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Precedent and the Law*

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1. Introduction

One of those themes which have always interested jurists is that of the binding or persuasive force of precedents. The topic has led to a great number of publications.¹ And yet, the time is right for a renewed discussion. A number of theoretical and practical issues are at stake. Of a theoretical nature is the question of how to justify the binding force of judgments within the perspective of a separation of powers. A practical question is how to deal with precedents in societies where there is no longer a clear hierarchy of courts, because of the proliferation of constitutional and supranational courts. Of a practical nature is also the question of what should be done when there are too few or too many precedents. In the former case, courts may be in need of sources other than case law from which to draw their inspiration. In the reverse case, some method will have to be devised as to how to cope with the thousands of decisions which may have to be considered.

On a personal note, my interest in the topic arose when I became involved in some research projects aiming at studying the harmonisation of private law in Europe. All over Europe, academics were actively studying the desirability and feasibility of such harmonisati-

* Session IC1. National Reports received from: Australia, M. Kirby; Belgium, M. Adams; Brazil, Th. Bustamante; Canada, C. Valcke; Colombia, C. Bernal Pulido; Czech Republic, Zd. Kühn; Denmark, J. Lookofsky; England & Wales, S. Whittaker; Finland, J. Husa; France, Ph. Malaurie; Greece, P. Sourlas; Hungary, B. Pokol; Israel, D. More & A. C. Wiechman; Italy, M. Taruffo; Japan, E. Matsumoto; Korea, Sang Yong Kim; Lebanon, J. Chaoul; Macao, I. Castelluci; Netherlands, O. Haazen; Poland, M. Krol; Serbia, D. Nikolic; Spain, G. García Cantero; US, M. Sellers. This report is also based on a report on international tribunals, M. Likosky & D. Sugarman. I have also profited from some Norwegian writings sent to me by Professor Svein Eng.

¹ A particularly useful volume is that by D. N. MacCormick & R. S. Summers (Eds.), *Interpreting Precedents* (1997).

on.² The question which I put to myself – and that is precisely the question which I have addressed in an introductory note to the national reporters – is whether or not even a fully harmonised private law would be applied the same way all over Europe. I developed the conviction that this is not necessarily the case. In various legal systems, the law in action and the law in the books may differ from one another to varying degrees. And courts may interpret uniform law in line with national traditions.³ One of these traditions has to do with the concept of precedent. The English common law, as is well known, is based on cases, whereas civil law systems are based on legislation. Behind this, there are conflicting theories on the importance of precedent.⁴ This is of course not just a question for Europe. In the world at large similar issues arise from the global application of conventions such as the Convention on the International Sale of Goods. In this general report, I want to explore to what extent these two approaches are converging in a harmonising Europe⁵ and a globalising world.⁶ I will argue that in civil law systems, two trends are discernable. In Western Europe, Latin America and Asia, precedent now plays an important role in practice, even when this is not always acknowledged in the legal literature. In Central and Eastern Europe and in China, also the practice is different, or at least has been different until recently. In the former socialist nations, precedent was not only denied a place as a source of law, but the courts often adhered to this denial doctrine. I will argue that this is not desirable, even apart from the question of harmonisation. But in the common law systems, too, a division can be made. First, there is the common law jurisdiction *par excellence*, the English common law, where the question is whether or not *stare decisis* is too rigid a doctrine for the law to develop. Second, in a number of common law jurisdictions, such as the United States, doubts have been expressed as to whether or not the courts are still influenced by precedents.⁷ A possible fifth group of jurisdictions – those where Western law has been exported beyond its host jurisdictions and where, in the words of Patrick Glenn, the problem of corruption has assumed massive proportions⁸ – will be omitted in this report. It would have been interesting to report on them, but no national reports from such jurisdictions were submitted.

² See my *General introduction to A. Hartkamp et al.*, (Eds.), *Towards a European Civil Code* (3rd ed. 2004).

³ U. P. Gruber, *Methoden des internationalen Einheitsrechts* (2004); H. Hahn, *Nationale Auslegungsmethoden, vergleichend betrachtet – europäische Anforderungen an die Methodenlehre*, 2003 *Zeitschrift für Rechtsvergleichung* 163-170.

⁴ See Gruber, *supra* note 3, Chapter 8, p. 275-328.

⁵ Mark Van Hoecke predicts that “The Europeanisation of private law will slowly, but thoroughly, influence theory building in the various jurisdictions”, M. Van Hoecke (Ed.), *Epistemology and methodology of comparative law* (2004).

⁶ Already more than twenty-five years ago, a convergence between the common law and the civil law was reported by M. Cappelletti, *The doctrine of stare decisis and the civil law: a fundamental difference or no difference at all?*, in *Festschrift Zweigert* 381, 393 (1981).

⁷ See the report on Australia (Kirby), on Canada (Valcke) and on the US (Sellers).

⁸ H. P. Glenn, *Legal traditions of the world/sustainable diversity in law* 247 (2000).

2. Structure of this Report

In the common law, cases have always been the cornerstone of the legal system. *Stare decisis* is an age-old tradition. In civil law systems the courts are but the “bouche de la loi”. Although in civil law jurisdictions, case-law plays an increasing role in the process of ‘Rechtsfortbildung’, this is hard to reconcile with the classical division of the *trias politica*, where it is the legislature’s monopoly to lay down rules.

The notion of the history of precedent, alluded to in the above-mentioned words, is false, as I shall try to explain, first with regard to the English common law (6) and the common law in other parts of the world (7), then with regard to civil law in Western nations (8) and civil law in the socialist and former socialist nations (9). Before arriving at these observations, I shall briefly deal with some terminological issues (3) and with the question of legal families where precedent is concerned (4). Also, I shall briefly describe the infrastructure of juridical and legal systems, which may be so different (5).

Having surveyed the scope of precedent in various jurisdictions, I would like to look more precisely into what constitutes a precedent (10) and what its effects are, including questions of overruling and prospective overruling (11). International precedents will then briefly be alluded to (12). I will then take a look at the future, first with regard to the common law (13), then civil law (14) and finally the law of the former socialist nations (15). I will conclude this general report with a prognosis for the future of precedent in the world at large (16).

The national reports and likewise this general report are basically limited to private law, although some national reports also deal with criminal law and most of the findings will also be valid for public law.⁹ The position of constitutional law is slightly different: the binding effect of the decisions of Constitutional courts is sometimes dealt with by legislation.¹⁰ For reasons of time and space I have refrained from analysing the role of precedent in the practice of supranational courts, such as the *Cour de cassation* of the OHADA in West Africa and the two main European courts, the European Court of Justice in Luxembourg¹¹ and the European Court of Human Rights in Strasbourg.¹² International courts, including internatio-

⁹ However, in criminal law the concept of precedent is not as rigid as in private law – see Lord Diplock in *R v. Gould*, [1968] 2 QB 65, 68-69 and Lord Woolf in *R v. Simpson*, [2004] QB 118, 128:

rules as to precedent reflect the practice of the courts and are of considerable importance because of their role in achieving the appropriate degree of certainty as to the law, but they should not be regarded as so rigid that they cannot develop in order to meet contemporary needs.

¹⁰ See for instance the reports on Greece (Sourlas) and on Colombia (Bernal-Pulido).

¹¹ There is reason to believe that at least this court adheres to the French legal method of dealing with cases: D. A. O. Edward, *Richterrecht in community law*, in R. Schulze & U. Seif (Eds.), *Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft* 75-80 (2003); S. Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent*, 2 parts (2001).

¹² See as to the two European courts the reports on England (Whittaker) and Serbia (Nikolic).

nal commercial arbitration boards, are however dealt with in the report by Likosky and Sugarman. The report focuses on Europe, but fortunately other continents are also dealt with to some degree.¹³

Some national reporters have developed certain ideas outside the general reporter's questionnaire. Thus, Catherine Valcke explains her theory of comparative law, which is the basis of her report.¹⁴ Several reporters dwell extensively on the coming into existence of their national court systems. Especially the reports from newly formed nations such as Serbia,¹⁵ or from little known legal systems such as that of Macao,¹⁶ may be of special interest to the reader. Almost all the national reporters have provided a historical framework, informing us – in common law jurisdictions – when *stare decisis* came into being, or – in civil law jurisdictions – when the courts seized power and their creative powers were first recognised.¹⁷

Some reports, such as those from Canada¹⁸ and Hungary,¹⁹ have added empirical data on precedents. These are too isolated, however, to form the basis for comparative conclusions.

3. Terminology

First, a terminological question must be settled. When may we speak of precedent? In the Belgian report, Maurice Adams argues that the term *precedential force* is mostly used as a kind of catch-all phrase covering two – in his opinion – conceptually separate notions, i.e. court decisions as 'precedents as such' on the one hand, and what he proposes to call the 'gravitational force' of court decisions on the other.²⁰ Although I agree with Adams that there is a wide gulf between common law and civil law where precedents are concerned, I prefer to use the term 'precedent' to cover both situations, chiefly because the notion of precedent is so universally accepted, whereas 'gravitational force' reminds one more of Newton's laws of physics. Often, the distinction is then made between binding and persuasive precedent,²¹ or

¹³ For instance, to what extent the adherence to precedent is considered to be a virtue for American judges – see S. Brenner & H. J. Spaeth, *Stare indecisus/the alteration of precedent on the Supreme Court 1946-1992* (1995). One associate justice of the US Supreme Court is recorded as having said: "I don't follow precedents, I make 'em" (William O. Douglas, quoted by R. A. Posner, *New Republic*, 24 February 2003).

¹⁴ Report on Canada (Valcke).

¹⁵ Report on Serbia (Nikolic).

¹⁶ Report on Macao (Castellucci).

¹⁷ In France, for instance, this occurred in the third quarter of the 19th century (Report on France (Malaurie)).

¹⁸ Report on Canada (Valcke).

¹⁹ Report on Hungary (Pokol).

²⁰ Report on Belgium (Adams).

²¹ See for instance the report on Israel (More and Wiechman).

as the civil law variant is described, the ‘light variant’.²² One reporter distinguishes between the sociological and political aspect (where a precedent is binding) and the normative aspect (where a precedent is only persuasive).²³

A further terminological question concerns the various aspects of precedents. In her Polish report, Malgorzata Krol distinguishes between formal and informal (or factual) precedents (from the institutional point of view), and constitutive and regulative precedents, from the substantive point of view.²⁴ Another distinction is between vertical precedent – denoting that there exists a hierarchy between courts – and horizontal courts, where courts of the same level influence one another.²⁵

4. A Division into Four – or Five? – Groups

The division of legal systems into families has perhaps had its heyday, but may still serve a useful function, if only to break down the number of national reports in the present volume. The most obvious division which springs to mind when dealing with precedent is that between common law and civil law. Indeed, in the common law precedent is a central element, whereas in the civil law it is mostly there, but rather inexplicably so. In theory, reporters from civil law jurisdictions argue, precedents have no more than persuasive power, but *de facto* case law has a higher status. That is to say, in most Western civil law jurisdictions in Europe, Latin America and Asia.

In the former socialist states of Central and Eastern Europe and in a present-day socialist state such as China, precedent does or did in fact not play a role at all, so these jurisdictions make up a separate group of nations, which often – as is the case with Central and Eastern Europe – are moving rapidly towards the Western civil law group. Often, but not always, as the example of Macao illustrates, there may actually be a move away from civil law towards a more Chinese-oriented attitude towards precedent. The Civil Law tradition is often further classified along the lines of the Germanic, the Nordic and the Romanic families. In this chapter, a fourth Civil Law group, that of jurisdictions outside Europe has been added. Two further groups consist of mixed jurisdictions and international tribunals.

As I have suggested earlier, a separate group of states consists of those countries where, because of corruption within the judiciary, case law has little if any value (‘because lawyers know that it merely reflects who was willing to pay the highest price’). These states, some of which have been identified by Patrick Glenn, are not represented by national reports in this volume (and had there been reports from such countries, it is doubtful whether a national

²² Report on Finland (Husa).

²³ Report on Greece (Sourlas).

²⁴ Report on Poland (Krol).

²⁵ Report on Denmark (Lookofsky).

reporter would feel inclined to describe his or her judiciary as corrupt). More in general, reports from Africa, most of Asia and most of Latin America are missing from this volume, which therefore has a slightly unbalanced nature. Not that this is uncommon: a major problem of the International Academy of Comparative Law as it is currently constituted, is the virtual absence of the less affluent nations. Another possible criticism of the Academy is its accent on national systems. There are at least two other systems which could be included in volumes such as this: the semi-autonomous systems – of a geographical or functional nature – within nations and the supranational systems. In order to remedy this shortcoming to some extent, this chapter is also based on a report on precedents in international tribunals.

So far, it seems as if the common law is a monolith, but reading the various national reports from common law jurisdictions will reveal that this is not in fact correct. First of all, it will soon become clear that the common law systems are constantly in a state of flux. Second, it will be seen that there are at least two strands in common law jurisdictions. First, as is the case in England & Wales and Australia, a rather (Australia) to very (England & Wales) hierarchical structure poses the question to what extent courts may leave aside precedent to adapt the law to the present needs of society. Second, as is the case in Canada and the US, the question is rather how in the absence of a court which controls all areas of the law the various lower jurisdictions do not grow apart to any great extent.²⁶

Finally, it may be observed that the topic of precedent raises various issues, which although they are related, may still be set apart: as Vogenauer has recently argued, these are, among other things, the competence of the courts to create law, the binding force of court decisions and the methods by which precedents are applied.²⁷

5. Setting the Scene

Precedents do not come out of the blue. In assessing their importance, the whole organisation of the judiciary and perhaps even the legal system is of the essence. These matters cannot be dealt with at length in this volume, but they can at least be alluded to in a very succinct form.

To begin with: it does make a difference whether we are dealing with a decision of the United Kingdom's House of Lords – shortly to be replaced by a Supreme Court – which in 2002 delivered no more than 72 decisions, or with a decision coming from countries such as France, Italy and Spain, which in that year delivered 32,296, 63,534 and 28,444 decisions respectively.²⁸ In some cases, precedential value is only given to a case when its dictum has been repeated at least twice.²⁹ These large numbers have the consequence that the courts need

²⁶ Reports on Canada (Valcke) and the US (Sellers).

²⁷ S. Vogenauer, *Common Law und Rechtsgeschichte*, 2006 *Zeitschrift für Neuere Rechtsgeschichte* 48-74.

²⁸ L. Vogel (Ed.), *Cours suprêmes: comment le filtrage des recours révèle le pouvoir des juges* 107-109 (2005).

²⁹ Report on Colombia (Bernal Pulido).

special procedures to ensure uniformity (*assemblée plénière, Großer Senat*). Other courts have special rules for overruling earlier precedents.³⁰ Special rules have in some jurisdiction also been adopted to overrule earlier precedents.³¹ Large numbers of decisions are also produced in the United States, where the special situation is that all 50 states have their own legal system, the decisions of which do not formally bind the courts of other states.

Widely diverging is also the style of judgments, ranging from the infamous single sentence decisions in France to the lengthy debates with academic writing and other case law in Germany and bringing up policy arguments especially in common law jurisdictions (as against the legalistic and deductive style prevailing in the civil law countries).

Then, case reporting differs substantially from one legal system to another. In some systems, all cases are currently reported in digital form; in others, only specific cases are reported, either by the courts themselves³² – which may do so by reporting a *massima*³³ or a *súmula*³⁴ – or by commercial companies. Arbitration tribunals generally dismiss the idea of precedent, other than that previous decisions are persuasive.

Supreme courts now frequently quote their own case law, witness the situation in Germany. Even in France “la Cour de cassation s’appuie maintenant sur ses propres règles, qu’elle a elle-même énoncées, les qualifiant de ‘principes’.”³⁵

Finally, annotations may help to focus on what is important in recent case law. In some jurisdictions, it was once feared that critical case notes would put one’s legal career in jeopardy, but this situation now seems to be improving.

6. Precedents in the Common Law: England & Wales

Earlier, in section 2, I mentioned the widespread belief that precedents and common law are interchangeable. This belief happens to be erroneous.³⁶ The system of precedents is much more youthful than the common law itself, it is not uncontested and it is subject to erosion. Historically speaking, precedents are much younger than one might think. “Prior to the mid- or late nineteenth century, judges in England did not regard themselves bound by earlier decisions [...].”³⁷ According to the thinking at the time of Bracton in 1256, “the law was not to be found in individual cases; rather the case decisions in their totality were a reflection of

³⁰ Report on Korea (Kim) and on Macao (Castelluci).

³¹ Report on Macao (Castelluci).

³² So for instance in Korea – Report on Korea (Kim).

³³ Report on Italy (Taruffo).

³⁴ Report on Brazil (Bustamante).

³⁵ Report on France (Maurier).

³⁶ Report on England (Whittaker).

³⁷ J. D. Murphy & R. Rueter, *Stare Decisis in Commonwealth Appellate Courts* 3 (1981).

the law.”³⁸ It was – among other things – the emergence of the printed text and the putting in place of a hierarchy of courts which in the sixteenth century combined to shift the nature of legal reasoning in the common law.³⁹ Other elements which contributed to the rise of *stare decisis* were the growing custom of providing reasons for decisions and the improvement in the quality of law reporting.

Only in 1898 was the binding force of precedents accepted,⁴⁰ but without everyone being convinced. Lord Denning, for example, engaged in an epic battle with precedents (he was known for his dissenting opinions).⁴¹ Before him, Lord Wright had already criticised the – now relinquished – theory whereby the House of Lords was bound by its own decisions.⁴² There has always been opposition in academic circles: “Judges owe their fidelity, not to the pronouncements of predecessors, but to the law. They might not now identify that as ancient custom, and in practice they will usually discover it in the law reports, but they are ultimately free to reject a precedent if they do not believe it represents the law.”⁴³ The prevailing view on precedent does give courts some discretionary power: “most cases coming to appellate courts for decision allow judges considerable scope for avoiding precedents which would result in injustice or an otherwise inappropriate decision.”⁴⁴ We should keep in mind that the notion of ‘precedent’ in the common law stands for two different meanings:

In English law, the concept of ‘precedent’ covers two ideas that are closely connected. In the broad sense, precedent involves treating previous judicial decisions as authoritative statements of the law which can serve as good legal reasons for subsequent decisions. In the narrow sense, precedent (often described as *stare decisis*) requires judges in specific courts to treat certain previous decisions, notably of superior courts, as a binding reason.⁴⁵

³⁸ Th. Lundmark, “Soft” *stare decisis*: the common law doctrine retooled for Europe, in R. Schulze & U. Seif (Eds.), *Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft* 161-168 (2003).

³⁹ D. J. Ibbetson, *Case-law and doctrine: a historical perspective on the English common law*, in R. Schulze & U. Seif (Eds.), *Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft* 27, 33 (2003).

⁴⁰ *London Tramways Co v. London County Council*, [1898] AC 375.

⁴¹ See M. Adams, *Stare decisis et quia non movere / Rechtszekerheid en de gebondenheid aan precedentes in het Engelse rechtssysteem. Lessen voor ons?*, 2002 *Tijdschrift voor Privaatrecht* 13, pp. 37-40.

⁴² Lord Wright, *Precedents*, 8 *Cambridge Law Journal* 118, 122 (1944).

⁴³ P. Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, in L. Goldstein (Ed.), *Precedent in Law* (1987) p. 73, 87. See already A. L. Goodhart, *Precedent in English and Continental Law*, 50 *Law Quarterly Review* 40-65 (1934).

⁴⁴ C. Cook, *et al.*, *Laying Down the Law* (5th ed. 2001) p. 79. On p. 107 they refer to a decision by the Australian High Court in which, notwithstanding a two-hundred-year old precedent, rape within marriage was held to be possible – see also the Maryland case reported by Sellers in his American report. On p. 109 they mention the rejection of vicarious liability of *Rylands v. Fletcher* as an independent tort category by the High Court in *Burnie Port Authority v. General Jones Pty Ltd*, (1994) 179 *Commonwealth Law Reports* 520.

⁴⁵ J. Bell, *Sources of Law*, in P. Birks (Ed.), *English Private Law*, I (2000) p. 1, 29. However, see report on Australia (Kirby).

The system of precedent has a number of exceptions; Holdsworth already mentioned these in 1934.⁴⁶ But, on the whole, the system of precedent seems to be well established in *common law* countries, including mixed legal systems such as those of Israel⁴⁷ and Scotland.

7. Common Law in other Jurisdictions

It is of interest to observe that in other common law nations, such as Australia, Israel and the United States, the development of *stare decisis* has not been the same as in England & Wales. An interesting case at hand is the *Bozman v. Bozman* case set out in the American report,⁴⁸ where a Maryland court negated an age-old common law precedent of interspousal immunity. The case illustrates the American approach which seems more liberal than the English attitude: “Exaggerating the inflexibility of *stare decisis* would ‘mandate the mockery of reality and the cultural lag of unfairness and injustice’.”⁴⁹

8. Precedent in a Civil Law Jurisdiction: the West

From a historical perspective, the era of *ius commune* was one in which there was a system of precedents on the European continent.⁵⁰ With the French Revolution⁵¹ and the entry of the codification principle on the continent, the system of precedents was all but abolished. The Prussian Code of 1794 held that ‘auf altere Aussprüche der Richter bei künftigen Entscheidungen keine Rücksicht genommen werden (soll)’ (in future cases, old decisions shall not be taken into consideration).⁵² In France and the countries with a system of cassation, courts only had to take into account another court’s decision after a *renvoi* by the Court of cassation.⁵³ Precedents were something of the past, at least in theory. Civil codes did not mention case law;⁵⁴ only constitutions might do so.⁵⁵ In practice, however, case law always remained of interest, especially after well-known academics started to write annotations.⁵⁶ In many jurisdictions, a change towards the growing use of precedents came about because of external influences, such as the introduction of the European Convention on Human Rights.⁵⁷

⁴⁶ 50 *Law Quarterly Review* 180 v. (1934), quoted by R. Cross & J. W. Harris, *Precedent in English Law* (4th ed. 1991) p. 125.

⁴⁷ Report on Israel (More and Wiechman).

⁴⁸ Report on the US (Sellers). *See also* the similar Australian case referred to above.

⁴⁹ Report on the US (Sellers).

⁵⁰ J. Drion, *Stare decisis/Het gezag van precedenten*, in *Verzamelde geschriften van J. Drion* 142-170 (1968).

⁵¹ Report on France (Malaurie).

⁵² Drion, *supra* note 50, p. 152.

⁵³ Drion, *supra* note 50, p. 147 (this is in fact slightly more nuanced).

⁵⁴ Report on Korea (Kim).

⁵⁵ Reports on Belgium (Adams) and on Korea (Kim).

⁵⁶ In the Netherlands Eduard Maurits Meijers and Paul Scholten, who both became annotators for the *Nederlandse Jurisprudentie*, were of major importance in this regard.

⁵⁷ Report on Finland (Husa).

How does one reconcile this practice with the theory of the *trias politica*? The Finnish reporter signals the problem of the missing theory, but fails to provide one himself.⁵⁸ Elsewhere, it has been suggested that a judge is bound to follow precedents “unless he can show why this precedent is wrong, outmoded, unjust or distinguishable.”⁵⁹ In the footsteps of Vranken,⁶⁰ the Dutch reporter has argued that precedents should be ‘sort of binding’, which should be sufficient to speak of a binding effect, while at the same time providing sufficient flexibility to allow the courts to deviate.⁶¹ It has also been argued that the fact that the argument against precedent, which is that only the legislature is democratically controlled, hardly makes legislation more democratic than judge-made law.⁶² The dilemma has also been analysed in terms of the *trias politica*.⁶³ There appears to be a *communis opinio* that in Western civil law there is a light variant of precedent. As to the theoretical foundation of this system, the opinions are divided.⁶⁴ Some look at constitutional values such as equality⁶⁵ and predictability. Others explain the following of precedents by the fear of judges for missing promotion or re-election.⁶⁶

As is well known, the civil law jurisdictions do differ more between each other than common law systems do. In Belgium, when it seems as if the *Cour de cassation* is unaware of any precedents, in fact it is the conclusions of the *Parquet général* and the *mercuriales* of the *procureur-général* which serve as a functional equivalent.⁶⁷ In France, a strict division between law and fact still has the consequence that courts of appeal are not considered to provide precedents. In Germany, legal authors have sometimes argued that once the *Bundesgerichtshof* has overturned previous case law, this will apply retroactively to the date of the entry into force of the legislation concerned to all cases that have arisen prior to the decision. Karl Larenz may be mentioned as exemplifying traditional German doctrine on this point.⁶⁸ A more modern view has been expounded by Fikentscher with his ‘Theorie der Fallnorm’⁶⁹ and Bydlinski with the ‘Lehre von der subsidiären Verbindlichkeit

⁵⁸ Report on Finland (Husa).

⁵⁹ R. J. P. Kottenhagen, Van precedent tot precedent 312 (1986).

⁶⁰ J. B. M. Vranken, C. Asser’s Handleiding tot de beoefening van het Nederlands burgerlijk recht/Algemeen deel** (1995) Nr. 190.

⁶¹ O. A. Haazen, *Algemeen deel van het rechterlijk overgangsrecht* (Ph.D. thesis, Tilburg, 2001) p. 340.

⁶² P. Rijpkema, *Rechtensrecht* (2001).

⁶³ A. J. T. Woltjer, *Wetgever, rechter en het primaat van de gelijkheid* (2002).

⁶⁴ There is an abundance of philosophical writing on this theme. See R. Sittala, *A Theory of Precedent/From Analytical Positivism to a Post-Analytical Philosophy of Law* (2000), with many references to Derrida, Dworkin, Hart and Wittgenstein.

⁶⁵ Report on Belgium (Adams).

⁶⁶ Reports on Japan (Matsumoto) and on Israel (More & Weichman).

⁶⁷ I. Rorive, *Le revirement de jurisprudence/Etude de droit anglais et de droit belge* 504, 520 (2003).

⁶⁸ K. Larenz, *Über die Bindungswirkung von Präjudizien*, in *Festschrift Hans Schima* 247-264 (1969). See also the translation into English of Larenz’s *Methodenlehre der Rechtswissenschaft* (1969), in J. Dainow (Ed.), *The role of judicial decisions and doctrine in civil law and in mixed jurisdictions* 133-162 (1974).

⁶⁹ W. Fikentscher, *Präjudizienbindung*, 1985 *Zeitschrift für Rechtsvergleichung* 163-193.

des Präjudizienrechts'.⁷⁰ For a more extended analysis, I refer to the study referred to above by MacCormick and Summers⁷¹ and to a volume edited by Vincenti.⁷² According to many authors, a convergence is taking place: "common law and civil law practice, each in like fashion to the other, likewise admit of justified departures from precedent."⁷³ This convergence is also considered to be apparent from a number of publications on the legitimacy of judge.⁷⁴ As I set out at the end of this report, I do not share this view.

9. Precedent in Central and Eastern Europe

So far, this report has presented the place of precedents in common and civil law as one evolving from two conflicting trends: the common law trend towards precedent, with a slight recoil only recently occurring, and the civil law trend away from precedent, with a slightly earlier tendency towards recognising precedents. Where does this leave the legal systems of Central and Eastern Europe, and perhaps more in general the former socialist nations? The answer can be short and succinct: way back where the civil law countries stood some fifty years ago: "the post-communist judicial methodology is much closer to the narratives of the European legal culture that prevailed in the nineteenth century."⁷⁵ One of the reasons for this can be found in the writings of communist writers. In the former Czechoslovakia, the role of precedent was denied on the ground that precedent as a source of socialist law would go against the principle of democratic centralism.⁷⁶ In this view, judge-made law is incomprehensible, beyond the reach of the vast masses of the population. Likewise, the Hungarian Eörsi emphasised that the socialist legal system consisted exclusively of written law.⁷⁷ The situation in the German Democratic Republic⁷⁸ and Estonia⁷⁹ was very similar. A

⁷⁰ F. Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* 501-515 (2nd ed. 1991).

⁷¹ MacCormick & Summers, *supra* note 1.

⁷² U. Vincenti (Ed.), *Il valore dei precedenti giudiziari nella tradizione europea* (1998).

⁷³ MacCormick & Summers, *supra* note 1, p. 531, 535.

⁷⁴ In 2002, this was one of the subjects on the agenda of the XVIth Comparative Congress of the Académie Internationale de Droit Comparé. See, among others, the national reports of J. L. M. Gribnau, *Legitimacy of the judiciary*, in Netherlands Reports to the Sixteenth International Congress of Comparative Law 25-45 (2002); B. Mercadal, *La légitimité du juge*, 2002 *Revue internationale de droit comparé* 277-291; A. Voßkuhle & G. Sydow, *Die demokratische Legitimation des Richters*, 2002 *Juristen Zeitung* 673-682.

⁷⁵ Report on the Czech Republic (Kühn). See also Zd. Kühn, *Worlds apart/Western and Central European judicial culture at the onset of the European enlargement* (2004).

⁷⁶ Boguszak, *Základy socialistické zákonosti v. CSSR*, Praha, 1963, p. 144 ff., quoted by Kühn, *supra* note 75.

⁷⁷ G. Eörsi, *Comparative civil (private) law/Law types, law groups, the roads of legal development* 547 (1979).

⁷⁸ I. Markovits, *Children of a lesser God: GDR lawyers in post-socialist Germany*, 94 *Michigan Law Review* 2270 (1996).

⁷⁹ F. Emmert, *The independence of judges/A concept often misunderstood in Central and Eastern Europe*, 3 *European Journal of Law Reform* 405 (2002).

problem also was the paucity of reported cases. One author, writing about Russian tort law, had to resort to newspaper clippings to find out about law suits against the government.⁸⁰ Only in Poland may the writing of Wróblewski have been influential in the use of precedent.⁸¹

Kühn suggests that the types of cases decided by the courts in Central and Eastern Europe, often very simple in nature, were very different from those in Western Europe:

Complex issues of international litigation, or of administrative, constitutional or commercial law, either did not arise in the socialist state or the task of resolving them was transferred from courts to other bodies. For instance, East German judges handled a caseload consisting 51% of family law issues, while the caseloads of their West German counterparts contained only 13.7% of similar cases.⁸²

And he adds as to the personnel of the judiciary that:

it was impoverished, lacking in prestige, with very problematic education, ignored by the elites, who generally did not join the judiciary, either before or after the anti-communist revolution. The judiciary continued to be a predominantly female profession, which was, however, not the sign of flourishing gender equality.⁸³

According to this author, since the fall of communism the old philosophy of bound decision-making still continues:

The ordinary courts in the Czech and Slovak republics, and most other post-communist nations, have never acted as one might expect transitional courts would act. With the exception of the constitutional courts, the post-communist courts have continued their formalist reading of the law. When it was necessary to solve a more difficult case, they often saved themselves by disposing of the case on purely formalist grounds.⁸⁴

Kühn informs us about his own experience in the Czech Republic:

It is not rare to find a judge, especially in the lower courts in both the Slovak and Czech Republics, who refuses during trial even any reference to precedent or legal science because she is not "bound by them" and, therefore, they are without any importance for her reasoning, which remains independent of anything but the letter of the law.⁸⁵

Similar views are reported from Hungary, where on the other hand there is a movement towards greater freedom in the courts,⁸⁶ Poland⁸⁷ and Serbia.⁸⁸

10. What Constitutes a Precedent?

The civil law use of precedents has been characterised as follows: "what the judge was looking for in the "precedent" was a rulelike pronouncement of higher authority, the facts

⁸⁰ D. D. Barry, *Tort law and the State in Russia*, in G. Ginsburgs, D. D. Barry & W. B. Simons (Eds.), *The revival of private law in Central and Eastern Europe/Essays in Honor of F. J. M. Feldbrugge* 179, 187 (1996).

⁸¹ J. Wróblewski, *The judicial application of law* (1992).

⁸² Kühn, *supra* note 75.

⁸³ Kühn, *supra* note 75.

⁸⁴ Kühn, *supra* note 75.

⁸⁵ Kühn, *supra* note 75.

⁸⁶ Report on Hungary (Pokol).

⁸⁷ Report on Poland (Krol).

⁸⁸ Report on Serbia (Nikolic).

of the case stripped to their shadows. Thus what conventional common-law doctrine would devalue as mere dictum was welcome precisely because it stood independent of the concrete constellation of facts in the case.”⁸⁹

On a number of technical points, a comparison between legal systems may be useful, simply to illustrate the different attitudes. A first question which may be raised is whether a single court decision may constitute a precedent. Although the English system is usually described as having moved from a jurisdiction where only the combined decisions of a court constituted the law towards a system where single decisions are now binding, the English reporter throws a slightly different light on this point.⁹⁰ Colombia has an intriguing rule that only if there are three decisions of the same nature, is there a precedent.⁹¹

A second question is what part of a judgment is considered to form a precedent. For reasons of space I once again refer to the English report on this point.⁹²

11. The Effect of Precedents

There are a further number of technical questions which may be raised once a judgment has been reported. In common law systems, there is no doubt that the *stare decisis* rule covers inferior courts. In England & Wales, a Court of Appeal judgment will bind the High Court, but not the House of Lords. And what about the Court of Appeal itself? The question has become famous with regard to the House of Lords, which in 1966 issued its well-known practice statement that it considered itself to be no longer bound to follow its previous decisions. Another question is the extent to which courts of appeal, where there are more than just one, are bound by the decisions of their colleagues.

Quite a different kind of question is what binding force actually means. Does a court have no discretionary power to avoid a precedent which it does not like, even where *stare decisis* is adhered to in the most rigid way?

With regard to overruling it may be of interest to see what techniques are used to do this. Is prospective overruling practised?⁹³ According to the American reporter, prospective overruling does occur, but usually not, because overruled precedents must be viewed as having been ‘mistaken’ or ‘unreasonable’ even before the high court has declared them to be so.⁹⁴ And what about the use of *mercuriales* in overruling?⁹⁵

⁸⁹ M. Damaska, *The faces of justice and state authority/A comparative approach to the legal process* 33-34 (1986)

⁹⁰ Report on England (Whittaker).

⁹¹ Report on Colombia (Bernal Pulido).

⁹² Report on England (Whittaker).

⁹³ Haazen, *supra* note 61.

⁹⁴ Report on the US (Sellers).

⁹⁵ Rorive, *supra* note 67.

12. International Precedents

As we have seen, there are certain jurisdictions where the number of precedents is very small. In those countries the question may arise as to what should be done when neither legislation nor case law provide solutions. One of the possible answers is to import precedents from other legal systems. These imports are also to be recommended when uniform legislation has to be interpreted by a court. Even non-uniform legislation may on occasions be subject to comparative interpretation.⁹⁶

13. The Future: Common Law

What does the future hold in store for us? Are the common law and the civil law converging and is it simply a question of time before Central and Eastern Europe's backlog is overcome? It seems as if in England & Wales the very rigid adherence to stare decisis has slightly declined during the past half century. Recently, there seems to be more room for divergence. On the basis of a number of cases which attracted a great deal of popular attention, Harris has concluded that precedents should be easier to depart from: "The presumption to date has been that stare decisis values should prevail over the overruling of 'merely wrong' precedents. I think that the presumption should be reversed in favour of the overruling of wrong precedents unless their retention can be justified in the circumstances by overriding stare decisis values."⁹⁷ For a further analysis of this tendency I refer to the English report.⁹⁸

14. Civil Law Systems: Towards Convergence with the Common Law?

Many writers in civil law countries seem to be of the opinion that the future lies in a system in which precedent plays a larger role, as compared to legislation.⁹⁹ I do not share this view. It seems to me that the notion of the primacy of the precedents of one single supreme court in a legal system is no longer adequate.¹⁰⁰ There are two arguments which I can give. First, the central position of the courts – and the rather humble role of legal writing – is changing. In most European countries, Constitutional courts or councils have gained in importance. If one reads the recent overviews of Belgian or German case law, the importance of the decisions

⁹⁶ See I. Klöckner, *Grenzüberschreitende Bindung an zivilgerichtliche Präjudizien* (2006).

⁹⁷ B. V. Harris, *Final appellate courts overruling their own 'wrong' precedents: the ongoing search for principle*, 118 *Law Quarterly Review* 408, 427 (2002). On p. 422 ff. the author develops a number of "considerations relevant to deciding whether to defer to or overrule precedent."

⁹⁸ Report on England (Whittaker).

⁹⁹ See Adams, *supra* note 41, p. 50.

¹⁰⁰ The same argument can be made with regard to public international law – see N. Miller, *An international jurisprudence? The operation of "precedent" across international tribunals*, 15 *Leiden Journal of International Law* 483, 498 (2002), who however argues that the various international tribunals have taken to referring to the case law of one another.

of the Arbitration Court (Belgium's Constitutional Court) and the *Bundesverfassungsgericht* (Germany's Constitutional Court) is overwhelming. But the Belgian *Cour de cassation* and the German *Bundesgerichtshof* will also have to follow the decisions of the two European courts: the Luxembourg Court of Justice – including its Court of first instance – of the European Union and the Court of Human Rights in Strasbourg. The Marckx case of June 13, 1979 is an example of a European decision of the latter court which has exerted considerable influence in Belgium. In the future, a system of federal European courts under the two Luxembourg courts can also be envisaged.

Apart from this formal argument, there is also a substantive argument. The changes in norms and values, in theories as to finding the law, are nowadays so rapid that case law – which often takes a long time to be submitted to a legal system's highest court – simply cannot cope with them. Legal authors will have to fill the gap. They should formulate general principles and fit in the various bodies of case law developed by the traditional highest civil courts, the newly formed constitutional courts and the European courts. Attributing *stare decisis* to the decisions of one of these courts no longer fits into this system.

This will mean that established precedents, which have not yet been challenged in the courts, may well lose their value, because they are at variance with the newly developed general principles, such as that of non-discrimination,¹⁰¹ equality¹⁰² or proportionality.

So far, I have addressed purely national questions of precedent. But in Europe, there is a growing body of Community law. It does not make sense that this law is being interpreted in different ways and by way of different systems of reasoning in the various jurisdictions. In this regard, civil law jurisdictions have much to learn from common law courts, where the use of precedents from other common law jurisdictions, if only as persuasive precedents, is by no means exceptional.¹⁰³ Recently, the English courts have even accepted continental cases as – persuasive – precedents.¹⁰⁴ Civil law courts rarely take into account what is happening over the border. I would suggest that not only the courts are to blame; legal academics also have a task in preparing the use of comparative law. A most important part of this is the collection of cases, putting these into a database and providing translations into easily accessible languages.¹⁰⁵

¹⁰¹ See for instance N. Jägers, *Corporate Human Rights Obligations: in Search of Accountability* (2002).

¹⁰² D. Berthiau, *Le principe d'égalité et le droit civil des contrats* (1999).

¹⁰³ A famous example is the case of *Donoghue v. Stevenson*, where a New Jersey case was used. See also the report on Australia.

¹⁰⁴ See cases such as *White v. Jones*, *Fairchild*, and *Greatorex v. Greatorex*, [2000] 1 Weekly Law Reports 1970, quoted by B. Markesinis, *Comparative Law in the Courtroom and Classroom/The Story of the Last Thirty-Five Years* (2003).

¹⁰⁵ Some examples are the several collections of cases relating to the Vienna Sales Convention and the one on the EU Directive on product liability, set out by Lundmark, *supra* note 38, p. 161, 168.

15. The Former Socialist Nations: We Shall Overcome!

Should the situation as to the status of precedents in Central and Eastern Europe remain as it is at present? I suggest that although this is something for the countries themselves to decide, for the ability of their legal system to react quickly to new developments it is essential that they follow their Western civil law counterparts. How can they do so? I will not try to give an exhaustive answer to this question, but will simply come up with some suggestions.

First, legal doctrine is important in this matter. It is essential that in national works on legal methodology, the importance of case law is stressed.

Second, cases should be reported far more often than is done at present. Until recently, the number of law reviews or other publications devoted to reporting cases has been very limited. Also, the idea was often that reporting a case gives it more weight and therefore such cases must be carefully selected, preferably by justices of the Supreme Court. Since the process of selection takes a considerable time, cases are reported with considerable delay.¹⁰⁶ I do not suggest that this selection process should be abolished, but rather that it should be supplemented by law reports for specific areas which are based on voluntary submissions by judges and attorneys. The argument that this will cost a great deal in this era of electronic law reports is no longer valid.

Third, in order for the reported cases to have any impact they should be annotated. This is the lesson to be learnt from Western Europe. It was the annotations of the two grandmasters of Dutch civil law, Meijers and Scholten, which revolutionised the place of case law in the Netherlands. In France, it is still virtually impossible for an outsider to fathom the relevance of a judgment delivered by the *Cour de cassation* without case notes. This is easier said than done. Courts may at first not like their awards being criticised and this may reflect upon the annotators. This, in turn, may alienate possible annotators who do not wish to jeopardise their career.

Fourth, legal education should take into consideration the importance of case law as a source. The impression one gets from legal education in Central and Eastern Europe is that precedent is not taught at all. Exchange students, upon their arrival in Western Europe, do not report cases in their classroom papers, unless by way of example. The place of case law in the legal education of Slovakia becomes clear from the following quotation:

During my early studies at a faculty of law in Slovakia, I do not remember reading a single court decision. Case law had always been considered as a source of law only in the common law system, and not ours, although it was admitted, that decisions of the Slovak Supreme Court are de facto followed. This phrase de facto, but not de iure was repeated many times, without actually introducing any court decision or pointing out its real importance in our legal order. Rather, it was stressed, that Slovak law is not based on court

¹⁰⁶ E. Caprdova, Importance of case law/Comparative study of English, German and Slovak law (LLM thesis, Utrecht, 2004) p. 44.

decisions; they are binding only for specific parties, not generally. They are definitely not sources of our law. As the role of case law had considerably been neglected, and this was presented as the reality in all civil law countries, I got the impression, that the whole of continental Europe does not use them at all.¹⁰⁷

And to quote yet again Kühn:

Legal academia supports the old dogmas of the inferior role of the judiciary and of parliamentary sovereignty. During the first ten years of the Czech Constitutional Court's existence (1993-2003) the prevailing attitude of the educators at the Czech law schools was oriented strongly against the Constitutional Court. The Constitutional Court is often considered a symbol of poor reasoning, as it openly employs value reasoning instead of textual arguments.¹⁰⁸

Fifth, if we wait for the present younger generation of law students to occupy key positions in society, it will take another 20-30 years before Central and Eastern European countries have caught up. We should therefore also provide continuing legal education to the present holders of key positions.¹⁰⁹

Not in all legal systems with a low degree of precedent awareness is there a movement towards greater respect for case law. As the Macao reporter observes, China has a system – which is gradually infiltrating Hong Kong and Macao – where a separation of powers is not practised and where the courts are still considered to be the *bouches de la loi*.¹¹⁰

16. Conclusions

The various reports submitted to the congress of the International Academy of Comparative Law provide us with a colourful picture of the notion and practice of precedent in a number of legal systems. It may be colourful, but not all the colours of the world are represented. Legal systems from OECD countries are well represented; jurisdictions in Africa, Asia and Latin America are unfortunately mostly missing. The IACL's system of national reports may also be criticised, because it means that reports from autonomous regions and international and supranational organisations are missing. This gap has at least partially been compensated for in the present volume, with its inclusion of a report on international tribunals.

What may we learn from the developments sketched above? There seem to be conflicting tendencies in civil and common law. On the European continent, there was a system of precedents before the codification in the 19th century. Because of the primacy which at the turn of the 18th century was attributed to legislation, precedent lost its importance. But because of idleness on the part of the legislature in the area of private law, the courts gradually regained some of their former positions. In this, they were helped by legal literature, which in its annotations provided case law with terms of reference and allowed practitioners to see its

¹⁰⁷ Caprdova, *supra* note 106, p. 4.

¹⁰⁸ Kühn, *supra* note 75.

¹⁰⁹ I have myself been involved in a project supported by the Dutch government, which aimed at helping Czech judges to cope with case law. The project included the funding of a new law report with annotated cases, Jurisprudence.

¹¹⁰ Report on Macao (Castellucci).

importance. Legal theory comes to the conclusion that there is now once again a light version of the system of precedent, although with exceptions and ways to avoid it. Not all civil law systems are in the same state of development. Especially lagging behind are the systems of Central and Eastern Europe, which still suffer from their socialist past.

In the *common law* systems, the development has been the reverse. Until the 19th century, there was no system of precedents. Only recently has it been accepted that the courts should also follow ‘wrong’ precedents. In this sense there is a major difference with the *civil law*, where courts are not bound to follow incorrect precedents.¹¹¹ But the difference is diminishing, witness the recent call in the *common law* by B. V. Harris for a reversal of the main rule.¹¹²

Most authors predict that the future lies in the common law, which will gradually extend its theory of precedent, first to Western civil law nations and then to Central and Eastern Europe and other socialist or formerly socialist states.¹¹³ I do not share this view. I do agree that equality and predictability justify the adherence to at least a limited theory of *stare decisis*.¹¹⁴ I also agree that legal theory should take into account the fact that the law does not evolve within itself. However, I do oppose the introduction in civil law jurisdictions of a strict system of precedent as may still be found in common law systems. Instead, I advocate a system based on the persuasive authority of cases as contextualised by legal doctrine. Surprisingly, I find support for this in the national reports from most civil law countries.¹¹⁵ As Professor Malaurie concludes in the French report: “Le rôle du précédent est donc différent dans le système juridique français et la *Common Law*; ces deux systèmes se sont légèrement rapprochés, mais de manière superficielle. Cette différence est une des richesses de l’héritage culturel de l’Europe.”¹¹⁶

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¹¹¹ That continental courts, unlike their common law counterparts, do not consider themselves to be bound by ‘wrong cases’ is apparent from decisions such as Hoge Raad 7 March 1980, *Nederlandse Jurisprudentie* 1980, 353, in which the Dutch Supreme Court accepted that its view had for a long time not been observed by the lower courts.

¹¹² Harris, *supra* note 97, p. 427.

¹¹³ See for instance the report on Denmark (Lookofsky), who argues that a better awareness of their role in creating jurisprudence may make Danish court decisions more transparent.

¹¹⁴ Lundmark, *supra* note 38, p. 166.

¹¹⁵ Reports on France (Malaurie), on Belgium (Adams), on Greece (Sourlas) and on the Netherlands (Haazen) concede, on the other hand, that the differences between the two systems have been exaggerated.

¹¹⁶ Report on France (Malaurie).