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The use of precedents as a measure to ensure uniform application of laws in Norway and Moldova

1. Introduction

The question of precedents has been much debated over the years. The basic issue goes back to the division of powers between the legislator, the administration and the courts. According to Montesquieu the role of the judges was only to be the mouth that pronounced the words of the laws. The use of precedents means that part of the legislative process has been taken over by the courts. However, the legislator is not able to draft legislation that covers all situations and then it is for the courts in the context of the individual case to pronounce itself on the interpretation of the provision in question. When such a pronouncement stems from the Supreme Court it is desirable that the lower courts follow it when similar issues later arise in another case. Whether the decision by the Supreme Court is binding on the lower courts, or only persuasive is very much a philosophical issue. The fact remains that the Supreme Court will always have the possibility to overturn any judgment that runs contrary to its previous interpretation. More important however is that by following the rational of the decisions from the Supreme Court in similar cases, there will be a uniform understanding of the interpretation of the legislation in question. This may assure that conflicts find a solution either before the matter is brought to court, or at the lowest possible level. This will save time as well money both for the litigants and the courts.

It is important to remember that the legislator will always have to adopt new laws that may change the legal understanding created by the courts. Secondly, the Supreme Court is also free to change its previous interpretation, though new rulings. The overruling/setting aside of a precedent should, however, preferably be done through a plenary or grand chamber decision. But there are of course also more subtle ways to handle that issue.

The question of precedent has become more pressing during the last 20-30 years due to the importance that is attached to judgments by international courts: The ECtHR or the courts in Luxembourg that pronounce themselves on the interpretation and application of the

conventions/regulations or directives. These pronouncements are generally considered binding in states that have ratified the convention in question. These international courts have also as one of their main purposes to unify the interpretation of the rules in question in all the states adhering to the convention in question. To a very large extent such judgments must be considered as binding precedents by the national courts. (And here the national legislator will have no possibility to change that interpretation by the international court by adopting new domestic legislation.)

2. The Norwegian situation

The Norwegian legal system is generally classified as belonging to the continental legal system, as the legal system in Moldova. However, like all national legal systems it has been, and continues to be, developed under the influence of legal solutions found in laws of other nations. Such "imports" have however been adapted to suit the Norwegian legal style. In the development of statutory laws the Norwegian legislators studies legal solutions adopted in many countries. This influence has become more significant during the last 20 years partly due to the impact of the human rights conventions and the decisions by different human rights organs, but also – and very much so – by the necessity to implement EU legislation and to national legislation based on EU-rules in accordance with the interpretation given to then by the EU courts.

Under the Norwegian Constitution the Norwegian Supreme Court adjudges cases in the last instance. This has been understood by the Norwegian courts, to mean that the the Supreme Court has the final say not only in the individual case, but also with regard to the interpretation of the applicable legislation to be applied by the courts of appeal and districts court later. If a judgment by the lower court does not follow the interpretation by the Supreme Court – where applicable – it will be overturned, unless the Supreme Court might want to amend/change/overturn its own previous decision. The case is then decided upon usually by a Grand Chamber (11 justices) or the Plenary. The decision to hear the question in a plenary or grand chamber meeting may be taken already when the case was accepted by the Appeals Selection Committee, but also later after a hearing by a panel of five, if one of the justices requests it because there is a question to overturn the previous decision. However, if the previous decision by the Supreme Court was "split", then the new decision may be taken by an ordinary panel of five. There may also be certain earlier interpretations that are overturned without the court actually saying so, mainly due to changes in the general societal circumstances.

This function of the Supreme Court as the interpreter of the laws was developed without any other support than the constitutional provision already mentioned. Even today there is no direct support for this notion in the statutes, but there is a general acceptance by the legislators as well as the administration that the main function of the Supreme court is to interpret the statutes, to make sure that the statutes are uniformly interpreted and to some extent to develop the law, where necessary, due to lacunas in the law.

The Norwegian Supreme Court only hears and decides around 170-200 cases a year. To this number should be added the much larger number of decisions taken by the Appeals Selection Committee each year (around 1 000 decisions). Decisions are taken by the

Committee on the basis of the written material – the decision/judgment by the lower courts, the request for appeal and the arguments against appeal by the other party. Many of these decisions are very short, but many also contain reasoned decisions of great importance for the application by the lower courts of the same legislation in similar cases. One area where the interpretations by the Committee have played a very important role is in the interpretation and application of the statutory rules on pretrial detention in light of the decisions by the ECtHR.

Uniformity of application of legal rules to cases that are similar is considered very important by the legislator as well as the general public in Norway. It is seen as a basic factor of the rule of law. If there is no such uniformity there will be legal uncertainty. That is detrimental to the development of society, not only in the area of business law, but also in criminal cases. If people start to feel that they are treated differently than others, not only they, but also the public, will see them as unfairly treated and the trust in the fairness of the judicial system is at risk.

It should be added that there is a constant discussion between the Supreme Courts and the courts of appeal and district courts with respect to the interpretation of legislation. If one of the lower courts finds that time has run from a precedent, it will discuss this in the reasoned part of its judgment and also explain why it considers that the solution should be a different one. – Such a judgment may then be the basis on which the Supreme Court may decide to change its previous understanding.

3. The Moldovan situation

In Moldova the Supreme Court has a duty to ensure not only "the correct" but in addition "uniform" application of legislation by all courts, see article 1 (2) of law on the Supreme Court of Justice. According to the wording decisions by the Supreme Court should have the function to guide the lower courts when applying the same legislation. It is therefore difficult to see why this wording does not mean that the courts of appeal and first instance also here in Moldova should be guided by the interpretations of statutes by the Supreme Court. There does however to exist a certain reluctance among judges to take decisions by the Supreme Court into consideration even when deciding similar cases.

One difficulty may be that the Moldovan Supreme Court revises more than 5 000 cases a year. Already this figure may make it difficult for the lower courts to identify the cases where the Supreme Court has pronounced itself on the correct and uniform application of the legislation in question.

If the Supreme Court should undertake it duties under article 1 (2) of the law on the Supreme Court of Justice, it should be empowered to select which cases it revises.

Presently the Supreme Court decides on the admissibility of requests for recourse. But this basically goes to formal questions and does not deal with the question whether it is necessary – from the point of view of assuring correct and uniform application – that the Supreme Court actually hears the case. The rules on admissibility should be changed to allow the Supreme Court to select which requests it hears. A prerequisite is that the lower

courts should follow decisions by the Supreme Court when later dealing with the same question of legal application.

In may take some time before one will see the effects such a change. In the meantime, however, it could be considered to introduce a system that allows the Supreme Court to decide that certain of its decisions shall have a binding effect. This should be the case where Supreme Court has pronounced itself on the interpretation of Moldovan legislation in light of the country's international treaty obligations, see article 4 of the Constitution of the Republic of Moldova and the decision of April 16th 2010 by the Constitutional Court of Moldova that made it clear that Moldovan courts are bound by the decisions by the ECtHR. This could be done by the Supreme Court panel deciding the request for recourse. When the reasoned decision is made available to the parties it should at the same time be made available in a special space on the home-page of the Court reserved for such decisions. In addition the decision should be marked in a manner that makes it clear that this decision should be followed by the courts, including the Supreme Court.

Due to the large number of requests for recourse that the Supreme Court presently has to decide upon, it is unavoidable that the court may decide similar questions differently. This is however not desirable and measures should be considered to avoid that there are too many such cases. One possibility is to have an internal register where cases involving the same statutory provisions are indexed. Another is that the judges try to keep each other aware of different decisions by issuing a small internal gazette daily or weekly. The best remedy, however, is to empower the Supreme Court to limit the number of cases that it hears every year.

The idea of selection of cases may be seen as radical. However, this is the only measure that will allow the Supreme Court of Justice of Moldova to ensure not only correct but also uniform interpretation of legal rules.

4. Recommendations

1. The number of requests for recourse or otherwise to the Supreme Court of Justice of Moldova is far too high and measures should be taken to diminish the number of cases that may be brought before the Supreme Court. The courts of appeal should be the last instance in a majority of cases.
2. The Supreme Court of Moldova should be empowered to select which of the requests for recourse that it hears and decides. The selection could be done by the judges themselves in "panels" of one or three judges. If it is difficult for the "panel" of one to decide whether to permit or deny the request it should be submitted to the panel of three. The question of whether to permit or reject a request should be taken on the basis of the arguments in the request and in the counterarguments by the other party as well as the decisions by the lower courts. The question should be decided upon within a certain number of weeks. Requests that are permitted should then be heard by a five member panel (or plenary).
3. In the meantime one should consider the introduction of a system of classification of its decisions by the Supreme Court. The decisions that should be followed by lower courts could be given the nr. 1 or labeled with a P. Furthermore they should be

placed under a special heading on the courts home-page – and indexed according to which provisions that are involved. – This system should initially be used for decisions where the Supreme Court expresses itself on the understanding of Moldovan legislation and legal practice in light of the country's international human rights obligations. Later on this practice could be enlarged to other areas.

4. Steps should be taken to hinder that the Supreme Court decides similar cases in different ways. Preferably all incoming requests should be indexed in a manner that makes it easy to discover when a new request raises the same issues. But one should also consider the possibility of keeping each other informed internally in the different divisions of the Supreme Court through an internal gazette.