

Ole Lando Memorial Lecture: The Interaction Between Soft Law and Case Law. How Precedents Fulfil Ole Lando’s Ambitions to Harmonize European Contract Law. Madrid 2023

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Abstract: The fourth Ole Lando Memorial Lecture is mainly about the interaction between soft law and precedents. The paper argues that precedents are an increasingly important source of law in civil law jurisdictions with examples from Brazil, China, France and Sweden. The paper provides an overview of some problems and benefits of precedents within the area of private law, inter alia judges as lawmakers compared to developments through statutory law and how to identify a legal rule from a precedent. I do not master German or French sufficiently well to be able to submit abstracts in these languages.

1. Introduction

1. I am very honoured by Hector MacQueen’s invitation to celebrate the memory of Ole Lando and to hold the fourth Ole Lando Memorial Lecture at the European Law Institute’s annual conference 2022 in Madrid. This article is a record of my lecture and of the ensuing debate.

2. I had the great fortune to engage in the work of the Study Group for a European Civil Code. During this work I got to know Ole Lando and many other distinguished European colleagues from whom I gained many new insights about the law in other jurisdictions and also a deeper understanding of the law in my own jurisdiction, Sweden.

My lecture today concerns the interaction between soft law instruments – such as the Principles of European Contract Law (PECL), the Draft Common Frame of Reference (DCFR) and the UNIDROIT Principles of International Commercial Contracts (UPICC) – on the one hand and precedents from national courts on the other hand. The participants active in creating PECL, DCFR and UPICC had various ideas about the purpose of the works:

- Merely a fun research project
- Inspiration to national courts and legal counsel (soft law)

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- Inspiration to national legislators (model law function)
- A communication facilitator for drafting EU-directives and regulations (tool-box)
- Statutory law for EU (directive or regulation) in whole or in parts

The Study Group worked for about ten years and successively published chapters. Already after some years, colleagues reported that their supreme courts had made references to our publications. I was strengthened in my belief that our work would have most impact through case law (precedents) from national courts. Despite my impatient personality, I am willing to accept this very, very slow means of harmonizing European law. The drawback of the slow process is to my mind outweighed by the benefit of high quality, fundamental impact and, first and foremost, a sustainable harmonization.

3. I will get back to harmonization through case law, but first I would like to speak generally about precedents and case law as a source of law. I have recently worked in a project with Bénédicte Fauvarque Cosson (France), Qiao Liu (Hong Kong) and the late Rodrigo Barioni (Brazil). We compared how case law and precedents function in our respective jurisdictions.¹ Two persons having given the Ole Lando Lecture before me, Hugh Beale (from England) and Hector MacQueen (from Scotland) are of course much more suitable to talk about precedents, as they are better acquainted with it than me coming from a civil law jurisdiction. It is, however, interesting to analyse how precedents function in civil law jurisdictions. Maybe it is also interesting for Anglo-American lawyers to get an idea of how civil law jurisdictions understand precedents in a different way.

A common trend seems to be that precedents are becoming increasingly important in civil law jurisdictions. The reasons for the increasing importance of precedents are:

- The pursuit of more certainty:
 - (1) in areas of law that are not regulated by statutory law,
 - (2) where statutory law uses general notions and broad principles, such as fairness, loyalty, equality, fundamental, reasonable, negligence, gross, and
 - (3) when statutory law is old and needs to be adapted;
- The interest of equality in judicial outcomes;
- The interest of national law developing in harmony with the law elsewhere.

¹ R. BARIONI, B. FAUVARQUE-COSSON, Q. LIU, C. RAMBERG, *The Emergence of Binding Precedents in Brazil, China, France and Sweden*, Wisconsin International Law Journal, Vol 40, No 1 p. 1.

When I started my comparison between Anglo-American and Swedish precedents, I believed that civil law would mimic English law and copy English traditions in relation to precedents.² But it turned out that this is not the case. Brazil, China, France and Sweden all give precedents increasing importance. But how this is achieved differs. I will give a broad overview of some differences. There is not sufficient time to go into details. And please note: my focus is on how precedents function with respect to private law – not criminal, administrative or public law and certainly not constitutional law.

2. How Precedents Are Regulated by Law

4. Both in France and Sweden the increasing importance of precedents has been gradual without any large legal reforms

In France, for long, it was considered that the French Civil Code excluded case law as a source of law. This theory is no longer maintained. In practice, some cases from the Cour de cassation have an important guiding function. Since some thirty years ago the Cour de Cassation is able to give opinions before the lower courts have rendered their decision; it does so in about 10 opinions per year.

5. In Sweden it is agreed that precedents from the *Högsta Domstolen* (Supreme Court) are a source of law in the sense that the precedents provide guidance. This has always been so without any clear support in statutory law. The increasing importance is a de facto development, mainly instigated by the Supreme Court itself by providing longer reasonings and more often referring to its own precedents.

6. On the contrary, Brazil and China have made statutory reforms aiming at increasing the importance of precedents. Brazil and China have given their supreme courts formal tasks resembling that of a legislator.

Brazil has made huge recent reforms. Originally precedent was not an acknowledged source of law and courts did not pay any interest to former decisions when deciding a case. After a reform in 2015 precedents from higher courts are binding on lower courts. This was a total and abrupt shift in the role of precedents. Furthermore, the Brazilian Supreme Court (*Supremo Tribunal Federal*) has been given different means to act almost as a legislator. It can establish the ‘legal thesis’ in an individual case or a binding *súmula* of a precedent. A *súmula* is a short general statement (not referring to the facts of an individual case) and serves the purpose to simplify the interpretation of a precedent.

7. Precedents are not recognized as a source of law by the Chinese constitution. However, the National People’s Congress has given the SPC (Supreme People’s Court) power to interpret the law (Judicial Interpretations). The SPC may also issue

2 C. RAMBERG, *Prejudikat som rättskälla i förmögenhetsrätten* (Stockholm 2017).

Guiding Cases, which are summaries of selected legal decisions from Chinese courts. Both Judicial Interpretations and Guiding Cases are general and expressed in a manner detached from the facts of an individual case.

The comparison of the four jurisdictions demonstrates that a jurisdiction's set up for precedents may take many different forms to fulfil the common functions to create certainty about the law, equal judicial outcome and to get inspiration from soft law and foreign law.

3. Do Judges Create New Law? Or Are They Only Applying Already Existing Law?

8. France has a rule in its civil code expressly prohibiting judges from making law. However, the French *Cour de cassation* itself officially recognizes that there is 'ample scope for the Court to give another meaning to the law over time in line with changes in society and the way they are perceived'.³ This statement seems to admit that the *Cour de cassation* creates new law.

Brazil, China and Sweden do not have any statutory law directly addressing the judges' powers as lawmakers. In practice judges in all three jurisdictions act as lawmakers by creating new law.

9. When transparently acknowledging that judges create new law, they automatically become less activist and less biased by their individual political views. The reason is that by openly allowing judges to create new law, they cannot hide behind a façade that they had no other choice but to apply the already existing law. A court that transparently creates new law needs to explain the reasons for the new rule (for the decision). A transparently law-making judge is encouraged to provide support for why the chosen rule is appropriate. This is where PECL, DCFR, UPICC and other soft law instruments and the comparison of rules in other jurisdictions come into play. If the chosen solution is in harmony with acknowledged soft law instruments or a foreign law solution, the judges indirectly demonstrate that they have not been biased by their own political preferences.

4. Are Precedents Binding?

10. I will not go deep into the question of 'bindingness' when here briefly addressing the question of whether precedents are binding. The simple answer is twofold: precedents are binding, and they are not binding. The 'bindingness' is not a matter of black or white, it is better described as a grey scale. The 'bindingness' depends on how the rule is identified, which is quite unclear, as will be explained below. Furthermore, Brazil, China, France and Sweden all

3 Cour de Cassation (France), https://www.courdecassation.fr/about_the_court_9256.html.

allow deviations from ‘binding’ supreme court decisions. The reasons for such deviations must normally be given in the courts’ reasonings (maybe France is different and does not require or expect explanations for deviations). There seem to be differences between the jurisdictions as to the extent to which deviations are allowed and the extent to which precedents are de facto upheld in practice.

5. How to Identify the Legal Rule in a Precedent?

11. It is extremely hard to understand how to extract legal rules from precedents (I here leave aside the question whether something qualifies as a legal rule when it is not 100 per cent binding).

The question of how to identify a rule from a precedent has been vividly debated in Anglo-American law for hundreds of years and there is still no common understanding: The boundaries of *ratio decidendi* are unclear, as well as how to find an appropriate level of generalization from a precedent to ‘similar’ situations.

The debates in civil law jurisdictions are more recent. I would be very surprised if any civil law jurisdiction had reached a common understanding of how to identify rules from precedents.

In Brazil and China, the supreme courts themselves help to identify the legal rules of precedents through the ‘legal thesis’, *súmulas*, Judicial Interpretations and Guiding Principles that I briefly described earlier. In Sweden the Supreme Court often proclaims wide, general statements that resembles statutory rules. Such statements are *obiter dicta* in the sense that they go beyond the facts of an individual case. It is unclear to what extent such general *obiter dicta* are binding. When the rules expressed in precedents are general and disconnected from the facts of the case, it is sometimes argued in Brazil and Sweden that the rules created by the supreme courts are unconstitutional, as the court has acted outside its mandate.

The French *Cour de cassation* reasonings are typically very casuistic and the problems in relation to general statements consequently do not arise. I guess that the problem in France is the opposite: how far can a casuistic statement be generalized?

6. Are Judges Suitable as Lawmakers?

12. All civil law jurisdictions are worried about judges gaining too much power, as these states rely mainly on statutory law and are historically unaccustomed to acknowledging judge-made law. The worries are typically not very strong in relation to private law, as opposed to constitutional and public law. I again emphasize that this lecture is confined to the area of private law.

Judges are generally not well equipped to make law for many reasons:

- facts of cases that reach the supreme courts are often peculiar and do not always represent ‘normal’ problems;

- judges are often restrained by how the legal counsels have structured the parties' arguments;
- courts do not have the ability to foresee the economic effects for society as a whole and courts lack national budgetary powers;
- the courts need to make a decision rather fast and lack the legislator's possibilities for carefully investigating and evaluating various solutions.

However, judges have an advantage that the makers of statutory law lack:

- judges immediately understand how the rule functions in practice. This is an important advantage compared to the statutory legislator who acts on an abstract level;
- judges can move step-by-step in ameliorating a successively wider rule and carve out exceptions;
- judges can reverse an unsuitable precedent-created rule by 'simply' deviating from an earlier precedent.

7. Judge-Made Law v. Statutory Law

13. It is inevitable for modern societies to supplement statutory law with judge-made law. And it seems to be a general trend that the fear of judges as lawmakers is gradually decreasing, at least within the area of private law. Precedents as a source of law contribute to efficiency and certainty. Efficiency is promoted when judges rely on prior decisions instead of making a new independent analysis in later similar cases. Precedents facilitate amicable settlements and reduce the inclination to take disputes to court. The key drive for the big reforms in Brazil and China was to provide better guidance to lower courts in an efficient manner.

The most beautiful feature of precedents is their flexibility. They are *kind of binding*. They provide foreseeability and certainty but may be tailored in later cases to encompass situations that were not considered in the first precedents. France has always been protective of legal certainty, and this is one of the reasons why France generally prefers statutory law. Many legal scholars in Brazil, China and Sweden also argue that precedents do not create predictability in the same way as statutory law. Against this, others argue that statutory law does not provide any real predictability due to the statutory wording either being too general or too casuistic.

14. The matter of judicial activism is of course sensitive. How far can judges go in their law-making without stepping too far into the politicians' exclusive territory? The question of judicial activism is not very pressing within the area of private law. Of course, private law may involve politically sensitive questions, but to find a

solution to a private law question that has not been clearly solved by statute is for most cases not politically sensitive – it is the ‘lawyers’ law’. It is important to remember that statutory law always supersedes private law precedents. If the legislator is dissatisfied with the law created by judges, it can always make away with the judge-made law by a new statute.

To sum up, predictability is best achieved through a combination of statutory law and precedents.

8. The Slow Process

15. Legal scholars in Brazil, China, France and Sweden formerly used to somewhat ignore judicial decisions as an aid to establishing the content of law and used to refer to them merely for the purpose of providing illustrations. Presently, legal scholars in all compared states are paying growing attention to precedents as a source of law.

16. The relation between precedents, soft law instruments and legal scholars is circular: Legal scholars are interested in precedents. They are also interested in soft law instruments, such as PECL, DCFR and UPICC. The research of legal scholars is often transformed into student books and legal scholars often teach students. The students will thereby become acquainted with the soft law instruments. When the students start to work as legal counsels (inhouse, or as advocates) they will recall the soft law instruments and they will refer to them in court disputes when the law is uncertain (due to lack of statutory law or due to vague notions in statutes). Such arguments based on soft law will inspire judges when making new law through precedents. And the scholars, who are interested in precedents, will examine the new rule and analyse how it relates to the soft law instruments. And so, the circular process slowly keeps on rotating.

17. This means of harmonization is slow and sometimes harmonization will not come about. Hector MacQueen gave an interesting example of this in his Ole Lando Memorial Lecture a year ago.⁴ The Supreme Court of the United Kingdom openly analysed a rule on no oral modification (NOM) boiler plate clauses in soft law instruments and in jurisdictions on the European continent. The court found this rule illogical and rejected it (not exactly in those words, but almost).⁵

18. An advantage of harmonization through precedents is that a national system for precedents can function in its own way, according to its own constitutional set up and according to its own national traditions. As we have seen, the process of how

4 H. MACQUEEN, ‘European Contract Law in the Post-Brexit and (Post?)-Pandemic United Kingdom, *Third Ole Lando Memorial Lecture*’, 30. ERPL 2022, pp 3-26.

5 UKSC 16 May 2018, *Rock Advertising Ltd v. MWB Business Exchange Centres Ltd*, <https://www.bailii.org/uk/cases/UKSC/2018/24.html>.

soft law influences national law through precedents is independent of whether the design for precedents is built in the English, Swedish, French, Chinese or Brazilian manner. Furthermore, each jurisdiction can develop the content of the individual rules and express the rules in wordings suitable for its own national legal system. The development is made step-by-step without frustrating disorders. Harmonization through precedents makes the rules sustainable and accepted by the actors who are intended to follow the rules.

As I said in the beginning of this lecture: I prefer harmonization of private law through case law and precedents. The main drawback with such means of harmonization it is that it is slow but often this disadvantage is outweighed by the advantage of high quality, a strong impact and, first and foremost, a sustainable harmonization.

9. The Future

19. Now, allow me to be provocative. How do precedents and soft law instruments function in the EU today? We have soft law instruments that have become relevant through precedents in many Member States, perhaps not very relevant, but the slow process has started. The slow process of harmonization through soft law and precedents is, however, prevented by statutory law in the form of very detailed directives and regulations, covering all 'new' problems in modern society. Such detailed statutory rulemaking reduces the possibility of harmonizing law in substance through case law.

I want Sweden to stay within the European Union, but I am worried that the way we make law within the EU creates detrimental hostility from within the Member States. It is therefore worth considering whether the European Union would be better served by less detailed rules and instead introduce rules of a more principled character. Such principles could then be slowly developed in detail by national courts, maybe with the help of a reformed European Court of Justice that is less focused on the individual case and more focused on providing general guidance, maybe by inspiration from Brazil and China. I welcome a reform of the European Court of Justice in order to make its decisions less hard to comprehend so that they provide guidance that is easier to understand.

20. Another argument against detailed regulations and directives within the area of private law is that most problems are in essence the same as in Roman times. The problems may on the surface appear to be new due to new techniques, new means of communications, artificial intelligence etc. But every time a new phenomenon is analysed in depth, it boils down to the same old opposing interests.

The same old rules - rules that have developed slowly in history in order to find a suitable balance between eternal opposing interests - are most of the time a proper way to solve a 'new' problem. Almost every attempt to solve a new phenomenon by specific statutory law will fail. We have seen this again and again, for

example with respect to directives and regulations in the area of electronic commerce. The many changes and revisions to directives and regulations create huge problems and costs for the persons and businesses that must adopt to the detailed rules and constant revisions. And worse, the detailed statutory provisions create obstacles for the development of new industries.

21. Many years ago Philip K Howard wrote a book with the title: *The Death of Common Sense - How Law is Suffocating America*.⁶ I strongly recommend you to read it. He describes how detailed and fragmented statutory law prevents judges from using their common sense and how the many detailed rules lead to unpredictable and stupid outcomes. I am worried that the European Union is moving fast towards the same unfortunate situation.

This is why I believe that it is wise to slow down the legislative pace and have trust in the slow process of harmonization through the interaction between soft law instruments precedents and legal scholars.

The difficult tasks confronting legal scholars, practitioners and courts should not discourage them from moving towards legal systems that can take full advantage of the benefits of precedents as a means of harmonization. I am sorry that Ole Lando is not still here with us to pursue this effort. He would have loved to engage in it.

22. Now it is time to finish this lecture and to open up for a discussion. I hope that many of you question my views and conclusions in order for us to have a fruitful and vivid debate.

10. The Ensuing Debate

23. Many interesting comments and questions were put forward in the debate following the lecture. I have grouped some of the interventions here without mentioning names, as I may have misunderstood some of them.

24. *Judges' lawmaking suffers from a democratic deficit. In some jurisdictions the state uses judges as a tool to circumvent statutory law in order to protect the interest of the state to the detriment of individual citizens. Judges are not trained to be lawmakers.*

My comment: As precedents become more important, the role of judges in civil law jurisdictions will fundamentally change. Judges need to be trained differently and this training ought to start already in law school. Universities in civil law jurisdictions need to include in the curriculum how precedents function. And of course, also the training for judges must emphasize how judges best fulfil their role as lawmaker in parallel with the traditional training in how to provide justice in an individual dispute.

6 P.K. HOWARD, *The Death of Common Sense: How law is suffocating America* (Random House 1994, latest edition 2011).

25. *In some jurisdictions the judges openly refuse to apply statutory law*

My comment: I understand that such problems exist. When it does, the whole jurisdiction is fundamentally flawed. What I suggest in this lecture only applies to improvements in basically well-functioning jurisdictions.

26. *Businesses in new industries want detailed rules in order to be certain that they are acting according to the law and in order to understand how they shall set up their activities.*

My comment: An individual business is typically not focused on what is best for the industry as a whole. If the legislator sets up detailed rules having in mind a particular new type of business, there is a risk that the future development of the industry will be harmed. The detailed rules will function as an obstacle to technical improvements. New businesses are best helped by deep analyses (by legal scholars) of how the new technology fits into the present system (the same old eternal problems) maybe in the form of guidelines (super soft law instruments) together with a general recommendation to act decently and not to stay too close to the blurred borderline between what is legal and not legal. After some time, society will get the details on how to deal with the new industry, through slow guidance from precedents.

27. *We cannot achieve harmonization without detailed rules. Many times EU directives are about specific problems that provide a clear-cut answer to a pressing problem for businesses that need to function in the European common market (for instance the spare parts directive).*

My comment: New statutory law is undoubtedly sometimes needed. My point is simply that detailed statutes are not always (and perhaps only rarely) the best solution.

28. *For a judge to be inspired by foreign law is dangerous, since there is not sufficient time to fully understand how an individual rule relates to the whole foreign law system*

My comment: It is true that this is a problem for scholars making comparative research. For a judge who tries to find a solution to a concrete problem in an individual case where the national law is uncertain there are often only two or maybe three possible good solutions. Then it is often sufficient support and comfort to choose a solution found in a soft law instrument and/or a foreign jurisdiction, even though the judge is not wholly familiar with every aspect of the foreign jurisdiction.

29. *To develop law by precedents involves deviations from earlier precedents, which may cause problematic retroactive effects for persons having adapted their behaviour to previous precedents. This is an additional reason why the judge is ill suited as a lawmaker.*

My comment: I fully agree. However, in most cases when there is good reason for a court to deviate from a previous precedent no problematic retroactive effect occurs. In the rare situations where negative retroactive effects occur and it is clear that the rule in the old precedent is unsuitable, the court should apply the old unsuitable rule and send a message to the legislator that a revision ought to be made through statutory law, taking transitional rules into account.

30. *End remark*

I am happy to announce that Anna Veneziano has accepted the invitation to give the fifth Ole Lando Memorial Lecture.⁷

⁷ Anna Veneziano, who lives in Rome, Italy, is the deputy secretary general of UNIDROIT and professor of comparative law at the University of Teramo.

