PRECEDENTS AND THE CONSTRUCTION OF STATUTES

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WHEN administering the law, a judge is not permitted merely to apply statutes to the best of his knowledge and to disregard the manner in which others construe them. The public is justified in claiming that cases which are similar shall be treated in a similar way, whether or not they are tried by the same judge. Thus, the judge must consider his decision in an individual case as an element in a system composed not only of statutory rules but also of earlier decisions. Regardless of the question whether precedents are held legally binding, the judge should not depart from an earlier decision without having adequate reasons for doing so. Thus the application of law to individual cases and the creation and utilization of precedents constitute two aspects of judicial activity. Various opinions have been entertained at different times and in different countries on the question which of these two aspects of the administration of law should be considered more important. The basic attitude prevailing in Continental law, and particularly in Germany, has been that as many problems as possible should be solved by legislation; but it has nevertheless been necessary to allow some limited scope to precedents, for however bulky a code is made, there will always remain some points of detail to be decided by the courts. A radically different attitude is adopted in English law, where those great fundamental principles of the legal system which are intended to endure for centuries are drawn up by the courts of justice through precedents, whereas legislation is supposed, at least in principle, to provide for exceptions from the common law as laid down by the courts. On this issue, Swedish law has adopted an intermediate attitude —at first unconsciously but later in a more deliberate way. The Swedish law of family relations may serve as an illustration: in the course of the present century, fairly detailed provisions on this field of law have been laid down in three codes, but nevertheless precedents are of such importance that a person who is ignorant of the decisions of courts cannot claim to have an adequate knowledge of the Swedish law of family relations.

In the Swedish view, the keeping of a proper balance between case law and codified law is connected with the old and well-known opposition between security in legal relations and substantive justice. To the judge who has to make a decision in an individual action it seems obvious that he must try to adjudicate as justly as possible in the case at bar. If it is set out in a statute how the case is to be handled, the judge must decide accordingly. Earlier decisions on the matter do not inspire the same awe. Even in English law, where precedents are binding upon courts, it frequently occurs that counsel invoking a precedent are told by the judge: "Yes, I know that case, but it can be distinguished". Thus the judge endeavours as far as possible to keep a free hand, in order to be at liberty to choose that decision which he thinks consistent with substantive justice in the case before him. To counsel, on the other hand, the opposite attitude is just as natural. He wants to be in a position to tell his client beforehand that if the latter acts in a certain manner, then such and such consequences—set out in a statute—will follow. If the matter is brought before a court of justice, the judge's task, in the view of counsel, is to deliver, rather like an automaton, the decision which could have been predicted from the statute. From the practising lawyer's point of view, it is not of paramount importance whether or not the provisions of a statute are satisfactory in actual substance: after all, you know what you are dealing with, and you must adopt your course of action accordingly. Conversely, such a lawyer is firmly opposed to decisions based upon substantive justice, for that is a matter upon which people may have differing opinions; and, in the absence of predictability, security will be utterly lost. The reasoning of practising lawyers as outlined above is undoubtedly justifiable in many respects, but it does not contain the whole truth. At present, most of those individual acts which give rise to lawsuits have been performed without asking the opinion of counsel, and this will be so in the future also, for legal proceedings often follow upon actions of such a character that they had to be performed upon the acting person's own judgment and without previous consultation. Moreover, the majority of litigants do not get involved in more than one case in their lifetime, so that as a rule a party is interested only in getting his rights in the case at bar, and is indifferent to the view that regard should be paid in lawsuits to the general interest in security.

It is obvious to anyone, whatever may be his opinion about the proper balance between substantive justice and security or be-

tween legislation and precedents, that judicial behaviour must be subject to certain general rules if it is to have any claim to the name of justice. It cannot be based merely upon considerations of expediency in the individual case. Undoubtedly, even administrative decisions by governmental agencies may contain an element of legal adjudication. We shall refrain from discussing the question whether it should be regarded as a deficiency that administrative decisions are reduced to mere practical considerations, as is the normal course of action in actual life. In this connection, I only wish to emphasize that courts of justice, far more than administrative authorities, are bound to follow a given pattern in the course of their administration of the law, and, particularly, to make a clear distinction between points of fact and points of law. The fundamental rule of judicial proceedings is that the question of fact must be answered first, i.e. the facts of the case must be made completely clear on the basis of evidence. Then, and only then, can the court proceed to consider these facts in the light of legal rules. This seems obvious to a lawyer. In the common-law countries, with their jury system, even the layman may be familiar with this distinction. To the average Swede, however, it is utterly unnatural—a fact which any judge in a court of first instance could affirm from his experience of how newly appointed lay assessors tend to present their views during the deliberations of the court. To take an extreme illustration: in a murder case where there is doubt whether the accused is guilty and should consequently be sentenced to hard labour for life, or is innocent and should thus be acquitted, it may seem natural to a layman to choose a middle course by meting out a milder punishment. It has also been debated among lawyers whether the free examination of evidence would not make it possible for the judge to base his decisions upon considerations of opportunenism in the individual case. Such confusion between law and fact is, however, obviously impermissible. The free examination of evidence implies that the judge is allowed to use any kind of evidence in order to establish the facts, but it does not mean that he should be at liberty to distort the finding of facts to make them fit the legal conclusion he finds desirable.

It is a different matter that complete certainty about facts can never be obtained and that the court, which is not allowed to conclude with a *non liquet,* must answer the questions of fact by applying certain rules which are not laws of nature but merely legal norms. Courts must have certain rules which give an answer

to such questions as which of the parties has the burden of proof and what amount of probability is required for that onus to be discharged; these rules may result in the finding of a set of facts different from that which is most probable. If, in an ordinary civil action, the plaintiff claims repayment of a loan, the defendant denies that he has borrowed any money from the plaintiff, and no further evidence is produced, the action will be dismissed because the plaintiff has not sustained his burden of proof, even though a person with experience of life may consider it far more probable that a defendant will lie to escape from his debt than that a plaintiff will venture to claim money from one who has no obligation at all towards him. In criminal actions, where the burden of proof lies upon the prosecution, the accused will be acquitted if the probability of guilt amounts to, roughly speaking, not more than seventy-five per cent, for anything less would involve far too great a risk of punishing an innocent person. On the other hand, if the probability of innocence is insignificant a conviction must result, for otherwise no one who proclaimed himself innocent could ever be found guilty.

Thus, courts apply rules which are not easily accessible to non-lawyers; but I do not believe in the hypothesis—which has occasionally been put forward—that this is a substantial reason for public distrust of the courts of justice. In my experience, those decisions which have stirred up the greatest public emotion concern cases which are perfectly clear to anyone who is acquainted with the evidence. If the decisions of courts are nevertheless criticized, this is due to the fact that many people consider it permissible to range themselves on the side of the losing party even without any knowledge of the evidence simply because others, equally unfamiliar with the facts of the case, have done so before. Lay influence based upon such foundations may be tolerated in politics, but it would mean death to any kind of justice. I do not intend to proceed to further discussion of this question, which has been touched upon merely as an introduction; the following presentation of views is based upon the assumption that the facts of the case are known. The present article purports to discuss the question how to decide the point of law upon this assumption, i.e. how to decide what is "right".

Laymen tend to think that it is an easy task to decide what is right, once the facts are known—that the only problem is to find the enactment which governs the particular set of circumstances actually under consideration. While admitting that this task calls

for special training, they suppose that this is so only because the statute book is so voluminous and is written in such queer language. To illustrate this point, let us take the case of a university janitor who, during a period of wartime shortage, appropriated some tar barrels belonging to undergraduates who had intended to use them as flares on May night. The man thought the barrels could more profitably be used for heating the university building. He stubbornly refused to give them up, only submitting when one of the undergraduates opened an impressive-looking statute book and pretended to read out the following "law": "Now a university janitor steals the undergraduates' tar barrels on May night, let him be burnt at the stake". Obviously, no actual statute would contain such a concrete description of the case at bar; an enactment contains general and abstract propositions which must be read with some—legally trained—intelligence before they can be applied to the question at issue.

To apply the law is by no means the same thing as to find one's way about in the statute book, for an enactment is never exhaustive but must be supplemented by the judge's intelligence, i.e. through an analysis based upon evaluation or through the exercise of reasonable discretion. First, a statute must be interpreted in the light of its purpose. No enactment devoid of reasonable purpose can ever be considered the law of the land. If the contrary is supposed to be implied by the expression *fiat justitia, pereat mundus,* then that adage is sheer nonsense. The general and implicitly obvious purpose of the law is to benefit human beings, and this is the basic assumption of modern lawyers in any civilized community. Moreover, statutes must be supplemented by the judge's intelligence in order to give a correct notion of the law. This is a fact that lawyers have not been particularly keen to acknowledge openly, for the public is much more likely to submit to the majesty of the law than to accept administrative discretion, and the assertion that the right to apply common sense is in any respect the prerogative of the judiciary will not easily be accepted by the public. It should be pointed out, to take a typical example, that persons who have been sentenced in criminal proceedings usually bear no grudge against the judge—*nota bene* the professional judge who has only applied his specialized knowledge—but do feel spite against the lay assessors who have merely entertained opinions, without having any greater knowledge or skill in legal matters than other people.

Nevertheless, when applying the law the judge should recognize,

at least in his own mind, that his task is very largely to fill gaps in the law. The liberty enjoyed by the judge in this respect is a great advantage according to the "free law" school, whose approach is expressed by the old Swedish adage that a good and honest judge is better than good law, for the judge can always decide upon the merits of the individual case. Even an advocate of the "free law" school must keep in mind, however, that the judge is not at liberty to act wholly as he sees fit as soon as the law contains no explicit provisions concerning the concrete case at issue. The judge must not surprise the parties by his decision. It is true that he has to use his own common sense when rendering his decision, but he must act in accordance with the legal consciousness prevailing in the community at large, not upon his own opinion. This "legal consciousness" is obviously a fiction in so far as there is no "man in the street" endowed with such a consciousness; but the term is not for that reason devoid of value as an abstract norm. The implication of this norm may be expressed as follows: the judge should judge as the "man in the street" would, if he possessed the judge's legal training, or—to use another illustration—as counsel for the parties would do, if they were impartial.

Thus, the judge must submit his decision to a hypothetical test: How would a representative of the prevailing "legal consciousness" have decided? But how is a judge to find an answer to that question? He has to consult those sources from which expressions of a general "legal consciousness" may be taken. In the first place, his attention should be directed to the *travaux préparatoires* of the statute concerned. The printed legislative material can often provide information about the intentions of the drafters—this is particularly true in Sweden—and this may obviously be of some importance for the creation of a general legal consciousness. There are two reasons, however, that inhibit an uncritical adoption of the *travaux préparatoires* in the administration of the law.

One reason is that the report of the law revision committee is written for the legislature and not for the authorities entrusted with the administration of the law. The *exposés de motifs* attached to a bill are intended to convince Parliament of its excellence, so that it will be passed. When the penalties for certain misdemeanours on the highways—e.g. for leaving the place of an accident without taking due measures—were considerably increased, the responsible minister pointed out that car-borne desperadoes might leave their victims run over, helpless, bleeding or dying on the

highway. The obvious purpose was to gain support for the aggravation of penalties from M. P.'s who, though usually car owners, could not imagine themselves committing villainous crimes of the kind described by the minister. Since most of the persons charged with the misdemeanour concerned have acted in a far more innocent way, the *exposé de motifs* might well lead the courts of justice to doubt whether the legislators intended that such normal, relatively harmless acts should be punished at all. In the actual practice of courts, they *are* punished, although the average assessment of penalties has been much more lenient than would seem to follow from the *travaux préparatoires*. Another illustration may be quoted: when the criminality attached to deliberately false statements in annual income tax returns was extended to statements that were false because of gross negligence only, it was alleged, as a reason for the measure, that the requisite criminal intention had often been impossible to prove. The reason was obviously framed for M. P.'s who could contemplate the possibility of giving incorrect figures themselves—but not deliberately. However, the courts of justice also inflict penalties in cases of negligence where it is evident that the accused has never harboured any criminal intention.

The second, and more important, reason why the judge must be critical when making use of the *travaux préparatoires* in his administration of the law is that they were written in the light of the state of affairs prevailing at the time when the statute was being prepared. If things have changed since then, such changes must be taken into consideration by the courts when interpreting the meaning of the statute; if the language of a statutory provision cannot be reconciled with the new state of things, an amendment should be made. However, it is impossible to amend the *travaux préparatoires* (fortunately, it may be added) and they may consequently become obsolete. In order to apply a statute correctly, the judge must therefore give consideration to elements other than the legislative material, even if this clearly indicates what was actually the intention of the legislators. In fact, there is no reason to accord to the *travaux préparatoires* an importance for the application of a statute that is substantially greater than that assigned to other generally available statements on the construction of the text, such as commentaries, case reports and the writings of legal scholars. Obviously, all such statements assume decisive importance primarily if they seem convincing. However, with regard to its impact on interpretation, a well-known statement may be decisive

where a choice has to be made between two equally reasonable solutions. Thus, in the case reported in 1951 N.J.A. 1, the majority of the Supreme Court, when deciding a point concerning the burden of proof under sec. 5 of the Swedish Sale of Goods Act, chose the solution recommended by Tore Almén in his Commentaries to the Act,[1] a work particularly esteemed by Swedish lawyers. In fact, these Commentaries are held in such esteem that the opposite outcome would certainly have astonished many observers.

It would appear from what has just been said that, when applying a statute, the judge should consider all available statements on the meaning of the text. In the last resort, however, the judge must rely upon his own judgment. Suppose that the case at bar may be considered the "mean proportional" between two situations explicitly governed by statutory provisions. The judge is not bound for this reason to make a decision along the mean proportional line. If the two enactments were good in their day, but times have changed, the judge should decide the new case in accordance with the new state of things; and, in my view, this decision must subsequently be allowed to influence the construction of the two enactments. True, it may be objected that this is to make new law instead of applying existing law; to some extent, however, such a result is unavoidable. It is impossible to provide an answer to every question by means of the cumbersome machinery of legislation, and the courts of justice are often better equipped to solve this sort of problem. In many cases, the courts may be just as good representatives of public opinion as are Parliament or the Cabinet. The fact that courts of justice are, and must be, more cautious than political bodies when introducing new creations makes them appear conservative, but it does not necessarily mean that they are always in the rear. Another explanation is that political bodies tend to shift position frequently according to the situation of the day, whereas in courts the process of change is like a tide which moves more slowly but also more steadily in one direction.

Under a system of free application of statutes as recommended above, the creation of precedents becomes an important element in the work of the judiciary, even though the prevailing view in Sweden is that precedents are not, and should not be, binding. In complete harmony with what has been said about statements concerning the construction of a statute, the judge should follow an

[1] Tore Almén, *Om köp och byte av lös egendom*, 1st ed. 1906, 1908, 3rd ed. 1934.

earlier decision if he finds it persuasive; but he should also beware of rejecting, without strong reasons, a decision which has become generally known and may consequently be supposed to have influenced the public's sense of justice. It is a matter of course that the precedent-creating function is more important in higher courts than in lower ones. A judge in a court of first or second instance should certainly not cause the parties the unnecessary trouble of lodging an appeal by rendering a judgment which must be expected to be reversed. On the other hand, no judge should take the easy course of slavishly following precedents. It should be the endeavour of every judge to contribute independent thinking to the decisional process from his own position in the hierarchy. The statement that the making of precedents is most important in the last instance finds support in the rule concerning Supreme Court decisions *en banc,* now embodied in Chap. 3, sec. 4, of the Code of Procedure. Under that enactment, which was originally introduced in 1876 after the Supreme Court had been divided into divisions, a division may refer a case to the Court *en banc* if the view held by that division is incompatible with a legal principle or a construction of statutes previously adopted by the Court. The rule was primarily intended to prevent the creation of divergent precedents in the different divisions of the Supreme Court.

It is even more true of precedents than of statements about the meaning of a statute that their importance depends upon the extent to which they are generally known. All Supreme Court decisions are published in the review *Nytt Juridiskt Arkiv* (*N.J.A.*) and have been so since about the time when the practice of decisions *en banc* was introduced. This review was founded by G. B. A. Holm, a practising lawyer with some experience on the Bench; all later editors have been Justices of the Supreme Court. It has been the practice from the very beginning that only a certain number of decisions are reported in full in the *N.J.A.*, the others being covered in short notices. The reports are written by the editors, but the question whether a decision is to be fully reported is decided by the division trying the case (decisions rendered by the Court *en banc* are always reported in full), and the heading of the report is drafted by a member of the trial division. It has often been pointed out that the fully reported decisions have greater weight as precedents than have decisions treated in the shorter notices. This, however, should not be taken to mean that the Supreme Court is in any way entitled to lay down rules

governing the actions of other courts by application of the principle: "Live as I teach, not as I live". The Supreme Court cannot order the application without exception of certain principles by other courts by having decisions fully reported and, at the same time, itself make exceptions which are "stored away in the short notices". It cannot be right that counsel or others should not be allowed to invoke a decision of the second category as a precedent, but the fact that the Justices who have heard the case in question have considered its importance as a precedent to be insufficient to justify a full report should lead counsel to exercise caution when using these decisions. The reason may be that the case was what professionally is called "impure", for example, because the facts were not properly established, or counsel did not assert relevant arguments, or because there were special complications regarding evidence, or because the facts were so unusual that a similar case cannot be expected to occur again. These are pitfalls which must be avoided when using decisions reported in the short notices; as a rule, therefore, it is necessary to gather much more detailed information about these cases than is contained in the notice. But if a case occurs to which a decision of this kind is suited as a precedent—and the possibility of such an event can never with absolute certainty be ruled out beforehand—the earlier decision obviously possesses some value as a precedent.

The coming into force in 1948 of the present Code of Procedure has brought changes in the order of proceedings before the Supreme Court which are of great importance for the precedent-making functions of the Court. The majority of cases are first considered by a division consisting of three Justices who decide whether or not leave to appeal shall be granted. If it is granted, the new trial (usually in the form of a public hearing) takes place in a full division composed of five, six or seven Justices. If no leave to appeal is granted, the decision of the Court of Appeal is automatically affirmed; the division deciding the question of leave to appeal is not entitled to modify in any way the judgment of the lower court. Consequently, the most important ground for leave to appeal is that there are reasons for reversing the decision of the Court of Appeal (leave for reversal). It should be mentioned that leave for reversal must be granted when one of the three Justices is in favour of granting such leave.

When the new legislation was being drafted, the idea was that the question of leave should be tried summarily and that leave should be granted whenever a case gave rise to any doubt. In

actual practice, however, the question whether leave to appeal should be granted is considered very carefully on the basis of the documents from the courts below, which are read to the three Justices, and leave is granted only in a minority of cases. The reason is that the Supreme Court wishes to save the parties the costs entailed by a regular hearing before a full division in those cases where the judgment of the Court of Appeal cannot be expected to be reversed. For the same reason, the Supreme Court may refuse to grant leave to appeal even though it has found some insignificant fault in the decision—provided, of course, that this fault has been disregarded by the parties and has not been invoked as a ground for leave to appeal. This practice must be kept in mind when considering the importance of a refusal to grant leave to appeal: the leave may have been refused because the effects of the fault were insignificant in the case at bar—e.g. that a change of interest from five to six per cent would mean only a few crowns; but such a modification may have a very considerable impact in other cases in which the refusal is asserted as a precedent. Even more important is the fact that what the Supreme Court affirms when refusing a leave of appeal is the *decision* of the Court of Appeal, but not its *ratio decidendi*. And although the Code of Procedure provides for a "precedent leave" in addition to the "leave for reversal", it is far from certain that the Supreme Court considers a case to be of any interest as a precedent merely because it finds the *ratio* of the Court of Appeal to be erroneous. Normally, the grounds for refusing to grant leave to appeal are not set out, and consequently the refusal gives no indication whether the Supreme Court has approved or disapproved the *ratio* of the Court of Appeal. It has, however, occurred on one or two occasions that the Supreme Court has explicitly rejected the *ratio* of the Court of Appeal by declaring in its decision on the matter of leave to appeal that it sees no reason for trying the case "since there are no grounds for reversing the *actual decision* of the Court of Appeal". In the vast majority of cases, refusals to grant leave to appeal are reported only in the short notices. This is to be expected, since leave should ordinarily be granted in cases which possess some interest as precedents. It sometimes happens, however, that refusals of leave are reported in full in the *N.J.A.* It is generally recognized that such reports should not be permitted unless the Supreme Court division from which the refusal emanates has approved both the actual decision and the *ratio decidendi* of the Court of Appeal's decision. Such a full report is considered

valuable in order to provide elementary illustrations of well-known principles which are not currently being debated but about which some doubt might arise if too long a time were to pass without evidence of their continuing validity appearing in the form of reports.

Although from the point of view of precedent-making, the judicial activity of the Supreme Court is of particular interest, the decisions of the courts below are also of considerable importance in this connection. Special mention should be made of those judgments of the Courts of Appeal which are reproduced in the report section of the *Svensk Juristtidning* (*Sv.J.T.*). It is considered the obvious duty of the referee of the Supreme Court, when submitting a case to the Court, to quote all decisions of interest not only from the *N.J.A.* but also from the *Sv.J.T.* Where the referee responsible for preparing a case makes enquiries of his own accord to find precedents in other sources also, he is considered to have acted with especial zeal. The fact that decisions from the courts below are published so seldom as they are obviously implies a danger that such precedents will be overlooked in spite of their possible value. However, if a judgment is invoked as a precedent and is found persuasive as such, it should be taken into consideration irrespective of the hierarchic position of the court from which it emanates and of the question whether it has been printed.

In the classical phrasing used in the old days, a judgment, in accordance with the French style, contained only one sentence, starting with the *ratio decidendi* expressed in a string of subordinate clauses summing up the preceding development—"whereas ... for this reason and because ... thus and considering that ..."—followed by the actual decision in a short main clause. Nowadays, judgments are longer, and the *ratio* is stated in a number of independent propositions separated by full stops. It cannot be denied that a lawyer looking for precedents will meet greater difficulties in finding out, from a judgment of the modern, more "talkative" kind, what has been the real ground for the decision. However, judgments are not primarily written for lawyers in search of precedents but for the parties to the action; and the parties are unable to grasp the forensic style unless it has some similarity to the spoken language, of which circumstantiality is the chief characteristic. It seems impossible to set a bar to this development. It must be pointed out, however, that "talkativeness" must not be pushed so far as to render the search for precedents utterly impossible, and that the higher the position of the trial court in the

hierarchy, the more reason there is to require that its decisions be stripped of unnecessary repetitions or irrelevant points of view.

Legal scholars often criticize the styling of judgments on the ground that, in accounting for the *ratio,* courts occasionally make use of what in Sweden is facetiously called a "hat", i.e. language which leaves open the question which of two routes, both leading to the same result, has been chosen. A "hat" reduces the usefulness of the decision as a precedent, but it may be justified. The creation of a precedent is comparable to a legislative act. In both situations, there is reason to act with great caution and to hear the views of those who will be affected by the proposed change in the law. In the creation of a precedent, the responsibility for this expression of views falls on the parties; but it must be kept in mind that the parties to a lawsuit take an interest only in its result, and not in the route by which that result is reached. It may therefore be justifiable to proceed slowly and to postpone the final answer to the question to a case in which the actual decision is dependent on a choice between the two possible routes.

In the opinion of the present writer, judgments should be given an essentially objective construction when used as precedents. Attention should be given to such elements as are manifest in the actual tenor of the judgment and consequently available to anybody. To ask the person who drafted the decision what was the underlying intention is rather more similar to any other consultation on a legal point. Likewise, the question for what length of time a precedent remains useful must be considered upon objective grounds. Therefore one should not inquire into the probability that those currently on the Bench have actually had to try a similar case before. Even if all those who sat on the Bench in the case concerned are dead, the value of that decision as a precedent may be unimpaired. It is only when times have changed, so that the decision no longer harmonizes with the general sense of justice in the community, that it should be considered ineffective. The term of life granted to precedents in one field of the law may greatly exceed that which is normal in other fields.

The hints on the problems of administering the law which have been given in the present paper may seem vague and unhelpful. They are based upon the writer's experience on the Bench, and others may have different opinions. However, divergencies between theoretical opinions in this field would seem to be partly due to the fact that the topic has not often been treated and that no established terminology has been developed. In actual practice,

statutes and precedents are likely to accompany and complement one another much more intimately than might be expected from vague theories. The topic we have dealt with—precedents and the construction of statutes—is in my view not so much a scientific matter, which can be learnt through merely theoretical studies, as an art, which can be acquired only through experience.