



**APPLYING THE METHOD OF CASE LAW COMMENTING IN LAW
SPECIALIZED TRAINING**

***APLICAÇÃO DO MÉTODO DA JURISPRUDÊNCIA COMENTANDO EM FORMAÇÃO
ESPECIALIZADA EM DIREITO***

***APLICACIÓN DEL MÉTODO JURISPRUDENCIAL COMENTARIO EN DERECHO
FORMACIÓN ESPECIALIZADA***

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ABSTRACT: The method of case law commenting is a method of teaching and training in the field of law that is widely applied in many advanced countries around the world. Different from the traditional lecture method, in the teaching method of case commenting, theoretical teaching will be carried out in parallel with precedents that are searched and selected to explain and illustrate the lesson. The article analyzes case law and the role of applying the method of case law commenting in law specialized training. On that basis, the article proposes the structure and method of implementing the case law commenting method in law specialized training.

KEYWORDS: Case law. Case comment. Law specialized training.

RESUMO: *O método de comentário de jurisprudência é um método de ensino e treinamento no campo do direito que é amplamente aplicado em muitos países avançados ao redor do mundo. Diferentemente do método expositivo tradicional, no método de ensino de comentário de casos, o ensino teórico será realizado em paralelo com precedentes que são pesquisados e selecionados para explicar e ilustrar a aula. O artigo analisa a jurisprudência e o papel da aplicação do método de comentário jurisprudencial na formação especializada em direito. Com base nisso, o artigo propõe a estrutura e o método de implementação do método de comentário de jurisprudência na formação especializada em direito.*

PALAVRAS-CHAVE: *Jurisprudência. Comentário de caso. Treinamento especializado em direito.*

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RESUMEN: *El método de comentar la jurisprudencia es un método de enseñanza y formación en el campo del derecho que se aplica ampliamente en muchos países avanzados de todo el mundo. A diferencia del método de lectura tradicional, en el método de enseñanza del comentario de casos, la enseñanza teórica se realizará en paralelo con precedentes que se buscan y seleccionan para explicar e ilustrar la lección. El artículo analiza la jurisprudencia y el papel de la aplicación del método jurisprudencial comentando en la formación especializada en derecho. Sobre esa base, el artículo propone la estructura y el método de implementación del método de comentario de jurisprudencia en la formación especializada en derecho.*

PALABRAS CLAVE: *Jurisprudencia. Comentario de caso. Formación especializada en derecho.*

Introduction

Precedents according to the provisions of Article 1 of Resolution No. 04/2019/NQ-HDTP of the Council of justices of the Supreme People's Court is determined to be arguments and rulings in a legally effective judgment or decision of the courts that are selected by the Council of Justices of the Supreme People's Court and published by the Chief Justice of the Supreme People's Court in order for other courts to study and apply them when deciding later cases. For cases where the law has not been specifically adjusted or there are no rules to regulate new social relations that arise, when a dispute occurs, to ensure the uniform application of the law and the equality in legal regulation as well as creating basic legal principles as the basis for the formation of new legal norms, the State also allows to record a number of principles and judgments of competent agencies to handle similar cases in the future. Therefore, case law plays a relatively important role in adjusting new social relations or filling legal gaps in some specific cases in reality.

Compared with traditional teaching, the application of case law and case law commenting to combine theoretical teaching with practice has created a breakthrough to transmit legal knowledge in practical application. Using case law is considered an effective method of transferring learners' legal knowledge into practice. However, the method of case law commenting in law training also requires a lot of conditions and requirements for lecturers as well as students. In order to effectively apply the application of legal precedents to the teaching of law major, it is necessary to clearly define the types of precedents, the structure, and methods of implementation. Currently, there are 52 precedents published by the Supreme People's Court relating to issues of commerce, labor, civil, land, marriage, and



family, criminal, this is an effective source in the practical adjudication of the People's Courts at all levels in general and in law specialized training in particular.

Methodology

The qualitative research method is considered as the basic method to approach and solve research objectives in jurisprudence which are: inductive - deductive method; method of analysis - synthesis, comparison. The methods are used synthetically on the basis of research and analysis of secondary documents from such sources as books, dissertations, yearbooks, reports, articles published in scientific journals, seminars, and judgments of the Supreme People's Court to clarify the application of case law in law specialized training. The purpose of the literature review is to evaluate the issues that have been solved, the "open" contents that have not been studied, and the issues that need to be inherited and developed.

Results and discussions

Case law and method of case law commenting in law specialized training

When it comes to case law, many jurists will immediately think of the Anglo-American legal tradition, because this is one of the prominent features of this legal system. In the Anglo-American legal system, case law becomes an important source of law and is represented by the phrase "case law" which means "the law formed by the case" (GLENDON; GORDON; CAROZZA, 1999). In the UK, case law is understood as legal principles drawn from court decisions created by judges, providing precedent or legal basis for judges to interpret cases of similar detail in the present and future (HANOI LAW UNIVERSITY, 2017).

According to the American dictionary Black's Law, the concept of case law is understood in the following two meanings: "(i). Case law is the act of making laws by the courts in the recognition and application of new rules in order to administer justice; (ii). The case has been settled as a basis for making decisions for future cases with similar circumstances or issues" (BRYANTH; GARNER, 1999). In the US legal system, a Court's judgment or decision must meet the following criteria to be considered case law:

- The content of case law must contain new legal issues;
- Case law must contain arguments, opinions, and ways of solving problems and be clearly expressed by the judge;
- Case law must arise from actual cases;





- Case law must be published and systematized according to an order and procedure
- Case law must be attached to the legal precedent “Satre decisis”, Lower courts are bound by legal principles created by superior courts, which are recognized in judgments (MICHAEL, 2013).

Legal practice shows that case law is also recognized and developed in countries following the continental European legal tradition. However, depending on the historical period and legal culture, each country has different levels of legal recognition. In France, although case law is not officially recognized, in practice judgments are used as case precedents must meet the following criteria: (i) The content of the case law must contain legal issues; (ii) The content of the case law must contain legal opinions; (iii) The case law must arise from real disputes; (iv) Case law is usually the judgment of the highest court in the court system (HAI, 2021). In Germany, case law is created primarily from the interpretation of the law as the judge applies it. In the German legal system, in some areas of law, such as Labor Law, there are currently no unified sources of law, which are codes such as in the civil and commercial fields. Therefore, although there are many legal documents as the source, the labor law in Germany is still incomplete because of the lack of case law of the Labor Courts, especially the German Federal Supreme Labor Court (Bundesarbeitsgericht:BAG) (NIGEL, 1993).

In Vietnam, case law is a legal term both old and new. This is because the existence of case law is also associated with the historical ups and downs of the country, which are not seamless but interrupted. In fact, case precedent was recognized in Vietnam in certain historical periods, but after that, it was not mentioned in legal documents. In 2015, case precedent returned to its status as an official source of law through the issuance of Resolution No. 03/2015/NQ-HDTP by the Supreme People's Court; and Resolution No. 04/2019/NQ-HDTP on the process of selecting, announcing, and applying case precedents. Accordingly, "precedents" is understood as " Arguments and rulings written on effective judgments or decisions (hereinafter referred to as judgment) of the courts that are selected by the Judicial Council of the Supreme People's Court and published by the Chief Justice of the Supreme People's Court in order for other courts to study and adopt them when deciding later cases." (Resolution 04/2019/NQ-HDTP). Regarding legislative techniques, the current Vietnamese law has developed a complete concept of the term "precedent". From the above concept, it can be seen that case precedent according to the concept of Vietnamese law has some basic characteristics as follows:



- Precedents are arguments and rulings written on effective judgments or decisions not the whole content of the judgment or decision, containing legal solutions that may be used as a standard in subsequent similar cases. This provision of Vietnamese law is similar to the provisions on case law in countries following the Anglo-American tradition;

- Case law must be selected by the Judicial Council of the Supreme People's Court and published by the Chief Justice of the Supreme People's Court. This point of view of Vietnamese law is different from that of other countries in the world, where the court's precedent-making activity is inseparable from adjudication. The publication of case law is mainly to bring the content of precedent to the public, not to determine the legal validity of the precedent like Vietnamese regulations (TRUNG, 2018). At the same time, according to the Supreme People's Court, the judgments and decisions of the Court selected to become case precedents must fully satisfy the following three criteria:

- (i) Containing arguments to clarify the provisions of the law which have differing interpretations, analyze and explain legal issues or events, and legal principles and guidelines to be followed in a specific situation;

- (ii) Having normative value;

- (iii) Ensuring the consistency of law in adjudication. (Resolution No. 04/2019/NQ-HDTP).

From a comparative perspective, in countries following the Anglo-American legal tradition, case law is a legally binding source of law that is recognized in court practice. This means that case law is an independent source of law that exists in parallel with the source of legal documents. As an independent source of law, case law plays an important role in judicial practice in these countries: (i) case law can be invoked as an independent legal basis for a court to make a decision; (ii) case precedent is the basis for the appeal to a higher competent court (CATHERINE; FRANCIS, 2009). In Vietnam, case law is considered a source of law. There is a reciprocal relationship between case law and legal documents, whereby case law is an addition to the "gap" of the law when there is no adjusting legal document. However, when the competent authority has promulgated legal documents to adjust issues previously resolved by the precedent, it will no longer be applied. Regarding the application of case law in a trial, the Supreme People's Court also stipulates: "When adjudicating, judges and jurors must study and apply precedents, ensuring that cases have similar legal situations must be treated equally".





From the above provisions, it can be seen that the Court will apply case law in two cases: (i) The case law will be applied by the Court to resolve cases that have been regulated by law, however, the actual law is not clear and logical, which leads to many different interpretations or the case is governed many legal provisions, but it is contradictory and overlapping; (ii) The case law will be created during the Court's adjudication for cases that have not yet been adjusted by legal regulations. Thus, in the above two cases, the case law functions as a supplementary source of law for the written legal system (in the first case), or case law becomes an official source of law and a legal basis for dispute settlement in court (in the second case).

On the basis of the resolutions on the process of selection, publication, and application of case law of the Supreme People's Court, after nearly 6 years of implementation, up to now, the Supreme People's Court has issued 43 valid precedents (SUPREME PEOPLE'S COURT, 2021). At the same time, legal precedents have been accepted by the local People's Courts in practice and applied to adjudication activities. As noted by the Legal and Scientific Management Department of the Supreme People's Court, the first case law in the settlement of a civil case at the Court was recorded at the People's Court of Quang Ngai Province. Specifically, the court applied Case No. 04/2016/AL on the case "Dispute over the contract for the transfer of land use rights". There was a case where the High People's Court used case law to hear a civil case. Besides, there are 23 cases of provincial People's Courts and 89 cases of district People's Courts that have applied precedent to hear civil cases (NHUNG, 2018).

Law training in Vietnam in recent years has made great progress compared to the previous period, this is reflected in the increased number of law training institutions at undergraduate and postgraduate levels. At the same time, the legal profession is considered a "career" with potential for development in the current period, when many "new" judicial titles are formed that require candidates to have graduated at least a bachelor's degree in law. However, the quality of law training in Vietnam is still far from that of countries with the development of "law profession" in the world (France, Germany, UK, USA, etc...) and other regional countries. One of the basic limitations of law training in Vietnam is the teaching method. The comparative research shows that, in developed countries, the use of the case law commenting method in law training and legal scientific research has a long tradition. The experiences in countries with the Anglo-American legal tradition show that applying the case law commenting method will help students develop the ability to read and analyze cases (this is a necessary skill for future law practitioners). Students and trainees can learn how to analyze the case according to the following factors: (i) Controversial circumstances; (ii) Legal





issues to be resolved by the court; (iii) The grounds for the court's decision and the reasons for its decision (HANH, 2015).

Through studying the bachelor's degree program in Law of some famous universities in the world (Yale University - USA, University of Melbourne - Australia; and University of Nottingham - UK), the author found that the use of the method of case law commenting in teaching is widely applied.

In Vietnam, the use of case law commenting in teaching and training law students has still received little attention; Meanwhile, the main method of teaching law applied today is that the lecturer conducts analysis and explains to students and then students will understand the written law. There are very few case studies that are included in the teaching content or if they are, it is usually just a few unsystematic minor details. The main teaching method is still lecturing although many law subjects have quite a large amount of case law that can be researched and taught, such as civil law, criminal law or labor law, etc.

At present, the method of commenting on case law is mainly interested and researched by jurists through articles published in the Journal of Legal Science (typically a cluster of "8 articles" on commenting on the case law of Vietnamese lawyers by author Tuong Duy Luong, the former Deputy Chief Justice of the Supreme People's Court) and monographs (typically the monograph "Case law comment" by author Dr. LS. Luu Tien Dung (DUNG, 2020) which has not been used as a "compulsory" teaching method in teaching law students and trainees at training institutions. In fact, at some training institutions, the method of commenting on case law has been used "limitedly" in teaching modules on international commercial law by several lecturers with expertise and specialized skills. (Typical the monograph on commenting on WTO case law of Ho Chi Minh City University of Law (QUY; NGUYET, 2012).

In legal science, case law comment in the narrow sense can be understood as the analysis and commentary on standard legal principles and legal interpretations by the trial panel for a legal case, and the court's decision is applied to settle similar cases in the future. In a broad sense, there is an opinion that: "When it comes to commenting on case law, readers can imagine case law in the context of a case, inseparable from the analysis and arguments of the judge, therefore, a case commentary is also an in-depth analysis of a particular case and how it was resolved or unresolved; or cover controversial legal issues in a particular area of law; from which the writer will give his opinion on the case and legal issues (THO, 2020). Thus, the case law commentary clearly shows scientific judgments and assessments under the personal lens of the writer. In our opinion, the use of case law commenting method should be developed and applied at law training institutions for the following reasons:



Firstly, the content of the case law arising from actual disputes is practical and must contain legal issues. The use of case law commenting in law training will help students become aware of legal issues and create experiences to identify legal issues in the process of practicing law. For example, Case Law No. 02/2016/AL on the property dispute reclaim raised the following legal issue: “According to the 1993 Land Law, overseas Vietnamese can only use land in Vietnam in the form of land lease. The transfer of land use rights is not allowed. Therefore, it is common to see a situation where Vietnamese residing abroad receive the transfer of land use rights in Vietnam, but on paper, another Vietnamese person is recorded. After that, the titleholder continues to transfer the land use right without the owner's permission and appropriates the entire transfer amount, leading to a dispute between the owner and the titleholder regarding the transfer money. Holding title to legalize the receipt of this land use right transfer is undisputed as falling into the case of an invalid transaction due to falsity under Article 129, the Civil Code 2005 (specifically, transaction purpose of concealing another transaction) and the transaction of receiving the transfer of land use rights of the Owner is also invalid because it violates the prohibition of the law under Article 128, Civil Code 2005. According to Article 137, the Civil Code 2005, When a civil transaction is invalid, the parties shall be restored to the original status and shall return to each other what they have received. However, the law does not provide any more specific guidance in the implementation of Article 137 of the 2005 Civil Code. The issue of dealing with this consequence still has many different points of view during the trial process.”.

Secondly, the content of the case law contains legal opinions, which is the generalization of the adjudication approach in a particular case into a general and precedent principle for which judges can apply in similar cases (HAI; NGOC, 2021). According to Resolution No. 04/2019/NQ-HDTP, the Court has the authority to give explanations to clarify the regulations that have many different interpretations; or provide principled explanations, which are valid as substitutes for the law in cases that have not yet been adjusted by legal regulations. The use of the case law commenting method in law training will help students and trainees identify the legal viewpoints of the Court. For instance, Case law No. 09/2016/AL on determining average overdue debt interest rate has provided a legal solution for determining “average overdue debt interest rate in the market at the time of payment” according to the provisions of Article 306 of the Commercial Law 2005. Accordingly: “*An interest on delayed payment is calculated at the average overdue debt interest rate in the market equal to the average overdue interest rate of at least three local banks at the time of payment (first instance trial). unless otherwise agreed or provided for by law*”.





Thirdly, the use of the case law commenting method in law training brings a multi-dimensional academic perspective; New approaches to court decisions help students and trainees to study in-depth in the future. From there, this method will help students understand more new legal concepts and apply these terms well for their future legal practice.

The structure and approach of implementing the case law commenting method in law specialized training

Throughout the world and in Vietnam, there is no common template for "case law comment", but a commentary usually follows certain steps according to the writer's choice which they think is most appropriate or according to general regulations about the form of the journal or the publisher. In the United States, a number of law schools have developed a common framework and set criteria for admissible case commentary for publication. Normally, a case comment with a capacity of 10,000-15,000 words consists of the following parts: Part I presents the legal facts of the case; Part II introduces legal issues (in this part the author can study previous cases and the impact of the case being commented on current legal regulations; find solutions to fill in the legal gaps); Part III deals with the solutions to the problems discussed in the previous section; Part IV is for the conclusion (THO, 2020).

In Vietnam, at present, some jurists often choose a number of precedents with new and complicated legal issues, then summarize the content and express their personal scientific opinion on the Supreme People's Court's solutions (Typically, there are comments on the case law of PhD. Lawyer Luu Tien Dung; and Jiang Wei Liang). In addition, there are scholars who use typical judgments (legal precedents) to analyze and interpret legal institutions and the application of legal provisions in judgments (compare with legal documents over time). period); at the same time, offer remedial solutions on the basis of research from foreign experiences (typically 10 monographs on judgments and judgment commentaries on "private law" by Assoc. Prof. Dr. Do Van Dai).

The process of studying the experiences of case commenting from domestic and foreign authors shows that commenting on a common court case is carried out in the following two steps: (i) Commentators must know how to analyze to understand case law; (ii) Commentators must know how to evaluate and comment on the solutions (the Court's point of view) contained in the case law.

• ***Understanding the content of case law:*** The purpose of analyzing case law is to seize the legal issues that need commenting and to understand the Court's point of view on

this legal issue. In addition to reading many times, to understand the case law well, you should take the following steps:

Step 1: Determine the legal situation, the requirements of the parties, identify the legal issues that need commenting. A case law contains many legal issues; therefore, it is advisable to focus only on factors and requirements related to legal issues that need commenting;

Step 2: Determine the opinion of the Court trying the previous case related to the legal issue that requires commenting;

Step 3: Determine the position of the Court that issued the precedent being commented on the legal issue of concern.

• ***Commenting and evaluating the value of the case law.*** In order to understand the value of the case law under comment, the following steps should be taken:

Step 1: To know the value of case law, it is necessary to see if the solution in the case law is commenting on anything new compared to the legal practice that existed before and after.

Step 2: It is necessary to evaluate, give the commentator's opinion on the solution in the case law. For example, should this be a reasonable, convincing solution? Is it the optimal solution? If the commentator is assigned to solve such a case now, what should be done optimally?

Thus, it can be seen that there is not a common structure for a case study comment, but the determination of the structure and manner of implementing a case comment depends entirely on the commentator. However, through the reference to the WTO case precedent comments, it is recognized that the basic structure of the case law comment should include the following two basic contents:

Firstly, the introduction to the event and legal issues. A brief introduction to the contents of the case law will give the reader the most general and concise picture of the key points of the case.

Secondly, the comment section includes the analysis of applicable law and the judge's legal interpretation; the author's analytical arguments and comments. Typically, in the inference section, the author will analyze and give opinions on a court judgment to determine if the court's judgment is fair; and at the same time compare the opinions from the point of view of other researchers and the author on this judgment. In case this judgment is unjust, what is the remedy? For example, commenting on the Case-law No. 09/2016/AL, the commentator analyzed and made the point of view "The content of the case law is convincing"; and at the same time give scientific explanations: "This precedent is formed on



the basis that the seller refunds the advance payment when the buyer does not receive the goods under the contract, and the same solution should be applied to both parties. In the case of contract cancellation due to a breach, because in this case there is also an obligation to return (under the Civil Code as well as the Commercial Law), the payee must return the money received when the contract is terminated and there has been a cassation decision of the Supreme People's Court in this direction (in France, there is also a Court in this direction such as the Metz Court of Appeal in 2011). When the contract is invalidated, the payee must also return the money received and the Court of our country follows the direction of the refunding party must also bear interest on the money received as in the case of the People's Court of Binh Duong province and we should maintain this direction for consistency with the analyzed Case No. 09/2016/AL analyzed (DAI, 2017).

Conclusion

Precedents are arguments and rulings written on effective judgments or decisions not the whole content of the judgment or decision, containing legal solutions that may be used as a standard in subsequent similar cases. Case law must be selected by the Judicial Council of the Supreme People's Court and published by the Chief Justice of the Supreme People's Court. The case law is highly practical, capable of filling legal gaps when the practice has not been regulated by legal regulations. In the process of developing and applying case law into practice in general and in law training in particular, it is necessary to:

- 1) Have analytical ability to understand case law;
- 2) Commentators must know how to evaluate and comment on the solutions (the Court's point of view) contained in the case law.

In particular, the parties should pay attention to:

- 1) The introduction to events and legal issues;
- 2) The comment section contains the views of both other researchers and the author on the judgment.

Using the case law commenting method in law specialized training is a way to link theory and practice, put arguments and judgments in a sentence so that learners can apply them effectively, improve creativity as well as apply hypothetical situations into practice.



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