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Report on the Questionnaire – Part II

The Effect of the Decision as Precedent and The Publication and dissemination of Judgments

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Dear Colleagues,

This report is limited to the last two, apparently very simple questions, of the questionnaire which was circulated. These were:

1. What effect do judgments have by way of binding precedents? and
2. How are judgments (i) delivered and (ii) published?

This brief report has been drawn up on the basis of the replies sent in by almost all the members of the network[1]. The replies to the abovementioned two questions varied considerably from jurisdiction to jurisdiction: some were exceptionally brief and telegraphic, whereas others were quite detailed and comprehensive. One common denominator, however, was that in none of the replies, with the exception of that of Lithuania, was any attempt made to link the two issues together, that is the question of precedent with that of the publication and dissemination of the judgments.

Rather than repeat what each jurisdiction has replied to either question – after all the replies are available to all of us – I propose to make some reflections taking the cue from the general trend of these replies. Admittedly, some, if not much, of what I have to say is not new to most of you here present: consciously or subconsciously, directly or indirectly we

[1] The replies considered at the time of the drafting of the report were those of Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, England and Wales, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Northern Ireland, Norway, Poland, Portugal, Scotland, Slovak Republic, Slovenia, Spain and Sweden.

are, in the course of our work as judges of Supreme Courts invariably dealing with precedent and the dissemination of the rulings we give. But precisely because most of us are practitioners rather than academics, we need sometimes to take a few steps back and consider questions with which we are dealing on a daily basis from a slightly more detached point of view.

Let me first consider the question of precedent.

Writing more than forty years ago, an English academic who I am sure is know to most of you – the late Sir Rupert Cross – had this to say by way of a general introduction to his work *Precedent in English Law* [2]:

> **"It is a basic principle of the administration of justice that like cases should be decided alike. This is enough to account for the fact that, in almost every jurisdiction, a judge tends to decide a case in the same way as that in which a similar case has been decided by another judge. The strength of this tendency varies greatly. It may be little more than an inclination to do as others have done before, or it may be the outcome of a positive obligation to follow a previous decision in the absence of justification for departing from it. Judicial precedent has some persuasive effect almost everywhere because *stare decisis* [3] (keep to what has been decided previously) is a maxim of practically universal application. The peculiar feature of the English doctrine of precedent is its strongly coercive nature. English judges are sometimes obliged to follow a**

[2] Oxford University Press, 2nd. ed., 1968.
[3] More precisely, *stare rationibus decidendis* – Michael Zander *The Law-Making Process* Cambridge University Press, 6th. ed., 2004, p. 215.

> **previous case although they have what would otherwise be good reasons for not doing so."** [4]

As was pointed out, in reply to the questionnaire, by England and Wales the position in this jurisdiction has changed since 1966, with the Supreme Court (the House of Lords) being now able to overturn its own decisions if it recognises that such previous decisions have been wrong. It would not be amiss here to point out the extreme caution with which the *Practice Note [on] Judicial Precedent* of 1966 was drafted:

> **"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a decision when it appears right to do so."** [5]

Such caution appears also in the position obtaining in Norway where, as we have been told, pursuant to the Courts of Justice Act 1915, *"in extraordinary circumstances, the Supreme Court may overturn a former decision…However, if a case is overturned, such a process is usually done through a step-by-step approach, i.e. 'silently' in the form of incremental changes over long periods of time, often many years."*

[4] p. 3.
[5] [1966] 3 All ER 77; [1966] 1 WLR 1234.

We are, of course, all familiar with the reasons why precedent, even if not "binding" – in the sense that another court is required to follow a previous decision even if it disagrees with it – is important: the need for certainty in the law and uniformity of application of the law being the reasons most often advanced. Incidentally they are also the reasons advanced by those jurisdictions which, although not adhering to the binding nature of precedent in the traditional "common law" sense, nevertheless have rules of procedure specifically designed to ensure a uniform application of the law both at a vertical level (by lower courts) and at horizontal level (by chambers of the same Supreme Court) – see, for example, the replies of Bulgaria, Hungary, Lithuania, Poland, Slovenia and Spain. It is sometimes argued that uncertainty is an inherent part of every legal system, and that "certainty and predictability in a legal system are very much matters of degree, [which] depend on the nature of the legal system taken as a whole"[6]. Nevertheless it is plausible to suggest that giving too much powers of change to the courts invites an even higher degree of uncertainty. In the criminal field in particular, it invites the possibility of trouble with the principle of the non-retroactivity of substantive criminal law. There may also be a thoroughly utilitarian reason for having binding precedent – that of reducing litigation by not allowing a point of law to be argued afresh in a subsequent case. A vague hint of this is given in the example supplied by Norway of the case of the seven oil companies; a more forthright exposition was given by Lord Halsbury, not quite yesterday but a hundred and ten years ago:

> **"Of course I do not deny that cases of individual hardship may arise and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is**

[6] Atiyah P.S. and Summers R.S. *Form and Substance in Anglo-American Law* Oxford U.P., 1987, p. 143.

perhaps abstract justice, as compared with the inconvenience – the disastrous inconvenience – of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final court of appeal. My lords 'interest rei publicae' is that there should be 'finis litium' sometime and there can be no 'finis litium' if it were possible to suggest in each case that it might be reargued because it is 'not an ordinary case' whatever that may mean." [7]

Needless to say, taken to its extreme, this theory of *stare decisis* would stifle all development of the law through the judicial process and would fail to allow for the adaptations necessary to meet new social needs. Incidentally, as was pointed out in the reply of England and Wales, although the House of Lords is the ultimate court of appeal in civil cases emanating from Scotland, in criminal cases the ultimate court of appeal is the Court of Session. It would seem that in Scotland, although there is a doctrine of binding precedent, both the High Court of Justiciary in civil cases and the Court of Session in criminal cases are somewhat more prepared to overturn their own judgments through the expedient of convening "a larger court"[8]. I will leave it up to the distinguished delegates from Scotland to confirm or otherwise the correctness of this proposition. Suffice it to point out that this same Scottish expedient (i.e. convening a plenary or larger court), although not necessarily for the purpose of overruling its own previous decision, can be found in the replies (see also

[7] Speech delivered in **London Tramways v. London County Council** [1898] AC 375, at 380, which settled the rule, as it then was, that the House of Lords was bound by its own previous decisions (quoted in Zander M. *op. cit.* p. 217).

[8] "The following remarks made by a Scottish court as recently as 1960 certainly suggest that the Scottish doctrine of precedent is less strict the our own [English doctrine]: *'If it is manifest that the ratio decidendi upon which a previous decision has rested has been superseded and invalidated by subsequent legislation or from other like cause, the ratio decidendi ceases to be binding'* (Beith's Trustees v. Beith [1950] S.C. 66 at p. 70). No doubt it would be quite incorrect to represent the English judiciary as a body which pays no attention to the maxim *cessante ratione cessat lex ipsa*, but it is

the replies to Part I) of Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, England and Wales, France, Hungary, Ireland, Italy, Latvia, Lithuania, Netherlands, Norway, Poland, Slovak Republic, Slovenia, Spain and Sweden – in effect when points of law of particular importance are to be decided, or when there are conflicting views between chambers or sections of the same court, "a larger court" is convened.

The great divide is, of course, between those jurisdictions where the judgments of the Supreme Court have a binding effect (or nearly so, if only to a limited extent), as precedent, on other lower courts (Bulgaria[9], Cyprus, England and Wales, Hungary[10] Ireland, Lithuania[11], Northern Ireland, Norway, Poland, Scotland, and Spain[12]) and those jurisdictions which have quite clearly indicated that decisions of the Supreme Court have no binding effect on other courts. Invariably, however, most, if not all, of the latter jurisdictions have indicated, that in spite of there being no requirement for lower courts to follow decisions of the Supreme Court, the latter decisions have considerable persuasive value. In these jurisdictions

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difficult to find as forthright an utterance of the maxim as that which has just been quoted from Scotland in any modern English law report." – Cross R., *op. cit.* pp. 16, 17.

[9] The reply states: "**Article 130** concludes that interpretative judgments and interpretative decrees shall be: adopted and delivered within three months of receipt of a request; and are binding on judicial and executive bodies, on local government bodies, as well as on all bodies issuing administrative acts."

[10] The reply states: "It is important to note that decisions relating to the unification of the law delivered by the Supreme Court are binding on the whole legal system on the basis of Article 47 of the Constitution of the Republic of Hungary and on Articles 27-33 of Law No. LXVI of 1997 on the organisation and administration of courts and tribunals." The second part of Article 47 of the Constitution of the Republic of Hungary states: "The Supreme Court shall ensure the uniformity of the case law of all courts. Its decisions delivered in the interests of the law shall be binding on all courts."

[11] With regard to Lithuania, the reply states quite clearly: "However it is not permitted that the significance of court precedents as sources of law be overestimated, let alone be made absolute. Court precedents must be referred to with a particular care. It needs to be emphasised that in the course of consideration of cases by courts, only those previous decisions of courts have the power of precedent which were created in analogous cases, i.e. the precedent is applied only in those cases whose factual circumstances are identical or very similar to the factual circumstances of the case in which the precedent was created and with regard to which the same law should be applied as in the case in which the precedent was created. In a situation where there is competition of precedents (i.e. when there are several differing court decisions adopted in analogous cases) one must follow the precedent that was created by the court of higher instance (a higher court)."

[12] The reply states: "Thus, a judgment given in appeals for breach of a law, once it has been published in the Official Gazette of the Spanish State, it complements the legal system, being binding on all civil Judges and Courts other than the Supreme Court. Likewise the binding character of the legal doctrine for lower Judges and Courts is unquestionable in the contentious-administrative jurisdiction through the provisions in law of jurisdiction (article 100, 7 in fine) and the purpose of the appeal to the Supreme Court for breach of a law which deals with the maintenance of the principle of legal security."

lower courts are expected, even if not required, to follow the rulings of the Supreme Court; if they do not do so, they risk having the judgement reversed on appeal. The point is very clearly and succinctly stated in the reply of the Italian Court of Cassation: *"The authority of the decisions of the Corte di Cassazione is based on their power of persuading the other judges that the principles of law already stated are the results of the correct interpretation of the law. In any case it is important for judges and lawyers to know the case law of the last instance court, where the case could be finally decided."*

Some jurisdictions (e.g. Belgium, France) have indicated that when the Supreme Court rules on a particular point in a given case and remits that case for reconsideration to the lower court, the lower court is bound by the ruling on that particular point. In my view this is not really a case of binding precedent, but the determination of an issue – whether the main issue or a collateral or procedural issue – in the same case.

What the questionnaire and therefore the replies[13] fail to address adequately are (1) the reasons which are advanced by Supreme Courts in overruling their own decisions, particularly in those jurisdictions which apply the doctrine of binding precedent (whether in the strict "common law" sense or otherwise), and (2) the effect, if any, of decisions of the European Court of Justice and the European Court of Human Rights on precedent. In particular, how does the principle of the effectiveness of E.C. law impact on the principle of *stare decisis*? We are all aware that a dynamic approach to the interpretation and application of a law often requires that a court take into consideration changing social, and perhaps economic, needs – this is particularly the case in constitutional jurisprudence, especially jurisprudence dealing with fundamental human rights. Allow me, therefore, to depart once again from the questionnaire and the replies thereto, and to propose for consideration some criteria

[13] With the notable exception of the reply of Lithuania.

which academics have put forward as justifying a departure from established case law even in those jurisdictions which apply the doctrine of binding precedent.

Professor Alan Patterson, in his book *The Law Lords* [14] published in 1982, has suggested that between 1966 – when the House of Lords decided that they were prepared to overrule their own decisions – and 1975, Lord Reid articulated at least seven criteria relating "to the use of the new freedom". These were:

- The freedom granted by the 1966 Practice Statement ought to be exercised sparingly (the 'use sparingly' criterion).
- A decision ought not to be overruled if to do so would upset the legitimate expectations of people who have entered into contracts or settlements or otherwise regulated their affairs in reliance on the validity of that decision (the 'legitimate expectations criterion').
- A decision concerning questions of construction of statutes or other documents ought not to be overruled except in rare and exceptional cases (the 'construction' criterion).
- (a) A decision ought not to be overruled if it would be impracticable for the Lords to foresee the consequences of departing from it (the 'unforeseeable consequences' criterion); (b) A decision ought not to be overruled if to do so would involve a change that ought to be part of a comprehensive reform of the law. Such changes are best done 'by legislation following on a wide survey of the whole field' (the 'need for comprehensive reform' criterion).
- In the interest of certainty, a decision ought not to be overruled merely because the Law Lords consider that it was wrongly decided. There must be some additional reasons to justify such a step (the 'precedent merely wrong' criterion).
- A decision ought to be overruled if it causes such great uncertainty in practice that the parties' advisers are unable to give any clear

[14] Quoted in Zander M. *op. cit.* p. 223.

indication as to what the courts will hold the law to be (the 'rectification of uncertainty' criterion).

- A decision ought to be overruled if in relation to some broad issue or principle it is not considered just or in keeping with contemporary social conditions or modern conceptions of public policy (the 'unjust or outmoded' criterion).

It will be observed that, except for the last two, these criteria are couched in the negative, their principal aim being to act more as a brake rather than as a catalyst for new ideas. In particular the fifth criterion would seem to fly in the face of the principle that a wrong decision is a wrong decision no matter whether it was taken by a lower court or by the supreme court of the land.

By way of contrast, Professor B. V. Harris of Auckland University, writing in the Law Quarterly Review [15], is of the opinion that doing justice in the particular case should be given greater weight than the values embodied in the principle of *stare decisis*. He suggests eight points that a court should weigh in considering whether or not to overturn established case-law:

- If the precedent can be distinguished, the question of whether it should be overruled is avoided.
- If the precedent was given *per incuriam*, it need not be followed.
- A precedent that has proved unworkable may be overruled.
- Were any reasons advanced on the present appeal that were not considered when the precedent was decided?
- If none of the above apply, does different weighting of reasons justify departing from the precedent?
- Do the merits of changing the rule outweigh the merits of sticking with the existing rule? Contrary to what is often said, the

[15] "Final Appellate Courts overruling their own 'Wrong' Precedents: the Ongoing Search for Principle" in 118 *Law Quarterly Review*, 2002, pp. 408-429; as quoted and explained in Zander M. *op. cit.* p. 224.

presumption should be that a precedent that is thought to have been wrongly decided should be overruled unless the *stare decisis* considerations warrant its maintenance.

- Is there any reason to suppose that the problem will be cured by the legislature?
- Does the issue raise fundamental principles?

These are, therefore, some of the issues that one may wish to consider.

Let me now pass on to consider the second question. As I have already hinted, the delivery and publication of judgments is somewhat related to the question of precedent. A strict doctrine of binding precedent can only be justified on the assumption that the decisions of higher courts are readily available not only to other judges and magistrates but also to lawyers. The delivery of a judgment is directed primarily to the parties to a particular case, and is intended to mark the determination of the issue (or of one of the issues) between them. A number of jurisdictions (e.g. Belgium, Cyprus, Denmark, England and Wales, France, Greece, Hungary, Ireland, Luxembourg, Malta, Netherlands, Norway, Scotland, Slovak Republic) have indicated that such a delivery is, at least in principle, made in a public sitting held by the court. This delivery may be accompanied by printed copies being made available immediately, or such printed copies are made available at some later date. Other jurisdictions opt for a "notification" process: the judgement is drawn up and deposited in the Registry, where it is available to the parties, who are advised that the judgment has been so deposited (e.g. Italy[16], Lithuania[17], Portugal, Sweden), with, in some cases, copies of the judgment being also delivered to the parties or their lawyers.

[16] But only in civil cases; in criminal cases, the decision is read in public after the hearing, with the motivation and the decision being lodged with the Clerk's Office.
[17] But only in civil cases.

Publication of the judgment refers to the judgment being made available to persons other than the parties. Here practice varies considerably. The common denominator, however, is that all jurisdiction make the effort to give as much publicity to their judgments as possible. In some jurisdictions the Supreme Court itself selects those cases which are to be published in official journals, leaving the publications of others to be made by private persons (including academic journals). Some jurisdictions have a fairly sophisticated system of dissemination of these judgments. France, for instance, has the "Judgments Bulletin" which is edited by the Research and Studies Service of the Court of Cassation, the "Information Bulletin of the Court of Cassation" (BICC) intended primarily for magistrates of the judiciary, and the "Annual Report of the Court of Cassation", edited by the Report and Studies Commission, which gives an integrated picture of the judgments and of the evolution of case-law by way of commentaries drawn up by councillors. It also has an intranet system for members of the judiciary and a website for the general public. Most jurisdictions make use of websites to publish their judgments, whether in full or in abridged version. A number of jurisdictions (e.g. Czech Republic, France, Hungary, Slovenia, Slovak Republic) have indicated that in disseminating judgments to the general public, the names of the parties, and possibly also certain other personal details, are omitted. It is not clear from the replies whether this "anonymization" is required by any special law (possibly dealing with data protection) or whether it is merely a precautionary practice.

I trust that this brief summary and these ideas will be of some assistance in our discussions on the effect of decisions as precedent and on the publication and dissemination of judgments of supreme courts.