

e-G@ius
(European Gaius Project)



CORTE SUPREMA DI CASSAZIONE

UFFICIO RELAZIONI INTERNAZIONALI

Struttura di formazione decentrata della Corte di cassazione

Questionnaire on the
judicial precedent

-

Questionnaire sur le
précédent judiciaire

Questionnaire on the judicial precedent	4
Albania - <i>Supreme Court</i>	5
Austria - <i>Supreme Court</i>	6
Belgium - <i>Cour de Cassation</i>	8
Czech Republic - <i>Supreme Court</i>	9
Bulgaria - <i>Supreme Court of Cassation</i>	13
Croatia - <i>Supreme Court</i>	14
Denmark - <i>Supreme Court</i>	15
Estonia - <i>Supreme Court</i>	17
Finland - <i>Supreme Court</i>	19
France - <i>Cour de Cassation</i>	20
Germany - <i>Federal Court of Justice</i>	23
Greece - <i>Supreme Court</i>	24
Hungary - <i>Supreme Court</i>	25
Ireland - <i>Supreme Court</i>	27
Latvia - <i>Supreme Court</i>	28
Lithuania - <i>Supreme Court</i>	30
Luxembourg - <i>Cour Supérieure de Justice</i>	33
Malta - <i>Courts of Justice</i>	34
Montenegro - <i>Supreme Court</i>	35
Netherlands - <i>Supreme Court</i>	36
Norway - <i>Supreme Court</i>	37
<i>Poland - Supreme Court</i>	39
Romania - <i>Court of Cassation</i>	43
Slovakia - <i>Supreme Court</i>	45
Slovenia - <i>Supreme Court</i>	46
Spain - <i>Supreme Court</i>	47
Sweden - <i>Supreme Court</i>	48
United Kingdom - <i>Supreme Court</i>	49

Questionnaire on the judicial precedent

To the Presidents of the Supreme Courts Members of the Network of the Supreme Judicial Courts of the European Union

Dear President,

The Judicial Training Unit of the High School for the Judiciary at the Italian Supreme Court is organising a seminar on the judicial precedent in criminal proceedings vis-à-vis new Article 618 of the Italian Code of Criminal Procedure. The meeting is scheduled to be held on Nov. 8, 2018.

To this purpose, in order to address the topic in the broadest way, including its supranational dimension, we would be very grateful if you could answer the following three short questions about the precedent as considered in your legal system.

Please, send your reply, either in English or in French, at your earliest convenience, and preferably no later than Sept. 30, 2018, via email to Judge Gianluca Grasso (gianluca.grasso@giustizia.it; copy to uri.cassazione@giustizia.it).

Questions:

1 - Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

2 - If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

3 - If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

1 - Le principe du droit affirmé par la Cour suprême, notamment en matière pénale, est-il contraignant dans d'autres jugements?

2 - Si le principe de la loi est contraignant, quelles sont les formes nécessaires pour le vérifier et éventuellement le surmonter?

3 - Si le principe de la loi est contraignant, quelles sont les limites de cette restriction? Par exemple, une modification partielle ultérieure du cadre législatif exclut-il toute efficacité contraignante du principe de droit affirmé par la Cour suprême?

Albania - Supreme Court

1) Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

In the organization of the Albanian judicial system, the Supreme Court is the highest instance, and it plays a crucial role as to the unification of case law. According to our law, the decisions taken by the Single Chambers (Criminal, Civil and Administrative) or by the Joint Chambers of the Supreme Court (en banc), have binding authority on the lower courts and judges are obliged to observe them in similar cases. During the exercise of their judicial activity, judges of lower courts are not allowed to depart from the case-law established by the Criminal Chamber or the Joint Chambers of Supreme Court.

2) If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

The Supreme Court, ex officio or at the request of the parties, when the need arises to change the case law established by the Criminal Chamber, has the right to hear the case in Joint Chambers (this is done specially when there are conflicting decisions by judging panels of Criminal Chamber, and this situation is solved by the Joint Chambers through a binding decision)

3) If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

If a specific provision, on which the Criminal Chamber or Joint Chambers through a decision has interpreted it, is amended subsequently by the lawmaker, this judicial decision is no longer binding on lower courts.

Austria - Supreme Court

Judgments of the Austrian Supreme Court are only binding in those concrete cases where they are given; as to similar cases in other proceedings, there is no formal “rule of precedent” in Austrian law. However, lower courts usually follow the case law of the Supreme Court simply because they do not want that their judgments be reversed by way of appeal.

The Supreme Court itself is free to depart from its own case law. However, where this case law concerns a “legal question of fundamental importance” (*Rechtsfrage von grundsätzlicher Bedeutung*), there is a special procedure, provided for in the Law on the Supreme Court for both civil and criminal law: Usually, the Supreme Court decides in “simple panels” (*einfache Senate*) of five judges. But where such panel intends to depart from a well established case law on a legal question of fundamental importance, it has to enlarge itself by six more judges; the judgement on the concrete case will then be given by this “enlarged panel” (*verstärkter Senat*) of eleven judges. An enlargement also takes place where a simple panel finds that a legal question of fundamental importance which is relevant for its decision had been solved in diverging ways in previous judgments of the Supreme Court. Also in this context, the enlarged panel will give the judgment on the concrete case; the previous (contradicting) judgments of simple panels will not be affected by its decision.

Where an enlarged panel has given a judgment, all other (simple) panels of the Supreme Court are bound by the solution of the legal question of fundamental importance on which the enlarged panel has based its judgment. There is no binding effect where the law has changed or where the facts of the new case can be distinguished from those which led to the judgment of the enlarged panel. Moreover, the Supreme Court can depart from the judgment of an enlarged panel, but this has to be done by a judgment of another enlarged panel in a new concrete case.

There is no rule in Austrian law that judgements of enlarged panels are formally binding for lower courts. However, those courts will usually follow such judgments in the same way as they follow the other case law of the Supreme Court.

There is of course a large margin of discretion for simple panels whether a particular legal question is of fundamental importance or not. But even where the conditions for an enlargement are clearly met, it is not possible to force a panel of five judges to enlarge itself. If the panel - despite the clear necessity of an enlargement - gives the judgment in the composition of five judges, its judgment will be as final as any other judgment of the Supreme Court.

In practice, judgments of enlarged panels are rather rare (one or two in a year). Among the judges of the Supreme Court, there are discussions to change the system, following the model of the EU preliminary ruling procedure: A simple panel could refer a legal question of fundamental importance to a larger panel and would then give the

judgment in the concrete case on the basis of the preliminary ruling of this larger panel. But there are no indications that the parliament will change the respective law in the near future.

Belgium - Cour de Cassation

1. En Belgique, les arrêts de la Cour ont, depuis une réforme récente, autorité de la chose jugée. Cette autorité ne vaut pas erga omnes. Elle n'existe qu'en cas de cassation et ne lie que le juge à qui l'affaire est renvoyée. Cependant, l'autorité morale et scientifique de la Cour fait que, la plupart du temps, le juge du fond se plie à l'enseignement de nos arrêts, même dans les cas où il n'y est pas tenu.

2. Si, dans l'hypothèse d'une cassation avec renvoi, le juge de renvoi est tenu de se conformer au point de droit tranché par la Cour, il peut s'en affranchir par la technique du renvoi préjudiciel à Strasbourg, à Luxembourg ou devant notre Cour constitutionnelle.

3. Le dernier mot revient bien sûr au législateur qui peut intervenir pour redresser une jurisprudence qui lui déplaît. Tant que cette modification n'a pas eu lieu, le droit est ce que la Cour dit être le droit.

Czech Republic - Supreme Court

1) Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

The legal system of the Czech Republic is not based on precedent. The primary formal source of law is always a statute. Therefore, courts in the Czech Republic do not create legal rules, but merely develop law that is already settled in the statutes and other legal regulations by interpreting them. Nevertheless, judicial decisions, in particular those of the higher courts, are of great importance, as they have a high authority. Departing from the case law adopted by the Supreme Court requires a special procedure and the constitutional principles demand judicial decisions to be foreseeable. Hence, even though they are not formally legally binding, they are generally binding in practice for similar subsequent cases.

Firstly, legal conclusions set out in the Supreme Court's decisions are of crucial importance. They are a significant source of arguments that the judge deciding a latter case should take into account. Accordingly, decisions of the Supreme Court fulfil the unification function and are the guiding principle in deciding similar cases in future. At the same time, they represent important information for litigants, having influence on their legal reasoning and consideration of the use of legal remedies.

Secondly, the fact that the Supreme Court is the highest judicial authority in criminal matters in the Czech Republic plays also an important role, since its decisions in these matters can only be quashed by the Constitutional Court of the Czech Republic. The Supreme Court is thus able to enforce its legal opinion by deciding the appeals that are filed against the decisions of lower courts, as it can change or quash them. If the decision is quashed, the lower court is then bound by the legal opinion of the Supreme Court in its subsequent legal assessment of the case.

In addition, an institutionalized mechanism for reviewing the Supreme Court's own case law has been established (see the answer to the question number 2). This prevents arbitrariness while reducing the possibility for judges of lower courts not to follow the case law adopted by the Supreme Court, especially when the case law of the Supreme Court has been unified by the Grand Chamber of the Criminal Division. All the arguments against the prevailing legal conclusion have already been heard and assessed. Therefore, it is not in principle possible for the lower court to successfully take a different legal position that is in contradiction with the opinion of the Grand Chamber of the Criminal Division of the Supreme Court.

Furthermore, as the Supreme Court stated in its judgement of 14 June 2012, Ref. No. 30 Cdo 1042/2012, in order to fulfil the requirement of the constitutional principle of foreseeability of judicial decisions and the legitimate expectations of unified decision-making, the lower courts are obliged to reflect the case-law of the Supreme Court in their decisions. It can therefore be concluded that although the judicial decisions of the

Supreme Court of the Czech Republic do not form a formally binding precedent as a source of law, these decisions are in practice binding for subsequent similar cases. However, even if a lower court departs from the settled case-law of the Supreme Court, this does not automatically mean a reason for quashing this decision on appeal. Such departing must nevertheless be convincingly reasoned (see the answer to the question number 2).

Apart from the judicial decisions, the Opinions of the Criminal Division of the Supreme Court are also significant for assessing future cases by the Czech courts. They are adopted by the Criminal Division of the Supreme Court on the basis of monitoring and evaluating the final decisions of the Czech courts in criminal proceedings. Opinions serve as a general guideline not only for judges of the Supreme Court but also for judges of lower courts, as their purpose is to ensure consistency in decision-making in criminal matters. As to the authority of the Opinions, they are the most significant source of arguments for subsequent decision-making, since it requires the consent of an absolute majority of all members of the Criminal Division of the Supreme Court, which currently comprises of 22 judges and 4 judges interns, to adopt them. The legal opinions expressed in the Opinions of the Criminal Division are also basically binding in practice for the future decision-making of the courts, as the existing Opinion of the Criminal Division can only be overcome by adopting a new Opinion.

The Criminal Division of the Supreme Court has already adopted a total of 49 Opinions.

2) If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

As stated in the answer to the question no. 1, the judicial decisions of the Supreme Court are binding in practice for future similar cases. That is due to their authority, the requirement of the constitutional principle of foreseeability of judicial decisions and legitimate expectations, as well as due to the existence of an institutionalized mechanism for reviewing the Supreme Court's own case law.

However, as it is merely a binding force in practice, formally speaking, the lower court may depart from the case law of the Supreme Court. Nevertheless, this may be successful only when it offers sufficient and convincing competing arguments that have not yet been assessed. In particular, the departing court must state reasons why it does not identify with the Supreme Court's legal opinion and for what reasons it deems it necessary to replace the Supreme Court's conclusions with new legal opinion. Moreover, the more the court deviates from previous case law, the more convincingly the subsequent change must be justified and reasoned. Otherwise, the new decision may not meet the requirements of the right to a fair trial (Constitutional Court judgment of 17 July 2007, Ref. No. IV ÚS 451/05).

Nevertheless, the situation is different when the Supreme Court itself intends to review its own previous case-law and depart from it. In such a case, a legal procedure

exists which ensures that a solution that is most acceptable to a democratic society is achieved. If the chamber intends to overcome a previous decision of the Supreme Court, it must refer the case to the Grand Chamber of the Criminal Division of the Supreme Court. In this referral, the proposed reassessment of the case-law must be sufficiently reasoned. The Grand Chamber then decides whether to overcome the legal conclusion from the previous decision or not.

However, in some cases, a chamber does not have to refer a case to the Grand Chamber. This is when a different legal opinion has already been expressed in the Opinion of the Criminal Division of the Supreme Court. Another situation is when the legal issue in question is concerning procedural law, unless a chamber unanimously decides that the question is of fundamental legal significance and hence submits the matter to the Grand Chamber. Certain deviations also exist in situations when the legal issue has already been decided by the Constitutional Court or when the Court of Justice of the European Union has already given its interpretation of EU law.

The Supreme Court itself acknowledged a great importance of the Grand Chamber of the Criminal Division in its plenary opinion of 14 September 2011, Ref. No. Plsn 1/2011, as it de facto attributed to it a "status of quasi-superior court". Compared to the ordinary chambers of the Supreme Court, which consist of 3 judges, the Grand Chamber of the Criminal Division of the Supreme Court is comprised of 9 judges of the Criminal Division, and its chairman is currently the President of the Supreme Court of the Czech Republic, prof. Pavel Šámal. The Grand Chamber of the Criminal Division is therefore composed of more than one third of all members of the Criminal Division.

Finally, it should be noted that if the chamber of the Supreme Court departs from the settled case-law of the Supreme Court without referring a case to the Grand Chamber, then it constitutes a violation of a constitutional right to a lawful judge (Constitutional Court judgment of 11 September 2009, Ref. No. IV ÚS 738/09).

As regards the Opinions of the Criminal Division of the Supreme Court, it was already stated in the answer to the question number 1 that an existing Opinion of the Division can only be overcome by adopting a new Opinion by the Criminal Division. Therefore, the aforementioned procedure in the form of referral of a case to the Grand Chamber of the Criminal Division cannot be used.

3) If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

The binding force of a judicial decision is always linked to a legal provision that is interpreted by this decision. Therefore, in the event of a subsequent modification of the legislative framework, the authority of such judicial decisions and the necessity to reflect them in the following similar cases cease. However, provided that the new provisions coincide with the former ones, courts may, under certain circumstances, follow the case-law that relates to previous (modified or repealed) legislation.

Conversely, even in the absence of a subsequent modification of the legislative framework, the case law may be reviewed and overcome. The reasons for such a development of the settled case law are mainly changes in social conditions in the country, a shifting of the legal environment or changes of the cultural views of society.

The very limits of the law-developing activities are inherent to the concept of the separation of powers and the civil law legal system. However, the Constitutional Court of the Czech Republic in its decision of 16 December 2015, Ref. No. II. ÚS 1955/15, made an attempt to expressly stipulate its boundaries. According to the decision of the Constitutional Court, the case law cannot exist without development. It is possible that even while legislation remains unchanged, the case law is supplemented by new interpretative conclusions or even changes. The courts, especially the Supreme Court, should approach these changes carefully. By assessing the individual cases, it is necessary not to distort the principle of foreseeability of judicial decisions.

Furthermore, it is worth noting that the ordinary courts, including the Supreme Court, are not allowed to carry out the constitutional review of legal provisions. In case of emerging doubts about the compliance of the applicable law with the Constitution, the ordinary court stays the proceeding which continues only after the decision of the Constitutional Court.

Bulgaria - Supreme Court of Cassation

1) Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

The Bulgarian legal system, including criminal law system, belongs to the Continental legal system that is not based on precedent but on the law. As a part of the judicial system the Supreme Court of Cassation of the Republic of Bulgaria execute the supreme judicial control for the accurate and equal application of laws by all courts.

The Supreme Court of Cassation adopts interpretative judgments where the law is interpreted and applied in conflicting or wrong case-law and those judgements shall be adopted by the general assembly of the criminal college, the civil college or the commercial college; by the civil college and the commercial colleges or the criminal college, the civil college and the commercial college of the Supreme Court of Cassation.

Where there is conflicting or wrong case-law between the Supreme Court of Cassation and the Supreme Administrative Court, the general assembly of judges of the respective colleges of the two courts shall adopt a joint interpretative decree.

Interpretative judgements and interpretative decrees shall be binding on the judicial and executive authorities, on the local self-government bodies, as well as on all bodies issuing administrative acts.

2) If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

N/A

3) If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

N/A

Croatia - Supreme Court

1) Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

The Croatian legal system, including criminal law system, is not based on precedent but on the law. In general, lower courts are not bounded by the legal standpoints taken by the Supreme Court of the Republic of Croatia. However, two important issues should be emphasized:

1. Legal standpoints adopted by the Legal Opinions of the Criminal Division of the Supreme Court are binding for all judges (panels) of the Criminal Division of the Supreme Court. Changing of one Legal Opinion is possible only with another Legal Opinion. The standpoints in Legal Opinion is adopted when judges vote by simple majority.

2. Legal standpoints adopted by Legal Opinions serves as guidelines for lower courts, by the power of its argument. They are not binding for lower courts, but lower courts very rarely depart from them.

2) If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

This is answered in the previous answer.

3) If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

If a new enacted law deals with legal issue that is a matter of already issued Legal Opinion in a different way than the one of the Legal Opinion, the law prevails. In such situation, there might be a need for a new Legal Opinion.

Denmark - Supreme Court

1. Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

There are no fixed or formal rules regulating the extent to which precedents are binding for other courts. However, as Section 3 and 63 of the Danish Constitution state that the courts have jurisdiction to settle any question of what is to be regarded as applicable law, and as the Supreme Court is positioned as the highest court of appeal in the Danish Court system, the judgments of the Supreme Court are given particular importance. The principles of law contained in the judgments are therefore, in practice, binding in future cases, whether in the judicial or in the administrative system, thus establishing the doctrine of *stare decisis*. Thus, when a Supreme Court judgment states that a certain interpretation of a statute is to be regarded as the correct one, this interpretation will be generally applied throughout the legal system. This regards both civil and criminal cases.

Generally, the in-practice-binding nature of a judgment depends on the court having delivered the judgment (Supreme Court judgments being particularly suitable to form precedence), whether the judgment is formulated in concrete or general terms, how old the judgment is, and whether it contains dissenting opinions.

2. If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

Parliament can, in matters not governed by the Danish Constitution, pass legislation that alters the state of law. This also applies to principles of law stated by the Supreme Court. Thus, parliament is free to pass legislation that overturns the Supreme Court's interpretation of a certain statute.

Besides this, there is no special way to review and overcome a certain principle of law as affirmed by the Supreme Court. Instead, during a court case, the parties to a dispute can argue that a certain precedent is no longer applicable. Generally, precedents - as they may be the result of specific conditions at the time of the judgment - are weakened over time.

3. If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

First and foremost, as stated regarding question 2, legislation is the primary legal source in Denmark. Thus, if subsequent legislation alters the principle of law in question, the precedent is no longer considered applicable law. However, partial modification of the legislative framework is not necessarily, in itself, sufficient to extinguish the binding effect of a judgment. One must evaluate whether the legislative intervention does in fact change

either the principle of law itself or the surrounding circumstances in such a way that the precedent loses its value as applicable law in each specific case.

Secondly, precedents are obviously limited by the facts of the case. Thus, if one case can be distinguished from the case in which the principle of law was stated, the principle of the former is not binding in the latter case.

Outside this, it is not possible to state in general terms what the limits of the binding nature of Supreme Court judgments are. In accordance with the general criteria listed in question 1, judgments can - generally speaking - be viewed as forming a gliding scale from the most concrete evaluation of factual circumstances in a district court to the most principle judgment of the Supreme Court. Thus, the limits to the binding nature of a judgment depends on a concrete evaluation of the principle of law in question.

Estonia - Supreme Court

1 - Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

First sentence of Section 3 of the Constitution of the Republic of Estonia¹ stipulates that governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith. Pursuant to Section 2 of the Code of Criminal Procedure² the sources of criminal procedural law are the Constitution of the Republic of Estonia, the generally recognised principles and provisions of international law and international agreements binding on Estonia, the Code of Criminal Procedure and other legislation which provides for criminal procedure, and finally, the decisions of the Supreme Court in the issues which are not regulated by other sources of criminal procedural law but which arise in the application of law.

If criminal procedure issues arise that are not regulated by law and there is no way to give a direct answer from the existing sources of criminal procedural law, then pursuant to the principle of legality set out in Section 3 of the Constitution the court is eligible to turn to judicial precedents as a subsidiary source of law. It means when an issue is not regulated by law, or there is a legislative gap and there is no other way including methods of interpretation solving the arisen issue.³

The judgments of Supreme Court are a subsidiary source of law as judicial precedents only in relation to issues which are not regulated by the Code of Criminal Procedure, Code of Misdemeanour Procedure⁴ or by other sources of criminal procedural law but which arise in the application of the criminal procedural law or in the misdemeanour procedural law⁵. Pursuant to Section 364 of the Code of Criminal Procedure the positions set out in a judgment of the Supreme Court on the interpretation and application of a provision of law are mandatory for the court conducting a new hearing of the same matter. It means that when the court is conducting a new hearing in another, new, but similar matter there is no obligation to comply with the judgment of the Supreme Court. However, when the court's reasoning in a similar matter differs from the judgment of the Supreme Court in a similar matter, then the aforementioned court's judgment has to be very persuasively motivated. Due to the rule of law, equitable application of law must be guaranteed and situations where in similar criminal matters the positions set out in a judgment of the Supreme Court is disregarded cannot be acceptable.⁶

¹ Available in English at: <https://www.riigiteataja.ee/en/eli/ee/rhvv/act/521052015001>.

² Available in English at: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/506062018001>.

³ Kergandberg, E. and Pikamäe, P. *Kriminaalmenetluse seadustik. Kommenteeritud väljaanne*. [Code of Criminal Procedure. Comments.] Tallinn: Juura 2012, page 45.

⁴ Available in English at: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/509012018006>.

⁵ Judgment of the Supreme Court, Case No 3-1-1-29-05.

⁶ Kergandberg, E. and Pikamäe, P. *Kriminaalmenetluse seadustik. Kommenteeritud väljaanne*. [Code of Criminal Procedure. Comments.] Tallinn: Juura 2012, page 46.

2 - If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

The judgments of the Supreme Court do not create direct in effect and binding statute related to issues which arise in application of substantive law matters, but it is very likely that in similar matters the Supreme Court judgments are alike. This makes the judgments of Supreme Court equable and binding. Therefore, when the judgment of county court or circuit court is different from judgments of the Supreme Court in a similar matter, then the county or circuit court's judgment has to be very persuasively motivated. Otherwise to eliminate oath breaking, dilution of administration of justice, violation of legal certainty, unfair treating of individuals *etc.*, the Supreme Court denounces the judgment that deviates from judicial precedent.⁷ This is due to the reason that higher courts are obligated to provide equable application of law (*i.e.* equable application of substantive law).⁸ This is reaffirmed by Section 349 (3) (2) of the Code of Criminal Procedure which stipulates that an appeal in cassation shall be accepted if at least one justice of the Supreme Court finds that the appeal in cassation contests the correctness of application of substantive law or requests annulment of the judgment of a circuit court due to material violation of criminal procedural law, and a judgment of the Supreme Court is essential for the uniform application of law or elaboration of law.

3 - If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

The county and circuit courts are not prohibited to give persuasively motivated judgments or decisions in the issues which are not regulated by other sources of criminal procedural law but which arise in the application of law, even though the judgment of the Supreme Court is a source of law as a judicial precedent or in the issues of application of substantive law which are different from the Supreme Court judicial precedent but are highly persuasively motivated.

⁷ Kergandberg, E. and Pikamäe, P. *Kriminaalmenetluse seadustik. Kommenteeritud väljaanne.* [Code of Criminal Procedure. Comments.] Tallinn: Juura 2012, page 46.

⁸ Judgment of the Supreme Court, Case No 3-1-1-101-07.

Finland - Supreme Court

- 1) Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?**
- 2) If the principle of is binding, what are the necessary forms to review it and eventually overcome it?**
- 3) If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?**

To answer your questions from the point of view of the Supreme Court of Finland, I would like to mention that since the law reform of 1980, the most important function of our Court is to establish judicial precedents in leading cases thus ensuring uniformity in the administration of justice by the lower courts.

Precedents can be given, for example, in cases where a provision of law is unclear or when there is a gap in the applicable law. Problems relating to application of European law can also give reason to issue a precedent. Precedents are always given in connection to an individual case solved by the Supreme Court. The Supreme Court does not have any other, more general competence to define principles of law. Decisions of courts of appeal and some other courts may be appealed against to the Supreme Court, provided that the Supreme Court grants a leave to appeal.

Precedents of the Supreme Court of Finland do not have a binding effect comparable to, for example, the precedents of the Supreme Court of Great Britain. Lower courts can deviate from a precedent given by the our Court, if they find, for example, that the circumstances of the new case before them are different compared to the precedent. However, this is very unusual. The Supreme Court can give a new precedent deviating from the old one, but then the composition of the division to make the decision is larger than the original one (11 member instead of 5). The President can also order that the case shall be decided by the plenum (18 members and the President).

France - Cour de Cassation

Pour une meilleure compréhension du système français et pour tenir compte de ses particularités, il sera répondu en deux points.

I- Sur le caractère contraignant du principe de droit affirmé par la Cour supreme, notamment en matière pénale, et sur ses limites:

La Cour de cassation est une cour régulatrice du droit, chargée d'assurer l'uniformité d'application et d'interprétation de la règle de droit, enfin de la compléter si besoin est.

En principe, ses arrêts en matière pénale n'ont d'autorité que dans le litige qu'elle régie, elle ne peut statuer par voie générale et réglementaire (article 5 du code civil).

Elle ne se prononce que sur la décision qui lui est déférée, dans la limite des moyens soulevés ou relevés d'office.

Enfin, si l'arrêt de rejet ou l'arrêt de cassation sans renvoi met fin à la procédure, ce n'est pas le cas de l'arrêt de cassation avec renvoi qui désigne une juridiction de renvoi qui dispose d'une grande liberté.

Un arrêt de rejet peut énoncer un principe qui n'a de portée que dans la procédure en cause mais peut servir de précédent auquel les juridictions de fond ou la Cour elle-même peuvent se référer mais il n'y a pas de caractère contraignant.

Un arrêt de cassation bénéficie d'une portée plus grande surtout s'il fait l'objet d'une mesure de publication plus grande mais son autorité reste relative.

Un tel système est sensiblement le même que celui applicable à la matière civile.

S'agissant des arrêts de principe exprimant la doctrine de la chambre criminelle, le système français est complexe, en cas de cassation, la juridiction de renvoi non seulement conserve toute liberté dans la constatation des faits qui peut la conduire à une autre qualification juridique sans contredire celle retenue par l'arrêt de cassation, mais surtout elle dispose de la faculté de résister à cette doctrine, la question étant dans ce cas soumise, sur nouveau pourvoi invoquant les mêmes moyens, à l'Assemblée plénière de la Cour de cassation (anciennement les chambres réunies).

En d'autres termes, la juridiction de renvoi n'est pas tenue de se conformer à la doctrine de l'arrêt de cassation, non seulement elle peut reproduire la décision cassée, mais encore s'appuyer sur les mêmes moyens de droit.

Elle agit en toute indépendance, exactement comme auraient pu le faire les premiers juges auxquels elle est substituée.

L'article 619 du code de procédure pénale prévoit que lorsque, après cassation, d'un premier arrêt ou jugement rendu en dernier ressort, le deuxième arrêt ou jugement rendu dans la même affaire, entre les mêmes parties, procédant en la même qualité, est attaqué par les mêmes moyens, l'affaire est portée devant l'Assemblée plénière.

Ces cas de résistance sont rares en raison de l'autorité morale qui s'attache aux arrêts rendus par la cour supreme.

Ce n'est que sur renvoi de l'Assemblée plénière après nouvelle cassation par celle-ci, que la juridiction de renvoi doit s'incliner sur le point de droit.

L'article L.431-4, alinéa 2 du code de l'organisation judiciaire dispose en effet que lorsque le renvoi est ordonné par l'Assemblée plénière, la juridiction de renvoi doit se conformer à la décision de cette assemblée sur les points de droit jugés par celle-ci.

Si la juridiction de renvoi refusait de s'incliner, situation non envisagée par les textes, sa décision pourrait faire l'objet d'un nouveau pourvoi et serait annulée par la chambre criminelle sans qu'il soit nécessaire de saisir l'Assemblée plénière (pour le seul cas retrouvé: arrêt Crim. 28 juillet 1844 Bull crim n° 242).

Ainsi le système français, au contraire des droits italien, allemand et néerlandais, ne reconnaît pas d'autorité immédiate aux arrêts de la chambre criminelle, a instauré un système faisant intervenir la plus haute formation de la Cour régulatrice qui a le dernier mot.

L'arrêt rendu par une chambre mixte (composée de représentants d'au moins deux chambres, réunie lorsqu'une affaire pose une question relevant normalement des attributions de plusieurs chambres, ou si la question a regu ou est susceptible de recevoir devant les chambres des solutions divergentes, enfin en cas de partage des voix au sein de la chambre qui a d'abord connu du pourvoi) n'a pas une autorité supérieure même si la formation qui l'a rendu lui confère une autorité morale et jurisprudentielle supérieure.

Ce système assure une formation progressive de la jurisprudence de la Cour de cassation, ce qui a pu être analysé soit comme un signe de méfiance vis à vis de celle-ci, ou, au contraire, comme l'expression d'un dialogue entre le juge du fond et le juge de cassation et un gage de qualité.

On a pu parler d'autorité conditionnelle de l'arrêt de cassation avec renvoi de la chambre criminelle, qui ne devient définitive qu'une fois ratifiée par la juridiction de renvoi.

En effet, le moyen demandant à la Cour de cassation de revenir sur la doctrine exprimée sur un arrêt de cassation lorsque la juridiction de renvoi s'y est conformée est irrecevable (cf. arrêt Crim 19 septembre 2007 Bull crim n° 214).

Si la cour de renvoi résiste, elle doit s'indiner devant la décision rendue par l'Assemblée plénière.

Un arrêt de chambre mixte du 30 avril 1971 Bull Ch mixte n° 8 résumé bien la situation: Il retient que l'article 15 de la loi n° 67-523 du 3 juillet 1967 prévoit la possibilité de saisir la Cour de cassation, laquelle doit se prononcer en assemblée plénière, lorsque le deuxième arrêt, rendu dans la même affaire, entre les mêmes parties procédant en la même qualité, est attaqué par les mêmes moyens; qu'au contraire la Cour de cassation ne peut être appelée à revenir sur la doctrine affirmée en son premier arrêt lorsque la

juridiction de renvoi s'y est conformée ; qu'il en résulte que n'est pas recevable le moyen par lequel il est seulement reproché à la cour de renvoi d'avoir statué en conformité de l'arrêt de cassation qui l'a saisie.

Mais l'autorité ainsi acquise reste relative. Une autre juridiction du fond, saisie d'une procédure distincte portant sur les memes problèmes de droit n'est pas tenue de s'y conformer et peut provoquer une nouvelle résistance qui pourrait entraîner un changement de jurisprudence de la Cour supreme.

II- Sur les revirements de jurisprudence:

Les arrêts de principe, qui expriment la doctrine de la Cour de cassation sur un point de droit, qui font désormais l'objet d'une motivation plus explicite, n'en sont pas pour autant intangibles.

La Cour peut se rendre compte de difficultés pratiques induites par sa jurisprudence, vouloir harmoniser sa jurisprudence avec celle des autres chambres de la Cour sur des sujets communs, avoir approfondi sa réflexion au regard d'une modification partielle ultérieure du cadre législatif, souhaiter mieux intégrer les normes conventionnelles ou communautaires ou tenir compte des décisions des juridictions supra-nationales, ce qui peut l'amener à amender ou modifier sa jurisprudence.

Une décision de revirement, qui fait également désormais l'objet d'une motivation plus précise, a un effet rétroactif; une réflexion a été menée en 2004, à la demande de la Cour de cassation, sous la présidence du professeur Molfessis pour voir s'il n'était pas possible, comme dans les systèmes de common law, de moduler dans le temps l'effet des revirements de jurisprudence qui portent atteinte à la nécessaire stabilité de la jurisprudence dont ont connaissance tant les juridictions du fond que les parties (cf. prof. Nicolas Molfessis, *Les revirements de jurisprudence*, Litec 2005).

Si ce revirement rend la loi pénale plus douce, son application est nécessairement rétroactive (principe de la rétroactivité *in mitius*), mais si c'est au contraire dans le sens de la sévérité, certains pensent la rétroactivité ne devrait pas s'appliquer. Mais la chambre criminelle juge le contraire (notamment arrêt Crim 30 janvier 2002 Bull Crim n° 16).

Au total, le système français fait preuve de prudence dans l'élaboration de la jurisprudence et présente une cohérence certaine même s'il est complexe et laisse une très large part au juge du fond. Il a pour inconvénient de retarder l'issue des litiges en admettant la résistance contre la première décision de cassation, du fait de la procédure qui doit être poursuivie devant l'Assemblée plénière de la Cour de cassation et, en cas de censure, devant une troisième juridiction de renvoi.

En cas de résistance, le dernier mot reste à la Cour de cassation, cour supreme qui reste souveraine pour interpréter la loi; c'est indispensable pour qu'elle joue le rôle d'une cour régulatrice et assure l'unité de la jurisprudence.

Germany - Federal Court of Justice

1 - Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

Judgments that have entered into force generally take only effect for and against the parties to the dispute. For civil proceedings this is expressly regulated by section 325 of the Code of Civil Procedure. For criminal proceedings the similar principle results from Article 103 paragraph 3 of the Basic Law. According to Article 97 of the Basic Law judges are independent and subject only to the law, which implies that they can deviate from other court's interpretation of law if they have to decide on similar cases.

However, even though the principle of law affirmed by the Bundesgerichtshof is not binding for other cases, its judgements are of great importance. The lower courts watch these judgements closely. Because they know, if they deviate from the interpretation of law given by the Bundesgerichtshof, it will be very likely that the party to the dispute respectively the defendant appeal against the judgement of the lower court.

2 - If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

See above.

3 - If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

See above.

Greece - Supreme Court

1) Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

As a general rule, the decisions of the Supreme Court, including those in criminal matters, are used as guidelines for lower courts. Technically, they are not binding, but in practice First Instance and Second Instance Courts follow Supreme Court's case-law. This is common practice for decisions issued by the different Chambers of the Supreme Court, but it is definitely the rule for decisions issued by its Plenary.

2) If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

Legally, a decision of a Chamber can only be reviewed by the Plenary, if the case is referred to it for a particular special reason, but in practice solutions adopted by one Chamber of the Supreme Court on a particular legal problem may sometimes be differentiated by another Chamber in another case with a certain reasoning.

3) If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

Should the law change after the Supreme Court's case-law is established on a certain legal issue, Courts are obliged to implement this new law, until the Supreme Court revises its position on it.

Hungary - Supreme Court

1. Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

Article 25, paragraph (2) of the Fundamental Law (Constitution) of Hungary stipulates that the supreme body of the court system shall be the Curia of Hungary. The Curia of Hungary shall ensure the uniformity of the application of law by courts and shall make uniformity decisions which shall be binding on the courts.

Pursuant to section 25 of Act no. CLXI of 2011 on the Organisation and Administration of the Courts of Hungary (hereinafter referred to as the Courts Organisation and Administration Act), the Curia of Hungary – based on the relevant provisions of the Fundamental Law of Hungary – shall, among others, deliver uniformity decisions. By virtue of section 42, subsection (1) of the Courts Organisation and Administration Act, uniformity decisions shall be published in the Hungarian Official Journal and shall be binding on the courts as from the date of their publication. With regard to the fact that the provisions of uniformity decisions have to be taken into due consideration by the courts in their adjudicating activities, the findings of uniformity decisions are appropriately referred to and applied by the courts in their individual decisions. Hence, uniformity decisions have an erga omnes binding effect in an indirect manner.

The answer is therefore in the affirmative, the principle of law affirmed by the Curia of Hungary in a uniformity decision is binding for other court cases as well.

2. If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

According to section 42, subsection (3) of the Courts Organisation and Administration Act, if the uniformity panel decided to annul a uniformity decision, the annulment decision shall be published in the Hungarian Official Journal. The uniformity decision may not be applied following the time of the publication of the annulment decision. By virtue of section 34, subsection (4), point a) of the Courts Organisation and Administration Act, the uniformity panel shall comprise not only five Curia justices, but all justices of the relevant department of the Curia of Hungary (in criminal cases, it is the Criminal Department that shall have competence) if the purpose of the uniformity decision procedure is the amendment or withdrawal of a previous uniformity decision.

Section 37, subsection (2) of Act no. CLI of 2011 on the Constitutional Court of Hungary stipulates that the latter may review the conformity of uniformity decisions with the Fundamental Law of Hungary or with international treaties. If the Constitutional Court of Hungary establishes the uniformity decision's non compliance with the Fundamental Law of Hungary, it shall annul the impugned uniformity decision.

3. If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

If the legislative framework is subsequently – partially or totally – modified, then the Curia’s uniformity decision on the previously applicable legislation may become devoid of purpose. However, with regard to the provisions of section 2, subsection (1) of Act no. C of 2012 on the Criminal Code according to which criminal offenses shall be adjudicated under the criminal law in force at the time when they were committed, uniformity decisions on previously applicable pieces of legislation in criminal matters may still have a binding effect. Having regard to the above limitation on the retroactive effect of criminal legislation, the Curia’s Criminal Department does not annul those of its uniformity decisions that are related to previously applicable pieces of criminal legislation, because they may still be of relevance in the adjudication of a criminal offense that was committed at a time when the previously applicable legislation had been in force.

The previously adopted uniformity decisions, of course, may have no binding effect on the application and interpretation of the new pieces of legislation that have a modified content.

Ireland - Supreme Court

1 - Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

Yes. The legal system of Ireland is based on the common law tradition and the system of precedent, encapsulated in the principle of stare decisis ('let the decision stand') applies. Courts must follow prior decisions of superior courts. Courts of lower jurisdiction are therefore bound by decisions of the Supreme Court. Courts generally also follow the decisions of courts of equal jurisdiction. It is only occasionally and for stated reasons, that the Supreme Court departs from its own decisions.

It is only the principle of law which is set out by the Court following the application of the law to the facts of the case (the 'ratio decidendi') which is binding. Other elements of a judgment, such as the facts or any other statements of law contained in the case which are not of direct relevant to the decision ('obiter dicta') are not binding, although such statements are of persuasive authority and may be adopted at the discretion of the court which is later considering the judgment.

2 - If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

As noted under question 1, the Supreme Court rarely declines to follow a principle of law which it has decided in an earlier decision. It is more common for the Court to distinguish a previous decision by finding that it is not relevant to the case before it if, for example, there are factual differences or different legal issues involved. However, there have been exceptional cases in which the Supreme Court has departed from a legal principle in one of its previous decisions. Such cases have generally involved a finding by the Supreme Court that a previous decision was wrongly decided. It is not open to lower courts to review binding decisions of the Supreme Court.

3 - If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

If a binding principle of law exists, it is binding insofar as it is relevant to the legal issues involved in the subsequent case and, as noted above, a decision might be distinguished on the basis that it is not relevant to the subsequent case.

If the legislative framework or the Constitution changes since the formulation of a legal principle by the Supreme Court, it will be for the Court to determine, when discussing and analysing legislation or constitutional provision as reformed, whether the previous legal principle applies or whether the legal principles should change or develop in light of any change in the law.

Latvia - Supreme Court

Pursuant to Section 2 of the Criminal Procedure Law, the criminal procedure is determined by the Constitution of the Republic of Latvia, international legal norms, and the Criminal Procedure Law. In the application of the legal norms of the European Union, the case law of the Court of Justice of the European Union shall be taken into account, and in the application of the legal norms of the Republic of Latvia, the interpretation of the appropriate norms provided in the judgment of the Constitutional Court shall be complied with. The norms of the criminal procedure of another state may be applied only in international co-operation on the basis of a request motivated by a foreign state, if such request is not in contradiction to the basic principles of the criminal procedure of Latvia.

The Criminal Procedure Law includes the basic principles of criminal proceedings: mandatory nature of criminal proceedings, prosecution in criminal proceedings, principle of equality, criminal procedural duty, immunity from criminal proceedings, language to be used in the criminal proceedings, guarantee of human rights, prohibition of torture and debasement, rights to the completion of criminal proceedings in a reasonable term, rights to examination of a case in court, rights to the objective progress of criminal proceedings, separation of procedural functions, the presumption of innocence, the right to defence, rights to cooperation, rights to compensation for inflicted harm, the administration of justice, defence of a person and property in the case of a threat, and the inadmissibility of double punishment (*ne bis in idem*). The Criminal Procedure Law provides an explanation of these basic principles of criminal proceedings, their content is also clarified in the legal science, in the practice of the national courts (as well as they are explained and interpreted in decisions of the court of cassation), and in the conclusions of the rulings of the European Court of Human Rights, which is also used in the argumentation for court rulings. In addition, the general principles of law are also taken into account in the interpretation and application of criminal law provisions.

In accordance with Section 589 of the Criminal Procedure Law, the rendering of a law expressed in a decision of a cassation court shall be binding for the court that examines such case *de novo*. At the same time, it is to be noted that the conclusions expressed in decisions of the court of cassation in the interpretation of various issues of law or legal provisions can be widely used both in other decisions of the court of cassation and in the decisions of the courts of first instance and appellate courts, by substantiating their opinion on the legal issue in question. This is also due to the fact that such conclusions promote a common understanding of a legal provision and its uniform application. At the same time, when identifying different factual and legal circumstances, particular legal conclusions cannot be used.

While not denying that observance of the case-law leads to legal certainty and predictability for the society, as well as strengthens the public confidence in the fair work of the judiciary necessary in a state governed by the rule of law, and obtaining new conclusions which are in full compliance with the legal system and ensure the right to a

fair trial, the court of cassation may recognize that there is a basis for changing the case-law. It should be noted that the Supreme Court changes the case-law rarely in criminal cases, thoroughly assessing whether there is a basis for such a change in the case-law and whether it results from the emergence of new conclusions or the change in legislation.

Persons and courts involved in the proceedings, referring to the conclusions of the court of cassation in criminal cases, should consider possible amendments to the legal provisions, as well as the fact that according to these amendments, it may be necessary to re-evaluate or explain in some other manner the individual conclusions expressed in the decisions of the court of cassation.

Lithuania - Supreme Court

1 - Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

In accordance with Part 4, Article 33 of the Law on Courts, which was determined by the official constitutional doctrine, the courts when taking decisions in cases of appropriate categories, are bound by the rules of interpretation of law created by them, formed in analogous or similar cases. The courts of lower instance when taking decisions in cases of appropriate categories are bound by the rules of interpretation formulated in analogous or conceptually similar cases.

Thus, the case law of the Supreme Court is binding both for itself and the lower instance courts.

Under the Constitution of the Republic of Lithuania (the Constitutional Court's rulings of 28 March 2006 and 24 October 2007):

-“ <...> court precedents are sources of law – auctoritate rationis; the reference to the precedents is a condition for the uniform (regular, consistent) court practice as well as that of implementation of the principle of justice entrenched in the Constitution. Therefore, it is not permitted to unreasonably ignore court precedents. In order to perform this function properly, the precedents themselves should be clear. Court precedents may not be in conflict with the official constitutional doctrine, either.”

- “the principle of a state under the rule of law entrenched in the Constitution implies continuity of jurisprudence. The instance system of courts of general jurisdiction established in the Constitution must function so that the preconditions are created to form the uniform (regular, consistent) practice of courts <..>, i.e. such, which would be based on the principles of a state under the rule of law, justice, equality of all persons before the law (and other constitutional principles) enshrined in the Constitution, on the maxim inseparably linked with the said principles and arising from them that the same (analogous) cases must be decided in the same way, i.e. they have to be decided not by creating new court precedents, competing with the existing ones, but by taking account of the already consolidated ones. When ensuring the uniformity (regularity, consistency) <..>, also the continuity of the jurisprudence, the following factors (along with other important factors) are of crucial importance: the courts<...>, when adopting decisions in cases of corresponding categories, are bound by their own created precedents – decisions in the analogous cases; the courts <...> of lower instance, when adopting decisions in the cases of corresponding categories, are bound by the decisions of the courts <...> of higher instance – precedents in the cases of the same categories; the courts of <...> higher instance, while revising decisions of the courts <...> of lower instance, must assess these decisions by always following the same legal criteria; these criteria must be clear and known ex ante to the subjects of law, inter alia, to the courts of <...> lower instance (thus, the jurisprudence <...> must be predictable). The already existing precedents in cases of

corresponding categories, which were created by courts <...> of higher instance, not only are binding on the courts <...> of lower instance that adopt decisions in analogous cases, but also the courts <...> of higher instance that created those precedents (inter alia, <...> the Supreme Court of Lithuania). Courts have to follow such concept of the content of corresponding provisions (norms, principles) of law, also of the application of these provisions of law, which was formed and which was followed when applying these provisions (norms, principles) in the previous cases, inter alia, when previously deciding analogous cases. Disregarding the maxim that the same (analogous) cases have to be decided in the same way, which arises from the Constitution, would also mean disregarding the provisions of the Constitution on administration of justice, that of the constitutional principles of a state under the rule of law, justice, equality of people before the court and other constitutional principles.”

2 - If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

According to Part 4, Article 33 of the Law on Courts, the court practice in cases of appropriate categories must be amended and new rules for the interpretation of law in analogous or similar cases may be created only in cases when it is unavoidably or objectively necessary.

This statutory norm also emerged due to the official constitutional doctrine. In this context, the following provisions of the official constitutional doctrine of the Constitutional Court’s rulings of 28 March 2006 and 24 October 2007 should be mentioned:

- “The practice of courts of general jurisdiction in cases of corresponding categories has to be corrected and new court precedents in these categories may be created only when it is unavoidably and objectively necessary, when it is constitutionally grounded and justified. Such correction <....> (deviation from the previous precedents, which had been binding on courts until then and creation of new precedents) must in all cases be properly (clearly and rationally) argued in corresponding decisions <...>.”

- “It needs to be specially emphasised that, when deviating from its previous precedents, the court must not only properly argue the adopted decision itself (i.e. the created precedent itself), but also clearly set forth the reasoning and the arguments substantiating the necessity to deviate from the previous precedent.”

- “No creation or reasoning of a new court precedent may be determined by accidental (in the aspect of law) factors. It is such correction—only when it is unavoidably and objectively necessary, and when it is properly (clearly and rationally) argued in all cases—of the practice of courts of general jurisdiction (deviation from the previous precedents that had been binding on courts by then and creation of new precedents) that must be respectively ensured by the Supreme Court of Lithuania within its competence. If the said requirements arising from the Constitution are disregarded <...>, not only the

preconditions for the irregularities and inconsistencies to occur in the practice of courts of general jurisdiction and the legal system are created, not only the jurisprudence of courts become less predictable, but also there are grounds for doubts on whether the corresponding courts <...> were impartial when adopting the decisions, and whether these decisions were not subjective in other aspects.”

3 - If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

The precedents are formed by the interpretation of the existing statutory law. If it changes, the interpretation will change. In addition, account must be taken of the fact that under the general rule statutory law has no retroactive effect.

As mentioned before precedents must be invoked with particular care. It needs to be emphasised that only those previous decisions of courts have the power of a precedent, which were created in analogous cases, i.e. the precedent is applied only in those cases whose factual circumstances are identical or very similar to the factual circumstances of the case in which the precedent was created, and with regard to which the same law should be applied as in the case in which the precedent was created. In a situation where there is competition of precedents (i.e. when there are several differing court decisions adopted in analogous cases) one must follow the precedent that was created by the court of higher instance (a higher court). Also, account should be taken of the time of the creation of the precedent and of other factors of significance, as, for instance: of the fact whether the corresponding precedent reflects the established court practice, or whether it is a single occurrence; of whether the reasoning of the decision is convincing; of the composition of the court that adopted the decision (whether the corresponding decision was adopted by a single judge, or by a college of judges, or whether by the enlarged college of judges, or whether by the entire composition of the court (its chamber)); whether there were any dissenting opinions of judges expressed because of the previous court decision; of possible significant (social, economic etc.) changes which took place after the adoption of the corresponding court decision, which has the significance of a precedent, etc.

Luxembourg - *Cour Supérieure de Justice*

Ad 1.- Le « précédent » n'est pas considéré à Luxembourg comme un principe contraignant.

Evidemment, une « jurisprudence » bien assise des juridictions supérieures a une influence non négligeable sur les juridictions inférieures et, dans pratiquement tous les cas, cette jurisprudence est également suivie. Cela vaut d'ailleurs non seulement en matière pénale, mais également en toute autre matière.

Ad. 2. et 3.

Cf ci-dessus.

Malta - Courts of Justice

We have no law of precedence in our Judicial Order. However judgments given by our Courts have a persuasive value and are cited in other judgments to sustain the argument accepted by the Court giving its judgment.

Montenegro - *Supreme Court*

In Montenegro, the case law is not explicitly defined as a formal source of law. Namely, the Constitution of Montenegro prescribes that the court shall decide on the basis of the Constitution, laws and ratified international treaties. However, we are convinced that the case law is the most important factor for ensuring the uniform application of the law.

It is the duty of all courts to consider the uniformity of the case law. This duty is particularly expressed at the vertical level, since the higher courts, when adjudicating on the appeals against decisions of lower courts, determine legal positions. If there is diversity of approach in the application of law among judges and judicial panels, the uniformity of law is achieved in the sessions of court departments or the sessions of all judges of the court.

In carrying out that obligation, the most important role has the Supreme Court of Montenegro, which is, in accordance with the Constitution, the highest court in Montenegro and has the duty to ensure uniform application of the law by the courts.

The Supreme Court of Montenegro performs the mentioned duty through adjudicating under its jurisdiction. Also, the court departments of the Supreme Court, determine legal positions in the form of guidelines for the application of the law, when judges consider it to be of significance for the unified application of the law, or when there is a different approach between the judicial panels in the interpretation of the provisions of law.

However, in accordance with the Law on Courts, the Supreme Court has the competence to determine legal positions of principle on the concerned issues which appear in case law, in order to perform the uniform application of law. The legal position of principle is not a rule, it is an interpretation of law, which aims to ensure the legal certainty and equal application of law in the same, or similar cases. It influences the case law of the lower courts with an argumentative interpretation of the law, which was determined on the session of all Supreme Court judges (the General Session), rather than as a binding rule. The Supreme Court determines legal position of principle ex officio or upon the court's request. All legal positions of principle are published in the Supreme Court Bulletin and they are available on our official website (www.sudovi.me).

Netherlands - *Supreme Court*

1) Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

The Dutch civil law legal system, including criminal law system, is not formally based on precedent but on the law. In the Netherlands, the lower courts are not formally bound by judgments of higher courts, including the Supreme Court. However, lower courts will generally follow the decisions of higher courts, those of the Supreme Court in particular, in similar matters. This is stimulated by the fact that the Supreme Court seldom deviates from an interpretation of the law given in its previous decisions. When stating the grounds for its decisions, it frequently refers to earlier judgements. Consequently court rulings, especially those of the Supreme Court, have a wider importance than the specific case in respect of which that ruling was given. One of the most important tasks of the Supreme Court is to uphold uniformity in law and development of the law. In new cases, therefore, the lower court will almost always take the decisions of the Supreme Court into account when giving its judgment.

2) If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

-

3) If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

-

Norway - *Supreme Court*

1. Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

The Supreme Court of Norway is the highest court in the country and is given the power by the Norwegian Constitution to have the final say in a case. The Supreme Court is however no ordinary court of appeal, such that appeals over judgements must be given a leave in order to be heard by the Supreme Court, and the main function of the Court is to contribute to the clarification and the unity of existing law - and to a certain extent - development of the law, both in civil and in criminal cases.

Judgements handed down by the Supreme Court are as a result of this considered as precedents by the lower courts and to a large degree also by the Supreme Court itself. The content of the doctrine of precedent is that lower courts are bound by judgements by the Supreme Court as far as the Supreme Court has expressed a certain interpretation of legal provisions in a judgement/decision in a case where the factual circumstances are similar. The Supreme Court also has the power to overturn decisions of lower courts that deviate from its earlier decisions. It can be added that in criminal cases, the Supreme Court never decide whether a person is guilty to a crime or not, but may set aside a judgement by the Court of Appeal and remit a case if the Supreme Court finds that the case has been decided on the basis of an erroneous interpretation of a statutory provision or that procedural rules has not been followed.

The Supreme Court itself is not bound by its earlier decisions in the same way, but will as a starting point follow its own interpretations in later cases. The rationale here is the idea that the Court should be seen as one unity, even though individual cases are often decided upon by panels consisting of five justices.

2. If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

As mentioned under question 1, the Supreme Court will as a starting point follow its own decisions, but has the power to deviate from earlier interpretations. The fact that an earlier interpretation of law given in a previous case can be questioned, could be a reason to grant leave for an appeal to be heard before the Supreme Court once more. It can be added that there is a hierarchy: the panels of five justices will often not consider themselves bound by a decision of the Supreme Court Appeal Selection Committee - consisting of three justices. Further, a Grand Chamber (11 justices) or Plenary (20 justices) may also be used to set aside precedents given by a panel. If the Supreme Court finds it necessary to deviate from an earlier decision, the new decision will often give a thorough explanation to why this is. See also our answer to question 3.

3. If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

As mentioned under question 1, one of the main objectives of the Supreme Court is to interpret existing law. The Norwegian assembly, the Storting, is the legislative power in Norway, and if the legislative framework is amended in such way that it deviates from an interpretation or principle of law previously set by the Supreme Court, the new legislation will prevail. If the legislation is amended without the intention of deviating the state of the law, earlier Supreme Court decisions may still be relevant.

Poland - Supreme Court

1. Is the principle of law affirmed by the Supreme Court, especially in criminal cases, binding?

Poland is a civil-law country, and views expressed by the courts while interpreting law are generally not regarded as a source of law. One reason for this is that case-law is not mentioned in the Constitution in the list of sources of law. According to Article 87(1) of the Constitution, the sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations.

Judgments of the Constitutional Court that declare provisions of legal acts void due to their being contrary to provisions of legal acts that come higher in the hierarchy of sources of law, especially the Constitution, have special status. These judgments may repeal a legal provision or change the content thereof. A judgment of the Constitutional Court enters into force upon its publication; however, as an exception, the Court may specify another date for the invalidation of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act (art. 190 (3) of the Constitution). A judgment of the Constitutional Court on the non-conformity to the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued, shall constitute grounds for the reopening of proceedings, or for quashing the decision or other settlement in the manner and on the principles specified in provisions applicable to the given proceedings (Article 190(4) of the Constitution).

The role of the Supreme Court in Poland is broader than that of merely an appeal or cassation court. According to the Constitution, the Supreme Court shall exercise supervision over common and military courts in terms of their judgments (Article 183(1)). Also, the Supreme Court Act 2017 (Article 1(1)(a)) stipulates that the Supreme Court is a judicial body created for the purpose of the administration of justice by ensuring that the judgments of common and military courts are issued according to the law and their uniformity. This task is to be fulfilled by examination of legal remedies and passing resolutions on legal issues.

A ruling of the Supreme Court may be binding in individual cases in two scenarios: when the Supreme Court issues a judgment or order annulling a previous judgment or order, thereby referring the case for re-examination, or when the Supreme Court answers preliminary question. Supreme Court rulings are not formally binding in other cases, but in practice the courts follow the jurisprudence of the Supreme Court.

Under the first scenario, according to Article 442 § 3 of the Polish Code of Criminal Procedure of 1997 (CCP), in relation to other provisions of the CCP, the legal opinions expressed by the Supreme Court and its recommendations as to further proceedings are

binding for the court to which a given case was referred for re-examination. This same rule applies where a case is referred for re-examination by an appeal court.

The second scenario may be twofold: reference by an appeal court or reference by an ordinary judicial panel of the Supreme Court.

Any court acting as a court of appeal may suspend criminal proceedings and ask the Supreme Court for a preliminary ruling if, during appeal proceedings, a legal issue requiring substantial analysis of a statute arose (Article 441 § 1 of the CCP). In such situation, the Supreme Court may further refer the case to an enlarged judicial panel of the Supreme Court (Article 441 § 2 of the CCP). The resolution of the Supreme Court shall be binding in relation to the matter in question (Article 441 § 3 of the CCP). Where a case is referred for a preliminary ruling, the Supreme Court may take over the case and act as an appeal court. This is very rare (few cases from 2002) and may take place when the case involves more important legal issues.

According to the jurisprudence of the Supreme Court, a judgment issued by a lower court can be appealed as inconsistent with a resolution issued pursuant to Article 441 of the CCP in another case only in situations where the lower court failed to provide justification for its interpretation of the law and did not refer to the reasons given by the Supreme Court (judgment of the Supreme Court of 27 May 2002, V KKN 188/00).

While examining cassation or another appellate remedy, the Supreme Court's ordinary judicial panel may also decide that there are serious doubts as to the interpretation of the law applied in the case and, after the suspension of proceedings, refer the legal issue to an enlarged judicial panel consisting of seven judges of the Supreme Court (Article 82 of the Supreme Court Act).

The above-mentioned preliminary rulings are issued in an individual case (in concreto). Furthermore, there is also a procedure for preliminary rulings in abstracto, i.e. not related to the examination of a particular case. According to the Supreme Court Act, if disparities in the interpretation of law are identified in the jurisprudence of common courts, military courts or the Supreme Court, the First President of the Supreme Court or the President of the Supreme Court may, in order to ensure uniformity of jurisprudence, refer the legal issue to a judicial panel of seven judges of the Supreme Court or another proper panel (Article 83 § 1). The issue may also be referred by the General Prosecutor, the Human Rights Commissioner and – within the field of their competence – by the President of the General Counsel to the Republic of Poland, the Commissioner for Children's Rights, the Commissioner for Patients' Rights, the President of the Council for Social Dialogue, the Chairmen of the Financial Supervision Authority, the Financial Ombudsman and the Small and Medium Business Ombudsman (Article 83 § 2).

Where the Supreme Court is of the opinion that the legal issue should be clarified or disparities in the interpretation of the law should be eliminated, it issues a resolution; in other cases, it may refuse to issue a resolution, and where a resolution is no longer required, it may discontinue proceedings.

If the judicial panel made up of seven judges is of the opinion that the significance of the issue in relation to legal practice or the seriousness of doubts call for the issue to be examined by a chamber of the Supreme Court, the panel may refer the issue to the chamber, and the chamber may refer the case further to joint chambers or to the full bench (all the judges) of the Supreme Court.

Abstract resolutions of the Supreme Court are, generally, not formally binding for the courts. Resolutions of a chamber, joint chambers or the full panel of judges of the Supreme Court have the same legal force as a principle of law (*zasada prawna*). A panel of seven judges of the Supreme Court may, while issuing a resolution, decide to grant it the same legal force as a principle of law (Article 87 § 1 of the Supreme Court Act). Resolutions with the same legal force as principles of law are published along with justification in the Public Information Bulletin (Article 87 § 2 of the Supreme Court Act).

Principles of law are not vertically binding on the lower courts, as these merely interpret and do not make the law. The principles of law are binding only on the judicial panels of the Supreme Court while examining appeals, cassations, etc. However, despite the fact they are not formally binding for the lower courts, the principles of law formulated by the Supreme Court and the justifications provided therefor are in practice observed by the lower courts based on the rationality of doing so (*imperio rationis*). The lower courts must also take into consideration that if a case over which they preside is subsequently referred to the Supreme Court, the judicial panel of the Supreme Court will be bound by the principles of law and may quash or alter the judgment. Resolutions that do not have the same legal force as a principle of law are also in practice observed and applied.

During the communist period (1949 - 1989), the Supreme Court was empowered to issue so called guidelines for the administration of justice and court practice concerning particular areas of law. These guidelines were binding initially only for common courts, and from 1962 for all courts. The guidelines not only interpreted the law but also indicated certain practices in the application of the law, sometimes *contra legem* and for the purposes of repression. They were regarded as limiting the principle of judicial independence and abolished after the fall of the communist regime in 1989. Soon thereafter, by way of a resolution of its full bench, the Supreme Court decided that all of the previous guidelines would no longer be binding (see <http://www.sn.pl/en/about/SitePages/History.aspx>).

2. If a principle of law is binding, how can it be reviewed and eventually overcome?

If a judicial panel of the Supreme Court intends to depart from a certain principle of law, it should refer the legal issue to a chamber (Article 88 § 1 of the Supreme Court Act). If the legal principle in question was formulated by a chamber, joint chambers or the full bench of the Supreme Court, a departure from the principle requires that a resolution be issued by the chamber, the joint chambers or the full bench of the Supreme Court (Article

88 § 2). If one chamber intends to depart from a legal principle formulated by another chamber of the Supreme Court, said resolution must be issued jointly by the two chambers. The chambers may refer the legal issue to the full bench of the Supreme Court (Article 88 § 3 of the Supreme Court Act). This procedure would usually be followed if a principle of law was dysfunctional in practice or where societal or economic change calls for review of the principle.

3. If a principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of a principle of law affirmed by the Supreme Court?

Certainly. Any amendment of the legislation which provided the basis for the formulation of a principle of law may result in the principle of law ceasing to be applicable.

Romania - Court of Cassation

1 - Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

Yes, but only the decision in interest of the law and the preliminary decisions in criminal and civil matters.

2 - If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

The Criminal Procedure Code provides:

“Art. 471. - (1) To ensure the uniform interpretation and application of the law by all courts of law, the Prosecutor General of the Prosecutor’s Office attached to the High Court of Review and Justice, ex officio or based on the request of the Minister of Justice, the management board of the High Court of Review and Justice or the management boards of the Courts of Appeals, as well as the Romanian Ombudsman, have as a duty to ask the High Court of Review and Justice to rule on legal issues settled differently by various courts of law. (...)

Art. 474.- (1) The judicial panel of the High Court of Review and Justice shall return a decision regarding the motion of appeal in the interest of the law.

(2) The decision shall be issued in the interest of the law alone and shall bear effects neither on the examined court rulings, nor on the situation of the parties to those court proceedings.

(3) The reasons for this decision shall be published no later than 30 days since the decision, which shall be published no later than 15 days since the writing, in the Romanian Official Journal, Part I.

(4) The settlement of the legal issues shall be binding for courts as of the date of the publication of the decision in the Romanian Official Journal, Part I.”

And in the art. 4741 - Cessation or amendment of the effects of the decision: “The effects of the decision shall cease when the legal provision that caused the settled legal issue is repealed, found unconstitutional or amended, except for the case when it shall feature in the new regulation.”

In the case of a preliminary ruling to settle legal issues, the same Code provides: “Art. 475. - If, during the proceedings in court, a judicial panel of the High Court of Review and Justice, the Courts of Appeals or the Tribunals, entrusted with the adjudication of a case as a court of last resort, finds that there is a legal issue whose clarification is paramount for the settlement on the merits of the respective case and about which the High Court of Review and Justice has not issued any decision in a preliminary ruling or in an appeal in the interest of the law and which is not the subject of a pending appeal in the interest of

the law, they may apply to the High Court of Review and Justice for a ruling to settle the principle of the legal issue referred to it. (...).

Art. 477. - (1) When seized, the judicial panel for the settlement of legal issues shall return a decision, based only in regards to the legal issues subject to settlement.

(2) Art. 474 par. (3) shall apply accordingly.

(3) The settlement of the legal issues shall be binding for courts as of the date of the publication of the decision in the Romanian Official Journal, Part I.

(4) Repealed under Item #117 of the Emergency Government Order #18/2016 as of 23 May 2016.”

Concerning the cessation or amendment of the effects of the decision is:

“Art. 477.1. - The effects of the decision shall cease when the legal provision that caused the settled legal issue is repealed, found unconstitutional or amended, except for the case when it subsists in the new regulation.”

3 - If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

See the answer to the Question no. 2.

Slovakia - Supreme Court

1 - Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

In order to secure uniform interpretation and application of laws and other generally binding legal regulations the Supreme Court publishes judicial decisions of fundamental importance and gives opinions aimed at unifying the interpretation of laws and other generally binding legal regulations. The Supreme Court issues the opinions and decisions of the Supreme Court published in the Collection of opinions of the Supreme Court and decisions of lower courts of the Slovak Republic (hereinafter referred to as "Collection"), which is ordinarily issued ten times a year. The decisions published in the Collection are not generally binding, but are instructive for the courts in similar matters.

Recently the Grand Chamber has been established, which is aimed at unifying the case law in particular in civil, commercial and administrative proceedings. The decisions of the Grand Chamber are binding for the panels of the Supreme Court.

2 - If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

Opinions and decisions of the Supreme Court published in the Collection are discussed and approved to publishing during regular half-yearly meetings of Colleges (Divisions) of Supreme Court. There are four Divisions (Colleges) of the Supreme Court – Civil, Criminal, Commercial and Administrative division. The Reviews of the former case former can be discuss on the Session of Division (College) too.

The decision on the Grand Chamber can be reviewed by later decision of the Grad Chamber.

3 - If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

The Supreme Court should adjust its Case Law after modification of legislation, but change of legislation has no direct effect to the binding effect.

Plenary of the Supreme Court shall discuss reports on the application of laws and other generally binding regulations and provide the Minister of Justice of the Slovak Republic with suggestions for new legal regulation.

Slovenia - Supreme Court

Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

According to the Slovenian Constitution judges are bound by the constitution and laws. Neither of these provides for binding effect of the Supreme Court decisions, which are not considered to be a formal legal source. The legal system in Slovenia does not recognise judicial precedence, which means that lower- instance courts are not formally bound by the decisions of higher-instance courts. However, lower-instance courts tend to observe and follow the case law of higher-instance courts and the Supreme Court. And through a constitutional right to equality before the law, which demands that like cases should be decided alike, a case law gains a position of an important legal source. The constitutional right to equality before the law is violated if there is a well-established case law on certain point and if in applicant's case a court has departed from it without explicit and thorough reasoning of the departure.

Apart from adjudicating in individual cases, the Supreme Court, sitting in a plenary session, may adopt legal opinions of principle on issues important to the uniform application of laws/acts. Under the Courts Act, such legal opinions of principle are only binding on panels of the Supreme Court and may be changed only at a new plenary session. However, lower-instance courts tend to observe legal opinions of principle, and the Supreme Court, in its case law, demands that due consideration be given to a party quoting an already adopted legal opinion on the issue in question.

2 - If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

Please see the answers to 1 and 3.

3 - If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

Subsequent modification of the legislative framework does not exclude the binding effect of the legal opinion as such.¹ However, depending on the nature and content of the legislative modification, the existing legal opinion may become irrelevant. Of course, a new legal opinion may be adopted by the plenary session of the Supreme Court and explicitly or implicitly annul the previously adopted legal opinion.

Spain - Supreme Court

1 - Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

Under the Spanish legal system, case law is not a source of the law. Nevertheless, the Supreme Court's case law is indirectly binding for all courts, because, in the case a court does not follow it when giving a judgement, this could be set aside by means of an appeal before the Supreme Court.

2 - If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

The only ways to review the principle of law is that the Supreme Court itself, giving its reasons, changes its opinion or that the subject matter is specifically regulated by law with a different opinion to that expressed in the case law.

3 - If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

Taking into account that the Supreme Court's case law is not a source of the law, thus, a subsequent law can perfectly amend the sense of a principle of law derived from a given piece of case law.

Sweden - *Supreme Court*

1. Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

The Swedish legal system, including the criminal law system, is based on the law, although precedents play an important role. Legal standpoints adopted by the Supreme Court serve as guidelines for lower courts, by the power of its argument. They are not legally binding for lower courts, but lower courts very rarely depart from them.

2. If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

As answered above the legal standpoints adopted by the Supreme Court are not legally binding for other cases. However, the legal standpoints adopted by the Supreme Courts are binding for all justices of the Court. If the justices in their deliberation of a case find reasons to overturn a former legal standpoint decided by the Court, they are obliged to refer the case to a plenary session with all the 16 justices participating in the judgment.

3. If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

The new law prevails and the former legal standpoints adopted by the Supreme Court might be obsolete.

United Kingdom - Supreme Court

1 - Is the principle of law affirmed by the Supreme Court, especially in criminal matters, binding for other cases?

A principle of law affirmed by the Supreme Court is binding on all inferior courts (including in criminal matters) and will be applied in cases with similar facts and issues. The Supreme Court is not, however, bound by its own decisions. This has been the case since 26 July 1966 when the House of Lords (a former incarnation of the Supreme Court) issued a Practice Statement stating that it would treat former decisions of the House as “normally binding” but that it would depart from a previous decision “when it appears right to do so”. In practice this is a power the court uses rarely.

2 - If the principle of law is binding, what are the necessary forms to review it and eventually overcome it?

As mentioned above, the Supreme Court is not bound by its own decisions and can review and depart from them when it appears right to do so. Parliament can also pass or amend legislation if it disagrees with a Supreme Court decision.

Decision-making by the Supreme Court may additionally be subject to review if a court or tribunal needs to determine a question of EU law in order to resolve a case before it, and a reference is made to the CJEU.

3 - If the principle of law is binding, what are the limits of this restriction? For example, does a subsequent partial modification of the legislative framework exclude any binding effect of the principle of law affirmed by the Supreme Court?

Parliamentary sovereignty is a principle of the UK constitution. It makes Parliament the supreme legal authority in the UK, which can enact or repeal any law. Accordingly, Parliament can enact legislation which overrules a principle of law affirmed by the Supreme Court, and the courts will apply the new legislation.

The only (limited) deviation from this principle is when a court concludes that a provision of UK legislation is incompatible with the European Convention on Human Rights. In such circumstances the court can make a ‘declaration of incompatibility’ pursuant to s.4 of the Human Rights Act 1998. However, this does not affect the validity, continuing operation or enforcement of the incompatible provision, and is not binding on the parties to the proceedings in which it is made. Parliament is therefore not required to take any action in response.