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COMPARISON OF PRECEDENT IN ARMENIA AND UNITED KINGDOM

The issues connected with the role, position and the functions of the Court of Cassation in the court system of Armenia always interested scholars, lawyers and practice workers. The bases of the Court of Cassation, as the highest court were created in 1995 by Constitution. But the functioning of the Court during the ten years shows the institutional and functional disadvantages of the Court. Therefore one of the aims of Constitutional reform in 1995 was also to ensure the legal status of the Court by the Constitutional guarantees.

As a result of Constitutional amendments the legal status of the Court of Cassation was thoroughly changed. The Constitution reflected the function of the Court to «ensure uniformity in the implementation of the law». Particularly, according to the Article 92 of the Constitution of RA «The highest court instance in the Republic of Armenia, except for matters of constitutional justice, is the Court of Cassation, which shall ensure uniformity in the implementation of the law. The powers of the Court of Cassation shall be defined by the Constitution and the law.»[1]

The new legal status of the Court of Cassation changes the meaning of the decisions of the Court of Cassation. Thus there is a need to analysis the legal meaning of the decisions of the Court of Cassations for the lower Courts. From the constitutional status is followed not only the competence of the Court of Cassation to correct the mistakes of the lower courts but also to express the legal opinion connected with uniformity understanding of the normative acts. So the precedential meaning of the decisions of the Court of Cassation is rising, as only in such circumstances the Court of Cassation can exercise constitutional function connected with the uniformity implementation of the law.

The research of the decisions of the Court of Cassation will be valuable only after the comparative analysis. It is more important in the current stage of development when the rapprochement of the legal systems (civil and common) is connected with the implementation of the different institutes. The analysis of creating of precedent in the common law system, especially in the English law will improve understanding of the decisions of the Court of Cassation of RA as a precedent.

The main principle of English justice is «the same cases should be decided alike»[2]. From this principle comes the notion of judicial precedent. The meaning of judicial precedent is that a decided rule of law is followed in similar cases until it is overturned or modified by a higher court. Where there is no previous decision on a point of law then a court may make its own decision, which may then be appealed in the higher courts[3].

The binding force of previous cases is called «stare rationibus decidendis». In the literature is often used the common form «stare decisis», which means «to keep what has been decided previously». Although precedent has persuasive effect almost in every legal system but the special feature of English doctrine of precedent is its strongly coercive nature[4]. A past decision in English law is binding if the legal point being argued in court is the same as the legal point that was argued in the precedent, the facts of the case are of a similar nature to those of the precedent and the precedent is a decision of a higher court. This is a general notion about precedent.

Prof. Rupert Cross separates the following main «rules of precedent» in English law:

1.«all courts must consider the relevant case law»;

2.«lower courts must follow the decisions of courts above them in the hierarchy»;

3.«Appellate courts are generally bound by their

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own decisions»[5].

For analyzing «the rules of precedent» and «stare decisis» in English law it is important to understand the main structure and hierarchy of English Court system.

The highest court in English legal system is the House of Lords. The decisions of House of Lords are absolutely binding on all lower courts. But it is important to mention that the House of Lords is subordinate on Matters of European law to the Court of Justice of European Communities[6].

Until 1966, the House of Lords was bound by its own decisions. However, in 1966 the Lord Chancellor published a Practice Statement allowing the House of Lords, in exceptional circumstances, the flexibility to change its view despite there being a clear precedent to follow[7]. This removes the possibility of the law becoming too rigid and the risk that the doctrine of precedent could restrict the healthy development of the law.

The interesting feature of English doctrine of precedent is that the House of Lords might follow the decisions of Court of Appeal though they are not binding for it. The reason is that the House of Lords recognizes that the binding nature of decisions of any court has the potential to promote development of the law[8].

Next in the court hierarchy is Court of Appeal which is one for the whole state and is located in London. According to the hierarchy of Court system Court of Appeal must follow the decisions of House of Lords. But controversy was connected with the case *Broome v. Cassel*[9] when Court of Appeal rejected this rule. The Court of Appeal adapted unanimously «that the House of Lords had been wrong in earlier decision»[10] and the decision itself was «hopelessly illogical and inconsistent»[11]**.** Lord Denning, who was one of the justices of the Court of Appeal, connected with this case wrote in his comments «The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision *Young v. Bristol Aeroplane Co Ltd KB 718* offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom…Yes – I had been guilty – of less majesty. I had impugned the authority of the House. That must never be done by anyone…»[12].

Concluding we can say that the rule «lower courts must follow the decisions of courts above them» is valid and binding on the Court of Appeal, because it is generally and internally accepted. And the rule «exists as a result of the hierarchical structure of the courts»[13].

The next interesting issue connecting with Court of Appeal is the binding force of its previous decisions for its own subsequent decisions. «The Court of Appeals and House of Lords decisions in *Davis v. Johnson*[14] address the question of whether the lower appellate court can deviate from its earlier decisions»[15]. The case was connected with the interpretation of the Domestic Violence and Matrimonial Proceedings Act 1976. The question was whether the court was bound by two previous interpretations of the Act by the same Court of Appeal[16].

According to the case *Young v. Bristol Aeroplane Co. Ltd*.[17] the Court of Appeal must follow its own previous decisions except in three following situations:

1.The Court can decide which of two conflicting decisions of its own it will follow.

2.The Court must refuse to follow a decision of its own which cannot, in its opinion, stand with a decision of the House of Lords.

3.The Court need not follow a decision of its own if that decision was given per *incuriam*[18].

Lord Denning noticed that «the list of exceptions from *Young v. Bristol Aeroplane Co. Ltd*….is now getting so large that they are in process of eating up the rule itself: and we would do well simply to follow the same practice as the House of Lords»[19]. But on appeal the 5 Law Lords did not adopt that the Court of Appeal did not have to follow its own ruling and the Lord Denning' offer was rejected. One of the reasons was that Lord Chancellor's announcement about not following the previous decisions of House of Lords was concluded with the words «This announcement is not intended to affect the use of precedent elsewhere than in this house».

«So the Court of Appeal is not in the same position with regard to the «rules of precedent» as is the House of Lords. The logic behind the altered practice of the House in 1966 does not apply to the Court. The House is the court of last resort, and therefore needs special power to review its own previous decision. Therefore the House of Lords needs to be able itself to

correct any errors»[20].

The next court in the courts' hierarchy is the High Court. The decisions of the High Court are binding for lower courts and for the High Court itself. But it was held that High Court is not strictly bound by its own decisions, though the decision of the High court judge has high persuasive authority[21].

The decisions of lower courts are not binding for the courts standing above them. But in the case if the issue has never been discussed in the Court of Appeal or the House of Lords and the decision of the lower court for a long time has been unquestionable the decision can have authority of precedent[22].

Precedent can be classified into «obligatory» and «persuasive»[23]. Generally the decisions of the high courts are obligatory and the decisions of the lower courts persuasive.

Summing up the above mentioned the rules of English doctrine of precedent are following:

1.The decisions of House of Lords are binding for all other courts, until 1966 for House of Lords itself;

2.The decisions of Court of Appeal are binding for all other courts, and for Court of Appeal itself, except House of Lords;

3.The decisions of High Court must be followed by lower courts, and have persuasive value for Divisions of High Court[24].

Though «stare decisis" means that the decisions of the court are binding for the lower courts but it does not mean that every provision of the court's decision has the same meaning and force. The next important feature of English doctrine of precedent is the notions «Ratio decidenti» and «Obiter dicta».

«Ratio decidenti» means «the principle on which decision is based»[25]. The «ratio» is prescribed by scholars as «the rule applied to decide any particular case, even though not expressed as clearly in the original case as in a later case, when the ratio of that earlier case has to be ascertained and given clear expression in terms of a rule»[26], also «the ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury»[27].

For each case it is important to find the «Ratio decidenti». The difficulty as we can see from above mentioned is that the «Ratio decidenti» is not formulated in the decision separately. And finding the «Ratio decidenti» is creative work which sometimes demands to choose among possible versions. And as William Geldart mentioned the main function of judges is not legislative function. The most important function of judges is solving the dispute between the parties by applying the principles of law to concrete facts. And important thing for the lawyer is separating the stated law from the facts to which it is applied[28].

The formulation of the «ratio» of the decision is not only separation of the main facts of the case. On the contrary, there is arising a new question: who is deciding which facts are the main facts, the judge of previous case, or the judge who must apply the precedent of previous case? The answer of this dispute is that the «ratio decidenti» can be used for two different aims: descriptively and prescriptively.

Descriptive «ratio decidenti» refers to how the previous judge made his decision. But the more important question is: which is the binding part of the decision? The answer of this question is in the prescriptively part of the previous decision which is the provision of the legal norm of previous case to which must follow judges in their further decision making.

«Ratio decidendi» we must separate from «Obiter dictum», which means «things said by the way»[29]. Generally the «obiter dictum» is determining by the principle of exception. Thus, «obiter dictum» includes those parts of the decision which are not included in the notion of «ratio decidenti» and are an «explanation or illustration or general exposition of the law»[30]. Generally, «obiter dictum» does not have binding force[31] but it does not mean that in the doctrine of precedent it has no any value. The «obiter dictum» mostly has persuasive meaning and «an authority which is entitled to respect and which will vary according to the reputation of the particular judge»[32]. From the point of view of the persuasiveness «obiter dictum» can be separated into 2 notions: «Gratis dicta» and «Judicial dicta». «Gratis dicta» is a point of view that was expressed «by the way». It is not valuable for further cases. The same we cannot say about «Judicial dicta» which is valuable in a point of precedent. As «Judicial dicta» is a deep analysis and includes detailed reflection of the facts. Such analysis of the fact is very useful for further cases to find out whether the facts of previous and current cases are similar and

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whether previous case can be used as a precedent for current case.

There are some similarities between the decisions of the Court of Cassation of Republic of Armenia and English precedent. The research of the decisions of the Court of Cassation of Republic of Armenia and their binding force as a precedent is important to begin with the analysis of the role and the place of the Court in the Court system of Armenia.

As a result of the previously mentioned constitutional amendments, the main mission of the Court of Cassation is to ensure uniformity of implementation of the law[33]. The amendments create the bases of the precedential meaning of the decisions of the Court of Cassation.

This requirement is directly reflected in the Recommendation No. R (95) 5 of the Council of Europe «Concerning the interdiction and improvement of the functioning of appeal systems and procedures in civil and commercial cases»[34]. «Appeals to the third court [in Armenian case the Court of Cassation] should be used in particular in cases which merit a third judicial review, for example cases which would develop the law or which would contribute to the uniform interpretation of the law. They might also be limited to appeals where the case concerns a point of law of general public importance. The appellant should be required to state his reasons why the case would contribute to such aims.»[35]

The legal role and the meaning of the decisions of the Court of Cassation for the lower Courts are changing according to this Recommendation and the Constitutional Amendment.

But after Constitutional Amendments the precedential meaning of the Court of Cassation has not been reflected by any legal act. Many scholars and the judges of the lower courts have skeptical attitude towards the binding force of the decisions of Court of Cassation. The situation has been changed by adopting the Judicial Code of the RA, which defined the binding force of the decisions of the Court of Cassation for the lower courts.

The Judicial Code went forward and defined the equal precedential force both for the judgments of the European Court of Human Rights and the decisions of the RA Court of Cassation. According to Article 15 of the Judicial Code of RA «The reasoning of a judicial act of the Cassation Court or the European Court of Human Rights in a case with certain factual circumstances (including the construal of the law) is binding on a court in the examination of a case with identical/similar 1 factual circumstances, unless the latter court, by indicating solid arguments, justifies that such reasoning is not applicable to the factual circumstances at hand»[36].

The Articles with the same context were defined in the Criminal Procedural Code Article 8 and Civil Procedural Codes of RA[37].

As a country of Romano Germanic law tradition, particularly similar with French law traditions, the main source of law of the Republic of Armenia continues to be statutes, which are the regulators of main part of social relations. In these circumstances, the decisions of the Court of Cassation ensure the uniformity of the implementation of the law by following ways:

1.Filling the gaps of the law,

2.Interpretation of the law.

Even in the situation of existence of the statute the same statute is being interpreted by the different courts (judges) differently. In the result the different cases with the same facts are being solved differently. The result of such situation is the skeptical and trustless attitude of the society towards the impartiality of judiciary.

An example of created precedent as a result of interpretation of the law by the Court of Cassation is the decision of the court on the case *Hakobyan v. Armenia*. The importance of this precedent is the change of the practice formed by the judges during the years (from 1998).

T. Sahakyan was accused for committing a serious crime and he was detained. The council of Sahakayna brought appeal and asked to change the detention by bail. The Court of Appeal satisfied the council's demand and detention was changed by the bail. The amount of the bail was defined 1.000.000 Armenian drams. The prosecutor disagreed with the decision of the Court of Appeal and brought an appellate the decision in the Court of Cassation. In his cassation appeal he mentioned that Sahakyan was accusing for the committing serious crime though the Article 143 of the Criminal Procedural Court of RA, according which "Bail may consist of money, securities and other valuables posted by one or several persons to the

deposit of the court for the release from detention of someone accused of committing a crime classified as minor and medium gravity»[38].

The Court of Cassation did not satisfy the appeal and based on the precedent of the European Court of Human Rights, defined that the bail can be applied also for serious crimes. So the Court of Cassation of RA defined a precedent which is binding for the lower courts and the courts must follow the precedent. The main function of the Court of Cassation, as the highest court in the court hierarchy, is the function of adjudication. The function of creating precedent flows out from function of adjudication. Not all the decisions of the Court of cassation so have the force of precedent.

Summing up we can say that the main function of the Court of Cassation is adjudication, but some of the decisions of the Court of the Cassation, which have important meaning connecting with interpreting and filling the gaps of law, have the force of precedent for the lower courts.

In spite of the huge differences between common law and civil law they have some similarities which are the outcomes of the mutual reflection. One of the main differences between two legal systems is the sources of the law. The main source of law in common law is precedent and in the civil law is statute. But one of the influences of common law on civil law is the implementation of precedent in civil law tradition. One of the examples of above mentioned is the new created roots of precedent in Armenian legal system. The implementation of tradition of precedent will have an enormous reflection on the development of Armenian law because one of the advantages of precedent is certainty. Precedent provides that any future case with similar factors will have the same solution. There are many other advantages which are «the possibility of growth, a great wealth of detailed rules, and their practical character»[39]. But there are many difficulties connected with implementation of a new institute from different legal system. The difficulties are connected with the different institutional, structural, organizational aspects. The implementation must be done taking into account the local traditions and social needs. And so can arise many differences between precedents in common law and civil law systems.

Analyzing the differences of precedent of the Armenian and the English law first of all we must mention that though the precedent was implemented in our legal system the main source of law continues to be statute, contrary to the English law, whose main source is precedent. In the English law, in spite of existence of legislator, judges are the main creators of the law but the Parliament of Armenia remains the main architect of Armenian legislation.

The second difference is the fact that unlike English law, in Armenian law only the decisions of highest court, thus the Court of Cassation, have the force of precedent.

As precedent is a new created tradition in Armenian legal system there are no certain rules of precedent in Armenian, which exist in English doctrine of precedent. The reasons are obvious. English doctrine of precedent has been developed for centuries and has formulated rigid rules of precedent. The same we cannot say about Armenian law.

First of all the unregulated part of precedent in Armenian law is the issue whether the Court of Cassation of RA is bound by its own decisions. As we can see from the researching of English law the highest Court of English court system, thus House of Lords has flexibility to change its own decisions. But in Armenian legislation there is no certain provision regarding this issue. The problem can be solved by judicial practice and by developing the certain rules on this issue by precedent as it was done in England in 1966. The need of providing the highest court with such a possibility is the necessity of healthy development of the law, otherwise as it was mentioned before there is a danger the law to be rigid.

In light of the flexibility of the Court of Cassation to change its own decisions, it is important to come back to the notion of development of law which can be in conflict with the notion of stability of the court decisions. As was mentioned hitherto the development of the law requires the opportunity to change law which can be connected with the development of social relations and changing social needs. But on the other hand the stability of court decisions is a guarantee of impartiality of the court and certainty. A stability of the decisions of the court provides a person in a case of applying to the court to have his dispute resolved the same way as the previous case. Also one of the advantages of the stability of the court decision is the creation of trust of society towards court system. Taking into account

all above mentioned, we can say that there is a need to give possibility to the Court of Cassation to change its own decisions in the case of well-grounded reason and necessity.

Another interesting aspect of precedent in Armenian law is the binding force of the decisions of Court of Appeal (the second level of the Court system of Armenia) for the lower courts. It is obvious that in contrast with the English Court of Appeal there is no certain legal provision or precedent that ensures the binding force of decisions of the Court of Appeal. But in light of the two types of precedent «obligatory» and «persuasive», it is obvious that the decisions of the Court of Cassation are obligatory. But the absence of the provision on precedential meaning of decisions of Court of Appeal doesn't mean that they have no value. The judges of the lower courts follow the decisions of the Court of Appellate because there is a fear that the decisions of the lower courts can be appealed in the Court of Appeal. Summing we can say the decisions of the Court of Appeal of RA have persuasive precedential meaning. And the difference with the Court of Appeal of UK is that the decisions of the Court of Appeal have binding force and are obligatory for the lower courts.

In a light of above mentioned it is obvious that the tradition of precedent will have positive reflection for Armenian law to become fairer and more impartial as the main advantages of precedent is certainty which is the basic requirement for the good judgments.

Of course there are many gaps in the current regulation of precedent. Like every new implemented conception precedent also needs to be improved during the years taking into account the external and internal factors which have influence and good practice. The current gaps as was mentioned above are following issues: whether the Court of Cassation of RA is bound by its own decisions, the decisions of Court of Appeal has binding force for lower courts, also the difficulties are connected with the separation of «ratio decidenti». However the first step has been done. And the step by step work towards improving the gaps of regulation will create stabile traditions of precedent in Armenia.

Concluding we can say that the implementation of precedent will have a huge role in developing of Armenian law. And it is very important to develop the tradition of the precedent taking account the long historical practice and theoretical background of common law countries such as UK.

[1] Տե՛ս Constitution of Republic of Armenia (1995), Article 92. The full English text is available at ttpp://parliament.am/parliament. php?id =constitution&lang=eng.

[2] Տե՛ս David Lyons, «Formal Justice and Judicial Precedent», Vand. LR 38 (1985). P. 495.

[3] Տե՛ս William M. Landes and Richard A. Posner, «Legal Precedent: A Theoretical and Empirical Analysis». Journal of Law and Economics, Vol. 19, No. 2, (Aug., 1976). P. 249-307.

[4] Տե՛ս Lady Cross and Jim Harris, «Precedent in English Law», Oxford University press, (1991). P. 5.

[5] Տե՛ս R. Cross. «The House of Lords and the Rules of Prec6dent» in Law, Morality and Society (1977) (ed. P. M. S. Hacker and J. Raz), P. 145.

[6] Տե՛ս William Geldart. «Introduction to English Law», Oxford University press, (1995). P. 7.

[7] Տե՛ս Lady Cross and Jim Harris. «Precedent in English Law», Oxford University press, (1991). P. 5.

[8] Տե՛ս Mari Glendon, Michael Gardon, Christopher Osakwe. «Comparative Legal Traditions: Text, Materials and Cases», (1994). P. 679.

[9] Տե՛ս Court of Appeal of UK. Broome v. Cassell & Co. Ltd. [1971] 2 Q.B. P. 354.

[10] Տե՛ս Mari Glendon, Michael Gardon, Christopher Osakwe. «Comparative Legal Traditions: Text, Materials and Cases», (1994). P. 680.

[11] Տե՛ս Court of Appeal of UK. Davis v. Johnson [1971] 2 Q.B. 354 at p. 381 (per Lord Denning M.R.).

[12] Տե՛ս Lord Denning. «The Discipline of Law» (1979). P. 310.

[13] Տե՛ս C. E. F. Rickett. «Precedent in the Court of Appeal» , The Modern Law Review, Vol. 43, No. 2 (Mar., 1980). P. 136-158.

[14] Տե՛ս Court of Appeal of UK. Davis v. Johnson [1979] A.C. 264 (H.L. and C.A.).

[15]Տե՛ս Mari Glendon, Michael Gardon, Christopher Osakwe. «Comparative Legal Traditions: Text, Materials and Cases», (1994). P. 680.
[16]Տե՛ս Peter Aldridge. «Precedent in the Court of Appeal. Another View, The Modern Law Review», Vol. 47, No. 2 (Mar., 1984). P. 187-200. See also: C. E. F. Rickett. «Precedent in the Court of Appeal , The Modern Law Review», Vol. 43, No. 2 (Mar., 1980). P. 136-158.
[17]Տե՛ս Young v. Bristol Aeroplane Co. Ltd, [1944] K.B. 718, per Lord Greene M.R. at P. 725-726.
[18]Տե՛ս See the same place.
[19]Տե՛ս Mari Glendon, Michael Gardon, Christopher Osakwe. «Comparative Legal Traditions: Text, Materials and Cases», (1994). P. 685.
[20]Տե՛ս C. E. F. Rickett. «Precedent in the Court of Appeal, The Modern Law Review», Vol. 43, No. 2 (Mar., 1980). P. 136-158.
[21]Տե՛ս William Geldart. «Introduction to English Law», Oxford University press, (1995). P. 7.
[22]Տե՛ս Supra. P. 8.
[23]Տե՛ս C. Sumner Lobingier. «Precedent in Past and Present Legal Systems». Michigan Law Review, Vol. 44, No. 6 (Jun., 1946). P. 955-996.
[24]Տե՛ս Rene David, John E. C. Brierley. «Major Legal Systems in the World Today: an interdiction to the comparative study of law», (1978). P. 351.
[25]Տե՛ս William Geldart. «Introduction to English Law», Oxford University press, (1995). P. 9.
[26]Տե՛ս C. E. F. Rickett. «Precedent in the Court of Appeal, the Modern Law Review», Vol. 43, No. 2 (Mar., 1980). P. 136-158.
[27]Տե՛ս Lady Cross and Jim Harris. «Precedent in English Law», Oxford University press, (1991). P. 76.
[28]Տե՛ս William Geldart. «Introduction to English Law», Oxford University press, (1995). P. 9.
[29]Տե՛ս See the same place.
[30]Տե՛ս William Geldart. «Introduction to English Law», Oxford University press, (1995). P. 9.
[31]Տե՛ս Rene David, John E. C. Brierley. «Major Legal Systems in the World Today: an interdiction to the comparative study of law”, (1978). P. 363.
[32]Տե՛ս William Geldart. «Introduction to English Law», Oxford University press, (1995). P. 11.
[33]Տե՛ս Constitution RA, (1995,) full text is available at ttpp://parliament.am/parliament.php?id=constitution&lang=eng.
[34]Տե՛ս Recommendation No.R (95) 5 of the Council of Europe «Concerning the interdiction and improvement of the functioning of appeal systems and procedures in civil and commercial cases», (Adopted by the Committee of Ministers on 7 February 1995 at the 528th meeting of the Ministers’ Deputies). The full text is available from https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(95)5&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=c3c3c3B.
[35]Տե՛ս Recommendation No. R (95) 5 of the Council of Europe, supra.
[36]Տե՛ս The Judicial Code of RA, 2007. Full text is available at http://parliament.am/legislation.php?sel=show&ID=2966&lang=eng.
[37]Տե՛ս Criminal Procedural Code of RA, Civil Procedural Code of RA. Full texts are available at www.laws. am.
[38]Տե՛ս Criminal Procedural Code of RA, full text is available at http://parliament.am/law_docs/010998HO248eng.pdf?lang=eng.
[39]Տե՛ս William Geldart. «Introduction to English Law», Oxford University press, (1995). P. 15.