescu, is not inferred from text, but from the „power of things and lessons of history"[23]. If a certain issue of law receives the same ruling from several courts, the ruling shall be most often complied with by all the courts, therefore it is deemed that „the case law is established and it has legal force".

Another opinion shows that, although theoretically, the judge cannot introduce a new regulation in the legal system, as the judge only „discovers" a regulation which exists in the system by default, however, „this strictly archaeological work is a mere fiction, beneath which a work of creation is hidden"[24]. The judge cannot claim previous case law as the legal ground of the new decision, due to the fact the judiciary precedent is not formally acknowledged as a formal source in continental law, but, the judge often relies on these principles. The judge „shall claim the principle as being incident to the system and not as being created by the judicial practice".

Given all the aforementioned, in Roman-Germanic system, judicial precedent has only persuasive value: as far as the judge finds that a principle emerges from a constant case law, the judge shall acquire the principle and shall apply it in the case he has to settle. The judge is not bound to comply with the precedent, but the principle can be mandatory for the reason by means of its intellectual value. Given these grounds, the *ratio decidendi* of a previous decision is often found in similar cases, even under the same formulation. Furthermore, due to reasons concerning the consistency of the system, the continuity of the principles and the safety of legal relations, the unification of the judicial practice is a challenge.

The power of a case law, according to Djuvara, is enforced „based on the great principle of stability and of the security of social relations, which is a general principle of justice: without such a consistency of the rulings, not only that similar cases are settled in a particular way, which represents an injustice, but nothing is certain and nobody

[19] Dimitrie Alexandresco, *Principiile dreptului civil român*, vol. I, Atelierele grafice SOCEC, Bucharest, 1926, p. 54.
[20] I. Demeter, I. Ceterchi, *Introducere în studiul dreptului*, Științifică Publishing House, Bucharest, 1962, p. 163
[21] Gheorghe Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III, All Beck Publishing House, Bucharest, 2004, p. 224.
[22] Mircea Djuvara, *op. cit.*, p. 476.
[23] Alexandru Vălimărescu, *Tratat de Enciclopedia dreptului*, Lumina Lex Publishing House, Bucharest, 1999, p. 237.
[24] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *op. cit.*, p. 146.

knows on what to rely, general legal order being therefore reached"[25].

The literature explains the persuasive value of precedent by considerations relating to the following: the need to ensure non-discriminatory treatment to individuals, which entails the considerations of rulings pronounced in similar cases; the fact that the judges represent a social body with well defined ideas, „which discriminates individual opinions in favor of the continuity of concepts which are expressed in decisions"; the hierarchical control of decisions, by higher courts, which determines, despite the independence of judges, the adoption of solutions in line with those pronounced by higher court[26].

We note that, under the apparent rigor of the provisions of the Civil Code, which force the judge to rule only by case decisions, the judge may, within certain limits, to exceed the framework of the enacted law. Although the judge claims to rely on preexistent law, in fact, the judge gets to create himself general principles of law.

Conclusions

In the light of all the aforementioned, we note that the legal principles drawn from the case law are enforced as mandatory, even if the judicial precedent is not mandatory in our legal system. The decisions establishing these principles are not formally mandatory for the courts of law, but the hierarchy of jurisdictional bodies and the authority of the Supreme Court require, at least in practice, the observance by lower courts of the Praetorian regulations.

Due to these grounds, recent specialized studies place continental case law, in terms of its creative role, between two limits: *de jure* negation and *de facto* acknowledgment[27]. Furthermore, we talk more and more about the power of the precedent in continental system, beyond its persuasive value. As an argument in favor of the acknowledgment of a creative case law, the possibility that the law grants to the judge in order to fill the gaps of the law is claimed, the judge having to choose between the potential meanings of concepts, such as: good faith, public order, good morals, equity. Furthermore, it is shown that the judge is authorized to remove potential contradictions, thus ensuring the consistency of the legal order[28]. Furthermore, the judge is liable to adjust law to the needs of social life, a prerogative that resulted in certain jurisprudential creations such as the institution of matrimonial regime and of the civil liability in French law or the institution of the tort liability and joint tenancy on shares, in Romanian law.

The matter of the judicial precedent role is very complex and very actual. The law creator role of the judge is discussed not only nationally, but also at the European Union level. The doctrine points out that although the rulings of the European Union courts are not *erga omnes* opposable, being binding only upon the parties of the litigation, they have „indirect law creator effect, due to the fact the settlement of similar litigations is also indicated"[29].

[25] Mircea Djuvara, *op. cit.*, p. 476.

[26] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *op. cit.*, p. 149.

[27] Steluța Ionescu, *Justiție și jurisprudență în statul de drept*, Universul Juridic Publishing House, Bucharest, 2008, p. 115.

[28] Ion Deleanu, *Construcția judiciară a normei juridice*, în Dreptul, an XV, no. 8/2004, p. 25.

[29] Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridică,* Hamangiu Publishing House, Bucharest, 2016, p. 158. For further details on the case law of the European Union courts as source of law, see, Laura-Cristiana Spătaru-Negură, *op. cit.*, p. 156-165.

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