

Continuity in the Development of Judicial Law

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Abstract: The ongoing changes in the legal map of the world reflect the interaction of legal systems. These processes inevitably affect the scope of activities of the judicial authorities associated with such a phenomenon as judicial law. The authors of the article take a narrow approach to understanding it. It implies the manifestation of judicial law as judicial practice and judicial precedents. The relevance of the topic is due to the fact that the phenomenon of judicial law goes beyond the limits of a single legal family, which implies its comparative legal research. At the same time, an important direction of such activity is the study of the development of this law associated with the processes of continuity. The objective of the study is to identify the concept and features of continuity in the development of judicial law. To do this, the authors formulated the following tasks: identify the concept and signs of continuity within the framework of legal development; disclose the peculiarities of understanding judicial law; determine the characteristic features of continuity in the development of judicial precedents; characterize continuity in the evolution of judicial practice. The conducted research is based on a dialectically understood model of continuity. This assumes the use of a systemic paradigm associated with a constellation of different methods, such as comparative, structural-functional, etc. The results allowed the authors to determine the trends and prospects for the development of judicial law within the framework of certain legal spaces. The authors of the article believe it advisable to use these results in subsequent research on this topic.

Keywords: Continuity, judicial law, legal system, legal family, judicial practice, judicial precedent.

INTRODUCTION

Judicial law is an actual legal phenomenon. The processes of its development are inevitably associated with continuity.

The literature reflects certain aspects of this topic. Both Russian and foreign philosophers and scientists deal in their works with the problems of continuity in general and legal succession in particular. In particular, the works by Williams (1983), Lemley & Casey (2019), Johnson *et al.*, (2006). A lot of research is devoted to the study of legal systems. For example, the studies by R Bell, (2018), Burgess, (2016), Gubaydullin and Kurnosova (2019). There are works related to the study of judicial practice and judicial precedent, written by Gidron & Kaplan, (2017), Hunter and Rackley, E. (2018), Johnson *et al.*, (2006).

However, the literature lacks research devoted to a holistic study of this issue. The authors made an attempt to combine existing knowledge and describe a single model of continuity in the development of judicial law. The legal map of the world is very diverse. Thus, one work cannot encompass all existing legal systems. Therefore, the subject of the research is limited to individual legal systems that are part of the Romano-Germanic and Anglo-Saxon legal families. Russian legal experience has also been considered.

The results, summary and conclusions are related to the general theory of law. The authors have shown the features of the genesis of judicial practice and judicial precedent, however, the issue of the prospects for the development of case law beyond the common law countries is still debatable. Therefore, the data obtained can serve as the basis for future research, and can also serve as a source for scientific polemics on this topic.

METHODS

The research methodology is multilevel.

On the one hand, issues related to continuity were studied. This is a philosophical category, therefore, the methodological basis was dialectics and the resulting system model of cognition of legal reality.

On the other hand, the subject of the study covered purely legal categories: "judicial law", "judicial practice", "judicial precedent". Moreover, their understanding depends on the type of legal family. Therefore, the authors considered the points of view of various researchers.

Using the structural-functional method, the authors analyzed and identified the features of the content of judicial practice and judicial precedent, to highlight their functional significance. In turn, this made it possible to use the comparative method, since these legal phenomena develop in different legal systems.

This methodological apparatus was organically supplemented by the methods of formal logic. The

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authors used analogy, analysis, synthesis, deduction, and induction at all levels of research.

RESULTS AND DISCUSSION

Development is a complex phenomenon. In terms of dialectics, it is inextricably linked with continuity, which must be understood as a connection between different stages of development (Lemley & Casey, (2019). The essence of this connection lies in the transformation and preservation of certain parts of the old in the new. Continuity is present in a variety of areas, including the legal system, while having a certain set of features.

First, versatility should be mentioned. This feature follows from the characteristics of the development itself, which is general. It is appropriate to emphasize here that legal continuity cannot be limited only by lawmaking; this connection exists due to the practices of various individuals (Kiminchizhi 2008). At the same time, judicial law is both a process and a product of the relevant legal practice related to continuity.

Secondly, it is worth noting the objective nature of legal continuity. With regard to the study of judicial law, this means the conditionality of successive relations by the general challenges facing the legal system, the peculiarities of the dominant legal policy in society. Of course, this feature should not be absolutized. Objectivity cannot be separated from subjectivity. History knows many examples when a person influenced the development of judicial law (for example, the role of Chief Justice John Marshall in the case of *Marbury v. Madison*). Yet, as a rule, the evolution of judicial law is subject to general legal trends.

Thirdly, there is the connection between legal continuity and legal progress. In this case, continuity relations perform a special function. They show progress or regression in the evolution of judicial law.

Fourthly, the legal continuity is manifested both vertically and horizontally. From the point of view of the study of judicial law, this allows us to speak of a diachronic and synchronous comparison in this area.

Further, it is necessary to consider such a phenomenon as judicial law. In many modern democracies it is closely related to the idea of the Rule of Law. For example, in the United States, this idea plays an important role in cases related to the Constitution (Masood *et al.*, 2008). Judicial law can be understood in different ways.

In a broad sense, judicial law is interpreted as a comprehensive legal system that regulates relations associated with the organization and activities of the entire judicial system. We are talking about a part of objective law, one way or another related to the development and functioning of various judicial bodies.

In a narrow sense, judicial law acts as a set of judicial precedents or judicial practice, depending on the type of legal family being discussed. In this case, we are talking only about the decisions of the highest courts. This is due to the nature of jurisprudence in the Anglo-Saxon legal family and the peculiarities of reviews of jurisprudence in the civil law family. The authors of this study take a narrow approach to understanding judicial law.

Continuity in the development of judicial precedents is due to the fact that they change over time (Rybakov, 2009). Therefore, considering this phenomenon, we should take a look at the legal sources of its nature.

Judicial acts from the earliest times served as the basis for the first laws. In particular, in ancient Rome, magistrates' edicts formed a stable character, transforming into a system of generally binding decisions and rules.

Judges were guided by a precedent in deciding the case, which has become a common and uniform practice. Terms such as "praeiudicium", "exemplum", "iudicatum", "res iudicata" were used to denote judicial precedent. A long-standing judicial position was called "jurisprudence constante". "Jurisprudence constante" was generally accepted by common law countries. Continuity was reflected in the technique developed by the judges, and determined that the judge should avoid defining generalizations whenever possible. This was associated with the method of active casuistry and was reflected in the peculiarities of the Anglo-Saxon legal family.

The development of the principles of case law in the English legal system took several centuries and ended with the abandonment of the principle of binding for the parties to this case ("res iudicata") in favor of the principle of binding decisions for judges ("stare decisis").

The process of forming a judicial precedent in the Anglo-Saxon legal family is associated with a series of several court decisions. Their comparison reveals a general rule that is subject to development. The development of judicial law in this legal system

predetermined the approach to the relationship between law and fact. If any gap is found, the court creates a law and applies it to the facts of the past. When assessing life circumstances and their legal qualifications, the court determines whether they formulate a law and what legal consequences they entail. This feature of the judicial precedent determines the retroactive effect of the action of the judicial precedent (Sullivan & Canty, 2015).

English law greatly influenced the legal systems of the former colonies of the British Empire. Initially, the dominance of English court precedents over local decisions was established by *Trimble v Hill*. Many former colonies still apply English common law. For example, in Australia prior to the 1960s, English judicial precedents took precedence over Australian courts.

Considering the legal system of Canada, we should mention the pluralism of the system of sources of law, which allows the application of legislative acts and judicial precedents of Canada, Australia, and the United Kingdom. Thus, the continuity in the development of judicial precedents is characterized by greater activity, both within the framework of a separate state, and between states with similar history and culture.

English common law forms the basis of the legal system in a number of countries (Tonga, Trinidad and Tobago, Samoa), although it is applied with reservations, for example, if there are gaps in law or inconsistency with national law. The Indian legal system should also be noted, which has retained the application of outdated English court precedents.

Another characteristic feature of the continuity in the development of case law is the change in the relationship of the judicial precedent with other sources of law and the growing role of statutory law. At the same time, the continuity in the development of the judicial precedents themselves is distinguished by the interpretation factor. For example, the US circuit judges are faced with the need to determine the similarity of the facts in their case with the decision of the US Supreme Court and then decide whether it is worth applying *Terekhin* (2010). The provision of "jurisprudence constante" is reflected not only in common law countries, but also in countries of the Romano-Germanic legal family. The jurisprudence in the law of some countries of continental Europe has the features of its status worth to mention, similar to the countries of common law.

The Swiss Civil Code empowers a judge, in case of a gap, to act as if he/she was a legislator, while following the prevailing doctrine and tradition of law. The Italian Civil Code recognizes jurisprudence as an auxiliary source of law. The Finnish Supreme Court Procedure Act makes it mandatory for lower courts to consider the positions of the highest court.

In most countries of the Romano-Germanic legal family, however, the *res judicata* concept prevails, according to which a court decision is binding only for the parties involved in the case (Williams, 1983).

Analyzing the provisions of the French Civil Code, one can find the position that a judge should not accept a general legal provision, even in the event of insufficient legal norms. At the same time, the approach to judicial law in France considers the precedent as a previously adopted judgment on a similar case or in similar circumstances with the case under consideration [8]. The German legal system defines precedent as any previous judgment that has anything to do with the case at hand.

The continuity in the development of judicial practice is determined by a number of factors. One of them is the complication of legal regulation, the hybridity of legal norms and their complexes, the complication of the judicial system and the flexibility of judicial practice, the development of legal technology. In this regard, it is important to note the development of judicial law in the legal system of Russia. The federal constitutional law "On the Constitutional Court of the Russian Federation" states that the decisions of the Constitutional Court of the Russian Federation are regulatory and are generally binding. The precedence of such decisions is manifested when considering the constitutionality of a specific normative legal act.

For a long time, the legal status of the decisions of the Plenum of the Supreme Court of the Russian Federation was not formalized. One of the competences of this court is to provide courts with mandatory explanations on matters of judicial practice, which are established in the form of these decisions. In this regard, the draft Resolution of the Plenum of the Supreme Court of the Russian Federation "On the Application of the Arbitration Procedure Code of the Russian Federation in the consideration of cases in the arbitration court of the cassation instance" became resonant. The draft states that the decisions of the courts that have entered into force will have to be checked for compliance with the legal positions of the

Supreme Court of Russia contained in the decisions of the Plenum, Presidium, as well as reviews. It is important to note that the decisions of the Plenum are general explanations, decisions of the Presidium are made on specific cases. Thus, in the legal system of Russia, the elements of a judicial precedent are institutionalized.

SUMMARY

Legal continuity is a necessary process within the framework of evolution, which has certain features, such as universality, objectivity, and connection with legal progress. Judicial law should be understood in the narrow sense as a set of judicial precedents or judicial practice, depending on a kind of legal family being discussed. This allows for comparative legal research at the level of sources of law.

Continuity in the development of judicial precedents took place in the ancient world. Later, it manifested itself in common law countries, and resulted in the doctrine of judicial precedent. The most active was manifestation of the internal continuity within one legal system or homogeneous legal systems. In particular, this was expressed in a change in the ratio of sources of law [9].

There is also continuity between disparate legal systems, manifested in the perception of case law by the former colonies of Great Britain. Successional relations are more moderate in nature, since such legal systems are often mixed. Continuity in the development of judicial precedents is determined by the factor of interpretation and depends on the role of the individual, that is, on the judges themselves. For example, ignoring the opinion of superior court judges expressed in an academic paper may entail certain consequences for the parties (Burgess, 2016).

Continuity in the development of judicial practice is more characteristic of the Romano-Germanic legal family. These processes are determined by a number of factors. The classical model of judicial precedent has developed in common law, and can be adopted by continental law in the event that the legal continuity affects the remaining elements of the legal system: sources of law, law-making, legal doctrine, legal culture. At the present time, it is advisable to talk about the limited continuity between judicial precedents and judicial practice. It is also worth highlighting the manifestation of continuity in judicial law as an independent type of continuity.

CONCLUSIONS

Summing up, it should be noted that judicial law is a connecting link between different legal cultures, which is also reflected in their coordination and common origins of development. The flexibility of judicial law, its properties as a legal regulator allow adjusting legal systems in interaction with each other. All this is inevitably accompanied by succession ties. An example of this is the institution of constitutional review. It first arose in the United States in the aforementioned *Marbury v. Madison* in 1803 and further spread both in the common law family and in the continental legal family.

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