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THE NORWEGIAN MISSION OF RULE OF LAW ADVISERS TO MOLDOVA

MISIUNEA NORVEGIANĂ DE EXPERTI PENTRU PROMOVAREA SUPREMAȚIEI LEGII ÎN MOLDOVA
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Using a judgment/decision by the Supreme Court of Justice or the ECtHR as a guidance when deciding a similar case

1. WHAT IS A PRECEDENT?

A precedent is a pronouncement on the interpretation and application of statutory rules that one will find in the reasoned part of a judgment/decision by handed down by a Supreme Court of Justice. The court there explains how one or several provisions must be understood and applied. The interpretation should be made on the basis of the wording of the provision in question, the purpose of the law where the provision is found and also explanations found in the explanatory notes from the government in connection with the proposal, or from the parliament in connection with the adoption of the statute.

In some cases a statutory provision is meant to be the national implementation of a treaty obligation that the country has accepted to be bound by. In that case the court will also consider this obligation in interpreting the text of the national rule in order to *harmonize* the interpretation of the national rule with that of the international treaty obligation.

In the case of obligations coming from certain human rights conventions the court may decide that the national rule must be set aside or to be interpreted in a manner that allows the international obligation to prevail.

2. WHY DO WE NEED PRECEDENTS?

Precedents are used as a tool to ensure that the legislation is uniformly interpreted and applied in a country. Similar factual circumstances should preferably be adjudged in a similar manner by all courts in a country. This will assure legal certainty and assure the litigants as well as the population of the fairness of justice. In some cases it may also allow the parties – especially where the factual situation does not raise questions – to solve their differences amicably at an early stage without having to go to court.

3. WHERE DO I FIND A PRECEDENT?

The Constitutional Court of Moldova has in its judgment of April 2011 made it clear that all judgments by the ECtHR in Strasbourg must be considered as precedents in Moldova. In its judgments the Strasbourg court gives clear statements on its understanding of the different provisions found in the ECHR and its protocols.

When studying judgments by the ECtHR to ascertain the court's interpretation of the rules of the Convention one should as a rule try to start with the latest decision as the court very often refers to its earlier interpretations in its reasoning. The Court uses its own interpretation of the legal terms used in the ECHR and in more difficult cases it attempts to achieve a "common European legislative understanding".

The Supreme Court of Justice of Moldova produces about 5 000 judgments/decisions a year. It is questionable whether all of them contain pronouncements on the interpretation of national legislation or international treaty obligations that can act as guidance to the lower courts or to the Supreme Court itself. The Supreme Court should therefore select a certain number of its decisions each year and make these available to the legal community at large on its website with the clear understanding that these decisions will serve to unify the interpretation and practice by the courts.

4. WILL THE SUPREME COURT NOT THEN ACT AS A POLITICAL BODY?

The parliament has been empowered by the constitution to adopt legislation, and the courts have been empowered to apply them when adjudicating cases that are brought before them. However, even where the legislation is very detailed, as the case is here in Moldova, questions arise with respect to its interpretation and application. It is almost impossible to write legal rules in a way that assures that they cover all the different factual circumstances that arise. The courts will however have to adjudicate the cases that come before it. When there exists uncertainty with respect whether a situation is covered by a rule or not, it will be a support to the judge to have a precedent from the Supreme Court to guide him/her. If the legislators do not like the precedent, it can always set it aside through the adoption of new legislation. Precedents may in this respect be seen as a dialogue between the courts and the Parliament.

The power of national Parliament is however curtailed when the Supreme Court of Justice has pronounced itself on the basis of the obligations emanating from the ECHR. However, this is a situation that the Parliament here in Moldova has accepted not only through the ratification of the ECHR but also through Article 4 of the Convention