

Aspects Concerning Judicial Precedent in Republic of Moldova's Legal System

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Abstract:

Although Republic of Moldova has a roman-Germanic legal system judicial precedent is included among the sources of law, even if the doctrine still disputes this aspect. There are actually domains where judicial precedent's use as a source of law is doubtless, while there are others where the opposite happens.

Keywords: *judicial precedent, legal system, source of law.*

Republic of Moldova's legal doctrine doesn't have a clear character regarding acknowledging judicial precedent as a source of law [1]. Still, judicial reality proves that the precedent is a source of law even if its position can't be compared to the one of the law within the sources of law system.

The notion of “judicial precedent” comprises a very precise sphere, specific to the functioning mode of common law's system. This notion is connected to the evolution of the English law, to its deductive approach (starting from facts) – compared to the inductive approach from the continental Europe. [2].

The role of jurisprudence is to interpret and enforce the law for specific cases. Thus, judge's activity is governed by two big principles: he always gives a solution for the particular case and has no right to set general dispositions beside it; the second principle involves the fact that a judge is not generally bound by a decision in a similar case sentenced by another judge or even by his own decisions [3].

It is to be noticed that there is currently an increased integration of the practices concerning judicial precedent from the Anglo-Saxon system of law in

carrying out justice according to continental system of law. The practice of examining the cases and sentencing by European Court of Human Rights proves this ascertainment. Judicial precedent's use is at an early stage in Republic of Moldova, the stage involving debates and questions. It is important to move on towards regarding judicial precedent as a source of law. Globalization and Europeanization are two processes undoubtedly leading to the closeness of the law institutions belonging to the continental system of law and the Anglo-Saxon one, by increasing the role of the judicial precedent. These two above-mentioned phenomena have no strict domains to produce their effects upon, leaving others unaffected [4].

Adopting the new Constitution of Republic of Moldova in 1994, July 29th signified the first step in bringing closer the national and the international and in acknowledging judicial precedent as a source of law.

As a legal base in acknowledging judicial precedent as a source of national law we can mention: article 120 of the Republic of Moldova Constitution, "Mandatory character of sentences and other final rulings"; Parliament's decision no. 582 dated July 19th 1997 about adopting the Strategy of consolidation the judicial system and the plan of actions to implement this strategy, revealing the necessity of unifying jurisprudence; Constitutional Court's decision [5] no. 55 dated 1999, October 14th regarding interpretation of the stipulations of article 4 in Moldova's Constitution, establishing "the principles and the stipulations unanimously recognized of the international law....become internal law norms"; the elaborated and adopted Codes of Republic of Moldova; the European system of protection of the human's fundamental rights and freedoms, based both on the concept of the continental system of law – The European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as on the Anglo-Saxon concept – The European Court of Human Rights' jurisprudence [6].

Article 1 of the Constitution stipulates that Republic of Moldova is a state governed by the rule of law, such obliging the legislator to adopt laws and the Constitutional Court to delimit the legal system and the constitutional equity from

the law, guaranteeing the supremacy of constitutional freedoms and rights and preventing the adoption of acts that would contravene the principles of law. The Constitutional Court's decision, if an act is found to be unconstitutional, has a general character and is compulsory for all subjects of law, courts being forced to follow it when dealing with civil, criminal or administrative cases.

International treaties signed by Moldova are acknowledged and have priority, article 8 of the Constitution stipulating that: "The Republic of Moldova pledges to observe the Charter of the United Nations Organization and the treaties to which it is a party, to institute relationships with other states on the basis of unanimously recognized principles and norms of the international law. The coming into force of an international treaty containing provisions contrary to the Constitution shall be preceded by a revision of the latter." This is why D. Pulbere alleges that the Republic of Moldova acknowledges judicial precedent as a source of internal law [7].

The constitutional precedent may be consolidated as a source of internal law considering the stipulations of article 16 of the Constitution, consecrating the principle of equality before the law for all the citizens. This implies for each case sentenced by a court to follow the same rules. So, the Constitution indirectly acknowledges the judicial precedent.

The Parliament's decision number 174 July 19th 2007 [8] approving the Strategy to consolidate the judicial system and the plan of actions to implement it establishes the necessity to unify jurisprudence. Point 3.2 of this Strategy alleges that unifying the jurisprudence is requested by the deficiencies of the judicial system with direct impact on the act of justice and credibility in it, unequal jurisprudence as well as non unitary enforcement of the law.

In order to remedy this situation and to ensure the security of the legal relations according to the jurisprudence of the European Court for Human Rights, it is compulsory to apply the existing procedural mechanisms and to facilitate the judges' access to the international law courts' jurisprudence. In other words, the decision determines the unification of the jurisprudence, mentioning that it is

uneven and it is applied non- unitarily. In order to remedy this situation and to ensure the security of the legal relations, courts are obliged to follow ECHR jurisprudence in similar cases.

In order to sustain the acknowledgement of national jurisprudence as a judicial precedent [9] we mention also the actions to intensify the jurisprudence, selection of the relevant decisions from different branches of law pronounced by the Supreme Court of Justice and publishing them on the Supreme Court of Justice's web page as well as elaborating bulletins of European Court of Human Rights' jurisprudence.

The Constitutional Court's decision concerning "interpreting some stipulations of article 4 of Republic of Moldova's Constitution" number 55 from October 14th 1999 [10] stipulates that "principles and norms unanimously recognized of international law, international treaties ratified by the Republic of Moldova are part of the legal frame of the Republic of Moldova and become norms of its internal law".

In the descriptive part of the same decision, the Constitutional Court revealed that "according to theory and practice of the international law, the principles and norms unanimously recognized by the international law are the principles and norms consecrated of the international law with a general and universal character. The norms and principles unanimously recognized by the international law should be enforced by the Republic of Moldova to the extent of its expressing the consent to be bound by those international acts. Meanwhile, the constitutional stipulations concerning rights and freedoms can't be interpreted and enforced without admitting these principles. International treaties are also a part of the legal frame of the Republic of Moldova, besides the principles and norms unanimously recognized by the international law."

The Plenum of the Supreme Court of Justice of the Republic of Moldova, admitting the status of an internal source of law of the Convention for Protection of Human Rights and Fundamental Freedoms, explained in Decision number 17 from June 19th 2000: „*The Convention is a part of internal legal system and it*

should be enforced as any other law of the Republic of Moldova, with the difference that ECHR should be the priority in case of contravening domestic laws.”

One example is case Olaru and others against Moldova from 2009, when the Court, as a result of a prolonged non-execution of courts' decisions and the absence of a remedy, issued the pilot decision from July 28th 2009, followed by the passing of the law 87/ 21.04.2011 concerning rectifying the prejudice caused by violation of the right to trial within a reasonable time of the case or the right to execute a court decision within a reasonable time, which targeted creating in the Republic of Moldova an efficient internal remedy. It is one of the main internal mechanisms aiming at the observance of the optimal and predictable time for deciding a trial [11].

Thus, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court for Human Rights' decisions, founded on this Convention and whose stipulations it applies being their supreme interpreter also, are acknowledged as a source of law and are directly enforceable in the national system of law. The European system of protection of the rights and fundamental freedoms is part of the legal reasons in sustaining judicial precedent's value as a source of national law.

It is unanimously admitted that the norms and principles of the international law are enriched and completed by the specific decisions of the international courts. Republic of Moldova ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms assumed the obligation to guarantee any person under its jurisdiction, the rights and the freedoms stipulated by the Convention (civil and political rights); it acknowledged the right to an individual appeal at the European Court of Human Rights; pledged to observe the final decisions of the Court in any case in which it is involved, as well as for all the cases referring to interpretation and enforcement of the Convention and of its additional protocols [12].

Thus the Republic of Moldova acknowledged the right to an individual appeal before the Court and the compulsory jurisdiction of the Court for both the national courts and the national public authorities.

Depending on the subject creating the judicial precedent, the doctrine draws up a classification: the precedent of the International Criminal Court, the precedent of the Constitutional Court, the precedent of the Supreme Court of Justice, the precedent of the European Court of Human Rights – the next one to be included – the highest rate of incorporation of the international law norms and principles in the Republic of Moldova, being the result of European Court of Human Rights' decisions.

Legal doctrine finds it appropriate to distinguish linguistic and conceptual the judicial precedent in two forms: judicial precedent with a normative or constitutional character and a judicial precedent with an interpretative or judiciary character [13].

The judicial precedent with a normative (constitutional) character regards a court's decision for a particular case that created a norm (constitutional, criminal), modifying or annulling the norm and it can be attributed to the Republic of Moldova's Constitutional Court's jurisprudence. This character is manifested by adopting a decision by the Court which modifies or annuls a norm stipulated by law, Parliament's decisions, the President's decrees, decisions and ordinances of the Government, international treaties.

Judicial precedent with interpretative (judicial) character regards a court's decision for a particular case stating a compulsory interpretation of the norm (constitutional, criminal) and it can be attributed to the Supreme Court of Justice or the Constitutional Court's jurisprudence. Most of the interpretations of the Constitutional Court regard the public authorities' competencies and respecting the principle of the separation and cooperation of powers in the state. The interpretative decisions have a specific significance, leading to the constitutional law shaping. The Court must not depart from the constitutional doctrine so that its decisions don't have an unpredictable character.

In many of its decisions, the Constitutional Court revealed that the interpretation of the constitutional dispositions targets eliminating the ambiguities, clearing the content, pointing out the principles of law, ensuring the unity and the correct understanding of their content and authentic meaning. The necessity of interpretation must be confirmed through the essence of the problem of law resulted from the uneven character of the constitutional dispositions. The prerogative of interpretation may be realized through functional or textual interpretation, insofar it can be deduced from the text of the Constitution, considering the norm's generic character, the specific situations that the legislator couldn't foresee at the moment of elaboration, the following stipulations (connected or contradictory), the complex situations when the norm must be enforced [14].

Thus official interpretation is imperative in cases where the uncertainty of the constitutional norms is determined by a specific situation and this uncertainty can't be solved by means of other judicial procedure. Between 1995 and 2011 33 decisions of Constitution's interpretation have been adopted. The interpretation of the constitutional stipulations has an official and compulsory character for all subjects of the legal relations.

Acknowledging the Republic of Moldova Constitutional Court's decisions as judicial precedents would contribute to the consolidation of the constitutional principles. The legal approach of the judicial precedent in the Republic of Moldova as a source of law is necessary and justified.

Acknowledging the quality of source of law of the judicial precedent in a system which holds the law as the main source of law, brings along advantages as well as disadvantages that must be considered in reevaluating the place and the role of the judicial precedent in the sources of law system.

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