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THE COMMON LAW SYSTEM OF PRECEDENT IN ENGLAND: LEGAL COMPARATIVE AND HISTORICAL RESEARCH

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SUMMARY

Legal comparative and historic research of common law system of precedent in England devotes special attention to experience of its application as one of main and the earliest sources of law in the law history of England. This article studies development of the doctrine of precedent in England, examines respective legal rules of creation and application of precedents. The author describes the nature of the common law tradition with particular reference to judicial precedent. The article helps legal professionals from Ukraine and Moldova to understand the distinctiveness of the common law approach as a legal methodology.

Key words: judicial precedent, common law, England and Wales, comparative law, law history.

СИСТЕМА ОБЩЕГО ПРЕЦЕДЕНТНОГО ПРАВА В АНГЛИИ: СРАВНИТЕЛЬНО-ПРАВОВОЕ И ИСТОРИЧЕСКОЕ ИССЛЕДОВАНИЕ

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АННОТАЦИЯ

Сравнительно-правовое и историческое исследование системы общего прецедентного права в Англии особое внимание уделяет опыту применения судебного прецедента как одного из основных и первых источников права в истории права Англии. В статье исследуется развитие доктрины судебного прецедента в Англии, рассматриваются соответствующие правовые нормы принятия и применения судебных прецедентов. Автор описывает природу англосаксонского права, уделяя особое внимание судебному прецеденту. Даная статья способствует специалистам в области права из Украины и Молдовы в понимании отличия правовой методологии англосаксонского подхода.

Ключевые слова: судебный прецедент, прецедентное право, Англия и Уэльс, сравнительное правоведение, история права.

REZUMAT

Un studiu juridic şi istoric comparativ al sistemului de jurisprudenţă generală din Anglia acordă o atenţie deosebită experienţei de aplicare a precedentului judiciar ca una dintre principalele şi primele surse de drept în istoria dreptului din Anglia. Articolul explorează evoluţia doctrinei precedentului judiciar în Anglia, examinează normele juridice relevante pentru adoptarea şi aplicarea precedentelor judiciare. Autorul descrie natura dreptului anglo-saxon, acordând o atenţie deosebită precedentului judiciar. Acest articol promovează experţi juridici din Ucraina şi Moldova în înţelegerea diferenţei dintre metodologia juridică a abordării anglo-saxone.

Cuvinte cheie: precedent judiciar, jurisprudenţă, Anglia şi Ţara Galilor, drept comparat, istorie de drept.

Introduction. The United Kingdom (the UK) has three separate legal systems: England and Wales, Scotland and Northern Ireland. England and Wales have one legal system. When we refer to the English law, we are usually referring to the law of England and Wales. English law has increasingly becoming a law of choice for international contracts with parties from Ukraine and Moldova. England offers a flexible legal system with predictability of outcome, legal certainty and fairness. English law has developed from a combination of legislation or statute law, case law also well known as the common law and European Union law. Unlike civil law tradition of Ukraine and Moldova, common law system has its roots in the decisions of judges adjudicating in individual cases. Historically the first sources of law were custom and the decisions of judges. This article deals primarily with the judge-made law based on the underlying system of precedent in England and Wales.

Purpose of the article is to outline the doctrine of judicial precedent and its importance in the common law of England, explain the difference between *ratio decidendi* and *obiter dicta* and clarify rules of application of precedents for legal professionals from Ukraine and Moldova.

Methods and materials used in the research. This article uses method of legal analysis of relevant English case law, textbooks on the English legal system and legal guide OSCOLA.

Most recently the Supreme Court of the United Kingdom summarized the doctrine of judicial precedent, its development and relevant case law in *Willers v Gubay* [2016] UKSC 44; [2016] 3 W.L.R. 534. The Supreme Court held that the doctrine of precedent was fundamental to the coherence, clarity and predictability of the common law system by providing a centralised hierarchical approach with regard to decisions of the

courts of England and Wales [1]. In the below we provide extensive quotation from the *Willers v Gubay* case.

In the 18th century, a famous judge and legal commentator, Sir William Blackstone, explained the source of English common law as follows: "The Common Law is to be found in the records of our several courts of justice in books of reports and judicial decisions, and in treatises of learned sages of the profession, prescribed and handed down to us from the times of ancient antiquity. They are the laws which gave rise and origin to that collection of maxims and customs which is now known by the name of common law" [2, p. 15].

Modern definition of the common law is the body of legal rules that have evolved through court cases based on the doctrine of judicial precedent. For instance, the main rules that govern the formation of contracts have developed through decided case law. However, law making by reliance on precedent is an unplanned process dependent on what issues will end up in the litigation process. The framework is hierarchical in that lower courts are bound to follow the decisions of higher courts within the UK court system. Courts are usually bound to follow the decisions of courts, which are above them in the court hierarchy. If the precedent was set by a court of equal or higher status to the court deciding the new case, then the judge in the present case should follow the rule of law established in the earlier case. Where the precedent is from a lower court in the hierarchy, the judge in the new case may not follow it. The term common law may also be used to describe those legal systems that developed from the English system.

The body of court decisions that comprises the English common law has developed over many years, dating back to its origins in the 12th century. Modern development of the English common law began at the time of William the Conqueror who invaded England in 1066. Before the Norman Conquest of England in 1066, there was no unitary, national legal system. The English legal system involved a mass of oral customary rules, which varied according to region. Each county or shire had its own local court dispensing its own justice in accordance with local customs. William, as King of England, laid the foundations of the legal system [2, p. 21].

Historically the common law was developed to produce a uniform system throughout the country rather than legal disputes being resolved according to local custom. The common law developed in a formalised and technical way. It was rigid in its application – a failure to follow formalities absolutely and precisely would result in the case being lost. The only remedy the common law could offer was damages i.e. monetary compensation.

By the 15th century the procedures of the common law courts had become slow, expensive and very technical. Despite the development of common law courts between the 12th and 15th centuries, the King himself continued to be a source of English law. Those seeking justice could apply directly to the King. Most of these cases were dealt with by the King's Chancellor. His decisions were based on the principles of natural justice and fairness. To do this new procedures and remedies were developed – the rules of equity. The word equity means fair or just in its wider sense, but its legal meaning refers to legal rules that were developed by the courts to overcome some of the inflexibility of the rules and procedures of common law courts [2, p. 22].

Equity was not a complete system of law but it did fill gaps in the common law and provide relief where the common law could not. Certain maxims have to be applied before the court can use its discretion to apply equitable rules. One who comes to equity must have clean hands – in other words if you are in some way in the wrong you will not be granted an equitable remedy. One who seeks equity must do equity – in other words you must be willing to act fairly with the other side. Delay defeats equity – the unreasonableness of the delay is a question of fact in each case.

The two systems of equity and the common law operated separately and this led to conflict between them. Ultimately it was decided that in these circumstances equity should prevail. Today there is no separate system of equity but those rights, interests and remedies are of fundamental importance in the law. Case law incorporates decisions made by judges under both historic legal systems and the expression common law is often used to describe all case law whatever its historic origin [2, p. 22].

The Oxford University Standard for Citation of Legal Authorities (OSCOLA) provides that when citing cases, give the name of the case, the neutral citation (if appropriate), and volume and first page of the relevant law report, and where necessary the court [3, p. 3]. The components of a typical case citation including a neutral citation are: case name | [year] | court | number, | [year] OR (year) | volume | report abbreviation | first page [3, p. 13]. In this article we extensively refer to *Willers v Gubay* [2016] UKSC 44; [2016] 3 W.L.R. 534 [1]. *Willers v Gubay* was the forty-forth judgment issued by the Supreme Court in 2016. Report of the judgment can be found in volume three of the 2016 volume of the series of the Law Reports called the Weekly Law Reports, beginning at page 534.

In 2001 the House of Lords, Privy Council, Court of Appeal and Administrative Court began issuing judgments with a neutral citation which identified the judgment independently of any report. This practice was extended to all divisions of the High Court in 2002, and later to tribunals and commissions. Transcripts of judgments with neutral citations are generally freely available on the British and Irish Legal Information Institute website (www.bailii.org). The cases are numbered consecutively throughout the year. All cases with neutral citations have numbered paragraphs [3, p. 16].

A law report is a published report of a judgment, with additional features such as a headnote summarising the facts of the case and the judgment, catchwords used for indexing, and lists of cases considered. In England and Wales, there are no official law reports of any kind, but the Law Reports series published by the Incorporated Council of Law Reporting (www.lawreports.co.uk) are regarded as the most authoritative reports. Different series of the Law Reports cover judgments of the House of Lords/Supreme Court and Privy Council (Appeal Cases), the Chancery Division, the Family Division, the Queen's Bench Division and so on. These reports include the arguments of counsel and are checked by both counsel and the judge [3, p. 17].

The doctrine of judicial precedent is fundamental to the operation of common

law. In practice it means that a judge deciding a particular case will look for a precedent – a decision in an earlier similar case – to help them reach their decision in the case before them. The doctrine of precedent is expressed in the maxim *stare decisis*, which means to stand by a decision. In any later case to which a legal principle is relevant the same principle should (subject to certain exceptions) be applied. A precedent is a previous court decision which another court is bound to follow by deciding a subsequent case in the same way [4, p. 19]. Indeed, in civil law jurisdictions like Ukraine and Moldova there are non-binding precedents, sometimes referred to as the practice of judicial consistency, according to which the courts should not significantly vary their approach to similar legal questions.

In a common law system, where the law is in some areas made, and the law is in virtually all areas developed, by judges, the doctrine of precedent, or as it is sometimes known *stare decisis*, is fundamental. Decisions on points of law by more senior courts have to be accepted by more junior courts. Otherwise, the law becomes anarchic, and it loses coherence clarity and predictability. Cross and Harris in their instructive Precedent in English Law 4th Ed. (1991), p. 11, rightly refer to the "highly centralised nature of the hierarchy" of the courts of England and Wales, and the doctrine of precedent is a natural and necessary ingredient, or consequence, of that hierarchy [1, para. 4].

It is important to be aware of which part of the decision of a previous case is to be regarded as binding. A judgment can be divided into its component parts: *ratio decidendi and obiter dicta. Ratio decidendi* means literally the reason for deciding. The *ratio decidendi* is that part of a previously decided case which later judges regard as binding on them, because it embodies the legal rule which justifies a particular decision. *Obiter dicta* are statements in a judgement which are said by the way. They are not binding on future cases but merely persuasive. Although *obiter dict*a do not form part of the binding precedent, they can be taken into consideration in later cases if the judge in the later case considers it appropriate to do so [5, p. 38].

The division of cases into these two distinct parts is a theoretical procedure. Unfortunately, judges do not actually separate their judgments into the two clearly defined categories, and it is for the person reading the case to determine what the *ratio decidendi* is. In some cases, this is no easy matter, and it may be made even more difficult in appellate cases where each of the judges may deliver their own lengthy judgments with no clear single *ratio decidendi* [6, p. 153].

There are numerous perceived advantages of the doctrine of *stare decisis*, among which are the following: consistency, certainty, efficiency and flexibility. Consistency refers to the fact that like cases are decided on a like basis and are not apparently subject to the whim of the individual judge deciding the case in question. This aspect of formal justice is important in justifying the decisions taken in particular cases [6, p. 153].

Certainty follows from, and indeed is presupposed by, the previous item. Lawyers and their clients are able to predict what the outcome of a particular legal question is likely to be in the light of previous judicial decisions. Also, once the legal rule has been established in one case, individuals can orientate their behaviour with regard to that rule, relatively secure in the knowledge that it will not be changed by some later court [6, p. 153].

Efficiency refers to the fact that it saves the time of the judiciary, lawyers and their clients for the reason that cases do not have to be reargued. In respect of potential litigants, it saves them money in court expenses because they can apply to their solicitor/barrister for guidance as to how their particular case is likely to be decided in the light of previous cases on the same or similar points [6, p. 154].

Flexibility refers to the fact that the various mechanisms by means of which the judges can manipulate the common law provide them with an opportunity to develop law in particular areas without waiting for Parliament to enact legislation. In practice, flexibility is achieved through the possibility of previous decisions being either overruled or distinguished, or the possibility of a later court extending or modifying the effective ambit of a precedent [6, p. 154].

English courts must follow the precedent. This means they consider the facts of the case to be sufficiently similar to those in an existing case to apply that precedent and decide the instant case in the same way. The court may distinguish a case. This means that the court considers that the facts of the case before them to have some significant difference to those in the case which is being offered as precedent. This justifies a different outcome. A case can lose its binding force by reversal and overruling. A previous decision may be overruled in a different case by a higher court. This is not regarded as changing the law so much as correcting previous misconceptions to the meaning of the law or its application. Where a decision is of a lower court is reversed, on appeal, by a higher court this is simply the higher court finding for the other party. Careful reasoning will usually be given for this decision and it will be the decision of the higher court which stands and constitutes future precedent [2, p. 49].

Not every decision made in every court is binding as a judicial precedent. The court's status has a significant effect on whether its decisions are binding, persuasive or disregarded. The courts in the English legal system are in a hierarchical relationship. Courts are organised on the basis of seniority. The more senior the court in the hierarchy, the greater will be the authority of the decisions of the court. So the decisions of the Supreme Court (formerly the House of Lords) are the most important and authoritative decisions of all the courts. The Court of Appeal and High Court are also authoritative.

The courts and tribunals at the lower end of the hierarchy deal with the vast mass of civil disputes and criminal cases (what are known as inferior or subordinate courts and tribunals); while the courts at the top of the hierarchy hear a small number of the most important cases on appeal in order to ensure that the decision of the trial court was correct and to clarify points of law (superior courts). The judges who sit in the superior courts are the most senior and distinguished members of the judiciary. Superior courts have unlimited jurisdiction so can hear cases of any value or legal complexity. Inferior courts have a limited jurisdiction. The Court of Appeal, High Court and Crown Courts are now known as the senior courts [2, p. 38].

The Supreme Court is the final court of appeal in the UK. The UK Supreme Court was established by Part 3 of the Constitutional Reform Act 2005 and officially came into being on 1 October 2009. It replaced the Appellate Committee of the House of Lords (referred to simply as

the House of Lords) in its judicial capacity and assumed the jurisdiction of the House of Lords. The decisions of the Supreme Court are binding on all other courts in the legal system, except the Supreme Court itself. The Privy Council is the final appellate court for the British Overseas Territories, the Channel Islands, the Isle of Man and a number of Commonwealth countries. The judges of the Supreme Court sit in the Privy Council. It is based in the new buildings of the Supreme Court but remains a separate entity [2, p. 39].

The doctrine is, of course, seen in its simplest and most familiar form when applied to the hierarchy of courts. On issues of law, (i) Circuit Judges are bound by decisions of High Court Judges, the Court of Appeal and the Supreme Court, (ii) High Court Judges are bound by decisions of the Court of Appeal and the Supreme Court, and (iii) the Court of Appeal is bound by decisions of the Supreme Court. (The rule that a Circuit Judge is bound by a decision of a High Court Judge is most clear from a "Note" included at the end of the judgment in *Howard De Walden Estates Ltd v Aggio* [2008] Ch 26) [1, para.5].

Until 50 years ago, the House of Lords used to be bound by its previous decisions – see e.g. *London Tramways Co Ltd v London County Council* [1898] AC 375. However, that changed in 1966 following the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234, which emphasised that, while the Law Lords would regard their earlier decisions as "normally binding", they would depart from them "when it appears right to do so". The importance of consistency in the law was emphasised by Lord Wilberforce in *Fitzleet Estates Ltd v Cherry* [1977] 1 WLR 1345, 1349, when he explained that the Practice Statement should not be invoked to depart from an earlier decision, merely because a subsequent committee of Law Lords take a different view of the law: there has to be something more. Having said that, the Practice Statement has been invoked on a number of occasions in the past half-century, most recently in *Knauer v Ministry of Justice* [2016] 2 WLR 672, where, at paras 21-23 it was emphasised that, because of the importance of the role of precedent and the need for certainty and consistency in the law, the Supreme Court "should be very circumspect before accepting an invitation to invoke the 1966 Practice Statement" [1, para.7].

The Court of Appeal is bound by its own previous decisions, subject to limited exceptions. The principles were set out by the Court of Appeal in a well-known passage (which was approved by the House of Lords in Davis v Johnson [1979] AC 264) *in Young v Bristol Aeroplane Co Ltd* [1944] KB 718, 729-730: "[The Court of Appeal] is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule … are … (1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam" [1, para.8].

The decisions of the Judicial Committee of the Privy Council could not be binding on any judge of England and Wales or override any decision of a court in England and Wales; but that given the identity of the Privy Councillors who sat in the Judicial Committee and that they applied the common law, any Judicial Committee decision on a common law issue was to be regarded as being of great weight and persuasive value; that, unless there were a decision of a superior court to contrary effect, a court in England and Wales could normally be expected, but was not bound as a matter of precedent, to follow a Judicial Committee decision [1].

Conclusion. As follow from this research, the operation of judicial precedent as a source of law is a distinctive feature of the common law tradition. One of the most important justifications for following precedents is the idea of doing justice. Consistency is an essential element in doing justice, in the sense that similar cases coming before the courts for determination should be treated in a similar way. Binding force of judicial precedent depends on the relationship between the court in which the original decision was made and the case in which the precedent is to be applied. Adherence to the doctrine of precedent also ensures that the law is sufficiently flexible to deal with novel situations and to ensure justice in each particular case. Accordingly, the doctrine of binding precedent operates to control and indeed limit the ambit of judicial discretion.

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