Guest Editors

Editores invitados

Álvaro Núñez Vaquero

Marina Gascón Abellán

TABLE OF CONTENTS

CONTENIDO

DISCUSSION: THE CONSTRUCTION OF PRECEDENT IN CIVILLAW. DEBATES, CONCEPTS AND CHALLENGES

DISCUSIÓN: LA CONSTRUCCIÓN DEL PRECEDENTE EN EL CIVIL LAW. DEBATES, CONCEPTOS Y DESAFÍOS

Message from the Editor

Nota editorial

Sandra Gómora Juárez

Variations on Judicial Precedent: From the Perspective of the Chilean Legal System

Variaciones sobre el precedente judicial: una mirada desde el sistema jurídico chileno

Flavia Carbonell

The Ratio Decidendi through Mexican Lens

La ratio decidendi *a través de ojos mexicanos*

Rodrigo Camarena

Precedent and Civil Law: The Road Ahead. Reflections on Precedent Based on the Works of Flavia Carbonell and Rodrigo Camarena

Precedente y Civil Law: un camino por recorrer. Reflexiones sobre el precedente a partir de los trabajos de Flavia Carbonell y Rodrigo Camarena

Marina Gascón Abellán

Legal Arguments and Case Law Precedents: An Experiment in Judicial-Sociological Experiment Between Practice and Theory

Argumentos jurídicos y precedentes jurisprudenciales: Un experimento de sociología judicial entre la práctica y la teoría

Silvia Zorzetto

Are Rules Governing the Use of Precedent Necessary?

¿Es necesaria la regla de precedente?

Fabio Pulido Ortiz

On the Rule and the Use of Precedents: Brief Comments on the Works of Fabio Pulido Ortiz and Silvia Zorzetto

Sobre la regla y el uso de los precedentes. Comentarios al margen de los trabajos de Fabio Pulido Ortiz y Silvia Zorzetto

Álvaro Núñez

DOI: 10.22201/iij.24487937e.2022.16.5.17576

Letter from the Editor

In the last twenty years, precedent and case law have become an increasingly prominent topic in the legal discussion of civil law legal systems. The use of precedent beyond the confines of common law legal systems has meant its incorporation and implementation in many different ways, as well as its study in academia.

This year's discussion section is the result of the effort of several people who submitted papers and made it possible to hold the *Problema. Anuario de Filosofía y Teoría del Derecho* seminar, entitled "The Construction of Precedent in Civil Law: Debates, Concepts and Challenges".

The purpose of the seminar was to identify the problems, questions and discussions that must be addressed to outline and deepen our understanding of precedent. The starting point for the discussion was the problems set out in the 2020 book *La construcción del precedente en el Civil Law* [The Construction of Precedent in Civil Law], and it grew from there.

Each of the articles in this issue pose a series of challenging questions. For instance, Flavia Carbonell ponders judicial decision-making in the context of a legal system like Chile's where there is no formal obligation to follow precedents. She raises the question of whether such a case-by-case balancing of reasons way of decision-making is better than a system bound by precedent. She also explores the problems caused by an absence of a rule of precedent and shed light on the varied consequences of each approach.

Rodrigo Camarena proposes four different theoretical models to understand *ratio decidendi*, given the incorporation of precedent in the Mexican context as part of the 2021 reform. In this sense, each model prioritizes one aspect or another in the understanding and use of precedent, while suggesting a way of applying precedent that opens the door as to whether its application might become a practice that is shaped locally, influenced by the contexts in which it is applied.

Silvia Zorzetto presents a detailed consideration on the uses of precedent, generating a typology of its use as arguments. By illustrating such uses in specific cases, it soon becomes apparent that there are a variety of argumentative uses of precedent and that not all of them are consistent with

the main notion, according to which it is used to be applied to a given interpretative solution. In this sense, there is a true precedent with its application and many other uses. The article sheds light on the complexity of applying precedent and the different forms it can take, as well as the difficulty in differentiating or even "discriminating" between real and other uses of precedent. Lastly, she reflects on the challenges faced in structuring a well-ordered system of precedent.

Fabio Pulido's article raises the question on the need for having "rules governing the use of precedent in legal system, i.e., the need to have rules that govern the use of precedent and whether, if at all, it is a necessary or incidental rule in legal systems. He suggests different ways such a rule can take in legal systems, as well as the different relationships between the nature of this rule and the ensuing consequences.

Lastly, to continue and enrich the discussion, each contribution is analyzed and discussed by Marina Gascón Abellán and Álvaro Núñez Vaquero in a reply that revisits the problems raised in the articles to reassess and question them as well as to enrich the debate. The overall purpose is to provide one more element in structuring the ideas on precedent that will enable its further study, understanding and dissemination in civil law legal systems.

I would like to express my sincere thanks and appreciation to each and every one or the people who welcomed and participated in this activity.

The *Problema* seminar, as well as the Discussion section of this issue of the journal is part of and was made possible by UNAM-PAPIIT clave: IN302422. Proyecto: La autoridad del precedente judicial. Debates teóricos y problemas prácticos.

This work was supported by UNAM-PAPIIT clave: IN302422. Proyecto: La autoridad del precedente judicial. Debates teóricos y problemas prácticos.

Sandra Gómora-Juárez

Editor-in-Chief

PROBLEMA

NÚMEROS DE PROBLEMA

VARIATIONS ON JUDICIAL PRECEDENT. THE CHILEAN LEGAL SYSTEM PERSPECTIVE*[1]

VARIACIONES SOBRE EL PRECEDENTE JUDICIAL. UNA MIRADA DESDE EL SISTEMA JURÍDICO CHILENO

Flavia Carbonell Bellolio**

DOI: 10.22201/iij.24487937e.2022.16.5.17577

Abstract:

This paper is the result of my participation in a discussion event of *Problema. Anuario de filosofía y teoría del derecho* entitled "The Construction of Precedent in Civil Law: Debates, Concepts and Challenges". Several colleagues with a vast knowledge on the subject of judicial precedent participated in this seminar, which also delved into the widely debated aspects of judicial precedent focused on the case of Chile. The entire discussion aimed at proposing solutions, as well as shedding some light on some of its important aspects.

Starting from such transcendental concepts as, rationality and argumentative use, it is possible to find certain problems arising from the improper use of the above concepts, which in turn leads us to stare decisis, a term that if used incorrectly may result in an act against the internal independence of judges.

Keywords:

Judicial Precedent, Statute of Limitations, Self-Precedent, Reasonableness, Stare Decisis

Resumen:

El presente trabajo es el resultado de mi participación en el evento de discusión de la revista Problema. Anuario de Filosofía y Teoría del Derecho, que llevó por nombre "La construcción del precedente en el Civil Law: debates, conceptos y desafíos", en el cual participaron varios colegas con un amplio conocimiento en el tema del precedente judicial; de igual forma, ahonda en los temas de mayor debate dentro de lo referente al precedente judicial, enfocado al caso chileno. Todo ello, con la finalidad de proponer algunas soluciones al respecto, así como dilucidar ciertos aspectos importantes dentro del precedente.

Partiendo de conceptos tan trascendentes como la prescriptibilidad, la racionalidad y el uso argumentativo, se logra llegar a ciertas problemáticas provocadas por el mal uso de los conceptos previamente mencionados, que a su

vez nos conduce al stare decisis*, término que mal utilizado puede resultar en un acto contrario a la independencia interna de la cual gozan los jueces.*

Palabras clave:

Precedente judicial, prescriptibilidad, autoprecedente, racionalidad, stare decisis

CONTENT: I. *Introduction.* II. *The Prescriptibility or Imprescriptibility of Civil Actions Stemming from Crimes Against Humanity.* III. *Self-Precedent and Rationality in the Application of the Law.* IV. *Binding Precedent and Equality*. V. *Argumentative Use of Precedent*. VI. *Final Thoughts*. VII. *References*.

I. INTRODUCTION

It is commonly held that the *summa divisio* between civil law systems ('statutory law') and common law systems ('customary law') is primarily, but not exclusively, based on the fact that the latter are "systems of precedent," and the former are not. In Chile, it is often claimed that Article 3, Paragraph 2, of the Civil Code precludes assigning "precedential value" to judicial decisions or excludes "case law" from the "formal sources of law" insofar as this provision states that "[j]udicial judgments have binding force only for the cases in which they are currently pronounced". To put it colloquially, in the Chilean legal system, this clause would act as a protective shield against the temptations that might exist to introduce a rule of "binding precedent".[2]

Based on further examples from the Chilean legal system, it can be seen that: a) there are no constitutional or legal provisions that establish rules empowering certain courts (Constitutional Court or Supreme Court, hereinafter, CC and SC, respectively) to issue "precedents" or rules that establish the obligation of certain courts, judges or judges other than the CC and SC[3] to follow the "precedent" these courts;[4] b) there are rules in the Chilean Code of Civil Procedure (hereinafter, CCP) referring to the effects of given judgment in a different proceeding (Arts.178, 179 and 180 CPC), as well as another provision referring to the possibility for the parties to request that a cassation appeal be "heard and decided by the plenary of the Court" (the general rule is for it to be heard by a chamber of the SC), based "on the fact that the Supreme Court, in diverse rulings, has upheld different interpretations on the matter of law object of the appeal" (Art. 780 CCP); (c) there is a so-called "unification of case law" remedy for labor proceedings;[5] (d) the law of criminal procedure grants the Supreme Court jurisdiction to hear an appeal for annulment of a judgment "which has made an erroneous application of the law that has substantially influenced the outcome of the judgment" when "different interpretations are reached in various rulings issued by higher courts on the point of law which is the subject of the appeal" (Arts. 373 (b) and 376 (3) of the Code of Criminal Procedure); e) legislative provisions have been proposed in a bill establishing a new Code of Civil Procedure that would introduce substantial amendments to the cassation appeal in favor of a "case law-unifying" SC model.[6]

As can be seen, the expressions in quotation marks in the foregoing paragraphs highlight some of the most important conceptual problems when it comes to speaking of precedent. The practice of making explicit theoretical-conceptual assumptions has been, with some exceptions, rather absent from the Chilean dogmatic debate on precedent. Nor has there been any clarity on the concept in jurisdictional venues where, despite having some "unifying" powers, the SC has not been able to apply them coherently and the collective discourse of some judges seems to resist "following the case law" of higher courts, arguing that it restricts their independence.[7]

Over the last few years, very valuable collective and monographic works have addressed these conceptual questions in great depth.[8] Drawing on these contributions, I would like to focus on self-precedent, binding precedent and the argumentative use of precedent, concepts which I believe should remain distinct but interconnected. I will do so, primarily, by examining a set of Chilean cases on the same subject, which are described below and provide a view of certain challenges and shortcomings in Chilean legislation and judicial practice.

II. The Prescriptibility or Imprescriptibility of Civil Actions Stemming from Crimes Against Humanity

For many years in Chile, civil actions for compensation for human rights violations committed during the dictatorship reached the SC in one of two ways: through a cassation appeal filed on criminal merits (provided for in Articles 546, *et seq*. of the former Code of Criminal Procedure) when civil action was brought as part of the criminal proceeding, or through a cassation appeal filed on the civil merits against Court of Appeals judgments on compensatory action brought directly as part of a civil proceeding. Civil suits filed under criminal proceeding were heard by the second chamber of the SC; civil suits of compensation for damages were heard, until 2014, by the Third Chamber of the SC.[9]

During this period, there were two different Court Opinions on civil action: on the one hand, the Second Chamber rejected the thesis on the prescriptibility of civil actions stemming from crimes against humanity (whose criminal action is imprescriptible in accordance with international treaties ratified by Chile and in effect, e.g., Art.7 of the Statute of the International Criminal Court) committed during the dictators hip; on the other hand, the Third Chamber accepted the thesis on the prescriptibility of civil action, establishing the arrival of democracy in the country as the *dies a quo*. This discrepancy in decisions was particularly important as it reflected "a serious attack on transitional justice mechanisms and on the rights of the affected parties." If civil action for compensation of damages was filed along with a criminal trial, significant sums of money were obtained. If the civil action was filed independently of the criminal proceedings, no compensation was obtained (Raúl Letelier, 2011, p. 164).[10]

In fact, the cases were similar: relatives of disappeared detainees or of people tortured by State agents during the military dictatorship sought compensation for the moral damage

suffered. Legally, the dispute mainly consisted of the applicable rules. In favor of prescriptibility, it was argued that the rules of domestic positive law should be applied, specifically those on the statute of limitations for civil actions arising from a crime (Article 2332 of the Civil Code, which establishes a four-year statute of limitation as of the perpetration of the act, and Article 2497, which provides that "The rules relating to the prescriptibility apply equally for and against the State").[11] In favor of imprescriptibility, it was argued that it was the duty of the courts to apply the rules and principles of international human rights law[12] (Mandated by Article 5, Paragraph 2, of the Constitution) which enshrine a fundamental right to full reparation and would not be limited, therefore, to the exercise of criminal action.[13] Counterbalancing this fundamental right[14] is the State's obligation to answer for crimes against humanity and the actions to enforce it should not be subject to any statute of limitations.

These Court opinions could also be construed as constituting anomalies —the confirmation of which would however require further clarification and justification— since two sets of rules would regulate the same factual situation or conditions (civil action arising from a crime against humanity) by ascribing incompatible legal effects (a 4-year statute of limitations and the non-applicability of a statute of limitation, respectively).

However, from the standpoint of the judicial enforcement system, of the administration of justice system users and/or of a legal scholar analyzing these decisions adopted by the "same" court at the apex of the judicial organization, the value judgment would be more drastic. From the point of view of the system itself, it could well be understood that one of the decisions is wrong, albeit definitive (since, in this case, there is no possibility of appeal because it is handed down by the SC); it could be understood that both Court opinions are possible and plausible solutions in the Chilean legal system and their coexistence could be admitted. The administration of justice system users would simply note an inexplicable injustice, an unjustified inequality of treatment by the SC, considered the one and the same court. A dogmatic approach would probably describe this case as one of judicial schizophrenia or explain it by highlighting the political tendencies and/or ideologies on the judicial application of law (Jerzy Wróblewski, 1989, pp. 67-84) underlying decisions in one sense or the other.

This already difficult scenario is exacerbated by the *González Galeno case involving the Chilean Tax Authorities*. In this case, the plenary of the SC was requested to hear the appeal in cassation appeal on the merits of a decision handed down by the Santiago Court of Appeals.[15] In addition to upholding the criminal conviction, the contested judgment "accepted the claim for compensation of damages, sentencing the defendant the Chilean Tax Authorities (*Fisco*) to pay the plaintiff the amount of $ 50,000,000 for non-pecuniary damages." The petition was based "on the fact that the Supreme Court, in various rulings, has held different interpretations on the subject matter of the appeal" (Art. 780 CPC); in the case in question, on having had different interpretations on the prescriptibility or imprescriptibility of the civil action arising from a crime against humanity. In a divided decision (9 votes against 7) and adopting the arguments of the Third Chamber, the SC ruled that civil action is prescriptible.

Thus, the Court of Appeals judgment was in breach of the law, thereby substantially influencing the operative part of the judgment, and was therefore overturned. Paragraph 3 of the judgment recognizes that "legal theory and case law differ regarding the possibility of extending the status of imprescriptibility inherent to criminal proceedings in the case of crimes against humanity to actions aimed at obtaining reparations of a civil nature for the same acts." To support its decision, it is argued that 1) international instruments refer exclusively to the imprescriptibility of criminal proceedings arising from crimes against humanity and nothing is said about civil action; 2) "prescriptibility is a general principle of law designed to ensure legal certainty, and as such it is found across the entire spectrum of different legal systems, unless otherwise determined by law or in view of the nature of the matter, i.e., the imprescriptibility of actions" (Par. 5).

The decision overturning the appealed judgment consists of 70 pages, 57 of which correspond to the dissenting or minority vote, citing Constitutional Court judgments (for example, on the "existence of general principles of law", Judgment of December 21, 1987, Case No. 46, Recital 21, and on the validity of international human rights treaties) and explains that it is supported by the "established case law from this Court" regarding the interruption of civil action (which, in fact, corresponds to "case law upheld by the Second Criminal Chamber of this Court in judgments dated September 27, 2000, in Case No. 4,367-1999, and September 27, 2001, in Case No. 3,574-2000, among other"). It also points out that Inter-American Court of Human Rights case law and comparative case law would lend support to the minority vote, making vague mentions of "the evolution of case law" and "consolidated case law." In the Court of Appeals decision under appeal, reference is also made to "numerous case law handed down by the Inter-American Court -...- whose rulings have accepted requests for compensation, considering them as part of the State's obligation of redress in cases of serious violations of international human rights law" (Rec. 13), without further details.

Less than six months after SC's decision, the Second Chamber of the SC issued another ruling on a similar case, declaring the imprescriptibility of the civil action and awarding compensation for moral damage to the relatives of a victim who disappeared during the dictatorship.[16] However, this judgment makes no mention of the SC's ruling which would have "unified the case law", nor of previous Second Chamber decisions or any other case law. Although the judgment contravenes that of the SC plenary, it should be noted that Second Chamber justices act in a manner consistent with the Court opinion in favor of the imprescriptibility that the chamber had upheld and continued to uphold in the minority vote in the plenary decision.

Subsequent cases brought before the Second Chamber were decided contrary to the plenary decision, while those brought before the Third Chamber were decided in favor of the plenary decision. This scattered case law prevailed for two more years. The issue was ultimately settled by means of an administrative decision of the SC plenary that reassigned the matters to be heard by each chamber. Thus, Act 233-2014, enacted on December 26,

2014 and published on January 16, 2015, administratively assigned the Second Chamber or criminal chamber, both ordinarily and extraordinarily, the jurisdiction "1°.- Of the ordinary and extraordinary appeals brought before the Supreme Court in criminal, tax and civil matters related to a *current case under the former criminal procedure system.*"[17] With this Act and the Inter-American Court of Human Rights ruling on the *Case of Órdenes Guerra et al. v. Chile* (judgment of November 29, 2018), the criterion of the imprescriptibility of the civil action was consolidated. However, this is a fragile and unstable consolidation since it could very well change if, for instance, an act was passed transferring these cases to another SC chamber or if the composition of the second Chamber were to change completely.

This set of cases serves as a precursor to, first, adopt definitions of what self-precedent is, what binding precedent is and what the argumentative use of precedent is, as three distinct but related concepts; second, to explain the bases of each of them; third, to examine, in the light of these concepts, the behavior of SC in the cases described above; and, fourth, to raise the question of possible ways of rationalizing the practice of judicial application of the law.[18] I will address these questions below.

III. Self-Precedent and Rationality in the Application of the Law

Marina Gascón defines the *self-precedent* as that which "comes from previous decisions adopted by the same judge or court that must now decide" and defines the *rule of judicial self-precedent* as one that "binds the judicial bodies to their own precedents". In the latter definition *precedent* means "the *criterion, principle or legal reason,* on which a previous decision is based, used as a source to be adopted in future decisions" (i.e., precedent in the strict sense, *ratio decidendi* or basis of the decision) (Marina Gascón, 2011, p. 134, italics in the original). In summary and following this author's conceptual clarifications, self-precedent is a rule that obliges the court or judge who issued a previous decision to incorporate the same legal reasons used therein when deciding a similar case in the future.

The question, then, is what the rationale for such a rule is and what kind of rule it would be. Gascón's answer is that self-precedent is "a rule of rationality whose only grounds lie in that demand for formal justice which is required by universalization" (Marina Gascón, 1993a, p. 38). This requirement of universalization applies especially when a judge is called upon to choose between different options, promotes rationality in the application of the law and constitutes a "guarantee against arbitrariness" (Marina Gascón, 2011, p. 136).[19]

Following MacCormick's lead, Gascón argues that Kantian universalization or universality plays an important role in the judicial application of the law. This Kantian maxim could be formulated as "adopt the decision which, because you deem it the right one, you are willing to adhere to in future cases that are? essentially the same." This forward-looking approach, however, does not prevent the precedent from being dismissed, i.e., it does not petrify the decision, but simply places the burden of the argument on whoever wishes to deviate from it.

This discarding or *overruling* of the self-precedent can be based either on the incorrectness of the previous decision or on its subsequent inadequacy (Marina Gascón, 2011, pp. 136-139).[20]

MacCormick referred to universalization in addressing the demand for formal justice as an idea closely related to that of justification (Neil MacCormick, 1978, pp. 73-99), and more specifically, to deductive justification, going beyond Perelmanian "conservatism" given by the principle of inertia that would favor the *status quo*.[21] The requirement of formal justice implies a willingness to uphold the same reasons for the decision in future cases or situations with similar features in the same way as the decision of the current case takes previous precedents into account. This requirement is both *backward-looking* and *forward-looking* and its observance constitutes a minimum requirement of rationality both in the task of administering justice and in the concept of *justice according to law*. This forward-looking approach, i.e., willingness to uphold the same reasons when deciding on similar cases in the future, has a stronger binding effect on the judge since the link to a backward-looking case tends to be weaker since there may possibly be a conflict between the precedent and the "material justice" of the case in question (Neil MacCormick, 1978, pp. 74 et seq.; Neil MacCormick, 1976, p. 109). Thus, one of the requirements for a decision to be justified, a logical requirement according to MacCormick, is precisely that it must be based on a universalizable norm.[22] In this sense, the justification of a decision is a matter of universals and not of particulars (Neil MacCormick, 1976, pp. 103-104).

From an argumentation point of view, self-precedent is a rule of rationality that mandates the universalization of reasons to reach the ideal of formal justice. From a legal point of view, self-precedent is considered a rule based on the obligation of judges to justify judicial decisions and the obligation to comply with the principle of equality and non- discrimination in the exercise of judicial duties.

Going back to the cases described above, the first question that arises is how to explain the fact that different chambers within the same court uphold different legal positions and conflicting interpretative criteria for the same legal issue. There are two possible explanations. On the one hand, each chamber can be considered an autonomous body or court and as such, upholding the grounds the decision in favor of prescriptibility (Third Chamber) and imprescriptibility (Second Chamber) reveals that each chamber is committed to universalizing the *ratio decidendi* to similar cases in the future, thus meeting the forward-looking approach of rationality. This position, however, undermines the citizen's guarantee of equality in the application of the law, which is especially significant in the case of chambers belonging to the hierarchically superior court of the Chilean judicial system. On the other hand, each chamber can be considered nothing more than an entity of the same court and that the continued presence of contradictory decisions, such as those described above, is a lapse of rationality and manifest arbitrariness towards those affected by the administration of justice.

Given this risk of contradictory decisions issued by different chambers of the same judicial body, lawmakers themselves have established a mechanism for unifying case law,

even if Chile's domestic legal culture does not regard it as such. Article 780 of the CPC allows the SC plenary to hear a case when contradictory rulings have been issued by SC chambers. What would be the justification for this rule if not to empower the SC plenary to decide on the institutionally correct interpretation, thus eliminating contradiction in the specific case and standardizing future decisions?

However, the reticent attitude of the criminal chamber which breaks away from the decision of the SC plenary reveals that, on the one hand, the chamber sees itself as an autonomous body and, on the other hand, it does not recognize the binding nature of the plenary's decision. Is this because there is no express rule of the *stare decisis*? Should Article 780 not be considered specifically as an express rule of *stare decisis*? For this, a second rule would be necessary, as discussed in the following section, in order to establish the existence of a binding precedent, which is the one defining whether to follow or not follow the precedent and attributing some legal consequence to it.

Examining these cases also requires some thought as to what institutional design is best suited to encourage adherence to self-precedent and, consequently, to produce the rationalization of the application of the law sought by said rule. Since it is impossible to address this complex issue here, I shall limit myself to two points. An SC model that works in specialized chambers and in the plenary should, on the one hand, clearly allocate the responsibilities among the chambers and, on the other hand, take care to harmonize the decisions taken by the chambers with those of the plenary. For example, it should establish a more precise distinction between the legally significant cases to be heard by one or the other chamber, even though this may not prevent dubious *a priori* cases in which the jurisdiction corresponds to two chambers. A CS model that works only with the plenary seems more likely to comply with the rule of self-precedent. The second point pertains to the grounds and reasons for adopting collective judicial decisions, as well as how such decisions are made within collegiate bodies. In the case of an SC acting as a chamber and as a plenary, the question arises as to whether adherence to plenary decisions can be linked, in any way, to the adherence to the decisions of the majority.

IV. Binding Precedent and Equality

The *rule of precedent* or rule of *stare decisis* consists of one or more rules stating that certain jurisdictional decisions count as precedents (Álvaro Núñez, 2021).[23] As Arriagada argues, the existence of binding precedents depends on the existence of two legal rules: one rule establishing the binding nature of the precedent; and another rule regulating when precedents are to be followed or not. These two rules constitute a set of legal relationships between three intervening parties: 1) the courts whose precedents must be followed; (2) the courts that must follow them; 3) individuals whose legal situations changed in following or not following these precedents (María Beatriz Arriagada, 2021).

Given the ambiguity, heterogeneity and inconsistent use of the word “precedent” in legal contexts, as discussed above, this author specifically defines “precedents” as “rules used in judicial rulings for deciding specific cases with *certain relevance* for deciding similar specific cases” (María Beatriz Arriagada, 2021, p. 368). This definition follows the same line as the one proposed by Gascón and Núñez (2021): in all cases, reference is made to the rule that constitutes the grounds of the decision, i.e., its *ratio decidendi.* By “binding precedents”, Arriagada refers to “those that, according to current positive law*, must be followed* by certain courts when deciding specific cases similar to the specific case that was solved by the judgment containing the precedent” (María Beatriz Arriagada, 2021, p. 369).

Unlike Núñez and adopting a narrower view, Arriagada limits her analysis “to normative, formally or institutionally binding precedents, that is, those whose binding nature is established and regulated by the rules of positive law in force” (María Beatriz Arriagada, 2021, p. 369). To put it simply, if there is no legal consequence for not following precedent, the author says, there can be no talk of binding precedent. In my opinion, this statement, which underlies the idea that adopting binding precedent is a conceptual priority over the other meanings or uses of the word “precedent”, seems accurate and prevents possible confusion over the configuration and legal effects of precedent.[24]

Arriagada's thesis about the physiognomy of binding precedent is built up using a remarkable and original idea of Núñez, which is that the existence of a system of precedents within a given legal system requires the existence of constitutive rules and not, as has been commonly claimed, the existence of regulatory rules (Álvaro Núñez, 2018).[25] In this sense, the existence of binding precedents depends “necessarily on the existence of two different legal rules: (i) one rule declaring that the rules generated by Court X constitute precedents for Court Y, by establishing a legal relationship of competence-subjection between Court X [the one that generates the precedent] and Court Y [the one bound by the precedent], and (ii) another rule governing Court Y’s following or not following said precedents” (María Beatriz Arriagada, 2021, p. 382). Thus, as mentioned before, the first is a binding rule of precedent, while the second is the rule on following or not following precedents.

Taking a closer look at these rules, it is observed that the first rule, the rule of binding precedent, is a rule of competence [of those conferring competence on certain subjects] that establishes a *relationship of competence-subjection* between Courts X and Y. Subjection to or being bound to precedent means that Court Y must follow the precedents set by Court X or, inversely, Court X modifies Court Y’s legal situation every time it exercises the precedent-setting competence granted to it.[26]

The second rule, the one that establishing when to follow or not follow precedents, can be one of two types: a) a regulatory rule that obliges Court Y to follow the precedent set by Court X (or that prohibits Court Y from not following the precedents of Court X) and that establishes a sanction for not complying with that obligation (failure to act) on the judge or judge(s) who deliver a ruling that does not follow the precedent;[27] and b) a rule of competence of those that

limit the content of decisions (individual rules) that Court Y is competent to rule in solving specific cases. And they limit it in the sense that they render it "*incompetent* to solve cases that are similar to those that have been solved through precedents issued by Court X by means of rules of content differing from that which has been predetermined by such precedents." This incompetence implies, in turn, "an *immunity* (non-subjection) to individuals who are parties to a judicial process" against decisions with a content different from that determined by such precedents. Such decisions are in effect *invalid* since they have been issued outside the competence of Court Y (María Beatriz Arriagada, 2021, pp. 393 y 394).

With this theoretically precise and impeccable structure, Arriagada highlights the facets that constitute binding precedent: the two sides of the first rule of subjection to precedent (Court X's competence and Court Y's subjection) and the two sides of the rules qualifying not following precedent (sanction to Court Y, the invalidity of Court Y's decision), together with the legal relationships to which they give rise.

The grounds for equality in the right to apply the rule of binding precedent are well known. The concept of jurisdiction already implies that settling legally significant disputes by applying the abstract and general law to the specific and particular case[28] does not lead to unequal treatment. Equality in the application of the law may be more difficult to achieve when carried out by this public entity[29] which in procedural models is more susceptible to having a judge's or a court's decision challenged and reviewed by higher courts.

The rule of precedent and the rule of self-precedent share the basis of equality, although the former adopts the point of view of the system of administration of justice (the way all judges and courts collectively decide similar legal disputes) while the latter focuses on the decisions of a judge, a chamber or a court.

Other values that justify the existence of a binding rule of precedent, as the literature amply asserts, are the *legal certainty* and *stability of the law* it seeks to promote. This "means that citizens can foresee or anticipate the response their case will most likely receive; i.e., they can make decisions in the confidence that the legal rules used by earlier judges will be applied to them as well." In addition, like self-precedent, it encourages *formal* equality, i.e., equal treatment for equals and unequal for unequals; no further justification is needed, and time is consequently saved (Marina Gascón, 2011, pp. 134 y 135).

In view of the non-uniformity of courts' response to similar legal problems, citizens reasonably wonder how a legal rule, which is intended to guide action, can give rise to two different responses or interpretations by courts of law given the same factual situation. Or how it is that two judges with the equivalent or comparable training arrive at different conclusions on the basis of the "same law."[30] The answer, from a certain concept of law and a theory of interpretation that rejects the one-right-answer thesis,[31] would be that it is impossible "for the legal system to always be able to offer the interpreter one and only one right answer to resolve a legal conflict" (Marina Gascón 1993b, p. 213). In other words, given

the at least partially indeterminate nature of the law, a certain margin of case law dispersion[32] is inevitable or, in other words, the coexistence of different interpretations within those that are linguistically possible and legally plausible in different courts is unavoidable. This fragmentation can lead to unequal treatment of the administration of justice system, which is difficult to justify (as in the case of those who receive financial compensation for crimes committed under the dictatorship and those who do not).

To avoid this disparity of treatment, procedural systems incorporate unification mechanisms at some point in judicial proceedings, whose decision is usually entrusted to some court at the highest level of the system.[33] Although the effect of a judgment issued by the SC plenary in exercise of its powers granted by Art. 780 CPC is under discussion in Chile, it is based on the need to standardize the interpretation of the law, despite the absence of the counterpart of the rule of binding precedent that regulates the effects of other SC chambers or other hierarchically lower courts following precedent or not. In the case of decisions issued on matters that fall within the competence of only one chamber, based on the above concepts, the answer is that there is no rule of binding precedent for the chambers given that the two rules necessary for its existence are missing: a rule of binding precedent and a rule governing whether to follow the precedent or not.

In any case, it seems that one way to rationalize a judicial practice promoting values of equality and legal certainty would be to positively incorporate a rule of binding precedent by the highest court, either within jurisdiction in chambers or in plenary session. In addition to its incorporation, it would be necessary to ensure that the courts could communicate the *ratio decidendi* of the decision clearly and precisely, which requires changes in the internal legal culture. In short, the dangers described in the literature is that a rule of binding precedent could transform the SC into a legislative or quasi-legislative body.

V. Argumentative Use of Precedent

The citation, use or mention[34] of past judicial decisions is frequent in litigation and judicial decisions. In the latter case, the argumentative use assumes there is no rule of binding precedent since, in such a case, the court bound by a precedent issued by the competent court must simply decide in accordance with the *ratio decidendi* applicable to the case.

As a reason or argument, these citations or references to past judicial decisions are used to support or justify assigning meaning to regulatory texts. As a type of interpretative argument, it can be said that it is part of the interpretative rules or customs followed (used and accepted) by a given legal culture.[35]

Generally speaking and to highlight its use in argumentation, the relevance of which may vary from system to system,[36] it is called “persuasive precedent”:[37] the judge is not obliged to respect the *ratio decidendi* of a past decision, but does so because of “the authority of the one who issued it, in the sense of the authority’s reputation or recognition,” recognition that may

be justified, presumed or even strategically attributed (Juan Antonio García Amado, 2016 p. 120).[38] As García Amado explains, however, the effectiveness or success of an argument will depend, especially, on whether the one to be persuaded to adopt the decision in the present using said argument recognizes the expertise or authority, understood as that special "competence, capacity or knowledge" of the one who adopted that decision in the past.

Within the catalog of interpretative arguments, this use of precedent in argumentation is situated within the authoritative or *ab exemplo* argument, defined by Tarello as "the one by which a normative statement [legal text] is given the meaning that someone had already attributed to it, and solely because of this. It is an argument that calls for adhering to applications-product or interpretations-product precedent, i.e., to practice of applying it based on the result of the official or judicial interpretation, or to the interpretation of legal theory" (Giovanni Tarello, 2018, p. 334).

The authoritative argument, in Atienza's words, is one of the most traditional arguments in rhetoric (as found in Aristotle's *Rhetoric* and studied by Perelman). In the legal field, it is used when precedent is not a source of law in the formal sense. Atienza goes on to show how the *ad hominem* argument in the strict sense and the argument of authority belong to the same genre, although they are opposite argumentative tactics, in that both "take the opinion of particular individuals as a reliable source of knowledge (or guide for action) […] In one case, [the] *ad hominem* argument [is used] to destroy or undermine a person's credibility; in another, [the] argument of authority is used to support a claim based on the opinion of an authority or an expert in the field" (Manuel Atienza, 2013, pp. 420, 417).

Following Summers' distinction, Atienza includes the arguments of authority within formal or authoritative reasons, giving an account of their importance for both the shaping of the normative premise (which resorts to the interpretation of the normative statements made by the practicing authorities such as those who decide on courses of action) and the shaping of the factual premise (which resorts to theoretical authorities or expert knowledge) (Manuel Atienza, 2015, p. 1443).

With a somewhat diverging perspective, Coloma describes the argument of authority as follows: "if, before any audience, the argumentative force of Statement P is different depending on whether it has been formulated by Subject X or Subject Y, we will find ourselves with an AA [argument of authority]" (Rodrigo Coloma, 2021, p. 213).[39] An AA, Coloma argues, "makes it possible to operate with a higher level of argumentative inertia than when interacting with subjects who are not recognized as highly credible, sharp or wise [...] it allows the division of labor since it saves us from having to investigate and analyze everything, if the aim is to create or modify beliefs" (Rodrigo Coloma, 2012, p. 214).[40] He then warns about the dangers that may arise from its use, including either the premature relinquishment of the deliberative exercise that allows beliefs or decisions to be modified, or, I would add, the abdication of taking seriously the practice of justifying the grounds of the judicial decision. In other words,

misusing precedent in argumentation as an argument of authority may lead to "tension with the claims of rationality control".[41]

An analysis of the cases studied shows that the argumentative use of precedent is inconsistent, vague and poorly grounded. For example, SC Second Chamber judges claim their own previous decisions on a matter as settled case law of the Court, even when six months later they disregard any value given to the plenary decision, without even mentioning that their departure from it. In the same decision, they mention case law from the Chilean Constitutional Court, holding it to be "authoritative" when the vast majority of the decisions of SC chambers simply disavow any authority to this court.[42] Clearly, the reported "*cherry picking*" or opportunistic use of arguments (by the litigants and the courts) is also presented in this group of cases, along with vague references to "settled case law" that do not indicate precisely the recitals where the reason now used to decide would be. It is not difficult to see these as unhealthy practices for an administration of justice system that aspires to certain rationality.

VI. Final Thoughts

Taking a Chilean case as a starting point, this article aims to illustrate some flaws in rationality caused by a series of factors: a) overlapping competences in two SC chambers; b) the lack of a complete rule of *stare decisis*; c) a practice that misuses the argument based on precedent; d) judges and courts who do not feel bound by their own decisions in similar future cases (and even less by those of higher courts) or who are not willing to follow the rationale of a decision issued by invoking a mechanism whose purpose is to avoid contradictory interpretations issued by the SC. Any proposed solution for most of these problems requires asking first about the desirability of the values that self-precedent and precedent foster and, second, about the regulatory changes that must be made to achieve this, considering the possible resistance that may exist in Chilean legal culture. Among the possible regulatory changes, I believe it is fundamental to redefine the main functions of the SC,[43] to include rules that establish binding precedent and to create a mechanism for the Court itself to identify its own self-precedent.

Conceptually and in line with recent theoretical developments, I find it important to differentiate between self-precedent, binding precedent and the argument of precedent, given that each fulfills a different function in a system of administration of justice. Respect for self-precedent, as a commitment to the universal application of the decision to similar future cases, serves, as Gascón says, as a guarantee against arbitrariness while allowing the diachronic rationality of the judge or court to be evaluated when applying the law. The existence of a binding rule of precedent would make it possible to introduce greater rationality in the procedural system and the exercise of jurisdiction, to provide greater legal certainty and to ensure formal equality in the judicial application of the law. In the absence of a rule of *stare decisis*, better use should be made of the argument of precedent -especially by judges and

courts- to adequately individualize the previous decision and justify why the *ratio decidendi* of that decision should be applied in this case, preventing this use from circumventing or diminishing the requirement of the duty to state the corresponding reasons to do so.

VII. References

Accatino, Daniela (2002). El precedente judicial en la cultura jurídica chilena, *Anuario de Filosofía Jurídica y Social*, *20*, 559-582.

Alexy, Robert (1989). *Teoría de la argumentación jurídica. La teoría del discurso racional como teoría de la fundamentación jurídica* [1978]. Centro de Estudios Constitucionales.

Arriagada, María Beatriz (2018). Fundamentalidad, interdefinibilidad y circularidad. *Revus*, *35*. http://journals.openedition.org/revus/4095

Arriagada, María Beatriz (2021). Las dos caras del precedente vinculante. In A. Núñez, M. B. Arriagada and I. Hunter (Coords.), *Teoría y práctica del precedente en Chile y Latinoamérica* (pp. 281-310). Tirant lo Blanch,.

Atienza, Manuel (2013). *Curso de argumentación jurídica*. Trotta.

Atienza, Manuel (2015). Razonamiento jurídico, *Enciclopedia de Filosofía y Teoría del Derecho* (pp. 1419-1452), Vol. 2, Chapter 39. Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas.

Atria, Fernando (2016). *La forma del derecho*. Marcial Pons.

Chiassoni, Pierluigi (2011a). ¿Los precedentes son vinculantes? In *Desencantos para abogados realistas* (pp. 211-266). Universidad Externado de Colombia.

Chiassoni, Pierluigi (2011b). *Técnicas de interpretación jurídica. Breviario para juristas*. Marcial Pons.

Coloma, Rodrigo (2012). "La caída del argumento de autoridad y el ascenso de la sana crítica". *Revista de derecho (Valdivia), 25*(2), 207-228.

Correa, Rodrigo (2020). "Función y deformación del recurso de unificación de jurisprudencia". *Revista de Derecho, 33*(2), 253-274.

Dworkin, Ronald (1963). Judicial Discretion. *The Journal of Philosophy*, *60*(21), 624-638.

Dworkin, Ronald (1967). The Model of Rules. *University of Chicago Law Review*, *35*, 14-46.

Dworkin, Ronald (1978). No Right Answer? *New York University Law Review*, *53*(1), 1-32.

Ezquiaga, Francisco Javier (1994). Argumentos interpretativos y el postulado del legislador racional. *Isonomía*, (1), 69-98.

García Amado, Juan Antonio (2012). Sobre el precedente judicial como argumento y como norma. In P. Bonorino (Ed.), *Modelos argumentativos en la aplicación judicial del derecho* (115-124). Bubok Publishing.

García Amado, Juan Antonio, (1986). Del método jurídico a las teorías de la argumentación. *Anuario de Filosofía del Derecho*, *III*, 151-182.

Gascón, Marina (1993a). *La técnica del precedente y la argumentación racional*. Tecnos.

Gascón, Marina (1993b). Igualdad y respeto al precedente. *Derechos y libertades*, *I*(2), 211-228.

GASCÓN, Marina (2011). Racionalidad y (auto) precedente. Breves consideraciones sobre el fundamento e implicaciones de la regla del autoprecedente. *Teoría y Derecho: Revista de Pensamiento Jurídico*, (10), 132-148.

GASCÓN, Marina (2020). Motivación de las sentencias y jurisprudencia. ¿Cumple nuestra jurisprudencia su función? In M. Gascón and A. Núñez (Eds.). *La práctica del precedente en el Civil Law* (pp.165-189). Atelier.

GÓMORA JUÁREZ, Sandra (2019). *Un análisis conceptual del precedente judicial*. UNAM, Instituto de Investigaciones Jurídicas.

GUASTINI, Riccardo (2011). *Interpretare e Argomentare.* Giuffré.

ITURRALDE, Victoria (2019). La igualdad en la aplicación de la ley: análisis de algunas objeciones iusfilosóficas. *DOXA*, (42), 131-148.

LETELIER, Raúl (2011). El Instituto Nacional de Derechos Humanos y la gestión de su auctoritas. *Anuario de Derecho Público*, 152-166.

LIRA, Elizabeth (2006). The Reparations Policy for Human Rights Violations in Chile. In P. de Greiff (ed.). *The Handbook of Reparations* (pp. 55-101). Oxford University Press.

MACCORMICK, Neil (1976). Formal Justice and the form of Legal Arguments", Ch.Perelman (Ed.). *Études de logique juridique* (pp. 103-118). Bruylant.

MACCORMICK, Neil (1978). *Legal Reasoning and Legal Theory*, Oxford, Clarendon.

NÚÑEZ, Álvaro (2016). Sin precedentes: una mirada escéptica a la regla del *stare decisis*, *Doxa*, (39), 127-156.

NÚÑEZ, Álvaro (2018). Precedente en materia de hechos. *Revista de Derecho* (Valdivia), *XXXI*(1), 51-78.

NÚÑEZ, Álvaro (2020). ¿Violan los precedentes la independencia judicial? *Revista de Derecho PUCP*, (84), 303-336.

NÚÑEZ, Álvaro (2021). ¿Son obligatorios los precedentes? La regla del precedente como norma(s) constitutiva(s). I n A. Núñez, M. B. Arriagada and I. Hunter (Coords.), *Teoría y práctica del precedente en Chile y Latinoamérica* (pp. 333-363). Tirant lo Blanch.

PEÑA, Diego de la (2019). "Comportamiento judicial de la Corte Suprema sobre delitos de lesa humanidad cometidos durante el periodo de la dictadura militar (1973-1990): el giro interpretativo con la radicación exclusiva de la segunda sala penal". http://repositorio.uchile.cl/bitstream/handle/2250/177997/Comportamiento-judicial-de-la-Corte-Suprema-sobre-delitos-de-lesa-humanidad-cometidos-durante-el-periodo-de-la-dictadura-militar-1973-1990.pdf?sequence=1

PERELMAN, Chaïm (1964). *De la Justicia*. Universidad Nacional Autónoma de México.

PERELMAN, Chaïm (1977). The Rule of Justice. In *The Idea of Justice and the Problem of Argument* (pp. 79-87). Routledge & Kegan Paul.

PRITCHETT, C. Herman (1941). Divisions of Opinion among Justices of the U.S. Supreme Court. *American Political Science* Review, *35*(5), 890-898.

PULIDO, Fabio (2018). *Jueces y reglas. La autoridad del precedente judicial*. Universidad de la Sabana.

ROMERO, Alejandro (2020). El recurso de casación en el proyecto de Código Procesal Civil y los desafíos para la práctica del precedente. In A. Núñez, M. B. Arriagada and I. Hunter (Coords.), *Teoría y práctica del precedente en Chile y Latinoamérica* (pp. 27-55). Tirant lo Blanch.

Tarello, Giovanni (2018). *La interpretación de la ley* [1980]. Palestra.

Taruffo, Michele (2006). *El vértice ambiguo. Ensayos sobre la Casación civil*. Palestra.

Taruffo, Michele (2016). Consideraciones sobre el precedente". *Ius et veritas*, (53), 330-342.

Vio, Juan (2020). La práctica de citar sentencias pasadas como modelo de precedentes en Chile. In A. Núñez, M. B. Arriagada and I. Hunter (Coords.), *Teoría y práctica del precedente en Chile y Latinoamérica* (pp. 279-302). Tirant lo Blanch.

Wróblewski, Jerzy (1989). *The Judicial Application of Law,* Springer Science & Business

---

Notes

*Article submitted on October 30, 2021 and accepted for publication on December 12, 2021.
**Doctor of Law, Universidad Carlos III de Madrid;Professor, School of Law, Universidad de Chile, fcarbonell@derecho.uchile.cl Orcid: 0000-0001-6834-043X
1 I would like to express my gratitude for the valuable comments received at the September 30, 2021 seminar, and especially to Marina Gascón Abellán, for her insightful and valuable observations, which I hope, at least in part, to have been able to incorporate.
2This provision has also been used to support the thesis that incorporating an explicit rule or creating an implicit rule stipulating the obligation to follow precedent, especially from hierarchically superior courts in the Chilean case, would go against the internal independence that judges should enjoy as a necessary framework to enable the exercise of its jurisdictional role.
3 I use the expression "court" herein to refer to judges who act as part of a collegiate body, and I reserve the word "judge" for those who act as individuals.
4 The law that establishes the organization and powers of the courts is the 1943 Organic Code of Courts; the law regulating the organization and powers of the TC is the 1981 Organic Law of the Constitutional Court, which was amended in 2005 and in 2010.
5 Law 20,260 of March 2008 introduces amendments to the Labor Code establishing, *inter alia*, a new labor procedure which contemplates the motion to unify the case law in Articles 483 to 483-C of this Code. This motion aims to unify the interpretations of labor provisions in the event of contradictory interpretations on a given matter, to which end the Fourth Chamber of the Supreme Court chooses to support one or the other. See Correa 2020.
6 Draft Code of Civil Procedure of 2012 (Bulletin No. 8197-07); with a change in 2014 and the latest executive orders of May 2021. See also Romero 2021. The discussion on the functions the Supreme Court should discharge, or which model of Supreme Court should be encouraged, has also been taking place in Chile within and outside the Constitutional Convention, a process underway at the time of writing this article.
7 This point has been addressed by Nuñez 2021a, who unravels this misunderstanding.
8 I will focus on scientific production, especially from Latin America and Spain, which is where, in my opinion, more recent and novel publications can be found: Álvaro Núñez (2021); Marina Gascón (2020); Sandra Gómora (2019); Fabio Pulido (2018); Álvaro Núñez (2016), Álvaro Núñez (2016).
9 The Second Chamber is the Criminal Chamber; the Third Chamber is the Constitutional and Administrative Law Chamber. Article 767 of the CPC regulates civil cassation appeals, defining the types of judgments and the grounds for appeal, which consists of "having been issued in violation of the law and that this violation has substantially influenced the outcome of the judgment". Reference is made to Article 546, final paragraph, of the former Code of Criminal Procedure, later replaced by the 2000 Code of Criminal Procedure, regarding cassation appeals against the civil decision of the judgment.
10 Therefore, according to some, equal pecuniary reparation policies should be prioritized by establishing general public policies (laws, regulations). Or to put it even more clearly, the result of allowing new claims for reparation has led to unequal access to such reparations and has weakened transitional justice programs (Elizabeth Lira, 2006).
11 There were, of course, other arguments, including that the lack of statutes of limitation needed express regulation, given the value of legal certainty underlying this concept. Another important claim is that the State had implemented administrative reparation laws aimed at repairing property and moral damage to the victims' next of kin (primarily, Laws 19,123, 19,980 and 19,992). A full account of the arguments can be found Diego de la Peña's 2019 undergraduate thesis.
12 Under Article 5, paragraph 2, of the Political Constitution of the Republic of Chile still in force: "The limitation on the exercise of sovereignty is the respect for the essential rights that emanate from human nature. It is the duty of the organs of the State to respect and promote such rights, guaranteed by this Constitution, as well as by the international treaties ratified by Chile and which are in force."
13 Art.131 of III. Geneva Convention relative to the Treatment of Prisoners of War, 1949; Art. 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.
14 In Hohfeldian terms, this would correspond to legal positions "right" and "duty": "To say that X, vis-à-vis Y, has the right for Y to do Z is equivalent to saying that Y, vis-à-vis X, has the duty to do Z because the position of right is passive, and the position of duty is active. The position of law is passive because it is not defined by a reference to the right holder's conduct but by a reference to the conduct of the person performing the corresponding duty" (María Beatriz Arriagada, 2018). (https://plato.stanford.edu/entries/rights/#FormRighHohfAnalSyst)
15 Judgment of the Court of Appeals of Santiago (Sixth Chamber), Case No. 682-2.010, August 19, 2011.
16 SC Sentence Case No. 519-2013, July 18, 2013.
17 Emphasis added. The act was adopted under the presidency of Justice Sergio Muñoz, a dissident in the Third Chamber decisions and in favor of the Court opinion of the imprescriptibility of civil action.
18 I would like to thank María Beatriz Arriagada for her comments on the importance of clearly differentiating these aspects in the text.
19 In other words, the author understands precedent as an instrument of interdiction of arbitrariness or prohibition of unthinking or arbitrary change (Marina Gascon. 1993b, p. 225).
The concept of rationality as opposed to arbitrariness is also used by argumentation theories. Nevertheless, as García Amado points out, there is no single criterion of argumentative rationality, but several, which are usually incorporated into specific theoretical or regulatory proposals: a) rationality as justification; b) rationality as an explanation of valuations (and for that to allow control over them); c) rationality as a logical soundness of argumentation; d) rationality as precedence among arguments and as weighing consequences; e) consensus as a criterion of rationality (e.g., appeals to intersubjectively shared values or values that would be acceptable in a given group); f) systematic rationality; g) procedural rationality (as a result of a procedure). (Juan Antonio García Amado, 1986, pp. 167 et seq).
In this sense, for example, some of these criteria of rationality are interwoven in an analytical model of proper justification, like Chiassoni's, "[a] *court ruling* is properly justified if, and only if, each of the judicial decisions (individual provisions, legal judgments, individual judicial rules) contained therein

is *rational* or *rationally* justified" and is understood to be rational or rationally justified if it meets the conditions of internal and external justification. The internal or logical-deductive justification is a condition of *formal rationality* which reflects the principle of non-contradiction; external justification may be regulatory or evidentiary depending on the type of premises to which it refers and is a condition of *substantive rationality* which reflects the principle of sufficient reason. Rationality, in this model, is synonymous with internal and external justification. Chiassoni (2011a): 18 et seq.; 56. 20 As a rule of argumentation, Alexy puts it as follows: "(J. 14) Whoever wishes to depart from a precedent carries the burden of argument" (Robert Alexy, 1989, p. 287)
21 According to Perelman, the relationship between the rule of justice and the principle of inertia is both conceptual and empirical, with the balance tipping towards the latter. Inertia is a concept that comes from physics, intended to express the tendency of bodies to remain in the state in which they are (movement at constant speed, rest, etc.) if there are no external forces acting on it. Applied to the field of argumentation, the principle of inertia consists in the tendency to treat similar beings, cases or situations alike if there are no good reasons to justify a change in treatment. In Perelman's words, it is a "tendency, natural to the human mind, to regard as normal and rational, and so as requiring no supplementary justification, a course of behaviour in conformity with precedent." He goes on to say "*Per contra* every deviation, every change, will have to be justified. This situation, which results from the application of the principle of inertia in the life of the mind, 2 explains the role played by tradition. It is tradition that is taken as a starting-point, it is tradition that is criticised and it is tradition that is maintained in so far as no reason is seen for departing from it" (Chaïm Perelman, 1977, p. 86). The principle of inertia implies stability, a characteristic pursued by social systems, particularly by the legal one. In Alexy's words, "an opinion or *praxis* that has once been accepted cannot be abandoned without a reason to do so" (Robert Alexy, 1989, p. 191).
22 The author explains the difference between 'universal' as a logical requirement —attributable, therefore, to the greater premise of a syllogism— and 'general' as a term that refers to differences of degree (more or less general). There may be, for example, more or less general rules (depending on the scope of individuals or situations covered), but in both cases they are universal rules, i.e., applicable to all individuals or situations. MacCormick uses the terms 'generic' and 'universal' indistinctly to refer to this requirement of logic, distinguishing them, accordingly, from the term 'general' (Neil MacCormick, 1978, pp.78-79).
23 "The rule that binds judicial bodies to the vertical precedent is known as *stare decisis et quieta non movere* and means that precedents have authority and must be followed" (Marina Gascon, 2011, p. 134). Elsewhere *stare decisis* systems are described as those "whose foundation rests on the demand for uniform justice – i.e., on the ideal of a single judge presiding over any judicial system that wants to guarantee the security, equality and unity of law" (Marina Gascón, 1993b, p. 212).
24 As I will later point out, "precedent" could simply be used to refer to binding precedent, thus discarding the use of "persuasive precedent" and replacing it with the use of rulings or case law as an argument.
25 In a recent text, Núñez deconstructs the opinion by which the rule of precedent is a prescriptive rule, showing that it is neither a rule of obligation nor a permissive rule, but constitutive rules (specifically, rules of competence) that is conceptually necessary or contingent to instituting a system of precedent. Núñez, 2021.
26 Competence is "the power to produce valid legal rules or to participate in their creation, constituted or determined by legal rules that are commonly called rules of competence or on legal production" (María Beatriz Arriagada, 2021, p. 380).
27 The obligation may be absolute or indirect (without a correlative right) or relational or direct (with a correlative right that allows the entitled party to sue for non-compliance).
28 This is Atria's understanding of jurisdiction (Fernando Atria, 2016, p. 216).
29 As Iturralde argues, ascertaining whether or not there is equality in the judicial application of the law requires a period of comparison or a (diachronic) analysis of one or more decisions over time. Iturralde describes the two elements that make up the principle of equality in application of the law: "A material element, which provides the justifying condition, i.e., the criterion of justice in favor of dealing with a category of subjects in a certain way (e.g., merit, necessity or a legal rule). In the case of the law, this criterion is first given by lawmakers in establishing the significant differences (between adults and minors, between different types of workers, between citizens and parliamentarians, etc.); and secondly, by the judges in deciding cases in a certain way within a margin of discretion. The formal element involves generalizing the conditions of the material element to subsequent cases" (Victoria Iturralde, 2019, p. 140).
30 These are the questions US political scientist Herman Pritchett asked himself in 1941 when describing an increasing practice of dissent within the U.S. Supreme Court (C. Herman Pritchett, 1941).
31 Dworkin uses the expression "*one-right answer*" to denote a judicial decision consisting of the interpretation that best reconstructs the legal practice and political morality of the community. There are, however, several versions of this thesis which will not be analyzed herein. See Ronald Dworkin, 1963, 1967, 1978.
32 On the distinction between the indeterminacy of the legal system in abstract interpretation (equivocal texts) and the indeterminacy of the rule in its specific interpretation, see (Riccardo Guastini, 2011, pp. 39 et seq).
33 The expression "vertex" comes from the famous book (Michele Taruffo, 2006). As (Michele Taruffo, 2016, p. 34) states, "uniformity in the interpretation and application of the law is pursued through various techniques." (Marina Gascón, 2011).
34 Vio 2021 explains that the use of a past sentence consists of mentioning its content and identifies different ways of making such mentions.
35 On the concept of "interpretative arguments", see (Giovanni Tarello, 2018, pp. 309 et seq.); (Francisco Javier Ezquiaga, 1994).
36 See the distinctions between very weak, weak and strong argumentative importance that (Chiassoni describes 2011b).
37 As Gascón says, persuasive precedents are those that "*do not have to be followed* but there are *good reasons* for them to be." (Marina Gascon, 2011 p.134).
38 Similarly, Accatino points out that in judicial argumentation "reference to case law predominantly assumes the form of an argument of authority – an argument whose justifying force is based solely on the issuer's status or prestige." (Daniela Accatino, 2002, p. 574).
39 Coloma refers to this argument to analyze the transition from a system of legal or appraised evidence valuation (in which what is established by the legislative authority is contested) to a system of sound criticism.
40 In a similar sense, Manuel Atienza, 2015.
41 Coloma says, "Sometimes, it may even operate as an *ad hoc* approach that allows the subject who is recognized as an authority to gradually adapt to their intuitions or preferences, depending on the case at hand. This is not what we expect from judges. The problem will then be when the arguments are based on the expertise of those who formulate them are reasonable and when they are fallacious." This may contribute to strengthen ascribing "value to any argument that enhances the belief that the subjectivity of a judge has no influence on whether a certain dispute has been resolved in one way or another (hopefully "the facts speak for themselves") (Rodrigo Coloma, 2012, p. 214).
42 A recent emblematic case, which I will not discuss herein, is one of the Third Chamber of the SC which, although it dismisses the appeal for protection sought against a judgment declaring the non-applicability on the grounds of unconstitutionality concerning two provisions of the Labor Code, notes that it has powers to control unlawful actions of the CC (unlawful actions committed through their judgments, although it does not accept it in specific cases). SCS Case 21.027-2019, ruling delivered on October 7, 2019.
43 It is now known that it handles a seriously overwhelming the number of cases per year, in addition to all the non-jurisdictional functions it performs. Such redistribution will depend on the future constitution, the drafting of which was entrusted to a constitutional convention, as well as on a reform to the civil process under discussion in Congress since 2012.

PROBLEMA

NÚMEROS DE PROBLEMA

THE RATIO DECIDENDI THROUGH MEXICAN LENS*

LA RATIO DECIDENDI A TRAVÉS DE OJOS MEXICANOS

Rodrigo Camarena González**

DOI: 10.22201/iij.24487937e.2022.16.5.17579

Abstract:

In March 2021, the Mexican Constitution was amended to transition to a system of precedents. This amendment mandates that the "reasons" of Supreme Court rulings will be binding on the lower courts. However, the reform is rooted in a long-standing practice of '*Tesis*', i.e., abstract statements that the Court itself identifies when deciding a case. Moreover, there is no consensus as to what these reasons are and why they should be binding. The aim of this article is to identify the possible conceptions of reasons to explore the Court's different judge-made law roles. Different common law conceptions of the *ratio decidendi* are used as "mirrors" to identify four models of judicial lawmaking in Mexican practice, namely: judicial legislation, implicit rules, moral-political justifications and social categories. Although the first model seems to prevail, the others provide means for a broader understanding of how the Court creates law depending on the interpretative context in which it operates.

Keywords:

Precedent, Holding, Ratio decidendi, Rules, Reasons, Categories

Resumen:

En marzo de 2021 se reformó la Constitución mexicana para transitar a un sistema de precedentes. Esta enmienda establece que las "razones" de las sentencias de la Suprema Corte serán obligatorias para los tribunales inferiores. Sin embargo, la reforma se enmarca en una arraigada práctica de tesis jurisprudenciales, i. e., enunciados abstractos identificados por la mis ma Corte al resolver un caso. Además, no hay consenso sobre qué son estas razones y por qué deberían ser vinculantes. El objetivo de este artículo es identificar las posibles concepciones de razones para revelar los distintos roles de la Corte en la creación del derecho judicial. Se utilizan nociones de la ratiodecidendi del common law como herramientas de introspec ción para identificar cuatro modelos de creación del derecho en la práctica mexicana, a

saber: legislación judicial, reglas implícitas, justificaciones po lítico-morales, y categorías sociales. Aunque la primera concepción parece ser la dominante, las alternativas amplían el abanico para entender cómo es que la Corte crea derecho dependiendo del contexto interpretativo en que opere.

***Palabras clave*:**

Precedente, tesis jurisprudenciales, Ratio decidendi, reglas, razones, categorías.

CONTENT: I. *Introduction: The "Reasons" of Precedent*. II. *Ratio as Judicial Legislation*. III. *Ratio as Implicit Rules*. IV. *Ratios as Political-Moral Justifications*. V. *Ratio as Social Categories*. VI. *Conclusion: Ratio Between Epistemic and Ideological Boundaries*. VII. *References*.

I. Introduction: The "Reasons" of Precedent

In March 2021, the Mexican Constitution was amended to establish that the 'reasons that justify the decisions contained in the rulings issued ...' by the Supreme Court "shall be *binding* for all courts" (Mexican Political Constitution, Art. 94, CPEUM from now on). Moreover, so as to strengthen the Court as a constitutional court, it was established that a single supermajority decision of eight out of 11 justices in Plenary or four of five in Chambers becomes binding precedent. Thus, the Court seems to be moving towards a system of precedent inspired by the Anglo-American tradition one where a single ruling from the highest court can create a binding standard for the lower courts, as opposed to a criterion of reiteration of cases typical of the civil law.[1]

However, there is no agreement on the nature of these "reasons" (José R. Cossío, 2008, pp. 716-718; José Vargas Cordero, 2010, pp. 170-174). In the common law tradition, the *ratio decidendi* are the reasons needed or deemed sufficient to decide on a case that becomes binding for lower courts, as opposed to non-binding statements known as *obiter dicta*.[2] Yet, there is no consensus on its meaning. In fact, Goodhart once said that the term *ratio decidendi* is the second "most misleading expression in English law" (1930, pp. 161-162). Are such reasons canonical rules? Or are they rules inferred from the ruling? Or are they indistinguishable from the moral justification underlying a decision? Some authors suggest that if *rationes* were rules, they should "bind like shackles" (H.L.A. Hart, 1994, p. 139) while others view them as flexible "examples" that guide human action (Barbara Levenbook, 2000). Perhaps the *ratio* boils down to the old joke of British judges who quipped that "if you agree with the other bloke, you say it's part of the ratio; if you don't, you say it's 'obiter dictum,' with the implication that he is a congenital idiot " (Lord J. Asquith, 1950, p. 359).

In addition to the lack of consensus on the nature of reasons in theories of precedent, the reform is framed within a predominantly formalistic precedential context. For decades, there has been a judicial culture of "*tesis*," i.e., abstract statements that the Court itself identifies when deciding a case. However, there are also those who insist on the importance of the facts

in deciding cases more than the rules (Fourth Collegiate Court in Civil Matters of the First Circuit, 2010, pp. 48-50). At the same time, some Justices assume that constitutional judgments go far beyond the specific case since the Court "shapes its judicial policy to exert its powers of interpretation of the Constitution, in order to ensure the supremacy of this norm in the legal life of the country" (SCJN, First Chamber, ADR 5833/2014, 2015, para. 33). Lastly, there are those who suspect that the prevalence of courts' "reasoning" (Ana M. Alterio, 2021, p. 133) as a legal source is nothing but judicial supremacy.

Given this context, what can be understood by "binding reasons" in Mexico? This paper aims to identify different notions of reasons to map the corresponding roles the Court can play in creating law. To do so, it uses common law conceptions of *ratio decidendi* as "mirrors" (Frank I. Michelman, 2003, p.1737). That is, foreign sources are not necessarily used as models to follow, but as tools of introspection to analyze Mexican law. Along this vein, this article contends that there are four understandings of *ratio*: judicial legislation, implicit rules, political-moral justifications and social categories. These concepts compete and sometimes converge in the Court and influence the self-perception of how it generates precedents and thus develops constitutional law.

II. *Ratio* as Judicial Legislation

> "*The rule will operate like a statute and will, like a statute, have a canonical formulation.*"
>
> (Larry Alexander, 1989, pp. 17-18)

One challenge for courts and theories of precedent is to understand or suggest how yesterday's rulings constrain today's courts. If lower courts can distinguish precedent and create exceptions, then they are not really constrained. For a system of judicial law that truly constrains to come about, Alexander suggested that rules must be clear and canonical in their formulation, but opaque or self-contained in their underlying reasoning (Larry Alexander, 1989, p. 19).

Decades before Alexander's suggestion, Mexico seems to have opted for a model of judicial legislation. Between 1919 and 1957, in view of the time lapse between deciding a case and the dissemination of criteria, as well as the overproduction of rulings, the Court chose the '*tesis*' model (Camilo E. Saavedra Herrera, 2018, pp. 311-312). Through these '*tesis*', the Court has sought to monopolize the identification of binding judicial criteria and to publish them without having to publicize the written judgment. Up until 2019, Court opinions were 'the abstract written expression of a judicial criterion established when ruling on a specific case' (SCJN, AG 20/2013, Art. 2.A.).

The plethora of precedents and the slow pace of their dissemination was also embedded in the generalist epistemic framework allegedly typical of the civil law tradition, i.e., the

propensity of ‘Roman law to abstract the typical and repeatable aspect of every human relationship’ (Aldo Schiavone, 2005, p. 176). Later, a quasi-legislative process was created to produce *tesis* voted on by supermajorities of justices. Some justices even considered that *tesis* had ‘a degree of autonomy from the considerations of a ruling’ (SCJN, Plenary Session, Cossío, Session of April 20, 2006, p. 29). In more extreme cases, the Court held that lower courts were ‘unable to question the nature, content and process of integrating *tesis’* (SCJN, Second Chamber, CT 40/2000, 2002). In a case of fraudulent use of *tesis*, justices published an opinion that protected the life of the fetus, even though the ruling upheld the constitutionality of allowing abortion for congenital disorders (SCJN, Plenary Session, *Tesis* 187817, 2002).

The model of judicial legislation, at least until recently, was not limited to the *ratio*. Some justices questioned the applicability of these concepts from the Anglo-American tradition (SCJN, Gudiño, Session of April 20, 2006, p. 21). The Court could extract *tesis* both from the ‘core of the decision’ (Cossí o, Session of April 20, 2006, p. 31) and from “additional reasons”. The then Chief Justice stated that some judges look for a way to decide on issues by “saying the least they can.” However, others introduce “a much more important issue than the one being raised” (SCJN, Azuela, Session of April 20, 2006, pp. 36 and 37). More recently, the Court has held that *dicta* can create binding case law as long as they are used in the “chain of the argument” (SCJN, First Chamber, Application for Modification of Case Law 19/2010, 2011).

Some rulings contain a wealth of opinions, regardless of whether they are *ratio*, whether they engage in varying degrees of generality, or whether they are more educational or symbolic than prescriptive statements. For instance, in A.D. 6/2008, a *trans* person sued the civil registry to obtain a new birth certificate due to gender reassignment. The court identified ten *tesis* (SCJN, Plenary Session, AD 6/2008, 2009). One *tesis* asserts that human dignity is the basis of all fundamental rights (SCJN, *Tesis* 165813, 2009); another proclaims that the right to health is not limited to the physical dimension (SCJN, *Tesis* 165826, 2009) and yet another indicates that the marginal annotation denoting a change of sex on a birth certificate is a discriminatory act (SCJN, *Tesis* 165695, 2009). Thus, the Court has accepted judicial legislation as a paradigm and adopted a maximalist view of the opinions.

More recently, the Court has adopted a new approach to the model of judicial legislation that does differentiate between *ratio* and *obiter*. As per the Court’s internal rules, as of 2019, any opinion must have the structure of a rule: a factual assumption and a legal consequence (SCJN, AG 17/2019, Art. 39). Similarly, Article 218 of the new *amparo* law establishes that issues that “are not necessary to justify the decision, under no circumstance, should be included in the *tesis*.” However, the Court rules establish that *tesis* must be drafted with such clarity that it is not necessary to “resort to the judgment” in abstract terms and in the case that it is considered “necessary to provide examples with particular aspects of the specific case, the generic formula should be given first and secondly, the exemplification” (AG 17/209 Art. 41 III and VII.). Although this new approach to the model seeks to prevent the publication

of *obiter* opinions, the generality of the rules over the particularities of the case is still preferred.

Furthermore, at least in some cases, the Court seems to suggest that lower courts may not challenge vertical precedent by using the technique of distinguishing. Distinguishing, in a broad sense, occurs when the facts of the case at hand are essentially different from those of the precedent and therefore the rule simply does not cover the case. In contrast, distinction, in a narrow sense, happens when the subsequent court, in view of the differences between relevant facts, creates an exception to the rule, thus restricting the scope of application of the original rule (Joseph Raz, 1979, p. 185). The Court has adopted a very ambiguous concept of "inapplicable," which occurs when "it has to do with a different human right than the one referred to in case law." But in all other scenarios, lower courts "lack the power to reinterpret its content" (SCJN, Plenary Session, CT 299/2013, 2014).

The Court's judicial legislation model is consistent with, but also differs from, Alexander's model. On the one hand, the prohibition of making a narrow distinction between cases is in line with Alexander's dream. He states that "[a]ny practice of precedential constraint that distinguishes between overruling a precedent and narrowing/modifying a precedent is not a practice of the rule model of precedent" (Larry Alexander, 1989, p. 19). According to the Court's and Alexander's judicial legislation models, subsequent courts must limit themselves to apply or invalidate rules. On the other hand, even with the new approach, *tesis* do not necessarily have the structure of a rule. Some *tesis* do not provide information on the factual information or the legal consequence in terms of permissions, prohibitions or obligations. It is paradoxical that in a civil law country where "judges are no more than the mouth that pronounces the words of the law" (Charles-Louis de S. Montesquieu, 1748, Book XI, Chap. VI), legislative language is actually the vehicle that makes the judicial creation of law self-evident.

Why did this model emerge? Perhaps justices accept the fact that the *ratio/obiter* distinction is illusory (Julius Stone, 1985, p. 33), that there is no universal way to identify it, and that there may be judgments with many *rationes*. Perhaps justices seek to move beyond common law categories (Jiri Komárek, 2013). After all, why use "foreign" concepts to understand one's own? The Court readily acknowledges that it does much more than rule on a specific case and creates rules. In this model, *tesis* are a kind of quasi-legislative provisions. With canonical statements, extracted from the facts and jurisdictional proceedings, the intention is to convey what the Court had in mind, analogous to the dissociation between the text of a law and its legislative process. Thus, it seeks to prevent subsequent courts from re-interpreting the criterion or modifying it and limit themselves to simply applying it.

This model combines formalist and realist elements. It adopts a formalist stance on creating precedent on the basis of abstract canonical statements, but implicitly accepts an interpretive realism of statutory law. The indeterminate nature of legislative sources is recognized, accepting that there are several interpretive methods and that the scope of legislative rules can be limited by restrictive interpretation or broadened by analogy. However,

back to formalism – but now prescriptive- the lower courts are ordered to adopt a strict exegesis of the *tesis* since "they do not have the authority to re-interpret their content." The interpretive order is to follow the more "literal" and immediate meaning that can be assigned to *tesis*, regardless of how unfair it may be to lower courts.

Judicial legislation is a paradigm that has been forged for a century, and it faces with alternative understandings of the *ratio*. The laws implemented by the 2021 reform do not dismiss the model, but rather update it. The new approach to *tesis* as explicit *rationes*, but limited to the facts, may serve a practical purpose. Assuming a suitable degree of generality is adopted, *Tesis* can clearly communicate the rule to subsequent courts, litigants and the general public. Moreover, it makes reasons more difficult to manipulate than leaving their identification in the hands of future interpreters. However, even accepting judicial interpretative creativity, the assimilation between judicial law and legislation is questionable. In a balanced model of separation of powers, the judicial law must emerge from a separate methodology which prevents the Court from simply establishing rules that seem appropriate to them. The casuistic and progressive construction of precedent must stand out from the radical potential of statutory law. The interpretive tendency to prefer abstractions goes deeper than the formal legislative amendment calling for the creation of *tesis* with an emphasis on the facts.

III. *Ratio* as an Implicit Rule

"*It is by his choice of the material facts that the judge creates law*"

(Arthur L. Goodhart, 1930, p. 169)

Although Mexican precedential culture is predominantly formalist, the reform seems to have encouraged a more casuistic idea of judge-made law. The new *amparo* law alludes to relevant facts as an element to any *Tesis*. The reference to facts recalls Goodhart's famous formula whereby the *ratio* is inferred from the facts regarded as judicially relevant and their outcome, not in the explicit rule formulated by the court nor in its reasoning (Arthur L. Goodhart, 1930, pp. 161,182). The canonical rule may be flawed, inconsistent with the case, or not reflect the majority decision. Likewise, the court's argumentation may be specious, politically undesirable or morally outrageous, but the subsequent court must follow precedent as if it were a rule. What truly binds the subsequent court is the choice of relevant facts.

The ideal model of implicit rules strives to recalibrate the generality-particularity relation in favor of the facts. The *ratio* has a descriptive function: to draw a distinction between the judicial creation of law through particular decisions limited by concrete facts and the arguments of the parties, as opposed to legislated law of general propositions. But it also has a normative function: out of deference to a certain understanding of separation of powers, it narrows the scope of its precedents to specific factual scenarios proven by the parties in an

adversarial trial. Moreover, it refrains from choosing a certain degree of generality of the rule, thus it avoids distancing itself from the facts. In this way, a minimalist approach is adopted for the Court in terms of developing law and a semi-formalist approach is adopted for lower courts. Although the Court does not automatically create the rule, it is open to determination by the subsequent court, albeit its level of generality may be controversial.

This emphasis on facts clashes with the generalist reasoning supposedly typical of (Konrad Zweigert and H. Kötz, 1998, pp. 69-70; Legrand, 1996, pp. 64-67; Cfr. Holger Spamann *et al.*, 2021), but it fits with the casuistic practice of procedural and evidence law. Courts, and first instance courts in particular, reconstruct and evaluate events from the parties' narratives and claims, the evidence, and the known, disputed and institutional facts (Michele Taruffo, 2011, pp. 96-104). This model also entails an understanding of *Tesis* as mere instruments of dissemination and not as autonomous rules as assumed by the judicial legislation model.[3] Without the need for an official rule encapsulating the decision in a canonical formula, or even a universally accepted methodology for inferring *ratio*, in most cases one can be reasonably deduced. In fact, litigants perhaps even intuitively infer the *ratio* when appealing a ruling in a second or higher courts (SCJN, First Chamber, AR 898/2006, 2006).

Furthermore, this model explains, at least initially, the practice of distinguishing precedent. Once the antecedent of a *ratio* has been reconstructed, it is possible for subsequent courts to create justified exceptions in light of new relevant facts. For some theorists, this practice is a basic component that every theory of precedent must contain (Robert Alexy, 1989, pp. 278-279; Adam Rigoni, 2014, p. 133). The Court itself has validated the legitimacy of this technique, understanding it as "*not applying* the rule derived from a precedent [...] when a subsequent court identifies *a new factual element* in the new case that was absent in the precedent (SCJN, ADR 5601/2014, 2015).[4]

Although this model seems promising, in practice facts are often overlooked, even in cases of concrete constitutional review. For instance, ADR 4865/2018 analyzed whether it was pertinent to provide compensation for moral damage to a person who was forced to resign from a company with Jewish executives because he had a Nazi swastika tattoo. The Court denied the *amparo* on the grounds that it was considered hate speech. However, it is not possible to infer from the ruling when, how or why the worker got the tattoo. It may well have been a tattoo gotten as a minor or without knowing or attributing an anti-Semitic meaning. This information does not appear in the body of the text, but in two footnotes (SCJN, 2019, footnotes 64 and 83). It is also unclear as to why the worker's resignation was not dated or what exactly triggered the resignation. Overlooking the relevant facts of the case complicates the future interpreter's task of inferring the background and may lead to a non-contextualized and over-inclusive rule.

On the other hand, the "facts" analyzed by the Supreme Court are quite different from those analyzed by a lower court. In cases of diffuse constitutional review, the original facts

begin to blur as one moves up the judicial hierarchy. In test cases, the parties themselves seek not only to win the case, but also to set a precedent that will transform the legal system. Abstract constitutional review cases do not even involve facts in the traditional sense; the Court analyzes provisions without any reference to people of flesh and blood. As Mitidiero says, in higher courts, even in civil law countries, 'the concrete case [is] merely an excuse [to] form precedents' (Daniel Mitidiero, 2016, pp. 261-262). The specific circumstances of what, who, how, when where or why a certain act was carried out take second place and what interests the Court is to make a normative, not an evidentiary, judgment.

Case law on same-sex marriage illustrates how the Court addresses facts in some concrete control cases. AR 704/2014 was the case that consolidated case law, establishing that:

> "[T]he law of any state of the federation that, on the one hand, considers that the purpose of the former is procreation and/or that defines it as that which is celebrated between a man and a woman is unconstitutional" (SCJN, Primera Sala, Tesis 2009407, 2015).

The ruling only mentions that the plaintiff identifies as homosexual and lives in the State of Colima (SCJN, AR 704/2014, 2015). It is not known whether she intended to marry, nor is there any information about her age or gender. Since she challenged the expressive function of the law, there is no need for specific information on the harm caused by a homophobic public civil registry officer.

After all, the judicial legislation model seems to be more faithful to the way the Court creates law. The Court abstracts the particularities of the case and encompasses millions of inhabitants who are part of the LGBTQI community. Even if the model of *tesis* were to be abandoned altogether, the Court may try to reassert its monopoly on judicial rules by consolidating dozens of overlapping arguments into a canonical rule in its judgment.

Perhaps the model of implied rules may be revisited with a different concept of "facts". The Court does not analyze particular disputed facts, but these are amplified in the light of thousands of similar scenarios that transcend the parties. The Court uses a complete factual framework[5] —perhaps made up of hundreds of precedents— to form a typical and repeatable precedent. For instance, in an *amparo* on discrimination of the right to social security for domestic workers, the Court used national statistics of millions of people to argue that a seemingly gender-neutral rule had in fact a disproportionate effect on women (SCJN, AD 9/2018, 2018). But perhaps, lest this model be confused with that of judicial legislation, the processes for making substantiated empirical statements should emerge from an adversarial proceeding between the parties, rather than being independently introduced by judges. There is still a pending debate on the deference that should be given to lower courts in assessing the facts in concrete constitutional review, as well as the weight that should be given to *amici curiae*, scientific expert opinions or proceedings to better provide empirical evidence supporting a *ratio*.

However, even rethinking an implicit rules model would still overlook one fundamental aspect of precedent-based argumentation: justification. The facts of a case are always *relevant* in the light of a goal, principle, purpose or value that justifies grouping certain traits of an event under a single category (Katharina Stevens, 2018, p. 239). Moreover, if it is accepted that the rules of precedent are not only applied and overruled but can also be extended in unforeseen but analogous cases or reduced in exceptional cases, it is necessary to provide reasons that explain the similarities or differences between the precedent and the case at hand. Hence, in addition to an antecedent and a judicial consequence, it is necessary to consider the political-moral justifications underlying the rules.

IV. *Ratio* as Political-Moral Justification

> "We can take rationes for what they are—rulings on law stated as necessary parts of justifications of decisions relatively to the cases and the arguments put by given parties."
>
> (Neil MacCormick, 2005, p. 154)

The *Amparo* Law identifies *justification* as a third element of *Tesis*, in addition to facts and consequences. Every ruling must answer why the case is treated similarly or not to the precedent. This model fits with the anti- or post-positivist position which includes principles as the justification of any rule. After all, many have recognized the role morality plays in the interpretation of precedent (Scott Brewer, 1996, pp. 959-961; Bustamante, 2012, pp. 66-67). MacCormick, for instance, holds that the theory of precedent is necessarily linked to justification, and this practice, in turn, consists of giving reasons that are consistent with moral principles (2005, pp. 100, 145).

However, the fact that the reform mentions "justification" may be a Trojan horse for the will of the Amending Power. The Court does not just safeguard the Constitution by specifying rules but incorporates its ideology into constitutional law. It is one thing, for example, to abide by a *rule* that simply prohibits heterosexual definitions of marriage; it is quite another, however, to follow the *justification* of the US Court, which stated that: [n]o union embodies is more profound that marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family." (*Obergefell v. Hodges,* 576 U.S. 644 (2015) or that of the Mexican Court, which argued that heterosexual definitions of marriage "promote and help build a social meaning of exclusion or demeaning" (SCJN, First Chamber, AR 704/2014, para. 75, 2014). Thus, conceiving justification as a constitutive element of reasons runs the risk of a government of judges.

In view of this objection, anti-positivists could say that following precedent is justified by formal principles. According to Alexy, formal principles "require that the authority of duly issued and socially efficacious norms is optimized" (Robert Alexy, 2014, p. 516) and include, *inter alia*, those of equality, competence and legal certainty (Jorge Portocarrero Quispe, 2016, p. 29). Thus, "justifications" would be specially protected arguments preventing similar cases from being treated differently, lower courts from disobeying a higher one, or the pre-existing law from being modified unless an argumentative burden is met. In this way, the formal principles serve a function equivalent to the positivist rule but making the argumentative aspect of the precedent transparent (R. Camarena González, 2021). If the Court does not identify any significant differences between the precedent and the case at hand, if it does not demonstrate that it has the authority to overrule the precedent, or even if it does have the authority to overrule the precedent but does not demonstrate that legal certainty must be affected, justifications will then operate as absolute rules.

Moreover, anti-positivists often argue that coherence constrains all judicial interpretation. Courts should not impose their convictions without demonstrating that their arguments are consistent with past decisions (Ronald Dworkin, 1996, pp. 10, 83). *Rationes* are open-ended and incomplete (Neil MacCormick, 2005, 147, pp. 154-155), interpreted as part of a set of decisions woven together by principles. Thus, even though there may be revisions to precedents by way of distinction or overruling, any such revision must be constrained by coherence.

In some precedents, the Court seems to understand its interpretative duty in coherentist terms. In the judgment CT 21/2011 (SCJN, Plenary Session, p. 54 2012), the Court admitted the "admissibility of different "interpretations" and suggested a criterion to rank interpretations according to the "highest possible degree of interpretative coherence". At times, the Court interprets its precedents not as isolated textual rules but as preliminary categories comprising a body of case law that emerges, zigzags, consolidates or collapses over time.[6] In fact, in another case, a Justice stated that:

> [C]onsistency requires that a court's precedents fit logically and coherently into a particular set of decisions so that the precedents laid down for a given problem are analogous, based on similar lines of reasoning (SCJN, First Chamber, ADR, 3166/2015, Dissenting Opinion, Zaldívar p. 5, 2016).[7]

In this understanding, coherence becomes a practical duty of the Court to demonstrate that its justifications conform to those given previously (Leonor Moral Soriano, 2003, p. 296). Thus, for instance, once the Court recognizes the right of trans people to obtain a new birth certificate on the grounds of free development of personality, it may then expand the precedent to include the right to divorce without cause or to consume marijuana. But it may also choose to exclude the use of cocaine because of the distinct harm it can cause. In non-distinguishable cases, the Court may reverse its own decisions, as long as the overruling restores coherence to its jurisprudence.

Once again, it can be asked whether coherence implies a maximalism of value judgments rather than of rules. Even if coherence is understood as the practical result of intersubjective arguments between interpreters in which the winning argument is the one most consistent with pre-existing law, there is a threat of judicial supremacy. Popular constitutionalists might ask why the Court would decide what the Constitution is (Ana M. Alterio, 2021, pp. 137-141). Some justices have even questioned the excessive power their precedents might wield, as if they possessed "epistemic superiority" (SCJN, Plenary Session, Cossío, Dissenting Opinion CT 299/2013, 2013) in determining the content of the Constitution. When all is said and done, while coherence may reduce discretion by compelling arguments that the case is or is not analogous to the precedent, it also encourages the introduction of new substantive content.

An anti-positivist court may argue that its creation of law is more democratic that rule models. This model is admittedly not as practical as that of judicial legislation in identifying a rule in a matter of seconds. But judicial practice is much more than identifying rules and applying them; it must also account for the creative role of interpretation. On the other hand, even though the Court abstracts facts from the case, it is much more transparent in its duty to justify its reasons. In the end, its role is to make interpretative judgments, not judgments of evidentiary assessment or empirical causation. At the same time, the justification given today must be framed not only by a precedent, but by a set of interrelated decisions, an argumentative constraint that models of rules ignore. In any case, the competence of the Court to make its reasoning binding comes from a substantive concept of democracy mandated by the Amending Power. Through constitutional review, the constitution withdraws certain issues from ordinary political discussion while judicial reasons enrich the debate and balance the legal sources in favor of minorities.

Although it is uncertain how a judicial system could work without a minimal commitment to precedent, popular constitutionalists could question whether the will of the people is reduced to what the Court holds. While the Mexican constitution has been reformed almost eight hundred times, sometimes overturning precedents, this does not solve the problem that the opinions of eight justices, whom no one elected, carry greater weight than the views of millions of people purportedly represented by the popular vote. Could it be that the only checks on the Court are constitutional reform or the appointment of new justices?

V. *Ratios* as Social Categories

> "[T]he meaning of a precedent is socially set and socially salient."
>
> (Barbara Levenbook, 2000, p. 186)

A further approach to the reasons of precedent, which could quell the suspicion of judicial supremacy, is that of social categories.[8] Whether consciously or unconsciously, the Court

organizes and classifies the sensory stimuli of the world according to certain properties based on shared beliefs, education, ideology, interests, biases, values, experiences, etc. There may be, as Schauer says, strictly legal categories like "contract" or pre-legal categories like "railroad," but many are categories borrowed from the social world (Frederick Schauer, 2005, pp. 307-320, 312). As social constructs, their meaning and validity do not correspond exclusively to the judiciary but are created in a way that is shared by the entire community.

Levenbook proposes to understand precedents as *examples* whose meaning is controlled by society (See also H. L. A. Hart, 1994, pp. 124-126). The model of examples is similar to that of the implicit rule in its suspicion of linguistic formulations but accepts that "importance" is not only judicial or moral, but social. According to Levenbook, facts are filtered by natural language and perceptions of individuals, who collectively give them "exemplar force" (Barbara Levenbook, 2000, p. 190) to precedent. This force is relatively unconnected to moral justification and is understood in terms of social salience.

Rather than allude to examples, it seems better to refer to this model as that of social categories to stress its classificatory role. The judicial perspective is complemented by a broader framework which recognizes that the exercise of categorization interacts with cultural, social and historical dimensions in constant flux. In this model, precedents compel, not because of legal coherence, but because of the social support underlying the categories used by the precedent. Social pressure needs to be present for the targets of the precedent to feel obliged to follow it, and even shamed for not doing so. The focal point of this model is to step back from the categorization of judicially relevant facts to first analyze how these social filters are instinctively assumed or consciously chosen and how categories are constructed.

To give an example illustrating the social construction of categories in precedents, in an abstract constitutional review complaint, the Court ruled on the constitutionality of the removal of municipal officials from office due to a "permanent physical or mental disability" (SCJN, AI 3/2010, p. 19, 2012). In the ensuring discussion, justices used categories drawn from the medical model of disabilities, which views them as "ailments" (SCJN, Session of January 17, 2012, p.20), as illnesses to be cured. One Justice went as far as to declare that a "one-armed person" (p. 25) could not play the piano in a symphony orchestra, or that Stephen Hawking's lectures were so "painfully slow" (p. 17) that he should not be a municipal official. Thus, the constitutionality of the provision was confirmed with only one dissident vote, albeit disapproving of the reasoning.

Many people with disabilities refused to be labeled as "disabled." In light of the social model that sees disabilities not as individual impairments but as socially imposed barriers (Rosemary Kayess and Phillip French, 2008), they criticized the ignorance and insensitivity of the discussion and the judgment (Carlos Ríos Espinosa, 2012) and met with justices to express their disagreement (SCJN, Press Release 033/2012). As a result, the Court shifted the paradigm toward the social model of disability in subsequent cases and drafted a protocol on the subject. Perhaps most surprising, and the most important thing for this text, is that the

Court did not publish any *Tesis*, perhaps, as a tacit apology for its mistake, as suggested by Smith and Stein (2018, p. 333). Because of social pressure, the anachronistic categories of precedent became a dead letter.

The social categories model enhances the taxonomy with a less legal and more socio-political perspective. Instead of taking a stand in the debate on the separation of powers, it transcends it. The judicial legislation model is overly legalistic; it does not consider the social context or the cultural wars in which it occurs. Even if the Court does legislate, it does so checked by social as well as legal forces. The implicit rules model, on the other hand, assumes the facts picked by the judge or court to be true, but does not critically analyze the lenses through which those facts were viewed. The raw facts of the real world are perceived differently by different people. The justifications model alone does not account for how normative judgments become stronger as social attitudes change.

Think, for example, of how the positions of both society and the Court, on reflection, have changed on abortion, homosexuality or the rights of people with disabilities in recent decades. In 1942, the Court interpreted intellectual disability as a "mental abnormality" (SCJN, First Chamber, *Tesis* 307739, 1943) typical of an "imbecile". This position began to waver in the 1970s when reference was being made to "mental disability" as "an alteration in health that impairs the normal functioning of the ability to think" (Suprema Corte de Justicia de la Nación, *Tesis* 240729, 1981). Later, the social model that advocates built since the 1960s was later incorporated into Mexican law through the Convention on the Rights of Persons with Disabilities. Finally, the social model, at least in discourse, evolved into the dominant one in the Court. The social categories by which the Court views disputes are shaped by heterogeneous, conflictive and changing societies. Categories that were once hegemonic weakened to the point of abandonment, changing the perception of the facts. The Court's value judgments are not impervious to social changes, but rather reflect them. Categories do not only emanate from the judicial elite or legal scholars, but from generalized changes in social attitudes. In short, the Court is not a transformer in itself, but a social co-builder that is also influenced by social changes.

There is a dialogical relationship between the Court's convictions and those of other political and social actors (Robert C. Post, 2003, pp. 4, 7-8). As Levenbook says, this relationship may be a product of "[u]narticulated folk wisdom" (p. 225) that subconsciously encumbers the Court. But it may also be part of a broader strategy to effect social change. Collectives, movements and public actors jointly build social categories. Although the degree of relative autonomy of precedents with regard to social forces may vary, it cannot be assumed that the Court decides cases in a solipsistic manner. If it tries to establish a precedent with categories that non-judicial sectors reject almost unanimously, the *ratio* will not take root. If, on the other hand, it uses strongly internalized or otherwise latent social categories, the precedent is more likely to consolidate itself and become binding.

In light of the example, it could be argued that social categories must enter the legal world through an institutional channel other than the Court's perceptions. The Convention that introduced the social model already existed in the legal world from the time Mexico ratified it and gave it constitutional status. Hence, the precedent can be challenged without appealing to social issues; the Court's decision was plainly and simply a miscarriage of justice, *a per incuriam* precedent. However, the fact that the Court ignored a legal provision strengthens the argument of the interdependence between legal and social categories. No matter how much the social model of disability was in effect, the Court had not internalized the new categories. The strategy approach for a court embracing this model is to identify the vibrant or consolidated categories and either sow the seed of a new one or kill the dying category at the right time.

Undoubtedly, the relative autonomy of the categories is contentious. On the one hand, by interweaving social and legal concepts, it could be objected that the Court relinquishes its counter-majoritarian role. By predicting the social import to be attached to a decision and shifting positions before the precedent is issued, majorities are given tyrannical power. In the end, precedent will depend on the social pedigree of the categories. From this viewpoint, it would be just as well for precedents to be drafted based on polls. However, the Court may have a counter-majoritarian role, in the sense of majorities such as ordinary legislatures and executives, but majority on par with non-institutional social forces. This happens, for instance, when the legislature has not updated its practices to include the categories used in constitutional sources, including precedents. This interaction between social and legal elements is inevitable. The Court already creates precedents within a socio-political reality, fully aware that its precedents may go against certain sectors, but it must always have sufficient social endorsement (Barry Friedman, 2005, pp. 322-323; Michael J. Klarman, 1996, pp. 6-9, 16-17). Without this social context, no matter how divided it may be, the legal dispute would not only not be open to litigation between two opposing positions, but it would also be unfathomable unless a sizable sector of society adopts the same position as the Court.

Although this complementary model of reasons might seem attractive since it accounts for the relative autonomy of law, if the Court were to adopt it, it could turn into populism or judicial submission. It is one thing to accept that social categories influence the perception of reality, but it is quite another to subscribe to the normative premise that the Court must issue its precedents with the intention of reflecting the social sentiment of the moment. The Court can always err in its reading of what the "people" want or can listen to or ignore certain sectors as best suits its political agenda, much like traditional populism. Thus, the Court regards itself as an enlightened body capable of knowing what social sectors seek through emerging categories foreseen and institutionalized in precedents. The traditional position of the role of constitutional precedent is that it should be the best possible expression of the law in force, regardless of what other branches or social sectors hold and without making political calculations of how a ruling will be received, at the risk pain of becoming mere politics.

VI. Conclusion: *Ratio* Between Epistemic and Ideological Frontiers

This article analyzed how binding reasons can be understood in Mexico. The amendment and rules implementing it seem to promote models of implicit rules and justifications as complements or alternatives to the model of judicial legislation, perhaps in an attempt to eliminate *Tesis*. Instead of proposing a super-conceptualization of *ratio* that takes the advantages of each and surmounts their disadvantages, it is probably better to understand them as shifting and sometimes overlapping ideas, depending on the interpretative context in which the Court sets the precedent.

In some scenarios, even if *Tesis* were abolished, there may be good reasons to issue rules under the judicial legislation model. Perhaps the Court already has ample information and knowledge, precedential strength and sufficient political backing to arrive at the "typical and repeatable aspect" of a given human relationship and translate it into the language of rules. The Court captures its decision in a canonical rule that makes it difficult for subsequent courts and other interpreters to manipulate. Nevertheless, the practicality of judicial rules is gained by paying the price of accepting the language of judicial legislation that does not fit with many conceptualizations of separation of powers.

In other cases, once the facts of the trial have been given their proper place in a judgment, an uncertain scenario might dictate providing the factual clues for the subsequent court to arrive at the category but leaving the rule implicit. The Court lacks sufficient information to formulate a rule as an explicit provision in a thriving discussion within the Court, the judiciary and society in general. The Court is experimenting with different approaches, and the nuances of the facts discourage the formulation of a rule with a certain degree of abstraction. Moreover, this approach is useful when there is a consensus in the Court in terms of the rulings, but differences in the justifications, as occurs when there are numerous concurring votes. Thus, the subsequent courts re-interpret, elaborate on and clarify the Court's precedent.

The model of political-moral justifications may be present in any reasoning by analogy or distinction, but it is especially visible when the Court overrules a precedent. Neither a *Tesis* nor even a good analysis of the facts is enough to produce judicial law. The Court provides substantive reasons as to why the new judicial category is better than the previous one. It accepts that the case is not dissimilar but demonstrates that it has the power to overrule it. Moreover, its impact on legal certainty is not very serious given that the change was drawn along a parallel line of precedents. Lastly, the overruling is justified in terms of coherence; there was an anomalous precedent that must be invalidated in order to reestablish conditions of mutual support between rulings. This justification within the judiciary must be aligned with the principle of separation of powers to demonstrate the Court's cooperation or predominance with the executive and legislative branches.

Lastly, the model of social categories can shed light on the previous models, especially when there is a gap between legal and social concepts. Legal language has lagged cultural, political and technological changes. At any rate, the Court that seeks to maximize the voices of

the minorities disregarded in ordinary political processes must accept that its precedents must be firmly rooted in society if these precedents are to transform reality.

This article has sought to further the discussion of *ratio decidendi* in the context of Mexican law and the civil law tradition, albeit inspired by the common law. Adopting the perspective of the Court as a collective and institutional agent raises many questions for future research. How should the pertinent facts be revisited in light of a constitutional court's role as a "court of precedent"? To what extent is the court a collective agent and not simply a collection of individuals in setting precedent? How much power and accountability does an acting justice have to set a collective position when issuing a judgment? Does focusing on supreme courts instead of lower courts distort the understanding of creating and following precedent? Many discussions are still pending in this collective effort to understand precedent from a situated standpoint while at the same time transcending national borders and legal traditions.

VII. References

1a./J. 43/2015 (10a.) (2015). *Gaceta del Seminario Judicial de la Federación*. Primera Sala.Book 19, June , T. I, p. 536.

Acción de Inconstitucionalidad 3/2010 (2012). Suprema Corte de Justicia de la Nación, Pleno. José Fernando Franco González Salas, January 19.

Acuerdo General 17/2019 (2019). Suprema Corte de Justicia de la Nación.Mexico.

Acuerdo General 20/2013 (2013). Suprema Corte de Justicia de la Nación. Mexico.

Alexander, Larry (1989). Constrained by precedent. *Southern California Law Review*, *63*(1).

Alexy, Robert (2014). Formal principles: Some replies to critics. *International Journal of Constitutional Law, 12*(3), 511-524.

Alexy, Robert (1989). *A theory of legal argumentation*. Clarendon,

Alterio, Ana M. (2021). *Entre lo neo y lo nuevo del constitucionalismo latinoamericano*. Tirant.

Amparo Directo 6/2008 (2009). Suprema Corte de Justicia de la Nación, Pleno. Sergio A. Valls Hernández, January 6.

Amparo Directo en Revisión 5833/2014 (2015). *Semanario Judicial de la Federación*.

Amparo Directo en Revisión 5601/2014 (2015). Suprema Corte de Justicia de la Nación Primera Sala. Arturo Zaldívar Lelo De Larrea.

Amparo Directo en Revisión 3166/2015 (2016). Suprema Corte de Justicia de la Nación, Primera Sala.José Ramón Cossío Díaz, May 18, Voto particular de Arturo Zaldívar Lelo de Larrea.

Amparo en Revisión 898/2006 (2006), Suprema Corte de Justicia de la Nación, Primera Sala. José Ramón Cossío Díaz, June 7.

Amparo en Revisión 1359/2015 (2017)., Suprema Corte de Justicia de la Nación, Primera Sala. Arturo Zaldívar Lelo De Larrea, November 15.

Amparo en Revisión 704/2014 (2015). Suprema Corte de Justicia de la Nación, Primera Sala. Alfredo Gutiérrez Ortiz Mena, March 18.

Amparo en Revisión 4865/2018 (2019). Suprema Corte de Justicia de la Nación, Primera Sala Norma Lucía Piña Hernández, October 30.

Amparo Directo 9/2018 (2018). Suprema Corte de Justicia de la Nación, Segunda Sala. Alberto Pérez Dayán, December 5.

Amparo Directo 160/2010, Cuarto Tribunal Colegiado en Materia Civil del Primer Circuito, Mexico, May 13, 2010.

Asquith, Lord J. (1959). Some Aspects of the Work of the Court of Appeal. *Journal of the Society of Public Teachers of Law*, *1*(5).

Asquith, Lord J. (1950). *The Language of, and a Notation for, the Doctrine of Precedent*

Brewer, Scott. (1996). Exemplary Reasoning: Semantics, Pragmatics and the Rational Force of Legal Argument by Analogy. *Harvard Law Review*, *109*(5).

Bustamante, Thomas (2010). Principles, Precedents and their Interplay in Legal Argumentation: How to Justify Analogies between Cases. *Archiv für Rechts-und Sozialphilosophie*, (119).

Camarena González, Rodrigo (2021). Janus-faced Coherentism and the Forgotten Role of Formal Principles. *Ratio Juris*. *34*(3), 263-281.

Cossío, José R. (2008). *La controversia constitucional*. Porrúa.

Contradicción de Tesis 21/2011 (2012). Suprema Corte de Justicia de la Nación, Pleno. Alfredo Gutiérrez Ortiz Mena, September 9.

Contradicción de Tesis 299/2013 (2014). Suprema Corte de Justicia de la Nación, Pleno. Jorge Mario Pardo Rebolledo, 22 de enero.

Contradicción de Tesis 40/2000 (2002). Suprema Corte de Justicia de la Nación, Segunda Sala, Guillermo I. Ortiz Mayagoitia, August 23.

Dworkin, Ronald (1996). Freedom's *Law: The Moral Reading of the American Constitution*. Oxford University Press.

Friedman, Barry (2005). The politics of judicial review. *Texas Law Review, 84*, 257.

Gerhardt, Michael J. (2008). *The Power of Precedent*. Oxford University Press.

Goodhart, Arthur L. (1930). Determining the ratio decidendi of a case. *Yale Law Journal, XL*(2).

Hart, H. L. A. (1994). *The Concept of Law* (2nd ed.). Clarendon Press.

Kayess, Rosemary and French, Phillip (2008). Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities. *Human Rights Law Review*, *8*(1).

Klarman, Michael J. (1996). Rethinking the civil rights and civil liberties revolutions. *Virginia Law Review*, *82*(1), 1-67.

Komárek, Jiri (2013). Reasoning with previous decisions: beyond the doctrine of precedent. *The American Journal of Comparative Law*, *61*(1).

LEGRAND, Pierre (1996). European Legal Systems Are Not Converging. *The International and Comparative Law Quarterly, 45*(1).

LEVENBOOK, Barbara B. (2006). The Meaning of a Precedent. *Legal Theory, 6*(2), p.185-240.

LEVENBOOK, Barbara B. (2000).*The meaning of a precedent.* p.190.

MACCORMICK, Neil (2005). *Reasoning, Rhetoric and The Rule of Law: A Theory of Legal*. Oxford University Press.

MICHELMAN, Frank I. (2003). Reflection. *Texas Law Review*, *82*.

MITIDIERO, Daniel (2016). Dos modelos de cortes de vértice- cortes superiores y cortes supremas. In Michele Taruffo, Luiz G. Marinoni, and Daniel Mitidero (Coords.), *La misión de los tribunales supremos*. Marcial Pons.

MONTESQUIEU, Charles-Louis de S. (1748). *De l'esprit des lois.*

MORAL SORIANO, Leonor (2003). A Modest Notion of Coherence in Legal Reasoning. A Model for the European Court of Justice. *Ratio Juris*, *16*(3).

OBERGEFELL v. *Hodges*, 576 US. 644 (2015). *https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf*

P./J. 14/2002, Suprema Corte de Justicia de la Nación, Pleno, SJF, Tome XV, February 2002, p. 588, Registro digital: 187817.

PORTOCARRERO QUISPE, Jorge (2016). *La ponderación y la autoridad en el derecho*. Marcial Pons.

Post, Robert C. (2003). Fashioning the legal constitution: Culture, courts, and law. *Harvard Law Review, 117*.

Press Release Comunicado No. 033/2012 (2012). Suprema Corte de Justicia de la Nación. Mexico,.

RAZ, Joseph (1979). *The authority of law: Essays on law and morality*. Oxford University Press.

RIGONI, Adam (2014). Common-Law Judicial Reasoning and Analogy. *Legal Theory*, *20*(2), 133-156.

RÍOS ESPINOSA, Carlos (2012). *Reflexiones sobre el fallo de la SCJN en torno a los derechos políticos de las personas con discapacidad*. Comisión Mexicana en Defensa y Promoción de los Derechos Humanos. *http://cmdpdh.org/2012/02/reflexiones-sobre-el-fallo-de-la-scjn-en-torno-a-los-derechos-politicos-de-las-personas-con-discapacidad/*

SAAVEDRA HERRERA, Camilo E. (2018). El poder de la jurisprudencia. Un análisis sobre el desarrollo y funcionamiento del precedente judicial en México. In Carlos Bernal, Rodrigo Camaren y Alejandra Martínez (Coords.). *El Precedente en la Suprema Corte de Justicia de la Nación* (pp. 279-353). Centro de Estudios Constitucionales SJCN.

SCHAUER, Frederick (2005). “La categorización, en el Derecho y en el mundo”, *Doxa*, *Cuadernos de Filosofía del Derecho, 28*, 307-320.

SCHIAVONE, Aldo (2005). *Ius: L’invenzione del diritto in occidente.* Einaudi.

SMITH, Hezzy and Stein, Michael A. (2018). Mexico. In Lisa Waddington and Anna Lawson (eds). *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts*. Oxford University Press.

Solicitud de modificación de jurisprudencia 19/2010 (2011). Suprema Corte de Justicia de la Nación, Primera Sala. Arturo Zaldívar Lelo De Larrea, August 24.

Solicitud de Ejercicio de la Facultad de Atracción 454/2015 (2016). Suprema Corte de Justicia de la Nación, Segunda Sala. Alberto Pérez Dayán, February 17.

Spamann, Holger et al. (2021). Judges in the Lab: No Precedent Effects, No Common/Civil Law Differences. *Journal of Legal Analysis*, *13*(1), 110-126.

Stevens, Katharina (2018). Reasoning by precedent-between rules and analogies. *Legal Theory*, *24*(3), 216-254.

Stone, Julius (1985). *Precedent and Law: Dynamics of Common law Growth*. Butterworths.

Suprema Corte de Justicia de la Nación, Primera Sala, *Seminario Judicial de la Federación*, T. LXXV, 1943, p. 2877.

Taruffo, Michele (2011). *La prueba de los hechos*. Trotta.

Tesis aislada LXIV/1997 (1997). Suprema Corte de Justicia de la Nación, Pleno SJF. Tome V, May 1997, p. 166, Registro digital: 198709.

Tesis Aislada LXV/2009 (2009). Suprema Corte de Justicia de la Nación, Pleno. SJF, Tomo XXX, December 2009, p. 8.

Tesis Aislada LXVIII/2009. Suprema Corte de Justicia de la Nación, Pleno. *Seminario Judicial de la Federación*, Tomo XXX, December 2009, p. 6.

Tesis de Reiteración 1a./J. 43/2015 (10a.). *Seminario Judicial de la Federación y su Gaceta*. 2009.

Tesis 249729 (1981). Semanario Judicial de la Federación, Suprema Corte de Justicia de la Nación, Tercera Sala Vol. 145-150, Fourth Part, 1981, p. 260.

Tesis Aislada P. LXIV/2009 (2009). Semanario Judicial de la Federación. Tome XXX, December, p. 18.

Tiersma, Peter (2006). The textualization of precedent. *Norte Dame Law Review*, *82*(3), 1187-1278.

Vargas Cordero, José (2010). *La jurisprudencia por razones, diferencias con la jurisprudencia tradicional y comparación con el sistema de precedentes,* Undergraduate Thesis, School of Law, UNAM.

Versión Taquigráfica de la sesión pública ordinaria del Pleno de la Suprema Corte de Justicia de la Nación, celebrada el jueves 20 de abril de 2006.Suprema Corte de Justicia de la Nación.

Versión taquigráfica de la sesión pública ordinaria del Pleno de la Suprema Corte de Justicia de la Nación, celebrada el martes 17 de enero de 2012. Suprema Corte de Justicia de la Nación.

Versión taquigráfica de la sesión pública ordinaria del Pleno de la Suprema Corte deJusticia de la Nación, celebrada el jueves 19 de enero de 2012, Mexico, 2012. Suprema Corte de Justicia de la Nación.

Zweigert, Konrad y Kötz, H. (1998). *An Introduction to Comparative Law*. Clarendon Press.

Notes

*Article submitted on August 30, 2021, and accepted for publication on October 15, 2021.
** Full-time Professor at the ITAM Law Department and a member of the Sistema Nacional de Investigadores [National Researcher System]. Email: rodrigo.camarena@itam.mx, ORCID: https://orcid.org/0000-0001-6661-0176 I would like to thank Sandra Gómora for her excellent organization of the “La construcción del precedente en el civil law: Debates, conceptos y desafíos” [The Construction of Precedent in Civil Law: Debates, Concepts and Challenges] seminar, as well as for her thought-provoking questions. I am very grateful for Marina Gascón’s valuable feedback and enriching suggestions. Thanks to Azul Valdivieso for their research assistance and to Imer Flores for his observations.

1 The term “precedent” is usually defined as a single decision and as an institution “typical” of the common law system as opposed to “case law” as a set of recurring decisions characteristic of the civil law system. Mexican judicial practice is a combination of both, but it seems to lean towards the first, at least in the cases decided by the Court.

2 The concepts of *ratio* and *dicta* can be traced back at least to the case of *Bole v. Horton* (1673) (United Kingdom) which held that statements that were not necessary for a judgment remained as a mere *gratis dictum*.

3 The Court has held that the mandatory criterion emerges from the jurisdictional decision embodied in judg ments and not in opinions. (SCJN, Tesis 198709, 2016)
4 Italics in the original. Citing Sartor, 1996, pp. 261-262.
5 I am indebted to Marina Gascón for this phrase, as well as for the invitation to rethink the facts in this model.
6 This is the case of *Amparo* under Review 1359/2015 (Suprema Corte de Justicia, First Chamber. Amparo en Revisión 1359/2015, Arturo Zaldívar Lelo De Larrea, November 15, 2017, pp. 24-34.)
7 Citing (Michael J. Gerhardt, 2008, p. 88)
8 I would like to thank Marina and Sandra Gómora for their comments on the autonomy of this model in comparison with the three previous ones.

PROBLEMA

NÚMEROS DE PROBLEMA

PRECEDENT AND CIVIL LAW: A ROAD AHEAD. REFLECTIONS ON THE WORKS OF FLAVIA CARBONELL AND RODRIGO CAMARENA *

*PRECEDENTE Y CIVIL LAW: UN CAMINO POR RECORRER. REFLEXIONES SOBRE EL PRECEDENTE A PARTIR DE LOS TRABAJOS DE FLAVIA CARBONELL Y RODRIGO CAMARENA**

Marina Gascón Abellán**

DOI: 10.22201/iij.24487937e.2022.16.5.17580

Abstract:

This paper is the result of the analysis and discussion that took place at the Problema. Anuario de filosofía y teoría del derecho seminar entitled "The Construction of Precedent in Civil Law: Debates, Concepts and Challenges." At this event, Flavia Carbonell and Rodrigo Camarena delivered a concise presentation on precedent in their respective countries (Chile and Mexico), addressing issues of a regulatory, practical, theoretical and conceptual nature. Having witnessed both their arguments with keen interest and inspired by their presentations, I offer my points of view on the most important and prominent aspects of their contributions.

Keywords:

Judicial Precedent, Chile, Mexico, Project Precedent, Common Law.

Resumen:

El presente trabajo es producto del análisis y discusión que se llevaron a cabo en el seminario de la revista Problema. Anuario de Filosofía y Teoría del Derecho *intitulado: "La construcción del precedente en el civil law. Debates, conceptos y desafíos". En dicho encuentro, Flavia Carbonell y Rodrigo Camarena intervinieron con una exposición concisa respecto al precedente en cada uno de sus respectivos países (Chile y México), que a la vez abordan problemas de tipo normativo, práctico, teórico y conceptual. Con gran interés fui testigo de los argumentos de ambos, y motivada por sus ponencias, presento mis puntos de vista respecto a los rubros más importantes y relevantes en torno a sus contribuciones.*

Palabras clave:

Precedente judicial, Chile, México, proyecto precedente, common law.

CONTENT: I. *The Importance of Precedent Studies*. II. *Chile and Mexico, for Example: What the Works of Flavia Carbonell and Rodrigo Camarena Show us About the Importance of a "Precedent Project"*. III. *References*.

I. The Importance of Precedent Studies

Following precedents (or case law, which I shall not differentiate here)[1] has classically been seen as one of the distinguishing features between common law and civil law systems. While in the former —so they say— judges are bound by precedent (acting according to the principle of *stare decisis*), in civil law systems, judges are bound by the inherent role of the law and case law, —a merely "complementary" value of the system, to use the words of the Spanish Civil Code, (insisting that case law "is not a source" of law). However, things are not exactly like that. Such a strict distinction between the two legal cultures in relation to the value of precedent is simply not appropriate if it ever was. In common law systems, the written law has a particularly importantplace where more and more areas of law are being codified;[2] and yet it cannot be stated that case law (or precedent) has no value in civil law systems.

This last aspect is the important one for us. Whether it is considered a source of law or not, in our legal systems judges constantly resort to case law (or precedent), especially in the Supreme Court.[3] They make their decisions by "referring to" what other judges have said about similar issues. Along with interpretive or theoretical arguments, precedents form some of the *reasons to decide* a case.[4] They act as a *topos,* to first guide the interpretation of the rule, and later, to form the rationale as to the correctness of the decision. Therefore, although our systems may not be *stare decisis*, there is no doubt that precedent contains a *persuasive* value, acting as a kind of *soft law*. When there is a more or less consolidated uniform doctrine on an issue, courts are expected to adopt their decisions accordingly. And the stronger the consolidation and uniformity of that doctrine, the greater its persuasive force.[5] In short, precedent (or case law) is used as a resource in the process of searching for the best reasons for a decision. Hence, a decisive factor in its interpretation and application is whether or not it is a "source" of law.

In fact, something is changing in civil law legal culture. On the one hand, there is now a marked tendency to establish *institutional mechanisms* to turn courts of cassation into courts of precedent, i.e., courts whose main function is not only (or not mainly) nomophilia, but also (or above all) to establish guidelines for deciding future cases.[6] Although it may sound like an exaggeration in some of our legal systems, we are witnessing a progressive construction of a system of case law precedents and, as a consequence, we are living in a strange "transition" period where —if I may use the expression— the "*legal* practice of precedent" (reiterated and abstract legal theory in the courts) coexists with the classic concept of precedent typical in common law (the rationale for deciding the case as opposed to the *obiter dicta*). On the other hand, *interest in the study of precedent* has also increased a great deal, both in procedural and

legal theory.[7] It seems to me that both phenomena are driven by the same reason: the well-founded conviction that a system of precedents guarantees better values within the system, such as legal certainty and equality. And I say "well-founded" conviction because this is so. To the extent that following precedents implies the reiteration (and therefore the consolidation) of the same reasons for deciding, when it contributes to *enhancing the uniformity of law* through the coherence of judicial decisions, it is evident that a greater uniformity in the interpretation of the law will guarantee improved legal certainty and equality. This is clear. The existence of a range of interpretative solutions makes it hard to foresee (and to some extent, prevents) the judicial response that a case might probably receive; and of course, it also thwarts the goal of equality in the law since there is no point in proclaiming equality if the courts, by virtue of their interpretative freedom, then provide different responses.

The initiative that Sandra Gómora, Álvaro Núñez and I are now presenting goes precisely in that direction: that of promoting amongst us the study of precedent, bringing to the table numerous issues of a normative, practical, theoretical and conceptual nature that need to be addressed. The magnificent work that Rodrigo Camarena, Flavia Carbonell, Fabio Pulido and Silvia Zorzetto have so generously provided to accompany the "kick-off" of this project are a good example of the importance of the discussion on these issues. I would like to acknowledge and congratulate all of them, although for purely organizational reasons, I will only make a few brief comments on the work of the first two.

II. Chile and Mexico for Example: What the Work of Flavia Carbonell and Rodrigo Camarena Show Us About the Importance of a "Precedent Project"

A. What happens when different chambers of the same court subscribe to different legal theories or interpretative criteria? (Carbonell's question)

In her excellent study *Variaciones sobre el precedente judicial: una mirada desde el sistema jurídico chileno,* [Variations on Judicial Precedent: From the perspective of the Chilean legal system], Flavia Carbonell presents us with a remarkably interesting case which constitutes an opportunity and an incentive to reflect on various aspects of precedent. Although any simplification is detracting, the essential aspects of the case may be summarized as follows:

1) *For a long time in Chile*, *an extremely important issue* (the prescriptibility[8] of civil suits claiming compensation for moral damages suffered by those who disappeared or were tortured by agents of the State during the military dictatorship) *was under discussion in two different chambers of the Supreme Court, the Civil Chamber and the Criminal Chamber,* (the cases reached the Court through two channels: through a civil cassation appeal, or through a criminal cassation appeal when the civil suit took place within a criminal proceeding) *while subscribing to differing legal principles* (the Civil Chamber upheld the opinion of prescriptibility, and the Criminal Chamber that of imprescriptibility, based on the imprescriptibility for crimes against humanity).

2) In 2013 (in the case "González Galeno v. Chilean Tax Authorities"), by virtue of Art. 780 CPC, the Supreme Court Plenary returned a verdict of 9 to 7 votes to *combine case law and assume the Civil Chamber criterion*.

3) A few months later, after the ruling of the Plenary, the *Criminal Chamber ignored it and continued to uphold its own legal case law of the imprescriptibility of the action,* so the disparity between legal principles within the Supreme Court persisted.

Carbonell uses this case to illustrate the questions and doubts concerning the "rule of self-precedent" and "binding precedent," since, in addition to being important because of the practical problem it represents, it is most interesting from a theoretical perspective.

The essence of the theoretical issue raised by the Chilean case is summarized as follows. Self-precedent, understood as a rule of rational argumentation obliging judicial bodies to decide on cases in accordance with a universalizable criterion, implies that every judicial body (every decision-maker) must respect its own precedent (i.e., it must always rule according to that criterion) unless, when appropriate, disregarding it is adequately justified; specifically, when it is understood that the previous criterion is not correct or is less correct than the current one. What happens when different chambers within the same court hold varying legal theories or decision-making criteria, to whom does the rule of self-precedent apply in such a case? Should it be understood that these chambers are *independent judicial bodies*, and that therefore the rule applies to each of them individually? Or, on the contrary, should it be understood that these chambers are simply *parts of a single court*, and that therefore the rule of self-precedent binds all the chambers within that court?

The first option (*each chamber, an independent body*) implies that different chambers may subscribe to different legal theories on the same issue; i.e., it admits that within the same court, contradictory legal theories may validly coexist. This is a misunderstanding not well accepted by most people, as it derails our logical expectations of the uniform application of the law, at least within the same court. The second option (*the judicial body is the court, composed of all its chambers*) is much more satisfactory for our expectations of the uniform application of the law, but requires articulating regulatory mechanisms to avoid discrepancies of criteria among the different chambers of the court or —if they have already occurred— correct them by setting the criterion or the "0ne-right legal theory"[9]. That is not to say, the *epistemically or philosophically one-right legal theory* since this issue depends on the interpretation of the theory handled, but the *institutionally one-right* one because there is a judicial rule that has granted it this status. Naturally, this option is desirable to maintain legal certainty and equality.

It seems to me that the Chilean case might be interpreted as reflecting this second option(*the judicial body is the court, composed of all its chambers)* since it is understood that Article 780 of the CPC establishes this "institutional mechanism" to standardize the case law of the chambers[10] and by virtue of that, the Plenary ruled and established the one-right case law opinion. This happens to coincide with that adopted by the Civil Chamber, where civil suit for compensation for moral damages is subject to prescriptibility. But the anomaly of the situation is that the Second Chamber continued to subscribe to its case law interpretation(differing from the one set as "one-right" by the Plenary), thereby showing that

its response is to be understood as a manifestation of the first option: *each chamber, an independent body.*

Flavia Carbonell seems to suggest that the Criminal Chamber's "fractious" attitude could be explained because, besides the aforementioned Article 780 CPC, "there are no additional rules that establish a mandatory binding of the Chambers to the *ratio decidendi* of the Plenary Court decision", and therefore, in the absence of such obligation, the Criminal Chamber did what it was supposed to do: respect its own precedent. However, it seems that things are not completely clear. On the one hand, because I find it a stretch to interpret that the Criminal Chamber's determination to maintain its previous criterion is entirely due to the lack of an express rule of *stare decisis*; and even less to its conviction of being an independent judicial body obliged to act according to rationality-universality criteria (and therefore follow its own precedent criterion before aligning with the Plenary Court criterion). On the other hand, things may also be seen from a different perspective.

The Plenary, in effect, responded that it is because there is a rule in the system granting them this competence when there is contradictory case law. But then it is worth asking: if we accept that this mechanism (of case law unification) cannot be understood as a rule of *stare decisis* binding the different chambers to the "one-right answer" established by the Plenary, in what sense should it be understood if it cannot be interpreted as a constitutive rule granting competence to the Plenary to establish a binding precedent?[11] Why was this mechanism introduced? For nothing? What should be the scope given to this Plenary decision? None? In my opinion it is clear that the mechanism of Art. 780 CPC could also be understood, without undue effort, as a rule of *stare decisis*, so that the decision of the Plenary should be the "one-right answer" for the case. And once this "one-right answer" has been established by the Plenary, there is no longer any reason for the chambers to appeal for self-precedent due to one simple reason: self-precedent is in essence a rule of rational argumentation that applies (only) when the correct solution does not exist. But when the correct solution exists (as in this case),[12] the different chambers should simply apply that solution.

Be that as it may, the case is magnificently presented by Carbonell because, in addition to the crucial problem it directly raises, it invites us to reflect on some important issues. For example, it invites us to ask ourselves what level of protection we want for the values that self-precedent and vertical precedent promote. Or what regulatory changes should be undertaken to better achieve these objectives. I agree with the author on the first of them, to redefine the functions of the Court of Cassation (Taruffo has clearly denounced this: a Court of Cassation with thousands of cases a year to decide can hardly become a Court of precedents) or to divide the Court into chambers specializing in different matters. It even pushes us to reflect on how collegiate decisions should be adopted to generate a binding precedent (for example, whether a qualified majority should decide). Or, —in relation to the latter— on the binding force that can be attributed to precedents issued by divided chambers, especially when the dissenting vote enjoys a solid enjoys solid argumentation. And naturally, the case also invites reflection on some crucial issues to establish a system of precedents: in particular, the meaning and scope

of "judicial independence", usually argued against establishing binding precedent mechanisms, or at the risk of system of binding precedents that turns Supreme Courts into "legislative or "quasi-legislative" bodies; and of course, the very concept of precedent itself.[13]

Precisely regarding this last very important issue (the concept of precedent), I find Rodrigo Camarena's work *La ratio decidendi a través de ojos mexicanos,* (*Ratio decidendi* from a Mexican perspective)also published in this issue, very thought-provoking.

B. What is understood by ratio decidendi? (Camarena's question)

Camarena addresses one of the core issues for a system of precedents to work: that of defining *ratio decidendi* (what constitutes a precedent). His analysis is based on a reform to the Mexican Constitution carried out in 2021, to evolve towards a system of precedent, and his objective is to identify the different concepts of the "reasons" for Supreme Court rulings that will now be binding "for all jurisdictional authorities".[14] It seems important for me to point out that this theoretical exercise is particularly necessary in a case such as Mexico's, a system reflecting the paradigm of the "transitional" situation to which I referred at the beginning. Consequently, it poses the need to make a system of precedents effective (which requires identifying the *ratio decidendi* of the decisions) quite different from the entrenched "doctrinal" practice framework (that of case law "*tesis"*: abstract statements identified, in this case, by the court itself when deciding a case). Apart from the Mexican case, this is an important theoretical exercise since most Latin American legal systems are in a similar "transitional" situation, although not all to the same extent.

Camarena's theoretical exercise is of considerable practical significance. The fundamental problem faced by judges and lawyers in "following precedent" means identifying the *ratio decidendi.* But identifying it clearly requires two prior tasks. The first (of a theoretical or conceptual nature) consists of providing a definition of *ratio decidendi*: what is meant by *ratio decidendi* and how these "reasons" should be understood? The second (of a practical nature) consists of the court setting the precedent do so in a clear, meticulous and precise way so that it can be easily identified by subsequent judges. This second issue is by no means trivial, for if subsequent judges cannot clearly identify the "reasons" that constitute the precedent, it will be overly complex to implement it extensively and uniformly. Therefore, no matter how much we refine the concept of precedent theoretically and no matter how many reforms we make to turn our change our courts of cassation into courts of precedent, without the proper communication of those "reasons" by the precedent-setting court, the goal of unifying the law by way of precedent cannot be achieved.[15]

Rodrigo Camarena has done an excellent job on the first issue, the conceptual issue, summarized in the question: what are the "reasons" that constitute precedent? He provides us with four different ways to shape or understand those reasons, comparable in reality to four different ways the Court can "create" laws:

a) The *judicial legislation* model (Alexander), which conceives the reasons as canonical rules formulated with clarity and precision, so that they truly constrain and may not be discarded by a simple exception or *distinguishing.*

b) The *implicit rules* model (Goodhart), which sees reasons as the rules that can be inferred from relevant facts of the judgment, regardless of the explicit rule formulated by the court or the argumentation used (which may be fallacious, politically undesirable or morally scandalous), and which naturally allows *distinguishing.*

c) The model of the *moral-policy justification* of decisions taken (MacCormick), which, besides the facts of the case and their consequences, understands "reasons" as statements indistinguishable from those justifications. This model, says the author, coincides with a post-positivist standpoint which includes principles as the justification for any rule.

d) And the *social category* model of Levenbook), in which the Court makes its decisions by organizing the world on the basis of shared categories or beliefs whose meaning and validity do not correspond exclusively to the judiciary, but to the entire community; i.e., the meaning of precedents "is governed by society". Thus, precedents will not take root if the Court attempts to establish a precedent with categories rejected by the community *ratio*. "If, on the other hand, it uses strongly internalized or otherwise latent social categories, the precedent is more likely to consolidate itself and become binding".

In principle, the author presents the four concepts as "possible", without any clear preference for one or the other. Rather, he presents them as "shifting and sometimes overlapping ideas depending on the interpretative context in which the Court sets the precedent". Thus, in some cases it may be justified to issue rules according to the judicial legislation model; in other cases, it may be advisable to leave the implicit rule; in cases of analogy or differentiation or in cases of overturning a precedent, the model of moral-policy justifications will always be present; and the social categories model would allow it to account for cases where there is a discrepancy between legal and social concepts.

Although all models are equally valid at the explanatory level (insofar as they allow for different scenarios in the Court's creation of precedent), it is clear that each one has advantages and disadvantages in certain situations or state of affairs considered significant. Hence, they are not all on the same level from a regulatory or prescriptive point of view. The first model, *judicial legislation*, has the advantage of precision as it conceives reasons as canonical rules indicating what should be done and followed precisely. Yes, but it evokes the danger of "governance by judges", representing one of the classical objections to be faced in any attempt to create a system of precedents. The second model, *implicit rules*, where precedents are conceived as rules "inferred" by the judgment issued by the corresponding judges, seems to be more respectful of judicial independence and of establishing precedents as a collective process. The third model, *moral-policy justification* in decisions made, understands precedents as parts of a coherent system of principles that evolves over time, while also posing the risk of introducing ideology into the law. This is also to some extent, a risk of "governance by judges". And the fourth model, *social categories,* also seems to be more respectful of judicial independence and the collective process in the construction of precedent as it allows rules to be overturned by virtue of shifting social categories, but it is at the cost of legal certainty.

The theoretical reconstruction of the different ways of conceiving reasons that Camarena shows us is important because, besides allowing us to explain the diverse ways of formulating

precedents, it permits us to clearly visualize which ones are more suited to achieve objectives we consider valuable. For example, if we think a system of precedents should ensure the clear identification of precedents in order to ensure their general implementation and thus a uniform application of the law, I believe this theoretical reconstruction points to *judicial legislation* as the most appropriate model. However, we should shy away from this model if the main value pursued is to prevent the court creating precedent from becoming a mini-legislator. In short, depending on what we prioritize (improving the identification of precedents to make the system work, or avoiding the "legislation" of a precedent-setting court), the models of "reasons" Camarena presents are a good tool to guide the choice of one system or another. In any case, these are matters worthy of further thought and discussion.

Because this is indeed the purpose of the project we started -to continue reflecting, sharing and discussing. The magnificent works of Flavia Carbonell and Rodrigo Camarena (as well as those of Silvia Zorzetto and Fabio Pulido) show us that we have some way to go in the transition towards systematic precedents.

III. References

Arriagada, María Beatriz (2021). Las dos caras del precedente vinculante. In A. Núñez, M. B. Arriagada and I. Hunter (Coords.). *Teoría y práctica del precedente en Chile y Latinoamérica* (pp. 281-310). Tirant lo Blanch.

Bustamante, Thomas (2016). *Teoría del precedente judicial. La justificación y la aplicación de reglas jurisprudenciales*, Lima-Peru: Ediciones legales EIRL.

Fon, Vicy & Parisi, Francesco (2006). Judicial precedents in Civil Law Systems: A dynamic analysis. *International Review of law and Economics*, *26*(4), 519-535.

Gascón, Marina (2011). Racionalidad y (auto) precedente. Breves consideraciones sobre el fundamento e implicaciones de la regla del autoprecedente. *Teoría y derecho: revista de pensamiento jurídico*, (10), 132-148.

Gascón, Marina (2016). Autoprecedente y creación de precedentes en una Corte Suprema. *Teoría Jurídica Contemporânea*, *Revista da Universidade Federal do Rio de Janeiro*, *1*(2).

Gascón, Marina (2020). Motivación de las sentencias y jurisprudencia ¿Cumple nuestra jurisprudencia eficazmente su función?. In M. Gascón & A. Núñez (Coords). *La construcción del precedente en el Civil Law* (pp. 165 ss). Atelier.

Gómora-Juárez, Sandra (2018). La ejemplaridad y proyección del precedente. *Problema. Anuario de Filosofía y Teoría del Derecho*. (12).

Mitidiero, Daniel. (2016). *La justicia civil en el Estado Constitucional. Diálogos para un diagnóstico.* Palestra Editores, pp.224

Moral, Leonor (2002). *El precedente judicial*. Marcial Pons.

Nieto, Alejandro (2001/2002). Valor legal y alcance real de la jurisprudencia. *Teoría y Realidad Constitucional*, 8-9.

Núñez, Álvaro (2021). ¿Son obligatorios los precedentes? La regla del precedente como norma(s) constitutiva(s). In A. Núñez, M. B. Arriagada and I. Hunter (Coords.), *Teoría y práctica del precedente en Chile y Latinoamérica* (pp. 333-363). Tirant lo Blanch.

TARUFFO, Michele (2007). Precedente y jurisprudencia (C. Martínez and F. Gandini, trans.) *Anuario Jurídico*. Universidad ICESI.

VECINA, Javier (2003). *La casación penal.* Tecnos.

Notes

*Article submitted on October 30, 2021 and accepted for publication on December 12, 2021.
** Researcher attached to the University of Castilla-La Mancha, mail: marina.gascon@uclm.es ORCID: https://orcid.org/0000-0002-3984-1806.
1 Naturally, I am not blind to the fact that it is very common to differentiate between precedent and case law. This is, significantly, the case of Taruffo, although of course he is not the only one (Michele Taruffo, pp. 2007, 87 ff.). However, it seems to me that what this author reflects by insisting on this distinction is a criticism of the *modus operandi* of case law in civil law systems, a *modus operandi* of a chaotic network of abstract and partial interpretations of the law making it difficult for it to fulfill its role of standardizing the law, i.e., to create a genuine system of precedents. I could not agree more with him in this criticism. But in my opinion, there is no reason not to use both concepts equally (at least conceptually). I will be taking precedent or case law here to mean the legal theory applied in one or more judgments which specify the scope or interpretation of the law in the specific circumstances of the case; i.e., that which expresses the *legal reason* according to which the case has been resolved and which would therefore constitute guidelines for deciding on future cases: the *law pertinent to the case*.
This latter is what is important. What we call precedent or case law is part of the legal reasons for a decision. What is important is that these reasons are always presented as a criterion or rule that can *potentially be generalized or universalized*, especially when the decision comes from a high court. The way it to decide is determined because the same decision would have to be made in a substantially similar case, and thus with the intention of projecting this decision-making rule into the future (Sandra Gómora-Juárez, 2018, p. 229) coincides with this appreciation.
2 This observation is already commonplace. *Cfr.* for example, Michele Taruffo (2007, p. 85).
3 "Neither judges nor lawyers -says Nieto (2001/2002, 106)- handle the laws in absolutes, but rather with additions and interpretations incorporated by the Supreme Court... The various editions and collections of laws are all the more appreciated, the richer the case law annotations that accompany them. Their psychological and practical value is, therefore, much greater than that which the civil code seems to suggest".
4 It is precisely for this reason current approaches study precedent in the discourse of legal reasoning. Such is the case of Leonor Moral (2002) whose approach I find accurate as it departs from the traditional, but sterile, analysis of the theory of sources of law.
5 In effect, the way the role of cassation has evolved, it can now be said that what matters most in their decisions is not so much to safeguard the law in a decision of a specific dispute (nomophylactic function) as its ability create a standard for ruling on future cases. In short, it is now assumed that the central mission of a Supreme Court is above all to advance the proper and uniform interpretation of the law: to serve as a *court of precedents*. It is not, therefore, that the role of safeguarding the law in specific disputes has failed, but that there is a clear tendency to give priority to the public duty of "unifying the law by means of its proper interpretation based on the decision of the cases presented", Mitidiero (2016, p. 107). Cfr. also Vecina (2003: 30 ss.) and Michele Taruffo (2001, pp. 96 y ss.)
6 The persuasiveness of a court's precedent may be due, obviously, to the quality and strength of the argumentation it contains, but also to the institutional position of that court in the system of judicial organization and the powers or functions it entails. That is to say, case law may be persuasive for *rational* (argumentative) and/or *authoritative* (court) reasons. Cf. Leonor Moral, 2002: Chap. III; and Bustamante, 2016.
7 "The higher the level of uniformity in past precedents, the greater the persuasive force of case law" (Vicy Fon and Francesco Parisi, 2006, p. 519), I will not even attempt to make a list of legal theory and other theoretical studies on these issues because it would be exceedingly long, but it must be said that very valuable studies have been made and are still being made on the matter, in practically all Latin American countries.
8 Legal concept referred to the period of time set by the law to exercise a right, after which the possibility to take legal action to enjoy the specific right is extinguished.
9 I have argued this point in Marina Gascón 2011 and 2016.
10 Article 780 of the Civil Procedure Code, as the author recalls, refers to the power of the parties to request the merits of an appeal to be "heard and resolved by the full court" (generally it is heard in chambers), based "on the fact that the Supreme Court, in various rulings, has upheld different interpretations of the legal aspect of the subject of the appeal"
11 Álvaro Núñez and Beatriz Arriagada have magnificently developed an in-depth theory, in which they hold that an existing binding precedent system requires the existence of constitutive norms (Cf. for example, Álvaro Núñez, 2021; and María Beatriz Arriagada, 2021).
12 I insist on this - an *institutionally* correct solution, not an *epistemically* correct one, which is an entirely different matter.
13 The work of Beatriz Arriagada and Álvaro Núñez that I have just mentioned already show seminal theoretical developments on this point.
14 CPEUM, (Political Constitution of Mexico) Art. 94: The reasons that justify the decisions contained in the sentences issued by the Plenary of the Supreme Court of Justice of the Nation by a majority of eight votes, and by the Chambers, by a majority of four votes, shall be binding for all jurisdictional authorities of the Federation and federal entities
15 I have given much thought to this point and insisted on it in Marina Gascón, 2016.

PROBLEMA

NÚMEROS DE PROBLEMA

LEGAL ARGUMENTS AND CASE LAW PRECEDENTS: AN EXPERIMENT IN JUDICIAL SOCIOLOGY BETWEEN PRACTICE AND THEORY*

ARGUMENTOS JURÍDICOS Y PRECEDENTES JURISPRUDENCIALES: UN EXPERIMENTO DE SOCIOLOGÍA JUDICIAL ENTRE LA PRÁCTICA Y LA TEORÍA

Silvia Zorzetto**

DOI: 10.22201/iij.24487937e.2022.16.5.17581

Abstract:

The object of this paper is to analyze some main types of judicial arguments based on precedents to grasp their relevance and range in practice. The analysis is drawn from the case law of the Italian Court of Cassation Civil United Sections, to elicit a comparison between the uses of precedents in different legal systems. However, the analysis is of an explanatory or critical-reconstructive nature and illustrates a series of uses and problems linked to judicial reasoning, the scope of which is general and therefore goes beyond the specific juridical context at hand. The analysis is conducted from an internal point of view and, particularly from the standpoint of the decision-maker (i.e., the judge) and addresses some vexatae quaestiones surrounding the idea that case law is the source of law in practice. This study the opinion that the argument surrounding precedent is, in fact, a very heterogeneous and much more extensive family of arguments than what is usually assumed from traditional taxonomies of judicial arguments. Moreover, the study defends the opinion that case law is inevitably a 'source of law' for pragmatic reasons inherent to judicial reasoning.

Keywords:

Case Law Precedent, Judicial Arguments, Judicial Reasoning, Sources of Law, Stare Decisis Doctrine.

Resumen:

El objetivo de esta contribución es analizar algunas de las principales variantes de argumentos jurídicos que usan los precedentes judiciales, con el fin de captar su relevancia y variedad en la práctica. El análisis está inspirado en la jurisprudencia de Secciones Unidas Civiles de la Corte de Casación italiana, también para estimular una comparación entre los usos de los precedentes judiciales en los diferentes sistemas jurídicos existentes. Sin embargo, el análisis es de carácter explicativo o crítico-reconstructivo, e ilustra una serie de usos y

problemas vinculados con el razonamiento jurídico, que tienen un alcance general y, por tanto, van más allá del contexto jurídico concreto considerado. El análisis se realiza desde el punto de vista interno y, en particular, del decisor (es decir, el juez) y aborda algunas vexatae quaestiones en torno a la idea de que la jurisprudencia es una fuente del derecho en la práctica. El estudio defiende la tesis de que el argumento del precedente es, de hecho, una familia de argumentos muy heterogénea y mucho más extendida de lo que suele desprenderse de las taxonomías clásicas de los argumentos jurídicos. Además, el estudio defiende la tesis de que la jurisprudencia es inevitablemente una "fuente del derecho" por razones pragmáticas inherentes al razonamiento jurídico.

Palabras clave:

Precedentes judiciales, argumentos jurídicos, razonamiento jurídico, fuentes del derecho, doctrina del stare decisis.

CONTENT: I. *Introduction: The Context of the Analysis*. II. *Some Preliminary Explanations on the Method of Analysis and Terminology*. III. *The "Internal" Point of View: The Regulatory Framework*. IV. *The "Internal" Point of View: On the Contribution of Case Law Precedents to Shaping Existing Law and Other Related Issues*. V. *Case Law Precedents: A Review of Some Emblematic Practices*. VI. *Conclusions*. VII. *References*.

I. Introduction: the Context of the Analysis

Are case law precedents legitimate or not? In what sense are they judicial rules and what is their scope? These are just a few of the questions addressed on the controversial issue of the significance of case law precedents in legal systems.[1]

The theories and doctrine devised by scholars (including legal theorists, comparativists and proceduralists) to explain and/or justify the phenomenon of precedent are, as is well known, plentiful,[2] each of them the product of a variety of theoretical-philosophical premises and various conceptualizations of the law and its sources (although more often than not these premises and concepts seem to appear only implicitly).

This paper explores the issue according to its actual use, as seen in judges' use of legal argumentation putting legal argumentation into use.[3] Therefore, neither an ideal model of precedent and its application nor a general theory or jurisprudence on how it should be conceived and used will be put forth. The scope of this paper is more modest, namely an experiment in legal sociology: to provide an explanatory overview of it's usage. This analysis, on the other hand, is also the result of a certain methodological persuasion that is by no means neutral: the belief that observing actions in practice is essential if one wants to understand, beyond theories and ideal models, the true role case law precedents play in legal systems.

This practical side is only marginally examined in "*La construcción del precedente en el Civil Law: debates, conceptos y desafíos* [The construction of precedent in civil law systems: Debates,

concepts and challenges].”[4] Consequently, I have chosen to delve deeper into it to contribute to the debate sparked by this work.

This paper is necessarily selective and targeted, given the sheer breadth of the problems raised by the issue of precedent and the numerous contexts in which they can be examined. I will start from a specific judicial experience -contemporary Italian law- and a specific context -practical experience at the Italian Court of Cassation Civil United Sections (hereinafter, "SUTC"). I will focus on the most representative rulings from the standpoint of the SUTCs over the last decade, comparing them with the opinions expressed in the same time frame by simple sections of the Court of Cassation and the Constitutional Court.

Despite the “local” nature of the analysis, I believe there are useful lessons and general insights to be drawn, at least for the existing continental legal systems; i.e., those in the same legal tradition as the Italian one.

A close examination will show that case law precedents can be used in several ways and to serve diverse functions in the chain of justification. Judicial arguments referring to case law precedents cannot easily be reduced to a single argument. Rather than case law precedent argumentation in singular, it would be more appropriate to speak of them in the plural as arguments based on case law precedents. In fact, practice shows a complex and diverse family of arguments with numerous variants, some of which are even incompatible and substitutes for each other. As with many other legal arguments, those involving precedents can be arranged in different ways and placed on different levels of the argumentative-justifying chain, taking on a variety of functions. There are primary, secondary, auxiliary, concurrent, arguments to name just a few. As for judicial arguments referring to precedents, their place at the level of judicial argumentation, as well as their conflation with other arguments, is completely contingent as are their argumentative-justifying force.

This and what follows is already influenced by fundamental premises as to what is construed as “(existing) law”, “judge”, “grounds” (i.e., the justification of a practical case), and so on. However, I trust that the descriptive and explanatory intention of this paper will shed light on the most controversial or debatable premises, thereby proving useful to the discussion, even with those who do not share the same assumptions.

II. Some Preliminary Explanations on the Method Of Analysis And Terminology

Bearing in mind that the topic at hand is extremely controversial, the underlying premises and choices of methodology and terminology I propose are controversial, too, but they serve to explain the context of discovery and the context of the justification. The terminological clarifications below are not intended to provide general definitions of the concepts discussed, but should be considered useful for the analysis and, therefore, “operational” tools for conducting the research.

In the analysis, the term "judicial precedent", "case law precedent" or simply "precedent" refers to any judicial decision in the strict sense of the word, which was made at an earlier date and whose text is accessible (e.g., in databases or case law collections) and is referred to in a decision.

I would like to point out that the definition is stipulative and functional for the meta-legal analysis carried out based on a predominantly syntactic-semantic search, i.e., a search through databases of the texts of court-issued regulatory measures.

From a conceptual point of view, there may well be precedents that are not public or published, even though a precedent must at least be known by someone other than its issuer. The sole exception is self-precedent in the strict sense, i.e., concerning the same regulatory authority that decides over time based on what it has decided in the past.[5] I focus on "public" precedents because they are most relevant to the case law practices regarding existing laws.

Admittedly, this is not the only possible approach to study case law precedents. A conceptual analysis can be made without using textual data. On such a complex and controversial issue as this one, often considered a veritable jungle of things that have been said both for and against it, I believe it is nonetheless useful —for a comparison with a minimum of intersubjective, if not objective, grounds)— to examine what is explicitly expressed in the texts of regulatory measures issued by the courts.

Thus, I will examine case law precedents from the point of view of their express use, looking for explicit references both in the legislative context and in the rationales underlying judicial decisions.

Before analyzing judicial practice, I will briefly mention some main references to case law precedents found in official canonical sources (i.e., laws and equivalent acts in Italian law), so as to show the regulatory context in which judges use precedents. The regulatory context influences how judges view case law precedents, so it would be methodologically unsound to extrapolate the analysis of case law precedents without considering the regulatory context of reference. In other words, to understand how judges use precedents, it is necessary to look at the corresponding uses as well as in the context in which they are framed because regulatory context influences use, just as use contributes to the creation of regulatory context.

Needless to say, all of the above, and especially the decision to conduct text-based research, does not mean that case law precedents are not used tacitly.

In fact, the opposite is true assuming that case law precedents are also (legal) rules whose scope of applicability is disputed (whether and to what extent they can be considered abstract and general or generalizable beyond the case concerning the individual decision). So, with respect to case law precedents, all the issues on the nature of rules and their regulatory statements, as well as the statements of these statements in judicial discourse, which appear in the general theory of judicial rules re-emerge. This analysis will not explore the merits of these

issues, but only note that it is conceptually possible (and actually happens) for case law precedents to be used in a way that is not expressed.

In other words, —and this will become clearer in the analysis— it is possible to refer to a case law precedent or use it for a certain reason in a decision (even when sharing or accepting it, i.e., making it a guide for decision-making processes or rejecting it), without mentioning it.[6]

On the other hand, the uses of precedent to be examined are not limited to a situation in which the *ratio decidendi* of a given case is consideredbinding in deciding a subsequent case. Thus, the precedent to be discussed does not necessarily refer to a specific case similar to another specific case, but that is simply the decision issued at t0, whose *ratio decidendi* of which is reflected in a decision at t1.[7] Precedents are also used when the similarity between cases is dubious or even non-existent. It also so happens that the similarity between specific cases is not relevant or cannot be justified because it uses a general-abstract principle contained in the precedent, which is unconnected to the circumstances of the case and/or is not the *ratio decidendi* of that case.

Somewhat proactively, one might say that this analysis aims to shed light, though not chiefly, on the "spurious"[8] uses or, at least, the broad range of uses reaching beyond the "pure" (according to traditional thought) case of binding precedent in which the decision at t1 is justified on the grounds of a decision to because the latter one stands as a binding rule for subsequent case at t1.

The objective is rather to show how judicial practice reveals that the uses of precedent are more heterogenous. This is not the place to discuss which definition of precedent is the most suitable, whether it is more appropriate to adopt a narrow or a looser[9] concept at the theoretical level. However questionable it may seem, the purpose of this analysis goes against the grain and consists in probing precisely those situations in which judges refer to precedents unorthodoxly according to the classical theory of precedent.

In other words, from the strictest point of view, only "true" or "pure" uses of judicial precedent reflect the rule of binding precedent.[10] Hence, it follows that the only judicial argument making use of precedent in its own sense is precisely the one justifying the subsequent decision on the basis of the precedent, assuming the "identity" of *ratio decidendi* in both cases. I do not dispute that this may be the "truest" or "purest" use of precedent, but it is a fact that practice goes far beyond this ideal. However, regardless of what is said about precedents in other cases or whether they are considered spurious or otherwise, judges do speak of precedents in many other cases even though the traditional perspective would not recognize them as precedents. On the other hand, even the most traditional and classical positions on precedent eventually diverge and, in fact, force practice to be based on a preconceived, so to say, laboratory definition of precedent.

In a deflated view of judicial practice, my analysis aims to fill a gap between theory and practice. The express uses of precedents show the possibility (as it happens in practice) that

precedents are only mentioned or cited, but not used in themselves as (let alone guiding or decisive) rules for the decision.

In all cases in which the use of precedent does not reflect the "pure" ideal type (according to a certain prevalent theory), the reference to precedent could seem, at least *prima facie*, spurious, declaratory, symbolic or fictitious in resolving a specific case. However, it would be rash to dismiss it as mere *flautus vocis* or emptiness from a semantic-pragmatic point of view. References that may seem "outlandish" can often fulfill their own oblique, indirect or expressive function in a variety of ways. As these functions will be analyzed later, I will simply point out that the influence and relevance depend, among other factors, on the informative purpose intended by both the sender and the receiver of the message, which are usually unrelated to the trial and pursue judicial and legal policies that go beyond the specific case. Furthermore, the target audience is often unrelated to the process and may also be unconnected to the judicial system (judges "talk" to politicians, public opinion, etc.).

In general, case law does contain relevant precedents (in the sense of relevant and effectively applied to resolve the case), but precedents that are only hypothetically relevant to deciding a specific case are also considered important. This is especially noticeable in the reasons given for a decision (i.e., their public and/or published texts), which should consider the parties' arguments in the proceedings, among other things.

Precedents adopted by judges guide the conduct of both the judge and the subjects of the decision. However, when each decision is made, no one can know whether the rulings will be shared by the other courts. Thus, the issuer may have, at most, a *de facto* hope or desire that their decision will become a precedent for others. It is also true that some decisions are made with a view, if not predominantly, to guide future decisions of other courts. The more or less pronounced tendency of some judges to address other judges, citizens or other regulatory or legal authorities —in the field of judicial sociology— accounts for (but does not necessarily justify) the extraordinarily widespread use of precedents in contemporary practice.

III. The "Internal" Point of View: the Regulatory Framework

To analyze the uses of SUTC case law, it is helpful to recall some legal provisions that expressly refer to them or are generally considered indicators of the relevance of precedents in law.[11]

The relevant parts of the regulatory texts are presented below and linked to other closely related provisions.[12]

Art. 65(1) "Powers of the Court of Cassation", Law on the Codification of the Legal Order enacted by Royal Decree No. 12 of January 30, 1941:[13]

> The Supreme Court of Cassation, as the supreme court of justice, shall ensure the correct application of the law and its uniform interpretation, the unity of the national objective law, and the respect for limits between the different jurisdictions. It shall resolve conflicts of jurisdiction and authority, and perform the other tasks conferred on it by law.

Article 360-bis "Inadmissibility of Appeal" of the Italian Code of Civil Procedure(M. Fornaciari, 2013, pp. 645 ss.):

> An appeal (before the Court of Cassation) is inadmissible: 1) when the disputed decision has resolved the legal issues pursuant to Court case law and the review of the grounds does not provide elements to confirm or modify its direction; 2) when the complaint concerning the violation of the principles regulating due process is clearly unfounded.

Art. 363 "Principle of Law in the Interest of the Law" of the Italian Code of Civil Procedure:[14]

> When the parties have not lodged an appeal within the term established by law or have waived their right to do so, or when the decision is not open to cassation appeal and cannot otherwise be contested, the Public Prosecutor of the Court of Cassation may request the Court to declare, in the interest of the law, the principle of law to which the trial judge should have deferred. The Court shall rule as a single chamber if it considers the matter to be of particular importance. In the event that the appeal of the parties is declared inadmissible, if the Court of Cassation considers the issue brought before it is of particular importance, the Court of Cassation may also rule ex officio on the principle of law in the interest of the law. The Court judgment does not affect the decision of the trial court.[15]

Art. 118 "Grounds of a Judgment", provisions for the application of the Italian Civil Procedural Law (in conjunction with Art. 132 (2) No. 4 of the Italian Civil Procedural Law):[16]

> The grounds of the judgment, which must contain a succinct recital of the factual and legal reasons for the decision, consist of a concise statement of the relevant facts of the case and the legal reasons for the decision, as well as the references to the relevant precedents.[17]

Art. 348-ter "Ruling on the Inadmissibility on the Appeal" of the Italian Code of Civil Procedure (in conjunction with Art. 348-bis, paragraph 1 of the Italian Code of Civil Procedure):

> The judge, before proceeding to the review of the appeal, after hearing the parties, can declare the appeal inadmissible when it has no reasonable possibility of being upheld, by means of a concise and reasoned order, even referring to the facts contained in one or various documents and to relevant precedents.[18]

Lastly, the introduction of a "preliminary ruling" from the lower courts to the Court of Cassation is being discussed within the framework of the proposed reform to civil procedure,[19] according to which "*the lower court may order a preliminary ruling to the Court to decide a question of law when the following conditions are met: 1) the issue is exclusively a point of law yet to be addressed by the Court and of particular importance; 2) it poses serious difficulties as to its interpretation; 3) it is bound to appear in numerous lawsuits."* The request for a preliminary ruling should be addressed to a simple section or, for issues of particular importance, to the SUTC, to establish the principle of law. The Court of Cassation's decision defining the point of law shall be binding on the court where the question was raised in the proceedings. The decision shall also be binding in the proceedings resulting from a resubmission of the same application.[20]

Around the above provisions, which are the result of successive reforms over the years, a discussion which will probably never die out has burgeoned as to whether and in what say case law precedents are important to Italian law; whether case law precedents are binding or merely authoritative points of reference for the interpretation and application of the rules in subsequent cases; whether judges are creators of law and to what extent of case law itself is a source of law,

among other issues. Needless to say, there are arguments for and against each of the positions in this debate, as well as those that are still controversial and contentious.

To put it simply, on a theoretical level, there are skeptical or hyper-skeptical theories on the impossibility of arriving at organized and binding[21] system of precedents. In practice, there is a realistic perception -in no way compatible with the hyper-skeptical "theoretical" theories- that every case law decision is, at the very least, conditioned by the context in which case law is made. Actually, in practice there is rarely just one single guideline on a given matter, so that, when faced with case law that is usually fleeting or in any case split in several directions, there is always the possibility for each judge to decide their case by following or not following one precedent or another.

In other words, regardless of that fact that the ideal scenario would be to have a (well) ordered system of binding precedents (and to have it evolve in that direction), the practice of current legal systems seems to be quite far from this ideal.

It is clear, however, that to speak of a system of judicial precedents and, in particular, of a well-ordered system, is not something to be taken for granted. It means assuming that precedents are not simply a chaotic fact, that it is not simply a collection of de facto decisions. To speak of a system actually implies the existence of sorting criteria and connections. This is especially true if we consider the idea of a "well-ordered" system a value-laden one.

However, to speak of a badly ordered or chaotic system seems almost a contradiction in terms and, in any case, something that should not be pursued but in fact, should be curbed. On the other hand, it is equally clear that the criteria for a (good) organization in the field of precedents are far from being shared either in practice or in theory.

Considering the ideal of a well-ordered system of precedents as utopian and impossible, or on the contrary, assuming that existing rights can approximate it, is irrelevant in terms of legal and judicial policy.

If it is assumed that it is impossible to regulate precedents, the very reforms and provisions that seek to do so become meaningless. Meta-legislation on case law precedents would either be meaningless and doomed to its inevitable failure or would only have a detrimental symbolic effect: fictitiously cultivating the illusion of an impossible task. Reaching these hyper-skeptical conclusions seems a case of logical fallacy.[22]

On the other hand, if we assume that case law precedents are a phenomenon that can be governed from within, by the law itself (through meta-rules), then the key is to assess the merits, benefits and/or pitfalls of each attempt at regulation.

As will be seen, case law shows its conviction in the possibility of self-governance of case law precedents and plays a key role in this regard. Hence, the number of judicial principles issued in the interest of the law in rulings is significant.

IV. The "Internal" Point of View: on the Contribution of Case Law Precedents to Shaping Existing Law and Other Related Issues

Below I will go over some prominent cases with paradigmatic value for understanding how judges —and not only SUTC judges— see their activity. There are many reasons why the following analysis is paradigmatic. In short, in Italian law the activity of the SUTC has exemplary *iure condito* value (recalling the regulatory context referred to above). Moreover, judicial practice takes notice of SUTC activity and draws examples from it. If we examine the activity of lower courts, we find uses similar to those of the SUTC. From these decisions, in fact, latent ideas and ideologies typical of the function of *ius dicere* emerge and, therefore, potentially determine case law in other contexts and experiences. The principles set by the SUTC can be summarized as follows:

> (i) The constitutional precept that judges are subject only to the law (Art. 101 of the Constitution) precludes attributing the value of a source law to the interpretation of case law.[23]
>
> (ii) Case law precedent, however authoritative and even if it comes from the Court of Cassation and even from the United Sections, is not one of the sources of law and, therefore, is not directly binding on judges.[24]
>
> (iii) Interpretation is not a "mere declaration", according to the enlightened utopia of the "*bouche de la loi*" judge. Hence, the role of updating, adopting and adapting the rules is legitimate and constitutionally compliant, and can have innovative profiles, "creative" to a certain extent without being subversive with regard to the law.[25]
>
> (iv) The intrinsic "creativity" of case law interpretation must have a sense of proportion and, above all, of the interpreter's responsibility because, over and above the subjective technical-legal convictions of individual judges, the parameters of the "justice" part of the process, understood as a tendentially shared value, must always be considered.[26]
>
> (v) There are no objectively "correct" interpretations, save with regard to the method used to arrive at them, regardless of the interpreter's axiological references.[27]
>
> (vi) The nomophylactic aspect responds to the structural need to establish fixed points or "hierarchies" among the possible hermeneutical options.[28]
>
> (vii) Art. 65 of the legal statutes provide the only merely formal and extrinsic criterion for assessing the "correction" of an interpretation: the interpretation provided by the body in charge of reviewing the legitimacy of other judges' judgments (i.e., the Court of Cassation) should conventionally be considered -if not the "correct" one, at least- the most "accurate" one (possible) or, as the case may be, the most "correct" and/or the most "accurate/sound" one. Therefore, this interpretation cannot be disregarded.[29]
>
> (viii) The interpretation made by the Court of Cassation (and mainly by the Sections United) tends to be understood as a "conventional objectification of the meaning".[30]
>
> (ix) The problem of nomophilia lies precisely in guaranteeing the legal system the possibility to evolve, adapt and correct themselves and, at the same time, retain, within reasonable limits, the uniformity and predictability of interpretation, especially as regards "procedural rules".[31]
>
> (x) Safeguarding the unity and "stability" of the judicial interpretation (especially that of the Court of Cassation and, within it, that of Sections United) is a judicial criterion of absolute importance for interpreting judicial rules. [32]
>
> (xi) There must be good reasons to stray from a previous interpretation (especially if it is from the Court of Cassation and Sections United), and very good reasons if it is an interpretation of "procedural rules".[33]

(xii) Especially when it concerns the interpretation of procedural rules, (prior) "knowledge" of the rules and thereby, upwards, to be able to count on the reliability, predictability and uniformity of the interpretation is an essential prerequisite for equality among citizens and for "justice".[34]

(xiii) Overruling in procedural matters may not always be avoidable or *pro futuro*, but it is necessary to carefully assess whether there are good reasons to change the course of case law and, first of all, to identify the legitimizing conditions for the interpretation to evolve. There are no mathematical formulas for this; it is a matter of balance and measure: of responsibility.[35]

(xiv) An SUTC overruling of a procedural matter can only be justified when the interpretation provided by corresponding precedent is manifestly arbitrary and pretextual and/or, in any event, leads (possibly as a result of changes in law or society as well) to dysfunctional, irrational or "unfair" results.[36]

(xv) The judge is responsible for an inexcusable violation of the law when their decision is outside the scope of a conscious choice of interpretation, giving rise to a clear, gross and macroscopic violation of the applied rule, to an interpretation that departs from any logical criterion, to the adoption of aberrant options in reconstructing the will of the lawmaker, to the absolutely arbitrary manipulation of the regulatory text or lastly, to the encroachment of interpretation on invention or free law. This situation arises when clear, certain and indisputable legal solutions are ignored, or basic principles of law which a judge cannot justifiably disregard are violated.[37]

(xvi) The criterion of serious infringement of the law due to inexcusable negligence is the error consisting of attributing an impossible meaning, which goes against the semantic expression itself, meaninglessness, i.e., a meaning that goes beyond any possible meaning that can be extracted from the textual signifier of the provision, a meaning that the provision can neither linguistically nor legally have or that is not inherent to it because it belongs to another rule, to another institution.[38]

(xvii) However, adopting a solution that does not conform to precedent cannot be without justifications or reflection: it must be the result of a conscious and recognizable (interpretative) choice, i.e., one made explicit to the outside world by means of justification.[39]

(xviii) It is necessary to justify a different interpretative choice -making it explicit in its decision-making rationale- regarding the so-called law doctrine (i.e., departure from a precedent or of a case law guideline so consolidated that the given precept "lives" in its applied reality with a meaning that includes, beyond its strict literal content, the one constantly attributed to it in case law).[40]

Each of the above statements merits a detailed analysis. I do not know whether the concept described represents a noble dream or a nightmare. In any case, whether we agree or not, it is a real fact. And, that which follows from the meta-case law analysis is not only at the level of discourse. It reflects not only what judges say they do, but also what they actually do.

In summary, the following points stand out:

a) As far as the sources of law are concerned, case law is anchored in the formal (or if you will, traditional or "legal positivist") view for axiological reasons, i.e., in deference to the ideal of the rule of law and, therefore, to the ideal model of the separation of powers.
b) In the gamut of theories of interpretation advanced by legal theorists (from extreme formalism towards extreme skepticism, passing through all the different combinations built over the decades), judges seem to be on a moderate side of conventionalist skepticism. It is a dual type of conventionalism in which the relevant conventions are both linguistic, linked to the so-called "literal meaning" and those linked to the meanings authoritatively attributed by the upper echelons of the judicial system.
c) What happens in practice seems to find a coherent theoretical explanation in Luka Burazin and Giovanni Battista Ratti's[41] proposal to separate the concept of rule of recognition into two more specific concepts: one has to do with identifying the standard

sources of law (the rule of recognition of standard sources), which does not entail the use of any interpretative canons, and the other which has to do with identifying the rules (the rule of recognition of rules), which does entail the use of canons by the bodies in charge of identifying the law. This distinction makes it possible to explain the twofold fact that there is often general agreement among legal scholars on the "legitimate" sources, but at the same time there is much disagreement on their interpretation. This seems to coincide with the findings of the meta-case law analysis.

d) In the area of legal interpretation and, specifically judicial interpretation, I find the observations of Damiano Canale and Giovanni Tuzet[42] important in their clear explanation of the fact that the meanings in judicial discourse depend on the linguistic interaction undertaken by participants in practice. The very criteria of correctness in the use of language depend on the participants' pragmatic interaction. This primarily results from the highly variable contextual background of legal action and interpretation. There is no single set of conditions for a judicial ruling and, at the same time, there is no single criterion that identifies the conditions of variability of such a set. The type of contextual dependence of semantic determination depends on the context itself. Second, the participants in this discussion have different levels of mastery and propositive attitudes and their use of language depends precisely on that. I somewhat disagree with Tuzet and Canale when they claim that what we call the "correct" use of a concept is neither a presumption of legal practice shared by participants, nor the simple result of the practice itself. It follows from practice and the meta-case law analysis that there is a shared assumption of "correctness" as an ideal to be pursued, and it is entirely contingent and local for there to be shared "correctness" in the results. Admittedly, this is always an inevitably precarious and unstable outcome since judicial interpretation is ongoing. Thus, judicial interpretation hinges on an ideal of correctness, but there is no consensus on its content nor on the rules and criteria for achieving it in such a way that a judicial agreement is reached in every case.

e) From a judge's internal viewpoint, interpretive discretion is considered inherent to the task of interpretation, i.e., inalienable, and a fairly high degree of discretion is permitted, where the boundaries of "creativity" are left undetermined.

f) An ideal limit of discretion/creativity should be the signifier understood as the literal sense of the words used in legal texts, whose multiple signifieds, however, are unanimously recognized.[43]

g) There are only general and axiologically denoted formulas to discriminate between signifieds that are possible/impossible to trace to the signifier and thus draw the line between what (discretionary, and creative if needed, but in any case permitted) interpretation is and what is not.

h) Theories, conceptual tools, etc. developed by general semiotics to better understand the relationship between signifier/signified and the connections between syntax and semantics/pragmatics, as well as, for instance, the linguistic vagueness and other properties of ordinary and legal language, do not seem to be part of judges' training or knowledge.

i) In the absence of guidelines on the workings of ordinary and legal language, the express justification of interpretive choices is the "residual" bastion to unravel what is permitted and what is not.

j) In this context, the human factor has the last word: the last real bulwark against arbitrariness is the interpreter's sense of proportion and of responsibility.

V. Case Law Precedents: a Review of Some Emblematic Uses

In the framework of such a concept and ideology, in practice, judges make constant and extensive use of case law precedents. The following is simply an illustrative review of the

arguments they use. The analysis is based on the texts of the decisions in their entirety, without referring to any "*massima*" because of the known problems afflicting the "*massimazione*". Given that the references are extraordinarily varied, it seems fitting to speak of a family of interpretive arguments, rather than an argument or argumentative canon. The review is by no means exhaustive[44] and the list is not arranged by importance or frequency of use. A name was invented for each argument solely for the sake of clarity. In fact, judges use and/or mention precedents in various ways in their reasoning, without being explicit or naming their legal arguments. There are only two exceptions in this regard: (i) the so-called adaptive interpretation, also known as interpretation according to the Constitution, *secundum Constitutionem*, constitutionally oriented and the like (the terminology greatly varies);[45] and (ii) the so-called living law doctrine (sometimes known by other names).[46] However, each of these interpretive-argumentative canons has far too many variants to be discussed herein.

Lastly, I stress that in reviewing these arguments, I do not intend in any way to legitimize their use. My analysis in no way predetermines the matter of their legitimacy (for each law in force) and under what conditions, if any. However, a general maxim applies to each of these arguments and can be applied to any other legal argument, i.e., every legal argument can be used well or badly (misused) depending on who uses it.

(i) *Ratio decidendi precedent argument:* Express reference is made to a given *ratio decidendi* so as to use it as a decisive binding argument in deciding a subsequent case. This would be the "true" precedent, in which the same *ratio decidendi* is applied in a subsequent case, presumably identical or, better said, similar in relevant aspects (and dissimilar in irrelevant aspects) to the one already resolved. Both the existence of a relevant similarity and the irrelevance of the differences are not always explicitly argued. A weak variant of this argument is one whereby the reference to the *ratio decidendi* precedent is not decisive, but only a supporting or concurrent argument reinforcing the decision on the basis of that *ratio decidendi*, but also based on other arguments.[47]

(ii) *Precedent as a point of law argument:* an interpretive solution can be justified by referring to a precedent as a general and abstract point of law without needing to develop its own legal arguments.[48] Unlike the "*ratio decidendi* precedent" argument, it is of no relevance for the point of law to be the *ratio decidendi* of the previous case for a "precedent as a point of law." The point of law is invoked for the subsequent decision as a general and abstract rule that lives a life of its own, i.e., it exists independently of the case in which it was first decided or of the series of cases in which it has been repeatedly applied. It is neither automatic nor necessary, but this argument may be used especially when a certain convergence is established within case law whereby the *ratio decidendi*-precedent is detached from the circumstances of the case and is conceived as a rule of decision in itself.

(iii) *Precedent as authority argument:*[49] In this case, the reference to precedent is, so to say, more procedural than substantive: what matters is who decided it and not what was decided. This use of precedent is often criticized by those who believe that the proper outcome of cases should depend on what is ruled on and not by who rules on it. On closer examination, this argument does not seem to be particularly sound, especially in today's systems where many decision-makers and the "hierarchies" between branches, especially top-level ones, are quite obscure. In contexts where the authority of different judicial bodies is subject to conflicts of power (*de facto* or *de jure*), such an argument runs the risk of being unconvincing or even stoking disagreement. It must be remembered that, *inter alia*, justifying a subsequent decision based on an *ex acutoritate* precedent weakens the position of the subsequent decision-maker (who admits that they are subject to the authority of the previous decision-maker). Therefore, this argument gains strength and seems attractive, especially in the case of self-precedent. In this case, invoking the *ex auctoritate* precedent is also a way of asserting one's own authority. The flaw, naturally, is that one runs the risk of a vicious circle since the authority appeals to itself.

(iv) *Precedent by analogy argument:* whereby the application of a precedent is expressly based on an analogy or a similarity. It may be explicitly explained or simply invoked without explanation, simply referring to it "by analogy."[50] The mere fact of justifying a decision on a subsequent case on the basis of a precedent cited "by analogy", without specifying the nature of the alleged analogy is evidently, at least, a partial form of argument. While it is true that by comparing the allegedly "analogous" precedent and the case to be decided, it is possible to grasp the relevant similarity underlying the analogy, the selection of similarities and differences is a highly discretionary activity, which runs the risk of there being no analogy or that the analogy is poorly constructed or incomprehensible. In any case, it is necessary to make a distinction between three different situations: (a) an argument *a simili*, in which it is justified to attribute the legal consequences of a similar, already decided case (by law or case law decision) to a case yet to be decided (*de iure condito*) on the basis of relevant similarity (and the irrelevance of the differences); (b) the "precedent by analogy" argument, in which it is justified to apply the precedent applied in Case A to Case B on the basis of the analogy between cases B and A, and (c) the condition that the choice among the myriad of existing precedents for every subsequent case is also made by searching for relevant similarities.
A distinction must be made between them because precedents are not always or solely chosen or selected based on analogy. It is also untrue that an argument *a simili* and "precedent by analogy" are mutually overlapping. On the contrary, much has been discussed as to whether an argument *a simili* fits when there is an applicable precedent. According to some, the very premise of the analogy argument is missing from this premise because there is no regulatory gap to fill.

(v) *Serial precedent argument:* happens when reference is made to a series of judgments, without specifying their content and without giving details of the specific cases involved, it being a serial case.[51] This use of precedent deserves to be isolated because of its specificity. First of all, its application implies the existence of serial cases. Second, it embodies the ideal of "economy" that often justifies, even *de iure condendo*, the use of precedent. The underlying commonsense principle that makes this argument "easy" and generally less open to criticism than other precedent-related arguments is that repetition is futile and counterproductive if it can be avoided. Although each case is unique in law, in serial situations, the idiosyncrasy of each case is left unguarded due to cognitive biases that characterize our perceptions and beliefs. Hence, different participants in the judicial practice tend to recall serial situations. In short, when weighing the pros and cons in serial situations, the risk (which is considered low) of losing the specificity of individual decisions and particular cases loses out to the advantage of saving time, intellectual effort, etc.

(vi) *Inspiring precedent argument:* is found when referring to guidelines, principles that guide/inspire the overall decision-making reasoning, whereby a hermeneutical solution that has already been reached by using other reasons is presented as more in line, for instance, with the system of due process, based on the reference to the general principles that govern it.[52] This argumentative use is aligned with the argumentation of legal principles and therein lies its interest. In other words, studying this usage helps shed light on the interference between arguments that invoke precedents and those that invoke legal principles. Interference is patent in all cases in which the legal principles invoked are not expressed and originate in previously adopted case law decisions. Besides, it is necessary to factor in the interference with the interpretation in accordance with the Constitution, i.e., with case law precedents from the Constitutional Court and/or SUTC on their reading of the Constitution. This often refers to principles that are not expressed or incorporated into the system but that in a very roundabout way, end up invoking case law interpretations (mainly unwritten rules).[53] The difference between an "inspiring precedent" and a "precedent as a point of law" is that the latter is a principle-precedent inherent to the specific case (i.e., it refers to the *thema disputandum*) while the former only illustrates a background context outside the specific case at hand. From this point of view, the "inspiring precedent" argument more often refers to the frequency of rules of judgment or procedure than to the substance of the dispute.

(vii) *Established precedent argument:* by referring to a legally established tendency or approach (which may in turn be understood in different ways) a hermeneutical solution is legitimized. The issue of possible alternate or conflicting interpretations is usually not explicitly addressed and its use is very vague and ambiguous. The established case law, living law or other formulas are invoked and supplemented with a reference to particular rulings.[54] The established precedents does not necessarily become *ratio decidendi*; it can only serve to support the decision-making reasoning and, therefore, can be situated at different levels of reasoning, if only as a reinforcement of the *ratio dicidendi* precedent. Its argumentative and persuasive power is all the more

pronounced the more participants and judges adopt a compliant attitude. This argument is mostly used to strengthen, unless the intention is to break with the continuity. Then, the reference to the established precedent is made precisely to become a target of criticism so as to justify a change.

(viii) *Obscure or fictitious precedent precedent:* by which the established guidelines are broadly appealed, without reference to specific decisions.[55] It can also be seen as an ambiguous variant of the "established precedent" argument. Abstractly speaking, reference to a precedent cannot be made without giving any specific indication or introducing it as "established case law or interpretation" (or something similar). In this case, the boundary with fabrication becomes blurred, so much so that the precedent may well be the result of invention if the interpreter takes their creativity to an extreme (beyond the acceptable limit). It is clear that this is more of a hypothetical case than a real one. However, it may come to be true, for instance, through error or oversight from an interpreter motivated by certain political or ethical reasons or seeking to pursue personal interests or those of third parties.

(ix) *Conservative precedent argument:* by which, when faced with several possible interpretation, the preferred one is based on a stable practice of application over time and consistency with the economic workings of the system.[56] It can be considered a variant of the "established precedent" argument, but with a particular expressive connotation in comparison. It is transparent in its objectives in terms of not being innovative in its deciding-making. This conservative objective can be limited to individual cases or extended to the legal system in its entirety. The best example of this is the *prospective overruling* that only innovates *pro futuro* but not for concrete cases, which are decided conservatively with strict adherence to what has been decided previously.

(x) *Evolving precedent argument:* refers to a precedent not so as to apply it directly, but as an indicator of an ongoing process of evolution, thus justifying a hermeneutical variation of the case at hand.[57]

(xi) *Precedent extra vagantes argument:* when not relevant to deciding a specific case, reference is made to it for the sake of thoroughness and/or to diverge from it, thereby demonstrating knowledge of its existence.[58]

(xii) *Precedent ad pompam argument:* refers to a precedent with no bearing on deciding the case, but to show the judge's knowledge and education or "legal culture" in deciding the subsequent case. The use of this argument is especially common in certain styles of argumentation, such as the so-called "treaty rulings,"[59] i.e., rulings in which judges aim to show off their legal education in the subject matter or in general.

(xiii) *Doubt of the precedent argument:* by which the precedent is invoked only as a starting point to raise an interpretive-applicative query that gives rise to the judge's argumentative process.[60] Like the *precedent ad pompam* argument, this also arises from certain argumentative styles and serves more for rhetorical purposes than to give content to judicial reasoning.

(xiv) *Majority and/or most current precedent argument:* used as the decisive criterion in choosing an interpretive solution from among other possible ones.[61] The two factors (i.e., "majority" and "current") are, of course, different and autonomous. However, as progressive factors, the greater the majority of the precedent and the more current it is and the more these two factors are combined, the greater the argumentative-persuasive force will be.

(xv) *Minority and/or obsolete precedent argument:* is, in a way, the alter ego or shadow argument to the "*majority*" and/or "*most current*" precedent argument. It is used symmetrically as a criterion to depart from a given interpretation considered unacceptable.[62] It is not unusual to see both arguments combined, thus rendering the argumentation particularly compelling. Given their complementary nature, their combined use gives the impression of a judicial reasoning unassailable by either party.

(xvi) *Isolated precedent argument:* (with two variants): either it ends up having the same role as the *ratio decidendi* precedent or its uniqueness is a reason to diverge from it. It represents the polar extremes of the two previous arguments. A single isolated precedent is either deemed relevant/decisive or is discarded based on its uniqueness and thereby its unreliability.

(xvii) *Conflicting precedents argument:* to justify a new interpretation (and possibly a new point of law) inconsistencies and conflicts between precedents are stressed.[63]

(xviii) *Comparative precedent argument:*to justify a specific interpretative solution, reference is made to the case law of other legal systems outside the legal context of the case to be decided, but it is invoked to substantiate an internationally agreed approach based on the assumption that what has been decided elsewhere is an example to follow.[64]

VI. Conclusions

In view of the above analysis, the following critical observations can be drawn, expressed as proactive and critical reflections for further study.

(i) Case law precedents are an integral part of existing legal systems, even if case law is not recognized as a source of law.[65] Regardless of the idea of the source of law adopted, the binding nature of case law precedents is not something that can be established in the abstract or once and for all. Even if the binding nature of case law precedents were established in the abstract through a principle or meta-standard, the *sceteris paribus* shall always apply:it would be a flawed or defeasible principle or a meta-standard from which one can and should depart whenever there are better reasons to decide otherwise.[66] In other words, regardless of whether case law is formally recognized as a source of law, and whether there is an ideology or legislation that formally sanctions the binding nature of precedents, in any given legal system precedents may be binding or non-binding, authoritative or not depending on the case and on various pragmatic and value-based factors.

(ii) Since interpretative and applicative discretion is unavoidable and each life case is "unique", judicial decisions are an unavoidable part of any existing law, assuming a connection between the concept of law and justice (even without any particular "moral" connotation of justice). The justice-equality (generality) demands that similar cases be regulated similarly, and that the differences between cases and their handling be commensurable and proportionate. This implies that if it is going to be fair or right under the law, no decision can be made in a vacuum, independently of the regulation of other cases. The pragmatic context, at macro and micro levels, conditions the judges' decision-making process, as well as their argumentative styles. This may lead to arguing more from the perspective of analogy, proportion, equality, etc. (generally valuing similarities) or, on the contrary, more from a distinctive perspective (generally highlighting differences).

(iii) The difficulty of having a well-ordered system of case law precedents depends on (the so-called macro and micro) pragmatic reasons of law and its language. It is quite clear that this concept value-laden and by no means neutral. Even then, it underscores the fact that in speaking of precedents, it is not of individual precedent, but of precedent as a whole. and that while no one is satisfied with a given system of precedents, they would like it to be well-ordered. The whole problem, of course, lies in what this a good order consists of. Therefore, the discussion of whether precedents are binding or persuasive, whether they should be this way or that, does not make it sufficiently clear that this alternative, like any other issue concerning the binding or non-binding nature of precedents, is somehow wrong and fallacious.

(iv) It is not entirely possible, from a theoretical-pragmatic point of view, to have a law in force characterized by a well-ordered system of precedents, but it is extraordinarily complex to implement. This is not so much for technical, political and value reasons, but because of the inevitable "human factor" ("… if men were angels/But if men are not devils, neither are they angels," to recall Hart's famous observation) (Herbert Hart, 2012, p. 169).

(v) It is evidently not enough to proclaim very general values or principles, like equality, certainty, predictability, reasonable duration, due process, etc. Each of these values or principles is much too diffuse to give judges sufficiently specific guiding criteria to implement a kind of spontaneous self-regulating process in the application of precedents.

(vi) On the other hand, even the most refined regulatory reforms and technicalities are incomplete and have proven to be ineffective in legal practice.

(vii) Precisely because of the "human factor", a well-ordered system of precedents basically depends on practice itself. It is built "from the ground up," so to say, by creating a legal and judicial culture that is as

sensitive, sharp, far-sighted and responsible as possible.

(viii) In other words, what Bobbio wrote about the good legislator also applies to judges (Norberto Bobbio, 1982, pp. 1-12): like any legal institution, judicial precedents live or die according to the ideals of the people on whose ideas, minds and actions the judicial institution itself is based.

(ix) A well-ordered system of precedents is an ideal to be pursued to improve the quality of existing legal systems.

(x) Therefore, whenever certain basic values are shared, it makes sense to address the regulation of judicial precedents, provided that they take into account the pragmatic characteristics of legal language and law, and the inevitable human factor that conditions any judicial case and its resolution.

Based on these premises, a legal sociological approach seems crucial to understanding how precedents actually work.

VII. References

Arriagada, María (2021). Las dos caras del precedente vinculante. In Á. Núñez, M. B. Arriagada e I. Hunter (Coord.), *Teoría y práctica del precedente* (pp.365 ss.). Tirant Lo Blanch.

Bobbio, Norberto (1982). Il buongoverno. *Belfagor*. *37*(1), 1-12.

Burazin, Luka & Ratti, Battista (2021). Rule(s) of Recognition and Canons of Interpretation. In P. Chiassoni, B. Spaić (Eds.), *Judges and Adjudication in Constitutional Democracies: A View from Legal Realism* (pp.123-138). Springer.

Camarena, Rodrigo (2018). La creación del precedente en la Suprema Corte de Justicia de la Nación. In C. Bernal Pulido, R. Camarena González, A. & Martínez Verástegui (Coords.), *El precedente en la Suprema Corte de Justicia de la Nación* (pp. 103 ss). Suprema Corte de Justicia de la Nación.

Canale, Damiano & Tuzet, Giovanni (2007). On Legal Inferentialism. Toward a Pragmatics of Semantic Content in Legal Interpretation? *Ratio Juris, 20*(1), 32-44.

Canzio, G. (2012). Nomofilachia, valore del precedente e struttura della motivazione. *Il Foro Italiano*,*135*(10), 305/306-311/312

Capponi, B., *La Corte di cassazione e la «nomofilachia»* (a proposito dell'art. 363 c.p.c.), April 6, 2020, https://www.judicium.it/wp-content/uploads/2020/04/B.-Capponi.pdf

Caputo, Angelo & Fidelbo, Girgio. Appunti per una discussione su ruolo della Corte di Cassazione e "nuova" legalità. *Sist. pen.*, 3/2020, 91-112. https://www.sistemapenale.it/pdf_contenuti/1583358421_caputofidelbo-2020a-nuova-legalita-corte-di-cassazione.pdf

Caruso, G., Nihil est idem, cui id ipsum simile est. Marginalia all'ordinanza Corte Cass. n. 29191 del 21 dicembre 2020, 6 Luglio 2021, https://www.judicium.it/nihil-est-idem-cui-id-ipsum-simile-est-marginalia-allordinanza-corte-cass-n-29191-del-21-dicembre-2020/#_ftn7

Fornaciari, M. (2013). L'inammissibilità del ricorso per cassazione ex *art. 360-bis c.p.c*. *Riv. trim. dir. dir. proc*., 645 ss.

Gómora Juárez, Sandra (2019), La jurisprudencia mexicana y el principio de legalidad: una compleja relación. *Boletín Mexicano de Derecho Comparado*, (155), 799-839.

Hart, Herbert (2012). *The concept of law*, with a Postscript edited by Penelope A. Bulloch and Joseph Raz and with an Introduction and Notes by Leslie Green (3rd ed.). Clarendon Press.

Battaglia, Luigi (A cura di) (2019). *La nuova responsabilità sanitaria nella giurisprudenza di legittimità*, report, 27 novembre https://www.cortedicassazione.it/cassazioneresources/resources/cms/documents/REPORT_Luigi_La_Battaglia_27

Lamberti, Cesare (2013). Stare decisis, nomofilachia e supremazia nel diritto amministrativo. *Giur. It.*, (4), 976 ss.

Mancini, L. (A cura di) (2018). *Report. L'argomentazione delle decisioni della Cassazione: tra autorevolezza del precedente ed esigenze di semplificazione Roma*, 11 ottobre, https://www.cortedicassazione.it/cassazioneresources/resources/cms/documents/REPORT_ARGOMENTAZIONE

Marshall, J. (1996). Trentatré cose che si possono fare con i precedenti. *Ragion pratica*, (6), 29 ss.

Ministero della giustizia Ufficio Legislativo Commissione per l'elaborazione di proposte di interventi in materia di processo civile e di strumento alternativi (Pres. Prof. F.P. Luiso) Proposte normative e note illustrative 24 maggio 2021 https://www.giustizia.it/cmsresources/cms/documents/commissione_LUISO_relazione_finale_24mag21.pdf

Muffato, N. (2009). Resta qualcosa da dire sulla polivocità degli enunciati deontici? D&Q, (9), 589-623, *http://www.dirittoequestionipubbliche.org/page/2009_n9/05_studi07_N_Muffato.pdf*

Núñez Vaquero, Álvaro (2020). La relevancia de los hechos para la interpretación y aplicación (analógica) de precedentes. In M. Gascón Abellán & Á. Núñez Vaquero (Coords.) *La construcción del precedente en el civil law* (pp. 81-105). Atelier.

Pardolesi, R. (A Cura Di) (2020). Responsabilità sanitaria in Cassazione: il nuovo corso tra razionalizzazione e consolidamento. *Il Foro italiano Fascicolo speciale*, (1), 1-462.

Passanante, L. (2018). *Il precedente impossibile. Contributo allo studio di diritto giurisprudenziale nel processo civile*.

Sierra Sorockinas, D. (2020). Un análisis sobre la formación del precedente. In Maria Gascón Abellán & Álvaro Núñez Vaquero (Coords.), La construcción del precedente en el civil law (pp. 53-80). Atelier.

Spirito, A. (2019). "Il <progetto esecuzioni> della terza sezione civile della Corte di Cassazione". *Riv. esec. forzata*, (1).

Taruffo, M. (2014). Aspetti del precedente giudiziale. *Criminalia*, 37-57.

Velluzzi, V. (A cura di) (2000). *Significato letterale e interpretazione del diritto*. Giappichelli.

Vogliotti, M. (2020). *Indipendenza del giudice e rispetto del precedente, La legislazione penale*.https://www.lalegislazionepenale.eu/wpcontent/uploads/2020/10/Vogliotti.REV_.pdf

---

Notes

* Article submitted on October 30, 2021, and accepted for publication on December 12, 2021.
** Associate professor at the Cesare Beccaria Department of Legal Sciences, University of Milan, Italy. Email: silvia.zorzetto@unimi.it, ORCID: https://orcid.org/0000-0001-9767-3700
1 For the sake of simplicity and brevity, this text will only mention precedents, in the understanding that I am only speaking of judicial precedents. It is well known that case law precedents are not the only types of precedent. For example, in many legal systems based on the principle of the rule of law, precedents set by executive bodies are also important and debate is underway as to whether these precedents are binding or self-binding on the executive itself and on citizens. This question is often raised in the debate regarding the principle of certainty and legitimate expectations. However, this analysis will not address non-judicial precedents.
2 Due to the extraordinary breadth of literature on the topic, subsequent bibliographical references are limited to only those deemed essential for the analysis.
3 In this text, judicial argumentation means, strictly speaking, a justifying process that is explicit, goes from general to abstract and serves as the bases for a given judicial conclusion. In this context, judicial arguments the reasons that are given in an argument to support a practical conclusion. More specifically, judicial arguments will be discussed as regards the reasons provided to justify a given interpretive solution "in the abstract" and/or the application of one or more legal rule to a concrete case.
4 Coordinated by M. Gascón Abellán, Á. Núñez Vaquero, Atelier, Barcelona, 2020.
5 It should be pointed out that current legal systems have the additional problem of not having a specific individual acting as the regulatory authority (neither in the case of collegiate bodies nor in the case of monocratic bodies where the important consideration is the body as an institution and not the individual who occasionally holds authority). This implies that even self-precedent could exist without public knowledge of the decisions, except for its author. This

does not apply in the residual case of self-precedent related not to the regulatory body or authority, but to the individual who authored it and who, by keeping an "individual" memory of it, can apply what has already been decided at a later date.

6 On this, see the study conducted by N. Muffato, 2009, pp. 589-623. *http://www.dirittoequestionipubbliche.org/page/2009_n9/05_studi-07_N_Muffato.pdf* .

7 This narrow idea of precedent has been adopted by M. Taruffo, Aspetto del precedente giudiziale, in Criminalia, 2014, 37-57, who rightly observes that case law is "composed of a series of decisions, which may also be many —as in the case of our Court of Cassation— and may include hudnreds or thousands of judgments on the same legal matters. It is therefore not surprising that case law can be —and often is— redundant, variable, ambiguous and contradictory, because there can be different and variable interpretive approaches on the same legal matter. It can even be said that case law like that produced by the Italian Supreme Court is like "an enormous supermarket where, with due patience, everyone can find what they want (and even the opposite)" (p. 39; n.d.r. author's translation). Continuing with the metaphor, this analysis is research on what this "supermarket" has to offer.

8 This adjective is used to imagine the point of view of traditional jurisprudence towards this research. It is not the point of view taken for this analysis, as explained in the text.

9 I would like to point out that this is in no way intended to deny the importance of studies on binding precedent and the understanding of its merits and workings in the theory of the rule. On the contrary, I believe these studies [See in particular the study by María Arriagada, 2021, pp. 365 ss.] are also essential in the perspective explored here and this analysis is meant to be more of a descriptive complement to what judges say they do and/or actually do with case law precedents.

10 That is to say that the meta-rule secondo la qual assuming the "identity" of *ratio decidendi* in both cases 0 and 1. Decision t1 is justified on the basis of decision t0 because the latter emerges as a binding rule for the subsequent case in t1.

11 Based on these provisions, judges themselves have also created protocols and guidelines to simplify the drafting of judicial acts and measures, as well as "projects" on specific topics to inform case law. Recent examples are the "Executions Project" and the "Health Project" of the 3rd Civil Section of the Court of Cassation. In this regard, see A. Spirito, Il "progetto esecuzioni" della terza sezione civile della Corte di Cassazione, en Rivista dell'esecuzione forzata n. 1/2019; L. La Battaglia (ed.), La nuova responsabilità sanitaria nella giurisprudenza di legittimità, report, November 27, 2019: *https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/REPORT_Luigi_La_Battaglia_27.11.2019_Nuova_responsabilita_sanitaria.pdf*and R. Pardolesi (ed.), Responsabilità sanitaria in Cassazione: il nuovo corso tra razionalizzazione e consolidamento, en Il Foro italiano No. 1/2020, 1-462.

12 Only provisions concerning civil proceedings will be mentioned in the text with footnote references to those relating to administrative proceedings. There are similar provisions for criminal proceedings (see Article 618, paragraph 1-bis of the Italian Code of Criminal Procedure) and the debate on criminal law and the nomophilia of the Civil United Sections of the Court of Cassation is becoming increasingly lively. To understand the common features of the problems from a general theoretical point of view, see: M. Vogliotti, Indipendenza del giudice e rispetto del precedente, in La legislazione penale, 19.10.2020, *https://www.lalegislazionepenale.eu/wp-content/uploads/2020/10/Vogliotti.REV_.pdf*; A. Caputo e G. Fidelbo, Appunti per una discussione su ruolo della Corte di Cassazione e "nuova" legalità, in Sist. pen., 3/2020, 91-112 *https://www.sistemapenale.it/pdf_contenuti/1583358421_caputofidelbo-2020a-nuova-legalita-corte-di-cassazione.pdf*.

13 For further comments, see G. Canzio, Nomofilachia, valore del precedente e struttura della motivazione, in Il Foro Italiano Vol. 135, No. 10, 2012, 305/306-311/312.

14 For a critical commentary on the application of the provision by the Court of Cassation in recent years, see B. Capponi, 2020.

15A similar provision exists in administrative procedure, in Art. 99 "Referral to the Plenary Session" (of the Council of State) of the Italian Code of Administrative Procedure: "*If the section of the Council of State to which the appeal is assigned considers the point of law submitted for its review has given or may give rise to differences in case law, it may, at the request of the parties or* ex officio*, refer the appeal to the plenary session for review. Before ruling, the President of the Council of State may, at the request of the parties or* ex officio*, refer any appeal to the plenary session to resolve issues of principle of particular importance or to settle differences of case law. If the Chamber to which the appeal was assigned deems that it does not agree with the principle of law established by the plenary, it shall remit the decision on the appeal to the plenum by means of a reasoned order. The full court shall decide the case in its entirety unless it decides to uphold the principle of law and return the remainder of the case to the chamber to which the appeal was assigned. If the matter is considered to be of particular importance, the plenary session may, however, declare the principle of the law in the interest of the law, even when the appeal is declared inadmissible, out of order or unenforceable, or when the proceedings are declared closed. In these cases, the plenary decision shall not affect the contested act".*

16 See G. Caruso, 2020.

17 A similar provision exists in administrative procedure, in Article 74 "Simplified Judgments" of the Italian Code of Administrative Procedure: *"If the court deems the appeal is manifestly well-founded or manifestly inadmissible, out of order or unfounded, it shall decide by means of a simplified judgment. The grounds of a judgement may consist of a concise reference to the point of fact or law deemed decisive or, where appropriate, to a relevant precedent."*

18 Es probable que la disposición sea modificada por la reforma del proceso civil que se está redactando actualmente: véase el art. 6-bis de la enmienda-13 al proyecto de ley AS 1662 sobre "Delegación en el Gobierno para la eficacia del proceso civil y la revisión de la disciplina de los instrumentos de resolución alternativa de conflictos", en la versión del 16 de junio de 2021.

19 La reforma prevé también una Oficina para el juicio en los tribunales y cortes de apelación, así como en el Tribunal de Casación, con la tarea de perseguir la mejora y la provisión de precedentes a nivel interno, para aumentar la capacidad productiva de la oficina; y, a nivel externo, perseguir un efecto deflactor a través de la difusión de directrices jurisdiccionales: Ministero della giustizia Ufficio Legislativo Commissione per l'elaborazione di proposte di interventi in materia di processo civile e di strumento alternativi (Pres. Prof. P.F. Luiso) Proposte normative e note illustrative 24 maggio 202,*https://www.giustizia.it/cmsresources/cms/documents/commissione_LUISO_relazione_finale_24mag21.pdf*. There is a similar provision in Bill A.C. 2435-A, which amends the system of criminal trials and penalties, approved by the Chamber of Deputies on August 3, 2021, the text of which and its constantly updated information can be accessed at: https://www.sistemapenale.it/.

20 See Art. 6 of Amendment 12 to Bill AS 1662 on "Government delegation for the effectiveness of civil proceedings and the review of alternative conflict resolution instruments" in the version of June 16, 2021.

21 See in particular L. Passanante, Il precedente impossibile. Contributo allo studio di diritto giurisprudenziale nel processo civile, Torino, Giappichelli, 2018. Despite the title of the work, it in no way defends a hyper-skeptical view; it examines with dismay the numerous problems that make it difficult to establish the adequate regulation of case law precedents in a legal system (Italian and others) and, therefore, the building of a well-ordered system of precedents.

22 From what I have learned, there is also talk of "crazy consequentialism" or "slippery slope" in the literature on argumentation fallacies.

23 *Ex plurimis*, SUTC No. 15144 from 2011.

24 Except for the court of reference since this is expressly provided for by law.

SUTC, 03-05-2019, No. 11747. The judgment in question is particularly significant as it addresses the following point of law: "In the presence of legal rules that are free of ambiguities or uncertainties, in view of the principles of law constantly reaffirmed for over 60 years by the Court of Legitimacy and the consolidated and unequivocal interpretation of the rules outlined above regarding the settlement of a compensatory debt stemming from a civil wrong, it is possible for a different approach reserved by a ruling of legitimacy to an economic compensatory debt, derived from a civil wrong (failure to deduct and apply the legal interest from the date of the request), to be considered ex se as falling within the scope of the "activity of interpreting the rules" -understood as the search for and conferral of prescriptive meaning to the wording which can be derived from the lemmas and syntagms of the provisions read individually, in relation to the logical connection within the structure of the source act and the systematic relationship with the other rules in the legal system. Therefore, to be considered "objectively speaking" as an appraisal activity which -however erroneous or implausible- falls under the scope of safeguard clause L. Nº 117 of 1988, Art. 2, paragraph 2 (regulating "Compensation for damages caused in the exercise of judicial functions and the civil liability of justices") or conversely

whether the level of consolidation of the meaning of the rules applying to the settlement of pecuniary damages arising from torts in the sphere of civil liability (regarding pecuniary damage due to expropriation): see SUTC No. 1464 of 26/02/1983; SUTC No. 12546 of 25/11/1992; id. SUTC No. 494 of 20/01/1998; id. Sec. 1, Judgment No. 4070 of 20/03/2003; id. Sec. 1, Judgment No. 19511 of 06/10/2005; id. Sec. 1, Judgment No. 22923 of 09/10/2013; id. Sec. 2, Judgment No. 11041 of 28/05/2015; id. Sec. 1, Judgment No. 18243 of 17/09/2015. As to the compensation of lost profits using the interest technique: id. Sec. 1, Judgment No. 1814 of 18/02/2000; id. Sec. 1, Judgment No. 9410 of 21/04/2006; id. Sec. 1, Judgment No. 9472 of 21/04/2006; id. Sec. 1, Judgment No. 13585 of 12/06/2006; id. Sec. 1, Judgment No. 15604 of 09/07/2014; id. Sec. 1, Judgment No. 18243 of 17/09/2015. The only exception is the solitary decision issued by the Court of Cassation, Sec. 1, Judgment No. 4766 of 03/04/2002 with a view to include compensation for expropriation and compensation for damages in the category of financial obligation according to compensation criteria as per L. 8 of August 1992, No. 359, Art. 5 bis, Section 7 bis). For this safeguard clause to apply, this implies the need to ensure, at least, the Judge's complete detachment from the interpretive options of a case law ruling that may be defined as unequivocal and "crystallized" by an apparent dubious application of the intended rule to the specific case in the sense attributed to it, or by a revised interpretive solution -whether grounded or not- in such a way that the ruling adopted is the result of an assessment activity and not of a mere "distraction" or disregard to consolidated case law principles." (n.d.r. Author's translation). Ultimately, the issue is whether and under what conditions the judge can be held liable for attributing a different meaning to established case law. In the wording applicable ratione temporis before the reform made by Law No. 18 of February 27, 2015, Article 2 of Law No. 117, of April 13, 1988, establishes that a person is entitled to compensation for loss of earnings. Law No. 18 of February 27, 2015, states that a person is entitled to compensation for damages resulting from a judicial action taken by a high court judge with malice or gross misconduct in the performance of their duties or from the denial of justice, stipulating that, on the one hand, "in the exercise of *jurisdictional duties, the activity of interpreting legal rules or assessing the facts and evidence cannot give rise to liability," and on the other hand, serious misconduct constitutes "a serious breach of the law caused by inexcusable negligence."*

25 SUTC, 06-11-2014, No. 23675. See also SUTC, 18-05-2011, No. 10864 and, as regards the so-called "living law doctrine", among others, Constitutional Court No. 350/1997 and Constitutional Court No. 122/2017.

26 SUTC, 06-11-2014, No. 23675.

27 *Idem.*

28 SUTC, 06-11-2014, No. 23675; SUTC, 03-05-2019, No. 11747.

29 *Idem.*

30 *Idem.*

31 *Idem.*

32 *Idem.*

33 *Idem.*

34 *Idem.*

35 *Idem.*

36 *Idem.*

37 See, for instance, Tribunal de Casación No. 6791 in 2016; Tribunal de Casación No. 2637 in 2013; Tribunal de Casación No. 2107 in 2012; Tribunal de Casación No. 11593 in 2011, and other references therein.

38 See SUTC, 03-05-2019, no. 11747. 39 *Idem.*

40 *Idem*.

41 Luka Burazin & Battista Ratti, 2021, p. 137.

42 Damiano Canale & Giovanni Tuzet, 2007, p. 35.

43 The concept of "literal meaning" is susceptible to a plethora of different interpretations and judges are usually well aware of this type of interpretation. On the plurality of meanings in which "literal meaning" is understood, there is the book by V. Velluzzi, 2000.

44 By way of comparison, the range of techniques used by jusdges is worth noting, as seen in J. Marshall (1996, pp. 29 ss).

45 To avoid any misunderstanding, it is worth noting noted that constitutionally oriented interpretation is not necessarily based on Constitutional Court precedents, although this is in fact the most common case. Thus, it is an interpretation that is constitutionally oriented toward and by Constitutional Court precedents. Reference to case law precedents by, but not only by, the SUTC assumes the form of interpretive and argumentative guidelines on compliance with the Constitution. Some examples are: (i) Among several possible meanings, the one conforming to the Constitution should take precedence (SUTC, 16-12-2013, No. 27986);

(ii) Of several possible meanings, precedence must be given to the interpretation most consistent with or most closely aligned with the Constitution (Tribunal de Casación, Sección V, 07/07/2021, No. 19368);

(iii) If it is not possible to interpret it according to the constitution, the rule/provision must be deemed constitutionally illegitimate and, therefore, should not be applied (and the issue of constitutionality must be raised; Tribunal Constitucional No. 356/1996 and Tribunal Constitucional No. 49/2011);

(iv) An interpretive judgment by the Constitutional Court rejecting a rule requires the non-application of the "rule" found not to conform to the constitutional parameter invoked and scrutinized by the Constitutional Court, but it does not exclude the possibility of following "third interpretations" found to be compatible with the Constitution, or of raising a new point of constitutional legitimacy with respect to a different constitutional parameter (Tribunal de Casación, Sección trabajo, No. 1581 de 2010; No. 166 de 2004; Tribunal de Casación, Sección II, 21-03-1990, No. 2326; Tribunal de Casación, Sección trabajo, 30-07-2001 No. 10379). An interpretive judgment by the Constitutional Court rejecting a rule is a judgment in which both the interpretation of the precept of ordinary law in the light of constitutional principles and the operative part thereof, which usually is indicated by *P.Q.M.* [for these reasons], are decisive.

46 If "living" law stems from judges' interpretation, living law -in the strict sense- would not be confined only to the "higher" courts. In practice, however, the idea is limited to the law that comes from the pinnacle of the judicial system. In the Italian case, this is the Constitutional Court, the Court of Cassation (and its Sections United), the Council of State and the Court of Audit, according to their respective jurisdiction. Hence, there are possible conflicts between living rights. Some specific interpretive guidelines emerge from practice: (i) The retroactive application of rules may be justified to the extent that they are rules recognizing principles that constitute a living law (see Tribunal de Casación, Sección II, 12/03/2021, No. 7051);

(ii) Living law does not necessarily conform to the Constitution, which is why the judge may depart from it, requesting a review of its compatibility with constitutional parameters (see Tribunal Constitucional, No. 180/2021; Tribunal Constitucional, 09/03/2021, No. 33);

(iii) If the action is pretextual because it contradicts living law and/or established case law, it may constitute a misuse of the procedural instrument (Tribunal Roma Sez. IV Sent., 04/01/2021).

47 Tribunal de Casación, Sección II, 18-08-2021, No. 23108.

48 See, for example, Tribunal de Casación, Sección VI - 5, 03-07-2018, No. 17403.

49 According to some authors, the principle of authority justifies the reference to precedent. It is not the object of this analysis to investigate the possible theoretical foundations or the ethical-political justifications for the use of precedent, so I will limit myself to observing that there is no agreement on the fact that the reasoning based on the precedent can be traced back to the reasoning former authoritative It is clear that judges are endowed with normative authority, but this is not enough to conclude that the argument based on precedent is nothing more than an ex auctoritate argument. For more details, see for example S. Gómora Juárez (2018, pp. 110 ss).

50 See, for instance, Tribunal de Casación. Sección V, 22-07-2021, No. 21013. I share the views presented in the contribution of Á. Núñez Vaquero (2020, pp. 81-105): "precedents as jurisdictional decisions expressing rules relevant to the decision and analogy as a form of interpretation or reasoning […] can be contextually combined (or not)". On the one hand, practice shows that precedents are not always or necessarily applied analogically. On the other hand, there is no ontological incompatibility between precedent and analogy; there is no empirical, logical or other type of obstacle to applying precedent analogically. In

other words, under certain circumstances it is true that there is a rule of precedent that consists of extending —by analogy— the application of a given rule to similar cases. I believe can only be claimed incidentally and not in principle or in general terms that "the traditional understanding of the rule of precedent would be the extension —by analogy of the application of a given rule (which embodies a general rule) to similar cases". (D. Sierra Sorockinas, 2020, p. 77).

51 For example, Tribunal de Casación, Sección V, 29-07-2021, No. 21712: "With a view to define the grounds of appeal described above, it is necessary to examine the regulatory framework of reference already set out by this court in dozens of judgments, as well as handed down in proceedings in which some of the current plaintiffs were also parties, which have substantially resolved the stated issues in the light of supranational law and constitutional principles and whose reasons are expressly endorsed herein and refer to the provisions of Article 118 of the Civil Procedure Law (in particular, invoking Section 5 of the Court of Cassation, 30/03/2021, No. 8757, as well as to the ex. The reasons for which they are included and expressly referred to in this document, in accordance with Art. 1118 Of the Civil Procedure Code (refers particularly to Court of Cassation, Section 5, 30/03/2021, No. 8757, as well as, *ex plurimis,* to subsequent ordinances Nos. 8907, 8908, 8909, 8910, 8911, 9079, 9080, 9081, 9144, 9145, 9146, 9147, 9148, 9149, 9151, 9152, 9153, 9160, 9162, 9168, 9176, 9178, 9182, 9516, 9528, 9529, 9530, 9531, 9532, 9533, 9534, 9729, 9730, 9733 and 9735 of 2021)" (n.d.r. Author's translation).

52 SUTC, 19-02-2020, No. 4247.

53 Tribunal de Casación, Sección V, 04/05/2021, No. 11604; Tribunal de Casación, Sección trabajo, 11/05/2021, No. 12424; Tribunal Administrativo Regional Lombardia Milano Sec. II, 10/02/2021, No. 374; Tribunal de Cuentas Lazio Sez. contr. delib., 10/09/2020, No. 73.

54 Tribunal Constitucional, 30-07-2021, No. 182.

55 SUTC, 09-09-2021, No. 24414 on the display of crucifixes in classrooms. The display of crucifixes is not established in Italian law. However, according to the Court, "On the one hand, they are directed by the particular strength of the fundamental principles at stake, ranging from religious freedom to the principle of secularism in their various forms, pluralism, non-discrimination and academic freedom in public schools open to all. These principles, defined by the Italian Constitution, by the Bills of Rights and by the Courts that interpret them, provide the driving force to find the rule to resolve the case. In addition, they are sustained by a dense network of legal precedents and contributions from legal scholarship: the first represent the paths already taken by case law experience to solve disputes with similar elements and are all the more important in the absence of an Act of Parliament; the second provide insights into reconstructing the framework of the system and developing approaches in line with the expectations of the interpreting community; and lastly, there are the contributions afforded by the process and its course throughout the proceedings between the parties".

56 See, for instance, Tribunal de Casación, Sección trabajo, 04-08-2021, No. 22251.

57 Tribunal de Casación, Sección V, 22-07-2021, No. 20977: For example, in this way reference is made to a certain slightly older precedent to comment on its unsoundness, irrelevance, etc., as opposed to another slightly later precedent whose point of law is applied in the case at hand.

58 Tribunal de Casación, Sección trabajo, 04-08-2021, No. 22251.

59 From an internal point of view, there is a tendency, or at least some judges believe, "treaty judgments should be avoided. See L. Mancini (2018). Instead, they continue to be dictated and the underlying reasons, which are generally not stated, are probably: the conviction that it is necessary to "instruct/educate", the desire to "teach", excessive ego or *hybris*, the conviction that it is a "lesser evil" of a situation that needs to be addressed head-on and the complete picture of the legal issue under discussion.

60 Tribunal de Casación, Sección V, 31-07-2018, No. 20253.

61 Tribunal de Casación, Sección V, 23-06-2021, No. 17924.

62 Tribunal de Casación, Sección VI - 5, 24-05-2021, No. 14209.

63 Tribunal de Casación, Sección III, 04-12-2018, No. 31233.

64 See, for instance, SUTC, 09-09-2021, No. 24414: "Denial of religious freedom deserves the same protection as positive religious freedom. [...] This is, moreover, the lesson that emerges from comparative case law.": German Federal Constitutional Court (Ruling of May 16, 1995); Swiss Federal Court (Judgment of September 26, 1990); Constitutional Court, 26-05-2017, No. 123.

65 This seems to be in line with S. Gómora Juárez, 2019, pp. 799-839.

66 This reconstruction seems to also arise from the study on the Mexican experience made by R. Camarena González (2018, pp. 103 ss).

NÚMEROS DE PROBLEMA

ARE RULES GOVERNING THE USE OF PRECEDENT NECESSARY?*

¿ES NECESARIA LA REGLA DE PRECEDENTE?

Fabio Enrique Pulido Ortiz**

DOI: 10.22201/iij.24487937e.2022.16.5.17582

Abstract:

This paper addresses the issue of the necessary or contingent nature of the rules governing the use of precedent. The author argues that the rules governing the use of precedent in lato sensu (the rules that define the legal operation of judicial precedent) is a necessary rule of legal systems. However, legal systems have three different (exclusive and exhaustive) kinds of rules governing the use of precedent: a) binding rules governing the use of precedent, b) rules admitting the use of precedent and c) rules rejecting the use of precedent. The main conclusion is that whether for conceptual reasons of conferring power or for the centrality of the rule of law in current legal systems, when a legal system does not define the legal operation of judicial precedents, it can be said say there are (implicit) rules rejecting the use of precedent.

Keywords:

Judicial Precedent, Rules Governing the Use of Precedent, Constitutive Rules, Power-conferring Rules, Mandatory Rules.

Resumen:

Este trabajo se ocupa de la pregunta por el carácter contingente o necesario de la regla de precedente en los ordenamientos jurídicos. Se argumenta que la regla de precedente en sentido amplio (aquella que configura el funcionamiento de los precedentes judiciales) es una norma necesaria de los sistemas jurídicos. En el trabajo se identifican tres formas (exhaustivas y excluyentes) que puede adoptar la regla de precedente: a) una regla de precedente vinculante, b) una regla de precedente como admisión y c) una regla de precedente como rechazo. Se concluye que la forma que adopte la regla de precedente es contingente en cada ordenamiento jurídico. No obstante, bien sea por las razones conceptuales asociadas a la noción de normas de competencia o por la centralidad del principio de legalidad, lo cierto es que, en aquellos ordenamientos jurídicos que

no contemplen las condiciones para crear, modificar y aplicar precedentes judiciales, se debe entender que existe implícitamente una regla de precedente como rechazo.

Palabras Clave:

Precedente judicial, regla de precedente, normas constitutivas, normas de competencia, normas prescriptivas.

CONTENT: I. *Introduction*. II. *Types of rules*. III. *Rules Governing the Use of Precedent*. IV. *Are Rules Governing the Use of Precedent Necessary?* V. *Conclusion*. VI. *References*.

I. Introduction

There is a basic distinction between rules governing the use of precedent and judicial precedents themselves (Fabio Pulido-Ortiz, 2018). Rules governing the use of precedent refer to the provisions in the legal system that define the regulatory process to make use of judicial precedents. Judicial precedents, on the other hand, are general directives arising from a judicial ruling deemed important for future judicial decisions.[1] To give an example, imagine that (in its *ratio decidendi*) a constitutional court establishes that "it is unconstitutional to impose disciplinary sanctions against lawyers for conducts that do not transcend or affect their professional duties". The legal system has also established that the *ratio decidendi* of such rulings are binding for judges in subsequent cases. This clearly shows the difference between a judicial precedent emerging from the *ratio decidendi* of a ruling (i.e., that disciplinary sanctions are invalid for conducts that do not transcend or affect a lawyer's professional duties) and the rule governing the use of precedent, which defines the binding nature of such precedents.

With this in mind, this article examines what it means to have rules governing the use of precedent and whether such rules are necessary or contingent in legal systems. It first argues that in analyzing it in a broad sense, the rules governing the use of precedent (i.e., the rules that shape how judicial precedent works) are necessary in legal systems. Secondly, it identifies three (exhaustive and exclusive) forms that rules governing the use of precedent, in a strict sense, can take: a) binding rules governing the use of precedent, b) rules admitting the use of precedent and c) rules rejecting the use of precedent. It stresses that the form given to the rules governing the use of precedent in a strict sense depends on each particular legal system. It concludes that either for the conceptual reasons associated with this idea of rule of competence or for the import of the principle of legality, it must be understood that in legal systems without the conditions to create, modify and apply judicial precedents, there is an implicit rule rejecting the use of precedent.

II. Types of Rules

Legal systems are comprised of two types of rules: prescriptive rules (e.g., the rule requiring the use of face masks) and constitutive rules (e.g., the legal rule establishing the conditions for writing a will). Prescriptive rules are in charge of governing action, requiring or allowing the performance (or non-performance) of certain types of actions. Thus, the prohibition to consume alcoholic beverages in public spaces, the obligation to serve in the military or the right to travel on public roads are examples of these rules. Constitutive rules, on the other hand, define certain aspects, among which those establishing conditions to identify, create and apply other rules are fundamental. Examples of constitutive rules include civil rules setting out the conditions for writing wills or constitutional rules establishing the conditions for making laws or constitutional amendments.[2]

In explaining prescriptive rules, it is essential to differentiate them from sanctioning rules. It is one thing for the law to require a conduct (i.e., the obligation to wear a face mask) and quite another for the law to contemplate sanctions as a strategy to encourage individuals to act as required (i.e., a fine, an arrest, or even positive sanctions or rewards). Prescriptive rules are conceptually distinct from sanctioning rules, whereby a prescribed action is possible without a sanction (Joseph Raz, 1990). By contrast, rules that establish sanctions have a conceptual and justifying dependence on prescriptive rules. For there to be a sanction for engaging in conduct Φ, there is already a prescription not to engage in Φ. Therefore, it makes no sense to claim that there is a legal sanction for doing Φ if there is no prescriptive rule that calls for not doing Φ (Fabio Pulido, 2019).

In explaining prescriptive rules, it is essential to differentiate them from sanctioning rules. It is one thing for the law to require a conduct (i.e., the obligation to wear a face mask) and quite another for the law to contemplate sanctions as a strategy to encourage individuals to act as required (i.e., a fine, an arrest, or even positive sanctions or rewards). Prescriptive rules are conceptually distinct from sanctioning rules, whereby a prescribed action is possible without a sanction (Joseph Raz, 1990). By contrast, rules that establish sanctions have a conceptual and justifying dependence on prescriptive rules. For there to be a sanction for engaging in conduct Φ, there is already a prescription not to engage in Φ. Therefore, it makes no sense to claim that there is a legal sanction for doing Φ if there is no prescriptive rule that calls for not doing Φ (Fabio Pulido, 2019).

By way of example, let us imagine the following situation: a decree issued within the context of Covid-19 emergency states that "it is mandatory to wear a face mask in all public places" and that "whoever fails to comply with this prohibition shall be fined up to 60 days of the current legal minimum wage". Here, it is easy to distinguish between (1) the duty created by the law, namely the obligation to wear a face mask and (2) the sanction, in this case the fine. There is therefore a conceptual separation between (1) and (2). Now let us imagine that the government has decided that whoever fails to comply with this obligation shall be imprisoned for 4 to 5 years (abolishing the fine and mandating imprisonment instead). Modifying (2), i.e., repealing fines and replacing them with prison sentences, does not modify (1). In other words, even though the sanction has changed, the duty remains the same: to

wear a face mask. Let us now suppose that the constitutional court has declared this sanction (i.e., imprisonment) unconstitutional and, deeming it disproportionate, had the power to strike it from the legal system.

As seen, repealing the rule establishing the sanction is neither a necessary nor sufficient reason to argue that there is no legal obligation to wear a face mask. Even though the sanction may have been repealed, it does not mean that it is now permitted not to wear a face mask. Furthermore, police authorities may continue to require people to wear face masks or may establish restrictions for those not wearing face masks to access certain places. These decisions would not be valid if the obligation to wear a face mask did not exist. When explaining prescriptive rules, it is necessary to differentiate between the grounds for the requirement to adhere to certain conducts and the possible sanctions the legal system may prescribe to encourage compliance with these requirements. The explanation of sanctions cannot be reduced to the explanation of duties, nor can duties be reduced to sanctions.

There are, admittedly, important links between prescriptive and sanctioning rules. However, legal sanctions cannot be regarded as a necessary component of legal prescriptions. The rules establishing sanctions actually depend on the existence of prescriptive rules. There is, nonetheless, a justifying relationship: the existence of a legal duty that must form part of the justification for the existence of a legal sanction. Even if a duty may not be sufficient reason for a sanction to exist because its very existence implies a duty justifying said sanction.

On the other hand, constitutive rules define certain aspects or allow certain things, among which those establishing conditions to identify, create and apply rules are fundamental (Eugenio Bulygin, 1992). Constitutive rules do not prescribe actions (i.e., they neither oblige nor prohibit actions) but are responsible for defining certain aspects (e.g., providing the definition of legal age or parliamentary majorities) or to allow certain acts to be carried out (e.g., a constitutional reform or the bylaws of a trading company). Constitutive rules have different functions, though. First, all legal systems contain a rule (or, if you will, a series of rules) defining the basic conditions of validity. In other words. legal systems have their own grounds of validity (which Hart calls the rule of recognition). To simplify matters, we could say the rule of recognition in Colombia establishes that any law is a valid law: Law N is a Colombian law if and only if a) it is provided for by the constitution or b) it meets the conditions of validity defined by the constitution.

The second type of constitutive rules are rules of competence (or rules conferring powers), i.e., the rules laying down the conditions for judicial acts to be validly carried out. In these terms, the rules of competence make it possible to generate valid acts. At this point, attention must be drawn to the use of certain terms. ‘Action’ is used to refer to behaviors governed by primary rules (smoking, wearing a seat belt, killing a person, driving animal-drawn vehicles, etc.). The term ‘Act’, on the other hand, refers to behaviors (and their outcomes) made possible by the rules of competence. Unlike prescriptive rules that require actions (e.g., if a rule

prohibits smoking, then there is a reason not to smoke), rules of competence are reasons that make it possible to perform certain acts, i.e., behaviors aimed at creating, changing or applying rules, e.g., laws, contracts, decrees, constitutional amendments or judicial decisions (Jordi Ferrer-Beltrán, 2000).

Rules of competence, therefore, establish the conditions for the validity of acts of normative production. Hence, such acts (e.g. drafting a law, drawing up a contract or delivering a judgment) are valid as long as they meet the conditions defined in the rule of competence. Thus, if a judicial operator fails to comply with the conditions defined in the rules of competence, their acts are not valid. For instance, supposing that the Constitution grants the Constitutional Court the power to declare laws unconstitutional and strike them from the legal system through a decision passed by an absolute majority of its members. If the Court does not comply with this requirement, its act is invalid. Consequently, it is easy to understand that legal systems not only require or impose *actions* (i.e., with prescriptive rules), but also make the validity of certain *acts of normative production* dependent on complying with the conditions defined in the rules of competence. Legal systems need rules of competence, *inter alia*, because compliance is needed for their authorities to validly exercise their powers. In short, these rules define and enable the valid exercise of those powers (Jordi Ferrer-Beltrán, 2000).

Legal systems have two main types of rules of competence: rules of change and rules of adjudication (Herbert Hart, 1994). Rules of change are rules that make it possible for certain individuals to carry out acts to introduce new rules, modify them or repeal them by establishing the conditions to do so. To give an example, Article 150 of the Colombian Constitution states that "[i]t is the responsibility of the Congress to enact laws" and through them, they can "draw up codes in all areas of legislation and [...] amend their provisions". Rules of adjudication, on the other hand, are rules of competence that establish the conditions of validity of juridical acts in order to apply the rules with an authoritative status. One paradigmatic case of these rules is those that define the judicial function. For example, the rule that defines the power to decide on claims of unconstitutionality against acts reforming the Colombian Constitution is a rule of adjudication. According to Article 241 of the Colombian Constitution, the Constitutional Court is the one to "decide on the petitions of unconstitutionality brought by citizens against measures amending the Constitution [...] exclusively for errors of procedure in their drafting."

There is another type of constitutive rules that merely define judicial concepts by establishing relations between different aspects, assumptions or cases (Carlos Alchourrón & Eugenio Bulygin, 1974). This type of rules can be called conceptual rules. The Colombian Civil Code contains several examples of these. Article 34 of the Colombian Civil Code defines a child as "anyone who has not reached seven years of age"; a prepubescent is "anyone who has not reached fourteen years of age"; an adult is "anyone who has reached 18 years of age; and a minor is "anyone who has not reached 18 years of age." This rule does not prescribe actions, nor does it define powers or establish (at least directly) conditions of validity but defines

correlations between certain legal terms (e.g., prepubescent) and certain conditions (a human being under the age of 14 and over the age of 7). These rules serve to give conceptual precision to the terms used in the legal system. For instance, a conceptual rule that defines who is of legal age means that we know which human beings can perform certain legal acts. We can also find examples of conceptual rules in the characterization of the rules governing the use of precedent, such as the one that defines what is understood by vertical precedent.

III. Rules Governing the Use of Precedent

Judicial precedents are general rules originating from a judicial decision relevant to judicial decision-making. Rules governing the use of precedent, on the other hand, are rules in legal systems that define the conditions to identify, dictate and follow judicial precedents. These rules are, in fact, a set of rules based on a series of constitutive rules on the powers for the creation and application of legal precedents. Álvaro Núñez Vaquero (2021) has best stressed the constitutive nature of rules governing the use of precedent, namely that it does not imply the prescription of actions, but the definition of conditions of validity for the creation, monitoring and application of judicial precedents.

Are rules governing the use of precedent necessary or contingent to legal systems? Can rules governing the use of precedent include prescriptions? To answer these questions, I will draw a distinction between *rules governing the use of precedent in a broad sense and rules governing the use of precedent in a strict sense*. In a broad sense, rules governing the use of precedent refers to the rules in a legal system that shape the way precedents operate. Meanwhile, rules governing the use of precedent in a strict sense refers to the different (exhaustive and exclusive) forms these rules may assume in different legal systems. In a strict sense, there are three basic kinds of rules governing the use of precedent: a) binding rules governing the use of precedent, b) rules admitting the use of precedent and c) rules rejecting the use of precedent. These kinds of rules are exhaustive in that they exhaust the possibilities of regulating the importance of judicial precedents in the legal system. They are also exclusive because if one of these rules were true, it would be contradictory for one of the other kinds of rules governing the use of precedent to exist for the same type of judicial precedent at the same time.

a) *Binding rules governing the use of precedent.* These rules are binding because they stipulate that judicial precedents establish conditions for the validity of the acts of judicial operators. To elaborate on this idea, it is vital to differentiate between I) the binding nature and II) the mandatory nature of judicial precedents. In the words of María Beatriz Arriagada, judicial precedents are binding whenever they represent a necessary condition for the validity of an act (paradigmatically, a judicial decision). Therefore, not following judicial precedent is sufficient reason to invalidate the related acts (M. Beatriz Arriagada, 2021).

Asserting the existence of binding rules is not sufficient reason to conclude there are mandatory rules governing the use of precedent (i.e., upholding the binding nature of

precedent does not imply that the precedent is mandatory). Constitutive rules define the conditions for the validity of acts (e.g., judicial decisions). The consequence of failing to comply with these conditions is the invalidity of the act. Therefore, the rules governing the use of precedent are binding insofar as it conditions the validity of certain acts (Álvaro Núñez, 2021). Affirming that the rules governing the use of precedent are mandatory means something else: the prescription for obligated subjects to undertake an action. While the binding nature of the rules governing the use of precedent point to the conditions for the validity of the acts (e.g., a judicial decision), a mandatory nature points to the action of an individual (e.g., a judge) who should perform that act.

One of the reasons for confusing binding and mandatory is connected with the Hartian concept of secondary rules, which refers to the constitutive rules of legal systems, i.e., the rule of recognition, rules of competence and conceptual rules. The term secondary rules comes from the idea that the object of these rules (like rules of competence) does not consist of actions, but other rules (i.e., rules about rules). However, one ambiguity regarding the concept of secondary rules is best avoided. Constitutive rules are *secondary rules* —rules about rules— since they define the conditions to identify, create, modify, repeal or apply other rules validly. These rules do not prescribe actions but set out the conditions of validity to perform certain acts or define the features of certain judicial concepts. By contrast, the concept of *secondary rules* can also be used to describe a different phenomenon, namely those rules intended to *prescribe the production of certain acts* to create or apply rules.

To give an example, the judicial function is defined by a series of secondary rules that stipulate the conditions for valid judicial decisions. These rules regulate competent judges, procedures and other means of producing valid judicial acts. But legal systems often round out the regulation of the judicial function with rules that make it mandatory to decide cases and, therefore, render judicial decisions (e.g., through the principle of inexcusability).[3] There are other rules that prohibit judges from issuing judicial acts contrary to law, even providing for criminal and disciplinary sanctions in cases which violate this prohibition.[4]

In order to avoid any confusion, it helps to differentiate between constitutive rules (secondary rules that define the conditions to identify, create or apply rules validly) and *second-order prescriptive rules* (i.e., rules that require the creation or application of certain rules). The first bind judicial authorities because the validity of their acts depends on complying with the conditions defined in secondary rules. The latter bind judicial authorities in the sense that they require carrying out actions that prioritize certain acts (e.g., the obligation to issue judicial decisions under the terms set out by law). In making this distinction, binding rules governing the use of precedent suggest that the validity of certain acts is conditioned by judicial precedents, but it is also possible (although contingent on the very idea of binding rules governing the use of precedent) that these same rules contain second-order prescriptive rules that require certain conducts and may even be reinforced by sanctions.

Therefore, the existence of second-order prescriptive rules in the rules governing the use of precedent is not a consequence of its binding nature. It is not true that binding rules also obligate (or prescribe). What happens is that, as a rule, judicial operators are not only bound by the law in force, but also have the obligation to apply it. Because of this, legal scholars have noted that legal systems often provide second-order prescriptive rules on how to use these powers to complement the rules of competence (like those in the binding rules governing the use of precedent) (Álvaro Núñez, 2021). But the fact remains that legal systems may have second-order prescriptive rules that require judicial operators to use the rules governing the use of precedent in the exercise of their powers (Fabio Pulido-Ortiz, 2018).

b) *Rules admitting the use of precedent*. The second type of rules governing the use of precedent is one that allows judicial operators to use judicial precedents to justify their acts, but without stipulating that precedents condition the validity of those same acts. In this context, rules governing the use of precedent accept the use of judicial precedents, but without binding effects. A well-known example of this type of rules governing the use of precedent is the eventual regulation of the use of top-down vertical precedents, as in the case of a legal system that allows the Supreme Court to use precedents of a lower judge or court in justifying its decisions without this becoming a condition for the validity of the decision.

Álvaro Núñez holds that rules admitting the use of precedent implies that "rules governing the use of precedents renders the use of precedents optional," which prevents "the decision that follows (or does not follow) a precedent" from being annulled. For him, this type of rules should be excluded because "it does not allow to differentiate between relevant and irrelevant conduct from an institutional point of view." He argues that even in legal systems which recognize that failure to adhere to judicial precedent "does not constitute a reason to overturn a judgment, it does not imply that it is irrelevant in justifying the decision." He concludes that in such legal systems "the use of precedent is, at least, one reason in favor of the grounds of the judgment" ((Álvaro Nuñez, 2021, pp. 345-346)).

Núñez's explanation contains two inaccuracies. First of all, rules admitting the use of precedent imply that the use of precedents do not affect the validity of the acts of judicial operators, but do not imply that the action of using precedents is optional. Typically, when it does not affect the validity of the decision, the use of judicial precedents is usually allowed. However, the conditions for the validity of the act and the permissibility of the action are two different issues. It is possible to imagine a legal system in which a legal code of judicial conduct prohibits judges from using, for example, foreign precedents. If judges fail to comply with this prohibition (i.e., by using foreign precedents), it has a negative impact on the evaluation procedure within the judicial branch. But, regardless, it is possible that the use of such precedents does not affect the validity of judicial decisions.

Rules admitting the use of precedent, therefore, are not the same as affirming it is permitted to use precedent insofar as it is neither mandatory nor prohibited. As explained above, rules governing the use of precedent is a constitutive rule as it establishes or defines

the regulatory function of judicial precedents. In this sense, rules governing the use of precedent are not intended to regulate the actions of judges and other judicial operators (allowing or forbidding certain actions) but to determine the valid exercise of their acts. It is worth noting that it is even theoretically possible for an act to be valid, but for the action of carrying it out to be prohibited. In many legal systems, the sale of another person's thing is a valid act (generally to protect the interests of third parties in good faith), but it can also be prohibited and sanctioned by criminal or police regulations.

Secondly, it is not true that the rules admitting the use of precedent do not make it possible to differentiate between institutionally relevant and irrelevant conducts. It has already been made clear that this type of rules governing the use of precedent does not necessarily point to the action of using precedents but to the validity of acts using precedents in their justification, which depends on the rules of competence that constitute them (for example, the validity of a judicial decision depends on the rules of competence giving judges the power to make this decision). The legal system also controls the type of sources to be used as reasons that affect the validity of institutional normative acts. What happens in the case of rules authorizing the use of precedents is that, as Núñez himself claims, the use of precedents does not constitute "a reason to annul a judgment." Lastly, I do not find the assertion that "the use of precedent constitutes, at least, a reason in favor of justifying the judgment" to be true. The law may consider this use irrelevant to legally justify a decision, but may authorize it for other reasons (e.g., to uphold judicial independence and autonomy).

c) *Rules rejecting the use of precedent.* The third type of rules governing the use of precedent establishes that the use of judicial precedents affects the validity of acts. Therefore, if a judicial precedent is used to justify an act, there is a reason to invalidate it. Cross and Harris illustrate this type of rules governing the use of precedent with an example from Article 5 of the French Civil Code, which states that judges are not allowed to create generally applicable rules in their decisions. In keeping with this rule, it is assumed that the decisions based on such rules are invalid (Rupert Cross y J.W. Harris, 2012, p. 36).

Like the other types, rules rejecting the use of precedent is a constitutive rule, but in this case it establishes that the use of precedent adversely affects the validity of the acts. This type of rules governing the use of precedent does not imply that the use of precedent is prohibited. It may be that *second-order prescriptive rules* are enacted, prohibiting acts using judicial precedents in their justification. In any case, the fundamental aspect in shaping the rules governing the use of precedent is its nature as a constitutive rule. Hence, rules rejecting the use of precedent implies that the use of precedent affects the validity of the acts.

In summary, rules governing the use of precedent in a broad sense are constitutive rules that specifies how judicial precedents are used in a legal system. In a strict sense, rules governing the use of precedent can be binding, admit its use or reject its use; and they can be enhanced by second-order prescriptive rules that require or prohibit the use (tracking or

application) of judicial precedents. However, none of these types of rules governing the use of precedent in a strict sense implies the existence of any type of second-order prescriptive rules.

IV. Are the Rules Governing the Use of Precedent Necessary?

Rules governing the use of precedent in a broad sense are the rules in a legal system that shape the way judicial precedents operate. Rules governing the use of precedent in a strict sense refers to ways these rules may by implemented in different legal systems. Thus, there are three types of such rules in a strict sense: a) binding rules governing the use of precedent, b) rules admitting the use of precedent and c) rules rejecting the use of precedent. The first type states that precedents are a necessary condition for the validity of the acts of judicial operators. With the second type, rules governing the use of precedents allow the use of judicial precedents, but these are not binding; that is, they do not condition the validity of the acts. The third type is when rules governing the use of precedent reject the use of judicial precedents in that their use affects the validity of judicial acts.

In any of its forms, rules governing the use of precedent include rules of competence, as well as –to use Hart's terms– rules of change and rules of adjudication. The first establish the conditions to validly issue judicial precedents (or to disallow that power in the case of rules rejecting the use of precedent). The latter define the conditions to control adherence to precedents (in the case of binding rules governing the use of precedent) or to ensure that precedents are not used (in the case of rules rejecting the use of precedent).[5] Regarding this last point, María Beatriz Arriagada Cáceres (2021, pp. 387-389) holds that it is misleading to claim that rules governing the use of precedent include rules of adjudication. She argues that courts applying precedents are bound by rules governing the use of precedent but since the flipside of competence is subjection, it cannot be said that courts have the competence to apply precedents but rather subjection.

She is right in stating that the rules governing the use of precedent necessarily involve the regulation of the competence to dictate precedent (a rule of change). But she is wrong in claiming that the use of this power implies binding authorities (e.g., judges or courts) to said precedent. In the case of rules admitting the use of precedent, judges would not be bound to judicial precedent. Here, judges have the option to use the precedents created under the rules governing the use of precedent, but they are not bound to do so since the refusal to use them does not affect the validity of the corresponding act. It could be supposed that Arriagada Cáceres's thesis is limited to cases of binding rules governing the use of precedent and that in this context there is no competence to apply judicial precedents, but a subjection/subordination to do so. However, and as indicated since the beginning of this paper, it is necessary to differentiate between the rules governing the use of precedent and judicial precedents.

So, when Court X issues precedent P, Court Y is bound to apply P (under the rules governing the use of precedents). But Court Y also has the power to peremptorily apply P in

Case C. This power is conferred by the rule of adjudication comprising the rules governing the use of precedent and not by precedent P. This shows that even when Court Y is bound to Court X regarding Precedent P, it also has the power to peremptorily apply P to Case C under the rules governing the use of precedent. In the context of binding rules governing the use of precedents, exercising the power to issue precedents actually does imply certain judicial operators' subjection to precedent: When Court X issues Precedent P, it binds Court Y. But Court Y also has the power to peremptorily apply Precedent P to Case C. Court Y's decision on Case C also binds the corresponding parties. Rules governing the use of precedent, therefore, not only defines the conditions of Court Y's subordination/subjection to precedent P, but it also defines the conditions under which Court Y can validly apply P in C to bind the parties to the case. In other words, rules governing the use of precedent as a rule of adjudication not only confers the power to apply precedents to a case, but also establishes the conditions to validly carry out an authoritative act of application of these precedents).

Rules governing the use of precedent, accordingly, involve rules of competence to create and apply judicial precedents validly. Let us return to the question are rules governing the use of precedent necessary or contingent on legal systems? The answer is that in a broad sense (the rules in the legal system that establishes how judicial precedents operate) are necessary rules in legal systems. In contrast, the forms and contents of rules governing the use of precedent in a strict sense are contingent and depend on how they are implemented in each legal system. Rules governing the use of precedent strictly adhering to a legal system takes different forms and can even implement several of them within the same legal system.

Rules governing the use of precedent as constitutive rules define the validity or invalidity of the use of judicial precedents. There are only two possibilities in this case: on the one hand, legal systems can allow the use of judicial precedents through their rules governing the use of precedent, which can be binding or admitted (without their being binding). On the other hand, rules governing the use of precedent can reject the use of judicial precedents by determining that this constitutes a reason to invalidate the acts. As stated above, rules governing the use of precedent in a strict sense refer to the specific nature of each of the types of rules governing precedent in each legal system and is contingent to each of them. All legal systems provide some type of rules governing the use of precedent in a broad sense and there are, naturally, various ways of implementing rules governing the use of precedent in a strict sense. Thus, some legal systems have binding rules governing the use of precedent, others can allow its use (without being binding) and yet others may reject its use.

These types of rules governing the use of precedent are exhaustive in that they exhaust all possibilities of regulating the importance of judicial precedents in the system: the use of precedent is either admitted or rejected. They are also exclusive because if one of these rules were true, it would be contradictory for one of the other types of rules governing the use of precedent to exist at the same time for the same type of judicial precedent. For example, if the *ratio decidendi* of Supreme Court decisions is binding for the decisions of judges and courts, it follows that it a contradiction to state that the use of such precedents do not affect the validity

of or invalidates decisions. Another issue is that different forms or types of rules governing the use of precedent are implemented within the same legal system (e.g., binding rules governing the use of precedent for judicial precedents coming from certain judicial authorities but rules admitting the use of precedent for rules of precedent coming from others).

According to the above, rules governing the use of precedent in a broad sense exist, at least implicitly, in all legal systems. Does this mean there are no legal loopholes in establishing precedent? To answer this question, it should be recalled that rules governing the use of precedent are constitutive rules that specify the way precedents operate. One characteristic of contemporary legal systems is that the powers of authorities are defined (or constituted) in judicial rules (rules of competence) that define and make the valid exercise of these powers possible.

As explained above, rules governing the use of precedent are constitutive rules establishing, specifically, the conditions to identify, create and apply judicial precedents validly. Rules governing the use of precedent are actually made up of a series of constitutive rules (including rules of competence and conceptual rules) on the valid use of judicial precedents. Rules governing the use of precedent, therefore, is made up of a series of rules that define the valid ways to create, identify and apply judicial precedents.[6]

The idea of the rule of competence is fundamental in explaining rules governing the use of precedent. The concept of judicial precedent assumes there are judicially created rules that are important to solve resolving certain issues. In most legal systems with binding rules governing the use of precedent, there is a fundamental empowerment given to judges to create general rules in their judicial decisions (Komarek, 2013). In these contexts, rules governing the use of precedent contain a rule outlining the competence to issue precedents, which is the definition of the valid exercise of the power to create rules that constitute precedents (Sandra Gómora-Juárez, 2019) and the rules conditioning the validity of other acts in adhering to judicial precedents (Álvaro Núñez, 2021). Rules admitting the use of precedent, on the other hand, implies that there is a rule of competence that recognizes the valid exercise of the power to create precedents and a rule of competence (a rule of adjudication) that allows judicial operators to use judicial precedents. Meanwhile, under rules rejecting the use of precedent as a rule of competence, the power to dictate precedents and use them is denied.

Bearing in mind the relationship between rules governing the use of precedent and rules of competence, it must be stressed that for public authorities to validly exercise their normative powers (including the creation and application of judicial precedents), there must be a rule to make it possible. This means that if there is no rule of competence to create judicial precedents, then it must be assumed that judges do not have the power to create or apply precedents and, consequently, the legal system does not allow judges to issue precedents or use them to justify their decisions. If there is no rule defining the conditions in which judicial precedents are binding or their use is accepted (i.e., at least admitting the

applicability of judicial precedents) then it must be supposed that the legal system does not recognize the valid use (or the applicability) of judicial precedents.

It could be argued that these conditions for authorities to exercise these powers are accidental and rules governing the use of precedent in a broad sense are therefore contingent on the assumption that it may so be that there are no rules admitting or rejecting the use of judicial precedents (i.e., loopholes in rules governing the use of precedent). But to uphold this idea, it would be necessary to deny the fact that one necessary element to explain judicial powers (including judges' normative powers) is the existence of rules of competence. These rules are intended to enable the exercise of judicial powers (such as creating or applying judicial precedents with institutional authority). In other words, legal power cannot be exercised (much less by public authorities like judges) without a rule of competence constituting it. Since the creation and use of precedents in institutional decisions are the exercise of judicial powers, if there is no rule of competence to make the use of precedents possible, it is assumed that their use is rejected.

Moreover, the principle of legality is central to explaining the exercise of public powers in contemporary legal systems, i.e., the principle according to which acts of public authority carried out according to the rules of competence are valid; and, consequently, acts of public authority carried out outside or contrary to these rules are invalid (Riccardo Guastini, 2001, p. 123). Given the centrality of the principle in judicial practice, the explanation of the conditions of validity in the exercise of public powers —at least in the context of rule of law— depends on the rules that make these powers possible. The principle of legality of public authority seeks to ensure that acts of the authorities are justified according to criteria previously and publicly defined in legal rules, and not on the basis of officials' beliefs (Jeremy Waldron, 2020).

Furthermore, the principle of legality of public authorities is essential to the rule of law, which accordingly implies a series of conditions for the exercise of public and institutional authority. Specifically, this principle requires that rules be clear, public and stable judicial; that authorities require behaviors that can be complied with; that the actions of public authorities be defined and guided by public and pre-established legal judicial rules; and that legal processes (especially judicial ones) be carried out by competent, independent and impartial authorities (Luvios Fuller, 1964). One fundamental aspect of the rule of law is the existence of rules that define competences and limit public power. These rules define procedures, the forms and content of the (valid) exercise of normative powers (Brian Z. Tamanaha, 2012). Thus, the rule of law depends on strengthening the institutional framework in which public authorities operate and, by extension, the rules of competence that limit the specific exercise of the actions of authorities. This is why constitutions acknowledge principles like the division of powers, legality or public administration because their common denominator is to enable and, at the same time, limit public authorities. In other words, these principles flesh out the tenets of the rule of law in political and legal ordinances (P. L. Strauss, 2018).

The relation between the principle of legality and rules of competence is clear. The principle of legality requires that the powers of public authorities be defined and limited in the rules of competence.[7] In this sense, not only do rules of competence make it possible for authorities to perform the acts authorized by said rules (legislating, issuing administrative acts, pronouncing judgments, etc.), but they also define the authorities themselves and the conditions for the validity of their acts. Authorities can only perform valid acts if they do so in the exercise of the powers granted to them in the rules of competence. Note that the presence of these rules of competence do not represent ideals for public bodies (like judges). In other words, rules of competence are not values to rate legal institutions as good or bad, better or worse, but define or constitute the bodies that form part of legal systems. Rules of competence make institutions what they are, i.e., judicial institutions are what the rules of competence make them: a constitutional court, for instance, is whatever its rules of competence say it is.

The principle of legality specifically requires that legal authorities (judges, legislators, administrators, etc.) are subjected to legal rules, which implies two things. On the one hand, their powers must be previously defined and regulated in legal rules (rules of competence) and, on the other hand, when legal situations or problems are to be resolved, they must do so according to the rules in force. The defining relation between public authorities and their rules of competence therefore imply that if the latter do not provide for a power, it must be concluded that the authority does not have it. Therefore, the principle of legality (and its close relationship with the concept of rules of competence) establishes a rule of closure for defining public powers, so that only the exercise of those powers contemplated in the rules of competence is valid.

In summary, the need for rules governing the use of precedent is the result of the principle of legality and the inescapable existence of rules of competence in the rules governing the use of precedent. The need for these rules of competence act as a rule of closure of the normative powers of judicial authorities in general and of the rules governing the use of precedent in particular. It should be clarified that affirming the necessity for rules governing the use of precedent is different from arguing that there can be no uncertainty surrounding these rules. There may indeed be gray areas in the precise meaning of these rules, for instance, when it is unclear whether or not certain sets of judicial decisions are designated by rules governing the use of precedent.

V. Conclusion

There is a basic difference between rules governing the use of precedent and judicial precedent. The first refer to the rules in a legal system that define the way in which judicial precedents operate, while the latter are general rules originating in a judicial decision that prove to be significant for making legal decisions. Rules governing the use of precedent are a set of complex rules based on a series of constitutive rules on the competences for creating and applying judicial precedents. These rules can be enhanced with second-order prescriptive

rules that require or prohibit the application or adherence to judicial precedent. But no type of rules governing the use of precedent imply the existence of a second-order prescriptive rule.

Rules governing precedent in a broad sense refer to rules in a legal system that shape the way judicial precedents operate. Rules governing the use of precedent in a strict sense refer to the way in which they can be implemented in each legal system. Thus, in a strict sense, these rules can be classified into three types: a) binding rules of precedent, b) rules admitting the use of precedent and c) rules rejecting the rules of precedent. It is concluded that for either conceptual reasons associated with the idea of rules of competence or the centrality of the principle of legality, it is true that in legal systems that do not provide for the conditions to create, modify and apply judicial precedents, it is understood that there is an implicit rule rejecting the use of precedent.

VI. References

Alchourrón, Carlos & Bulygin, Eugenio (1974). *Introducción a la Metodología de las Ciencias Jurídicas y Sociales.* Astrea

Arriagada, M. Beatriz (2021). Las dos caras del precedente vinculante. In A. Núñez Vaquero, M. Beatriz Arriagada Cáceres & I. Hunter Ampuero. *Teoría y práctica del Precedente* (pp. 361-396). Tirant lo Blanch.

Cross, R. & Harris, J. W. (2012). *El precedente en el derecho inglés*, Madrid: Marcial Pons.

Bulygin, E. (1992). On norms of competence. *Law and Philosophy*, *11*, 201-216. https://doi.org/10.1007/BF01000642

Ferrer-Beltrán, Jordi (2000). *Las normas de competencia un aspecto de la dinámica jurídica*. Centro de Estudios Políticos y Constitucionales.

Fuller, Luvios (1964). *The Morality of Law*. Yale University Press

Gascón Abellán, Marina (2020). *La construcción del precedente en el Civil Law.* Atelier, pp. 260.

Gómora Juárez, Sandra (2019). *Un análisis conceptual del precedente judicial*. UNAM, Instituto de Investigaciones Jurídica.

Guastini, Riccardo (2001). *Estudios de teoría constitucional.* Fontamara.

Hart, Herbert (1994). *The concept of law* (2nd. Ed.) P. Bulloch & J. Raz (Eds.). Clarendon Press.

Komárek, J. (2013). Reasoning with previous decisions: beyond the doctrine of precedent.*The American Journal of Comparative Law 61*.

Núñez Vaquero, Álvaro (2021). ¿Son obligatorios los precedentes? La regla del precedente como norma(s) constitutiva(s). In A. Núñez Vaquero, M. Beatriz Arriagada Cáceres & I. Hunter Ampuero. *Teoría y práctica del Precedente* (pp. 329-360). Tirant lo Blanch.

Peña Freire, Antonio M. (2020). La constitución del Estado de derecho*, Anuario de Filosofía,* ISSN 0518-0872, No. 36.

Pulido-Ortiz, Fabio (2018). *Jueces y reglas. La autoridad del precedente judicial*. Universidad de La Sabana.

Pulido-Ortiz, Fabio (2019). La fuerza del derecho: sanciones, coerción y coacción. *Persona y Derecho*, *81*(2), 151-183151, DOI 10.15581/011.81.151-183

Raz, Joseph (1990). *Practical Reason and Norms*. Oxford University Press.

Strauss, P. L. (2018). Separation of Powers in Comparative Perspective: How Much Protection for the Rule of Law?. Forthcoming. In Peter Cane, Herwig Hofmann & Peter Lindseth(Eds.). *Oxford University Press book on Comparative Administrative Law*.

Tamanaha, B. Z. (2012). The History and Elements of the Rule of Law. *Singapore Journal of Legal Studies*, 232-247.

Von Wright & Georg Henrik (1963). *Norm and Action. A Logical Inquiry.* Routledge & Kegan Paul.

Waldron, Jeremy (2020). The Rule of Law. In Edward N. Zalta (Ed.). *The Stanford Encyclopedia of Philosophy*. https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/

Notes

* Article submitted on October 18, 2021, and accepted for publication on October 30, 2021.
** Associate Professor of the School of Law and Political Sciences at the Universidad de La Sabana, Colombia. Email: fabio.pulido@unisabana.edu.co ORCID Nº: https://orcid.org/0000-0002-1100-9962. This article is based on the results of the research project “La política con toga: Un estudio del activismo judicial” (DER-60-2019) funded by the Research Department of the Universidad de La Sabana. I would like to thank the participants of “The Construction of Precedent in Civil Law: Debates, Concepts and Challenges” seminar for their comments, and especially María Beatriz Arriagada, Álvaro Núñez Vaquero and Sandra Gómora Juárez for their comments and suggestions.
1 In the words of Núñez Vaquero, judicial precedents are jurisdictional decisions that express a general rule that is important for the justification of other jurisdictional decisions (2021, p. 335). A more restricted form of judicial precedents has been defined as “the rule of decision contained in the judgment, its *ratio decidendi*, which is the interpretation or specification of the law that is applied in resolving the case and that serves as a guide for resolving future cases that are essentially the same” (Gascón, 2020, p. 167).
2 This distinction has been made, with some differences in details that are not relevant to this work, in Herbert Hart (1994) and Von Wright & Georg Henrik (1963).
3 Article 42 of the Colombian General Code of Procedure establishes that it is the obligation of judges to decide on disputes and issue rulings within the terms of the law.
4 For the crime of malfeasance in office, for instance, the law establishes that “The public servant who issues a ruling, opinion or statement that is clearly contrary to the law shall be subject to a prison term of forty-eight (48) to one hundred forty-for (144) months, a fine of sixty-six point sixty-six (66.66) to three hundred (300) months of legal minimum wages in force, and suspension from exercising public rights and duties for eighty (80) to one hundred forty-four (144) months” (Article 413 of the Colombian Criminal Code).
5 This is what Álvaro Núñez Vaquero calls rules of competence to control adherence to precedents (2021).
6 Even though rules governing the use of precedent have secondary rules, not all of these constitutive rules are rules of competence because some are purely conceptual (e.g., the definition of vertical precedent).
7 In fact, some authors defend the conceptual connection between law and the rule of law. Peña Freire claims that “the concept of law and the rule of law are inseparable since law is nothing more than the set of rules governing the behavior of the individuals [living] under the rule of law… From this perspective, it can be clearly observed that the law as a legal system and the rule of law are, actually, the same thing because the rule of law is no different from the situation achieved when the system of rules that form the law governs the behavior of individuals” (Peña Freire, 2020, pp. 22-23).

PROBLEMA

NÚMEROS DE PROBLEMA

ON THE RULE AND THE USE OF PRECEDENTS: BRIEF COMMENTS ON THE WORKS OF FABIO PULIDO ORTIZ AND SILVIA ZORZETTO*

SOBRE LA REGLA Y EL USO DE LOS PRECEDENTES. COMENTARIOS AL MARGEN DE LOS TRABAJOS DE FABIO PULIDO ORTIZ Y SILVIA ZORZETTO

Álvaro Núñez Vaquero**

DOI: 10.22201/iij.24487937e.2022.16.5.17583

Abstract:

It filled me with pleasure to be asked by Problema editor-in-chief Sandra Gómora Juárez to lead a discussion on the theories and doctrine on precedent in our context alongside Prof. Marina Gascón Abellán. Besides the undeniable and recognized prestige of the Problema journal, there was also the possibility of working with Prof. Marina Gascón again and with Sandra Gómora for the first time. It was also an opportunity to discuss issues regarding precedent with old friends like Flavia Carbonell, Fabio Pulido and Silvia Zorzetto, and exchange opinions with new ones like Rodrigo Camarena.

On this occasion, I would like to comment specifically on the works of Prof. Fabio Pulido Ortiz and Prof. Silvia Zorzetto, both of which are of unquestionable quality. The article by Prof. Pulido Ortiz of the Universidad de la Sabana in Colombia is a work of analytical finesse and subtlety that discusses some fundamental problems of legal theory from the standpoint of the theory of precedent. Prof. Silvia Zorzetto from Università Statale di Milano has conducted an analytical and metalinguistic survey of the use of precedents in Italy, particularly at the Italian Sezioni Unite Civili della Corte di Cassazione. This work is priceless not only in terms of its value as a study of (internal) Italian legal culture, but also because the analysis can be generalized, at least in part, to explain how precedents are used in civil law systems.

Keywords:

Rule of Precedent, Theory of Precedent, Doctrine of Precedent, Constitutive Norms, Trivalence of Precedent.

Resumen:

Cuando la profesora y directora de la revista Problema*, Sandra Gómora Juárez, nos propuso a la profesora Marina Gascón Abellán y a mí llevar a cabo una discusión acerca de las teorías y doctrinas del precedente en nuestro contexto, no me pude sentir más contento. Al indudable y reconocido prestigio de la revista Problema se sumó la posibilidad de volver a trabajar con la profesora Marina Gascón y hacerlo por primera vez con Sandra Gómora. Además, surgió la oportunidad de volver a discutir con viejos amigos —como Flavia Carbonell, Fabio Pulido, Silvia Zorzetto— sobre cuestiones relativas al precedente, y poder contrastar opiniones con otros nuevos, como Rodrigo Camarena.*

En esta ocasión, me corresponde comentar, en particular, los trabajos del profesor Fabio Pulido Ortiz y de la profesora Silvia Zorzetto. Ambos trabajos son de una indudable calidad. El del profesor Pulido Ortiz, de la Universidad de La Sabana de Colombia, es un trabajo de finura y sutileza analítica que entra a discutir, al calor de la teoría del precedente, algunos problemas fundamentales de la teoría del derecho. La profesora Silvia Zorzetto, de la Università Statale di Milano, ha llevado a cabo un reconocimiento analítico y metalingüístico de la práctica de los precedentes en Italia, con especial atención a le Sezioni Unite Civili della Corte di Cassazione italiana, de incalculable valor. Ello no sólo por el valor que pueda tener para el estudio de la cultura jurídica (interna) italiana, sino porque su análisis puede ser, al menos en parte, generalizado para dar cuenta de cómo son usados los precedentes en los ordenamientos de civil law*.*

Palabras clave:

Regla del precedente, teoría del precedente, doctrina del precedente, normas constitutivas, trivalencia del precedente.

CONTENT: I. *Constitutive Rules, Authorized Precedent and Necessity of Rules Governing the Use of Precedent, According to Fabio Pulido Ortiz*. II. *Use of and Abiding by Precedents, According to Silvia Zorzetto*. III. *References*.

I. Constitutive Rules, Authorized Precedent and Necessity of Rules Governing the Use of Precedent, According to Fabio Pulido Ortiz

To better understand Pulido Ortiz's highly sophisticated work, it is worth contextualizing it as, at least to some extent, part of a broader discussion with me and Prof. María Beatriz Arriagada Cáceres, from the Diego Portales University of Chile. This discussion began in October 2019 at an international congress on precedents held in Puerto Montt (Chile). Some differences emerged, especially between Pulido Ortiz, on the one hand, and Prof. Arriagada Cáceres and me, on the other, but these point were first brought to light in a collective book that was subsequently published (Álvaro Núñez et al, 2021).

One of the issues already under discussion on that occasion was the Pulido Ortiz's view of the need for rules governing the use of precedent. In his opinion, every legal system

necessarily contains a legal rule establishing the way the use of precedents is to be regulated. This time Pulido Ortiz presents new arguments whose specific merits need to be discussed.

The second issue Pulido Ortiz particularly touched upon on this occasion is directly at odds with several theories I had defended at Puerto Montt and in the ensuing publication. Specifically, Pulido Ortiz criticizes my portrayal of the review of precedent solely as a rule that establishes conditions of validity and invalidity for subsequent decisions that apply (or not) the precedent. In his opinion, between establishing conditions of validity (by following or not following them) for other decisions and establishing conditions of invalidity (by following or not following them) for these decisions, there is a middle ground: when the use of precedents is merely authorized.

There is a certain connection between the two theories, although not mutually implied. Since Pulido Ortiz defends the view of needing rules governing the use of precedent, he also believes it necessary to uphold the opinion that said rules must be only followed when authorized. Both theories can admittedly be defended separately, but since Pulido Ortiz argues that there are legal systems in which following precedents does not affect the validity of jurisdictional decisions (but regulates it in any case), he has to assert the existence of this *tertium datur* between validity and invalidity to argue that all legal systems must have rules governing the use of precedent. Since this connection is not mutually implied between these two theories, I will discuss each one separately.[1] I will therefore follow the same order Pulido Ortiz himself presents his ideas.

Following Pulido Ortiz's lead, it is first necessary to examine his definition of the constituted rules. At first glance his approach seems perfectly correct, but it nevertheless detracts from his interpretation of precedent systems in general, and of the rule of precedent in particular. It is precisely because he regards constitutive rules as those establishing only the conditions required to validate legal acts (and normative acts), he has problems in accounting for how any rule governing the use of precedent can shape the validity of jurisdictional decisions.

1. Constitutive Rules According to Pulido Ortiz

Pulido Ortiz is extremely clear when it comes to drawing a distinction between constitutive rules and prescriptive rules. According to Pulido Ortiz, "[p]rescriptive rules are in charge of governing action, requiring or allowing the performance (or non-performance) of certain types of actions [...] Constitutive rules [...] define certain aspects, among which those establishing the conditions to identify, create and apply other rules are fundamental", (Fabio Pulido, 2022). The author himself stresses the difference: "Constitutive rules do not prescribe actions (i.e., they neither oblige nor prohibit actions) but are responsible for defining certain aspects (e.g., providing the definition of legal age or parliamentary majorities) or to allow certain acts to be carried out (e.g., a constitutional reform or the bylaws of a trading company)", (Fabio Pulido, 2022).

Pulido Ortiz goes on to point out three different types of constitutive rules: the Hartian rule of recognition, rules of competence and the purely conceptual rules. We are particularly interested in the second and third types of rules. He defines the rules of jurisdiction as “the rules laying down the conditions for judicial acts to be validly carried out", (Fabio Pulido, 2022). He then provides a stipulation, distinguishing between actions (“behaviors governed by primary rules") and acts [“behaviors (and their outcomes) made possible by the rules of competence"]. Pulido Ortiz logically contends that prescriptive rules may concern both actions and normative acts. Thus, a legal system can “create" a new type of behavior and then consider it binding or even —why not— prohibited.

After differentiating between rules of change and rules of adjudication in the field of rules of competence, Pulido Ortiz discusses the purely conceptual rules, those that “merely define judicial concepts by establishing relations between different aspects, assumptions or cases", (Fabio Pulido, 2022). According to Pulido Ortiz, these rules do not prescribe actions, nor do they define powers or establish (at least directly) conditions of validity, but such a rule, he says, “defines correlations between certain legal terms (e.g., a prepubescent) and certain conditions (a human being under the age of 14 and over the age of 7)", (Fabio Pulido, 2022).

A. Certain Considerations on Interpretation of Constitutive Rules

Pulido Ortiz's description of purely conceptual rules has great merit: it offers a structural definition not only of purely conceptual rules, but also of the entire family of constitutive rules, although I am not sure this was Pulido Ortiz's intention. In defining them from a purely structural point of view by connecting various aspects, events or actions, he has provided a structural definition that makes it possible to differentiate, in general terms, constitutive rules from prescriptive ones: while the first interlink two factual assumptions, the latter second interlinks a factual assumption with a deontic operator. This is not a feature inherent only to defining rules but can be found in the entire family of constitutive rules. In fact, from a structural point of view, all constitutive rules have the same form: a generic case linked to another generic case (José Juan Moreso y Josep Vilajosana, 2005, p. 74).

Returning to his general definition of constitutive rules, the one encompassing the three types of constitutive rules would be: “constitutive rules define certain aspects or allow certain things, among which those establishing conditions to identify, create and apply rules are fundamental", (Fabio Pulido, 2022). In terms of rules of competence, Pulido Ortiz is slightly ambiguous since he defines them both as rules that allow judicial acts, as well as normative acts, to be carried out.

This last ambiguity poses a slight problem. It is not the same thing to say that rules of competence are rules for carrying out legal acts as it is to say that they are rules for carrying out normative acts. If it is only for the purpose of carrying out normative acts, then there are two types of rules that cannot be accounted for.

(I) In the first place, it would not address the rules establishing competences for certain subjects, but such competences do not produce rules. (ii) In the second place, there are the rules that do not establish the conditions to identify, create or apply rules but which create a new legal reality in themselves.

(II) In the first case, there are certain competences conferred on unquestionably judicial bodies to carry out acts which in no way produce rules. One example is the Rules of Procedure of the Spanish Congress of Deputies, which contemplates —i.e., establishes— the possibility of submitting non-legislative proposals, which in no way creates binding or mandatory rules. This is not a Spanish peculiarity as the same is true of United Nations General Assembly recommendations. And it does not seem that this type of rule can fit into the category of purely conceptual rules.

(ii) Secondly, in defining constitutive rules as rules establishing conditions to identify, create and apply other rules, Pulido Ortiz does not take into account a very important type of constitutive rules: those that directly create a legal reality, without establishing any type of condition (Gaetano Carcattera, 2014, pp. 48 ss). A few examples should suffice: Royal Decree 3217/1981, dated November 27, 1981, ratifying October 12th as the National Day of Spain; the rule repealing another rule; the rule establishing a renvoi without stipulating a new competence; etc. And these do not seem to apply to purely defining rules either.

B. The Distinction Between "Acts" and "Actions"

The abovementioned distinction Pulido Ortiz makes between "actions" and "acts" seems dangerous to me, even if it is only a simple caveat. It would seem that Pulido Ortiz is thus ontologizing a purely epistemic distinction. The world does not have "acts" or "actions," but rather, depending on how we want to describe a certain human behavior, it will qualify as an "action" or as an "act." "Actions" would refer to behaviors governed by primary rules, while "acts" refer to behaviors made possible by the rules of competence. What Pulido Ortiz seems to overlook is that every "action" is also an "act." This can be easily illustrated with a couple of examples: shooting someone with a firearm can constitute both the 'action' of killing and the 'act' of executing a death sentence; making a holographic will is both the "action" of writing certain characters on a piece of paper, and the "act" of establishing to whom to bequeath one's belongings. Reality is only one: it all depends on how we want to describe it.

C. Rules of Competence as Rules Establishing the Necessary Conditions for Valid Normative Acts

Lastly, Pulido Ortiz argues that an act is valid as long as the conditions defined in the rule of competence are met. In addition to the fact that such a distinction could be made between a rule that establishes the competence itself and the rules that establish the conditions for it to be applied (Jordi Ferrer, 2000, pp. 129 ss.), he actually seems to take its statement too far: "if a judicial operator fails comply with the conditions defined in the rules of competence, their acts are not valid", (Fabio Pulido, 2022). This apparently innocuous

statement may lead to some confusion if it is not borne in mind that the conditions laid down in the rules governing competence are, in many cases, disjunctive enough as they are. In other words, lawmakers look for different ways to achieve the same institutional result.

For example, Spanish legislators provide up to six different ways to draw up a will, each of which results in a valid will. Thus, we have are different ways to achieve the same institutional result: a will. And the same can be said of many other legal acts. To go one step further, taken individually, rules sometimes only establish contributing conditions for an act to be valid. Another example is found in the Spanish university system, where to obtain the credential of “University Professor", having directed a doctoral dissertation is not considered a necessary or sufficient condition, but a complementary qualification —i.e., a contributing condition— to obtain this credential.

But this is not about such a particular as the ways to write a will or obtain university credentials. There are different ways and/or procedures for creating laws, too. In the Spanish legal system, there are at least three other ways, aside from the ordinary procedure, to create an ordinary law: through urgent processing, by being delegated to committee and by a single reading. These four ways constitute sets of disjunctively sufficient conditions to achieve the same institutional result: the creation of an ordinary law.

This calls into question whether the conditions laid down in the rules of competence are always necessary conditions to carry out legal acts. On the contrary, it seems that in many cases lawmakers establish parallel courses to carry out a legal act;[2] or sometimes, elements are considered normatively important, but not necessary or sufficient.

It should be noted that this problem Pulido Ortiz runs into is not an isolated issue. On the contrary, it is precisely because he sees constitutive rules only as necessary conditions for legal acts to be valid that he is forced to defend the idea that a legal system can classify the use of precedents as merely authorized. As will be seen below, it is perfectly possible that following or not following precedents does not constitute a necessary condition for a decision’s validity or invalidity. However, this does not mean that the validity of decisions is conditioned in other ways: as a sufficient condition or a contributing condition, which is vastly different from claiming that the use of precedents is merely authorized.

2. The Theory of the Three Types of Rules Governing the Use of Precedents

The second issue to be addressed is Pulido Ortiz’s theory of the rules governing the use of precedent —the rules in the legal system that define the normative operation of precedents. He explains that these are rules that can classify the application of judicial precedents (defined as rules, which can also be the subject of another discussion best left for later) as binding, as admitting the use of precedents or as rejecting the rules of precedent. This would mean a comprehensive and exclusive distinction, i.e., following precedent is regulated in one of these three ways, and only in one of these three ways. These are distinctions, according to Pulido Ortiz, based on constitutive rules, not prescriptive rules.[3]

A. The Three Comprehensive and Exclusive Elements of the Rules Governing the Use of Precedent

In this section I will specifically discuss how the rules governing the use of precedent regulate following precedents or not following them, leaving the issue of necessity for such rules for the next section.

In the first place, it is necessary to discuss the argument of comprehensiveness and exclusiveness, i.e., the argument that each of these ways of regulating the use of precedents covers all possible forms of regulating precedents and that it is not possible for a legal system to regulate the use of precedents in more ways than one. Naturally, a single legal system can have different rules governing the use of different types of precedents, but Pulido Ortiz refers to the fact that following the same types of precedents are regulated differently in one same legal system.

To begin with the argument of exclusiveness, (i) according to Pulido Ortiz, a legal system can regulate the use of precedents in one of three ways, but only in one of these three ways. However, it should be noted that Pulido Ortiz justifies this argument of exclusiveness by stating that, if it were regulated in two different ways, there would be a contradiction between rules. However, it does not seem impossible for a legal system to regulate the use of precedents —or any other behavior— in ways that come in conflict with other rules.

But, on the other hand, if the rules governing the use of precedents can be both binding and admitting their use, there is no apparent contradiction in saying that a behavior is merely authorized and that it is binding. If courts are authorized to cite precedents, this does not seem to contradict the fact that they are also bound to do so. This idea is based on the relationships between deontic operators of prescriptive rules, according to which the fact that a behavior is mandatory implies that it is also allowed (although not the other way around). Although Pulido Ortiz is clear on the distinction between prescriptive and constitutive rules, the way he redefines the different ways in which rules can govern the use of precedent seems to draw from the prescriptivist way of understanding such rules. Pulido Ortiz seems to have allowed himself to be dragged from the world of constitutive rules to the world of prescriptive rules. "Authorized" in the constitutive world plays the same role as "permitted" in the prescriptive world.

(ii) But things do not improve much from comprehensive approach. Pulido Ortiz appears not to see the various possibilities afforded with rules governing the use of precedents. Beyond the fact of arguing about behavior required by the rules governing the use of precedents —citing them, applying them hypothetically, using rules that are logical consequences, and so on, Pulido Ortiz does not consider all the possible consequences that could stem from these rules.

To give a few examples, one legal system might consider that, although not binding —in the sense of necessarily conditioning the validity of decisions, the fact that a decision follows

or does not follow a precedent may not be sufficient justification to annul a decision, but it may affect its possibilities for appeal. While following precedents may not be a condition to annul or validate a decision, following it may be considered a (necessary and sufficient) condition for the level of its binding nature.[4] Lastly, not following precedents may result in a precedent that ceases to be considered as such, falling into disuse.

B. Rules Admitting the Use of Precedent

The critical aspect of Pulido Ortiz's interpretation is the idea of rules admitting the use of precedent, i.e., "that allows judicial operators to use judicial precedents to justify their acts, but without stipulating that precedents condition the validity of those same acts", (Fabio Pulido, 2022). In other words, it admits judicial operators' use of precedents, but without it being binding, without placing conditions on their validity. Although it might seem otherwise, this form of admitting use is not permission in deontic terms, a theory that —according to Pulido Ortiz himself— I would have dismissed in a previous work (Álvaro Núñez, 2021, pp. 33-363). But he claims that my argument has two flaws: the first is that the rules admitting the use of precedent would imply, in his interpretation of my proposition, that rules governing the use of precedents does not affect the validity of legal acts, but this does not imply that it is allowed; the second is that the rules admitting the use of precedent would not make it possible to distinguish between institutionally important and irrelevant behaviors.

I do not believe giving an account of what I said in the work to which Pulido Ortiz refers to be of much interest. I will instead deal with the issue directly. To better understand why I believe rules governing the use of precedent cannot simply admit their use, it is necessary to explain the reasoning behind that theory. The aim of that paper was to reject the idea that rules governing the use of precedent could be redefined as a prescriptive rule. The intention was to rule out the possibility for rules governing the use of precedent to be interpreted as a permit (i.e., a non-mandatory prescriptive rule) where it is not mandatory to follow them.

The argument was that permission can serve various functions but, in this case, —if the rule of precedent were a permission it would protect the normative status of certain actions against the creation of certain rules. For example, freedom of expression is borne out in many legal systems as permission of constitutional standing so that ordinary lawmakers cannot modify its normative status.

To determine whether the rules governing the use of precedent can be interpreted as permission, I asked myself how the act of not following precedent would be deontically qualified, in the event that following the precedent were allowed. For the sake of brevity, our focus will be on the case where both following and not following precedent are allowed, i.e., it the use of precedent is optional. The permission (i.e., option) to follow precedent would come into play if someone uses a precedent (or not) to justify a judicial decision. In this case, one of two things (or both) would happen: either the head of the body is sanctioned for following or not following a precedent, or the decision is annulled because a precedent was followed (or

not). It is precisely when faced with these two possibilities —sanction and annulment— that the rule governing the use of precedent as optional would apply.

Aside from the possibility of sanctions,[5] I contend that if permission protects against issuing a review decision the judicial decision for using (or not) a precedent, this rule cannot be permission. Rules setting forth immunities —in this case, the reviewing body's lack of authority to overturn a decision merely because another body followed (or did not follow) a precedent— are not permission (prescriptive rules), but actually constitutive rules.[6]

But I added one more point to this work: claiming that rules governing the use of precedent endow it with immunity does not yet constitute a comprehensive interpretation of how precedents are normatively important in legal systems. It is not simply a matter of not allowing a reviewing body to overturn a decision on the basis of following precedents. This would be, he said, like saying that a judicial decision cannot be overturned because it was signed in green ink. To plausibly speak of precedents, the act of following or not following precedents must have normative normative relevance. My response was that if a decision is considered a precedent, it should then at least count as a condition that contributes to the justification of the decision and, therefore, its validity.[7]

Pulido Ortiz points at two failings in this regard. The first one he argues that since a subject has the competence to carry out certain acts, it would follow that the subject is also allowed to do so. I do not believe to have claimed that if a subject has the competence to carry out an action, it can be inferred that the behavior is also permitted, or vice versa. Regardless of my exact wording, we cannot infer prescriptive rules from constitutive ones, or vice versa. It would like supposing some words uttered are a promise, and based on the definition of promise, there is an obligation to fulfill what has been promised (Daniel Mendoca, 2011, pp. 39 ss.). Therefore, we agree that rules governing the use of precedent cannot classify "following precedent" as permissible and this does not say anything about competence.

(II) The second objection is that I claim that rules governing the use of precedent that consider, to use Pulido Ortiz's terms, following precedents as merely authoritative, thus rendering them irrelevant, which is exactly what I am saying.

As a reminder, we are not in the realm of prescriptive rules, but in that of constitutive ones. Pulido Ortiz seems to include a *tertium datur* between the fact that following precedents is binding —in the sense that they condition the validity of an act— and precedents are rejected —as a condition to consider the decision as invalid. Pulido Ortiz encounters an obstacle when thinking of constitutive rules in terms of prescriptive ones.

For these cases, Pulido Ortiz says "the use of the petitions does not constitute 'a reason to annul a judgment". "But, regardless, it is possible that the use of such precedents does not affect the validity of judicial decisions". According to Pulido Ortiz, when the rules governing the use of precedent consider following it only as authorized, the use of precedents would not constitute a reason to overturn a decision: "The law may consider this use irrelevant to legally

justify a decision, but may authorize it for other reasons (e.g., to uphold judicial independence and autonomy)", (Fabio Pulido, 2022).

In the work Pulido Ortiz cites, I argued that if this was the way things were, then there would be no difference between citing a precedent and not citing one; or using a Spanish proverb to justify a decision: it would simply not be taken into account. If (the validity or correctness of) a decision cannot be appealed because it follows or does not follow a precedent, we cannot actually draw any conclusion about the validity of that decision; it only tells us that it is not a relevant criterion. I do not know if it makes sense to speak of a "system of precedent" in these cases. No one is going to overturn or uphold a sentence because it cites a passage from Don Quixote in its rationale; it will simply be ignored when assessing its (in)validity. Something similar happens here: the validity of a decision cannot be assessed on whether it followed (or did not follow) a precedent.

However, there seems to be an important gap between the possibility that citing a precedent is irrelevant for justifying a decision (i.e., the validity of the justification for the decision) and that a precedent is binding –in that following a precedent or not is a necessary condition for justifying a decision. I will give one example from among the many positions on this point. It may well be that following precedents is not a necessary condition for the validity of a decision, but it is a sufficient condition to justify the judicial decision (and, therefore, its validity). Thus, for example, following Supreme Court case law would guarantee the material correctness of the judicial decision following the precedent and, in this sense, its validity; however, departing from this case law would not be a necessary or sufficient condition for the decision to be considered invalid (not following it would not be legally defined).

Pulido Ortiz fails to view constitutive rules, like the rules of competence mentioned above, as a necessary condition for the validity of legal acts (*supra*, 1.1.3). From his point of view, if an act does not meet all the conditions of validity, it is therefore null and void. But things are a bit more complex. A rule may very well make the validity of a judicial decision conditional upon following a precedent, but only in a way that is sufficient or contributes, and failure to do so is legally irrelevant.

In short, Pulido Ortiz and I might agree on conceiving the rules governing the use of precedent as binding in all cases, if this means that the rule of precedent is always a necessary condition for the validity of decisions. However, there are many scenarios in which following a precedent is a necessary condition of validity or invalidity; both following or not following a precedent may be a sufficient or contributing condition. I cannot subscribe to a rule that labels following or not following precedents as irrelevant, simply because I believe that in such a case it is pointless to speak of "precedents." If we have a system of precedents, it is because using a precedent mark a practical difference; otherwise, why would such decisions constitute precedents?

3. The Rule of Precedent as a Necessary Rule

The last of Pulido Ortiz's theories I will address is the one whereby the rules governing the use of precedent is a necessary norm, found in all legal systems. Thus, the rules governing the use of precedent would regulate them either as binding, as being admitted, or as being rejected when followed or not followed. It is not, according to Pulido Ortiz, a rule that is present in all legal systems by chance, a theory to which I could subscribe. However, Pulido Ortiz's theory is conceptual, a required, or at least from the perspective that legal systems have incorporated the principle of legality.

Pulido Ortiz structures his argument by first noting that rules governing the use of precedent establish, on the one hand, the competence of certain bodies to dictate precedents and, on the other, regulate the use of precedents in the terms seen in the previous section, namely: binding rules of precedent, rules admitting the use of precedent and rules rejecting the use of precedent.

Pulido Ortiz does not claim that lawmakers in every legal system have enacted express rules explicitly regulating the use of precedents. On the contrary, he underlines how it is characteristic of contemporary legal systems that "the powers of authorities are defined (or constituted) in judicial rules (rules of competence) that define or make the valid exercise of these powers possible", (Fabio Pulido, 2022). The problem arises when lawmakers remain silent, and the principle of legality comes into play.

He then states, on the one hand, that the "concept of judicial precedent assumes there are judicially created rules that are important to resolving certain issues" (Fabio Pulido, 2022) and, on the other hand, that "rules admitting the use of precedent... implies that there is a rule of competence that recognizes the valid exercise of the power to create precedents and a rule of competence (a rule of adjudication) that allows judicial operators to use judicial precedents", (Fabio Pulido, 2022). To this he adds, concurring with Tamanaha and Waldron, the principle of legality as a guiding principle of the rule of law, which implies that the exercise of powers must be previously provided for by some type of rule of competence.

Here are two different, but central arguments. (I) The first asserts that if there is a rule conferring competence to certain bodies to establish precedents, then there is also a rule regulating heir use. And vice versa, if there is a rule regulating the use of following precedents, then there is a rule conferring competence on somebody to dictate precedents. (II) The second argument is that the principle of legality sets a rule of closure regarding the rules of competence in legal systems, i.e., the theory that all acts that have no rule of competence authorizing such acts are invalid.

(I') To analyze the first argument, if there is a rule establishing competence to dictate precedents, then there is another rule regulating them. If there is one rule regulating them, then there is another establishing competence. The first theory is easy to dismiss as long as we take into account that lawmakers often forget to establish certain rules. Sometimes, lawmakers enact repeals whose logical consequences are unknown when enacted, and it is

perfectly possible that, despite having the power to dictate them, the rules governing the use of precedents may have been repealed.

This other example is even clearer: it is entirely possible that there is a rule regulating the use of precedents, but no one has the competence to dictate them. The possibility of lawmakers implicitly repealing certain rules should not be excluded, but there are other cases which are not the fault of lawmakers. In this sense, it is possible for a legal system to determine the value to be attributed to precedents, but no one has the competence to dictate new precedents in that system.

(II') Pulido Ortiz's second argument, which is quite simple but by no means insignificant, revolves around the principle of legality. In modern common law States, the use of regulatory powers must be regulated by rules of competence; if a subject uses exercises normative power without a rule of competence authorizing it, it is therefore not a valid act. From this, Pulido Ortiz infers that if establishing precedents is not expressly stipulated, the principle of legality comes into play and those precedents are considered rejected.

I will not address the issue of rules of closure regarding the rules of competence in legal systems because the other author Pulido Ortiz mentions, María Beatriz Arriagada Cáceres, has already dealt with the subject in her work (María Beatriz Arriagada, 2021a, pp. 1-23). It is, however, possible to introduce two different theories.

(a) First, if the principle of legality comes into play, then does not exactly mean that we have a rule rejecting the use of precedent, but one that simply states the applicability of the principle of legality. Thus, we would not have a rule governing the use of precedent, but only the principle of legality. Just as we do not have a rule prohibiting mayors from making formal declarations of war against other States or the central bank from imposing new taxes, we would not have rules establishing the use of precedents.

(b) Secondly, this way of understanding the principle of legality seems to make superfluous rules expressly establishing certain bodies' lack competence to undertake certain normative acts. There are rules that rather than establishing a subject's authority to carry out normative acts, expressly prohibit such bodies from doing so. For example, Article 134.7 of the Spanish Constitution states that "The Budget Law cannot create taxes," i.e., it expressly prohibits the lawmakers with the authority to establish the General State Budget from creating new taxes, rates and duties.

Why would we want such a rule if we have a principle of legality that limits the system of competence in such a way that any act without express authorization is invalid? Such an interpretation of the principle of legality makes the rules of non-competence irrelevant.

I have no doubt that, whenever a legal system grants a body the competence to carry out judicial and/or normative acts, this is sufficient condition for acts under those rules to be valid. I am not so sure as to whether it constitutes a necessary condition. On the contrary, it

seems that our legal systems contain various rules that have been enacted and considered valid, without any legal rule protecting or authorizing them. In such cases, it seems that it is the practice of judges themselves —who identify the set of valid rules through the Hartian rule of recognition— that determines what the valid law is, either by applying a rule of competence or by directly referring to the rule of recognition. Ultimately, in order to understand the principle of legality or any other principle, it seems necessary to refer to what judges actually do in practice.

Pulido Ortiz's work clearly has great merits even if I may not entirely subscribe to every argument. I hope this will not be the last time we have the pleasure to discuss these ideas.

II. Use of and Abiding by Precedents, According to Silvia Zorzetto

It is no easy task to comment on Prof. Zorzetto's work. On reading her first draft, I had some theoretical-conceptual questions regarding the scope of her theory. However, by the final version of her paper, Prof. Zorzetto has made her work literally ironclad from a conceptual standpoint, following the best possible analytical tradition. It is truly an impeccable work.

But the ability to elucidate the scope of the concepts that not the only virtue of Silvia Zorzetto's work. As she herself states, her paper seeks to fill, at least in part, a gap left uncovered in the collective book Prof. Marina Gascón and I co-edited a couple of years ago. Zorzetto patently contributes to this end, making headway in the understanding of the argumentative use of precedents. Building on an analysis of the Italian Court of Cassation Sections United decisions and contextualizing it in the light of relevant legislation, she then draws out two conclusions.

The first one can be described as an analysis of Italian (internal) legal culture, explaining the assumptions and theories emerging from these decisions in terms of the system of sources, the theory of interpretation and a number of highly relevant issues. The second one deals with the different ways precedents can be, and in fact are, used, identifying a set of ways in which case law uses Italian Court of Cassation Sections United decisions.

Both theories are based on a specifically Italian analysis, but —as the author herself says— they may be applicable universally to some extent. While the more or less general nature of internal legal culture issues —by their very nature contingent on each place and time— might be open to discussion, the analysis of the different types of arguments based on the precedent can undoubtedly be generalized, if not in terms of how the judicial operators of a given legal system (other than the Italian one) actually operate, then most certainly in the possible argumentative uses of precedents. However, I have some reservations about whether some of the different uses might overlap others, but in the absence of an exhaustive classification of the ways precedents can be used,[8] I believe that it is better to err on the side of multiple categories than reductivism (there will be room for analytical subtleties in this regard). I think

Zorzetto has thus expanded the scope of research on precedent-based argumentation of which some of us have only scratched the surface.

There is not much left to say, except for a few details. A couple of theories underlying Professor Zorzetto's work are more important than they might seem and cast doubts on —not the plausibility of her work, but— the viability of well-ordered system of precedents. The first refers to the conditions for the existence of precedents; the second could be described as the implicit pessimism regarding human skill to make jurisdictional decisions rather than on whether precedents can definitively regulate cases. To get both theories out of the way, it is necessary to look at details, but without taking Zorzetto's descriptive claim out of context.

1. The Relevance Of Past Decisions

Zorzetto's methodical work contains, as already mentioned, a first premise that catches –or should catch– the reader's attention: "However, when each decision is made, no one can know the rulings will be shared by the other courts. Thus, the issuer may have, at most, a *de facto* hope or desire that their decision will become a precedent for others" (Silvia Zorzetto, 2022). This assertion is of the utmost importance in Zorzetto's work, as well as to understand how precedents work in our legal systems.

Zorzetto simply argues that whether a judicial decision counts as precedent ultimately depends on whether that decision is shared by the other courts and/or by the legal community in general. In other words, one can try to create a precedent, but there is no guarantee that it will succeed, even if it is the highest court in the legal system.

If a minimally empiricist point of view is adopted, this statement seems quite sensible. It is absolutely true that a court decision may be disregarded altogether, even if its originators intended the decision to constitute a precedent and this in fact happens on many occasions. For a judicial decision to become a precedent, it must not be systematically disregarded. But I am not so sure that for a decision to be considered a precedent, it is necessary for it to be accepted.

However, that it is one thing to hold, as Zorzetto does, that the fate of a decision to become a precedent depends on its acceptance by other judicial operators, but it is quite another is to claim that a precedent may cease to be considered as such because it is no longer effective, i.e., because of *desuetude*. Along the same empirical lines I share with Zorzetto, it would seem that the means to know whether a precedent has been accepted or not among the rest of the judicial operators is because it has been used as the basis for a court decision. Without access to judges' states of mind, it is hard to imagine another way to know whether it has been accepted unless it has been used.

But this is where things start to get complicated. Following highly respected voices like Taruffo's (Taruffo, pp. 12 ss.), Zorzetto could counter that precedent is only born when it is later used by a judicial operator. But before explaining this point, it bears asking whether the

same could be said of laws. Would anyone say that a law does not become a law until it has been accepted and therefore applied? I think only a radical skeptical empiricist would be willing to accept such an argument.[9] But if this argument is absurd when referring to the law, we may wonder why it is not also absurd when referring to precedents.

One could argue that the reason is that while we have rules to grant parliament- to make laws, we do not have rules to grant the power to make precedents. It is again helpful to turn to the same healthy empiricism mentioned above: is it certain that judges and other judicial operators are not using some criterion —i.e., a rule— to identify certain decisions as precedents? I suspect that, regardless of the specific rules used by Italian judicial operators, it does not seem that they randomly select judgments to consider precedents, but they rely on some criterion, i.e., rules to identify which decisions qualify as precedents. If there really are criteria to identify which decisions qualify as precedents, we can say there are subjects with the competence to establish precedents.

In this same skeptical tone, we must also look at two other statements Zorzetto makes about precedents. The first is a statement that, for lack of a better name, I will call philosophy of legal history. According to Zorzetto, a well-ordered system of precedents (we will address this point below at 2.2) needs to be born "'from the ground up' so to say, by creating a legal and judicial culture that is as sensitive, sharp, far-sighted and responsible as possible" (Silvia Zorzetto, 2022), in the sense that it would not be possible for it to be otherwise. Of course, if a decision is dependent on the acceptance of others for it to be considered a precedent, then it follows that the only way for a system of precedents to work is because there has been a prior change in the legal culture that makes it possible.

Would it make sense to make the same claim about laws enacted by parliament? I am not convinced that all the major changes that have taken place in our legal cultures have been 'from the ground up.' It did indeed happen 'from the ground up' with processes for constitutionalizing the law. But we also have examples to the contrary, such as with the codification processes created by lawmakers which had an enormous impact on the practice of legal operators (Pio Caroni, 2013, pp. 43 ss.). However, Zorzetto is wary, perhaps unjustifiably so, as will be seen in the next section, of the possibility of creating a well-organized system of precedents.

In keeping with the argument of the need for a judicial decision to be accepted by other judicial operators before being considered a precedent, the second claim is that justifying a subsequent decision based on an *ex-auctoritate* precedent weakens its position (Silvia Zorzetto, 2022). Legal operators' acceptance of a judicial decision as precedent and the *ex-auctoritate* argument are diametrically opposed ways of conceiving law. Zorzetto herself goes as far as to say that it is possible for a legal principle, without being linked to the facts of the case, to stand independently of the very decision in which it was formulated. What counts, so to speak, is the content, not the fact, that a rule has been used (or merely) formulated by a court; not even in the case of the Italian Court of Cassation Sections United.

While I understand and somewhat agree that precedents can be used as arguments from authority, I hesitate to say this is a good way to present the use of precedents. The reason is that the *ex-auctoritate* argument is often presented (Giovanni Tarello, 2013, p. 193; Riccardo Guastini, 2018, p. 193) hand in hand with reliance on foreign law and, especially, on the science of law and/or legal doctrine. Placing both arguments (a precedent and legal doctrine) in the same category is [misleading] because they represent authorities in quite different senses. Whereas the use of doctrine is based on proposed solutions to cases having a certain quality (epistemic or moral), in the case of precedents, it is a solution... coming from a body created (or recognized) by the legal system itself! And a precedent enjoys, at least, authority of this kind, regardless of the quality of its content.

In this sense, it may be possible for there to be a precedent, but for it to be considered a bad one.[10] If we can have decisions held to be precedents because they meet certain criteria of identification despite being held to be bad decisions, it seems that it is because the authoritative nature of precedents does not come from a purported (moral or epistemic) quality or virtue. If this were the case with precedents, Zorzetto could rightly claim that the *ex-auctoritate* argument weakens them. However, when a precedent is invoked in favor of a type of decision, the decision of a body created (or at least recognized) by the legal system is invoked. We are not, therefore, referring to the virtues of a body, but rather to an authentic interpretation, at least in the Kelsenian sense (Hans Kelsen, pp. 351 ss.).

Zorzetto herself makes a point of saying that, while conventionalist skepticism is allowed in matters of interpretation, the Sections United are considered to offer the “most accurate" interpretations (p. 21). If that is so, it seems that the *ex-auctoritate* argument based on precedent is not as weak. It is an interpretative decision that the legal system recognizes as having some normative value, even if only for a specific case. But if we confer generality to such interpretations, it is because we agree that it is good for there to be uniformity in the interpretation of legislative texts.

A decision handed down by the Sections United may well be categorically disregarded by all other judicial operators, but this does not prevent it from being recognized as a precedent, at least at the time it is pronounced. When judicial operators engage in evaluated the acceptability of a judicial decision, they are already applying a series of criteria enabling them to recognize that decision as a precedent. Hence, it is possible to identify a judicial decision as a precedent beyond a future act of acceptance and application by other judicial operators. Otherwise, we would be forced to contend, *inter alia*, that the first judge to use a certain decision to justify their own decision is committing an error of law because he would not actually be using a precedent.

2. Excessive Pessimism About the Future of Systems of Precedent

On this second point I will address the pessimism (or perhaps realism?) underlying some of Prof. Zorzetto's comments on the possibility of having a well-ordered system of precedents.

To begin, for Zorzetto a well-ordered system of precedents: "means assuming that precedents are not simply a chaotic fact, that it is not simply a collection of *de facto* decisions. To speak of a system actually implies the existence of a sorting criteria and connections. This is especially true we consider the idea of a 'well-ordered' system a value-laden one" (Silvia Zorzetto, 2022).

I have questions about exactly what Prof. Zorzetto means when referring to "the existence of ... criteria," but it seems clear that when she mentions "sorting criteria and connections" she is probably speaking of hierarchical (material) (Ricardo Guastini, 2016, pp. 207 ss) relationships between precedents that define which of the different conflicting precedents (i.e., *rationes decidendi*) should be applied. One might first ask what these sorting connections would be and there are, in fact, several options: from weighting the conflicting precedents applicable to a given case to the use of traditional criteria for resolving conflicts. In the latter case, however, it should be noted that such criteria acquire certain particularities when used in the context of precedents and their *rationes decidendi*.[11]

Secondly, it is necessary to ask whether these sorting connections are abrogating in nature, i.e., whether the fact that two precedents contradict each other implies that one needs to be repealed. The issue is by no means trivial, because –if it has abrogating effects– a single isolated decision could overturn a series of precedents that could not be cited again. Prof. Zorzetto obviously cannot be accused of not having further specified these criteria and their effects, given that the problem lies in the lack of precision in our systems of precedents.

Thirdly, it seems that a well-ordered system of precedents requires something more than just "the existence of sorting criteria and connections." I am referring in particular to rules of change for, and especially overruling, precedents. One of the reasons precedents in Italy, Spain or Chile seem to be a catch-all is because the conditions under which a court can distinguish a special precedent or directly overrule a precedent.

Returning to the Hartian metaphor of primitive legal systems (in general), systems of precedent require both rules to identify what the precedents are (rules of recognition) and rules to know who can create new precedents and overrule those already in force (rules of change), as well as who is obliged to follow the precedents and the ensuing effects.

Prof. Zorzetto is quite skeptical of the possibility of building a well-ordered system of precedents. It is no longer an issue and not only an issue of building systems of precedents "from the ground up" (Silvia Zorzetto, 2022) but that "[e]ven if the binding nature of case law precedents were established in the abstract through a principle or a meta-standard, *sceteris paribus* shall always apply: it would be a flawed or defeasible principle or meta-standard from which one can and should depart whenever there are better reasons to decide otherwise" (Silvia Zorzetto, 2022). Zorzetto's main reason for such a claim is, I believe, that since "each life case is 'unique,' judicial decisions are an unavoidable part of any existing law... Justice-equality (generality) demands that similar cases be regulated similarly, and that the differences between cases and their handling be commensurate and proportionate. This

implies that if it is going to be fair or right under the law, no decision can be made in a vacuum, independently of the regulation of other cases... This may lead to arguing more from the perspective of analogy, proportion, equality, etc. (generally valuing similarities) or, on the contrary, more from a distinctive perspective (generally highlighting the differences)" (Silvia Zorzetto, 2022).

We are not simply stating that cases are unique or that decisions should not be made in a regulatory vacuum. I cannot possibly disagree with statements of such a general nature. The point is that Zorzetto assumes not only that Italian judges do take into account the uniqueness of each case, but that it is also impossible for them not to do so. In other words, since the particularities of the case must be borne in mind and the lawmakers who have expressly established a rule of precedent are not flawless angels, it is necessarily a defeasible rule, which leaves –and must leave– open the possibility that the judge of a given case may take other aspects into account as relevant and depart from the precedent (ideally, justifiably).

Given this context, a well-ordered system of precedents is impossible. It will always be open to a judge *a quo* to consider facts and circumstances that had not been taken into account when setting the precedent. It seems that judges, all judges, must be capable of deciding whether or not to follow a precedent based on the circumstances of the case. In terms of precedents of interpretation, each judge (every judge) must be capable of establishing the interpretation that best suits the case and thereby achieves material justice, making distinctions among the different cases are apparently the same.

However, I do not consider this a descriptive or conceptual theory, but an ideological approach (of legal ideology) Prof. Zorzetto assumes. These latter conclusions are what make a well-ordered system of precedents undesirable. Zorzetto's comments are rooted in a particularistic ideology according to which it is up to the judge in the specific case to determine the relevant circumstances of each case. In this way, precedents —and the rule of precedent should serve as principles or guidelines to be followed, but without ever sacrificing justice for the specific case.

This would not, as Zorzetto claims, make it impossible to have a well-ordered system of precedents, but it would make it undesirable. Do we really want each and every judge to reopen issues already settled by the Court of Cassation Sections United? Would it not be more sensible for the highest courts to be the ones to issue general rules to guide the rest of the cases without reopening the issues? Moreover, as it is more than debatable whether proximity to the case puts us in a better (moral or epistemic) position as to what the relevant circumstances are, this implies waiving the values advocated by a system of precedents.

A system of precedent clearly promotes equality in a formal sense, although this does not necessarily mean that material justice is sacrificed. Besides, it is an important constraint to judicial arbitrariness and, in a country like Italy with places with a considerable judicial

backlog, it would also bring much greater efficiency to making and justifying decisions. It does not seem a good idea to underestimate its virtues, even if it implies sacrificing other values.

As Zorzetto claims, there is no such thing as a perfect system. But from this we cannot conclude that a well-ordered system of precedents is not possible. The fact is that this implies taking a position in favor of certain values over others. But there is no logical or axiological impediment in taking a legislative approach that limits judges' powers to interpret legislative texts in the way they consider most appropriate, to fill gaps, etc., in favor of interpretations established in the precedents issued by the Court of Cassation Sections United.

In no way does this imply that a court of last resort's interpretation is either the fairest or the right one. The important question is whether we want each judge in their jurisdiction to have the competence to decide which interpretations are the most convenient, or whether it should be the highest courts to decide in general terms.

This has been an excellent opportunity to discuss some of the theories in Professor Zorzetto's and Pulido Ortiz's work, and I hope it will not be the last time I do so.

III. References

Arriagada Cáceres, María Beatriz(2021). La clausura de los sistemas de normas jurídicas de competencia. Episodio I: Los poderes normativos de las autoridades públicas. In *Revus – Journal for Constitutional Theory and Philosophy of Law*, (43), 1-23.

Arriagada Cáceres, María Beatriz(2021). Las dos caras del precedente vinculantes. In Á. Núñez Vaquero, M. B. Arriagada Cáceres, and I. Hunter Ampuero. *Teoría y práctica del precedente* (pp. 365-400). Tirant lo Blanch. 2021.

Carcattera, Gaetano (2014). *Le norme costitutive*. Giappichelli.

Caroni, Pio (2013). *Lecciones de historia de la codificación*. Dykinson,

Ferrer, Jordi (2000). *Las normas de competencia.* Centro de Estudios Políticos y Constitucionales.

Guastini, Ricardo (2016). *La sintaxis del Derecho*. Marcial Pons.

Guastini, Ricardo (2018). *Ensayos escépticos sobre la interpretación*. Zela+.

Kelsen, Hans. *Teoría Pura del Derecho.* Porrúa.

Mendonca, Daniel (2011). *Las claves del derecho*. Gedisa.

Moreso, José Juan & Vilajosana, Josep M, (2005). *Introducción a la teoría del derecho*. Marcial Pons.

Núñez Vaquero, Álvaro (2021). ¿Son obligatorios los precedentes? La regla del precedente como norma(s) constitutiva(s). In Á. Núñez Vaquero, M. B. Arriagada Cáceres & I. Hunter Ampuero. *Teoría y práctica del precedente* (pp. 333-363). Tirant lo Blanch.

Núñez Vaquero, Álvaro & Arriagada Cáceres, María (2021). ¿Es la aplicación del precedente una condición necesaria de su existencia? Un examen desde la teoría analítica del derecho. *Revista Ius et Praxis*, (1), 75-94.

Pulido, Fabio (2022), Are Rules Governing the Use of Precedent Necessary?, (en cursivas) *Problema. Anuario de Filosofía y Teoría del Derecho*, número especial. https://revistas.juridicas.unam.mx/index.php/filosofia-derecho/issue/view/700

Tarello, Giovanni (2013), *La interpretación de la ley*, Lima, Palestra.

Troper, Michael (2004). Una teoría realista de la interpretación. In *Ensayos de teoría constitucional* (pp. 37-62). Fontamara.

Vío Vargas, José. La práctica de citar sentencias pasadas como modelo de precedentes en Chile. In Á. Núñez Vaquero, M. B. Arriagada Cáceres & Hunter Ampuero, I., *Teoría y práctica del precedente* (pp. 279-302). Tirant lo Blanch.

Zorzetto, Silvia (2011). *La norma speciale.* ETS.

Zorzetto, Silvia (2022),Legal Arguments and Case Law Precedents: An Experiment in Judicial-Sociological Experiment Between Practice and Theory, (en cursivas) *Problema. Anuario de Filosofía y Teoría del Derecho*, número especial. https://revistas.juridicas.unam.mx/index.php/filosofia-derecho/issue/view/700

Notes

* Article submitted on October 30, 2021, and accepted for publication on december 12, 2021.
** Professor of Legal Philosophy at the University of Murcia. Email: a.nunezvaquero@um.es, ORCID: https://orcid.org/0000-0001-8665-2381.
1 However, in order to uphold the theory of necessity, the possibility that following precedents are merely authorized must first be upheld as a preliminary step in understanding this concept.
2 Although this set of disjunctively sufficient conditions can be reconstructed by a single rule containing a necessary condition made up of different disjunctively sufficient conditions, it is true that this is a somewhat complicated way of reconstructing the law.
3 In summary, if we hold that precedents are rules, we cannot say that the same decision contains two *rationes decidendi*, but that it constitutes two different precedents. However, it seems much more plausible to think that a single decision, which constitutes a precedent, may contain more than one rule relevant to deciding other cases, i.e., more than one *ratio decidendi.*
4 Consider the legal systems where for court case law to be binding, it must be reiterated on several occasions. Thus, following a previous decision constitutes the necessary reiteration for it to become binding. However, reiteration should not be necessary to speak of precedent. Among other reasons, (Núñez Vaquero, Á. and Arriagada Cáceres, M.B., "¿Es la aplicación del precedente una condición necesaria de su existencia? Un examen desde la teoría analítica del derecho", *Ius et Praxis Magazine*, Year 27, No. 1, 2021, pp. 86 ff.), because the first court to cite a previous decision might appear to be incurring in a legal error.
5 My position in the aforementioned work is that rules governing the use of precedent cannot be interpreted as prescriptive rules, obligating us to follow precedents, but as a constitutive rule limiting the content of judicial decisions. In addition to the fact that sanctions against judges for disregarding precedents are exceedingly rare and forward-looking in nature, it seems that such sanctions would require subjective input. It should also be pointed out that a system of precedent could operate exclusively on the basis of constitutive rules, but not exclusively on the basis of prescriptive rules because there might be dissenting judges who would be willing to accept sanctions if they can continue deciding contrary to precedent.
6 For a different interpretation of rules governing the use of precedent using a Hohfeldian approach, see M. B Arriagada Cáceres (2021b, pp. 365-400).
7 Here, I am implying that the rule for a decision to be considered a precedent must be justified in some way. This raises problems that would require further explanation –in what sense it must be justified; if it is a partial justification, to what extent it must be justified; the possibility of implicit justification, and so on– but are beyond the scope of this paper. Even so, such a rule has been positivized in many legal systems.
8 A similar work, albeit more focused on the analysis of linguistic forms, was undertaken by John Vío Vargas (pp. 279-302).
9 See, for example, M. Troper (2004, pp. 37-62).
10 In fact, there are many precedents in US legal culture which many courts consider bad precedents, but even so, they continue to be regarded as precedents. Consider, for example, the attacks on *Roe v. Wade* in recent years.
11 Here are a few examples. First, the principle of hierarchy can be inferred from the individual rules resulting from decisions considered precedents or from the legal texts on the basis of which the *rationes decidendi* of precedents are formulated. Thus, there would doubt as to the relationship of precedence between a precedent issued by a lower court interpreting the constitution as opposed to a precedent handed down by a constitutional court issuing a rule that fills a legal gap. Second, the principle of specialty —on which Prof. Zorzetto is an expert (*La norma speciale*, ETS, Pisa, 2011)— can take on a different meaning when dealing with courts with a very specialized material scope of competence, such as the Chilean Environmental Courts or the Spanish Courts of Violence against Women.