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THE ROLE OF JUDICIAL PRECEDENT IN THE COURT PRACTICE OF LITHUANIA

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Annotation. *The article analyzes the importance of judicial precedents and interpretation and application of law in the practice of Lithuanian courts. It discusses what kind of model of judicial precedent, as a source of law, is currently institutionalized in the legal system of Lithuania, and what changes should occur as a result of the principle of horizontal and vertical judicial precedent, introduced by Article 33 of the Law on Courts after the decision of the Constitutional Court of the Republic of Lithuania of 28 March 2006. The article argues that it is necessary to maintain a distinction between bindingness of court decisions in the countries of common law and the importance of uniform court practice formation in the countries of civil law. Therefore, though judicial precedent de jure is considered as a source of law in Lithuania, under current circumstances the establishment of horizontal and vertical model of precedent cannot be regarded as corresponding to Lithuanian legal traditions. In view of the authors, the establishment of this model needs a careful consideration, based on comprehensible and detailed methodology of identification of a judicial precedent as well as its application in later cases, and a thorough analysis of the changing role of a judge in a democratic society in order to maintain a proper balance between legal stability and the development of law and the principles of court independence and confidence in law as well as to ensure that legitimate expectations of the parties are not violated.*

Keywords: *stare decisis doctrine, jurisprudence constante doctrine, judicial precedent, source of law.*

Introduction

The object of this article is to analyze judicial precedent as a source of law in the court practice of Lithuania. The relevance of the subject is determined by the discussion of recent decades in western European countries about the convergence of the two legal systems – common and civil law – not only in separate branches of law but also the rising tendency of the importance of court practice in the countries of civil law as well as liberalization of the doctrine of stare decisis in the common law countries. This question gained relevance after the decision of the Lithuanian Constitutional Court on the horizontal and vertical bindingness of judicial decisions and after incorporation of this principle into the Law on Courts of Lithuania (Article 33). Also, the question is whether incorporation by law of the doctrine of stare decisis, which is characteristic to common law countries, would lead to its reception in Lithuania, and, finally, what is the importance of the requirement to follow previous decisions of courts for uniform and predictable practice of application and interpretation of law in Lithuania. Thus, the aim of this article is to analyze the role of judicial precedent in the court practice of Lithuania and what kind of the model of a judicial precedent, as a source of law, is currently institutionalized in the legal system of Lithuania, and what changes should occur as a result of the principle of horizontal and vertical judicial precedent, introduced by Article 33 of the Law on Courts after the decision of the Constitutional Court of the Republic of Lithuania of 28 March 2006.

To achieve the objectives and goals, the article discusses the relationship between the judicial precedents, based on the doctrine of stare decisis, in common law countries and the formation of a uniform conception of court practice in civil law countries and analyzes the practice of Lithuanian courts on the issue. For this purpose it uses systematic, teleological, historical and comparative methods.

1. Factors and Problems Determining the Recognition of Judicial Precedent as a Source of Law

As has been repeatedly observed in the law doctrine, the countries of civil law tradition recently experience a gradual and developing influence of court practice on their judicial systems. The first ones to analyze the role of a judge for interpretation and application of law, the need for creative interpretation and application of law and the importance of judicial precedent in Lithuania were prof. V. Mikelėnas and D. Mikelėnienė in their monograph 'Judicial proceedings: aspects of interpretation and application of law'.[1] The conception and the extent of the discretion of judges, the importance of judicial precedent as a source of law, the limits of interpretation of legal content and the aspects of application of formal and meaningful methods of legal interpretation, the

1 Mikelėnienė, D.; Mikelėnas, V. *Teismo procesas: teisės taikymo ir aiškinimo aspektai.* [Judicial proceedings: aspects of interpretation and application of law]. Justitia: Vilnius, 1997.

limits of implementation of freedom and relating threats were analyzed in the articles and research papers of V. Vasiliauskas, J. Gumbis, T. Berkmanas**,** G. Lastauskienė, H. Šinkūnas, R. Šimašius and others[2]**.**

The Lithuanian law doctrine emphasises that the reason of increasing importance of court practice is the changing attitude towards a judge: he is no longer expected to merely formally apply the law, he is expected to apply and interpret the law creatively or even to act as a quasi-legislative body. The aim of interpretation and application of law is to ensure succession, predictability and stability of courts' practice, which are the core maxims guaranteeing the proper implementation of the rule of law, based on justice and equality of all persons before the law.

In addition, the current constitutional interpretation of statutory law of civil law countries makes it possible to state that judicial precedents are sources of law for the purpose of ensuring uniform and predictable practice of application and interpretation of law. Therefore, despite the fact that the doctrine of *stare decisis* of the common law countries is still not established *de jure* in the civil law countries, the recent tendency of unification of court practice in these countries shows that lower courts defer to the interpretation and application by higher courts whereas highest courts are especially careful about correction of court practice, changing it only on serious grounds and on the basis of detailed argumentation. On the other hand, in civil law countries uniformity and predictability of court practice is achieved on the basis of the doctrine of *jurisprudence constante,* not by a direct statutory provision demanding the courts to follow previous judicial decisions. These tendencies lead to the discussion on the convergence of the two legal systems not only in separate law branches but also on the increasing significance of court practice in the civil law countries and liberalization of the doctrine of *stare decisis* in the common law countries.

Similar tendencies relating to the increased role of court practice can be observed also in Lithuania. Firstly, seeking to ensure continuity of jurisprudence, the Constitutional Court has explicitly indicated that judicial precedents are sources of law and that by following previous decisions uniform and consistent practice of courts would be achieved. Therefore the courts of lower instance are bound by their own decisions and the

2 E.g., Šimašius, R. Teisės aiškinimas ir jo privalomumas [Law interpretation and its binding power]. *Teisės problemos*. 2004, 2 (44): 8-29; Vasiliauskas, V. Teisminio precedento, kaip teisės šaltinio sąvokos problema: teisminis precedentas kaip nauja teisės norma ar kaip teisės aiškinimo (plėtojimo) rezultatas [The problem of the concept of judicial precedent, as a source of law: judicial precedent - a new rule or the result of interpretation of law]. *Teisė*. 2002, 42: 140-151; Gumbis, J. Diskrecija: teorinis požiūris. [Discretion: theoretical approach]. *Teisė*. 2004, 52: 25-47; Lastauskienė, G.; Šinkūnas, H. Konsultacijos teisėjams kaip priemonė formuoti vienodą teismų praktiką: probleminiai aspektai. [Consultations for judges as a means to form uniform court practice: problematic aspects]. *Teisė.* 2007, 65: 64-75; Lastauskienė, G. Teisinio teksto interpretavimo ribų ir teisės principų santykis: teorinės nuostatos ir Lietuvos teismų praktika [The relation between the limits of the interpretation of a legal content and the principles of law: theoretical guidelines and practice of Lithuanian courts]. *Teisės problemos*. 2005, 1 (47): 21-37; Berkmanas, T. Teismo aktyvumo kuriant ir aiškinant teisę plėtros tendencija: motyvai ir problemos [The tendency of the development of the activeness of court in creating and interpreting law: motives and problems]. *Teisės problemos*. 2004, 2 (44): 17-51.

decisions of the higher courts, whereas the higher courts, including the Court of Appeal and the Supreme Court, are bound also by their own earlier decisions[3].

Secondly, continuity and predictability of jurisprudence and the working principles of the instance system of the courts of general jurisprudence of the judicial precedent, as the source of law, are obviously reflected in the practice of the Supreme Court of Lithuania, which is under a duty to ensure the formation of uniform practice of courts. The source of this duty are the grounds of cassation determined by the Code of Civil Procedure and the duty of the courts of lower instance to follow the application and interpretation of law of the Supreme Court of Lithuania[4].

Thirdly, after the Constitutional Court ruled on the binding nature of horizontal and vertical judicial decisions, the principle was included in Article 33 of the Law on Courts of the Republic of Lithuania.[5] This raised a question whether the obligation to follow previous decisions of courts, established by law, constitutes reception of the doctrine of *stare decisis*, which is characteristic to common law countries, in Lithuania and what is the importance of this provision. In view of the authors, this problem can be properly solved by analyzing the courts' own evaluation of their decisions and practice on interpretation and application of law, including the practice of the Supreme Court of Lithuania and the Court of Appeal of Lithuania. This is the only way to initiate discussion on the Lithuanian model of judicial precedent as a source of law, whether it exists at all and what changes should result from that for the development of a uniform conception of a judicial precedent.

2. The Significance of Judicial Precedents in the Court Practice of Lithuania

It is obvious that in Lithuania, as in other countries, increasing role of court practice is expected to ensure predictable and uniform development of court practice. E.g., the Supreme Court of Lithuania has repeatedly stated that its main goal is to develop uniform court practice. Therefore, its interpretation of law establish a precedent, which is binding in subsequent corresponding cases. In addition, divergence from the practice of

3 E.g., the decision of the CC, 24 October, 2007, case No. 26/07 Regarding the concordance of Art. 4, 165 of CPC with the Constitution of the Republic of Lithuania.

4 E.g., the analysis of Art. 346, part 2 of CCP leads to the conclusion that the grounds of cassation bind on the uniformity of court practice. Article 361 of CCP determines that the stated decision of the court of cassation should contain the rule of law application or interpretation of the case, relevant to judicial practice. Art 4 obliges the courts, as the law is being applied, to consider the clarifications of law application in the decisions under cassation.

5 Article 33(4) of the Law on Courts (July 3 2008) states: 'The courts passing their decisions in the cases of certain categories bind on their own rules of law interpretation, defined in corresponding or similar cases. The courts of lower instance passing their decisions in the cases of certain categories bind on the rules of law interpretation courts of higher instance, defined in corresponding or similar cases. The judicial practice in the cases of certain categories should be changed and the new rules of law interpretation in corresponding or similar cases can be created only if it is unavoidable and objectively necessary.

the Supreme Court may constitute a ground for cassation, as Article 346 (items 1 and 2, part 2) of the Code of Civil Procedure ("CCP") suggests[6].

Court practice allows distinguishing the following rules of application of judicial precedent, which should be followed in later cases:

First, with regard to the argument that derogation from the established practice of courts is a ground of cassation appeal, it is important to justify reasonably and in detail on what questions of law the courts did not follow the proposed interpretations of law in previous decisions of the Supreme Court[7].

Second, only those prior judicial decisions which were made in analogous cases are binding as precedent, i.e. the precedent is applied only in those cases which contain factual circumstances identical or very similar to the factual circumstances of the cases which established the precedent and in which the same rule of law, as in the case with the established precedent, should be applied[8].

Third, it is essential to consider other significant circumstances: the time of the establishment of the precedent; whether the precedent reflects the existing court practice or whether it is only a sporadic occurrence; persuasion of reasoning; important social, economic and other changes resulting from the decision of the court binding as a precedent. Besides, it is necessary to follow general criteria of justice, reasonableness and good faith (CC Article 1.5)[9]. E.g., the Supreme Court of Lithuania has noted that deciding upon interpretation and application of law it is important to consider the factor of time i.e. it is essential to take into consideration that after the formulation of a certain rule both the interpreted rule and the court practice may change. Thus, any interpretation of the Supreme Court of Lithuania must be applied in the context of factual circumstances of the case, changes in law and the developments of court practice[10].

In addition, before applying a precedent one should take into consideration whether the court practice is uniform on a specific issue i.e. in the case of conflict of precedents (when there are several different court decisions concerning analogous cases) the precedent of a higher instance should be followed also regarding the time of adoption and other significant factors (such as whether a precedent reflects the existing court practice or whether is it only a sporadic occurrence; persuasion of the reasoning; the structure of the court (whether the decision has been made by a single judge or a chamber sitting in an extended composition or full court); whether the judges expressed separate opinions regarding a prior decision; important changes (social, economic and other) resulting from the decision of the court considered as precedent[11].

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6 E.g., decision of LSC of April 8, 2008, case No. 3K-3-231/2008.

7 E.g., decision of LSC of August 11, 2008, civil case No. 3K-3-362/2008; August 14, 2008 civil case No. 3K-3-399/2008, May 6, 2008 case No. 3K-3-120/2008; LSC October 1, 2003 case No. 3K-3-910.

8 E.g., decision of LSC of March 3, 2008, case No. 3K-3-137/2008, September 28, 1998 case No. 3K-122; October 25, 2005 case No. 3K-7-372, April 15, 2002 case No. 3K-3-569.

9 E.g., decision of LSC of April 1, 2008, case No. 3K-3-194/2008.

10 E.g., LSC decision of March 8, 2000, case No. 3K-3-271/2000.

11 E.g., CC the decision of October 24, 2007 in the cases No. 26/07 regarding the concordance of Art. 4, 165 of CPC, edition of February 28, 2002, with the Constitution of the Republic of Lithuania.

E.g., in a case relating to the lawfulness of remuneration to a bailiff the Supreme Court of Lithuania followed a rule of the latest judicial precedents that when a debtor has exercised an executive document (its part) after the expiry of the term, determined in the summons (proposal), and if the summons (proposal) were not to be sent to the debtor – after the executive document has been exercised – the debtor covers all enforcement expenses, i.e. not only administrative expenses and expenses for separate executive actions as well as the payment for bailiff's services[12]. In another case the Supreme Court of Lithuania had to decide a question of proper application and interpretation of Art. 2, part 18 of the Law of the Compulsory Motor Third Party Liability Insurance of Vehicle Owners and Possessors. In this case it also followed a rule that in case of conflicting precedents, the later precedent applies[13].

Fourth, after the aforesaid decisions of the Constitutional Court it is argued in the judicial practice that only those decisions of the Supreme Court of Lithuania are binding as precedents where cassation issues have been raised. Therefore interpretations of the Senate of the Supreme Court of Lithuania or the reviews of the Department of Civil Cases of the Supreme Court of Lithuania constitute solely methodological material, deviation from which may not be considered as a ground for annullment of the decision of the courts of lower instance[14].

Fifth, the Supreme Court pays a lot of attention on whether the corresponding precedent reflects the established court practice, or whether it is a single occurrence. It emphasizes that by refering to previous court practice it is not sufficient to point out to one or several court decisions in corresponding cases but it is necessary to analyze as many examples of court practice in analogous cases as possible[15].

Therefore, when the ground for a cassation appeal is deviation from the practice of the Supreme Court, it is required to discuss relevant Supreme Court practice in similar cases[16]. It means that within the meaning of Article 346 part 2, Item 2 of CCP the established court practice, as a ground of cassation, should be understood as sporadic, but as a sequential rule, mentioned in several decisions or applied in several analogous factual situations. Therefore, derogations from the established practice are allowed, i.e. the rule which was repeatedly mentioned in the decisions and applied by the court of cassation for a certain time. Thus, the argumentation of the violation of substantive or procedural rulings, the analysis of court practice or different practice of the Court of Cassation in cassation appeal should be presented in brief and clear arguments, in a consistent, thorough and logical way and the conclusions should be summarized and systematized so

12 E.g., LSC decision of May 8, 2008 case No. 3K-3-255/2008.

13 E.g., LSC decision of 2005 December 5, case No. 3K-3-634/2005.

14 E.g., LSC decision of February 26, 2008, case No. 3K-3-129/2008; February 11, 2008 case No. 3K-3-64/2008.

15 E.g., LSC decision of October 8, 2007, case No. 3K-3-364/2007.

16 E.g., LSC decision of October 8, 2007, case No. 3K-3-364/2007, December 29, 2007 case No. 3K-3-607/2007.

that the litigants and the court would clearly understand the legal issues for the proceedings of cassation (Art. 346, part 2, Art. 347 part 1, Item 3 of CCP).[17]

It is obvious that the courts refer only to previous decisions of the Supreme Court of Lithuania[18] or even only to those decisions which have been affirmed by the Supreme Court.[19] The decisions of the Court of Appeal started to attract more attention only after the ruling of the Constitutional Court establishing that the Supreme Court shares responsibility with the Court of Appeal of Lithuania ensuring formation of uniform court practice within their competence.

E.g., in one case determining the purpose and validity of application of the interim measures the Supreme Court noted that it was bound on the maxim that similar (analogous) cases are to be tried similarly, i.e. they have to be treated not by establishing new competitive judicial precedents but by following the already existing precedents, therefore the court was following a well-established rule of application of law, formulated in the practice of the Court of Appeal of Lithuania, that even when an interim measure - attachment of money of the debtor - is applied - it cannot be absolute, i.e. it cannot preclude the debtor from paying the workers, the budgets of the country, municipality or social fund of the state.[20]

In another case where the delay of the payment of stamp duty was at issue, the Supreme Court of Lithuania noted that it was important to take into consideration the explanations of the Court of Appeal of Lithuania on the issue and, only after that it is vital to decide whether it is necessary to reconsider that practice. The Court observed that the Court of Appeal had repeatedly pronounced on the legal questions of delay of payment of the stamp duty and developed a general interpretation on this issue which is regulated by Art. 84 of CCP, and decided that there were no grounds to alter the established practice of interpretation and declined to consider ther the arguments concerning the necessity to form new practice and to unify it.[21]

To conclude, the aforementioned rules of judicial precedent formulated in court practice clearly show that judicial precedent becomes recognized as a source of law in the practice of Lithuanian courts.

On the other hand, the courts apart from invoking judicial precedent in order to substantiate their decisions the courts also invoke previous judicial decisions in order to dismiss the arguments concerning derogation from uniform practice. Thus, the court decisions tend to be brief, mentioning only the relevant legislation and not going into great detail about how a decision was reached, i.e. the courts do not analyze or compare factual circumstances of the earlier case but only briefly mention that the cassation ap-

17 E.g., LSC decision of 4 February 2008, case No. 3K-3-52/2008.

18 E.g., LSC decision of 31October, 2007, case No. 3K-3-477/2007.

19 E.g., LSC decision of 5 July, 2006, case No. 3K-3-432/2006, 5 December, 2005 case No. 3K-3-634, October 26, 2005 case No. 3K-3-509/2005.

20 E.g., LSC decision of 8 May, 2008, case No. 2-335/2008.

21 E.g., LSC decision of 10 April 2008 case No. 3K-3-234/2008.

peal concerned a different problem of law or the factual circumstances of the case was different and as a result a certain case was not relevant on the case at hand[22].

Besides, although the courts refer quite often to the previous decisions of the Court of Appeal or the Supreme Court, they are discussed as a systematic analysis of previous court practice on a relevant question of law or as a supplementary argument for the decision of the court. Therefore, it is often not clear whether the court referred to such rules as *ratio decidendi,* the identification of which presupposes the necessity to refer to it in subsequent cases, or as an interpretation of law which follows the principle of unified and consistent court practice[23].

Such a position of Lithuanian courts, when they refer equally to both rules of application and interpretation of law which are relevant for a case under consideration and other rules of application and interpretation of law which explain the essence and purpose of the relevant legal regulation may be explained by the attempt to ensure uniform and consistent court practice in Lithuania. It should be considered as a feature of developing legal systems, including Lithuania and other post-Soviet countries which is a result of weak legal doctrine and changing legal system.

Such a position of the Lithuanian courts also implies that they usually treat judicial precedents as means of application and interpretation of law; therefore it is natural that the decisions of courts contain little attention to the analysis of the identification of factual circumstances and to determination of *ratio decidendi*, as the obligatory rule of performance, in a case under consideration.

It should be noted that the other civil law countries also often consider precedent as a means of application and interpretation of law or the method of perception of the meaning of the rule and the specification of law. Therefore, the courts usually do not analyze prior judicial precedents thoroughly and there is no reference to analogous decisions, i.e. as the prior case was judged in a certain way, this case would be judged analogously – thus, opposite to common law countries, motivation of decisions of these countries pay very little attention to the determination and discussion of the court decision *ratio decidendi* whether certain judicial precedent could be applied in a later case and whether there is some ground for derogation.

This position of civil law countries can be explained by the fact that the doctrine of *stare decisis* is not an obligatory feature of their juridical systems because it is traditionally argued that it violates the principle of a separation of powers, i.e. that only the legislature may make law. In addition, it is supposed that a strict adherence to *stare decisis* doctrine cannot be compatible with the duty of a judge to obey only the word of the law while administering justice and the principle of the independence of the judge. Hence, the civil law countries give emphasis not to *stare decisis* but the continuity of the

22 E.g., LSC decision of 4 January 2006 case No. 3K-3-9/2006; 21 March 2005 case No. 3k-3-135/2005; LSC decision of 14 May 2008 case No. 3K-3-239/2008; LSC decision of 9 November 2005 case No. 3K-3-559; 1 April 2008 case No. 3K-3-194/2008; 25 January 2006 case No. 3K-3-68; March 6, 2007 case No. 3K-3-89/2007.

23 E.g., LSC decision of 26 February 2007, case No. 3K-3-72/2007.

jurisprudence or *jurisprudence constante* doctrine according to which the courts, though independent, must rule the cases in a predictable and coherent manner.

It means that a well-established rule of application and interpretation of law in the court practice has a great impact on later analogous cases and that the principle of independence of courts does not preclude reference to the rules of application and interpretation formed in the practice of courts.

The discussed aspects of the significance of court practice in the civil law countries imply the different perception of the role of the judicial precedent and its bindingness in these countries compared with *stare decisis* doctrine of the common law countries which is grounded on the idea that the judicial precedent is the law. As a result the judicial precedent in the common law countries is considered to be a binding rule of law *per se*, which should be followed in later cases. Accordingly, the legal doctrine of both common law and civil law countries often criticize the prevailing attitude to the judicial precedent in civil law countries (including Lithuania) as the means of interpretation of law or a method of determination of the sense of law, but not as the obligatory rule of law *per se.* E.g., criticizing the understanding of the judicial precedent as a means of application of law, which prevails in Lithuanian legal doctrine, T. Berkmanas has noted that the majority of civil law countries refer to judicial precedent as a means to determine the meaning of law, whereas common law countries recognize the principle that the courts apply judicial precedent as a binding rule of law, not for the purpose of determining the meaning of law. As the decisions of courts are considered as law *per se,* they are binding on courts in later analogous cases[24].

Thus, the doctrine of binding precedent in common law countries should not be equated with the doctrine of *jurisprudence constante* in the civil law countries. Although the court practice in civil law countries is quite important, the courts are not obliged to cite it. Besides, only the decisions of the highest courts, based on scholarly authorities rather than on the statutory imperative, are most important.

The result of this is that there is no well-established tradition of systematization of court practice, uniform method for the publication of the decisions of courts and accessibility in many civil law countries, besides, the courts of lower instances may not refer to the precedent and the courts of higher instances usually deviate from prior judicial precedents without any serious reasoning[25].

Besides, these countries as well as Lithuania do not have either a clear methodology which would allow to determine the identity of factual circumstances in prior and later cases or a clear division between *ratio decidendi* and *obiter dictum*, therefore, it is acknowledged that application and interpretation of law in these countries plays a rather restorative role of the motivation of court decisions or has the influence for the development of law.

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24 Berkmanas, T. On the academic understanding of legal interpretation in Lithuania. *Lituanus: Lithuania Quarterly Journal of Arts and Sciences*. 2004, 50: 17-51.

25 Rorive, I. Diverging legal culture but Similar Jurisprudence of overruling: the case of the House of Lords and the Belgian Cour de cassation. *European Preview of Private law*. 2004, 3: 321-346.

Thus, after incorporation by law of the model of horizontal and vertical bindingness of judicial decisions in Lithuania, it must be taken into consideration that it would be a new phenomenon in Lithuania, a civil law country, so it could be implemented only when the methodology of judicial argumentation is changed and when clear rules of determination of *ratio decidendi* and the separation of *obiter dictum* are formed. Furthermore, it is important to systematize the practice of both the Supreme Court of Lithuania and the Court of Appeal of Lithuania on the relevant issues of application and interpretation of law and to ensure the system of publication of the decisions of all courts. The establishment of an accessible technical informational system is also essential for certain cases where the formed practice is changed and the cases where interpretation of the rules of law have changed by a subsequent decision.

3. The Conditions for Correction of the Court Practice

Another important aspect on which the convergence of the common and civil law countries is based is the conditions and grounds of correction of the existing court practice. The significance of the conditions of correction of the court practice in Lithuania was firstly emphasized by the above mentioned decisions of the Constitutional Court. E.g. in one of its decisions, the Constitutional Court explained that the practice of the courts of general competence in the cases of corresponding categories may be modified and new judicial precedents in the cases of those categories may be established only when it is unavoidably and objectively necessary and when it may be grounded and justified constitutionally. In all cases the correction of the practice of the courts of general competence (derogation from the prior precedents and establishment of new precedents) should be argued properly (clearly and rationally). Such correction should be made only when it is unavoidably and objectively necessary, and when it is properly (clearly and rationally) argued in all cases of the courts of general jurisdiction which deviate from the previous precedents of the Court of Appeal and the Supreme Court within their competence[26]. The identical provision of the Article 33 of the Law on Courts implies that for the uniform court practice, it cannot be modified *in silentio* and in all cases the grounds of correction of court practice must be responsibly discussed and argued properly.

As for the existing court practice, there is no practice of the Supreme Court of Lithuania, which would identify clear grounds of correction of judiciary decisions or reasoning. The decisions of the Supreme Court of Lithuania concerning the correction of court practice often either repeat the rules of conflict of precedent formulated by the Constitutional Court[27] or the decisions of the Supreme Court of Lithuania, passed by a chamber sitting in an extended composition of seven judges or plenary session, may be also considered as a signal of the change of court practice. However, even these deci-

26 CC decision of 24 October 2007 case No. 26/07 'Regarding the concordance of Art. 4, 165 of CPC with the Constitution of the Republic of Lithuania.

27 E.g., LSC decision of January 22, 2007 case No. 3K-3-8/2007; 18 December 2007 Case No. 3K-3-571/2007.

sions refer to unification of court practice, not its correction[28]. It does not directly imply, though, but from the later decision of the Supreme Court of Lithuania in the cases of such category as well as from the decisions of lower courts it can be affirmed that this decision was important for the unification of the court practice in the cases of the obligation of the insurer on the grounds of the Law of the Compulsory Motor Third Party Liability Insurance of Vehicle Owners and Possessors to redress non-pecuniary damage to the aggrieved person. In the decision of 6 November 2006 the Supreme Court of Lithuania[29] had to interpret the peculiarities of liability under a preliminary agreement. It clearly defined that the reason for pronouncing the issues of interpretation and application of the rulings in this case was that there were some obscurities in the court practice regarding the principles of performance of pre-contractual obligations established in the Civil Code of 2000 (CC Art. 6.163). In a subsequent case the chamber of the Supreme Court sitting in an extended composition[30] directly indicated in its decision and agreed with the assertion of the cassator that the practice of the Supreme Court concerning an issue of the case[31] was not uniform and emphasized that adopting this decision it aimed to unify the practice of courts.

As the correction of court practice is a new juridical phenomenon in the practice of Lithuanian courts, the issue of how to understand the requirements of "unavoidable, objectively necessary and constitutionally grounded and justified" for the purposes of correcting of court practice in Lithuania is a relevant subject, deserving a thorough research.

In other civil law countries, differently from Lithuania, the system of proper correction of court practice as an essential feature of *jurisprudence constante* is better developed. On the other hand, it is admitted in the countries of both common and civil law that it is impossible to develop a thorough system of correcting judicial decisions, as these rules, as well as law, change and they may be limited only by the constitutional principles of the rule of law[32]. The obvious fact is that the correction of judicial decisions is regarded as lawful only when it is determined by objective reasons and only when it is properly motivated.

E.g., in the common law countries, despite the prevalence of a rather consequent and strict doctrine of *stare decisis*, in the 70s of the last century it was acknowledged that too intense involvement into the judicial precedent may result in injustice as well as unjustifiable restriction of development, of law therefore, the change of the judicial precedent is justifiable in exceptional cases[33]. On the other hand, an error of application and interpretation of law or the necessity for development of law is not as such sufficient

28 LSC decision of 11 April 2006, case No. 3K-7-115/2006.

29 LSC decision of 6 November 2006, case No. 3K-P-382/2006.

30 LSC decision of 5 February 2007 case No. 3K-7-1/2007.

31 At issue was whether the bailiff should be paid for exercising an executive document when the debtor exercised the executive document himself, but after the time of the summons had expired and if the summons was not to be sent to the debtor – after the executive document has been exercised.

32 Rorive, I., p. 333.

33 *Ibid*., p. 331.

to change the precedent. In order to change a judicial precedent one should take into consideration that the court interprets and applies the law in retrospect, thus, it is necessary to have in mind the legitimate expectations of the parties. Therefore, a precedent may be overruled taking into consideration not only negative consequences of incorrect application and interpretation of law in a certain case but also negative consequences for the whole legal system. Besides, it is necessary to correct the judicial precedent on the basis of new arguments, e.g. that in the previous case the court did not consider either important principles or intentions of the legislature or the possible negative legal consequences of its decision; if the need to change the precedent is connected with essential social changes or with the changes of legal regulation and legal doctrine.

The possibility to change the judicial precedent may also depend on the power of the court's decision, the instance of the court, the time of the decision of the court, the nature of the legal relationship and other circumstances. First, it is acknowledged that the change of judicial precedent is the prerogative of the court of higher instance. Therefore, the courts of the same level can not modify their own decisions and change the decisions of the courts of higher instance, except in the following cases: in conflict of precedents, when the circumstances of the previous case sufficiently differ from the circumstances of the case under consideration, when there is another decision of the supreme court, which, indirectly overrules the earlier court practice, or when the court decision was passed by lack of care (lot. *per incuriam*), e.g. when the prior decision of court was not well-grounded or is outdated.[34] Secondly, considering the time of the court's decision, it is easier to change a recent precedent than to change an earlier one. Therefore, one cannot blindly apply the rule of exclusion of conflicts of precedents, in which a later decision should be followed, however, it should be properly, rationally and correctly argued. In addition, one should carefully estimate the possibility to change the court precedents in contractual relations, questions concerning tax law, in the sphere of criminal law and in the cases when legal regulation has been changed on the basis of judicial precedent. In all cases the derogation from the court practice should be appropriately grounded.

In the civil law countries where the model of judicial precedent, as a source of law, is based on the doctrine of the need to maintain uniform and predictable practice of application and interpretation of law, the deviation of the court practice is possible only if there are serious grounds and a proper motive. Changing precedents, one should take into consideration both the legitimacy of law and the need of coherence and stability of the legal system. E.g. in Belgium with a view to the formation of uniform and predictable court practice, despite the fact that officially court precedents for the courts in analogous cases are not binding, the correction of the judicial precedents is not usual, as it is declared that the essential assignment of the Court of Cassation is to ensure social peace and juridical clarity, therefore, even an error of application and interpretation of law *per se* is not a sufficient basis to change the court's decision. This means that it is

34 Vasiliauskas, V. Teisminio precedento reikšmė jo tėvynėje – Anglijoje. [The role of judicial precedent in its motherland – England]. *Teisė.* 2002, 42:152-165, p. 161.

not a decisive condition to correct the practice of courts[35]. Thus, it is acknowledged that an unjust but stable judicial decision is better than a subsequent, just, but controversial decision. On the other hand, the stability of the legal system should not be equivalent to stagnation, thus, the correction of court practice could be justified not only by essential error of law in the application and interpretation but also the need for development of law.

It is worth noting that the correction of court decisions in civil law countries involves new serious arguments, related to essential changes in social relationship and values or to the changes of legal regulation or they can be related to the erroneous interpretation and application of law, which violates essential principles of law, when a rule is interpreted completely misjudging the intentions of legislature and instead of ensuring legal stability and juridical coherence, causes chaos and is completely overruled by the courts of lower instance or is criticized by the legal scholars. Even in such case the court has to take into consideration the principles of legitimate expectations. Therefore, the possibility of the change of the judicial precedent *inter alia* is determined by the nature of legal relationship and the nature of the applied rule, e.g. in the case of estimated rules-principles it is acknowledged that the judicial precedents may be changed more easily, as it is considered that the legitimate expectations of the parties are not as strong, and in the cases when the confidence in law or legitimate expectations of the parties are determined by the imperative rules or are related to the protection of public interest, the judicial precedents are changed in a more complicated way. Even in the case of contractual law relations, e.g. deciding whether the parties properly fulfilled their contractual duties, the correction of the judicial precedent is more difficult to justify than in the cases deciding upon void agreement because of fraud or essential error where the legitimate expectations of the parties are less significant[36]. The correction of the judicial precedent is also more justifiable in cases when the rule is not well-established or concerns sporadic cases. In addition, in the cases when all grounds to justify the correction of the judicial precedent are determined but it is concluded that the legislature would do that better it is acknowledged that the court practice with respect to legitimate expectations of the parties should not be changed. It also should be noted that one should distinguish not only the issues when the judicial precedent *can be* changed but also when it *must be* changed. Those are the cases when the goals of legal regulation cannot be achieved by a chosen interpretation, but can be achieved with an alternative interpretation, and the cases when mandatory rules and fundamental principles of a legal system are violated.

Conclusions

1. The binding nature of judicial precedents in the common law countries and the doctrine of uniform court practice formation in the civil law countries cannot be equated, despite the increasing importance of court practice in civil law countries and liberalization of *stare decisis* doctrine in the common law countries.

35 Rorive, I., p. 331.

36 Barak, A. *The role of a judge in a democracy*. Princeton: Princeton University Press, 2006, p. 335.

2. The analysis of the judicial practice in Lithuania leads to the conclusion that although the judicial precedent in Lithuania *de jure* is considered as a source of law, statutory evaluation of the model of horizontal and vertical court decision, characteristic to the common law countries, cannot be considered, in the present situation, as corresponding to Lithuanian legal traditions and, therefore, it is an essential and exclusive condition for the development of uniform practice of courts.

3. In the developing legal system of Lithuania the uniform court practice can be ensured by strengthening the authority of the court system and the change of the method of adoption, reasoning and publication of the court decisions and their implementation.

4. The peculiarities of correction of the judicial decision are determined by national legal traditions and the ideology of the judges' role in judicial proceedings. Lithuania does not have deep legal traditions, its legal system is new, therefore, in the case of keeping to the judicial precedent and the necessity to properly ground the correction of the court practice, it is important not only to refer to the cases when the practice *can be changed* but also to the cases when the practice *must be changed*, as this is the only way when a predictable and uniform criterion of the court practice will correspond to the principle of a rule of law state.

5. The conditions for correcting court practice need careful consideration, based on comprehensible and detailed methodology of identification of a judicial precedent as well as its application in later cases, and a thorough analysis of the changing role of a judge in a democratic society in order to maintain a proper balance between legal stability and the development of law and the principles of court independence and confidence in law as well as to ensure that legitimate expectations of the parties are not violated.

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TEISMO PRECEDENTO REIKŠMĖ LIETUVOS TEISMŲ PRAKTIKOJE

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Santrauka. *Straipsnyje analizuojama teismų sprendimų ir juose pateiktų teisės aiškinimo ir taikymo taisyklių reikšmė Lietuvos teismų praktikoje bei analizuojama teismų praktikos koregavimo problema. Temos aktualumą lemia pastarųjų dešimtmečių polemika Vakarų Europos šalyse apie dviejų teisinių sistemų – bendrosios ir kontinentinės teisės šalių – konvergenciją ne tik atskirose teisės šakose, bet ir teismų praktikos reikšmės didėjimo tendencija kontinentinės teisinės sistemos šalyse bei stare decisis doktrinos liberalėjimas bendrosios teisinės sistemos šalyse. Lietuvos Respublikos Konstituciniam Teismui pasisakius dėl teismus saistančios horizontalios ir vertikalios teismų precedentų galios bei šį principą įtvirtinus Lietuvos Respublikos Teismų įstatymo 33 str. Lietuvoje tapo aktualus klausimas dėl teismų precedentų imperatyvaus pobūdžio ir dėl to, ar precedento privalomumo įtvirtinimas įstatymu reiškia stare decisis doktrinos, būdingos bendrosios teisinės sistemos šalims, recepciją Lietuvoje ir kokia yra imperatyvo, jei laikysime tai imperatyvu, vadovautis teismų sprendimais, priimtais ankstesnėse bylose, reikšmė siekiant formuoti vienodą ir prognozuojamą teisės taikymo bei aiškinimo praktiką Lietuvoje. Straipsnyje siekiama pagrįsti, kad teismo sprendimų galia bendrosios teisinės tradicijos šalyse ir vienodos teismų praktikos formavimo reikšmė kontinentinės teisinės sistemos šalyse neturėtų būti sutapatinama, todėl, nors teismo precedentas Lietuvoje de jure pripažįstamas teisės šaltiniu, horizontalaus ir vertikalaus teismo sprendimo veikimo modelio įtvirtinimas pagal esamą situaciją negali būti laikomas kaip atitinkantis Lietuvos teisines tradicijas. Autorių teigimu, dar tik besiformuojančioje Lietuvos teisinėje sistemoje vieninga teismų praktika gali būti užtikrinta teismų sistemos autoriteto stiprinimu bei pačios teismų sprendimų priėmimo, motyvavimo ir skelbimo tvarkos pasikeitimu bei realiu tokios tvarkos įgyvendinimu. Stare decisis modelio įtvirtinimas Lietuvoje reikalingas atsargaus požiūrio, kuris turi remtis aiškia ir detalia teismo precedento identifikavimo, jo taikymo vėlesnėse bylose metodologija ir išsamia moksline besikeičiančio teisėjo vaidmens demokratinėje visuomenėje analize tam, kad siekiant vieningos ir prognozuojamos teismų praktikos formavimo būtų išlaikoma tinkama pusiausvyra tarp teisinio stabilumo ir teisės plėtojimo bei nebūtų pažeisti teismo nepriklausomumo ir pasitikėjimo teise bei šalių teisėtų lūkesčių principai. Straipsnyje taip pat atskleidžiami teismų praktikos koregavimo ypatumai, kuriuos lemia nacionalinės teisinės tradicijos bei teisėjo vaidmens procese ideologija. Autorių teigimu, Lietuvoje, kurioje nėra gilių tradicijų ir teisinė sistema yra nauja, neišvengiamai daroma klaidų, kurios negali būti toleruojamos, todėl kalbant apie teismo precedento laikymąsi ir būtinybę deramai argumentuoti teismų praktikos koregavimą, reikia analizuoti ne tik atvejus, kada praktiką keisti galima, bet ir atvejus, kada ją keisti iš tiesų yra būtina, nes tik taip prognozuojamos ir vieningos teismų praktikos kriterijus atitiks teisinės valstybės idėją.*

Reikšminiai žodžiai: *civilinio proceso teisė, stare decisis doktrina, jurisprudence constante doktrina, teismo precedentas, teisės šaltinis.*

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