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CASE LAW SCHOOL AS A WAY OF LAW RATIONALIZATION

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Abstract: The authors of this article attempt to separate a case law school as an independent direction, which is based on a number of provisions and postulates that can unite scientists who developed a technique of formation of case law. Formation of the scientific concept of search and consolidation of the rules in the real life of society in a court is a topical issue of present-day legal practice. The rules that allow ensuring the effectiveness of law through a rational approach to the method of identification and formulation of "real-life rules of law" have been proposed as part of the case law school.

Keywords: Case law, a realistic law school, sources of law, judicial law-making, legal certainty, sociology of law, law effectiveness.

INTRODUCTION

The problem of judicial law-making is one of the most urgent problems of modern legal systems. In some countries a court case is historically recognized and occupies a central place in the sources-of-law system, in other countries– it can be considered only in theoretical terms. However, one cannot deny the fact that the court's role in the formation of law is enhanced in the formation of a rule-of-law state and existence of civil society. Relying on objective factors of reality (economic, political, social ones, etc.) and taking into account public opinion, judicial authorities reveal the meaning of legal rules as part of the regulations and provide a balance of public, social and personal interests.

The object of research is a complex of social and legal views substantiating the authority of case law in the present-day legal system.

The purpose of research is to formulate and analyze the main provisions of the case-law school, which is based on the ideas of American legal experts and professionals lawyers Holmes O. and Llewellyn K.

The methodological basis of research includes a set of different methods. Social phenomena are considered based on the presence of a seamless link between history and modernity. In this connection principles of historical continuity and interaction of different legal theories have been taken into account. A systemic, holistic approach to the object of research is of particular importance. Synchronic and diachronic comparison is also used in the study of social and legal views of legal experts.

The analysis is based on logical and comparative law methods. The study was conducted based on the objectivity principles which imply an unprejudiced study

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of legal concepts. In order to achieve the most effective results when clarifying the basic provisions of the case-law school, the disclosure of its epistemological meaning and practical significance, a comparativistic approach, according to which it is necessary to strive for "thinking in the same way as a foreign lawyer thinks", has been used (Romanov 2000).

RESULTS

Based on the views of Holmes O. and Llewellyn K., we can formulate the following principles and rules of rational development of the case law, which may be taken by different legal systems, including the Russian legal system:

1. There should be a maximum freedom of judicial discretion.
2. There should be clear regulatory restrictions for judges, preventing arbitrary and inefficient law-making.
3. Restrictions in judicial law-making include applicable legal rules; other legal cases; existing legal traditions and the need for continuity in the law; a high level of legal culture and consciousness of judges; the idea of law, the spirit of law; specific factual circumstances; compliance of adopted legal rules with real-life conditions;
4. A judge shall not be guided by intuition and prejudice. He/she should be guided by actual facts that will abstract away all unnecessary impacts and deliver a "fair" judgment.
5. A judgment may be considered fair if it has three main qualities: (1) it corresponds to legal rules; (2) it corresponds to "real-life rules"; (3) it corresponds to particular facts, circumstances of the case.
6. The study of legal procedures, techniques in the activity of a lawyer, but not the study of legal rules, should be the main task of training lawyers and judges;
7. The law should be rather predictable, only in this case it is effective. It is particularly important that people with no legal experience understand the certainty and predictability of law.
8. The public opinion on justness of judicial acts adopted and on the courts is the main indicator of the quality, objectivity and effectiveness of the case law.
9. An increase in the number of dissenting opinions of judges when considering any type of case is another indicator of non-compliance of the adopted rules with the changed social conditions. This resulted in the transition of quantity into quality, when the accumulated dissenting opinions result in a change of a legal case and in the emergence of a new, more effective legal rule.

DISCUSSION

As is known, Holmes O. and Llewellyn K., supporters of sociological, legal and realistic views on law, discussed the importance of a legal case. Their ideas on the way case law should be formed for ensuring the dynamics, flexibility and stability of law are of particular importance.

Oliver Wendell Holmes was a professor at the Harvard Law School, a judge of the Supreme Judicial Court of Massachusetts and then a judge of the Supreme Court of the United States of America. In his article "The Path of the Law" (Holmes 1897) published in 1897, he criticized a dominated approach to the study of law, according to which common law was considered being formed as a result of an objective set of methods for resolving disputes, as well as abstract principles. He was the first to propose "a theory of foresight" (or "a theory of prediction"), according to which the main task of a lawyer is to anticipate the judge's decision.

Holmes drew the attention to himself by his brilliant dissenting opinions, because of which he was called «The Great Dissent». He developed his own approach to the understanding of law based on sociological and legal ideas, giving a special status to a law-related profession (especially a judge), significance of judicial decisions in the formation of law on the basis of historical knowledge.

Judgments made by Holmes were different, firstly, by their own style characterized by clarity, conciseness, unambiguousness. Pointing out this feature, Cardoso B. noted that «a judge with a sense of style will not make a mistake» (Cardozo 1995).

The second characteristic feature of Holmes's judgments is as follows: when deciding a case, Holmes was not influenced by prejudices and emotions, he was guided by law and common sense and indeed followed the constitutional rules on independence and impartiality of judges. A striking example confirming this statement is his dissenting opinion in the case «Vegelan vs. Gunther», where he supported the right of strikers to picket the office of their employer, provided that they would not use the violence and threats of violence while public opinion was against it. In Holmes's career there have been a lot of cases when he adopted a decision that was contrary to public opinion, the position of government authorities and even the president. He developed a system of certain truths, principles he tried to stick to, ignoring the pressure from the outside without compromise. Holmes avoided economic interests, profit, corporatism and did not interfere in political conflicts.

Holmes had a special attitude to the judge's activity, he defined law as a prediction of what court decision will be adopted, and called for a conscious recognition of a law-making function of the court. He said: «I have an outstanding interest not in the importance of the issue and the importance of a case, but in those minor cases and decisions that will be adopted by the court, because they contain «sprouts» of deeper interpretations and consequently – deep intermediate changes in

the essence of law» (Speeches by Oliver Wendell Holmes, 1913). That is why a court judgment is so important, it should not blindly follow public opinion, mercantile interests, political ambitions, as this will be detrimental to law.

Holmes had an exceptional opinion on the role of court judgments in connection with the implementation of constitutional provisions. The Constitution consists of general provisions requiring interpretation, which will influence the definition of concepts «freedom and property», «proper execution of law and equality before law», etc. It can stir up society and, although in theory this is just a matter of interpretation, as Holmes argued, in practice it raises the court over executive and legislative powers. In this case the American scientist identified two problems.

Firstly, misuse and excess of powers by a court, which, according to Holmes, should be clearly stipulated by law and limited based on common sense. We should resort to services of the court only when it is impossible to achieve a result by other means. As for his activity and assistants Holmes noted that "they have never searched for ways to expand their legal powers in excess of limits established by law and were not afraid to exercise them to the fullest extent, in the way they had to do that" (Hill 1995).

Secondly, there is a danger of unreasonable restriction of law-making functions of the court. The implementation of legal regulation requires an understanding of its goals and the needs of society at a certain stage of development, and that the court is a body that can have a serious impact on the formation of law, although Holmes did not hold an opinion that the court should undertake a task to "update law". Guided by this position, Holmes defined the law as a prediction of a result of the legal dispute resolution by the court. The author appealed to the conscious recognition of the legislative functions of courts, while not denying the importance of the legislative acts, which should define the scope of the judicial discretion (Adygelazova 2012).

Another researcher of case law – Llewellyn K., one of the founders of the American Realist Law School, is the author of the work "Law, the Life of Law and Society", published in German in 1977. The Dean of the Law Faculty of the Chicago University described this work as follows: "This book does not claim to systematization, it is perhaps the most thorough presentation of an early sociological approach of Llewellyn. He carefully describes his position by comparing and contrasting it with the position of Eugene Ehrlich and especially Max Weber, whom he calls a great specialist. According to him, he is interested in the behavior of officials during the settlement of disputes arising from the activities of non-professionals, primarily not in legal and regulatory aspects... In addition to methodological issues, he considers the general relationship between the order and society, freedom and rules of law, the whole and its parts, he illustrates many of his thoughts in an unusually lively, rich and erudite discussion on the marriage institution in the modern world"(Casper 1978).

In another work Llewellyn spoke of the social pre-science of law that has not yet become a science, which studies the operation of the institution of law, what it takes from the society and gives the society, where it operates. This research is focused on the conditions in which the rules of law are followed and to which they conform (Llewellyn 1941). In contrast to the American sociologist of Russian origin Timashev N.S., he supposed that the sociology of law should not be located between such poles as power and ethics, but between six poles: Power, Justice, Professionalism (Mastery), Standards, Results and Legal State (Llewellyn 1941).

Llewellyn deeply researched the legal system of the United States of America, focusing on judicial practice and, above all, on the work of the courts of appeal. He laid out his sociological and legal views in his work "The Case System in the USA". He considered this work "a one-of-its-kind study of the mechanism of the American case system in the courts of appeal" (Letter from Karl Llewellyn to Henry S. Haskell). "This is an attempt to penetrate into the social psychology of the judicial process more systematically than it was done in Cardoso's articles and other existing works" (Letter from Karl Llewellyn to Katharine Jocher); "This study, which has never been carried out consistently, is a study of the sociology of case law" (Letter from Karl Llewellyn to Walter R. Sharp).

The central idea of the work "The Case System in the USA" is that the American case system gives judges both relative freedom of action (greater than it was expected) and limitations (different from the way they were perceived).

The analysis of the relative freedom of action is based on the concepts of a legal rule and a legal case. Llewellyn argued that the courts do not simply «apply» legal rules, they either expand or narrow their content. Moreover, both methods are necessary and must co-exist, replacing each other to maintain the operation of the case law system. Moreover, the freedom of the court actions is not only the possibility of a different interpretation of legal rules, but it also implies the possibility to interpret the facts. Thus, Llewellyn pointed out that it is impossible to consider factors limiting a judge in the interpretation, application and formation of rules only certain legal rules (including the rules set out in case law). This approach developed by Llewellyn can provide the authority of judicial law-making.

The fact that Llewellyn put an emphasis on the combination of different methods by judges in their activity, gives grounds to assume that the author recognized the uncertainty of law. The development of methods and techniques to achieve an optimal degree of predictability in case law is one of the main tasks of legal science and practice. A constant reference to «legal certainty» by the scientist in the second part of the book is an attempt to justify the case law and law in general, that was seemed undermined by his remarks. The advantage of Llewellyn's works is that he overstated neither the existing «legal uncertainty» nor an impact of the court on the preservation of such uncertainty.

Llewellyn identified three factors that could ensure «legal certainty»:

1. Methods of work of judges and lawyers, their professionalism and intuition – a powerful source of certainty in law.
2. The facts available in the case, rather than legal rules, allow adopting a decision, the facts cause «a sense of justice in a certain case». A pressure of facts makes different judges come to the same decision despite the differences in their analysis.
3. Dynamics of legal rules and their social efficiency. In order to achieve the legal certainty it is required to constantly update legal rules, it is necessary that they keep pace with changing social conditions. This should be felt especially by people who have no legal education and no professional sense of justice (Table 1).

TABLE 1: LEGAL CERTAINTY

LEGAL CERTAINTY		
PROFESSIONALISM AND INTERNAL CONVICTIONS OF JUDGES	FACTS OF A CERTAIN CASE	UPDATING LEGAL RULES IN ACCORDANCE WITH THEREAL-LIFE CONDITIONS

Predictability of law indicated by Llewellyn occurs not only due to the dependence of judges on legal cases and legal rules, but also due to the working method, the facts of a certain case and "living rules" ("real-life rules").

Llewellyn spoke about the need for training lawyers on working methods. According to him, the focus should be on "practice, not on a legal rule; a mode of action, rather than a verbal formula" (Llewellyn 1989). As to working method training: "A lawyer must learn to derive a general idea out of a legal rule in such a way as to link the solution of a new case with the essence and spirit of the existing law. A judge, as a member of society with legal experience, is a guarantor of the continuity of legal rules and predictability in the decision-making process" (Llewellyn 1989).

At the same time, Llewellyn did not exaggerate the role of a judge in legal activities, and pointed out that judges should have a high level of legal culture, self-awareness, an ability to follow the traditions of society: "Professional training of judges influences their methods of work; their sense of duty influences succession of law; a conscious feeling of power implies responsibility and constant distrust of one's own prejudices, their intuition and understanding imply those small, fundamentally important steps forward that make judges proponents of Law and Life" (Llewellyn 1989).

Llewellyn also spoke of "a sense of justice" in a judge. From time to time, in his book the author expressed the idea that the result will be valid if a judge "would

allow the facts to manage his decision". Thus, they recognized the existence of so-called real-life rules. If legal rules comply with real-life rules, then can we talk about a "fair" legal rule (Adygelazova 2009).

However, neither a special consideration of the facts nor a focus on real-life rules are sufficient criteria of justice. Since, firstly, real-life rules are often contradictory, that causes the situation when judges need to find other sources of formation of optimal legal rules. Secondly, real-life rules may be perceived as legal rules, but they are sometimes unfair. Existence may not always coincide with what is due and necessary for the law.

Thus, Llewellyn stated the importance of the case law. The author indicated the main tasks of lawyers–the identification of real-life rules and reasonable transformation of these rules into legal rules. The process of such kind of law-making is important.

CONCLUSION

The legal development of modern states is characterized by an interchange and interaction of legal systems in the context of globalization, the formation of a common economic and legal space, harmonization of law. As a result of the convergence of legal systems clear differences that previously existed in the sources-of-law system are gradually blurred out. In particular, in the Russian system of law a legal case is not officially recognized as a source of law, but there are acts of the higher courts (Resolutions of the Plenum of the Supreme Court of the Russian Federation, acts of the Constitutional Court of the Russian Federation), which do not just interpret the rules, but, in fact, consolidate new legal rules. This is undisputable that case law in one form or another takes a constant place in the sources-of-law system of many states that are based on the ideas of the legal state and civil society.

In such circumstances it seems appropriate to form the concept of the case law defining the principles and rules of the case law development. It is important to take into account the experience and the theoretical basis proposed by famous legal experts and legal practitioners, which relied on their wealth of experience. Holmes O. and Llewellyn K. can be considered the founders of the case law school, as first and foremost they did not claim the priority of a legal case, but tried to formulate rational rules and techniques of developing a legal case, emphasizing its advantages, such as a close relationship with the public opinion and real-life social conditions.

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