ТЕОРИЯ И ИСТОРИЯ ПРАВА И ГОСУДАРСТВА, ИСТОРИЯ УЧЕНИЙ О ПРАВЕ И ГОСУДАРСТВЕ

УДК 340.5
DOI: 10.19073/2658-7602-2020-17-1-6-10

ПЕРЕОСМЫСЛЕНИЕ СОВРЕМЕННОЙ СИСТЕМЫ ПРАВОВЫХ СЕМЕЙ (НА ПРИМЕРЕ НАЦИОНАЛЬНЫХ ПРАВОВЫХ СИСТЕМ СОЕДИНЕННЫХ ШТАТОВ АМЕРИКИ И РОССИЙСКОЙ ФЕДЕРАЦИИ)

КАРАМАНУКЯН Давид Тониевич*
✉ davo_lawyer@mail.ru
Ул. Короленко, 12, Омск, 644010, Россия

Аннотация. *Автор приводит результаты сравнительного анализа двух классически дифференцированных юристами национальных правовых систем – американской и российской. Очевидно, что объявленные правовые системы представляют две основные категории правовых систем: общее право и римское право. Автор исследует отличительные признаки американского федерального и государственного права, традиционно рассматриваемого как часть общего права, доказывая факт интеграции существенных особенностей континентальной Европы и англосаксонских правовых систем. В статье также содержится анализ правовой природы прецедентного права Европейского Суда по правам человека и его выдающегося места в качестве прецедента (который является основным атрибутом общего права) и источника права в Российской Федерации.*

Ключевые слова: *Европейский Суд по правам человека, американское право, российское право, прецедент, англосаксонская правовая система, романо-германская правовая система, источники американского права, прецедентное право, общее право, источники российского права, кодификация, правовая система.*

The Remodeling of Modern Legal Systems (An Analysis of the National Legal Systems of the United States of America and Russian Federation)

Karamanukyan David T.**
✉ davo_lawyer@mail.ru
12 Korolenko st., Omsk, 644010, Russia

Abstract. *The Author provides the results of a comparative analysis of two classically differentiated by legal scholars national legal systems – the American and Russian systems. Obviously, the announced legal systems represent two of the main categories of legal systems: common law and Roman law. Considered traditionally as part of common law, the Author investigates distinctive attributes of American federal and state law, proving the fact of integration of significant features of Continental Europe and Anglo-Saxon legal systems. The article also contains an analysis of the legal nature of the case-law of the European Court of Human Rights and its distinguished place as a precedent (which is the main common law attribute) and source of law in the Russian Federation.*

* Первый проректор Сибирского юридического университета, кандидат юридических наук, доцент.
** Provost of Siberian Law University, Candidate of Legal Sciences, Docent.

Keywords: *European Court of Human Rights, American law, Russian law, precedent, Anglo-Saxon legal system, Romano-Germanic legal system, sources of American law, case law, common law, sources of Russian law, codification, legal system.*

In accordance with the doctrinal consensus of Russian scholars about the characteristics of legal systems, theory of law highlights the external form of expression (source of law) and legal technique as the primary criteria for the classification of national legal systems into "families".

The objective requirements of today's global community – the ongoing processes of globalization and the collective method of solving large-scale problems, generate the integration of different national legal systems in individual states. This shows the importance and relevance of comparative law. In order to create a truly flexible legal system in the Russian Federation continuously improving and upgrading, it is sensible to carry out a fundamental and comprehensive study of different variations of national legal systems containing several specific features of classical legal families[1].

A striking example of such a combination of the characteristic features of different legal families is the American legal system. American law is the embodiment of the characteristic features of the classic common (Anglo-Saxon) legal system [1, 5, 7, 8], which is why Russian researchers often refer it to the category of common law, and has certain features embodying Roman-Germanic legal family, particularly in the systematization of law and building a form of government. The dualistic nature of the legal system of the United States is due to several factors: the evolutionary process of the formation of American law; features of the form of government and territorial structure; legal psychology and ideology.

The Anglo-Saxon legal system serves as one of the oldest groups of the national legal systems of today, under the regulatory influence of which is located nearly one-third of the world's population. Undoubtedly, this originated from the global expansion of the British Empire, on the territory of which emerged and developed common law. In recent decades, this tendency not only weakened, but on the contrary, it constantly increased.

The integration processes between the major representatives of the international community in the economic, political, legal, social and many other spheres stimulated the increase of the role and influence of common law even more. An important thrust to this process has been provided by the creation and functioning of two of the most high-ranked European integration associations – the European Union and the Council of Europe, which operate mainly on the basis of case law [2, p. 4–7].

However, the specialty of the spread of common law outside of the UK is the inevitable modification due to the process of adaptation to the new conditions which, for example, occurred in the United States.

Fundamental structural elements and principles of the US legal system began to take shape back in the XVII–XVIII centuries under colonialism, many of which have survived to the present day.

However, the most important step towards the creation of a separate and independent from the British legal system was the adoption of the US Constitution in 1787. As is known, in the UK legal system there is no analogue of the written text of the US Constitution, which to this day is a very important characteristic trait of the American legal system differing it from the Anglo-Saxon one. However, it will be legally incorrect to assume the absence in the UK legal acts establishing the foundations of the constitutional system of the country. In English law there is no codified document which takes superiority over other sources of national law, but there are a lot of acts defining the legal status of the supreme bodies of state power and local self-government[2].

Furthermore, the existence of a written constitutional act emphasized separation of the former

[1] A multidimensional methodology for categorizing national legal systems was proposed by Konrad Zweigert and Hein Kötz, calling them families of laws. They maintain that the existence of five criteria for such a classification: the historical background, the characteristic way of thought, the different institutions, the recognized sources of law, and the dominant ideology. Using the aforementioned criteria, they classify the legal systems of the world into: Roman family, German family, Common law family, Nordic family, Family of the laws of the Far East (China, and Japan), Religious family (Jewish, Muslim, and Hindu law) [9].

[2] These include, in particular, the Act of Parliament of 1911 and 1949., Peers Act of 1963, Habeas Corpus Act of 1679, the Bill of Rights of 1689 (the last two acts of today are of a historical character), Representation of the People Acts of 1949, 1969, 1974; Acts of local government of 1972 and 1985.

13 American colonies from Great Britain and the acquisition of independence on the international scene and in the legal space.

The US Constitution secured a completely new mechanism of governance based on the principle of separation of powers, defined functions and powers of each branch of government, as well as the limits of legal regulation of social relations authorities. Moreover, in terms of legal ideology, the US Constitution established the basic principles of American law, guided by the ideas of natural law and the contractual theory of the origin of the state that is fundamentally different from the English state, where the monarch was officially recognized as the source of state sovereignty.

Thus during the past two centuries the Constitution of the United States has been amended only 27 times. Despite the fact that some of its provisions are outdated and do not fully correspond to today's realities, the declarative nature of the legal rules of the Constitution allows the judicial and legislative powers to apply them, through expansion and evolutive interpretation[3], to current public relations.

Another feature of the US legal system is its "federal" nature, which is inherent in a two-level system of laws and institutions of higher authorities. Due to various historical factors, in particular a large amount of economic and political independence of character and considerable diversity of traditions in the former colonies, in the current states there are 51 differing from one another legal systems.

The American legal system is also estranged from the Anglo-Saxon family in forms of systematization of legislation.

British law until the XIX century was a constantly growing collection of disordered contradicting one another and outdated legal acts. However, due to political and economic factors law-making activities of the supreme legislative body of the United Kingdom greatly intensified, which had a positive effect on the unification and systematization of British law. As a result are today's consolidated acts of Great Britain, containing in an orderly manner unified standards that were previously diverse and chaotic parliamentary acts.

Thus, from the XIX century to the present day, the basic form of systemizing the British legislation remained and remains consolidation.

Otherwise looks the process of systematization of legislation in the United States. Special conditions for the development of national law in the country, legislative activism in the early stages of statehood, not bound by state agencies with common law tradition, – all this and more served as the foundation for the codification of US law.

Immediately after the adoption of the Constitution of the United States at the states level began the process of the development of codified state acts (codes) in specific fields of both material and procedural law. A special place in the codification process of state law belongs to the state of New York, where a civil, criminal, civil procedure and criminal procedure codes were prepared and adopted, which served as model codes for other states to develop analogical acts in relevant areas of law.

The adoption of codified acts carried out not only at the state level, but also at a federal scale: in 1909 – the Federal Criminal Code, in 1926 – Code of Laws of the United States of America, consisting of 52 titles, in 1946 – the Administrative Procedure Act, etc.

In summary, we can conclude that the American legal system, recognizing codification as the main form of systematization of legislation, with the highest constitutional act and a vast array of legal acts at the federal and states' levels contain the basic attributes of the Roman-Germanic legal family and in many areas differs from the common law family. Such a conclusion is only partly true.

Outlining the basic similarities of American law with the legal system of continental Europe and the distinctive features of the common law, there is no denying that the latter has a tremendous impact on the history of the American legal system and the presence of a universal primary source of law – the judicial and administrative precedent.

The prevailing role and importance of procedural law as compared with the material is the main approach of the structure of the American legal system and the common law. In all countries of the Anglo-Saxon legal family and in the United States a dominating place is held by the sociological approach to law under which "law" is understood as a highly organized form of social control, which is implemented by the judicial and administrative control. In other words, the courts, adjudicating legal disputes and carrying out justice, create precedents by the interpretation of laws and regulations, adapting them to a changing society. Thus, laws are recognized by the courts as a living organism, changing and upgrading through judicial decisions.

[3] Evolutive interpretation is defined as the process of clarification of the legal act, during which the interpreter often brings new provisions recognizing them as "arising" out of it [4].

This specific feature of the legal systems of English-speaking countries emerged in the earliest stages of their formation and development, one of the reasons that can be attributed to a permanent legal ideology domination in the legal system of "judicial law". Relatively weak development of legislation – in the early stages of Great Britain aw history, the inability to timely regulate arising social relations and gaps in the legislation – in the US, led to the use of other means of legal action – the creation a legal precedent.

However, even in this area, the American precedent law has some important features.

Firstly, regarding the historical development of case law, in the United States the basis of the legal system have always been legislative acts and agency regulations. Unlike British experience in this area, there has never been a period in American legal history when law was formed on the basis of court decisions.

Secondly, unlike the English centralized system of government, the American court system has federal and state courts, which within its jurisdiction have the constitutional right to examine and create precedents. Due to the advanced level of federalism in the United States, each of the higher courts of states and the US Supreme Court, independently determine their relevance to case-law and develop their own rules for its application.

Summarizing the comparative legal analysis of American law within the system of legal families, we may identify the following conclusions about the ratio of the US legal system and common law:

1) American legal system was formed under the influence of common law, historically being a derivative of British law;

2) in view of the socio-cultural, economic and political factors influencing the different stages of evolution American law has been substantially modified, having untraditional legal institutions and specific features;

3) for the proclamation of the independence and unity of the former British colonies the first ever codified constitution had been adopted;

4) in view of the federal structure of the country, there is a two-level system in the US legislation, governmental bodies and, therefore, case law;

5) because of an active legislative body an incredibly amount of laws and regulations had been adopted, by virtue of which there became a need to systemize legislation in which codification as a form was chosen.

These specific features of American law significantly distinguish it from its ancestor – common law – and brings it close to the Romano-Germanic legal family.

The Russian legal system, according to most scholars, refers to the Roman-Germanic legal family. In favor of this view, the founder of modern comparative law R. David underlines such significant features as the division of law into private and public, the distinction between material and procedural law, acts as the main source of law, codification as the main form of legislative systemization. For the Roman-Germanic legal family precedent is characterized as having a rather paradoxical position.

In the theory of comparative law scholars have a fixed view of precedent as the main, dominant source of common law, and, on the contrary, regulatory act as an exclusive attribute of continental (Romano-Germanic) law.

Such a position, especially with regard to judicial precedent as the "exceptional attribute" of common law, to some extent was just until the beginning of the second half of the XX century, before the relatively rapid development of globalization and regionalization in the world. However, it has completely lost its basis "today", during the functioning of the European Union and Council of Europe [6, p. 136].

As proof of the above statement, we may provide a concrete argument by referring to the Council of Europe, in particular to the European Court of Human Rights.

The European Court of Human Rights is an independent supranational judicial body, which at the European level monitors the observance and enforcement of fundamental human rights by all 47 states-parties of the European Convention on Human Rights (including Russia). In the process of adjudicating legal disputes regarding complaints of private persons (individuals) to acts and decisions of government bodies and officials, the European Court of Human Rights at the same time solves an important problem of the interpretation of the European Convention, providing it with a standardized character [3, p. 143–147].

Currently, the case law and interpretative acts of the Strasbourg Court are regularly referred by national judicial authorities of government-parties when carrying out justice.

A similar legal position is occupied by the higher judicial authorities of the Russian Federation. Judicial practice testifies to the repeated appeals

by the Supreme Court of the Russian Federation on the precedents of the European Court of human Rights. An example is the decision of the Supreme Court of the Russian Federation dated October 10, 2003 № 5 "On the application by the courts of general jurisdiction of the generally recognized principles and norms of international law and international treaties of the Russian Federation", according to par. 10 which enforcement activities of the Russian courts shall be in accordance with practice of the Strasbourg Court in order to avoid violation of the Convention[4].

At the same time, the need for compliance with the views of the European Court of Human Rights also extends to the bodies of the executive and legislative branch. Par. 2.1 of the act of the Constitutional Court of the Russian Federation № 2-P dated February 5, 2007 states that the case law of the European Court of Human Rights, in parallel with the rules and ratified protocols to the European Convention, according to art. 15 of the Constitution of the Russian Federation are officially part of the Russian legal system[5]. In this regard, the aforementioned sources should be taken into account by the federal legislators in the regulation of public relations and law enforcement agencies in the application of relevant law.

We can conclude that, even if the legal nature of the interpretation of acts of domestic courts Russia still cause a doctrinal controversy, today, finally, a generally accepted rule is formed, according to which the state, entering the membership ofthe Council of Europe, should bring its legislation and practice in line with the case law and the interpretative acts of the European Court of Human Rights.

These specific features of American and Russian law significantly distinguish them from the classical legal families to whom they once belonged to – Romano-Germanic and Anglo-Saxon. This, in turn, proves the integration of not only domestic, national legal systems, but different legal families.

Список литературы

1. Гук П. А. Судебный прецедент: теория и практика. М. : Юрлитинформ, 2009. 128 с.

2. Караманукян Д. Т. Влияние Европейского союза на конвергенцию романо-германского и анлосаксонского права // Вестник Омского юридического института. 2012. № 1 (18). С. 4–7.

3. Караманукян Д. Т. Прецедентное право ЕСПЧ как составная часть российской правовой системы // Современные проблемы гуманитарных и естественных наук : материалы VIII всерос. науч. конф. (26–27 сент. 2011 г.). М. : Ин-т стратег. исслед., 2011. Т. II. С. 143–147.

4. Караманукян Д. Т. Процедура обращения в Европейский Суд по правам человека : учеб. пособие. Омск : Ом. юрид. акад., 2014. 164 с.

5. Лазарев В. В., Липень С. В. Теория государства и права : учеб. для вузов. 4-е изд., перераб. и доп. М. : Юрайт, 2010. 634 с.

6. Марченко М. Н. Право Европейского союза. Вопросы истории и теории : учеб. пособие. М. : Проспект, 2010. 431 с.

7. Марченко М. Н. Проблемы теории государства и права : учеб. М. : Проспект, 2011. 756 с.

8. Пиголкин А. С. Теория государства и права : учеб. / под ред. А. С. Пиголкина, Ю. А. Дмитриева. 2-е изд., перераб. и доп. М. : Юрайт, 2010. 743 с.

9. Zweigert K., Kötz H. An Introduction to Comparative Law. 3rd ed. Oxford : Clarendon Press, 1998. 714 p.

References

1. Guk P. A. *Sudebnyi pretsedent: teoriya i praktika* [Judicial Precedent: Theory and Practice]. Moscow, Yurlitinform Publ., 2009. 128 p.

2. Karamanukyan D. T. Vliyanie Evropeiskogo soyuza na konvergentsiyu romano-germanskogo i anlosaksonskogo prava [The Influence of the European Union on the Convergence of Roman-Germanic and Anglo-Saxon Law]. *Vestnik Omskogo yuridicheskogo instituta – Vestnik of the Omsk Law Institute*, 2012, no. 1 (18), pp. 4–7.

3. Karamanukyan D. T. Pretsedentnoe pravo ESPCh kak sostavnaya chast' rossiiskoi pravovoi sistemy [Case Law of ECHR as an Intergral Part of the Russian Legal System]. *Sovremennye problemy gumanitarnykh i estestvennykh nauk. T. II – Contemporary Problems of Human and Natural Sciences. Vol. II*. Moscow, Institute for Strategic Studies Publ., 2011, pp. 143–147.

4. Karamanukyan D. T. *Protsedura obrashcheniya v Evropeiskii Sud po pravam cheloveka* [The Procedure of Filling a Complaint to the European Court of Human Rights]. Omsk, Omsk Law Academy Publ., 2014. 164 p.

5. Lazarev V. V., Lipen' S. V. *Teoriya gosudarstva i prava* [Theory of State and Law]. 4th ed. Moscow, Yurait Publ., 2010. 634 p.

6. Marchenko M. N. *Pravo Evropeiskogo soyuza. Voprosy istorii i teorii* [European Union Law. Questions of Theory and History]. Moscow, Prospekt Publ., 2010. 431 p.

7. Marchenko M. N. *Problemy teorii gosudarstva i prava* [Problems of Theory of State and Law]. Moscow, Prospekt Publ., 2011. 756 p.

8. Pigolkin A. S. *Teoriya gosudarstva i prava* [Theory of State and Law]. 2nd ed. Moscow, Yurait Publ., 2010. 743 p.

9. Zweigert K., Kötz H. *An Introduction to Comparative Law*. 3rd ed. Oxford, Clarendon Press, 1998. 714 p.

[4] URL: http://www.rg.ru/2003/12/02/pravo-doc.html

[5] URL: http://www.echr.ru/documents/doc/12051912/12051912.htm