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**PRACTICE OF APPLICATION BY THE COURTS
OF AZERBAIJANIAN REPUBLIC OF PRECEDENT
OF LAW IN A CIVIL LAW**

This article is an attempt to analyze the precedent law of the European Court of Human Rights. The article analyzes the precedent law as a theory and its models giving examples on national legal systems. The precedent law of the European Court of Human Rights is one of the complicated issues, because there is not general theoretical view on it. The precedent law of the Court is developing and gains new features. The Court uses its previous consequences in previous decisions on a subsequent case as a precedent norm. The Court creates a case law system that influences legal reforms in national legal order. The aim of the article is also to analyze modern views on precedent law of the Court and on its influences into national legal systems analyzing example of Azerbaijan Republic by using the analyzing model of methodology for research aims. In this framework impact of case law of the European Court of Human Rights to the legal system of Azerbaijan Republic and precedent law practice in Azerbaijan Republic are reviewed.

Keywords: precedents, case law, precedent norm, judicial decision, the European Court of Human Rights, national court.

(стаття друкується мовою оригіналу)

I. Introduction

The European Court on Human Rights has a great role in protecting of human rights as a regional court in Europe and the court is considered the most effective regional institute on protection of human rights. Giving priority to human rights the European Court on Human Rights legally protects them in a clear and exemplary way. Besides, the European Court on Human Rights causes to developing and spreading of precedent law by referring its previous decisions when the court came to decision on almost every cases. This estimably activity known as “precedent law” of the court is very important for the developing of human rights issues. Consequently, the case law process of the European Court on Human Rights influences to domestic legal systems of member states and in results a lot of important changes arise in them. Being a very effective regional human rights protection mechanism, the European Court on Human Rights has great influences to developing of domestic legal systems of contracting members by its precedent law. Such as, some scientists argued that “today the European Court on Human Rights is the unrivalled master of the Convention, a posture it uses to construct European fundamental rights in a prospective and progressive way” [1, p. 7]. A precedent norm is created by a judicial decision. The judicial decision is seen as a basis for precedents. Every judicial decision directly decides only the particular case. Such particular decisions can be used as legal basis for general rules. Every judicial decision is part of a possible rule-generating practice in that it falls into line with or crosses other judicial decisions. Prof. Eng argued that “in generally, rule-making activity called precedent law” [2, p. 8]. Prof. Eng noted that “the judicial decisions of course is basis for rules of precedent even if the judge does not make any statements about these rules, his decision serves as a basis for the establishment, affirmation, or correction of the rules of precedent, simply because his opinion makes use of earlier judgements as authoritative arguments in the case at hand”

[2, p. 10]. These made rules are used by other judges and they are converted into term of “precedent law”.

II. Precedent law practice in Azerbaijan Republic

In Azerbaijan Republic the sources of law are the normative acts. All courts which are included court system of Azerbaijan Republic have to refer to laws or to the normative acts. In Azerbaijan, being a former Soviet country, decisions of the courts have not being traditionally believed as source of law. Because the Soviet law system was not based on the rule of law. It means that in Azerbaijan, a precedent was not considered an official source of law. However, historically, in practice the decisions of higher courts are often taken into account when resolving disputes. The highest courts made decision on specific cases and other lower courts followed their decision for interpretation of subsequent cases. For aim of analyzing of precedent law in Azerbaijan, it is important to look at court system of the Republic. Such as, there are three kinds of courts: the first instance courts; appeal instance courts; and the cassation instance court.

According to second part of Article 125 of the Constitution of Azerbaijan Republic: “judicial power is implemented through the Constitutional Court of the Azerbaijan Republic, Supreme Court of the Azerbaijan Republic, Appeal Court of the Azerbaijan Republic, ordinary and specialized law courts of the Azerbaijan Republic” [3]. The Constitutional Court and the Supreme Court are the highest courts in Azerbaijan Republic. The Constitutional Court is not included into common jurisdiction court system because it mainly conducted the correspondence of law and other legal acts into the Constitution but not decide on a common court cases. Therefore, the Supreme Court is believed as the top court institution on court system. In Part 1 of the Article 131 of the Constitution of Azerbaijan Republic “Supreme Court of the Azerbaijan Republic is the highest judicial body on civil, criminal, administrative and other cases directed to general and specialized law courts; it exercises control over activity of general and specialized law courts; gives explanations as per practices in activity of law courts in an order envisaged by legislation” [3]. As seen, authority of “giving explanations” has been given to the Supreme Court. The Supreme Court has right to give decisions on specific court issues. But such kind of decision is believed as “explanation of legal norm on specific case”. In most of cases these explanations by the Supreme Court are not general or common, but are about concrete issue. In other words, such kinds of decisions consist of just explanations and there are not concrete directions to courts. In such kind of decision Supreme Court of Azerbaijan Republic may do suggestion to court to take into account some points when they make a statement on analogy cases. For example, Supreme Court may give a decision on crime of adults and may state on it that common courts take into consideration their social position in family when they make a statement on case of adult crimes. Such kind of decision later will be considered by other courts and hereby it will be converted into a precedent norm. At the same time, some lawyers believe that precedent law does not exist in Azerbaijan because none of the highest court have right to give precedent norms. However, there are contra arguments about existence of precedent law in Azerbaijan by defending that if the Supreme Court made decisions on explanation of any court case and if other court

takes account them on subsequent cases it means that precedent law is used by courts in Azerbaijan. Supporting last opinion, it is important to note, in fact, in practice the decisions of the highest courts are often taken into account by lower courts when resolving disputes. As noted before the Supreme Court of Azerbaijan could explain the norms of any law. The Supreme Court could explain how other court may use any complex legal norm when they come to decision on a case. But it could not interpret the norms of laws. Authority of interpretation belongs to only the Constitutional Court in Azerbaijan. Such as, according to the Part 4 of the Article 130 of the Constitution of Azerbaijan Republic, "Constitutional Court of the Azerbaijan Republic gives interpretation of the Constitution and laws of the Azerbaijan Republic based on inquiries of the President of the Azerbaijan Republic, Milli Majlis (Parliament – author) of the Azerbaijan Republic, Cabinet of Ministers of the Azerbaijan Republic, Supreme Court of the Azerbaijan Republic, Procurator's Office of the Azerbaijan Republic and Ali Majlis of Nakhichevan Autonomous Republic" [3]. All courts of Azerbaijan have right to use of the Constitutional Court's interpretations on legal norms of laws in their decision. But such kind of using must not be to take that interpretation in behalf of legal norms instead they must be used by court as like additionally for explain their arguments. As seen, precedent law is used in Azerbaijan. It is important to note that in apart from other countries used precedent, in Azerbaijan, precedents are not legal base used to fill gaps in the legislation. In this system, precedents of the highest courts determine the uniformity of judicial practice.

The reference model of precedent law theory is used by the courts of Azerbaijan Republic. In order to know what its features are, we have to look at theoretical point of views. Such as, prof. Siltala explained that the reference model of precedent ideology is outlined in terms of total argumentative closure and semantic predetermination of the precedent norm's meaning content, supported by an absolute ban on any later modifications made to the ratio of a case by the subsequent court. The constrained court is, in other words, deprived of any genuine discretion as to the formal constitution and the exact meaning content of ratio decidendi of the case [4,p.74]. Main features of the model that highest court makes general decision on different cases and lower courts use these decisions as the precedent norms. In this model none of court has obligation to use this method, but important point of model is that highest court's decision and results shall be very useful for lower courts. According to the reference model of precedent ideology lower courts are free both to use precedent norm in their decision and to choose which precedent norm they will use on a case. Such as, according the main rules of the reference model courts does not accept a decision that was enacted before on same case as source of law. And none of courts has obligation to follow other court's decisions. Such as, they have to refer to concrete legal norms of laws. But at the same time the courts have right to apply to the Supreme Court's explanations and to the Constitutional Court's implementations on legal norms when they use them (legal norms). In Azerbaijan, the courts use the decisions of the highest courts (both the explanations of the Supreme Court and the interpretations of the Constitutional Court) as additional resource for only to explain their arguments. In other words, precedents are used for strengthening court's argument. The reference

model of precedent ideology which is used in Azerbaijan is close to Italy law system. Such as, in Italy there is special institution of the highest court, namely *Ufficio del Massimario* engages to make general decision by explaining legal norms on any special case in which afterwards other courts use these decisions (the decisions called as *massima*) as precedent [5,p.144]. In Azerbaijan this role is exercised by the Supreme Court. As noted before, other courts use explanations of the Supreme Courts as precedent norms.

As seen, the Courts (the Constitutional Court and the Supreme Court) use reference model of precedent ideology. Such as,

- the Courts are not under obligation of using its previous cases; it may use if needs to it;
- there is concrete legal source for the Courts and the Courts refer to concrete article of laws, such as the Courts do not need to use their previous precedent norm as a legal source;
- the Courts use their previous legal consequences as a precedent norm to interpret and to strength their arguments;
- The Courts use merely *obiter dicta* of a case.

All of displayed features prove that the Courts uses reference model of precedent theory in Azerbaijan.

III. Impact of case law of the European Court of Human Rights to national legal system: the legal system of Azerbaijan Republic

It should be noted that the national courts of Azerbaijan refer to the case law of the European Court of Human Rights as well. The European Convention on Human Rights and Fundamental Liberties is the part of national law. Such as, according to the Part 2 of the Article 148 of the Constitution of Azerbaijan Republic where was noted: "International agreements wherein the Azerbaijan Republic is one of the parties constitute an integral part of legislative system of the Azerbaijan Republic" [3]. As seen, all bodies that are law practiser in Azerbaijan could refer into international agreements as resource of law without other special regulating law. From this aspect, according with the requirement of the Article 148 of the Constitution, all courts of Azerbaijan have right to apply to both the European Convention on Human Rights and Fundamental Liberties as a legal source and precedent law of the European Court of Human Rights as a supplementary source since 2002. In defining the position of the Convention in the hierarchy of norms, the Constitution gives superiority to the Convention. Azerbaijan Republic is a new member of the Convention and there are seriously legal reforms toward the precedent law of the European Court of Human Rights. These reforms aim to make the best mechanism for protecting human rights of citizens using previous consequences of the European Court of Human Rights on various rights. These reforms occur in national orders and practice of national courts. Such as, there is two important order reviewed in the thesis. These orders allow to national court to use the decisions of the European Court of Human Rights as a precedent norm on their subsequent cases. These reforms could be taken into consideration as an influence by the precedent law of the European Court of Human Rights into national legal system. This influence gets better protection of human rights and liberties. In Azerbaijan, some reforms have been occurred under influences by the precedent law of the European Court of Human Rights. These reforms toward practice the precedent law of the European Court of Human

Rights by national court and to develop mechanism of protection of human rights. Assuming international legal obligations to recognize the jurisdiction of the European Court of Human Rights binding to the interpretation and application of the Convention, these reforms are also about referring to the precedent law of the European Court of Human Rights by courts. Broaden, these laws implies the development of the concept of legal reforms; taking into account the case law of the European Court of Human Rights; revision of the national law for compliance with European standards of human rights; and organize training for judges and employees of state and law enforcement case law.

IV. Conclusion

As stated, precedent law of the European Court of Human Rights is used by the courts in Azerbaijan. For deeply understanding using levels of precedent law, we should apply a case. Such as, the decision of Constitutional Court of Azerbaijan Republic is a usual example for research. "The decision of Constitutional Court of Azerbaijan Republic on "interpretation of the article of 449.2.3 of Criminal Procedural Code of Azerbaijan Republic", 05 August 2009, is a very important precedent norm for all courts. The decision is a destination decision. Such as, the court directly referred to the concrete norm of the European Convention on Human Rights and Fundamental Liberties as well as national laws. The Court noted on the decision that when a court runs on laws or rights on a case and when a court make a statement on a case all arguments of it must be suitable also to the Convention:

"The courts of the country refer to the concrete norms of national laws when they come to decision and make statements on a case. They have to substantiate their argument in accordance with a legal norm. Beside it, their arguments could not be different substance accordance with the European Convention on Human rights and Fundamental Liberties, instead their arguments must be comply with norms of the Convention" [3]. In accordance with this opinion by Constitutional Court of Azerbaijan Republic, this precedent norm is used by courts in Azerbaijan and the court have been begun to refer to the various norm of the Convention. The norm was converted into a precedent norm and used by courts.

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Практика застосування судами Азербайджанської Республіки прецеденту закону в цивільному праві

Ця стаття є спробою проаналізувати прецедентне право Європейського Суду з Прав Людини. Аналізується прецедентне право та її моделі як теорія, а також даються приклади національних правових систем. Прецедентне право Європейського Суду з Прав Людини є одним із складних питань, тому що немає загального теоретичного погляду на нього. Прецедентне право Європейського

Суду розвивається і набуває нових рис. Суд використовує свої попередні рішення у подальшому випадку як прецедентної норми. Суд створює систему прецедентного права, що впливає на правові реформи в національній правовій системі. Метою статті є також проаналізувати сучасні погляди на прецедентне право Суду і його вплив на національні правові системи, що аналізують приклад Азербайджанської Республіки за допомогою моделі методології для дослідницьких цілей. У цих рамках показується вплив прецедентного права Європейського Суду з Прав Людини в правовій системі Азербайджанської Республіки та прецедент юридичної практики в Азербайджанській Республіці.

Ключові слова: прецеденти, прецедентне право, прецедент нормою, судове рішення, Європейський Суд з Прав Людини, національним судом.

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Практика применения судами Азербайджанской Республики прецедента закона в гражданском праве

Эта статья является попыткой проанализировать прецедентное право Европейского Суда по Правам Человека. Анализируется прецедентное право и ее модели как теория, а также даются примеры национальных правовых систем. Прецедентное право Европейского Суда по Правам Человека является одним из сложных вопросов, потому что нет общего теоретического взгляда на него. Прецедентное право Европейского Суда развивается и приобретает новые черты. Суд использует свои предыдущие решения в последующем случае в качестве прецедентной нормы. Суд создает систему прецедентного права, что влияет на правовые реформы в национальной правовой системе. Целью статьи является также проанализировать современные взгляды на прецедентное право Суда и его влияние на национальные правовые системы, анализирующих пример Азербайджанской Республики с помощью модели методологии для исследовательских целей. В этих рамках показывается воздействие прецедентного права Европейского Суда по Правам Человека в правовой системе Азербайджанской Республики и прецедент юридической практики в Азербайджанской Республике.

Ключевые слова: прецеденты, прецедентное право, прецедент нормой, судебное решение, Европейский Суд по Правам Человека, национальним судом.