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ANALOGY AND PRECEDENT IN THE COMMON LAW AND THE CIVIL LAW: OUTSTANDING FEATURES AND TERMINOLOGICAL DIFFERENCES

Romanenko D.I., Dekhnich O.V.

The article is devoted to the research of comparing terminological and meaning differences between such legal institutes as analogy and precedent in both the Common Law and the Civil Law systems. The applicability of this theme is proved by importance of comparative research in order to shows that mindful of differences between separate systems, we can nevertheless find some common features. Despite Common Law was built on precedent and Civil Law on statutes, in modern times the statutes play more significant role in Common Law and case law influences on Civil Law jurisdiction.

The primary goal of this study is a research of outstanding features, the similarities and differences both institutes analogy and precedent in the separate systems.

Research results can be used in the comparative legal studies and cross-linguistic researches and also when applying analogy and precedent especially in the area of comparative law.

Keywords: *the Common Law legal system; the Civil Law legal system; analogy; analogia legis; analogia iuris; precedent; legal reasoning; justification; arguments; legal gap.*

АНАЛОГИЯ И ПРЕЦЕДЕНТ В СИСТЕМАХ ОБЩЕГО И КОНТИНЕНТАЛЬНОГО ПРАВА: КЛЮЧЕВЫЕ ОСОБЕННОСТИ И ТЕРМИНОЛОГИЧЕСКИЕ РАЗЛИЧИЯ

Романенко Д.И., Дехнич О.В.

Статья посвящена сравнительному исследованию институтов прецедента и аналогии в англо-американском и континентальном праве.

Объектом изучения являются терминологические, лексические и семантические особенности институтов прецедента и аналогии в общем и романо-германском праве.

Как отмечается авторами, главной особенностью языка юриспруденции является высокая степень абстракции юридических терминов, широкая возможность интерпретации и толкования. Несмотря на взаимопроникновение систем общего и континентального права, сглаживание границ между правовыми отраслями, терминологические различия между институтами остаются существенными. Поскольку право выполняет важную социальную функцию, терминологические ошибки в юридическом тексте должны быть сведены к минимуму. Правильное определение значения термина с учетом особенностей правовой системы необходимо в любой сфере юриспруденции, что обусловливает актуальность и прикладной характер темы исследования.

Научная новизна работы состоит в разработке авторами классификации терминологических особенностей институтов прецедента и аналогии в общем и континентальном праве.

Полученные результаты могут быть использованы в сравнительных юридических и лингвистических исследованиях. При применении институтов аналогии и прецедента, в особенности в сфере сравнительного права.

Ключевые слова: *система общего права; система романо-германского (континентального) права; аналогия; аналогия закона; аналогия права; прецедент; правовое обоснование; мотивирование; аргументация; правовой пробел.*

Introduction

Arguments from analogy and precedent are two basic forms of reasoning in many legal systems, especially the Common Law and the Civil Law (Romanic-Germanic Law, Continental Civil Law) systems, that cover more than half of the world. In general terms analogy in legal reasoning involves an earlier decision being followed in a later case because the later case is similar to the earlier one. In contraposition to analogy, precedent involves an earlier decision being followed in a later case because both cases are the same. However the institutes of precedent and analogy have terminology differences in both the Common Law and the Civil Law that is the point at issue in this paper.

In broad terms legal reasoning is the particular method of arguing used when applying legal rules to particular interactions among legal persons. Arguments from precedent and analogy are an integral part of legal reasoning. Legal reasoning differs in a number of ways from the ordinary reasoning used by individuals.It often uses arguments that individuals do not employ, or that individuals employ in different ways. The main difference between legal reasoning and ordinary reasoning is following. In individual reasoning we do not normally regard the fact that we decided one way in the past as raising some presumption that we should decide the same way in the future. As for legal reasoning both the Common Law and the Romanic-Germanic Law systems contain different approach to enforcement of law.

The basic legal reasoning approach in the Common Law is this: since courts are bound to apply the law, and since earlier decisions have practical authority over the content of the law, later courts are bound to follow the decisions of earlier cases. This is commonly known as the *doctrine* of precedent, or *stare*

decisis. Whereas analogy are used when the facts of a case do not fall within any precedent in order to assimilate the result to that in the analogical case.

Another legal reasoning approach is typical for the Civil Law that is much different from the Common Law one.

In the Civil Law system earlier decisions are, officially, treated in just this way: cases are cited to courts, but courts may only justify their decisions by reference to other legal materials such as legislation. As a consequence the decision in an earlier case is not in itself regarded as a justification for reaching a decision in a later case. Doctrine of precedents does not work in the Civil Law the same way like in the Common Law. When the decision maker finds a legal gap, in other words cannot applies legislation and when the facts of the case do not fall within the legislation, analogy may be a solution. There are both legislation and principles that may be applied by analogy in the Civil Law for the purpose of adoption the result inthe case at hand to the analogical case.

In this way precedent and analogy terminological and meaning differences in the Common Law and the Civil Law must be taken into account when applying such institutes especially in the area of comparative law.

Objective

The research objective is comparing terminological and meaning differences as well as the outstanding featuresboth legal institutes analogy and precedent in the Common Law and the Civil Law systems.

Materials and research methods

The source base of the research is collection of legislation, including foreign and domestic legislation, case law, international private law, comparative law and underlying law principles. The numerous group of sources is the legal doctrine of the Common Law and the Romanic-Germanic Law. The method used in the research is the method of complex linguistic description, including generalization, comparison and classification. The research is executed in a problem and comparative key with application of the general scientific and

the specific scientific methods. The work is based on the modern and classical methodological principles of research: the structural functional method, principles of historicism and objectivity. The research methodology includes general philosofical methods: analysis, synthesis, induction, deduction and analogy.

The research results and their discussion

In broad terms a precedent is the decision of a court (or other adjudicative body) that has a special legal significance. That significance often depends on the legal system and intrinsic legal sources. For that reason a court's decision being regarded as having practical or just theoretical authority over the content of the law.

1. The term 'precedent' in the Common Law system. As noted above the doctrine of precedent (*stare decisis*) is widely spread in the Common Law system. It means that the decisions of the Common Law courts have exactly practical authority. The legal reasoning by *stare decisis* varies from one legal system to another. It is common for courts lower in a judicial hierarchy to be strictly bound by the decisions of higher courts. So that the English Court of Appeal is bound by decisions of the House of Lords, and Federal Court judges in the United States are bound by decisions of the Federal Court of Appeals. The lower court is 'strictly' bound because it has no power to overrule the higher court's decision. Finally, courts are generally not bound by the decisions of lower courts: the House of Lords for example is not bound to follow decisions of the Court of Appeal and is free to overrule such decisions if it takes a different view of how the case should have been decided.

In Common Law system the term precedent may be regarded as (a) laying down rules, as (b) the application of underlying principles, and as (c) a decision on the balance of reasons.

On the first approach precedents consider as laying down rules which later courts are then bound to apply to the facts before them [18, p. 38; 15, pp. 82–86; 9, pp. 1–64; 19, pp. 469–471; 20, pp. 174–187]. In favour of this interpretation of precedent is the distinction drawn in legal practice between what is

reffered to as the *'ratio decidendi'* of a case and *'obiter dicta'*. The *ratio* of a case is the proposition of law that represents the aspect (part) of the case that is binding on later courts. In contraposition to the *ratio, obiter dicta* represents other statements and views expressed in the judgment which are not binding on later courts. On this view of precedent, the rule laid down in the earlier case is represented by the *ratio.*

There are a range of criticisms of the rule-making account of precedent [16, pp. 185–187] that is embodied in two issues: (a) the form in which judgments are presented, and (b) the practice of distinguishing.

It is widely accepted that the decision is a marked contrast with statutes, where a canonical formulation of the legal rule being laid down is provided. However, although there is a contrast with legislation here, it can be exaggerated. In both situations the propositions of law for which a case or statutory provision is authority must be derived from the case or statute and is not identical with the text of either. The real difference between statutes and precedent is what in the case of statutes legal systems have elaborate conventions of interpretation to assist in the process of deriving the law from a legislative text, whereas in the case of precedents they do not. It is merely shows that the law derived from precedents may be general and more vague than that derived from statutes.Thus it does not establish that precedents do not laying down rules.

An integral part of legal reasoning using precedents is the practice of distinguishing. Distinguishing contains a precedent not being followed even though the facts of the later case fall within the scope of the *ratio* of the earlier case. If the later case falls within the scope of the earlier *ratio*, it may be assumed that the decision in the later case must be the same. In legal reasoning using precedents, the later court may not to follow the earlier case by pointing to some difference in the facts between the two cases.

The result of distinguishingis that the later court is free not to follow a precedent that applies to it, by making a ruling which is narrower than that made in the precedent case. But the later court has following formal constraints: (a) in

creating the *ratio* of the later case, the circumstances in the *ratio* of the earlier case must be retained, and (b) the ruling in the later case must support the result reached in the precedent case. In short, the ruling in the second case must not be inconsistent with the result in the precedent case, but the court is otherwise free to make a ruling narrower than that in the precedent. Hence the more accurate statements of the doctrine of precedent are to the effect that a later court must either follow or distinguish a binding precedent [13, pp. 161–183; 14, pp. 117–124; 10, pp. 60–65; 12, pp. 51–54]**.**

One of the outstanding features of distinguishing is that it cuts across the normal justifications for having rules, namely to have a class of cases treated in a certain way despite individual variation between them, with transparency in the decision-making process. Instead, the later court is free to avoid the result indicated by the earlier *ratio* so long as it can find some difference in facts between the two cases that narrows the earlier *ratio* while still supporting the result in the earlier case. What is more, this power is not merely given to courts of the same level of authority as the one laying down the precedent, but is given to every court lower in the judicial hierarchy. So on the rule-making view of precedent lower courts have the power to narrow the rules laid down by higher courts, just it is necessarily to support the result reached in the earlier case [21, pp. 168–169].

The application of underlying principles plays significant role in legal reasoning by precedent. Actually, the 'underlying principles' lead to three major difficulties: (a) the scope of distinguishing; (b) accounting for the role played by rationes; and (c) keep the distinction between precedent and analogy. Any good argument can provide the basis for distinguishing. For instance, the novel facts in the later case provide considerations that outweigh the original justification. It is not that the original justification is inapplicable to the novel facts, it is merely that those facts raise additional considerations that are more compelling. So later courts go beyond what was done in the earlier decision. Abandoning the idea that later courts always are bound to follow the decisions of earlier cases is one possible line of response to these

difficulties. But where the circumstances of the case at hand do not fall exactly within the *ratio* of any precedentthe court is free to make a ruling narrower than that in the precedent. In that cases what is binding in law is the set of principles which best fit and justify the totality of the results in past decisions [11, pp. 110–123; 17, pp. 235, 239].

2. The term 'precedent' in the Civil Law system. It is obvious that in legal systems based on the Civil Law tradition, precedent is not formally recognized as a source of law, and the doctrine of *stare decisis* is not supported. In many Civilian legal systems, such as Russia, the official view is that court decisions do not make law, they just involve the application of the law. This is because of the separation of powers. Actually, the responsibility of the legislator is to make law, the responsibility of the judiciary is to apply the law made by the legislator. For the courts to make law would be to usurp the legislative function. When considering precedent, courts may merely take into accountthe prior decisions as interpretations of the law, and the courts are often free to decide consistently with the prior court's decision or reject the prior decision.

In practice even the Civil Law system cannot function completely without case law. The decisions of the courts playing at least a concurrentrole in settling the content of the law. This conception is embodied in the doctrine of *jurisprudence constante* when a long series of previous decisions applying a particular rule of law and may be determinative in subsequent cases.

For instance, in France the law of torts and delicts is based on only five articles of the Code Civil (§§ 1382–1386). It is obvious that this articles cannot cover completely all possible situations that may arise in the future in the event of litigation. Formally, the law is found in those five articles, and a court decision is legally flawed if it does not applying that articles in legal reasoning as the basic for its decisions. But there are a lot of interpreting and applying those articles that helps judges in reaching them decisions. It is nothing short of so-called 'informal making law'.

Take another example. Russia is a 'Civil Law jurisdiction', which means that precedent is not an official source of law in Russia. Despite the fact that

precedent is not a legal source the following tendency exists. In general, lower Russian courts try to follow the principles established by the higher courts. This is tradition originates from Soviet jurisprudence when higher courts often give the guidelines to the lower courts. Nowadays, the role which the Supreme Russian courts play in the law-making process cannot be overemphasized. Moreover, even Russian legislation contains some premises of consideration precedent as one of the sources of law that have limited legal force. Provisions of the Article 308.8 of the Arbitration Procedure Code, and the Article 391^9 of the Civil Procedure Code give the Supreme Court of the Russian Federation the right to overturn a lower court decision if it contradicts other established decisions on similar matters [1; 4]. Normative acts in the form of explanations of the Plenum of the Supreme Court are binding on all lower courts which is confirmed by the 1993 Russian Constitution (Articles 126 and 127) [6].

There is following generally classification of precedents in Russian law: (a) precedents of interpretation and gap-filling; (b) precedents arising out of judicial review; (c) precedents of discretion [22, p. 117]. Precedents of gap-filling and interpritation are both most common in Russian legal system. Precedents of judicial review have been encountered in practice and seem to be expanding through the jurisprudence of the Constitutional Court. The exercise of judicial discretion is widely spread but it is not binding as a precedent, that is a piece of proposal which are given by the higher courts.

The higher court papers (the Supreme Court and the formerSupreme Arbitrazh Court of the Russian Federation, whose papers are still enforceable) are presented in the following legal forms: (a) Decision of the Court, (b) Resolution of the Plenum of the Court, (c) Informational Letter from the Presidium of the Court, (d) Resolution of the Presidium of the Court, (e) Declaration of the Court. All of this ruling have immediate value for the purpose of legal analysis and reasoning and show the significant role that precedent plays in the Civil Law system [8; p. 75; 5, p. 152; 2, p. 38; 7, p. 10].

3. The term 'analogy' in the Common Law system. In broad terms,reasoning by analogy is a legal reasoning when an early case being followed in a later

case because the later case is similar to the earlier one. Arguments by analogy are closed to the arguments from precedent and compliment them in two ways: (a) they are used when the facts of a case do not fall within the *ratio* of any precedent, for the purpose of adapt the result to that in the analogical case; and (b) they are used when the facts of a case do fall within the *ratio* of a precedent, for the purpose of distinguishing the case at hand from the precedent. It is obvious that the legal force both arguments from analogy and from precedent is different. According to *stare decisis* a precedent should be followed unless the court has the power to overrule the earlier decision. In contraposition to precedent, arguments from analogy distinguish in their strengths: from very 'close' analogies (which strongly follow a result) to more 'remote' analogies (which weakly follow a result). Analogy does not bind,it must be considered along with other reasons for the purpose of reach a result. It means that an analogy is rejected in one case does not preclude raising the analogy in a different case.It also frequently happens that there is more than one case that arguably applies to the case at hand. In that circumstance, courts that reason by analogy must determine which of the previous cases is most similar to the case to be decided.

Two guestions may be determined by analogical reasoning. Firstly, how can a decision-maker identify the 'common characterisation' between the case at hand and the analogous one, in other words when are two cases 'similar' for the purposes of analogy? Secondly, what type of justificatory force does the common characterisation provide? On the first question, it is obvious that no two cases are identical in every respect, at the same time not every case is thought to provide an analogy. For that reason the question that has to be answered iswhat limits or directs the selection of analogies? What kind of reason does an analogy provide for deciding the case at hand in the same way?

The existence of an analogy depends on the justification for the analogical decision. The facts of a case may do not fall within the *ratio* of any precedent, and thus the court is not bound by the precedent. By contrast, arguments from analogy provide when the justification for the earlier decision apply to the later case. It should be noted that underlying principles may have influence with

the legal reasoning by analogy. A body of cases can be examined to determine which principle explains and justifies those decisions. A principle that makes best sense of a series of cases or aspects of legal doctrine can have some justificatory force even though the cases or doctrines are imperfect.

The use of analogies in law provides a compensate function for some of the indeterminacy which flows from fragmented materials and the pluralism of decision-makers. That a close analogy exists usually provides a good reason for deciding the case the same way, since it renders the law more replicable than it would otherwise be. At the same time, analogies can be defeated by other considerations if there is a good basis for distinguishing, or if its merits are too weak.

4. The term 'analogy' in the Civil Law system. Analogy in the Civil Law is considered another way then in the Common Law. Particularly in the Civil Law tradition legal theory differentiates between statutory analogy (*analogia legis*) and legal analogy (*analogia iuris*). Traditionally, statutory analogy is considered an interpretive argument, which refers to the application of a legal norm regulating a case to an essentially similar case for which no legal norm exists. In contrast, legal analogy is used for the purpose of filling in gaps where the statutory analogy does not provide a solution. In these cases, the analogy does not applying according to norms, but to the so-called "general principle of law".

The Civil Law legal system often allows the gaps in the law. Take for example Russian legal system. According to the Civil Code (the Article 6) in cases when the relations are not directly regulated by legislation or by an agreement between the parties, while the custom that would be applicable to them does not exist, and if this is not in contradiction with their substance, the civil legislation will be applied, which regulates similar relations (statutory analogy).

If it is impossible to apply the similar law, the rights and duties of the parties will be defined, proceeding from the general principles and the meaning of the civil legislation (legal analogy), and also from the requirements of honesty, reasonableness and justice [3].

In general terms, ‘legal gap’ means the lack of a definite legal rule for the regulation of certain relations. It is obvious that the legislator cannot predetermine all the cases that may arise, on the other; it should be taken into consideration that life itself undergoes change. However, the subjective factor also has a role in the existence of legal gaps. Actually, the issue of the lacking legal rule is decided exclusively within the framework of legislation and on the premise that positive law, through its principles,constitutes an accomplished and all-encompassing system, which can give an answer to anyspecific problem. For that reason the legislation does not aim at giving a definition, but, rather, at showing what is to be done, when it is established that the law has gaps.

Conclusion

Distinctions between the Common Law system and the Civil Law system are vital. In this connection, both institutes analogy and precedent have substantial differences in legal reasoning across the Civil Law and Common Law jurisdictions.

Precedent in the Common Law vs. Precedent in the Civil Law.

1. Different significance. Precedent is a central part of legal reasoning in the Common Law: since courts are bound to apply the law, and since earlier decisions have practical authority over the content of the law, later courts are bound to follow the decisions of earlier cases. In contrast, precedent are not formally recognized as a source of law in the Civil Law. The decisions of the courts playing merely a concurrent role in settling the content of the law.

2. Focus on holdings. In Civil Law systems, there is no tradition of differentiating systematically in connection with a precedent opinion between *ratio decidendi* and *obiter dicta* – between holding and dictum – as in the Common Law.

3. Focus on distinguishing. No approach of distinguishing precedents in the Civil Law countries. By contrast, distinguishing has long been something of a high art among practitioners and judges in the Common Law countries.

4. Statements of facts. In general, Civil Law decisions do not include detailed statements of facts, as distinct from the Common Law papers.

5. Contextualization of rules. Rules in the Common Law are contextualized within and emerge from fact situations. In most Civil Law systems rules are usualy the primary determinants of their ultimate scope (statutes, codes, ect.)

6. Subsequent court departures. Anessential difference concerns the liberty of even lower courts to depart from a single higher-court precedent, or even from a line of several precedents, that is used to the Civil Law.

Analogy in the Common Law vs. Analogy in the Civil Law.

1. Different significance. The gaps in the law are often allowed in the Civil Law, thus the courts are bound by analogy in that cases where applying statutes is not enough or merely impossible. Courts are not bound by analogy in the Common Law, they often apply it for argumentation.

2. Focus on purpose. In the Civil Law legal system analogy applies for the purpose of filling gaps in the law, while analogy also applies in order to distinguishing the case at hand from the precedent in the Common Law.

3. Different types. It is widely spread both statutory analogy (*analogia legis*) and legal analogy (*analogia iuris*) in the Civil Law that does not exists in the Common Law.

Finally, terminological and meaning differences of precedent and analogy in the Common Law and the Civil Law,that have been described above, have both appliedand theoretical significance. It may help in the comparative legal studies and cross-linguistic researches and also when applying such institutes especially in the area of comparative law.

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DATA ABOUT THE AUTHORS

Romanenko Denis Ivanovich, Graduate Student
Belgorod State National Research University
85, Pobedy Str., Belgorod, 308015, Russian Federation
deromanenko@mail.ru

Dekhnich Olga Vitalievna, Candidate of Philology, Associate Professor
Belgorod State National Research University
85, Pobedy Str., Belgorod, 308015, Russian Federation
dekhnich@bsu.edu.ru

ДАННЫЕ ОБ АВТОРАХ

Романенко Денис Иванович, студент-магистрант, аспирант
Белгородский государственный национальный исследовательский университет
ул. Победы, 85, г. Белгород, 308015, Российская Федерация
deromanenko@mail.ru

Дехнич Ольга Витальевна, кандидат филологических наук, доцент
Белгородский государственный национальный исследовательский университет
ул. Победы, 85, г. Белгород, 308015, Российская Федерация
dekhnich@bsu.edu.ru