REPORT OF THE IALS STUDY GROUP: CIVIL PROCEDURE

INTRODUCTION

In general, Civil Procedure is a subject, which in some states is taught at law school and, in others, is left to the legal practitioners' training institutions. In view of this and also because this is a comparative law school conference, it seemed best to select a topic engaging a major question of principle, and which offers the chance to compare the civil and common law This is the doctrine of precedent, which is appropriate to be studied at a university law school, whether under the actual title of 'Civil Procedure' or under some different rubric, for instance European Union Law.

Precedent is an inherently simple principle which brings to a legal system the most desirable values of consistency, certainty and predictability. The point which is of special interest, in the context of this Conference, is, first, that precedent was traditionally, not a principle which was followed, in the civil law states. However, by now the precedent idea has migrated to the civil law world, especially where a court is administered a law, which originates in a transnational text. The big example here is cases in which EU law is being applied so that, because of the international dimension, it is vital that (say) a dispute involving German employers and employees is resolved in the same way as the equivalent in France or the UK. The idea of the equal sacrifice of sovereignty, which is central when states are members of the EU, also provides a particular need for consistency between national courts in applying EU law.

Give the potential of the precedent idea, its ramifications run in many directions. One could, for instance, connect its dominance in the common law, in contrast with its traditional absence from the civil law with the very different status of the judges in these two legal empires. Put simply, common law judges are regarded by other lawyers, ordinary citizens, politicians, and, not least, themselves as occupying a higher status in their constitution and social hierarchy than is the case with civilian judges. In the eyes of the common law, the status and legitimacy of precedents depends, to a large extent, upon the fact that, following thorough argument in open court, they have been adopted and articulated by the senior and independent personages, who delight in being called 'the Queen's judges'. Put briefly, there is a strong argument that the practice of following precedent makes the judges a *stronger group* and so enforces their independence of the Government or pressure groups. So here one could haul out into broader waters and talk about the relationship between precedent and the Independence of the judiciary.

PRACTICAL OPERATION: 'EXTRACTING THE PRECEDENT'

However, given the emphasis here on law Schools, their curricula and educational technique, it seems more appropriate to focus on how it might be useful for the civil law to react to the recent arrival of the precedent. For to get the maximum value out of precedent, there are various techniques, which need to be followed, but have not yet been comprehensively adopted in most civil law judgments.

The critical part of operating the machinery of precedent lies in determining what was the character and width of the rule, which was established in the earlier case. The difficulty here arises from the fact that two cases never have exactly identical facts so that the judge in the case before the court (usually called the 'present' case) has to reach a decision as to how the facts in an earlier case compare with the facts of the present case. The judge needs to carry out this exercise in order to decide whether the facts of an earlier case are sufficiently similar to those of the present case to be regarded as a precedent. Alternatively, should the earlier case be 'distinguished', on the basis that its facts are not sufficiently similar, and so not regarded as a precedent.

In the average common law hearing and judgment, probably too much time goes into the exercise of dissecting out the precedent. In part, it is an attempt, by a virtuoso display of unrealistically fine line-drawing, to conceal the fact that subjective decision-making is going on. In addition, the fact that lawyers are paid by the day prolongs the proceedings.

But this does not justify the rush to the other extreme, which has occurred in civil law courts. Most common law text books on EU Law, written by common law authors, comment dismissively on the 'formalistic' way (referring mainly to their treatment of precedents) in which ECJ civil law judgments are written. This is a significant failing. For, in order for the process of identifying and isolating the rule of law which is to be treated as the precedent (in effect making law) to carry legitimacy, the judge must do this openly and convincingly.

To operate the precedent system in a way which carries legitimacy requires a sophisticated understanding of such differences as: between the reason of a case and judicial remarks by the way (sometimes called obiter dicta) or whether a judgment is to be disregarded as a precedent because some relevant earlier case was not advanced to the court.

PRECEDENT IN LEGAL EDUCATION IN CIVIL LAW STATES

Before going further, may we insert a sort of caveat, which is of interest at a Conference where most of the participants are full-time academic lawyers, many of them from the civil law world? To begin, it is surely uncontroversial that, in the civil law world, most objective, long term thinking about a legal system will be done by members of the academic legal community: practicing lawyers are too busy with their clients; and most lay-people are insufficiently informed to think about such topics.

But, so far as the present subject - systematic study and operation of precedent - is concerned, there may be a particular difficulty arising from this ascendancy of academics. Put simply, the traditional heart and substance of the civil law - inductive reasoning from a code or text - has a powerful intellectual appeal. To an intellectual, it has an almost seductive allure, which means that it is a delight to convey the history, techniques and vocabulary of this powerful reasoning tool to eager young minds.

In contrast, the sort of virtues which inhere in precedent - consistency, certainty, predictability - are more likely to appeal to practitioners. But, the important point is that, on the whole, in the civil law world, practitioners have had much less influence on legal education than academics.

Here, there is a striking difference from the position in the common law world. There, to put it briefly, the balance of authority was the reverse of that in the civil law countries. For many centuries, the judiciary and the legal professions fixed the parameters of legal education. The full-time, free-thinking academic lawyer, with time and freedom to research and publish beyond the range of interests of the practitioner was a rarity until the 1950s. This lateness in the development of a free academic profession gave rise to many evils, among them the slowness to reform the common law, including its excessive doctrine of precedent. But our subject here is the civil law. And our respectful suspicion is that, perhaps the people who do the thinking have been unduly influenced by their strong intellectual tradition and, as a result, have not sufficiently questioned the absence of the precedent doctrine, as a central feature of the contemporary legal system.

After that comment, may we suggest that there have already been developments in law and legal systems, which have increased the use of precedents in civil law jurisdictions. Over the practicing life-time of the present cohort of students, this change is likely to increase and needs to be made more systematic. This development probably calls for some reform of university legal education, in universities where this has not already happened, Now, given: that we are outsiders; and that structure and operation will vary very much from one place to another, we can only offer the following very general thoughts.

In law, context is very important so that, in many cases, the best approach would be not to teach 'precedent' as a isolated subject, but to assess its operation, alongside the other sources of law, as these operate in a concrete field. The most obvious case-study may be EU law.

Let us sketch a brief case study.[1] At the outset of the EU and according to the foundation-instruments, a treaty or directive could not be given direct effect before a national court. In a major change, the ECJ decided first that, in appropriate circumstance, even a Treaty or a Directive could be given 'Direct Effect' in a national court. What circumstances? Eventually, a number of conditions were set down in case-law. One is that the EU provision must be 'sufficiently clear and precise'. Another is that the defendant must be the state or an 'emanation of the State'. This that a complainant would still be deprived of success if the defendant was a private party, in other words, not the State or any part of it. But, even after this change an EU Directive would not apply because the wrong-doer was a private party. To meet this situation (following Factortame, to use the language of precedent), the state was made liable because of its failure to bring the Treaty-Directive into national law. However, again, the claimant must satisfy various conditions, most importantly, that the breach was 'sufficiently serious '.

We are concerned here not with the substance of the law, but with the impact of precedent. The essential point is that the law in this field is all judge-made: even if one accepts the classic idea of civil law (logical deduction from an authoritative legal text, which produces uniform results among all judges),there is, in this situation, simply no legal text from which to start. Another point is that (for good reasons) this has to be a complicated area of law, with lots of exceptions, qualifications and nuances. We have noted in the previous paragraph, the centrality of difficult tests, such as

[1] An account of this well known area may be found in **Wyatt and Dashwood's European Union Law** (Hart Publishing, 2011), chap 8-9. Factortame is reported at [1990] ECR I-2433.].

'emanation of the State' or 'sufficiently serious'. Especially in such an area, there is great scope for judicial subjectivity and inconsistency, unless judges know and appreciate each others' rulings and accept some obligation to follow them. In short, the precedent principle.

In line with this, our suggestion in the context of legal education is that a significant of the time given to Civil Procedure or EU law should be allocated to the study of precedent. In other words, as a useful case-study the student should be led through (to take some EU law examples) the law on Direct Effect and State Liability, but with special emphasis on testing for precedent.

At a more general level, one can say that the development of a rigorous focus on precedent, in its various form, provides a most useful focal point in legal education. In the first place, precedent is a system which varies from one jurisdiction to another and from one historical era to another. Thus it affords a fruitful basis for comparison. Most important of all, it is useful for a student to fasten on to how precedents occur in one case and how they develop or fail to do so, in later cases. This exercise is an excellent way of focusing a student's attention on a number of features. The first of these is that the operation of a legal rule has to be observed in relation to the facts thrown up by society and its characteristic situations of cooperation or conflict, as these develop. And a focus on these social changes and the law's reaction to them is useful.

Next, a keen concentration on the facts which either distinguish one case from another or alternatively make them similar, is a convincing way of drawing out the factors which fix the scope and character of the law. Thus, determining exactly what is the rule established by the precedent and tracing its development through later cases offers an exercise in close, indeed logical, reasoning which is good intellectual training for the young lawyer. A final advantage is that, especially at the start, some students find law a rather dry subject. Case law brings in a dimension of human interest, readily capturing attention which might otherwise be tempted to stray.

Over time, as law students become practitioners and judges, one would expect that such a change to legal education would (with other influences) feed into legal practice and, in particular, make an impact on how judges write their judgments. In addition, we believe that the kind of techniques which this sophisticated operation of precedent demands adds up to what the Singapore Declaration on Global Standards and Outcomes of a Legal Education calls 'Knowledge, Skills and Values'.