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The Precedent of the Court of Cassation and its application in Armenian legal system.



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Introduction

Precedent is a prior decision that functions as a model for later decisions¹. Applying lessons of the past to solve problems of present and future is a basic part of human practical reasoning. So there is no better way for a lawyer to get to the heart of a legal system than to ask how it handles precedent. The latter represents the law observing itself.

The origin of traditional notion of precedent comes from Anglo-American common-law and particularly the doctrine of stare decisis ("stand by decided matters"), the meaning of which is to direct a court to look to past decisions for guidance on how to decide a case before it.² Justification for the use of precedent has generally been as providing predictability, stability, fairness, and efficiency in the law. Precedent helps the parties to know the approximate result of their cases. In other words it contributes to predictability of the law because it provides notice of what a person's rights and obligations are in particular circumstances. A person contemplating an action has the ability to know beforehand the legal outcome. It also means that lawyers can give legal advice to clients based on settled cases.

The use of precedent also stabilizes the law. Society can expect the law, which organizes social relationships in terms of rights and obligations, to remain relatively stable and coherent through the use of precedent. There is a need in society to rely on legal rules, even if persons disagree with particular ones. Justice LOUIS D. BRANDEIS emphasized the importance of this when he wrote, "*Stare decisis* is usually the wise

¹ MacCormick D.N., Summer R.S, *Interpreting precedents*, England, USA,1997, 3

² Kakoyan A., *Precedence as source of law in RA and its comparative analyses*, Yerevan 2008

policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right".³

Reliance upon precedent also promotes the expectation that the law is just. The idea that like cases should be treated alike is anchored in the assumption that one person is the legal equal of any other. Thus, persons in similar situations should not be treated differently except for legally relevant and clearly justifiable reasons. Precedent promotes judicial restraint and limits a judge's ability to determine the outcome of a case in a way that he or she might choose if there were no precedent. This function of precedent gives it its moral force.⁴

Precedent also enhances efficiency. Reliance on the accumulation of legal rules helps guide judges in their resolution of legal disputes.

Legal systems differ significantly over the question how, and how far, they require or expect judges and others to observe precedents as governing models for decision. The general distinction is made as to civil and common law. Differences in history, in judicial tradition, and in constitutional and institutional structures may well produce difference of practice and approach between different systems.⁵

But the paper is not going to observe the differences between the judicial systems and their particularities, instead it is going to explore the application of precedent in RA and take that fact that we already have that institute as granted.

After the adoption of the Constitutional amendments in 2005⁶, the institute of precedent is adopted in Armenia. Of course the judicial system in RA is still in the

³ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 52 S. Ct. 443, 76 L. Ed. 815 1932.

⁴ *Ibid*

⁵ MacCormick, D.N., Sumner, R.S., *Interpreting precedents*, England, USA, 7

⁶ The Constitution of the Republic of Armenia, adopted 5 July 1995; as amended November 27, 2005

stage of development, which means that this institute has a long way in becoming fully integrated in our judicial system and our legal conscious. This paper is going to explore whether the precedents made by the RA Court of Cassation are applied by lower courts. Is the reform, introducing precedent as a source of law in Armenia, has accomplished its mission? It is also very important to reveal the real importance of this institution in our society and especially for our courts, judges, lawyers, etc. The paper also aims to understand whether the above mentioned universal goals and approaches of precedents are also the same in Armenia. Whether judges are reluctant and unhappy with this institute or they even do not deeply realize the essence of it.

Chapter1. Are the precedents made by the RA Court of Cassation applied by lower courts?

1. a. Legal Basis

The precedent first appeared in our reality due to the constitutional amendments of 2005. Article 92 of RA Constitution stipulates that the highest court instance in the Republic of Armenia, except for matters of constitutional justice, is the Court of Cassation, which shall ensure uniformity in the implementation of the law. The powers of the Court of Cassation shall be defined by the Constitution and the law. It also states that the courts operating in the Republic of Armenia are the first instance courts of general jurisdiction, the courts of appeal, the Court of Cassation, as well as specialized courts in cases prescribed by the law. This article stipulates the notion of precedent for the first time, brings it to practice and sets the role it has, thus ensuring uniformity in the implementation of the law. The same article also sets forth the courts operating in the Republic of Armenia which are to be bound by the decisions of the Court of Cassation. Therefore, it is quite clear what is the role of the decision of the supreme court of RA. Precedent is a source of law, besides it has a very important role of interpreting laws, clarifying and making them more precise and unconditional. Generally, as it was discussed above, precedent is a tool to reach equality and unity in applying law and interpreting it.

So, this constitutional provision not only requires making precedent but also requires that those precedents be applied by lower courts, thus also guaranteeing equality before the law.

It is logical that if the laws are applied in a uniform manner, then as a result, cases with identical/similar factual circumstances unavoidably will have the same outcome in all the courts, be it the first instance, intermediate or supreme courts.

So, when courts ignore the precedent and make dramatically different decisions on two similar cases then it can be construed as a breach of constitutional requirement.

Another basis for having precedent in RA judicial system is Article 15 of Judicial Code of RA, and particularly its forth part which states that the reasoning of a judicial act of the Cassation Court or the European Court of Human Rights in a case with certain factual circumstances (including the construal of the law) is binding on a court in the examination of a case with identical/similar factual circumstances, unless the latter court, by indicating solid arguments, justifies that such reasoning is not applicable to the factual circumstances at hand. The article itself is called *Equality before the Law and Court*. So, it can be inferred that the legislator came to the conclusion that everyone's equality before the law and the court can be guaranteed through and by adopting a new "model of making justice" named "precedent".

After the adoption of the two mentioned provisions an amendment was also made in the Civil Procedural Code of RA and particularly in article 225 and 334 concerning the duties of the Court of Cassation. So, the 3rd part of article 225 states that the aim of discussing/examinig cases by the court of cassation is to provide an equal application of law. And by doing so it should enhance the development of law. Article 234 of the same code stipulates that the Court of Cassation hears cases when there is prima facie inconvinence of lower courts' decisions with an already apopted decision of the Court of Cassation and when a decision on a claim can have an essential role for an equal application of law. For example, in Germany though not being a classical country of precedent and not having a binding provision of applying precedent, the

precedent has a very important role in all branches of law but their importance varies.⁷ Some areas of labor law are made up primarily of judge made law. Most precedents interpret statutes, codes and the constitution. As a country which is based on the codified system of law, Germany will have no problem of not having precedents, as the judges may interpret law with or without precedent. Nevertheless, they still have it, as it can always be the case that a particular life situation or some relations are not regulated by law. So, the precedent also has a “duty” to fill the gaps of law. In Finland the role of the precedent is not so authoritative, but, however, in practice precedent does have a significant argumentative value in the interpretation of statutes.⁸ Precedent is characterized as so called “should” sources: a precedent should be referred to if the decision maker wants to avoid the decision being changed in a higher instance. So, it can be inferred that in this country also, the precedent, even not having so much binding force, is made for deciding cases in similar ways. It is better for a lower court to use a precedent for similar cases for its judgments not to be reversed by a higher court.

Turning to Armenian reality: The Court of Cassation hears cases and makes decisions which serve as precedent for making decisions in similar cases. Pursuant to the new Judicial Code, decisions of the Court of Cassation create binding precedents which are issued as published decisions. The problem now is whether the result, which is to create unity and equality of implementing law, is reached. This can be done only by applying the same precedent for each similar case.

The authority of the court essentially reduces in the eyes of public especially when the courts, and particularly the same bench of the court or the same judge, makes a decision that is significantly different from the initial decision for two identical cases.

⁷ MacCormick, D.N., Sumner, R.S., *Interpreting precedents*, England, USA, 1997, 17-20.

⁸ *Id.*, 65-67.

Conversely, when the courts try to adhere to principles, judgments of prior cases, the credibility of the judges will increase, and people would not avoid applying to courts. So, having two similar cases and different solutions to that cases, be those decisions of the first instance, appellate or the court of cassation, will end up having unjust decision for at least one case. In the scope of making justice, the institute of precedent is not in contradiction with our legal conscience and thinking, but there are problems in applying those precedents.

b. Judicial system of the RA and application of precedent-incompatible? OR

Legal nature of courts, professionalism, independence and impartiality of judges as a real ground for applying precedents.

It is not a secret that the level of professional knowledge, moral and psychological traits of judges is not as good as is supposed or expected to be in Armenia.

Although some of the requirements and procedures for judicial appointment, promotion,

discipline specified in the Judicial Code are based on objective criteria, e.g. such as passing a qualification examination, other criteria are still subjective or at least

difficult to apply in a consistent and objective manner.⁹ With minor exceptions, the President of Armenia still has discretion in accepting or rejecting nominations for judicial appointment or advancement without specifying any reason for doing so. Similarly, some disciplinary procedures still lack transparency and can appear unfair and arbitrary insofar as some judges have been subjected to disciplinary sanctions for behavior that did not result in disciplinary actions against other judges. Despite the improvements in the process, suspicions linger among some interviewed that discipline or the threat of discipline is used as a means of influencing judges. So, we cannot have courts which will have a legal nature when the judges are not highly qualified, are appointed as a result of political will and dismissed for the same reason. One of the main and real bases for the existence of any legal institute is the role and importance of courts' legal nature. The role of the latter is increasing year after year in each society and for development of every single sovereign country. As V. Shevcov stated(in his book *Право и судебная власть в Российской Федерации*, 2003), it is not enough that the applied rule is legal¹⁰. It is also necessary that the decision-makers, in these case courts, judges, and the whole process of the application of law have a legal nature. What is legal nature in the sense of courts and legal system? It is when the judges are independent and impartial, when all three branches of power inside the state act as separate bodies without any harmful influence on each other. The logic behind this is that judges who are biased and are not independent “do not care” about applying precedents, as they already know the outcome of the decision and the final result. Influence on judges and judicial corruption continue to

⁹ American Bar Association, *JUDICIAL Reform index for Armenia*, Volume 3, January 2008.

¹⁰ Armenian Association of International Law, *The judicial precedent as a source of law*, collection of studies, Yerevan 2005, 11.

be one of the most serious problems Armenian judiciary faces.¹¹ Many believe that corruption within the judiciary is widespread, although it is very hard to prove. It is widely believed that the President and the Government influence judges in cases having political implications or when a business associated with Government officials is involved. Influence from regional governors is also believed to threaten judicial independence in the regions. Attempts to influence judges are not limited to other branches of state power, they also may take the form of a request from a friend or relative for a favor. So, it is useless to speak about applying precedents when the outcome of the cases is already obvious and the judges have no other way of changing it.

RA Constitution states that the independence of courts shall be guaranteed by the Constitution and laws and that the powers, the procedures of formation and activities of the courts shall be defined by the Constitution and laws. So, it is inferred that the Constitution of the Republic of Armenia, having supreme legal force, guarantees that all the courts from are independent since their creation, and justice shall be administered solely by the courts in accordance with the Constitution and the laws.

Unfortunately, the reality in Armenia is that the courts are not as independent as it is supposed to be. Therefore, the result would not be as good as in states where courts are really independent. So, if the courts are not enough independent, it can be implied that they cannot be impartial either. However, we have what we have. Moreover, we have a newly adopted and not very ordinary system for Armenia: precedent. So, another issue is added to the old problems and another concern rises whether this institution would reach its goal, when it is already mentioned that the judicial system is not perfect in Armenia. Thus, the problem may be solved only if and when the

¹¹ American Bar Association, *JUDICIAL REFORM INDEX FOR ARMENIA*, Volume 3, January 2008.

judicial system becomes more non-political, independent, unbiased. Judges need incentives for making good, reasoned decisions, but for that end they should apply laws, precedents properly. However, the problem still exists and it is now worth considering the real application of precedents in RA courts.

2. The path to application: A myth or reality???

The application of precedents by courts remains an imminent issue. As this institution is quite new, there were not many researches done in this field and it is difficult to figure out the real picture of precedent application in the lower courts. There is no mechanism controlling the application of precedents. I conducted a research about application of precedents in Armenian Bar Association, Association of Judges, American bar Association, Court of Cassation, etc. No one knows how this institute works in RA, whether judges use or do not use precedents. There may be studies done by other bodies or organizations, but my research did not provide with any result and the only way for finding out whether precedents are applied or not, interviews were conducted with judges, their clerks, court decisions were read one by one.

There are more than 800 precedents for civil cases both for 2009 and 2010. The number of criminal cases vary from 40-50 for 2009 and for 2010.¹² As it can be seen, the number of civil case precedents is much more than that of criminal cases. However, as the research done shows, the application process is not so different in civil and criminal cases.

Civil cases - Being involved very actively in one of Avan and Nor Norq first instance courts' judge's decision making process, I found out that in decisions for both 2009 and 2010 year there was no single case that a precedent was used. This is of

¹² As Ruben Melikyan, the court of cassation's president's consultant stated.

course not a positive indicator of precedents application, when both the RA constitution and Judicial code give the precedent a binding force, which means that the courts are obliged to use decisions which have precedential value. What is very interesting is that in most of the cases even the lawyers did not refer to a precedent and it is coming to say that the precedent is not widely accepted and that the society and essentially the judges and the lawyers are not aware of this institute very deeply.

In this case even if that particular judge's intention is to make justice and to deliver decisions based only on the law, however it is still an ignorance of the concrete requirement of the law. Thus there is still a chance that the equality before the law is breached, as other judge may use a particular precedent and come to more just decision than in the case where the precedent is ignored. In other court, Court of First Instance of Erebuni and Nubarashen Communities I have researched more than 50 judgments, from which only 3 had a reference to a precedent. One of the Court of General Jurisdiction of Ajapnyak and Davtashen Communities judge's assistant also evidenced that they didn't feel bound by the precedent and that they use precedent whenever the cases are similar. But to the question what were the latest cases they had referred she could not answer, she could not even say what was the most used precedent.

Another tendency is noticed in the sense of applying precedents. After having interviewed many judges, such as judges of Court of Cassation Mr. Asatryan¹³ and Antonyan¹⁴, law clerks of first instance judges and Court of Appeals, the judge of Court of Appeals Mr. Chilingaryan¹⁵, it is clear enough that there are decisions of the court of cassation (two or three out of eight hundred) that are

¹³ Asatryan Hamlet. Personal Interview. 20 January 2011

¹⁴ Antonyan Suren . Personal Interview. 20 January 2011

¹⁵ Chilingaryan Karen . Personal Interview. 22 January 2011

very often used and referred to. As Mr. Antonyan stated there were well known and popular cases which are referred automatically. For example decisions of the appellate court of RA concerning the Acquisitive Prescription judges use almost every time the decisions about this issue. So more than 30 civil cases of this issue in Court of Appeals were compared and all the time the Court refers to the case somehow. By the way the same result was seen in Achapnyak and Davtashen, Erebuni and Nubarashen first instance courts, the most used or the only precedent was again the precedent about *Acquisitive Prescription*.

The issues about articles 78 of civil procedural code, which is about the court summons, article 17 of civil code and particularly its part of lost profits are referred to respective precedents both in 2009 and 2010 in Court of Appeals. So, again the precedent is used not as a part of law, which is mandatory every time the two cases' essential factual elements are the same, and as a source to make a good, reasoned decisions. Instead it is used whenever the judges find it "appropriate", even not providing a conclusion why the applied case is the exact one.

What is also very interesting the judges do not require their assistants to look through the cases before trying to understand how to solve the problem, instead there is some tradition to use this or that well known decision and nothing more. Judges feel no responsibility to use or even try to find precedents. They do not even scare of being reversed by the court of cassation, as the civil procedure code provides a provision, discussed above, which states that a contradiction between a decision of court of cassation and the lower court decision is a ground for hearing the case. However there are as already said cases which are used, but on the other hand they are very few and they are done very mechanically. So it is also inferred that as in the decisions of one judge there is reference to a precedent, it becomes a model and later

decisions of the similar cases and rules are mechanically the same because the next decision is created on a sample decision. Thus if the judge is used to apply any precedent it is done for every similar case, if not then no precedent is used. These can have one justification: I looked through more than 200 cases of court of appeals of 2009 and 2010 most of them concerns also the breach of the provision of 52, 53, 131, 132, articles of civil procedure code, which are about the evidences and their assessment as a whole and the decision of a court that should be reasoned in details. The court did not refer to the precedents regarding these articles, as the law and the court's precedent is quiet similar and referring to them is like doing the same thing twice. But on the other hand there are also cases where the judges decide to use precedets even for these articles and even not considering the fact that they did not do it for hundreds of cases on the same issue. So this also proves that there can be no excuse and justification for negligence or intent of not using precedent.

Precedent should be applied for every similar case regardless the value of that precedent and the mood of the judge. By doing so the culture of using precedent will be anchored in the judges' conscience and minds. Unfortunately the judges still do not feel bound by a precedent as they and their assistants prove. As some of them say, they use it when they wish and when dont figure out anything of the case. On the other hand there are judges who don't use precedents because they think that precedent is a "cancer" in the legal system which hinders their actions and limits the scope of their independence. However they do not have the road back, they are bound. But how to convince them who are skeptical about this institution and how to force those, who fill no responsibility in applying precedents, use the latter??? A united mechanism should be created. A line of frequent seminars, sections, round tables should be organized. Best practices should be presented. It will also be useful to have exchange of experience with developed countries in this field. First of all Armenian

judges should know that they are bound by law, secondly they should understand that there is no way of escaping law, and finally they have to realize that precedent is nothing but an alternative and essential “tool” for unity in decision –making and for final decision and it will serve its goal when each of them fill that he or she is in charge for deciding cases based on law (including precedent) and legal conscience and not nepotism and corruption. Of course these all is not enough to have a good practice of application of precedents, as it is already discussed the core problem is in legal system as a whole, but this will “mitigate the non-usage of precedent” somehow.

Criminal cases- The picture is quite different regarding criminal cases. As the number of the precedents are much less than in case of civil cases. And as many judges and professionals evidenced, the value of these decisions are higher. One of the main precedents of the court of cassation is Aslan Avetisyan’s case¹⁶ about detention and the time period that can be renewed based on reasoned circumstances and facts. Many lawyers’, attorneys’ testimonies prove that even though the precedent is very valuable, but the reality is that they refer to this and other decisions concerning detentions in their motions, but judges even do not try to explain why they did not use them. So it is even useless to speak about unity and equality of law, when the precedent is not used. But this issue rises when some judges very rarely use those precedent and the issue of everyone’s equality before the law becomes very vulnerable. The application of other precedents in the court of a Criminal court of Apelles again depends on circumstances¹⁷. The more a case is complicated and a law

¹⁶ RA Ct. of Cassation, Criminal Case, AVD-0022-06-08, 31.10.08

¹⁷ Diana Gasparyan. Personal Interview. 28 February 2011 .

One of the criminal court judge’s assistant -stated that they use precedents, but they did not give it much value. On the other hand they did refer to a precedent when there was no way of figuring out of a case.

not explicit, the more a precedent is used. So again the standards are not equal for everyone. Each court itself interprets the word “binding” and “application”.

The level of application of precedents in many developed countries is not stable and constant either. For example, the practice of application in US Supreme Court differs from century to century. Researchers **James H. Fowler** (University of California, San Diego) and **Sangick Jeon** (Stanford University) after having studied the complete network of 30,288 majority opinions written by the U.S. Supreme Court and the cases they cite from 1754 to 2002 in the *United States Reports*, showed¹⁸ that over the course of the 19th Century, the number of citations rose—as did the fraction of cases citing others at least once—suggesting that the Court gradually learned to ground its rulings in the facts and opinions of previous decisions. In concord with past qualitative observations by legal scholars (Goodhart 1930, 180), the quantitative data indicate that the norm of *stare decisis* was fully adopted by about 1900. During this period, majority opinions tended to cite fewer cases. There was also a sharp decrease in the number of opinions that contained at least one citation to another case. And in 2000s the number of Supreme Court’s application of precedents decreased. But the authors of the research did not state the reason of this. Anyway, the fact is that they either do apply or not for a particular period and they do this in a uniform manner unlike Armenian judges who “apply” precedents in an abstract manner, as described above.

¹⁸ A project- paper. *Precedence and transparency*, realized by the British East –West Center , 2006

Chapter 2 Citations and references of precedents

It is impossible to find two cases which are completely identical. The precedents are bound regarding the cases which are sufficiently similar. Lawyers call the case sufficiently similar when the material facts are the same. The doctrine of precedent assumes that cases must be decided in the same way if the material facts are the same. The *ratio* tells what material facts are. What is the *ratio*? *Ratio* is defined as the totality of the material facts of the case plus the decision made in relation to those facts.¹⁹ Saying more precisely the *ratio* is the reason for the decision. The foundation of the *ratio* is that every case which applies the law to certain facts is inspired by a legal principle which is fundamental for a decision and this principle makes judgment binding. The classic example of this is the famous English case of *Donoghue v. Stevenson* (AC 562; House of Lords 1932).²⁰ Mrs. Donoghue decided to bring an action against the manufacturer of the ginger beer for negligently causing gastroenteritis. It was impossible to claim against the café owner because he had not been negligent and at the same time she did not have a contract with the ginger beer manufacturer. But she succeeded in her claim against the manufacturer and the manufacturer was held liable. The material facts can change depending on whether the issue is interpreted narrowly or more broadly. The possible question for the case could be; was in the bottle dead insect or was the product defective, was the defect invisible?

¹⁹ Goodhart A., *Essays in Jurisprudence and the Common law*

²⁰ *Ibid*

So an important element for a good reasoned judgment is comparing two cases (the case of precedential value with considered case) finding essential fact, holdings even dictum.

Therefore another concern about the precedent in Armenia is the way the courts refer to the decisions of court of cassation and how deep they go explaining the similarities or differences between the two cases. This is not a technical issue, instead it will help the parties of the case, as well as potential litigants understand the rationale of the court, to realize what fact the court considers as similar and what tools and methods the judges use for drawing the conclusion.

It will be useful to have some idea about the mechanisms of citing precedents in some countries which are more experienced in that field, which use precedents more frequently.

For example in Germany, where the precedent does not have such a binding effect than in Anglo-Saxon countries, citation of the cases are done mostly by just reference and without detailed discussion.²¹ The latter is not done in decisions but on the other hand very often it is done through articles of judges, attorneys, scholars. This aims to explain and systemize bodies of precedents. So, even the German courts do not very comprehensively discuss precedents in their decisions, they do it separately as a support for understanding the factual findings of the case, the important facts, etc. Moreover, German courts could afford themselves just to refer to the case, as the level of the legal conscience of German people is much higher than of the Armenians.

²¹.MacCormick D.N, Sumner R.S, *Interpreting precedents*, England, USA, 1997, 19

To have more illustrative picture on this in RA we can consider some cases of first instance or appellate courts. In Yurik Titiryan vs. Martin Sahakyan case²² about seizing money for property tax, the judge refer to the decision of court of casation of civil action²³ stateing the finding of the court in one sentence, which holds that property tax responsibilities can arise only for the past three years.

In this case the court cited the decision and also the holding, ratio but did not try to explain why this is the most accurate part of the decision that is to be cited and what are the essential fact features that made the judge draw the similarities. Of course it is clear that the case is about the property tax and the facts are supposed to be alike.

But they are still supposed. It would take two or three sentences to make a simple comparison of facts and law, but that would ease the job of parties, lawyers and ordinary people understand the conclusion.

Another comparison can be made with French practice regarding this issue.²⁴

Judges in France do not cite precedents in their written decisions, but practitioners and scholars do. The importance of these citations varies pursuant to the type of court and the type of law. They are more frequent when the statue is few, or not codified, as in administrative law. This is so due to the fact that this country is not an heir of the institute of precedent. And the necessity of citation comes into existence, when a specific field of relationship is not well regulated. These citations refer to the published text of the precedent and the reasons given for the ruling. It can be inferred that the courts do not have to very deep analyze of two cases. Mere reference will be enough. But Armenia, even not being a common law country, has an obligation to refer to precedents even when the particular case can be solved by a law. Again the

²² EAND /1259/02/2010, 10.09.2010

²³ RA Court OF Cassation, Civil Case, VD/6350/05/08, 12.03.2010

²⁴ MacCormick D.N, Summer R.S, *Interpreting precedents*, England, USA, 1997,103-107

question is how to do that. Because as it was said above much depends on the “technical” aspect of this issue. Alongside with the above mentioned arguments, it also helps the Armenian judges who are going to use a particular case, understand the whole importance of the cases. As this system is quite new in our reality, even judges should get used to this and a very helpful method will be first of all understand the case and then find similar elements of the cases, which can be done inside the decision, as in case of applying laws. At the end of the day the judge and all the other interested and not interested parties of the case will understand the whole “story”. And gradually lawyers and judges as well as ordinary people will get acquainted with this system and with the results of application of this system.

Another case will show that there are many unsettled things concerning citation and references. In one of the Erebuni and Nubarashen Communities’ court case²⁵ where the party refers to a court of cassation’s 02.03. 2007, 3-466 decision, the court did not even try to disagree or agree with that reference. It was stated in palintiffs position. A question raises: why did the judge wrote about the palintiff reference, when he knew that he/she would never try to make even a comment on it? It comes to say that the judges do not feel very resposiable themselves while maaking decisions and the referances and dicussion over a precedent is not an exclusion. This is the result of poor professional knowledge and absence of will to become more experienced and to handle cases in a professional manner.

For example in Italy academic legal writing very often devote much space and detaild analyses to discussion of precedents. As usual the main part of the judicial opinon consists only of the discussion of precedents.²⁶ Lawers arguing cases befor

²⁵ EED/0065/02/10, 31.03.2010

²⁶ D.N. MacCormick, R.S. Summer, Interpreting precedents, England, USA,page 143

courts are expected to cite and discuss the relevant precedents and they very often do in fact.

In Armenia, of course there are cases which make clear comparison, discussion of facts, ruling, etc. One of these cases is for instance, Anatoly Manasyan vs. Emma Eghiazaryan²⁷, where the judge very comprehensively showed the fact and the rule similarities and differences. As many 100 of cases show there is no uniform application, as well as uniform method, style of citation of precedents in RA. Each judge himself decides what is the best way to do things, in this case to apply rule or not, and how to apply. Moreover there is not a single case which would cite the controversies of cases, which would also help to emphasize the differences and provide strong grounds and arguments.

For example, in US although justices frequently use citations to *support* their arguments, they sometimes use them to point out controversies, argue against previous opinions, and even overturn past decisions²⁸. The contextual exploration of the positive and negative nature of each citation may yield additional insights into the network of precedent and its effect on the relative importance of cited decisions.

So the mere application, without any analyses, comparison is not enough to find the “truth”, to serve its goal of equality and uniformity at least for some period when the precedent is not very precisely and clearly understandable. Later on when the courts and the whole society get to know all the layers of this institution and understand the meaning of the references by a single citation of a case name and the number, then the deep analyses won’t be so necessary. But now we cannot afford ourselves such a “luxury”.

²⁷ EADD/0227/02/09, 29.07.2010

²⁸ H. Fowler, S. Jeon The Authority of Supreme Court Precedent, Forthcoming in *Social Networks* (2007), doi:10.1016/j.socnet.2007.05.001

Chapter 3. Codifying precedents

A judgment may become a precedent only when it is known not only by the parties to the single case but also by all courts, lawyers and finally by the public.²⁹ Therefore the devices aimed at publishing, codifying judgments in order to make them known are essential to any system of precedent. There are usually two ways of reporting these decisions: official and private. But sometimes it is also done by semi-official private organizations (e.g. West publishing system in the USA, the private system in Norway, semi -official system in Sweden and Italy). It is also very common when both systems exist, for instance in Germany, Spain, France, Poland, Finland, and the EU.³⁰

The use of precedent has resulted in the publication of law reports that contain case decisions. These reports are used by judges to find the decisions relevant to each particular case. They try to determine whether the facts of the present case precisely match previous cases. If so, the application of legal precedent may be clear. If, however, the facts are not exact, prior cases may be distinguished and precedents discounted.

Though the application of precedent may appear to be mechanical, a simple means of matching facts and rules, it is a more subjective process. Legal rules, embodied in precedents, are generalizations that accentuate the importance of certain facts and discount or ignore others. In order to concentrate more on legal issues and not on finding precedents, it is too important to have a codified, well designed system of precedents, which will help the courts, lawyers, and ordinary people to find

²⁹ D.N. MacCormick, R.S. Summer, *Interpreting precedents*, England, USA, 451

³⁰ <http://www.experts123.com/q/why-is-law-reporting-essential-to-judicial-precedent.html>

precedents applicable to their case. Now there is no such codification of precedents in RA. There are several publications of precedents but they are not codified by articles, codes, etc, etc. Having a codified model of precedent will help not only the parties, but also judges, who won't spend much time on looking through a precedent.

So the above mentioned factor also impedes the judges and the lawyers to use precedent.

For example in France a huge number of cases are published in official bullets, then they are comprised by³¹

- a short list of related topics or key words, which corresponds to the general index of the volume,
- short summery of judgments.

What is also very important, the court itself decides which case is worth to publish and give a value of precedent, unlike Armenia, where there is no criterion of dividing cases into precedential and non-precedential categories.

The sooner Armenia starts codifying the precedents the better the result will be. As now there are not so many precedents yet and the system is just making first steps, it will be wiser to launch this process now not to face difficulties later when everything becomes more complicated and when there are piles of precedents The developed countries' practice, such as Germany, UK, Italy, shows that the publication can be done either by state body or by private organization, or by both. So it does not matter who will do that since the result is important. It will also be very wise to distinguish precedents form non precedents, and should be done by court of cassation, as they know better what they rule and what the most important rulings are.

³¹ MacCormick D.N,Summer R.S, Interpreting precedents, England, USA ,1997, 143

Another way of having good impact on application of this institute in my opinion is to emphasize the binding force of the precedent in the following way:

as it is known the final verdicts are entered into a database of each court. There are several sub-columns in those databases, where some elements of the case, such as the names of parties, complaints, the name of the court and the judge and other elements are described. I would also suggest to add one more column about the applied precedents, where a court clerk will put information about the particular precedent which is used by the court in the particular case. This will first of all control the application of precedent by everyone, including lawyers, secondly, it will at least remind the judges that there is a requirement to apply precedent, which will increase the number and may be the quality of using precedent.

Conclusion

As Plato and Aristotle stated ³² law includes only general definitions and there are many cases and situations that are impossible to regulate with those general definitions. There are cases when the law is not applicable, and that does not necessarily mean that the law is imperfect. This lies in situations which are not so ordinary or even are not expected to happen. So these are the cases where a special interference is needed. The precedent may be considered as a way of solving this problem. So this picture is not for a particular group of legal systems, it is common for each one. Armenia is not an exclusion and the institution of precedent may have its quite logical place in our national legal system. It can serve as a good media for reaching the justice. Unfortunately, many decades are needed until we understand the importance of the precedent and its legal application. Now, as the paper shows, the reality is that political influence on the whole legal system and particularly on decision making process is a huge obstacle. Judges don't use laws, precedents properly as they know the overall outcome much before the judgment is publicized. As it was discussed only a few precedents out of 800 are used in civil cases. So the whole picture of precedents' applicability in Armenia is very poor and unpromising. There are lower courts which do not use precedent at all or even if they use, they do it randomly and very mechanically. Judges are not experienced in this field; moreover they don't want to become so. Therefore it is even useless to speak about precedent as source of law in RA. It is de jure so, but de facto, not. Well known, universal goals of

³² Kakoyan A., *Precedent as 200a source of law in RA and its comparative analyses*, Yerevan 2008.

precedents are just a great desire in our reality yet. As the research revealed there can be situations when cases of identical content and facts are solved differently, as one judge may be used to apply a particular decision the other no. Thus it is also useless to think that the precedent serves as a tool of reaching the unity and equality.

On the other hand this institution is new, many things will change and to that end some steps should be taken.

The problem of course is both the political influence and quality of judges. But this does not mean that nothing can be changed. First of all I think that in all Law universities, faculties a separate course should be devoted to an Armenian case law, its application, citation, etc. Another important role may play attorneys, who may gradually by their concrete and plausible references make judges use precedents. Lawyers also sometimes use ungrounded, disorganized precedents and use them not properly, indifferently. Instead they should be more attentive, careful to show and convince the judge why the cases are similar or different, to indicate the policy of the law as well as the precedent and finally to direct all the points to show that the result will be just (as the goal of the court is to reach the justice) when the case is decided in a way as the previous case was solved or vice versa.³³

It is also very important to have a codified system of precedents. This will also somehow be an incentive to use precedents.

There is no doubt that the above mentioned will not solve all the problems, but it will help to have equality and unity in those cases when there is no political influence on the judge. The latter is an issue which is not in the scope of our paper, moreover is an unsolved problem taking account current Armenian situation.

³³ V. Bournazian, Case law in Armenia, 2010 <http://armenianlegal.info/archives/354>,

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