Reconstruction of Civil Law Systems and the Law of Obligations under the English Common Law Heritage

Dr. Thafar M. Alhajri
Assistant Professor
Saad Al-Abdullah Academy for Security Sciences, Department of Law, Kuwait

Abstract:

The central theme of this research is to illuminate the role of judicial precedents in the reconstruction of civil law legal systems around the world. Consistent with this pursuit and analysis it will be essential to explore the historical background that underpins the role of judicial precedents in civil legal systems.

There are significant differences between civil and common law jurisdictions. Thus evidence will be presented to show that judges have found precedents to be persuasive when adjudicating similar cases. This research will also juxtapose the role judicial precedents against the backdrop of the doctrine of Juris Constantein the development of civil law legal systems.

In this regard, this paper will present an example of the mechanism of a civil law jurisdiction for further detailed exploration of the theory submitted. Finally, it will examine the relationship between common law and statutory provisions in the law of obligations under English law.

Key Words: Civil Legal Systems, Civil Countries, Common and Civil Laws, Stare Decisis, Judicial Precedents, English Law, Law of Obligations, English Law, Law of Obligations.

1. Introduction

In all the legal jurisdictions around the world, the concept of judicial precedent holds great importance(1). It may be considered an administrative practice whereby the decisions of higher courts are considered as binding on the lower courts(2). This idea is certainly acknowledged and practiced within the Common Law traditions. The doctrine of *Jurisprudence Constante* also traces its origin from the same source enclosed within the same context(3). In historical context, civil legal systems can be regarded as a set of ideas evolved from Justinian Code(4), additionally covered by Germanic, Canonic, Feudal, Napoleonic and other local practices(5). This paper will restrict itself, however, to the role that judicial precedents play in the development of civil law formats. Several theories have been proposed that have attempted to counter the perception that the civil legal system is uncertain(6). This perception of an uncertain image may be true to some extent not least because generally, there is no concept of a developed doctrine of precedents in civil law jurisdictions. In practice, it is widely acknowledged and understood that different policies and strategies are applied in order to serve the interests of justice. These strategies and policies are then upgraded gradually. The remedies which are available under the law often leave some room for the judges over which they hold partial or absolute discretion. These remedies and judicial trends keep changing with the changing norms of the society. Countries following civil legal system are different from those where common law traditions are followed(7). A strong and well developed feature of common law system is the doctrine of stare decisis

(1) Tim Vollans& Glenn Asquith, English Legal System Concentrate Law Revision and Study Guide, (2nded, Oxford University Press, Uk, 2011), p 46.

(2) Payandeh, Mehrdad. "Precedents and Case-based Reasoning in the European Court of Justice." International Journal of Constitutional Law 12, no. 3 (2014)

(3) V. Fon, F. Parisi / International Review of Law and Economics 26 (2006) 519-535.

(4) Richard Schaffer and Others, *International Business Law and Its Environment*, (9thed, Cengage Learning, Canada, 2014) p 48.

(5) Charles Arnold Baker, The Companion to British History, "Civilian" (London: Routledge, 2001), 308.

(6) Mattei, "Stare decisis." Milano, IT: Guiffre (1988).

(7) Thomas R. Van Dervort, American Law and legal System: Equal Justice under the Law (2nded, West Legal studies, United State, 2000) p 365.

which is nowhere to be found, hitherto, in civil law legal systems. This, however, is as far as it goes. It is not, by any means, a clear-cut principle. Even in civil law countries, legal precedents are regarded as persuasive force among judges and legal writers.

This paper will investigate the relationship between the common law and statute in the context of the English law for law of obligations (contracts- tort- unjust enrichment- compensation- damage- property- etc.) and the role played by each of them in the development of the other.

2. Civil Law System and the Doctrine of Precedents

To understand the function of precedents in the construction and development of civil law systems, it is important to ascertain the historical perspective. This paper will restrict itself to discussing and analyzing the gradual development and evolution of the doctrine of precedents in the civil legal system. This will assist in setting the stage for a clear understanding of the issues.

2.1 Stare Decisis

It is well acknowledged that there exists glaring differences between common and civil law traditions related to the doctrine of stare decisis or precedents[8]. Amongst the common propositions between the two systems is the understanding that the doctrine relates to the line of similar decisions which are adjudicated on a particular point of law and fact. This doctrine of precedent can be traced back from early 1500s A.D. Then, judges across England, also known as Common law judges,[9] developed the practice of following pre-decided judicial principles and practices[10]. Despite its commencement at an early stage, this practice was not concretely established as a legal doctrine until 1700 -1800 AD. The relevant literatures on this topic further show that back then, English judges were more interested in finding the law rather than creating it[11].

(8) Kent Greenawatt, Statutory and Common Law Interpretation,(1sted, Oxford University Press, New York, 2013) p 279.

(9) Merryman, John Henry &Perdomo, Rogelio Perez, *The Civil Law Tradition: An Introduction of Europe and Latin America*, (3rded, Standford University Press, California, 2007) p 34.

(10) Berman, Harold J., and Charles J. Reid Jr. "Transformation of English Legal Science: From Hale to Blackstone, the." Emory LJ 45 (1996).

(11) Blackstone. (1764). Commentaries. Chicago University of Chicago Press, 1979.

With the passage of time, this practice became more and more established; making these chains of similar decisions more persuasive than ever before[12]. This doctrine of stare decisis later became the primary legal source with the propagation of legal positivism during the period of 1800-1900 AD[13].

Therefore, stare decisis lies at the very heart of common law. It is the main principle in common law. It represents the way of a group of judges that make up a present court to follow its own decisions[14]. A judge faced with two obviously identical cases must decide them similarly. A method of stare decisis depends on the court's power to identify those cases that it and lower courts must either follow or distinguish[15].

2.2 History of Precedents in Civil LawSystem

The*Ius commune's*[16] *Era was the time where the doctrine of judicial precedent in the civil legal system can be traced from*[17]. After the revolution in France, codified form of laws was regarded as the preferred form of legislation. The idea of judicial precedents had technically become obsolete with the prevalent proposition that the decision of new cases would not be influenced by the earlier decisions on the same subject matter. The courts in countries of Cassation system were under an obligation to pay regard to the decisions of any court which was not before the issuance of *renvoi* by the Court of Cassation[18]. Technically, the doctrine of precedent had become completely obsolete and as such there was no space for case law-based persuasive authorities within the civil legal system. Despite propositions, the importance of case laws was

(12) Hale, M. (1713). The History of the Common Law of England (p. 1971). Chicago: University of Chicago Press.

(13) Parisi, F., &Depoorter, B. (2003). Legal Precedents and Judicial Discretion. In C. K. Rowley & F. Schneider (Eds.), Encyclopedia of public choice (pp. 341-343). Amsterdam.

(14) KatjaLangenbucher, 'Argument by Analogy in European Law', (1998), Cambridge Law Journal.

(15) William M. Richman & William L. Reynolds, *Injustice On Appeal: The United States Courts of Appeals in Crisis,* (1sted, Oxford University Press, New York, 2012). p.10-50.

(16) J. Drion, Stare decisis/Het gezag van precedenten, in Verzamelde geschriften van J. Drion 142-170 (1968).

(17) James Q. Whitman, *The legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change*, (Princeton University Press, UK, 2014) p 9.

(18) Eva Steiner, French, *French Law: A Comparative Approach*, (Oxford University Press, New York, 2010) p 79-101.

never sabotaged. Later, scholarly writings of academics and policy makers presented the case that the role of precedents was of immense importance within the civil legal systems(19).

After the support of this doctrine from legal academics and scholars of those times, the legislative codes secured to serve as primary source of law, alongside the case laws which served as persuasive yet secondary source of laws(20). In order to curtail the arbitrariness in the exercise of powers amongst the state institutions, the doctrine of separation of power was introduced. This attempted to limit the role of courts strictly to resolving disputes, therefore discouraging judges from law making. Such idea was introduced due to the increasing distrust of the public of the estate institutions, particularly, the judiciary of France. As a consequence, lawmakers started to draft the codes and policies in the exhaustive manner, covering each and every possible interpretation to reduce the chances of arbitrariness on the part of the courts(21).

With the passage of time, this conservative approach started to change; jurists and scholars started to put more emphasis on bringing flexibility to the system. As a natural result, more and more civil law jurisdictions started to pay attention to the persuasive doctrine of judicial precedents, which practically started to serve as a source of law(22). This new approach resulted in minimizing the downsides of the legal administration and also served to increase stability, clarity and tenacity in legal administration. It also proved to be far better than the one which was practiced earlier(23). Following these developments, the doctrine of *jurisprudence constante* came into practice. According to jurisprudence constant, the courts are solely obliged to take into account and consider previous decisions if there is substantial uniformity between the previous and present cases(24). Considering the development of these cases as being

(19) Hondius, Ewoud. "Precedent and the Law." Australian Law Journal 83, no. 11 (2009): 775.
(20) Troper, M.,&Grzegorczyk, C. (1997). Precedent in France. In D. MacCormick & R. Summers (Eds.), Interpreting. Precedents: A comparative study (p. 103). Dartmouth, MA: Dartmouth Publishing Co.
(21) V. Fon, F. Parisi / International Review of Law and Economics 26 (2006).
(22) Hiroshi Oda, *Russian Commercial Law*, (2nded, MartinusNijhoff Publishers, Leiden, 2007) p 15.
(23) Ibid No.20.
(24) Ibid No.20.

consistent on certain points of fact and laws, it will be regarded as persuasive doctrine which will help the courts to adjudicate on them easily. The element of persuasiveness annexed with a particular doctrine is proportional to the uniformity of case laws developed.

2.3 Current Position

Today, most of the legal systems are fairly developed in the West in particular and in the world in general. In this regard, the doctrine of precedents as persuasive authority has been adopted in several civil law jurisdictions. This includes France, Germany and other civil law jurisdictions to name a few(25). In Germany, for instance, the approach, with respect to the judicial precedents on a particular subject matter, has created the novel idea of judicial customs.

In the same manner, consistent set of such cases that play the role of judicial precedents or *jurisprudence constante* became the persuasive source of law. In practice, however, such judicial pronouncements are hardly ever referred to as it is done in the common law regimes. Despite this, these case law principles serve as persuasive force and influence the judiciary in adjudicating over similar prospective issues. In this regard, academics have also dictated that "Courts, as well as scholars, tend to recognize the existence of [a case] rule and the character of '*arretde principe*' of the precedent when it has been followed by a line of others"(26) In the same manner, a set of predetermined cases serves as a source of law in the State of Louisiana, USA, once it is acknowledged as a settled precedent in law. Justice James Dennis of the Supreme Court of Louisiana suggests that where there is an existing trend of precedents that hold uniformity and consistency in the decisions, such precedents can be regarded as holding profound authority(27). This doctrine, as persuasive force, assists the courts in reaching coherent yet rational decisions. The

(25) MacCormick, N., & Summers, R. (Eds.). (1997). Interpreting precedent. Aldershot, UK: Ashgate Publishing

(26) Troper, M.,&Grzegorczyk, C. (1997) p 130 in Precedent in France. In D. MacCormick&R. Summers (Eds.), Interpreting Precedents: A comparative study (p. 103). Dartmouth, MA: Dartmouth Publishing Co

(27) Dennis, J. (1993). The John Tucker Jr. Lecturer in Civil Law: Interpretation and application of the civil code and the evaluation of judicial precedent. Louisiana Law Review, 54.

aforementioned examples of the role of precedents in different jurisdictions evidence its development in civil legal systems[28].

2.4 An Example of a Civil Law Country

The Judiciary, as an institution, has always played a very important role in framing the judicial administration. It is, indeed, interesting to note that a substantial body of prevalent laws and regulations in Japan are made by judges from time to time. Although the literature written by civil law scholars usually denounces this theory of legal development, the judge made body of laws is not even widely acknowledged, but there are hardly any areas of law which are yet to be touched upon by the Japanese judges[29].

Although there are glaring differences in the role of judicial precedents in civil and common law jurisdictions,[30] an insight of legal administration of a civil law country will help to ascertain the role of precedents in the development of its legal system. Japan, a civil law jurisdiction, will best explain the administrative impact of precedents in its legal system and its development[31]. Per the constitutional principles of Japan, the power vested in the state is divided into three areas, namely: The Judiciary, the Executive and the Legislature[32]. The parliament of Japan is bi-cameral, i.e. comprising of two houses. These upper and lower houses of parliament enjoy the highest status in terms of policy making role within the Japanese jurisdiction. Likewise, the judiciary, being the other organ of the state, comprises of the Supreme Court, the highest most in terms of hierarchy, the High Courts, Summary and the District Courts[33]. In Japan, like all other civil law countries,[34] precedents are not regarded as a binding source of

(28) Ibid No.20.

(29) Haley, John O. "Role of Courts in Making Law in Japan: The Communitarian Conservatism of Japanese Judges," Pac. Rim L. &Pol'y J. 22 (2013): 491.

(30) Cyril Chem, The Law of Construction Disputes, (2nded, Informa Law from Routledge, New York, 2016) p 9.

(31) T. Morishita Transparency of Japanese Law Project - Group for International Finance Law 2006-2009 Kyushu University http://www.tomeika.jur.kyushu-u.ac.jp/finance/.

(32) M. Ibusuki, "Japanese Law via the Internet"[2005], Retrieved from: http://www.nyulawglobal.org/Globalex/Japan.htm#_Basic_Structure_of_Japanese%20Legal%20S

(33) Ibid No20.

(34) Cliff Roberson & John Harrison Watts, Law Society: An Introduction, (CRC Press, London, 2013) p 37.

law. However, they serve as the non-binding guidelines for the judges to adjudicate on prospective cases. In other words, they serve as persuasive authorities to satisfy the courts in adjudication of similar cases. As such, whenever there is any previous guideline available with respect to a particular point of law or fact in question, the courts pay regard to it which is reflected in their decisions(35).

2.5 History

In the 12thtwelve century when warriors ruled the Japanese islands, the decisions of judges were regarded as the major source of law to maintain legal administration across the country. With the passage of time, the role of judicial precedents was further enhanced with a series of *Tokugawa* precedents. These were published a couple of centuries ago by the Japanese ministry of justice. The collection of these precedents was termed the 'Collection of Civil Customs of Tokugawa Era: Tokugawa Legal Precedents'. John Henry Wigmore was the person who first translated the copy of these precedents into English language(36). It was not much later than the post-earthquake era of 1920s that a new version of these precedents was initiated. This version was published during the period of 1960-1980 A.D by the University of Tokyo Press. Given all the literatures and writings on this subject matter, it can be argued, with some certainty, that the doctrine of judicial precedents had some influence on the judicial administration during the Tokugawa Era in relation to personal property and contract laws and regulations(37).

In previous centuries, judicial precedents have played an important role in Japanese legal development. According to some jurists, precedents as witnessed in Japan could be regarded as the reception of European law in Japan(38). The courts started to get influenced by the European style of construction and interpretation of laws, mostly borrowed from British

(35) Haley, John O, Ibid no 29.

(36) John Henry Wigmore, Law and Justice in Tokugawa Japan: Materials for the History of Japanese Law and Justice under the Tokugawa Shogunate 1603-1867, a part in 26 Vols. (1967-1986).

(37) Ibid No.31.

(38) Zentaro Kitagawa, Theory Reception: One Aspect of the Development of Japanese Civil Law Science, 29 SHIH? 251 (1967),

Common Law and French Civil law regime. Influence of German theoretical concept can also be seen in the interpretation of legal frameworks by Japanese policy makers. The Japanese administration went through substantial socio-political reforms during the 19th century. The policies which were enacted during subsequently proved to be of great success, resulting in economic and industrial boost across the country. These drastic policies lifted the status of Japan into the list of developed countries of the world. In order to maintain this status, new regulations and laws were enacted to meet the demand of ever increasing contentious matters. In the same manner, the doctrine of judicial precedents continued to play its role as a persuasive guideline to minimize the gap between interpretation of the enacted laws and regulations. It was during this time that the subjective ideas of good faith and misuse of rights by the individuals were recognized by the judiciary which made their interpretations liberal. Furthermore, the impact of public policy and socio-political factors was considered in order to deliver justice. The case of Mukaiyama v Yoshikawa(39) can be regarded as a relevant case law in this regard. In this case, the concept of good faith was recognized by the judge, despite being a novel idea in the civil administrative system(40). In this case, it was decided that the dispute between the parties will be decided on the balance of good faith, following which it was essential to debar the transfer of property in lieu of non-payment by one party. In the same manner, the doctrine of misuse of power was also applied in the case of Sonoda v Sonoda(41). In this case, the discretionary authority of one party in dispute was restricted in view of the possible abuse of right and privilege which was revealed during the proceeding of the case. Such judicial activism, nonetheless, did not affect the pace of economic and industrial progress in the country. In fact, such activism apparently left a positive impact on bringing innovative measures to meet the corporate requirements necessitated by those times.

(39) Gr. Ct. Cass. Dec. 18, 1920, 26 Minroku 1947 (Japan).

(40) John Owen Haley, *The Spirit of Japanese Law*, (The University of Georgia Press, London, 2006) p 164.

(41) Gr. Ct. Cass., June 20, 1901, 7 MINROKU (No. 6) 47 (Japan).

In view of the foregoing and given the gradual development of the role of judiciary, Frank K. Upham has presented an explanation with respect to the approach of Japanese judges. According to him, the judges have been much more liberal in terms of family, discrimination and employment issues as compared to the real projection of Japanese society[42]. This approach of Japanese judiciary can predominantly be observed after the world war. This, to some extent, explains the distortion between the eastern and western legal systems and their cultures. In this regard, it is submitted that something that appears to be liberal in western society will not necessarily be regarded in the same manner in an Asian society like the Japanese. Several cases of employment laws were brought before the Japanese courts during those times, with the bone of contention being the exclusion clauses. Being skeptical about termination issues, the courts handled such issues with extreme diligence. Similarly, Japanese courts have traditionally been more conservative in adjudicating over matters relating to the constitution. Despite such approach, their role has been similar in this regard as well.

There are ample numbers of judgments where certain legal principles have been settled by the court of law. In the case of Sakata v Japan[43], the contention was raised with regard to article 9 of the constitution of Japan. Known as the Sunakawa case, the matter was adjudicated in the late 1960s. In this case, the judges declared that the power related to the determination of the scope of the said article vested with the political authority. This case proved to be a turning point in the Japanese judicial norm and continued to serve as persuasive authority for many years. However, it is also essential to note that the judges further prescribed a limited position in relation to this which suggested that such would be the case in so far as it conforms to the framework of that provision.

2.6 Effect

In light of the foregone description which demarks the historical role of precedents in relation to civil legal system, this section will address the

(42) Frank K. Upham, Stealth Activism: Norm Formation by Japanese Courts, 88 WASHINGTON. UNIVERSITY. LAW. REVIEW.

(43) Sup. Ct., G.B. 1959, 13 Keishû 3225 (Japan).

role and effect of precedents in the modern-day administration of civil legal systems.

The persuasive nature of their authority brings the doctrine closer to the historical doctrine of precedents as acknowledged in Common law jurisdictions like United Kingdom, United States, and other common-wealth countries. This is indeed the case, regardless of the perception as endorsed by jurists and advocates of civil legal systems. In common law countries, courts have generally been reluctant to overturn earlier decisions(44).Likewise, in civil law countries, there have been rare incidents when the Supreme Court has overturned the decisions previously decided by its predecessor bench. This is not only restricted to the decisions of the Supreme Court, but the judicial institute has been generally reluctant to overturn the decision of its predecessor court, which is called the Daishin'in. As indicated earlier, the role of judicial law making has contributed to every area of law and policy. Even in the adjudication of criminal laws, the Apex Court of Japan seems to have acknowledged the persuasive role of judicial precedents, as it has applied the principle decided in one of the cases during 1930s to the case bearing similar facts which was brought before the court during late 1950s. In this case, the crime of arson was extended by the court by declaring that failure of the defendant to extinguish fire which was, in fact, ignited because of his negligence, would be regarded as sufficient evidence to prove arson(45). In the 1932 case law, on similar facts, it was decided that failure to put out fire started by the defendant with the motive to burn the building will be regarded as arson(46). Similarly, in another case that was decided about 6 years after the aforementioned one, it was held that failure to extinguish fire on the part of the defendant which was created by a fallen candle, which, in fact, had been due to negligence of the defendant, amounted to arson(47). All these cases clearly suggest that the judiciary of Japan has been active in creating legal principles with persuasive authority. This, it turns out, to some extent, serve in the same

(44) Keith S. Rosenn, Law and Inflation, (University of Pennsylvania Press, 2015) p 98.
(45) Gr. Ct. Cass. 1958, 12 Keishû2882 (Japan).
(46) Gr. Ct. Cass. 1932, 24 Keiroku 1558 (Japan).
(47) Gr. Ct. Cass. 1938, 17 DaihanKeishû237 (Japan).

manner as judicial precedents in the common law system. The case of Sumiyoshi v Governor of Heroshima was decided by the Supreme Court of Japan in 1975. This case also projects the acknowledgment of the persuasive role of precedent in civil legal system(48). In this case, the court held that it was an infringement of freedom protected by the constitution to restrict the location of pharmacies. However, in this case, the judiciary did not opt to overrule the Fukuoka Bathhouse case which was previously decided on a similar pattern(49).

However, it must be pointed out that despite the general reluctance of the judiciary to overrule previously adjudicated cases, there have been quite a number of cases where the courts have disregarded earlier decisions.

One such instance is the case of Aizawa v Japan(50). Some of the provisions of the Japanese Criminal Code were regarded as unconstitutional by the court. The reason was that the said provisions were abrasive due to the imposition of undue penalty on defendants belonging to a special category. This decision overruled the earlier decision of 1950 which was decided by the Grand Bench of Japanese judiciary(51). The underlying reason for the judicial reluctance in overruling lower courts'pronouncements would be to adhere to consistency of judicial principles and practices. This also depicts the consensus of the judiciary as an institution that adhers to the coherence of persuasive principles of laws. A unique approach to Japanese legal development is that despite being a civil law country, its parliament has been proactive in endorsing the decisions of judges as part of policies.

2.7 Consequence of Precedent as Doctrine

Apart from the aforementioned discussion, the impact of the doctrine of precedents in the development and construction of civil legal system can be related from European countries(52). Civil law system

(48) Lawrence W. Beer and hiroshiitoh, the constitutional case law of Japan, 1970 through 1990,188-99 (1996).

(49) John M. Maki, Court and Constitution in Japan: Selected Supreme Court Decisions, 1948-60 293 (1964)

(50) Beer and Itoh, The Constitutional Case law of Japan, 143 (1996).

(51) Meryll Dean, *Japanese Legal System*, (2nded, Cavendish Publishing Limited, London, 2002) p 508.

(52) Laetitia Hattingh and Others, *Australian Pharmacy Law and Practice*, (2nded, Elsevier, Australia, 2013) p 3.

traces its origins from the early Roman era of conquests. Amongst the main features, essential ones are the comprehensive codes of law, which are, in fact, legislative declarations. In general, the civil legal system of administration is governed by abstractions and principles which differentiate between the procedural and substantive rules(53). Although it is important to ascertain the difference between codes and statutes, case law emerged, increasing importance, as a secondary source. The Codes of law, on the other hand, provide the all-inclusive contents pertaining to that area of law to facilitate interpretation of the law without any possibility of deviation. The basic idea behind the emphasis on the literal interpretation of codified laws as opposed to the liberal approach of the court is to avoid arbitrariness in decisions. Judicial administration of civil law system is primarily carried out on the basis of comprehensive codes of laws, accompanied by scholarly writings on that subject of law(54). These codes, together with supporting articles, assist in the determination of rights, privileges and duties of individuals in Civil law countries. All the legal systems in the world, regardless of their background, tend to be inclined towards their adhesiveness with certainty, thereby paying deference to the concept of judicial precedents. Total disregard of this principle is not only impractical, but administratively unsustainable. Hypothetically, such proposition is likely to lead to anarchy within the society. Even in the case of France which is regarded as a high-end civil law system, the judicial pronouncements play this role to a certain degree. For instance, it was the decisions of the Apex Court of France, the Court of Cassation, which defined the law of torts being practiced within the jurisdiction(55). It has, from time to time, interpreted the law to make it more understandable, thereby filling the gaps left by the statutes and codes. In the same manner, the administrative law of France has also been developed by the decisions made by its courts and councils.

(53) Michel Fromont, Grands systèmes de droit étrangers, 4th edn. (Paris: Dalloz, 2001) p. 8.

(54) Neubauer, David W.,and Stephen S. Meinhold. Judicial Process: Law, Courts, and Politics in the United States. Belmont: Thomson Wadsworth, 2007, p. 28.

(55) George A. Bermann& Etienne Picard, *Introduction to French Law*, (Wolters Kluwer, New York, 2008) p 238-239.

3. Juxtaposing Common-law with Statute in the Law of Obligations under English Legal System

Moving from continental Europe, we now turn attention to English law jurisdiction and the relationship between its legal provisions and the law of obligations.

Most discussions on the relationship between common law and statute in obligation law(56) are often focused on the difference(57) between the unclear nature of the common law and the codified nature of statutory provisions, represented in the case law systems based on the decisions of the courts. The extent of the strong effect of the statutes on the common law regulation is observed. However, the prevailing idea in the common law jurisdiction is that statutes are grounded on policy and not principle(58). Hence, no inference or measurement of the legislative intent can be made with regards to the common law.

The common law is based on principles and can easily be developed without defined border system in advance, making it superior, in some cases, to statutes which are considered to be issued rules, *the extent of which is determined by reference to the scope of its provisions*(59) Common law principles and the extent to which they impact the construction and understanding of statutes must be borne in mind during the legislative process(60). Whereas judicial precedents remained the favourite in the field of those working with contracts, damage, unjust enrichment or property, they considered the legislative system an unwelcomed guest in those areas "An alien intruder in the house of the common law"(61). However, Henry Hart and Albert Sacks, in their seminal materials on legal process, say that judges should assume legislators are reasonable

(56) (Contracts, tort, compensation, unjust enrichment and property).

(57) HeikkiMattila, *Comparative Legal Linguistics*,(Ashgate Publishing Limited, England, 2007) p 106. See also, Michael R. T. Macnair, *The Law of Proof in Early Modern Equity*, (Duncker&Humblot, Berlin, 2013) p 13.

(58) J. Beatson, 'The Role of Statute in the Development of Common Law Doctrine', (2001), Law Quarterly Review.248.

(59) Patrick Atiyah, (1985) 48 M.L.R. 1. Trevor Allan, *Law Liberty and Justice* (1993), pp. 79, 81.

(60) Radwan v. Radwan (No. 2) [1973] Fam. 35, *per* Cumming Bruce J.

(61) Justice Harlan Stone, "The Common Law in the United States" (1936) 50 Harvard L.R. 4.

people pursuing reasonable purposes rationally[62].The relationship between the common law and the statute in the law of obligations should not be seen to be that of two entities working independent of each other. Therefore, Beatson[63] sees that the statute depends, to some extent, on the common law and as the basis for its development, making statute and common law more integrated than traditionally thought. In Pepper v. Hart,[64] the courts are allowed, by reference to the legislative history, to interpret the legislations where the legislative intent is mysterious, enigmatic and unclear. This case law then led to the development of an informed platform to interpret the statutes so as to give effect to the legislative intent of a given statute.

Thus, statute in law of obligations remains dependent on the survival of the common law and the system relied on it in the interpretation of its statutes[65]. This is evident in the law reform (Contributory Negligence) Act of 1945 which states that in the event the plaintiff contributed, by his error, partially in his loss, the court may limit the compensatory damages due to him. In this case, the statute does not define the law of tort nor does it attempt to establish the objectives and content of the tort.

Thus, the error contained in the definition of Article (1) S.1 is:

"Fault means negligence, breach of statutory duty or other act or omission which gives rise to liability in tort"[66].

Thus, the basis of the application of this legislation is the extent of our understanding of the rules of liability in tort in accordance with the principles of the common law.

For instance, he duty of care imposed on the director and members of the Board of Directors under the Insolvency Act of 1986 finds its

(62) Henry Hart & Albert Sacks, The Legal Process: Basic Problems in the Making and Application Law, 1124-1125 (William N. Eskridge, Jr., and Philip P. Frickey, eds, Westbury, Foundation Press, 1994)

(63) J. Beatson, "Has the Common Law a Future?" [1997] C.L.J. 291; J. Beatson, "The Role of Statue in the Development of Common Law Doctrine" (2001) 117 L.Q.R. 247.

(64) [1993] A.C. 593.

(65) Kent Greenawatt, Ibid no 8, p 290.

(66) Law Reform (Contributory Negligence) Act 1945.

interpretation clearly under the standard of duty of care found in the common law principles where:

Bingham L.J. in Interfoto Picture Library v. Stiletto visual Program Ltd(67) sees that in the cases existing on the basis of a contractual clause, they must be read in the context of the common law principles. The Contributory Negligence Act may be a mixture of statutes and the common law, where the common law in question may have a legislative basis. The (Fatal Accidents Act 1976) refers to tort in claims under this Act and therefore, this legislation depends on the case law in its application and interpretation. This case law is the basis of the interpretation of the Law Reform (Contributory Negligence) Act of 1945.

Third Party Rights under English law

Third party's rights in the contract were unsatisfactory in English law where the judges were reluctant to recognize the right of others to carry out contractual obligations where both parties delegated this right to a third party. This reluctance is due to the nature of the third party rule, as in Trident General Insurance Co. Ltd v. McNiece Bros Pty. Ltd(68) where the majority of the court rejected a claim filed under the insurance contract by a third party. However, others felt that the third party rule is a substantial rule(69) and according to the interpretation of Anson, "seems to flow from the very conception we form of Contract"(70) and "is Statement or reflection of an aspect of the Nature of a Contract"(71).

With the continuation of this reluctance came a legislative solution in the Contracts (Rights of Third Parties) Act of 1999, of which article (1) includes the following: "A person who is not a party to a contract (a" third Party ") may in his own right enforce a term of the contract if (a) the contract expressly provides that he may..."

Despite this legislation, the understanding of third party rights remained dependent on the survival of the common law of contracts. So,

(67) [1989] Q.B. 433.

(68) (1988) 165 C.L.R. 107.

(69) Brennan and Deane JJ. in *Trident General Insurance Co. Ltd v. McNiece Bros Pty. Ltd. (1988) pp. 128-148. pp. 128-145.*

(70) Anson, *Principles of the Law of Contract* (1879), p. 195.

(71) Trident, Ibid, n. 45.

to find out what is intended by the contract, its duration and the contract parties, it is required to find out the principles of the common law(72). Thus, every statute concerning civil law relies, to varying degrees, on the survival of the principles of the common law(73). Indeed, the Act of 1999 did not include provision for the interpretation of the contract, but rather, they are derived from common law principles, where Atiyah sees that:

"a new statute becomes part of a very large body of law even though not one word is said about these things in the Act itself"(74).

Thus, when drafting any legislation, the established principles of common law must be taken into account. Statutes related to the law of obligations, such as contracts and tort are traditionally connected to the understanding of the common law.

Therefore, statutory provisions in the law of obligations and the common law may not be considered as completely separate. Rather, an appreciation of the statute should depend upon a good understanding and interpretation of the common law.

Another example explicitly illustrating this point is where the *promisee* is permitted to prosecute as stipulated in the Rights of Third Parties Act of 1999. Article 4 stipulates the following:

"Section 1 does not affect any right of the promisee to enforce any term of the contract"

There are also provisions in the statute which explicitly stipulate the necessity of maintaining the relevant common law. This is evident from the Sale of Goods Act of 1979, by S.62 (2):

"The rules of the common law, including the law merchant, except in so far as they are inconsistent with the provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, apply to contracts for the sale of goods."

Whereas the Civil Evidence Act of 1995 pointed directly in article 7 (2) to the "effective preservation" of the common law rules set forth

(72) Millar & Co. Ltd, v. Taylor & Co. Ltd [1916] 1 K.B. 402.

(73) Thomas Lundmark, *Common Law Tort and Contract*, (Lit Verlag, 1998) p 132-140.

(74) P.Atiyah, "Common Law and Statute Law" (1985) 48 M.L.R. 1 at 2.

under article 9 (1) and (2) of the cancelled Evidence Act of 1968 in connection with hearsay evidence, where article 9 (1) stipulates the following:

"In any civil proceeding, a statement which, if this part of the Act had not been passed, would, by virtue of any rule of law mentioned in subsection 2 below, have been admissible as evidence of any fact stated therein, shall be admissible as evidence of that fact by virtue of this subsection."

Thus, it becomes clear that the legislature is obliged, in some instances, to replace elements of the common law for reasons of clarity and other justice provisions. In the next section, we discuss this legislative intervention.

3.1 Statutory intervention and substitution of common law in law of obligations

We start by conceding that legislative intervention in the common law does not always lead to imposing a duty for a new condition nor is it designed to frustrate the previous common law principles. However the landscape and relevance of the statute and its relationship with the common law is be regarded as clear from a reading of the relevant statute.

In England, the legislator considered that the duty of care owed to the children exposed to exploitation and violence is not a common law duty of care(75).

There may be an explicit reference to the replacement of the common law by the statute as stipulated by article (1) of the Occupiers' Liability Act of 1957:

"The rules enacted by the two next following sections shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them."

It is noted in the previous provision that the wording "in place of the rules of the common law", confirms the statute's replacement of the

(75) Ors (Minors) v. Bedfordshire C.C. [1995] 2 A.C. 633 at p. 739.

common law rules, as evidenced by article (1) of the Occupiers Liability Act of 1984, which stipulates the following;

"The rules enacted by this section shall have effect, in place of the rules of the common law, whether any duty is owed by a person....."

It is clear, upon a reading of the statue that the text "shall have effect in place of the rules of the common law" is conclusive of the substitution of the common law by the statute. To be clear, article 18 (8) of the Water Industry Act 1991 does not altogether forbid common law redress. However, the House of Lords, in Marcic v. Thames Water Utilities Ltd,(76) observed that the claim for compensation according for the tort of nuisance emanating from the overflow of sewage will clash with the statute Lord Nicholls confirmed that "the existence of a parallel common law right, whereby individual householders who suffer sewer flooding may themselves bring court proceedings when no enforcement order has been made, would set at nought the statutory scheme. It would effectively supplant the regulatory role the director was intended to discharge when questions of sewer flooding arise."(77)

Further, the matter is considered in Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd(78)where the contracts had been frustrated pursuant to the Frustrated Contracts Act 1943. Article (1) stipulates that when the contract is revoked due to frustration, the next provisions of this section shall be effective in this respect. Thus, it is evident that these provisions replace the common law. The legislative intent is determined by reference to the benefits granted according to the contract and not on the basis of the common law rules. However, the Frustrated Contracts Act 1943(79) does not apply to the contract for the carriage of goods by sea or the contract of insurance. These are subject to the Common Law rules in addition to being applicable to the law on unjust enrichment because of the frustrated contracts. It would seem that as statutes began to replace large swathes of the common law, the latter

(76) [2003] UKHL 66; [2004] 1 All E.R. 135.
(77) Marcic v Thames Water Utilities Ltd [2003] UKHL 66; [2004] 1 All E.R. 135 at [35].
(78) [1943] A.C. 32.
(79) S. 2(5).

did not recede into the shadows but started to evolve as a powerful luminescence of statutes.

In the following section, we expand on this theme by discussing the piecemeal evolution of the new common law into an interpretation aid to the statue in the law of obligations.

3.2 The emergence of the new Common Law as an aid to statutory Interpretation in the law of obligations

It is worth observing that when a judge interprets a statute, whether he is aware of it or not, he, invariably, creates a new body of law. Therefore, there is a strong relationship between statute and the common law which interprets it(80). This emerging *New Common Law*, nevertheless, still owes allegiance to the case law principles applicable under common law. It is noted that although the legislative intent provides the foundation upon which the judges base their decisions, they, nevertheless, rely on the spirit of this Common Law.

Furthermore, we find, in the implicit conditions of the Sale of Goods Act 1979, the implementation of the Occupiers Liability Act 1957 and 1984. The case law in the aforesaid Acts was the basis for the dependence of civil law on the common law.

Under common law rules, in Baker v. Bolton,(81) we find that there is no reason for the case due to the death of another person. For this reason, the Fatal Accidents Act of 1976 was enacted. This Act permits compensation for the damage to the dependants, resulting from economic losses. In article 3 (1), it states that such damages may be awarded "as are proportioned to the injury resulting from the death to the dependants respectively".

The Law Reform (Personal Injuries) Act 1948, rules that damages from deaths resulting from error are legislation based although the evaluation of damages resulting from economic losses in the law for compensation of personal injuries and death are based purely on common law rules.

(80) Clarkson, Miller and Cross, *Business Law: Text and Cases: Legal, Ethical, Global and Corporate Environment*, (12thed, South Western Cengage Learning, United Kingdom, 2012) p 12.

(81) (1808) 1 Camp. 493.

This matter was settled in Dubai Aluminium Co. Ltd. V. Salaam[82] where the House of Lords decided that according to article 2 (1) of the civil liability (Contributory) Act 1978, the profits accruing to the defendants should be taken into account in determining the "just and equitable" contribution which should be paid according to the said law".

To achieve a balance between the interests of the plaintiff and the defendant, it is important to refer to the rule of common law. However, this should not be pushed beyond a reasonable bound so as not to injure the wording or intent of the Act. In this respect, Sales J. sees in 4 Eng Limited v. Harper[83] that there must be a balance between the interests of the parties who seek to redress by reference to the principles of equity and restitution.

Compensation is thus based on these principles in the relevant case law without omission of the interpretation of Article 423 of the Bankruptcy Act 1986.

In BP Exploration (Libya) v. Hunt (No.2)[84] where Robert Goff.J. said "The Principle underlying the Act (is) the principle of unjust enrichment, which underlies the right of recovery in very many cases in English law, and indeed is the basic principle of the English law of restitution, of which the Act forms a part."[85] He held that the Law Reform (Frustrated Contracts) Act of 1943 is based on the principle of unjust enrichment[86].

This, as we note, is a common law principle. However, there was a gradual erosion of the march of common law by a burgeoning body of statutes that sought to clarify the law while removing some of the subjectivity of interpretation.

3.3 The impact of supplanting common law by statute

The forgone depicts a landscape of a rich interplay between the foundational common law and statutory provisions. The reader may

(82) [2002] UKHL 48; [2003] 2 A.C. 366.
(83) [2009] EWHC 2633 (Ch).
(84) [1979] 1 W.L.R. 783.
(85) Hunt (No.2) [1979] 1 W.L.R. 783 at 799.
(86) Graham Virgo, *Principles of the Law of Restitution*, (3ed ed, Oxford University Press, UK, 2015). p 58-60.

notice a symbiotic relationship that acquiesces to the existence of one by the other without ousting their respective jurisdictions. There may be a natural evolution of the common law but the courts may ignore it under the pretext of the existence of a statute to address the subject. This led to the lack of development of the common law as a result of a practical clash between the common law and statute(87).

An example is that under the common law in the late payment of a debt, the amount of compensation is ruling for the amount agreed upon, where the House of Lords decided in London Chatham and Dover Rly Co. v. South Eastern Rly(88) that the interest cannot be awarded as compensation.

In the President of India v. La Pintada Compania Navigacion SA,(89) the House of Lords sought to determine whether to depart from the dicta in London Chatham and Dover Rly. However, their attempts collided with Article 35A of The Senior Courts Act 1981, where Article 35A stipulates that the court has the discretion to award the simple benefit for the amount agreed upon with effect from the date of the cause of action until the date of judgment or payment.

In contrast, in Sempra Metals Ltd v. Inland Revenue Commissioners(90) the House of Lords decided to abandon London Chatham and Dover Rly and decided to accept the compound interest that are judged as damages or restitutionary award.

In Alfred McAlpine Construction Ltd v. Panatown Ltd,(91) a judicial review of the law on privity of contracts addressed the Contracts (Rights of third Parties) Act of 1999. It made clear in its report that the statute does not aim to stop the development of the common law, in two key areas. The first is with respect to the measures of the *promisee* in a contract for the benefit of a third party and the second is with regards to new exceptions that allow for others to implement the contracts.

(87) Simona Grossi, *The U.S. Supreme Court and the Modern Common Law Approach*, (Cambridge University Press, Uk, 2015) p 122.
(88) [1893] A.C. 429.
(89) (The La Pintada) [1985] A.C. 104.
(90) [2007] UKHL 34; [2008] 1 A.C. 561.
(91) [2001] 1 A.C. 518.

For that, Lord Goff observes that "I cannot see why proposed statutory reform of the old doctrine of privity of contract should inhibit the ordinary judicial function, and so prevent your Lordships' House from doing justice between the parties in the present case"[92].Thus, by Lord Goff's belief, the statute does not prevent the return to the rules of the common law with respect to the promisee's remedies. In contrast, Lord Clyde[93] observes that it is inappropriate to extend the statutory provision by judicial innovation which depends on the existence of the Act as a good reason not to think about judicial innovation. This statement clearly, foreshadows and embraces the debate on judge-made law.

Thus, it is clear that even in the House of Lords, there are different points of view. Whereas some judges see that the statute prevents the development of the common law, others see that it does not preclude the development of the common law[94]. It is recognized that when Parliament passes a law, it is otherwise considered as the development of the common law rules. The statute must be seen that it does not hinder the development of the common law, except in rare cases. Thus, judges must not abandon the rules of the common law on the grounds that the legislature has the ability and freedom to issue a statutory solution or the issuance of the amendments when they deem that the rules of the common law are incomplete or unsatisfactory[95].

In K2 Restaurants Ltd v Glasgow City Council,[96] the defendants tried to persuade the court that as they did not breach the duty of care under the Building (Scotland) Act 1959, a common law duty of care did not arise. In other words, there was no explicit statutory provision for a duty of care. This argument was rejected:

"I have reached the view that this is a clear case of a common law breach of duty as contended for by Senior Counsel for the Pursuers. The physical proximity of the Prsuers' premises to the part of the tenement on

(92) Alfred McAlpine Construction Ltd v Panatown Ltd (No.1) [2001] 1 A.C. 518 at 553.
(93) Panatown Ltd (No.1) [2001] 1 A.C. 518 at 535.
(94) P. G. Turner, *Equity and Administration*, (1sted, Cambridge University Press, UK, 2016) p 231.
(95) Lord Goff's brilliant speech in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] A.C. 70.
(96) [2011] CSOH 171.

which work was being carried out was such as to give rise to a clear and direct duty on the defenders to take reasonable care not to cause injury and damage to that property."[97] Clearly, the court was unable to ignore common law rules in its interpretation and application of this statute.

In a similar case, it was accepted in X (Minors) v Bedfordshire CC[98] by both Lord Jauncey and Lord Browne-Wilkinson that a patient in an NHS hospital is was owed a similar duty of care as someone being treated in a private hospital. The duty of care did not arise in National Health Service Act 1977. However, it can arise under common law duty[99].

4. Conclusion

This research explored the role of judicial precedent in the construction of civil law systems. The foregone paragraphs attempted to shed light on the historical and current approaches to civil legal systems concerning the role of judicial precedents. Certain examples have also been submitted with an analysis of the legal framework and case laws of different civil law countries. In this respect, considering the intrinsic roles of precedent as a persuasive force in civil systems, it is submitted that the doctrine of precedent has played an essential role in the development and construction of civil legal systems. Despite the fact that scholarly writing and perceptions suggest the contrary, the foundational role of judicial pronouncements in civil law jurisdictions cannot be ignored.

Finally, in England, statute and common law have developed as complementary parts of the legal jurisdiction. It is also clear that law on obligations derive the interpretation of its provisions from the common law. Statutory provisions, when created, we argue, have supplemented rather than replaced common law principles. Statutory provisions in the law of obligations (contracts- tort- unjust enrichment- compensation- etc.) depend on the survival of the common law to make sense of its principles. Conversely, we can also use statute by analogy to the

(97) K2 Restaurants Ltd v Glasgow City Council [2011] CSOH 171.
(98) [1995] 2 A.C.633.
(99) Gorringe v Calderdale MBC [2004] 2 All E.R. 326 at 339.

development of the common law. Courts should take into account the relevant common law when applying the provisions of statutes. Further, judicial precedents that are the result of the interpretation of the statute are of great significance as they are a mix of the judicial interpretation and the common law.

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