



Precedents: Theoretical and Practical Foundations

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- Precedents and reports on precedents
- Precedents in common law and civil law
- The role of precedent within a legal system and between different legal systems
- ICT and precedents (using ICT to promote dialogue and progress in legal culture)



What is a precedent

- A legal problem:
 - certain, possibly controversial facts
 - certain legal issues arising from such fact
- Its judicial solution
 - the sequence of the proceedings (the acts of the proceedings, the arguments of the parties)
 - the decision on the parties of the case
 - the whole reasoning leading to the decision-maker (the judge) to the decision on the parties of the case
 - the reasons which directly support the decision (ratio decidendi)



An example: A classical English case, *Donoghue v. Stevens*

- The facts: A lady drank a bottle of ginger ale containing a snail, and fell sick
- The legal issue: Is she entitled to recover damages from the producer of the drink?
- The legal decision: Yes, she is entitled
- The reason (ratio of the decision): Producers own a duty of care to customers
- The opinion:



Lord Atkin's opinion

- LORD ATKIN: The sole question for determination in this case is legal: Do the averments made by the pursuer in her pleading, if true, disclose a cause of action? I need not re-state the particular facts. The question is whether the manufacturer of an article of drink sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health. I do not think a more important problem has occupied your Lordships in your judicial capacity, important both because of its bearing on public health and because of the practical test which it applies to the system of law under which it arises. The case has to be determined in accordance with Scots law, but it has been a matter of agreement between the experienced counsel who argued this case, and it appears to be the basis of the judgments of the learned judges of the Court of Session, that for the purposes of determining this problem the law of Scotland and the law of England are the same. I speak with little authority on this point, but my own research, such as it is, satisfies me that the principles of the law of Scotland on such a question as the present are identical with those of English law, and I discuss the issue on that footing. The law of both countries appears to be that in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. In the present case we are not concerned with the breach of the duty; if a duty exists, that would be a question of fact which is sufficiently averred and for the present purposes must be assumed. We are solely concerned with the question whether as a matter of law in the circumstances alleged the defender owed any duty to the pursuer to take care ...



An African Case (1)

- The facts: Two persons were sentenced for murder
- The legal issue: Are the provisions according to which they were sentenced consistent with South African Constitution? Can death sentences be executed?



An African Case (2)

- The decision: All corresponding provisions sanctioning capital punishment, are declared to be inconsistent with the Constitution and, accordingly, to be invalid. 2. the State is and all its organs are forbidden to execute any person already sentenced to death.
- The ratio decidendi: Retribution cannot be accorded the same weight ... as the rights to life and dignity... It has not been shown that the death sentence would be materially more effective ... than the alternative sentence of life imprisonment would be. Taking these factors into account, ... the clear and convincing case that is required to justify the death sentence as a penalty for murder, has not been made out.
- The opinion (too long for a slide)



Reporting on precedent

- A most comprehensive record should present all aspects of the case:
 - the decision on the parties of the case (the disposition)
 - the reasons which directly support the decision (the ratio decidendi)
 - the whole reasoning leading to the decision-maker (the judge) to the decision on the parties of the case (the whole opinion)
 - the conclusions of the parties
 - the sequence of the proceedings



Why are precedent important for understanding the law?

- The information contained in statutory texts is insufficient for deciding particular cases. “General propositions do not decide concrete cases” (Holmes):
 - only looking at precedents we can forecast future judicial decisions
 - only looking at precedents we can know how we should take (criticise or support) judicial decisions



Why are precedents significant (1)

- Moral and cognitive authority (the judges who decided the precedents were honest and competent)
- Legal certainty (only on the basis of precedents can parties know their rights and duties and their chances of success).
- Coordination upon shared expectation (people expect future cases to be decided as the past ones)
- Bounded individual rationality (we are unable to develop anew, alone, all consideration required for finding the best legal solution)
- Economy of judicial effort (a decision can be justified just by appealing to precedent)



Why are precedents significant (2)

- Control over arbitrariness (the need to justify departures from precedent limits arbitrary decisions)
- Development of the law and evolution of jurisprudence cannot be done only by Parliament (courts can lay down new principles or extend old ones to meet novel circumstances)
- Cooperative progress in legal knowledge.



The stereotype of common law and civil law

- Civil law: the law is only made of statutes. What the judge has done is irrelevant since he or she only is “only the mouth that pronounces the words of the law, inanimate beings that are not able to modify either its force or its rigour” (Montesquieu).
- Common law: real law is case law, statutes should only fix particular disfunctions (mischief) of the common law, since “by reasoning and debating ... the right is discerned, and thereupon judgment given according to law, which is the perfection of reason” (Coke).



The rapprochement of legal systems

- In all legal system precedent has a decisive importance for knowing the law.
- What varies is the degree according to which judges are bound to follow precedents
 - In common law system the obligation is stronger: judges must follow precedent even if when they think they are wrong (except when conditions for overruling or distinguishing are satisfied)
 - In some civil law systems the obligation is weaker: judges have an obligation to follow precedents unless they provide reasons for departing from precedents
 - Possibly in some civil law systems (like the French) there is no such obligation (though this is debated), but judges tend to follow precedents (of supreme courts) nevertheless



A diminishing difference

- Even in common law legislation is increasingly important (most law is statutory law, and most precedent interpret statutes)
- Even in civil law precedents are increasingly important (there are areas of mostly case-based law, and the meaning of statutes can only be understood by looking at judicial application)
- Even in common law (though in different ways) judges can depart from unjust or erroneous precedents
- Even in civil law systems judges are bound to precedents (must provide reasons for departing from precedent, and can justify decisions by referring to precedent)



Judicial dialogue

- Judges should have access to each other's precedents
 - Cite precedents when they agree with them, by following, analogising, specifying a precedent's reasons
 - Cite precedents when they disagree with them, by distinguishing, refining, or rejecting the precedent
- Judicial dialogue produces cooperative progress in legal knowledge (one's reasoned choice is made on the basis of past knowledge, and contributes to it - the Internet model for distributed growth of knowledge)



Dialogue presupposes access knowledge

- Ability to access knowledge:
 - precedents (not only the decision, but also facts, rationes decidendi, opinions, arguments by the parties)
 - a map of the connections between precedents (viewing the precedents' network)
- Avoiding information overload (IT tools for selecting of most relevant material)



Dialogue presupposes contribution to knowledge

- Ability to contribute to knowledge
 - To adding a precedent to the existing network
 - To embed connections to other precedents within one's precedent
 - To comment on precedents
- Facilities for enabling contributions (IT support for judges and commentators)



Dialogue, rather than borrowing or transplant

- Precedent has a transnational dimension (not only in the domain of human rights, as in the South-African Constitution: “when interpreting the Bill of Rights, a court . . . must consider international law”)
 - Many courts are citing precedents from other jurisdictions, not only when they follow them, but also when they depart from them
 - Legal approaches and solutions are spreading from one court to another (e.g. the use of proportionality in constitutional and administrative review has expanded from Germany into Europe, Africa, and Middle East)
 - This is no passive reception, but often involves development and refinement of the original ideas



Dialogue is not easy

- International judicial dialogue
 - does not entail that foreign precedents are binding (foreign precedents are not “controlling”)
 - it entails taking seriously the opinions (judgments) of others as a possible source of persuasion, considering their and one’s own reasons with critical attitude (and possibly the need of a shared solution to certain issues)



IT and the networks of networks of precedents (1)

- IT may enable case law to become a learning network of networks, where
 - Overlapping networks exist of municipal or regional legal systems, but also networks of judges dealing with the same issues (e.g. international commerce, human rights, etc.)
 - Everybody has access to such a network of legal knowledge (cases and their reasoned solutions)
 - Judges and parties can access and link to the network when writing their opinions and argument,



IT and the networks of networks of precedents (2)

- Judges can add their judgments, agreements, distinctions, and criticisms so expanding the net with new nodes and links
- Everybody can add comments or criticisms on the precedents, so embedding further knowledge into the network
- The use of such a collective construction grows over time





Precedents and judicial informatics

- Using ICT for dealing with precedents only is an aspect of judicial informatics (see BUNGENI), namely using ICT for improving
 - Access to justice: internet-based communication between citizens (lawyer) and courts
 - Efficiency of the judicial process
 - Quality of judicial decision-making
 - Transparency of judicial decision-making
 - Dialogue between the judiciary and other institutions
 - Democratic debate on cases and case-law



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J.p. Machira T/a Machira & Co. Advocates V Wachira Waruru & Another [2007] eKLR

Case Number : Civil Suit 2002 of 2000

Delivery Date : Fri 26 , January, 2007

Judge : J.B. OJWANG

Court : High Court at Nairobi (Nairobi Law Courts)

Citation : J.P. MACHIRA T/a MACHIRA & CO. ADVOCATES V WACHIRA WARURU & Another [2007] eKLR

Advocates : Mr. J.P. Machira, instructed by M/s. Machira & Co. Advocates for the plaintiff; Mr. Ohaga, instructed by M/s. Ochieng, Onyango, Kibet & Ohaga Advocates for the defendants

[Ruling] – CIVIL PRACTICE AND PROCEDURE – preliminary objection – objection to an application by the plaintiff to strike out the defence – objection on the grounds that some of the plaintiff’s pleadings were drawn by an unqualified person and were therefore defective – effect of – court discretion – applicable principles – whether this defect was enough to nullify the pleadings - Advocates Act section 34; Civil Procedure Rules Order 7, rule 2

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Bedan Moses Kinyongu Mbae V Robinson Njagi Gachogu [2007] eKLR

Case Number : Civil Suit 1454 of 1999

Delivery Date : Fri 19 , January, 2007

Judge : J.B. OJWANG



Laws of Kenya



The complete Laws of Kenya (statutes & subsidiary legislation)

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s 6. Evidence.	11	Kadhis' Courts
s 175. Effect of improper admission or rejection.	80	Evidence
s 162. Exclusion of evidence to contradict a witness.	80	Evidence
s 116. Destroying evidence.	63	Penal
s 11. Power to examine witness immediately.	21 - ORDER XVII	Hearing of the Suit and Examination of Witnesses
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