

## Comparing Precedent

John Bell

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### Recommended Citation

John Bell, *Comparing Precedent*, 82 Cornell L. Rev. 1243 (1997)  
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# BOOK REVIEW

## COMPARING PRECEDENT

*John Bell*†

INTERPRETING PRECEDENTS: A COMPARATIVE STUDY. *Edited by D. Neil MacCormick & Robert S. Summers.* Aldershot: Dartmouth Publishing Co. Ltd. 1997. Pp. 585. \$97.95.

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### INTRODUCTION

*Interpreting Precedents* is a major work of high scholarship. It will be a substantial point of reference for comparative lawyers and legal theorists for many years to come. Neil MacCormick and Robert Summers have brought together many of the most influential and creative legal theorists of our day to examine the nature of precedent. Building on an analysis of their own systems, the scholars have worked to produce a synthesis of reflection on the nature and authority of precedent within the western legal tradition. The task was substantial and

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† Head of Department of Law, University of Leeds, Leeds, England.

complex, but the result as published in this edited collection is a substantial advance in both comparative law and legal scholarship.

As a book on comparative law, the work is an advance because it seriously analyzes the rules and practices of both civilian and common-law systems within a common framework of questions and terminology that has been refined by long discussion and collaboration among the members of the research group producing it. The authors make a clear attempt to stand back from the preoccupations and terminology of their own systems in order to explain them in terms of the common agenda of questions that the group has established. We thus move away from comparative law as a variant on stamp collecting—an activity that involves obtaining samples of different legal systems. Rather, the authors give us an analytical approach that helps us to compare legal systems in order to penetrate deeper into the nature of law.

In terms of its message, *Interpreting Precedents* confirms the views of many legal scholars. Thus Zweigert and Kötz have written:

recently the attitudes of Common Law and Continental Law have been drawing closer. On the Continent statute law is making something of its primacy; lawyers no longer see decision-making as a merely technical and automatic process, but accept that the comprehensive principles laid down by statutes call for broad interpretation, and have begun to treat the *jurisprudence constante*<sup>1</sup> of the courts as an independent source of law. At the same time the need for large-scale planning and ordering of social affairs has forced Anglo-American law into using abstract norms, though its methods of interpretation still show many . . . stylistic differences. . . .<sup>2</sup>

. . . .

. . . [T]he courts (jurisprudence) as well as the legislator have played a leading part in adjusting the rules of the [French] Code civil to modern requirements . . . .<sup>3</sup>

But if MacCormick and Summers confirm these observations, they do so by providing positive, concrete evidence that this is the case, and we understand better the extent to which a change has taken place over the recent period. The novelty lies not so much in the broad conclusion reached as in both the depth of the evidence offered to support the conclusion and the way the conclusion is then expanded into a direct contribution to legal theory.

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<sup>1</sup> The "consistent case-law" of the courts.

<sup>2</sup> 1 KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 71 (Tony Weir trans., Oxford U. Press 2d rev. ed. 1987).

<sup>3</sup> *Id.* at 96; see also ALAN WATSON, *THE MAKING OF THE CIVIL LAW* 168-78 (1981) (describing how judicial decisions influence the development and interpretation of the law).

As a book on legal theory, the work is an advance because it is able to review the way precedent fits into a legal system on the basis of legal systems of different kinds. While common law systems assign a large role to precedent, civilian systems, in varying degrees, do not. Can something general be said about precedent? This work establishes that it can. Furthermore, the debate has become a central concern of jurisprudence, a move in which Robert Summers has played a very distinguished part. The balance between the place of formal and substantive reasons in a legal system is very important.<sup>4</sup> Formal reasons, particularly authority reasons, enable a society to constrain discussion on an issue to how rules and prior decisions are to be interpreted, rather than opening it up to the full range of appropriate considerations. It is sufficient justification of a decision to point to the authority that laid down a rule, which in the case of precedent is a previous court. In addition, legal systems seek to limit the range of judicial lawmaking, particularly in democratic countries. Legal systems do differ about the scope of judicial lawmaking that they consider appropriate. In some systems, this affects the very authority given to judicial decisions in the first place—how can judges have authority to lay down the law? In some systems, once judicial decisions have laid down the law, then judges have only limited authority to change it—legal certainty is a constraint on judicial lawmaking where prospective overruling is not permitted. Whatever the legal system's attitude toward judicial lawmaking, however, one cannot totally exclude substantive considerations. A legal system has to accept that it makes mistakes in the formulations of rules and that it needs to adapt to changing conditions. These considerations are central to the enterprise of law. In relation to precedent, they are in play in a very particular way. Citizens in a legal system must give weight to judicial decisions and frame claims against others or against the state by reference to them, rather than by reference to wider considerations of what is right. For this reason, we can agree with MacCormick and Summers that the treatment of precedent is a key to a legal culture.<sup>5</sup>

In my view, a study of legal reasoning reveals the culture of a legal system. If we attend to the form and institutional structures surrounding legal reasoning, especially judicial reasoning, we find expressed the kinds of argument used, the audience to which they are addressed, and the form in which the argument is couched. We find the weight a legal community attaches to different forms of legal and non-

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<sup>4</sup> For a fully developed presentation of the distinction between formal and substantive reasons, see Robert S. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707 (1978).

<sup>5</sup> D. Neil MacCormick & Robert S. Summers, *Introduction to INTERPRETING PRECEDENTS: A COMPARATIVE STUDY* at 1, 1 (D. Neil MacCormick & Robert S. Summers eds., 1997).

legal argument, and through this, we gain insight into that community's conception of law. The structure of legal argument also reveals who the relevant actors in a legal community are and what the function of a judge within the overall legal system is. Although style is often suggested as the key difference among legal systems,<sup>6</sup> I would argue that style is merely one useful focus of attention in revealing the internal workings of a legal system. It is important to go beyond the formal description that a legal system gives of itself to find a genuine indicator of the reality of how the system operates and how actors within that system perceive it. These are the concerns of a comparative lawyer, which I will deal with in Part I of this review.

From the perspective of the legal theorist, the book is interesting because it raises questions about the nature of legal reasons. It is often assumed that precedent offers an autonomous reason for judicial decisions that precludes the need to examine the substantive reasons that might lead to a decision. If there is a precedent that favors the plaintiff, I can ignore the various arguments of justice or fairness or arguments from legal principle that argue for and against such a conclusion. This study questions that assumption. It leads us to conclude that precedent operates predominantly as a procedural device. A precedent creates a burden of proof in favor of both one version of the substantive arguments that affect a case and the solution the precedent case lays down. To overturn that presumption, a judge must adduce at least weighty reasons. In many systems, one must go further and take the case to a higher or more solemn formation of a court in order to overrule the outcome the precedent establishes. Precedent does not preclude a revision of the ruling of the previous decision; it makes it more difficult. These issues, raised in Part II, inevitably call into account certain versions of positivism. We are led to the view that the question about what is law cannot wholly exclude moral arguments. In using precedent to raise this point, MacCormick and Summers perform a valuable service.

Part III will explore the various ways of making use of precedent. If MacCormick and Summers are right in suggesting that precedent is but a weighty reason in a legal argument,<sup>7</sup> then there are various ways for judges to pay attention to it. All courts do pay attention to the past, but the style of judgment provides us with evidence of the very different ways in which they do so. Legal systems differ about the weight that precedents should have. They differ about the social role of the judge. All this emerges in an examination of the structures and content of legal reasoning.

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<sup>6</sup> See, e.g., 1 ZWIGERT & KÖTZ, *supra* note 2, at 68-75.

<sup>7</sup> MacCormick & Summers, *supra* note 5, at 1-2, 532-33.

The methodology of the book upholds what many of us would regard as good practice in comparative law. It has made progress by adopting an in-depth study of a narrowly focused topic. It is supported by empirical study (and coincides with the outcomes of other empirical studies). We are able to get behind the rhetoric and look at the detail of a legal system. To understand how a legal system fits together, we have to be informed by legal theory about the nature of the legal system. At the same time, to be well-founded, legal theory needs support by comparative study. A theory of law needs to be justifiable by reference to the realities of actual legal systems. Part IV tries to bring out some of the key features of a legal system that make up a legal culture.

## I

## WHY STUDY PRECEDENT?

## THE COMPARATIVE LAWYER'S CONCERNS

The choice of precedent as a focus for discussing legal culture is appropriate because of the divergences among different western legal traditions. John Merryman suggested years ago that:

the familiar common law doctrine of *stare decisis*—i.e. the power and obligation of courts to base decisions on prior decisions—is obviously inconsistent with the separation of powers as formulated in civil law countries, and is therefore rejected by the civil law tradition. Judicial decisions are not law.

....

... [T]he function of the judge within that tradition is to interpret and to apply "the law" as it is technically defined in his jurisdiction.<sup>8</sup>

We thus start with contrasting rhetorics and self-presentations of different legal systems. The civilian tradition, led by the French, tries to argue that precedent is not a source of law. The common-law tradition takes it for granted that precedent is and should be treated as a major source of law. Numerous books on comparative law repeat these stereotypical positions. However, the underlying reality is rarely probed. Is there really such a contrast in rules and practice among the different legal systems? The book's approach enables us to get beneath the rhetoric to discover a more complex position.

## A. Civilian and Common Law Approaches

The presentation of civilian systems given in *Interpreting Precedents* is appropriately complex. On the one hand, we discover from a number of the national reports that the theory of precedent is an ac-

<sup>8</sup> JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 22-23 (2d ed. 1985).

tivity that is discussed rarely in judicial or even academic writing.<sup>9</sup> Most civilian countries do not exhibit a culture of distinguishing precedents in judgments or in scholarly writing. The degree of close scrutiny to which judicial decisions are subjected in common law judgments and writings is not paralleled in civilian systems. On the other hand, we discover that a large number of judicial decisions (for example, between 97% and 99% of those in Germany<sup>10</sup>) make reference to precedent. Whereas judgments in other systems, for example, France, do not typically contain reference to cases, both lawyers and the advocate-general discuss cases extensively in their filings.<sup>11</sup> The facts give rise to questions. Are we faced with a conflict between what is said and what is done? Each national chapter is required to reflect on this and does so effectively.

The apparent difference between civilian and common law systems focuses on three aspects: the style of the judgments that courts hand down, the authority that is given to precedent, and the function of judicial decisions within the legal system.

## B. The Style of Judgments

A number of national reports usefully illustrate a national style of judgment writing. Those familiar with the length of common law judgments will find the brevity of a French judgment astonishing. The following is a brief, but clear example of the style of French judgments. It is the full text of a decision concerning an action by Greenpeace France to challenge the validity of the French President's decision to hold a series of nuclear tests in 1995:

Considering that, on 13 June 1995, the President of the Republic announced his decision to proceed with a new series of nuclear tests prior to the negotiation of an international treaty; that these tests had been suspended in April 1992 to support a French diplomatic initiative concerning nuclear disarmament, and that this moratorium had been extended in July 1993 after the principal nuclear powers had themselves announced the suspension of their own tests; that thus the challenged decision is not separable from the

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<sup>9</sup> See, e.g., Svein Eng, *Precedent in Norway*, in INTERPRETING PRECEDENTS, *supra* note 5, at 189, 214; Alfonso Ruiz Miguel & Francisco J. Laporta, *Precedent in Spain*, in INTERPRETING PRECEDENTS, *supra* note 5, at 259, 270.

<sup>10</sup> See Robert Alexy & Ralf Dreier, *Precedent in the Federal Republic of Germany*, in INTERPRETING PRECEDENTS, *supra* note 5, at 17, 23.

<sup>11</sup> See Michel Troper & Christophe Grzegorzczuk, *Precedent in France*, in INTERPRETING PRECEDENTS, *supra* note 5, at 103, 112. The advocate-general or equivalent in a civilian system is a representative of the public interest who performs a kind of *amicus curiae* role. See L. NEVILLE BROWN & TOM KENNEDY, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 60-67 (4th ed. 1994); Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L. J. 1325, 1355-56 (1995). In some systems, the advocate-general may even participate in the private deliberations of the judges.

conduct of France's international relations and, in consequence, escapes any control by the courts; that the administrative courts thus lack jurisdiction to receive the request of the association Greenpeace France seeking to annul this decision for exceeding his powers;<sup>12</sup>

Held:

Art. 1st: The request by the association Greenpeace France is denied.

The decision contains no discussion of arguments of counsel and no attempt to justify the reasons given in terms of precedent. As various authors make clear, it is magisterial in style.<sup>13</sup> A number of other countries, such as Spain, Italy, and Finland, adopt a similar uninformative style.<sup>14</sup> Indeed, in Italy, most decisions are not published in full, but only as *massime* (maxims), i.e., summaries of the key rules related to a narrow statement of facts.<sup>15</sup> This practice of limited publication does not encourage a discursive style.<sup>16</sup>

At the same, we know that the judges did actually read the precedents and discuss them in their private sessions and did hear presentations of the cases by the advocate-general or by the lawyers.<sup>17</sup> The judgments seem to play an actual, but unacknowledged role in the decisionmaking process.

The book provides us with evidence to question the stereotype of the civil law judge. The research that Mitchel Lasser and I have done in examining case files confirms the appropriateness of such questioning.<sup>18</sup> We found that the reporting judge—the author of the draft judgment—made extensive use of cases and summarized the major ones for the court.<sup>19</sup> Every conceivable method of reasoning in relation to precedent exists in the written report and in the oral argument among judges.<sup>20</sup> Distinguishing, reasoning by analogy, and overruling are devices with which the French judge is familiar.<sup>21</sup> The national

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<sup>12</sup> Conseil d'Etat, Assemblée, 29 Sept. 1995, *Greenpeace*, A.J.D.A. 1995, 749 (author's translation from original French).

<sup>13</sup> See, e.g., Troper & Grzegorzczuk, *supra* note 11, at 107.

<sup>14</sup> See Aulis Aarnio, *Precedent in Finland*, in INTERPRETING PRECEDENT, *supra* note 5, at 72-73; Miguel & Laporta, *supra* note 9, at 263-66; Michele Taruffo & Massimo La Torre, *Precedent in Italy*, in INTERPRETING PRECEDENTS, *supra* note 5, at 146-48.

<sup>15</sup> See Taruffo & La Torre, *supra* note 14, at 148-49.

<sup>16</sup> See *id.* at 182.

<sup>17</sup> See John Bell, *Reflections on the Procedure of the Conseil d'Etat*, in DROIT SANS FRONTIERES 211, 216-17 (Geoffrey Hand & Jeremy McBride eds., 1991).

<sup>18</sup> It is one of the ironies of the French system that foreign lawyers seem to be given better access to the judicial system than are national lawyers. For studies of the French system, see Bell, *supra* note 17, and Lasser, *supra* note 11.

<sup>19</sup> Bell, *supra* note 17, at 216, 220; Lasser, *supra* note 11, at 1364-69, 1376-81.

<sup>20</sup> See Bell, *supra* note 17, at 224-26; Lasser, *supra* note 11, at 1364-69.

<sup>21</sup> See Bell, *supra* note 17, at 227-30; Lasser, *supra* note 11, at 1376-84.

chapters confirm that this goes on in all jurisdictions.<sup>22</sup> There is not a refusal to read precedent in one system and a willingness to read it in another; rather, we are faced with a difference in the transparency of this process of legal reasoning and in the weight attached to precedents as legal reasons.

The style of a judgment is, therefore, not direct evidence of how a judge reasoned or even of how a judge justifies a conclusion in law. Obviously, we do need to follow Wróblewski and distinguish between the process of *explaining* a decision, how the judge was led to come to that conclusion, and the process of *justifying* the decision, how the judge can persuade the legal audience that the decision is right in law.<sup>23</sup> In discussing precedent, we are properly concerned only with the process of justification, but within the process of justification, we need to examine the difference between various forms of reason-giving. The common law judge is typically an advocate, telling a story and attempting to convince lawyers and scholars that law can support the decision. The French judge is not attempting to perform that task, but rather is trying to offer an authoritative rule that other courts can apply. Performing the task of persuasion obviously necessitates a demonstration that the decision is consistent with the previous state of the law and with legal principle, so precedent has a natural place. Performing the task of laying down a rule, however, necessitates no such demonstration—the lower court need only know the answer given. One conclusion of this is that a judicial decision that will later serve as precedent is not going to perform the same function in each legal system. The character of a statement of law and the role that the statement is intended to have in the legal system are important reasons why precedent may have a different place in the reasoning within each legal system.

Taruffo carefully analyzes the most significant functions of the higher courts within the institutional factors affecting precedent.<sup>24</sup> He isolates questions such as whether the court decides prospectively or retrospectively, whether it selects its cases, and whether it sits in panels of differing status. But the audience of the judicial decision within the legal system needs further elaboration. Markesinis has put the problem succinctly, when he suggests that, despite some areas of convergence between European legal systems: "Judicial styles may remain more different since common-law judges still seem to talk to everyone who is prepared to listen (or must listen), German judges only

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<sup>22</sup> See, e.g., Aarnio, *supra* note 14, at 95-99; Taruffo & La Torre, *supra* note 14, at 175-82.

<sup>23</sup> Jerzy Wróblewski, *Motivation de la Décision Judiciaire*, in *LA MOTIVATION DES DÉCISIONS DE JUSTICE* 111, 119-32 (Ch. Perelman & P. Foriers eds., 1978).

<sup>24</sup> Michele Taruffo, *Institutional Factors Influencing Precedents*, in *INTERPRETING PRECEDENTS*, *supra* note 5, at 437-60.

talk to intellectual equals, and French judges (at the highest levels) keep their thoughts to themselves!"<sup>25</sup> Taruffo distinguishes between a "legalistic, deductive and magisterial style, in which the final ruling is presented as the last and necessary outcome of a legal and logical set of arguments" and a "substantive, discursive and personalized style . . . [in which a] decision is supported by several . . . arguments, including value judgments and personal opinions of the judge."<sup>26</sup> As the book and particularly that chapter reveal, legal systems exhibit points along a spectrum between these two extremes with French private law at the legalistic end and common law constitutional judgments at the discursive end. In writing about judgments of these different styles, Taruffo seems to assume that the lower court is the audience of the judge. That is certainly the case with some courts, for example, the highest courts in France or the European Court of Justice, but it is less true of the common law courts whose reasoning is readable by a wider public audience.<sup>27</sup> In addition, the kind of dialogue between higher and lower courts is more subtle than Taruffo's analysis allows. It is not simply a question of laying down rules in a bureaucratic fashion. That may be true of Italy and France, but the fuller judgments of some other systems are genuine attempts at explanation and persuasion.<sup>28</sup> There are thus distinctive institutional relationships between higher and lower courts that also affect the character of judgments and the role of precedent. Since lower courts may know no more than what is published about the higher court decisions, if the decision is not fully reasoned they may remain unpersuaded by its conclusion and resistance may occur. As Josef Esser argued, "Legal thinking is about opinions, the formation and influencing of opinions is the heart of discovering the law—and that applies for persuasion in answering the question of law as in setting out the question of facts."<sup>29</sup> Such influ-

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<sup>25</sup> Bernard S. Markesinis, *Learning from Europe and Learning in Europe*, in *THE GRADUAL CONVERGENCE* 1, 30 (B.S. Markesinis ed., 1994); see also Bernard Rudden, *Courts and Codes in England, France and Soviet Russia*, 48 *TUL. L. REV.* 1010, 1027 (1974) ("The French judgment—like the contract of sale—appears as instantaneous, new-minted; it no tomorrow has, nor yesterday. The English judge seems to feel that his role this morning is no bar to a conversation with his predecessors nor is it without relevance to the future . . .").

<sup>26</sup> Taruffo, *supra* note 24, at 448-49 (italics omitted).

<sup>27</sup> See PETER GOODRICH, *READING THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHOD AND TECHNIQUES* 117 (1986) (noting that "the primary legal audience is composed of lawyers and legal officials; it is they who in the first instance must obey and apply the law").

<sup>28</sup> The lack of such a discursive approach has been the subject of comment by distinguished academics and practitioners. See, e.g., Adolphe Touffait & André Tunc, *Pour une Motivation Plus Explicite des Décisions de Justice Notamment de Celles de la Cour de Cassation*, 72 *REVUE TRIMESTRIELLE DE DROIT CIVIL* 487 (1974).

<sup>29</sup> Josef Esser, *Motivation und Begründung Richterlicher Entscheidungen*, in *LA MOTIVATION DES DÉCISIONS DE JUSTICE*, *supra* note 23, at 137, 146 (author's translation from original German).

encing arguments may be of different kinds. Esser distinguishes between arguments which attempt to create opinion ("doletic" arguments), polemic or forensic arguments ("eristic" arguments) and justifications for a decision ("apologetic" arguments).<sup>30</sup> It is clear that not all these argument types are found in judicial decisions as reported in the various national reports, whereas the common law judges will use all three types (especially because they were once attorneys themselves and are used to forensic argument). By contrast, the Finns, French, and Italians will confine the first two argument types to internal discussions among the judges (including the report produced by the reporter judge).<sup>31</sup> The style of judgment that Taruffo identifies<sup>32</sup> reflects a view about what will be persuasive or influential in shaping the opinion of the judgment's relevant audience. The national reports identify the various audiences, but they could have spent more time in explaining why certain audiences are chosen as the principal target of judicial judgments.

One may conclude that the debate on precedent is not simply about judicial lawmaking, the power of judges to lay down rules affecting the general public. It is also about the power of the higher courts to control and influence lower branches of the judicial hierarchy. What emerges from the national reports on many civilian systems is that judges do not respond well to hierarchical dictates by superior courts.<sup>33</sup> Like all professionals, they are influenced by an appeal to their professional sense of purpose, to do justice to citizens, rather than by a respect for order, even within the bureaucratic systems that exist in most civilian countries. As the German Constitution states it in article 20, paragraph 3, the judge is subordinated to "statute and the law" (*Gesetz und Recht*), not primarily to hierarchical superiors.<sup>34</sup>

Taruffo's conception of what is an "institutional" question<sup>35</sup> is perhaps unduly narrow. He concentrates on the institutional relation-

<sup>30</sup> *Id.* at 145-46 (author's translation from original German).

<sup>31</sup> The procedure in many civil law courts and the European Court of Justice is that one judge in a multijudge court is assigned the task of preparing a draft judgment in advance of the hearing. That draft judgment is usually accompanied by a long note that sets out the reasons that justify the draft produced and is intended to persuade the other judges to agree to the draft judgment. Their role is not so much to review all the evidence, but to act as a control of legal common sense on the views of the reporter. For a discussion of this approach, see BROWN & KENNEDY, *supra* note 11, at 52-54; Bell, *supra* note 17, at 214-16; Lasser, *supra* note 11, at 1356-57.

<sup>32</sup> See *supra* note 26 and accompanying text.

<sup>33</sup> *E.g.*, Troper & Grzegorzczuk, *supra* note 11, at 120 (stating that "a first instance court acts independently and often declares that it does not fear an appeal when disregarding a precedent of the Court of Appeal above it").

<sup>34</sup> CG art. 20, § 3 ("under the constitutional order, judges and other administrators are bound to the statutes and the law which have exclusive authority.") (trans. by R.S. Summers).

<sup>35</sup> Taruffo, *supra* note 24.

ships within the judicial hierarchy, rather than broadening the question to embrace the relationship between the different institutions that constitute the legal community. In my view, the legal community comprises not only courts, but legal professionals, legal doctrinal writers and academics, as well as the organs of government that make and devise the law. It should also comprise those nongovernmental bodies that are involved closely in lawmaking and the application of law. Courts and advocates-general often direct their pronouncements to the concerns of one or more of these groups. That not all court judgments are so directed<sup>36</sup> should not make us lose sight of this fact. In some legal systems, the authority attached to precedent as a source of law is related not only to the subordination of the judge to the legislature, but also to the comparative importance of writers of legal doctrine in shaping the law.<sup>37</sup> This is certainly true of France and Italy where the pre-eminence of doctrinal legal writers in private law has limited the influence of judges on shaping the law.<sup>38</sup> Common law judges are more likely to perform the role of shaping legal doctrine from the bench. It is not unusual for a common law judgment to be like a short lecture, covering much of what might be covered in an academic treatise.<sup>39</sup> Academic writing then becomes a debate with the judges about their formulation of the law, rather than just a comment on the outcome. A review of institutional questions needs to expose the dynamics within the legal community.<sup>40</sup>

## II

### THE LEGAL THEORIST'S CONCERNS

#### A. The Authority of Precedent

As the reports identify, the authority accorded to precedent decisions differs among the legal systems represented in this book.<sup>41</sup> The questionnaire to which the national reporters had to respond drew a distinction between decisions which are formally binding, those which have strong force (i.e., will be treated as defeasible or outweighed only

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<sup>36</sup> See John Bell, *The Acceptability of Legal Arguments*, in *THE LEGAL MIND: ESSAYS FOR TONY HONORÉ* 45, 55-57 (Neil MacCormick & Peter Birks eds., 1986).

<sup>37</sup> See, e.g., RENÉ DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY* 188-93 (1972).

<sup>38</sup> See Taruffo & La Torre, *supra* note 14, at 161; Troper & Grzegorzczuk, *supra* note 11, at 123.

<sup>39</sup> See, e.g., Robert S. Summers, *Precedent in the United States (New York State)*, in *INTERPRETING PRECEDENTS*, *supra* note 5, at 360-61, 364-65.

<sup>40</sup> See generally Hein Kötz, *Scholarship and the Courts: A Comparative Survey*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW* 183 (David S. Clark ed., 1990) (discussing how differences in courts' use of legal doctrines and processes define different legal systems).

<sup>41</sup> Compare Summers, *supra* note 39, at 365 (precedent in New York is the primary source of decisive authority in some subject areas) with Troper & Grzegorzczuk, *supra* note 11, at 127 ("Precedent is never officially binding.").

by strong countervailing arguments), those which have weaker force, (i.e., offer supporting arguments for a decision), and those which are merely illustrative. This analysis is in itself an improvement on the existing literature in the field. There has been a tendency, noted in the national reports, for judges and writers to suggest that precedents are either binding or mere illustrations of the law. The analysis adopted by the group here and supported by the evidence adduced in the reports is that there is a spectrum of weight that can be attached to a precedent.<sup>42</sup> Whereas the binding decision is the paradigm exclusionary reason, justifying a judge's decision to ignore the substantive arguments that could be in play, there are other possibilities. While the ways in which higher courts treat lower court decisions are paradigm examples of precedent as mere illustration, decisions of higher courts are accorded more status. As MacCormick and Summers conclude, the extent to which precedent is binding lies on a continuum, rather than in a sharp dichotomy.<sup>43</sup> The national reports corroborate this analysis, such that we achieve a much richer picture of the phenomenon of precedent than is contained in the standard works on comparative law.<sup>44</sup>

## B. Authority and the Balance of Reasons

It is apparent from reading the various national reports that decisions of the highest courts are accorded significant weight, even if the lower courts lawfully fail to follow their decisions. For example, both the German<sup>45</sup> and the Italian<sup>46</sup> reports suggest that the existence of a prior decision by the highest national court alters the burden of proof. The burden is on those who dispute the rightness of the precedent to produce sufficiently cogent substantive arguments to overturn it. This is very much a practical effect similar to the rationale of common law courts in choosing not to overturn their own precedents in undue haste. The report on New York makes that point fairly clearly,<sup>47</sup> as do the comments on the House of Lords in the United

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<sup>42</sup> See, e.g., Aarnio, *supra* note 14, at 85 (listing four degrees of normative force, some with further subparts).

<sup>43</sup> [W]e should "side" with the civilian approach that refuses to classify precedent as a "formal source"; but we should also "side" with the common law in holding that nevertheless the propositions that are elaborated in this process have a genuinely legal quality, though having more or less soundness, greater or less weight.

D. Neil MacCormick & Robert S. Summers, *Further General Reflections and Conclusions, in INTERPRETING PRECEDENTS*, *supra* note 5, at 531, 545.

<sup>44</sup> E.g., Aarnio, *supra* note 14, at 85.

<sup>45</sup> Alexy & Dreier, *supra* note 10, at 30.

<sup>46</sup> Taruffo & La Torre, *supra* note 14, at 154-56.

<sup>47</sup> Summers, *supra* note 39, at 369-70.

Kingdom report.<sup>48</sup> If the highest court has made a deliberate attempt to resolve a difficult point of law or to unify the approaches of different courts, then it is both disrespectful and foolhardy for the lower courts to ignore this. Respect for hierarchy and for the wisdom of higher judges requires that lower courts give some weight to the decision. This common-sense approach is evidenced in all the legal systems.

If we probe the common law practice of distinguishing, then we can see that the binding authority of common law precedents is also a matter of degree. The negative conditions that restrict distinguishing<sup>49</sup> are that the new formulation of the precedent's rule must still be able to justify the outcome of the case and that the new formulation must fit with the formulation of the law from the precedent-case. As long as the material facts of the case can be reconciled with a new formulation of the rule, the court may depart from the formulation of the rule in the precedent case. Given that power, there are only a limited number of cases in which it will be impossible to do anything other than apply the precedent rule as formulated in the previous cases. Most common law cases will actually not be binding in the narrow sense, but will carry weight such that they may alter the burden of proof in arguments in court, yet are not ultimately decisive, even at the lower court level. The willingness of common law courts to distinguish precedents that they find uncomfortable matches, to some extent, the phenomenon found in many civil law systems of lower courts rejecting the decisions of higher courts.

The key question is thus not whether there exists a sliding scale, but rather why, in each system, different weights are assigned to the decisions of different courts. In this area, *Interpreting Precedents* introduces us helpfully to the idea that legal systems are not monolithic. Summers, in relation to New York, distinguishes among precedents in constitutional, common law, and statute law areas.<sup>50</sup> Constitutions need updating and are sufficiently open-textured that substantive arguments have a major role. Common law areas have established rules that need to be brought up to date and sometimes corrected, but the legislator is loath to intervene. By contrast, where the legislature has created rules, the courts should respect them. Other legal systems make different distinctions. In Germany, labor law has been an area for major judicial, rather than legislative, rulemaking.<sup>51</sup> In France

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<sup>48</sup> Zenon Bankowski et al., *Precedent in the United Kingdom*, in *INTERPRETING PRECEDENTS*, *supra* note 5, at 325-26.

<sup>49</sup> See JOSEPH RAZ, *THE AUTHORITY OF LAW* 186-88 (1979).

<sup>50</sup> Summers, *supra* note 39, at 355, 372.

<sup>51</sup> See Alexy & Dreier, *supra* note 10, at 24.

and Italy, administrative law bears this role.<sup>52</sup> In Spain and Italy, as well as Germany, the substantive considerations that Summers identifies are equally relevant in encouraging constitutional courts to take a more adventurous role with regard to precedent.<sup>53</sup> At the same time, the specialized nature of constitutional courts in those systems gives them a special status that other courts respect. We thus have other courts following constitutional court decisions from which the constitutional court itself will be willing to depart. Most systems are wary of significant changes in the criminal law lest they breach the principle of *nulla crimen sine lege*. There is thus a tendency to follow established views while rejecting the idea that judges can have a significant law-making function in this area.

Seen in this light, precedent involves giving weight to previous judicial decisions in a reasoning process that attends to the balance of reasons in each case. The fact that a superior court has given a decision on a particular issue affects the balance of reasons, but does not determine the result. The crunch comes in the case when the judge has to say, "I think the correct interpretation of the law favors the plaintiff, but precedent binds me to decide for the defendant." Even in civilian systems this occurs. A clear example is the German asylum case where the lower court tried on over 160 occasions to get the higher court to change its mind on the question whether Tamils were persecuted on political grounds, but eventually had to defer.<sup>54</sup> Respect for hierarchy and the orderly development of law is a legitimate concern that may outweigh the correctness of the outcome in the individual case.

### C. Sources of Law

The Polish chapter raises the issue of the status of precedent in a way that attempts to resolve the issue of precedent as a source of law.<sup>55</sup> Civilian systems clearly hold that legislation, the Constitution, and custom are formal sources of law—they have a legitimacy as enactments of the sovereign. But all recognize that lawyers and the courts properly cite cases regularly. One approach is to distinguish between authorities in law and authorities in fact. In law, precedent is not an authority, but in fact, it is treated as such. Such a fudge pleases no one. The Polish chapter offers a more subtle approach based on the idea that precedent acts as a reason in legal thought. The Polish au-

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<sup>52</sup> See Taruffo & La Torre, *supra* note 14, at 143 (administrative courts interpret administrative rules in the first instance); Troper & Grzegorzczuk, *supra* note 11, at 104.

<sup>53</sup> See Taruffo, *supra* note 24, at 442-43.

<sup>54</sup> See Alexy & Dreier, *supra* note 10, at 37-38.

<sup>55</sup> Lech Morawski & Marek Zirk-Sadowski, *Precedent in Poland*, in INTERPRETING PRECEDENTS, *supra* note 5, at 219, 233-35.

thors distinguish between "autonomous" and "non-autonomous" sources of law: "Any norm or rule which may constitute an independent basis of a judge's decision shall be called an autonomous source of law, that is, such a norm or rule which may be an independent source of our rights and duties."<sup>56</sup> Thus, for example, it is a sufficient reason for a judge to point out that a traffic violation breaches express provisions of a statute, for example, driving at 50 m.p.h. breaches the statute setting a maximum speed of 30 m.p.h. in a built-up area. For most legal systems, it is not a sufficient reason to point out that certain conduct violates the holding in a precedent case. The precedent case may provide a good, even weighty reason for a decision, but for the reasons of the judge to be sufficient to justify the decision, it is necessary to combine the reference to a precedent with a reference to a relevant statute or general principle of law. As Wisdom suggests, the justification of an argument rests on a number of reasons, each supporting it as the legs of a chair.<sup>57</sup>

On similar lines, the civilian approach typically gives greater weight to a line of authority (*la jurisprudence constante*) than to an individual decision.<sup>58</sup> It is the cumulation of authority in a particular direction that is seen as persuasive. Even in the common law, the extent to which a precedent is embedded in traditional principles will affect its authority. For example, Jim Harris, in his study of overruling, notes that the highest courts in Britain and Australia will overrule decisions when they consider them to be against fundamental principles of the common law.<sup>59</sup>

If the cumulation of reasons predominates as a model for legal justification, then the individual leading case carries weight not merely because it is an act of authority, but also because it encapsulates a reasonably good formulation of legal principle.<sup>60</sup> Indeed, the common law processes of interpretation and distinguishing are ways of bringing closer the relationship between the precedent and legal principle. As MacCormick and Summers suggest, "Decisions can be precedents only to the extent that they are conceived to rest upon justifying grounds; for these justifying grounds, according to a model

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<sup>56</sup> *Id.* at 233.

<sup>57</sup> J. Wisdom, *Gods*, in 45 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 185, 193-95 (1945).

<sup>58</sup> See, e.g., Alexy & Dreier, *supra* note 10, at 50 (discussing Germany); Taruffo & La Torre, *supra* note 14, at 172-73 (discussing Italy).

<sup>59</sup> J.W. Harris, *Towards Principles of Overruling—When Should a Final Court of Appeal Second Guess?*, 10 OXFORD J. LEGAL STUD. 135, 184-91 (1990).

<sup>60</sup> See, e.g., Summers, *supra* note 39, at 388-90 (discussing the "leading case" concept in New York State).

of rational and discursive justification, cannot be confined to the single case."<sup>61</sup>

That analysis explicitly seeks to draw close to certain aspects of civilian analysis, but it does not fully engage with the literature on precedent in non-common-law jurisdictions. I would highlight three cognate approaches. Fikentscher has developed the "Fallnorm" theory that the role of the judge is to formulate the norm which provides the legal solution for the facts of a particular case. In formal terms, the solution follows deductively from the application of the *Fallnorm* to the facts.<sup>62</sup> This process of interpreting the law to produce the concrete norm for the case is "new lawmaking" (*Rechtsneubildung*), which produces a corpus of judicially created law (*fortgebildetes Recht*). It is this corpus of judicially created law that the judge must take into account when producing the *Fallnorm* for new cases.<sup>63</sup> Fikentscher is thus trying to ascribe some authority to precedent in the formation of the rule for resolving a particular case while denying it the status of a norm in its own right. As Kottenhagen points out in his study,<sup>64</sup> the norm about which Fikentscher speaks is so specific that it almost loses any power to regulate other cases and to be a precedent in any recognizable sense. All the same, he shares much of Fikentscher's hermeneutical position in seeing precedent as simply part of the reasoning process of the judge, rather than a free-standing justification on which the judge can rely. To that extent, precedent is not a source of law (*rechtsbron*), but merely a source of knowledge about the law (*kenbron*). The precedent contains an hypothesis about what is just, which provides a point of orientation for the judge's thinking. The judge is bound by the law (*recht*) as a body of principle, rather than as just posited statements. Precedents are thus chief starting points in the reasoning process.

Among comparative lawyers, similar ideas are in debate. Rodolfo Sacco argues that the rules elaborated in statute, caselaw, and doctrinal legal writing are merely "formative elements" (*formants*) in establishing the law to be applied to the situation.<sup>65</sup> Caselaw thus sits as an important component in producing the norm for the case, but not as the determinative element. Each of these theories focuses on the way

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<sup>61</sup> MacCormick & Summers, *supra* note 43, at 543. Cf. 1 WILLIAM BLACKSTONE, COMMENTARIES \*71 (noting "that the decisions of courts of justice are the evidence of what is common law") (punctuation altered).

<sup>62</sup> See WOLFGANG FIKENTSCHER, METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG 202 (1977).

<sup>63</sup> *Id.* at 313-14.

<sup>64</sup> ROBERTUS JOHANNES PETRUS KOTTENHAGEN, VAN PRECEDENT TOT PRECEDENT 184-89 (1986).

<sup>65</sup> RODOLFO SACCO, LA COMPARAISON JURIDIQUE AU SERVICE DE LA CONNAISSANCE DU DROIT 33-34 (1991).

in which a judge comes to a decision, but it is not intended as merely an explanation of the psychology of judicial reasoning. Rather, it is offered as an analysis of how judges can build precedents into justifications as weighty, but not determinative, arguments. MacCormick and Summers join Kottenhagen in stressing that what is decisive is the reason underlying the precedent, rather than the fact of the precedent itself.<sup>66</sup>

In many ways, as Kottenhagen suggests,<sup>67</sup> the civilian approach rejoins that of Wasserstrom.<sup>68</sup> Wasserstrom argued in favor of a two-level procedure:

First, before any particular decision is deemed to have been truly justified, it must be shown to be formally deducible from some legal rule. . . .

Second, before any particular decision is deemed to have been truly justified, the rule upon which its justification depends must be shown to be itself desirable, and its introduction into the legal system itself defensible.<sup>69</sup>

In the case of precedent, if the judge does not have personal or institutional authority to lay down rules, then subsequent judges need to examine the justification of the rule declared in the precedent in order that they themselves can give a proper justification for their decision. Only if the courts are recognized as having institutional authority to make determinative rulings does the precedent decision have authority in its own right. The Polish report's distinction between autonomous and nonautonomous sources of law has some significance not only for the status of precedent decisions, but also for the character of the arguments that will count as a justification for a decision. In the civilian approach that Sacco, Kottenhagen and Fikentscher suggest,<sup>70</sup> in agreement with many authors in the book,<sup>71</sup> precedent decisions contribute to the justification of the instant case, but this does not obviate the need to engage in substantive arguments about what is right.

The conclusion thus invites us to recharacterize precedent as a set of weighty reasons for decision, but not as a source of law in their own right.<sup>72</sup> In the end, this is justified by a more careful attention to the real way in which the common law works (especially the role of persuasive precedents and distinguishing) and to the way in which continental European systems work (especially the practical place that

66 MacCormick & Summers, *supra* note 43, at 545.

67 KOTTENHAGEN, *supra* note 64, at 222-30.

68 RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION* (1961).

69 *Id.* at 172-73.

70 See *supra* notes 62-65 and accompanying text.

71 See, e.g., Summers, *supra* note 39, at 360-61.

72 See MacCormick & Summers, *supra* note 43, at 545.

they afford to previous decisions). When we get behind the rhetoric, thanks to the serious research of the group of scholars producing this book, we are able to confirm the views of a number of comparative scholars who have argued that the dichotomy between the two systems often presented in books masks a more complex reality.

#### D. Practical Reason and Precedent

Precedent is offered as an illustration of practical reason. In society, we have to come to decisions about what we should do even though we disagree about what is right. Of course, we could reopen the substantive debate about what is the right thing to do in every instance. But that wastes time and provokes uncertainty for those who have to guide their lives by the law. Will those who can pay to take a case to court be able to impose their point of view on others? The national reports all point for the need to provide legal certainty and to protect the legitimate expectations that citizens have built up on the basis of the law as previously applied.<sup>73</sup> These are offered as major justifications for a practice of following precedent in any legal system. As a result, legal reasoning is not open-ended. As Robert Alexy has argued, legal reasoning depends for its rationality on what he calls a "special case thesis."<sup>74</sup> Under this "special case thesis," "[t]here is no claim that the normative statement asserted, proposed, or pronounced in judgments is absolutely rational, but only a claim that it can be rationally justified within the framework of the prevailing legal order."<sup>75</sup> We are able to offer a framework within which individuals can operate and plan their lives, if we seek to justify decisions within the narrower band of reasons that is acceptable within the legal system.

Precedent offers both an illustration of the "special case thesis" and a good area in which to test its limits. It is easy to see that statutes, laid down by a legislator and formulated with care and precision after much debate, are clear points of reference that preclude much discussion about what is morally acceptable. Although moral reasons do come back into the interpretation of statutes, a purposive or teleological approach focuses upon the reasons the legislator used as the key moral principles that should influence the interpretation of the statute. We are not dealing with a truly open-ended debate. But precedents do not have this character. They are not precisely formulated as future-regarding provisions, because they are more typically focused

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<sup>73</sup> E.g., Zenon Bankowski et al., *Rationales for Precedent*, in INTERPRETING PRECEDENTS, *supra* note 5, at 486.

<sup>74</sup> ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION 212-20 (Ruth Adler & Neil MacCormick trans., 1989).

<sup>75</sup> *Id.* at 214.

on resolving the peculiarities of the instant case. Secondly, they are not exhaustive—they deliberately do not address all consequential changes in the law, nor do they articulate all the background justifications. Even taking this into account, there is still the question of the authority that attaches to the precedent decision. The discussion in the book suggests that we find it very difficult to provide closed systems within which human affairs can be regulated. The provisionality and fallibility of human beings mean that questions need to be re-opened. Stable frameworks are only possible where we are prepared to treat mistakes and imperfections as matters with which we just have to live. However, the desire for perfectibility pushes us to come back to questions.

This influences the style of judicial decisions. As Perelman pointed out:

As long as the judge only had to justify himself to the legislator through his reasoning, by showing that he was not violating the law, it was sufficient that he referred to the texts which he was applying in his decision. But, if in his reasoning, he has to address the general public, it requires furthermore that the interpretation of the law made by the judge is the most consistent with fairness and the public interest.<sup>76</sup>

Interpretation involves value judgments that must be justified. The engagement of the judge with the legal and social community limits the impersonality of the process. As Perelman goes on to say, there is a distinction between basing the decision on an impersonal rule in a demonstrative fashion and actually offering a justification.<sup>77</sup> In the open discourse of justification, we need to look beyond the formal style of a judgment that is presented as purely deductive to understand the reasons that the decisionmaker considers relevant in producing a justified decision.

The problem of practical reason is how to make decisions where there is disagreement or inadequate information to make a fully grounded decision.<sup>78</sup> As Corsale has pointed out, the courts' resolution of problems of these kinds is never left simply to the arbitrary will of the judge. The limits are set by the legal materials—cases, statutes,

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<sup>76</sup> Chaim Perelman, *La Motivation des Décisions de Justice, Essai de Synthèse*, in *LA MOTIVATION DES DÉCISIONS DE JUSTICE*, *supra* note 23, at 415, 421 (author's translation from original French).

<sup>77</sup> *Id.* at 425.

<sup>78</sup> See P.S. ATIYAH, *PRAGMATISM AND THEORY IN ENGLISH LAW* 26-34, 136 (1987); ROBERT SAMUEL SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 29-34 (1982). Summers's use of "pragmatism" is more focused on the attempt to achieve instrumental results, rather than to engage in speculative theory. My approach here is to suggest that "pragmatism" is a willingness to come to decisions within specified time constraints even when theoretical consensus is practically unachievable. I do not think that there is much difference in our use of the term "pragmatism" in this regard.

legal principles—that have to be reconciled and by the ideology of the social group among whom they must apply.<sup>79</sup> He suggests that judges apply the “sense of justice prevailing in the community.”<sup>80</sup> Neither of these constraints is a straight matter of fact. Rather, it is an issue for interpretation. Practical reason needs to have justified reasons for action. Pragmatism requires reasons for action today. The reason for the authority of the judge is that the complex values and ideas that underlie the notion of an acceptable reason for decisions in the court are ones that are essentially contested. The pragmatic solution is to let the judge make a decision. This pragmatic approach is exemplified in article 4 of the French Civil Code, which instructs the judge to decide all cases coming to him and not to use the obscurity of the law as an excuse for inaction.<sup>81</sup> At the same time, the French recognize the inherent contestability of that outcome and formally deny the judge the power to make generally binding rulings about how a problem should be resolved. A particular piece of litigation must have an end, but is the same true of ethical and doctrinal debate about what the law should be? Whereas it might be acceptable for judges to decide technical questions of legal doctrine, it is unlikely to be acceptable for them to have a definitive say about what community values contain. If we consider that legal doctrine merely mediates social values, then the acceptability of judges having the final say on questions of law is also problematic. The debate about the status of precedent is one illustration of the difficulty of making definitive resolutions of issues within a community. People are not willing to let an issue be definitive, and the argument that it has once been decided does not easily carry weight. On the other hand, the need to respect certainty and legitimate expectations based on the publicly declared decisions of community authorities such as courts provides us with justifications for the manner in which the ongoing debate about rightness should be conducted. Precedent is an illustration not of the substantive closure of a debate, but of a procedural constraint on the way in which a contested issue can continue to be considered. Of course, the extent to which such a procedural constraint is acceptable will depend on whether it is practical to carry forward the debate in any other way.

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<sup>79</sup> MASSIMO CORSALE, *LA CERTEZZA DEL DIRITTO* 116-17 (1970).

<sup>80</sup> *Id.* at 117. There are other views expressed of a similar kind in several European legal systems. See, e.g., JOHN BELL, *POLICY ARGUMENTS IN JUDICIAL DECISIONS* 12 n.23 (1983) (quoting Introductory Section, art. 7 of the New Dutch Civil Code: “In determining what justice demands, account may be taken of generally recognized legal principles, the legal convictions of the Dutch people (*de in het Nederlandse volk levende rechtsovertuigingen*), and the social and individual interests which are affected in a particular case.”).

<sup>81</sup> C. Civ. prelim. tit., art. 4 (“A judge who refuses to decide a case, under the pretext of the silence, obscurity or insufficiency of the law, may be prosecuted as being guilty of a denial of justice.”) (translation from I GEORGE A. BERMAN ET AL., *FRENCH LAW: CONSTITUTION & SELECTIVE LEGISLATION* 4-10 (Transnational Juris Publications, Inc.)).

Where the legislative process is blocked or restricted as in Italy or where different values are to be proposed, such as in protecting rights against the government, the judicial process needs to be kept more open than in other systems where the legislature can be counted upon to take up the debate from the courts.<sup>82</sup>

The authority accorded to precedent is thus essentially procedural, not substantive. The existence of the precedent affects the burden of proof and often the formation of the court that comes to a final decision. Properly conceived, it rarely operates as an exclusionary reason in its own right, preventing further discussion of the right solution to be reached. To that extent, it affects the balance of weight of substantive reasons, rather than being an autonomous substantive reason.

### III

#### WHAT COUNTS AS FOLLOWING PRECEDENT?

In his chapter on the binding force of precedent, Peczenik argues that “[f]ollowing precedents is seldom a mechanical process of following pre-existing rules. It is rather like weighing and balancing of reasons, *inter alia* pre-existent precedent rules (or principles) in order to make new rules.”<sup>83</sup> Given that the different systems examined have different practices with regard to the articulation of reasons for decisions and that they accord a different formal status to judicial decisions, it is important to be clear about what following a precedent involves.

#### A. Empirical Regularity of Reference to Previous Decisions Does Not Suffice

It is clear that a mere empirical regularity in reaching a decision on an issue is insufficient to establish a practice of precedent. Law can rightly be seen as a traditional practice in the sense that it is an activity that involves knowledge and interpretation of texts handed down from the past.<sup>84</sup> But the texts containing that tradition, although authentic, may not have prescriptive weight in terms of their content. They may tell us the tradition, but not tell us whether the tradition ought to be applied to the present. Long ago, Stone identified the difference between the descriptive view of precedent and the

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<sup>82</sup> See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 9-32 (1985).

<sup>83</sup> Aleksander Peczenik, *The Binding Force of Precedent*, in *INTERPRETING PRECEDENTS*, *supra* note 5, at 461, 475.

<sup>84</sup> See GOODRICH, *supra* note 27, at 91.

prescriptive view.<sup>85</sup> Marshall makes a similar point in this collection when he identifies a distinction between positive and critical practices in relation to precedent. The former identify actual regularity in following precedent among judges. But to establish a practice of precedent, we require more:

The critical view of precedent implies that what is binding is the ruling that is required on a proper assessment of the law and the facts of the case—as compared with a positive attitude that merely reports what as a matter of fact a judge believes himself (perhaps confusedly or shortsightedly) to be laying down.<sup>86</sup>

In other words, the practice we seek to establish in a legal system is normative—it is what the judge ought to do in deciding a case. My minimum requirement would follow Marshall in requiring that a judge should treat the ruling in a previous decision as carrying weight in his own judgment.

The point here is that the previous decision must be treated as a legal reason, albeit not a determinative reason. To use Marshall's language, we should not use the idea of precedent in an advocate's sense, as a *topos* on which a rhetorically persuasive argument can be based.<sup>87</sup> The weight of a precedent does not lie in the fact that it is a useful, or even well-regarded source of information about the law or an armory of plausible arguments that have been used before.<sup>88</sup> Rather, we are looking to the "critic's" sense under which there is a wider, more generalizable rule that the precedent case instantiates or illustrates. It is that rule which the judge must take into account in the subsequent decision.

Although we are looking for a rule in a precedent case, precedent is not just limited to those binding rules that a subsequent court must apply. The common law tradition, particularly in the United Kingdom, is preoccupied with the binding decision and the rules governing which parts of the judicial hierarchy are bound by the previous decisions of certain superior courts.<sup>89</sup> These rules of hierarchy and the complementary discussions on the permissible limits of distinguishing distort our perception of the predominance of "persuasive"

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<sup>85</sup> Julius Stone, *The Ratio of the Ratio Decidendi*, 22 MOD. L. REV. 597, 600-01 (1959) (noting that a descriptive view focuses on the process of reasoning which the judge actually used, while a prescriptive sense focuses on what the courts are bound to follow).

<sup>86</sup> Geoffrey Marshall, *What is Binding in a Precedent*, in INTERPRETING PRECEDENTS, *supra* note 5, at 503, 514. Wesley-Smith also draws a somewhat clear distinction between a practice and a rule of precedent. Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, in PRECEDENT IN LAW 73, 85-86 (Laurence Goldstein ed., 1987).

<sup>87</sup> Marshall, *supra* note 86, at 503-04.

<sup>88</sup> Cf. Morawski & Zirk-Sadowski, *supra* note 55, at 242-45.

<sup>89</sup> See Bankowski et al., *supra* note 48, at 315-17, 323.

or "influential" precedents.<sup>90</sup> In many cases, particularly in the superior courts, a previous decision will not be technically binding. But this does not mean that the rule laid down in that case does not operate as a precedent. It has a status by virtue of the fact that an important organ of the legal community has specifically deliberated on a question and attempted to produce a distillation of what is the right answer within the framework of the law. There is a system of precedent in operation where judges are not considered to have done their job properly if they have not considered what is stated in prior cases.

The approach of MacCormick and Summers in their conclusion reinforces this weaker idea of precedent. They draw a distinction between a precedent of solution and a precedent of interpretation.<sup>91</sup> This distinction is well established in continental legal thinking and is attributable to Portalis, who argued that judges were not entitled to lay down decisions by way of authority (*arrêts de règlement*) but could proffer decisions by way of interpretation of the law (*arrêt d'interprétation*):

There are two kinds of interpretation: one by way of doctrine and the other by way of authority.

Interpretation by way of doctrine consists of grasping the true meaning of the laws, applying them with discernment and supplementing them in cases which they have not regulated. Without this form of interpretation, how could it be possible to carry out the office of judge?

Interpretation by way of authority consists of resolving questions and doubts by means of regulations or general provisions. This is the only form of interpretation which is forbidden to a judge.<sup>92</sup>

It is sufficient if the precedent is treated as an authoritative interpretation of the law (which might prove to be wrong), rather than simply as an authority sufficient in its own right to lay down a legal norm.

## B. The Weight of Previous Decisions as Reasons

Legal systems vary in the ways in which they use precedents,<sup>93</sup> but if a precedent is to be used as a reason for a decision, then certain minimum conditions must be met. In the first place, the reason must have weight. The argument from precedent must carry some weight such that it excludes the direct application of some substantive rea-

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<sup>90</sup> Richard Bronaugh, *Persuasive Precedent*, in PRECEDENT IN LAW, *supra* note 86, at 217, 247 (stating that "even when bound by a precedent, a court may in truth follow a persuasive precedent").

<sup>91</sup> MacCormick & Summers, *supra* note 43, at 540-41.

<sup>92</sup> Portalis, *Discours Préliminaire* (1800), reprinted in NAISSANCE DU CODE CIVIL at 35, 45-46 (François Ewald ed., 1989) (author's translation from original French).

<sup>93</sup> See *supra* note 41 and accompanying text.

sons.<sup>94</sup> Second, it would be sufficient that a precedent decision served as an argument from analogy justifying the decision in the instant case, even if the precedent was not directly applied. Bronaugh has argued that so-called "persuasive precedents" do have a significant place in the legal system of the common law.<sup>95</sup> Furthermore, as Bankowski and his colleagues point out: "A regime that allows for the use of precedent as analogy or as exemplifying principles is one that acknowledges the legitimate power of courts to contribute to development of the law in an incremental way quite distinct from the modern model of parliamentary, governmentally directed, statutory enactment."<sup>96</sup> It is clear from the national chapters in this book that judges do make use of the argument from analogy in all legal systems, though not necessarily in the reasons given in the judgment.<sup>97</sup> The force of precedent in terms of the argument from analogy is borne out well by legal systems other than those studied in this volume. For example, the Swiss Civil Code specifically empowers the judge to create rules as if he were a legislator.<sup>98</sup> But, in practice, this is rarely invoked since judges rely on analogy to support their arguments.<sup>99</sup> The judge feels both less exposed when drawing on materials from the legal tradition, and the general obligation to ensure consistency and coherence requires judges to examine what is already in place and to adjust their solutions accordingly.<sup>100</sup> Precedent is an integral part of judicial thinking because judges are able to proceed on the basis of what they have experienced in concrete instances, rather than on viewing the distant scene in the round.<sup>101</sup>

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<sup>94</sup> See Peczenik, *supra* note 83, at 469.

<sup>95</sup> Bronaugh, *supra* note 90, at 217.

<sup>96</sup> Bankowski et al., *supra* note 73, at 500.

<sup>97</sup> E.g., Bankowski et al., *supra* note 48, at 339; Eng, *supra* note 9, at 208.

<sup>98</sup> Introduction, art. 1, para. 1 of the Swiss Civil Code of 1907 states:

If no command can be taken from the statute then the judge shall pronounce in accordance with the customary law and, failing that, according to the rule which he as a legislator would adopt.

<sup>99</sup> See ARTHUR MEIER-HAYOZ, *DER RICHTER ALS GESETZGEBER passim* (1951); Alfred E. von Overbeck, *Some Observations on the Role of the Judge Under the Swiss Civil Code*, 37 LA. L. REV. 681, 689-90 (1977).

<sup>100</sup> See NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 106-08 (1978).

<sup>101</sup> Lord Simon of Glaisdale remarked that "judicial advance should be gradual" and that judges are not well-placed to see the broader picture—they are best placed to handle individual cases. *Miliangos v. George Frank (Textiles) Ltd.*, 1976 App. Cas. 443, 481-82 (appeal taken from Eng. C.A.). As a former government minister, he is well-placed to distinguish the capabilities of the legislature and those of the judiciary. For similar views, see Lord Lowry, *C v. Director of Pub. Prosecutions*, [1995] 2 All E.R. 43, 52 (stating that judicial lawmaking should be approached with caution and that judges should not make a change "unless they can achieve finality and certainty"); Lord Lloyd of Berwick, *R v. Clegg*, [1995] 1 All E.R. 334, 346-47 (cautioning that, although judges may develop law or make new law they should do so only "when they can see their way clearly" and should usually leave it to legislative bodies).

A number of national reports point out a more limited use of precedent cases.<sup>102</sup> Whereas quite a number note that judges do not cite any precedents at all in their reasoning,<sup>103</sup> others such as Germany's and the EEC's note that previous judgments are referred to, but these are mere citations without analysis of what those precedents actually decided.<sup>104</sup> The reference to the previous cases identifies a line of precedent which is consistent with the decision about to be made or it at least demonstrates that this solution is coherent within the body of law. At best, this is a negative use of precedent. The reference to previous cases serves to give supporting weight to the solution reached, but does not directly require that solution to be reached. Like the authors of the national reports, I think this limited reference to previous cases is an example of precedent, since the previous decisions are carrying some weight as legal arguments, albeit as constituent elements of the decision.

Obviously the most straightforward case is where the precedent serves as a positive reason for the decision in the subsequent case. Whether it serves as a precedent of solution as in many common law jurisdictions or as a precedent of interpretation, it may provide substantial authority for the decision to be reached.<sup>105</sup>

In a number of legal systems, the force of precedent seems to lie less in the single decision that is the leading case as in the line of precedents that has followed it.<sup>106</sup> A decision has force because it exemplifies a line of authority. In civilian systems, this is explicable by the importance of the principle behind the individual case.<sup>107</sup> In common law systems, the leading case has greater weight, though the authority of a decision is frequently undermined to a significant extent if it has not been followed.<sup>108</sup> Thus the importance of a single case is not determinative for the existence of precedent. It is sufficient that previous decisions as a class are taken as reasons justifying subsequent decisions.

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<sup>102</sup> *E.g.*, Gunnar Bergholtz & Aleksander Peczenik, *Precedent in Sweden*, in INTERPRETING PRECEDENTS, *supra* note 5, at 297-98.

<sup>103</sup> *E.g.*, Aarnio, *supra* note 14, at 81; Troper & Grzegorzczak, *supra* note 11, at 11.

<sup>104</sup> *See* Alexy & Dreier, *supra* note 10, at 52; John J. Barceló, *Precedent in European Community Law*, in INTERPRETING PRECEDENTS, *supra* note 5, at 407, 415-17; *see also* Eng, *supra* note 9, at 196-97; Miguel & Laporta, *supra* note 9, at 259, 276; Taruffo & La Torre, *supra* note 14, at 152; Morawski & Zirk-Sadowski, *supra* note 55, at 228-29. As Taruffo points out, this listing of precedents "without considering them individually and analytically" is a use of bare precedents which tacitly assumes their relevance. Taruffo, *supra* note 24, at 455.

<sup>105</sup> *See, e.g.*, Taruffo & La Torre, *supra* note 14, at 152-53.

<sup>106</sup> *See, e.g.*, Alexy & Dreier, *supra* note 10, at 50-54; Taruffo & La Torre, *supra* note 14, at 172-74.

<sup>107</sup> *See, e.g.*, Bergholtz & Peczenik, *supra* note 102, at 308; Morawski & Zirk-Sadowski, *supra* note 55, at 229, 231.

<sup>108</sup> *See, e.g.*, Summers, *supra* note 39, at 374-75, 377.

There are thus different ways in which a precedent can play a role as a reason for a decision. Each of these ways should be considered as evidence of a practice of precedent, but in each case, it is important that the previous decision falls within the "should consider" category of matters courts take into account in justifying their decisions, rather than "may consider" matters.

### C. A Deliberate Strategy of Authoritative Precedent

One of the most interesting features of the collection is the variety of ways in which it provides evidence that higher courts do seriously attempt to lay down precedents, even in systems where these are not formally considered to be authoritative sources of law.

The first way in which a deliberate strategy can be identified is where the lower courts use the decisions of the higher court as a reason for their own decision. Even in countries like France, where the highest court decisions are brief, not to say obscure, the lower court judgments can be fuller and may contain references to the leading cases in the field.<sup>109</sup> The advocate-generals' comments in the higher courts engage in a dialogue with such explicit discussion of precedent in the lower courts. Even though the higher court decisions are not binding, they are significant reasons that the courts offer for their decisions.<sup>110</sup> In most systems, it may also be clear that the highest court takes account of its own decisions as reasons. This may appear from the statements of the reporter judge or of the advocate-general, even if it does not appear from the judgment itself.<sup>111</sup> In countries such as Germany and more recently in Sweden, as well as in the European Court of Justice, the court may explicitly mention and rely on its previous caselaw.<sup>112</sup>

A second, more subtle form of evidence is the internal procedure of the highest courts. In a large number of the national reports, it is mentioned that the highest courts have a large number of judges who sit typically in relatively small panels of three or five judges.<sup>113</sup> But when the court wishes to overturn established precedents of its own or of another part of the court, a larger panel of judges is convened and it makes the decision whether to reverse the precedents.<sup>114</sup> This has

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<sup>109</sup> See Troper & Grzegorzczuk, *supra* note 11, at 107-08.

<sup>110</sup> See *id.* at 117.

<sup>111</sup> See, e.g., Aarnio, *supra* note 14, at 81.

<sup>112</sup> See Alexy & Dreier, *supra* note 10, at 23-24; Barceló, *supra* note 104, at 417; Bergholtz & Peczenik, *supra* note 102, at 297, 311.

<sup>113</sup> See, e.g., Eng, *supra* note 9, at 189-90.

<sup>114</sup> Sometimes these procedures are enshrined in law. Article 13 of the Organic Statute of the Constitutional Court requires the full Constitutional Court to approve a departure from previous constitutional caselaw. See Miguel & Laporta, *supra* note 9, at 262. But most are part of the internal practice of courts. Examples cited in the book are of France,

two effects. First, there is a structural barrier to overturning a previous line of authority—in order to achieve this result, it will be necessary to convene a larger panel of judges taken from different parts of the court and convince them that overruling is the correct policy. Second, the meetings of these larger panels, for example the Sezioni Unite of the Italian Corte di Cassazione, the highest civil court, or the Adunanza Plenaria of the Consiglio di Stato, the highest administrative court, will carry special weight. Among the factors affecting the weight of precedent identified in the report, the formation of the highest court was seen as very significant.<sup>115</sup> In effect, these procedures recognize the need to overturn precedents with caution. In so doing, the courts provide evidence that precedent has weight as a reason for a decision, even if it is not determinative. After all, why trouble to convene a more cumbersome size of court if you are disregarding something that carries no special weight?

Third, it is clear that legal systems have procedures whereby superior courts can give authoritative rulings on questions of law. The clearest of these procedures is the reference procedure adopted under article 177 of the EEC Treaty whereby a national court faced with a doubt about the appropriate rule of EEC law to apply in a case may (and sometimes must) refer the question of EEC law to the European Court of Justice in Luxembourg for a ruling before continuing with the hearing of the case.<sup>116</sup> The court is there required to give an authoritative ruling that will serve not merely for the case in hand, but that will guide the national courts of all fifteen member states.

There are two other ways in which the superior courts can perform this function. In systems with a diversity of regional courts of appeal and lower courts, the highest courts have the role specifically as unifiers of the law.<sup>117</sup> This role of unification is even more central where the Constitutional Court is a specialist court distinct from the main courts. Here, for example, under article 65 of the Italian Constitution or in Poland, all public authorities (including courts) are bound to respect the decisions of the Constitutional Court.<sup>118</sup> When the full court convenes or where a small, specialist Constitutional

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see Troper & Grzegorzczuk, *supra* note 11, at 120-21; Germany, see Alexy & Dreier, *supra* note 10, at 31-34; Italy, see Taruffo & La Torre, *supra* note 14, at 177-78; Norway, see Eng, *supra* note 9, at 200-01; Poland, Morawski & Zirk-Sadowski, *supra* note 55, at 223; and Sweden, Bergholtz & Peczenik, *supra* note 102, at 293, 309.

<sup>115</sup> See Taruffo & La Torre, *supra* note 14, at 159.

<sup>116</sup> See BROWN & KENNEDY, *supra* note 11, at 193-226, 343-50. A number of national legal systems have a similar procedure. For example, in France, the lower civil courts can refer questions to the *Cour de Cassation*, and the lower administrative courts can refer a question to the *Conseil d'État*. L. N. BROWN & J. S. BELL, *FRENCH ADMINISTRATIVE LAW* 119 (4th ed. 1993).

<sup>117</sup> See, e.g., Taruffo & La Torre, *supra* note 14, at 146, 184 (discussing Italy).

<sup>118</sup> See *id.* at 184; Morawski & Zirk-Sadowski, *supra* note 55, at 237-38.

Court sits, there is a deliberate attempt to formulate a rule that the rest of the legal system should follow. Given that mission of unification, it would be extraordinary if the lower courts could lightly set aside the decisions so made. Indeed, for most countries, this is prohibited. However, even where conflict can still arise between superior and lower courts, it is clear from the national reports that great weight attaches to the decisions of the highest courts sitting in this way.<sup>119</sup> As Taruffo also points out, some courts are able to ensure a role in setting authoritative precedents by selecting the cases that come to them.<sup>120</sup> This is a familiar practice in common law jurisdictions.<sup>121</sup> In civilian systems, such as France, Italy and Spain, the right to bring a case to the highest court prevents a simple leave procedure.<sup>122</sup> Rather, what one gets is a selection between cases that will be given a summary judgment (often because they contain nothing new that precedent cases have not settled) and those that will be decided after full deliberation. In the former case, it is precedent that determines whether a summary or full hearing is required. In the latter case, there is a clear process of hearing designed to produce an authoritative statement of law.

A fourth and final deliberate strategy comes with the selection of cases for reporting. In a number of legal systems, reporting of decisions is controlled by the courts themselves. Thus Finnish, French, German and Italian highest courts control the cases that will be included in the official reports.<sup>123</sup> As Taruffo observes, “[C]ourts select prospective precedents, in some cases emphasizing the value of the precedents selected either by using narrow standards of selection, as in Finland, or by using special methods of selection, as in Poland.”<sup>124</sup> The very fact that certain cases have been selected for publication (or for comment in an annual report) is an indication of the importance the highest court attaches to that case, and the lower courts and lawyers will treat this as significant.

#### D. Saying and Doing

Each national reporter was asked whether there was a difference between what judges said they were doing and what they actually did. All national reports were able to point to ways in which judges in their

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<sup>119</sup> See, e.g., Alexy & Dreier, *supra* note 10, at 26.

<sup>120</sup> Taruffo, *supra* note 24, at 444.

<sup>121</sup> See Summers, *supra* note 39, at 358-59.

<sup>122</sup> See Miguel & Laporta, *supra* note 9 at 263; Taruffo & La Torre, *supra* note 14, at 146; Troper & Grzegorzczuk, *supra* note 11, at 104, 106.

<sup>123</sup> See Aarnio, *supra* note 14, at 73-74; Alexy & Dreier, *supra* note 10, at 22; Taruffo & La Torre, *supra* note 14, at 149; Troper & Grzegorzczuk, *supra* note 11, at 108.

<sup>124</sup> Taruffo, *supra* note 24, at 454. Cf. Aarnio, *supra* note 14, at 94-95 (noting that “merely repetitive” precedents come up only exceptionally).

system were less than open in what they were doing.<sup>125</sup> In part, this stems in most systems from a sense of unease about the boundaries of the judicial role. Where the judge is not clearly authorized to make law, then a role of laying down rules seems inappropriate. Even where some lawmaking role is acknowledged, the courts may feel inhibited about engaging in too overt a debate about what is socially acceptable. To this extent, analogy provides a way of narrowing the focus of the debate and limiting the judge's responsibility.

There are, however, other aspects of this situation. Most national reports identify the practice of "silent overruling" or distinguishing.<sup>126</sup> The refusal to acknowledge what is really going on may be linked to the earlier discussion of the procedural mechanisms for controlling departures from precedent. If there is a cumbersome procedure or, apparently, a need to go to appeal, then a lower judge or an ordinary panel of a higher court may be tempted to take a shortcut.

The prevalence of divergences between saying and doing does not mean that precedent has no real place in legal justification. Much of the silence and lack of transparency is illegitimate, even in terms of the legal system in question. Even where there is officially sanctioned obfuscation, as in France, there is enough evidence to suggest that precedent is genuinely an accepted justification used in discourse between judges, even if it does not feature in their discourse with the rest of the community.<sup>127</sup>

The conclusion we can draw is that precedent appears to be a feature in any legal system in one form or another. There are certain values that a legal system must serve—consistency, coherence, reliability, and protection of expectations—that require judges to adhere to the decisions of their predecessors unless they have good reason for acting differently. The complexity of a legal system requires that order be imposed by using precedents as limits on decisionmaking by judges for both practical and theoretical reasons. But the way that data from previous decisions is used as an integral part of the legal system depends on a range of institutional and constitutional factors that determine the authority of precedents.

#### IV

#### METHODOLOGICAL ISSUES

In terms of generating the appropriate information, the questionnaire used in this survey has proved a success. It provides sufficiently specific questions to provoke the national reporters to probe beneath

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<sup>125</sup> *E.g.*, Taruffo & La Torre, *supra* note 14, at 182 (stating that "[r]eported decisions failed to reflect the real justificatory use of precedent").

<sup>126</sup> *E.g.*, Summers, *supra* note 39, at 392-93.

<sup>127</sup> *See* Bell, *supra* note 17, at 224-29.

the conventional presentation of their system and to reveal matters such as the different weights attached to precedents, the different procedural devices used to resolve potential conflicts with precedent, and the different structures of legal decisions. It has produced a richer body of information than would be revealed by simply studying normal texts on legal method in each system. It has also imposed a common vocabulary in significant fields. Authors have proved able to represent their legal systems in terms of a vocabulary which is clearly attuned to generating theoretical questions. It is quite clear that these gains have not been won easily. Colleagues have not simply responded to a questionnaire, but have talked together in such a way that they have a common understanding of their tasks. For instance, the French report makes the French system more comprehensible to a common lawyer than any other survey produced by a French author.

The net result has been to provide a kind of "metalanguage"<sup>128</sup> which describes the activity of the legal system. There is no use in simply reproducing the language that each legal system conventionally uses. It is necessary to move beyond that to provide the basis for an intellectually justifiable comparison. The quality of the overview chapters suggests that this has been successful. The editors have understood the phenomena well enough to impose a framework that will generate answers faithful to the legal systems represented, but also provide the basis for meaningful comparison. That metalanguage is the language of the legal theorist, not the language of the practitioner of each legal system. Its value is the extent to which it clarifies answers to legal theory questions. Although not clearly explained in the book, it is obvious that the erudite editors knew clearly the questions of legal theory that were at issue in the field. They have responded to them with a comparative questionnaire that specifically raises the theoretical issues, and this has generated the data. In methodological terms, we recognize that they had some sense of what the answers might be before the questionnaire was set. The questionnaire brought that information out clearly and illuminated other legal systems of a similar kind. We cannot hope to provide such a useful theoretical metalanguage without first having a similar understanding of the likely results of studies in the field. The questions inevitably are shaped by the known data and help to take that range of knowledge further.

To succeed in this depth of comparison, the authors suggest that the range of comparative research may need to be limited: "[I]t might for some purposes be as significant to conduct comparisons between the role of precedent in specific branches of law considered across different legal systems as to make holistic comparisons between

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<sup>128</sup> Peczenik, *supra* note 83, at 464.

different systems in their entirety."<sup>129</sup> This has been suggested in other places with equal appropriateness.<sup>130</sup> By focusing on a specific aspect of a legal system, one can be clear about what can be generated by a comparison and what is a manageable set of data to understand. Given that different aspects of legal systems have potentially different points of convergence with other legal systems,<sup>131</sup> this is the only appropriate form of comparison.

The methodology adopted provides us with a rich range of data, but does it engage with the questions raised by various comparative lawyers about the differences in "mentalit[y]" among the participants in different legal systems?<sup>132</sup> It is not sufficient to capture certain facts about legal systems, for example, that previous cases are cited. It is also necessary that we understand what the activity means to the participants in the process: how do these references to cases fit their understanding of what it is to be a lawyer? It is not sufficient to have achieved a common semantics for the description of legal systems or to enable similar data to be assembled. We must also be given an insight into how participants view these facets of a legal system. A common questionnaire that the national respondents understand is very valuable as a heuristic device and as an aid to building a metalanguage usable for legal theory. But the national reporters must feel comfortable that their responses are faithful to their own legal tradition and do not distort it in an effort to achieve a common grid for explanation and description between different legal systems.

Basil Markesinis has well described some of the organizational dilemmas of comparative reports.<sup>133</sup> The approach of MacCormick and Summers provides a good example of how to achieve the close coordination of contributions. The contributors met together to design the questionnaire and to discuss the reports in draft, such that the final product represents a common enterprise. The result is that there is some significant commonality in the synthesis produced in Chapters 13 to 18, each of which deals with an important aspect of legal theory. The result is also that the national reporters have succeeded in making their legal systems intelligible to lawyers from other jurisdictions. The descriptions of court systems at the beginning of each chapter help to provide part of the basis of such information. In addition, the

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<sup>129</sup> MacCormick & Summers, *supra* note 43, at 533.

<sup>130</sup> *E.g.*, THE GRADUAL CONVERGENCE, *supra* note 25 (comparing specific areas of the law in different countries); Basil Markesinis, *Comparative Law—A Subject in Search of an Audience*, 53 MOD. L. REV. 1, 4-7 (1990).

<sup>131</sup> 1 ZWEIGERT & KÖTZ, *supra* note 2, at 74-75.

<sup>132</sup> *Id.* at 71; *see also* Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 52, 60-62 (1996) [hereinafter Legrand, *Legal Systems*]; Pierre Legrand, *How to Compare Now*, 16 LEGAL STUD. 232, 238 (1996) [hereinafter Legrand, *How to Compare Now*].

<sup>133</sup> Markesinis, *supra* note 25, at 3-20.

common understanding among the group producing the book helped to ensure that authors could anticipate the questions that others would ask (and probably did ask during the group sessions). A major myth to be combatted is that French and Italian judges do not refer to cases. The reports make clear that this is a myth and the discussion on procedures adopted in higher courts for dealing with potential conflicts with precedent shows this clearly.<sup>134</sup> Difference in style is accepted, but this is not taken to be evidence of a difference in reasoning. The analysis of weighing reasons provides us with some way of penetrating beyond the difference in style to an understanding of genuine differences in the legal importance of caselaw.

However, I would argue that the reports could have been enriched in their ability to represent the mentality of the lawyers in their legal system if they had talked more about legal education and the practice of lawyers.<sup>135</sup> Legal education is significant in that it is the process of induction into the legal tradition and shapes the thinking of the lawyers in the system. If university education focused around doctrinal legal writing as the primary object of attention, this will color the way lawyers subsequently treat the caselaw to which they refer. Education by the case method, on the other hand, will place cases and judicial decisions in center stage as a reference point to what the law is. An explanation of the character of legal education will help to illustrate the way in which the legal community values cases.

In a similar way, the way lawyers go about their practice of advice and preparing cases for trial will also tell us much about the place of precedent cases in the thinking of the legal community. How far do Italian and Polish lawyers search out the latest precedents of relevant courts when framing their advice? What do they look for? The valuable work which MacCormick, Summers, and their team have undertaken informs us of the place of precedents in the practice of judges, but we need to look beyond that in order to have a full sense of their place in the legal system. For a start, many civilian systems operate with the principle *curia novit legem*,<sup>136</sup> the judges will conduct their own research on precedent. In the English courts, barristers and their clerks lug many volumes of law reports into the court room, marked up so the judge can refer to the right pages.<sup>137</sup> In French courts, the judge comes into court having done her own research, photocopied

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<sup>134</sup> E.g., Robert S. Summers & Svein Eng, *Departures from Precedent*, in INTERPRETING PRECEDENTS, *supra* note 5, at 519, 529-30; Taruffo & La Torre, *supra* note 14, at 181; Troper & Grzegorzczuk, *supra* note 11, at 136.

<sup>135</sup> Markesinis signals both of these features as factors which contribute to the gradual convergence of western European legal systems. Markesinis, *supra* note 25, at 21-24.

<sup>136</sup> "Courts become acquainted with the law." Bell, *supra* note 17, at 216-17.

<sup>137</sup> See Bankowski et al., *supra* note 48, at 324 ("Counsel are expected to explain and present argument upon relevant precedents in arguing cases before the courts.").

the cases, and formulated a view.<sup>138</sup> These will rarely be discussed with counsel during the public hearing. The reports seem to be there for the private information of the judge. Judges have to justify their decisions to each other in terms of the precedents collected, but they do not have to use them much as justifications to the outside world.<sup>139</sup>

The method adopted requires not merely answers to a questionnaire, but for these to focus on providing concrete evidence on crucial issues. It seems right that Summers and Eng consecrate a whole chapter<sup>140</sup> to the question of departures from precedent. If precedent decisions are supposed to have weight as legal reasons, then departures must require special justification or some serious consideration. It is the value of the book that it is able to provide illuminating answers to how this crucial area is approached. The answers cover both the kinds of reasons given and the procedures adopted.

#### CONCLUSION

What lessons can we take from this book about how to conduct comparative law? In the first place, the book confirms that a concrete focus is required if we are to be able to conduct meaningful comparison among a number of different systems. This is a clear topic on which it is not sufficient to collate what is said in textbook introductions to the individual legal systems. Those books rarely contain the information on court practice and the analysis of the work of lawyers. Those books are designed to convey key messages to students as they start their studies, rather than to reveal the complexities of the practical operation of a legal system. It is necessary to get information about the practical operation of the systems and thus to have concrete evidence and illustrations. That process is only manageable if one is able to focus the consideration on a rather precise issue. The choice of narrow-focus comparison pays dividends, even if it leaves many questions unanswered. On a narrow focus, one is able to get answers representing a common approach.

The questionnaire does provide a sufficient precision of focus in that it provides a clear framework and a common vocabulary. The book demonstrates the need to reinforce the formal commonality that this provides with a dialogue between participants which ensures that they are on the same wavelength about what to cover. Some research using common, well-designed questionnaires still produces divergent results. But this is appropriate divergence because the national reports are revealing key differences in conceptions of the subject in

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<sup>138</sup> See Bell, *supra* note 17, at 212, 219-29.

<sup>139</sup> See *id.* at 227-28; Troper & Grzegorzczuk, *supra* note 11, at 112.

<sup>140</sup> Summers & Eng, *supra* note 134, at 519-30.

their own legal system.<sup>141</sup> In this case, the use of nationals to produce reports helps to ensure that the differences of approach in their countries are well reflected. I would not go so far as Legrand in suggesting that it is impossible for a foreign lawyer to penetrate the spirit of another legal system,<sup>142</sup> but I recognize that it is very difficult. At the same time, it has taken a long time of working together to establish the common approach, and this might have been easier with jurists from fewer jurisdictions. Most of the team producing the present book also produced *Interpreting Statutes*<sup>143</sup> in 1991. Between the two works, there has been a notable growing together in the approaches of the authors. This therefore argues for the need to have many of the same people involved in a number of projects.

A further advantage this book exhibits is that the research must have a clear focus and purpose. The purpose of the work was to reveal the role of judicial decisions in a legal system. This issue of legal theory relates to the nature of law, and the questions asked provide answers. Their conclusion is drafted in the language of legal theory: "It would, therefore, seem likely that any system of law that has a hierarchical court system and publishes the courts' decisions to any appreciable extent, and that exists for any significant period, will eventually come to recognize precedent as a major source of authoritative reasons for decision."<sup>144</sup> The comparative evidence adds plausibility to this generalization. Legal theory requires such underpinning if it is not to be merely speculative or misdirected. Comparative law generalizations are not always a direct contribution to legal theory, but here the conclusion is based on evidence that is designed to support a conclusion of legal theory and it succeeds. For it to be fully grounded, however, we need to understand the relationship of law to morals, social values, and social power. The conditionality of the conclusion is a further contribution that comparative law can provide. It is easy for a legal theory generalization to be overly influenced by the historical evolution of a few developed and articulate legal systems. The addi-

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<sup>141</sup> A good recent example is J. SCHWARZE, *ADMINISTRATIVE LAW UNDER EUROPEAN INFLUENCE* (1996). In that book, the Danish report focuses on the role of the Ombudsman, the British report on judicial review of administrative action, and the Italian report on the substantive rules governing the different organs of government. The radical differences of subject matter considered reflect different conceptions of administrative law in those systems.

<sup>142</sup> Legrand, *How to Compare Now*, *supra* note 132, at 240-41.

<sup>143</sup> *INTERPRETING STATUTES: A COMPARATIVE STUDY* (D. Neil MacCormick & Robert S. Summers eds., 1991). For a review, see John Bell, *Studying Statute Law*, 13 OXFORD J. LEGAL STUD. 130 (1993).

<sup>144</sup> MacCormick & Summers, *supra* note 43, at 542.

tion of the European Court of Justice to this collection is helpful.<sup>145</sup> The European system is relatively new (dating from 1952) and has brought together different legal traditions. Its own practice helps support the conclusion that, to operate, any legal system requires some version of a precedent system.

The book thus illustrates some good practice in comparative law research and can serve as a useful model for future work. Whether or not the conditions for its success can be reproduced is another matter. At least we can be clear why it worked and what it has contributed.

The book also isolates a number of features of a legal system that favor the development of a precedent system. Three are identified by Koopmans, a former judge of the European Court of Justice: a prevalence of unwritten rules, the need to impose uniformity in the service of a centralized authority, and the need to formulate principles.<sup>146</sup> The first condition might be reformulated as a dominance in the contemporary system of unwritten rules as the operating norms of the law. Although there may be codes of considerable detail, the judicial statements and general principles must have a significant place in the way the rules of the system are formulated today. This is important in the area of constitutional law. Most reports note the importance of precedent in constitutional law. Although nearly all the systems studied have detailed written constitutions, many of the provisions on civil rights and fundamental freedoms are formulated at a high level of generality with more attention to political rhetoric than legal practicality. Judicial statements have been able to mediate between the generality of the text and the specificity required for solving practical situations. The emphasis on uniformity is obviously significant. Specialized constitutional courts and national supreme courts have an important role in limiting divergent interpretations in lower courts. The Polish report mentions the increasing judicialization of law since the 1980s.<sup>147</sup> With the crisis of other institutions and the importance of the law as a mechanism for protecting individuals against the State, the status of judges and their pronouncements increased. A number of other countries have undergone a similar reevaluation of the role of the judge and this contributes to greater weight being placed on precedent in many civil law jurisdictions compared with the past.

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<sup>145</sup> All the same, one might remark that the report seems more distant from the practice of the court than some others and collaboration with a *referendaire* in the court might have produced a richer analysis of the evolution of this legal system.

<sup>146</sup> T. Koopmans, *Stare Decisis in European Law*, in *ESSAYS IN EUROPEAN LAW AND INTEGRATION* 11, 14-16 (David O'Keeffe & Henry G. Schermers eds., 1982).

<sup>147</sup> Morawski & Zirk-Sadowski, *supra* note 55, at 252.

But we should not exaggerate. In the first place, there is no uniform trend. The Spanish report points to a deliberate refusal to accord formal authority to precedent in recent decisions of the Constitutional Court.<sup>148</sup> Part of the reason for this was that judges of the democratic era need not consider themselves bound by judicial decisions of the Franco period. A similar concern exists in Poland after the fall of communism.<sup>149</sup> The culture of precedent presupposes a radical continuity with the past that most common law jurisdictions have experienced, but which very many civil law systems have not. Flexibility as a value must embrace an ability to adapt from one political regime to another, such that precedent may not be a helpful guide to what is required today. It is often not just continuity of formal rules that is required for a system of precedent to apply, but also a continuity of interpretation of the values and the political regime in which they fall. Precedent rules are part of a wider legal tradition whose influence needs to be recognized. In terms of legal theory, the phenomenon of precedent and the conditions that relate to its emergence and continuity require us to review the notion of law as a system of rules. For MacCormick and Summers, the consequence is to review the idea that lawmaking is an act of will in an individual instance. It is necessary, in their view, to see that the weight of the individual precedent is determined in large part by the quality of the justifications that lie behind it.<sup>150</sup> But one could go further and argue that precedent reveals the way in which legal norms and texts are embedded in the practice of a legal community and a legal tradition. It is only when we understand the tradition and place precedent within it that we really appreciate the view of the insider about why and to what extent precedential judicial decisions have any status as legal reasons. The legal community with its history and institutions has developed a particular tradition,<sup>151</sup> and it is this phenomenon that helps both to contextualize particular forms of lawmaking in the legal system and to clarify the interpretative practice of which following precedent is a part.

MacCormick, Summers, and their colleagues have provided us with much stimulus for thought both in the field of comparative law and in legal theory. This volume is the second reflection by the group, and it has improved on its predecessor. It is to be hoped that the group will be able to continue and produce further analysis of the complexities of our legal systems in such a way as to be able to provide a better grounding for legal theory.

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<sup>148</sup> Miguel & Laporta, *supra* note 9, at 273.

<sup>149</sup> See Morawski & Zirk-Sadowski, *supra* note 55, at 252-53.

<sup>150</sup> MacCormick & Summers, *supra* note 43, at 543.

<sup>151</sup> See Bell, *supra* note 36, at 53-57; Martin Krygier, *Law as Tradition*, 5 *LAW & PHIL.* 237 (1986).

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