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TYPES AND SYSTEM OF FOREIGN CIVIL PROCEDURE LAW SOURCES: COMPARATIVE LEGAL ANALYSIS

Summary. The research paper is devoted to the comparative legal analysis of existing sources of civil procedure law of foreign countries. The author describes individual sources of civil procedure law applied in the countries of both Romano-Germanic and Anglo-Saxon legal families, namely: legal acts, court practice, court precedent, legal principles and legal doctrine. The author's classification of sources of civil procedure law of foreign countries is proposed. The author carries out a comparative analysis of sources of civil procedure law of foreign countries and Ukraine and makes his own conclusion about their importance to the science of civil procedure law.

Keywords: legal act, court practice, court precedent, legal doctrine, legal principles, civil procedure law.

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ВИДИ ТА СИСТЕМА ДЖЕРЕЛ ЦИВІЛЬНОГО ПРОЦЕСУАЛЬНОГО ПРАВА ЗАРУБІЖНИХ КРАЇН: ПОРІВНЯЛЬНО-ПРАВОВИЙ АНАЛІЗ

Анотація. У статті проводиться порівняльно-правовий аналіз джерел цивільного процесуального права зарубіжних країн. Автором дається опис окремих джерел цивільного процесуального права, що застосовуються в країнах як романо-германської, так і англо-саксонської правової сім'ї, а саме: нормативно-правових актів, судової практики, судового прецеденту, принципів права і правової доктрини. Пропонується авторська класифікація джерел цивільного процесуального права зарубіжних країн. Автором проводиться порівняльний аналіз джерел цивільного процесуального права зарубіжних країн та України і робиться свій власний висновок про їхнє значення для науки цивільного процесуального права. У статті автор акцентує увагу на тому що, цивільний процесуальний кодекс є основним джерелом норм цивільного процесуального права в країнах романо-германської правової сім'ї, оскільки містить норми, що визначають завдання та принципи цивільного процесу, положення загальної частини статичного характеру, а також розгорнуті процесуальні регламенти, відображають динаміку діяльності суду та інших учас ників судочинства. Автор також зазначає, що у країнах романо-германського права історично склалися вельми суперечливі традиції, що дозволяють в одних країнах досить широко використовувати прецедент як джерело права поряд з іншими джерелами права, а в інших – навпаки, забороняють його застосування. Також заслуговує уваги аналіз автора пострадянських джерел цивільного процесуального права. Автор також зазначає, що на відміну від континентального і англо-американського права доктрина відіграє дуже важливу роль в якості джерел права в правових системах релігійного і традиційного типу, в тому числі і в правозастосовчій діяльності при здійсненні правосуддя. У висновках автор узагальнює систему джерел цивільного процесуального права зарубіжних країн так наголошує на тому, що єдиної класифікації джерел цивільного процесуального права зарубіжних країн не існує, тому можна використовувати класифікацію джерел права, яка запропонована в загальній теорії права.

Ключові слова: нормативно-правовий акт, судова практика, судовий прецедент, правова доктрина, принцип права, цивільне процесуальне право.

Setting the problem. Recent years have seen a significant increase in comparative legal research in various fields of legal science. Comparative legal analysis allows to show the originality of separate branches of law, their institutions, norms in different legal systems, to compare these branches of law with similar branches of law in other legal systems and to reveal national differences. Therefore, the practical importance of legal comparativism is to study and summarize both positive and negative real legal experience of foreign countries.

Analysis of recent scientific research and publications. As the analysis of scientific legal literature shows, the greatest interest among researchers are the issues of organization and functioning of judicial systems of foreign countries, the status of judges, prosecutors, lawyers and other participants in the process. Another picture with scientific research in the field of certain institutions of civil proceedings (jurisdiction, jurisdiction, evidence, etc.), which are considered at best in the aspect of specific states, the list of which is not numerous (Germany, France, Great Britain, USA). It also turns out that there are no scientific works devoted to the problems of sources of civil proceedings, in particular their comparative legal analysis. One of the reasons for this situation is related to the limited possibility to get acquainted with the procedural legislation of certain foreign countries.

Identification of previously unresolved parts of the overall problem. This topic was not the subject of a separate scientific study, but was considered only in the context of general ones, which significantly affects the increased scientific interest in this issue.

The aim of the research paper is to form a system of sources of civil proceedings of foreign countries on the basis of analysis of their current legislation.

Setting out the basic material. Sources of civil procedure law are forms of establishment and expression of mysterious or specific rules of conduct adopted or authorized by law-making bodies of the state regulating public relations, which are the subject of civil procedure law.

The main sources (form) of law in modern European legal systems are state legal acts. A legal act is an act of law-making by competent state bodies, which establishes, changes or cancels legal norms. A normative act is adopted by a competent body in a certain procedural way. It is an official document containing legal norms, i.e. a carrier of information on legal norms, a legal source of law.

Normative acts have different names, they differ from each other in legal force, by the subjects of the publication and the like.

The fundamental principles of the judicial organization and procedure usually contain constitutional acts.

The constitutions mainly reflect the definition of the judiciary, the principles of justice, the procedure for the formation of the judiciary and the status of judges, the independence of the judiciary, guarantees for the independence of judges, and the right of citizens to judicial protection. The structure of the country's judicial system and the list of courts that make up it are not always enshrined in the Constitution or covered in general terms. At the same time, the constitutions may be detailed for all the courts that make up the judicial system and the principles of the organization of the judiciary when administrative or judicial reform takes place in such a State and the vision for the future organization of the country's judiciary, achieved through political compromise or other factors, is enshrined at the constitutional level [1, p. 183].

For example, the Constitution of Egypt 2014 contains the most important provisions on judicial proceedings and the judicial system in the section "The judiciary", in particular: the judiciary is independent. It belongs to the courts of various types and levels that adjudicate sentences under the law. Their powers are determined by law. Interference in court cases or court proceedings is an offence that has no limitation period (art. 184); judges are independent, cannot be removed from office, are subject only to the law and are equal in rights and duties (art. 186); court sessions are held in public, except when, in order to maintain public order and morals, the court is confidential (art. 187).

Separate sections of the Egyptian Constitution dealing with the legal status of the Bar (section 5) and judicial assistants: forensic experts, forensic medical experts and public notaries (section 7). As a rule, the judicial system is governed by separate laws on the judiciary. Thus, they may be:

1) uniform acts defining the status of all the judicial authorities of the State, such as the French Code of the Judiciary of 1978.

The legislation of Hong Kong, where all laws of the country are gathered in a single Code of Laws of Hong Kong, is characterized by its peculiarity, and each normative act has a section in the Code of Laws. The laws on courts include: Hong Kong Court of Final Appeal Ordinance 1997 (Cap. 484); High Court Order 1997 (Cap. 4); District Court Ordinance 2013 (Cap. 336) (4) Magistrates Ordinance 1997 (Cap. 227).

2) different laws, each of which is dedicated to a particular judicial system, such as courts of law or labour courts (Germany);

3) various acts, each focusing on a different judicial system, such as the Supreme Court Act or local courts (United Kingdom);

4) civil procedure codes (in continental legal systems);

5) rules of court proceedings (USA), which by their legal nature are the result of the delegation of legislation [2, p. 48].

The Code of Civil Procedure is the main source of the rules of civil procedure in the countries of the Romano-Germanic legal family, as it contains rules defining the tasks and principles of civil procedure, provisions of the general part of the static nature, as well as detailed procedural regulations reflecting the dynamics of the court and other parts of the proceedings.

For example, the French Code of Civil Procedure, which consists of five books, regulates proceedings in private law cases, including cases before special courts. In addition, the sources of French civil procedure law include the 1991 Law on Legal Aid to the Poor, the 1990 Law Reforming Certain Judicial and Legal Professions, the 1971 Law on Judicial Experts and a number of decrees regulating the fees and tariffs collected by bailiffs, clerks and notaries.

The German Code of Civil Procedure, consisting of 10 books, is also supplemented by other laws that are sources of civil procedure law. The situation is similar in most other states, e.g., the CPC of Latvia and the Law of Latvia "On the Judicial System" of 15 December 1992, the CPC of Lithuania and the Law of Lithuania "On the Judicial System" of 31 May 1994, the CPC of the Netherlands 1838 and the Law of the Netherlands "On the Composition of Courts and Organization of the Judicial System" of 18 April 1827, etc.

In common law countries, the law is also the law. In the USA, for example, the specificity of sources of civil proceedings is connected with the federal structure of the country. Federal sources, in particular, include the U.S. Code of Laws, where Section 28, "Ship Management and Legal Proceedings", contains the rules of ship management and the most important provisions of legal proceedings. This section is divided into six parts: the judicial system, the Department of Justice, court officials and officers, jurisdiction and jurisdiction, process, and specific procedures.

Federal Civil Procedure Rules for United States District Courts 1937 is, so to speak, the procedural code that governs civil cases in federal first instance courts. Sample court documents are an official annex to the rules.

Other federal courts have their own rules of procedure, such as the 1967 Federal Rules of Appeals, the 1989 Supreme Court Rules of Procedure, and the 1992 U.S. Federal Court Rules of Procedure for Federal Claims.

The system of state law sources is generally similar to that of federal law sources.

In England, USA, as well as in all other countries, the legal system of which was created on the basis of Anglo-Saxon common law, the sources of civil procedure law include the delegated legislation, which is a set of rules, orders, regulations, by-laws of the bodies to which the Parliament has delegated special powers to issue these acts.

A form of delegated legislation is the judicial rules adopted by judicial rule committees to establish procedures in various courts under the Supreme Court Act 1981, the County Courts Act 1984, the Magistrates Courts Act 1980.

In Hong Kong, Malaysia, the Philippines, Singapore the civil procedure codes are by-laws, rules of procedure that are created and approved by the highest courts of the country. In Hong Kong, for example, these are: the Rules of the Court of Appeal of last resort of Hong Kong 1997; the High Court Rules 1997; the District Court Rules 2000. In Malaysia: the Magistrates Courts Rules and Forms 1997; the Malaysian Courts Rules 2012 (the Rules of Courts 2012); the Federal Court Rules 1995 (the Rules of the Federal Court of Justice 1995) and the Magistrates Courts Rules and Forms 1997 (the Rules of the Federal Court).

The advantage of delegated legislation is that it allows for the rapid adoption, amendment and approval of regulations, usually without submission to parliament. The drawback is that it takes part of the legislative process beyond the direct control of democratically elected representatives of the people and puts it in the hands of government officials [3, p. 169].

The source of civil proceedings is an international agreement (treaty) between subjects of international law on establishing principles and norms in the sphere of civil proceedings, which is binding for the contracting states.

Examples of such agreements include the Hague Convention on Civil Procedure (1954), the Hague Agreement (1958) on the Recognition and Enforcement of Decisions on Maintenance Obligations, the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (1970), and international treaties on special matters – a variety of bilateral and multilateral legal assistance agreements.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) occupies a special place among international agreements.

In contrast to the countries of the Romano-Germanic legal family, where the main source of law is the enacted law, in the countries of the Anglo-Saxon legal family the main source of law is the rule formulated by the judges and expressed in court cases.

Judicial precedent is a principle on the basis of which a decision in a particular case is made, which is binding on the court of the same or lower instance in all similar cases in the future or serves as a model of interpretation of the law [4, p. 183]. The essence of the doctrine of judicial precedent is that lower courts are obliged to use decisions of higher courts in the consideration of cases, made in similar cases. In doing so, they do not use all decisions, but only the part called racio decidendi. It is this part of the decision that is the legal norm and judicial precedent [5, p. 10; 6, p. 15].

The English system of precedents has a hierarchy: in particular, two types of precedents are distinguished: binding (created by decisions of higher courts, binding on all lower courts, which should be guided by such precedents in their own decisions); persuasive (they cannot be an explicit reference to all lower courts, but where possible they should be taken into account to ensure uniformity of law enforcement practice throughout the system).

Thus, traditionally in the legal system of Great Britain precedent is considered, "on the one hand, as an act on which earlier decisions made by the highest judicial instances of the state had the character" of legal provisions "and serve as a legal basis for its formation and functioning, and on the other hand – as an act that provided a "binding" action on all subsequent decisions, relate to it".

In the Australian legal system, case law is also an important source of law, but attention is drawn to the fact that what constitutes "customary law" is "not only and not so much the decision in a particular case as the principles on which those decisions are made".

Australia's legal doctrine highlights these types of precedents: binding, i.e. court decisions of courts that exist within the same judicial hierarchy and are binding on lower courts; and declaratory precedents are decisions that are consistent with established jurisprudence and that build on existing precedents; create a new rule (original or first impression), i.e. court decisions which are made on matters for which there is no case law; persuasive precedents include, inter alia, decisions of lower courts, foreign courts; precedent sub silentio precedents are matters which have not been raised directly in court, but which are decided by those present in the court decision [7, p. 14].

In the countries of Romano-Germanic law, historically there have been very contradictory traditions that allow for the widespread use of precedent as a source of law in some countries, while in others it is prohibited.

The situation in which the precedent is the result of the legal activity of the courts is not legislated and enforced, i.e. it is not formally recognized, but actually exists and is applied, is practiced in Italy, Norway, Finland, Sweden, the Netherlands and other Romano-Germanic law.

In recent years, there has been a trend towards the influence of case law in continental countries as well. Thus, in Turkey the rulings of higher courts can be a source of law if they concern relations not regulated by law [8, pp. 13–14].

Thus, in the countries of the continental legal family, there is a departure from the principle of recognizing the instrument as the sole source of law because the changes made to the legal system when adopting laws do not always keep pace with the rapid development of legal reality, and the case law (but not the jurisprudence as a whole) is a flexible mechanism for filling such gaps; it also serves as a basic tool for interpreting laws in order to avoid unduly compartmentalized social relations.

It should be noted that case law is an hour of judicial practice, but not the whole of judicial practice, so that judicial practice may have a separate place among sources of civil procedure rights.

Judicial practice is the purposeful activity of subjects of judicial system of the state on realization of justice and the result formed on its basis in the form of legal prescriptions (legal positions) which catch up, supplement or replace in connection with defectivity

(presence of gaps) of norms regulating public relations in consideration of concrete categories of cases.

In the question of jurisprudence as a source of Romano-Germanic law, the position of the doctrine is very controversial. In spite of this, it can be concluded that the jurisprudence can be classified as auxiliary sources of procedural law.

Case law has played an important role in the development of French law, and modern legislative practice has paved the way even further for law-making in the form of individual and general rules. The judge, although not obliged to strictly follow existing practice and to a certain extent freedom of decision, is still strongly influenced by the authority of previous court decisions.

In post-Soviet countries, decisions of plenums of the highest judicial bodies, which have a recommendatory character, are actively used.

The system of sources of civil procedure law should also include general principles of law, understood as a provision (rules) of objective law, which may or may not be embodied in the law, but are necessarily applied in the jurisprudence and are quite general in nature.

In a number of States of the Romano-Germanic legal family, the general principles of law are explicitly enshrined in law as a source of law. For example, the right to deal with general principles of law in case of gaps in legislation is attributed to judges in the civil codes of Austria, Egypt, Greece, Italy, Spain and Italy [9, p. 174].

There is a tendency in European law to expand the scope of application of legal principles. It is explained by the fact that in France, for example, general principles of law are now regarded as a higher law, a kind of analogue of natural law. A similar approach is taken in Germany, where super-positive justice is the basis for solving a case not only in case of gaps, but also in cases where literal interpretation of the law leads to an unacceptable decision, for example, goes against the intention of the legislator [10, p. 278].

Legal doctrine is usually seen as a system of ideas and views of legal scholars, comments on individual laws and the like. In the source system of both Romano-Germanic and Anglo-American law, it is not recognized as a source of civil procedure law in the formal legal sense, but is considered an informal authoritative source, which has a significant impact on the law.

It is the doctrine that synthesizes the law, criticizes it, identifies gaps in the law, and contributes in various ways to the development of legislation. It is often stressed, however, that doctrine cannot generate rules of law, but can only lead to their existence. In any case, doctrine does not refer to primary sources of law, but to secondary sources of law [11, p. 105].

Unlike continental and Anglo-American law, the doctrine plays a very important role as a source of law in religious and traditional legal systems, including in law enforcement in the administration of justice.

Conclusions. Deepening contacts between states, taking into account new social conditions and needs, as well as taking into account the concepts of modern procedural legislation of foreign countries allows us to simulate a common system of sources of civil procedural law, which consists of legal acts, court practice, court precedent, general principles of law and court doctrine. There is no unified classification of sources of civil procedural law of foreign countries, so it is possible to use the classification of sources of civil procedural law of foreign countries.

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