THE MIGRATION OF PRECEDENT IN CIVIL LAW COUNTRIES: AN EU PERSPECTIVE

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ABSTRACT

Especially with the increase in transnational and international law, that quintessential feature of the common law, the precedent doctrine, is becoming an unexpectedly successful export model to civil law jurisdictions.

This paper will address the influence of precedent in civil law countries by primarily focusing on European Union Law and to a lesser extent, in International Law and the European Convention on Human Rights. This practice is increasing, despite the fact that in the European Union only two out of the 28 Member States are common law jurisdictions.

Key terms: precedent, sources of law, civil law, common law, transnational law, International Law, European Union Law, European Convention on Human Rights.

PART 1: INTRODUCTION

It is said, rather fancifully, that one may be a horse, even without being born in a stable. And, somewhat similarly, with the increase in transnational and international law, that quintessential feature of the common law, the precedent doctrine, is becoming an unexpectedly successful export model. To elaborate, it is true that the doctrine of precedent is one of the many rather distinctive features that make up the so-called common law, which originated in England and was transferred to most of the countries that were once part of the British Empire.

Even more important, when we speak of precedent, we are not taking the inflexible binding form, with all its quirks, developed in England. Rather, what we have in mind for discussion purposes is a simple Platonic form, without detailed specifications. There is

however, the following terminological (or vocabulary) point. After some thought, in this paper we are going to use the term 'precedent', as opposed to paler expressions used elsewhere, like 'case-law' or 'judicial decisions'.(1) Accordingly, our focus in this paper is the impact of precedent through international and transnational law in the civil law world.

It is a major assumption underlying this paper that precedent is both a good and inherently simple, principle that, since it is based on the idea that, other things being equal, 'like cases must be decided alike'. Thus, for instance,quite outside the courts and the legal system, in many areas (often unsophisticated of human organization), some sense of precedent has emerged almost spontaneously. To take some examples, at random: within the family, if one child is allowed to drive the parents' car, on achieving the age 18, then so must the other children; if Developer A gets a building license to construct a three story building, then so must Developer B, for the next-door site.

Despite this excursion, we should emphasize that, throughout this Paper, we are contemplating a senior court addressing a dispute on a point of law, not fact: we assume that the facts were either not in dispute or, if they were, have been settled by a lower court or in an earlier part of the judgment. In other words, we are examining precedent in the context in which it seems to be moving fitfully towards achievement in many civil law jurisdic-

(1) For example, Article 38 (1) (d) of the ICJ Statute places 'judicial decisions' as subsidiary means for the determination of rules of law. To clarify that 'judicial decisions' are not to be considered as precedents, Article 59 of the Statute of I.C.J. clearly states that the 'decision of the Court has no binding force except between the parties and in respect of that particular case'. Therefore, strictly speaking ICJ does not observe a doctrine of precedent, but strives to maintain judicial consistency. See James Crawford, "Brownlie's Principles of Public International Law", 8th Ed., (Oxford UP, 2012),pg. 37-39.

tions, as a significant source of law. Thus, for example, dealing mainly with France and Germany, an authoritative text makes the following strong statement:

"…a quick look round the Continent shows that matters are not really very different[from the common law world]. There it is true that there is never any rule which compels a judge to follow the decisions of a higher court, but the reality is different…It is hardly an exaggeration to say that the doctrine of *staredecisis* in the Common Law and the practice of the Continental courts generally lead to the same results… "(1)

Another authority after confirming this, so far as Western European jurisdictions are concerned, then goes on to add the following gloss:

'Where does this leave the legal systems of Central and Eastern Europe, and perhaps more in general the former socialist nations? The answer can be short and succinct: way back where all the civil law countries stood some fifty years ago: "the post-communist judicial methodology is much closer to the narratives of the European legal culture that prevailed in the nineteenth century." One of the reasons for this can be found in the writings of communist writers. In the former Czechoslovakia, the role of precedent was denied on the ground that precedent as a source of socialist law would go against the principle of democratic centralism. In this view, judge-made law is incomprehensible, beyond the reach of the vast masses of the population.'(2)

(1) Zweigert & Kötz, Introduction to Comparative Law, (0xford UP, 1998) pg. 262-263.

(2) Hondius, 'Precedent and the Law', in (eds.) Boele-Woelki & van Erp, General Report of the XV11th Congress of the International Academy of Comparative Law (2006), p. 42. Professor Hondius was writing a commentary on a survey of six common law and 15 civil law jurisdictions (not including Africa, most of Asia or most of Latin America), whose Rapporteurs had responded to a questionnaire issued by the Congress. The quotation within a quotation is from the national report of the Czech Rapporteur (Prof. Kühn).

Bearing in mind these statements, which we accept, we would elaborate as follows. First, in practice,the onward march of precedent has been a patchy development with change in some jurisdictions and not others, for instance there has been much less of a move in a precedent-direction in the Balkans or the Middle East. In such jurisdictions, the point is made that each individual judge has to adjudicate based on the specific legal sources identified in the national constitution and these do not include precedent.(1) And by legal sources, the focus here is on legal sources that are binding.(2) Accordingly, strictly speaking, if the judge follows a precedent they violate their constitution. By contrast, what the common law has to say is that, while the judge must be 'independent', meaning independent of pressure from government or other powerful bodies, the judge is subject to the law. The judicial oath is 'to do justice according to the law' and, importantly, 'law' includes the doctrine of precedent. This ideal is contrasted with the (mis)conduct of a judge who feels compelled to follow his own ideas and do 'palm tree (in)justice'.

(1) See for example, Article 98 of the Constitution of R. of Macedonia determining the sources of law of the Judiciary by stating that "Courts judge on the basis of the Constitution and laws and international agreements"; Article 116 of the Constitution of R. of Albania determines "the normative acts that are effective in the entire territory" by referring to the Constitution, ratified international agreements, laws and normative acts of the Council of Ministers"; Article 102 of the Constitution of Kosovo states that the Courts adjudicate based on the Constitution and the Law; Article 118 of the Croatian Constitution states that the Courts administer justice based on the Constitution, law, international treaties and others sources of law. As there is no mention of case law or precedent as a valid source of law to be used by the judiciary, their use would be unconstitutional, to say the least.

(2) For a discussion on sources of law in comparative law, see Stefan Vogenauer, 'Sources of Law and Legal Method in Comparative Law', in Mathias Reimann, Reinhard Zimmermann, Editors, The Oxford Handbook of Comparative Law, (Oxford UP, 2006), pg. 866-898.

There is more to be said about theory. Even in jurisdictions, where in practice there has been movement in the direction of precedent, this has not affected the underlying theory and dogma. The significance of a change in practice, which is not reflected in theory, is problematic and hard to define, especially across several jurisdictions. But one can say, as a generalization, that long-term it is well for legal system's theory and practice to be in alignment. Here, we consider briefly why it is that the precedent doctrine has for many centuries not been a central plank of the theory underpinning civil law system? Two features need to be briefly mentioned.

The first point, which is historical, is that, in the civil law tradition, following nineteenth century codification, the 'codes' form the heart of the laws.(1) They are comprehensive, for there are separate codes for most private law issues – persons, ownership of land and things, conflict of laws; children; evidence; civil procedure; criminal procedure. Taken together, they range over most of the field of human activity governed by the law. By contrast, in the common law a good deal of the heartland of the law just mentioned was first established by the common law, not statute. Given this difference, it seemed natural in the common law jurisdictions to develop a precedent system, as a necessary discipline to assist in the organisation and transmission of what was largely judge-made law.

By today, the second point, which is based on the different intellectual traditions and styles of the common and civil law systems, is probably stronger. The style of deductive reasoning used in the civil law has been characterized as: "The old positivistic

(1) See for example the French Civil Code of 1804, the German BGB of 1900, the Austrian ABGB of 1811, and the Swiss Civil Code of 1912.

idea that deciding a case involves nothing more than 'applying' a particular given rule of law to the facts in issue by means of an act of categorization …"[1] But this use of logic as a basis for reasoning from a general principle to a conclusion makes a major assumption. This is that logic is objective and so any subjectivity on the part of the judge is excluded. But our response to this is that the civilian judge who has to answer the subjective question ‹what should we do this time...› is, in principle, at least, taking on his shoulders a great weight of value judgment. The common law judge, asks only the (relatively) factual query, ‹what did we do last time?[2] By contrast, the civil law question: 'what should we do?' depends on values, some of which will be personal to the particular judge.This greater reliance on the subjective opinion of the judge inevitably draws with it a loss of consistency and certainty, in comparison with a system in which precedents are followed. This is because, in that system, the foundation from which a judge is beginning their reasoning is a published precedent; whereas in the traditional civil law court the judge has to move all the wayfrom the abstract text of the governing instrument and interpret it directly to the result. In general, the common law judge usually has to make a narrower jump in their reasoning than their civil law counterparts.

As a supporting point, we suggest that what may be called 'the civil law assumption' would be more likely to be correct, if the instrument which supplies the general principle, for example an EU

(1) See Zweigert & Kötz, pg. 264.

(2) ‹The civilian naturally reasons from principles, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, ‹What should we do this time?› And the second asking aloud in the same situation, ‹What did we do last time?››. This contrast is from Lord Cooper, (an eminent Scottish judge) in ‹The Common Law and the Civil Law - A Scot›s View›, 63 Harv. L. Rev. 468, 470 (1950).

Directive, provides a single, precise message.(1) But, as it happens, EU law is customarily drafted in very general terms such that the text is able to last through time and be applied to changing circumstances. In addition, most Directives, serve a number of diverse policies, because they are usually the outcome of political compromises (resulting in voluminous preambles). The judge thus has a large number of choices, among which he or she may favor his personal preference. And in that way reach a subjective result. In Part 2 we give some more detailed examples as to why precedents are needed in European UnionLaw.

Moreover, the jurisprudence of the European Court of Justice (ECJ) prides a number of major examples of judicial activism, going way beyond interpretation, for instance: Direct Effect of Treaties or Directives;State Liability;or the Supremacy of EU law.(2) We are commenting on this only in relation to precedent and merely remark that, if there is to be judicial activism, involving, a substantial glossing of a balance deliberately drawn by the Founding Fathers of the EU, then one can surely expect that all judges should follow the same line: otherwise, the change goes beyond judicial activism to 'judicial anarchy'.

Another and broader point is that the precedent doctrine may be regarded as being connected with a difference in the constitutional, historical and political positions of civil and common law judges. Put simply, common law judges are regarded by ordinary

(1) There is a further point. 'In the European communities, the legislation is often new and incomplete, with the result that the case-law of the Court of Justice is more important than in most other legal orders. This case-law – though in theory not formally binding – is often the most important source of law.' Schermers and Waelbroeck, *Judicial Protection in the European Union*, 6th Ed., (Kluwer Law International, 2001), pg. 260.

(2) For a discussion on the status of case law in the ECJ see for example, Anthony Arnull, The European Union and its Court of Justice, 2nd Ed., (Oxford UP, 2006), pg. 622-638.

citizens, politicians, and, not least, themselves as occupying a higher status in their constitution and social hierarchy than is the case with civilian judges. In the eyes of the common law, the status and legitimacy of precedents depends, to a large extent, upon the fact that, following thorough argument in open court, they have been adopted and articulated by the senior and independent personages, who delight in being called 'the Queen's judges'.

This difference in the positions of the common and civil law judiciaries does raise a possible objection to the thesis of this paper, which we briefly address here. This objection starts from the assumption that in many civil jurisdictions, senior judges do not have (or believe themselves not to have, as is also relevant) quite the same independence from government or vested interests, as their equivalents in common law countries. Underlying this is the fact that, in the common law jurisdictions, judges are selected from among senior practitioners rather than being members of a career judiciary. Does this major structural difference mean that civil law judges should not be entrusted with the same degree of power to make precedents?

This is by no means a negligible objection. It could indeed lead on to the deep waters of constitutional law and history of particular jurisdictions. Here we have no space available to voyage in such uncharted seas. We merely flag it as requiring more attention and go on to suggest however that in general, there are two substantial contra-arguments, against its objection.

The first counter argument is that preventing earlier judgments from having precedential force over later judgments (in other words, the classic civil law position) means that later judges have the freedom to decide the same points subjectively. In particular, the judge in the later case is allowed greater freedom to decide

the case in a way which may suit the Government interest (assuming this interest is involved in the case).

At a broad level, one can say that the doctrine of precedent bands the judges together. This gives them a corporate identity and reputation, with the public, and increases their authority as against, say, the Government. To speak plainly, if a Government wishes to coerce a judge, as a matter of practice it is usually easier to do so in relation to one judge who is deciding a sensitive case rather than a cohesive band of judges. To put the same point another way, a judge is less isolated if they can be understood as saying to the Government: 'I am not deciding this in isolation but as a member of a group, applying their collective wisdom, worked out in public over many centuries.'

The second counter-argument is that, quite apart from precedent, there is an international movement to establish and fortify the Rule of Law, including the independence of the judiciary, and making judges accountable. And this is true even, or perhaps especially, in jurisdictions where traditionally, these desirable conditions have not existed. Now making judges accountable is of course, a full subject by itself, with which we are not dealing. But here is an important, incidental point: one of the best ways (in that it is relatively inoffensive to the Independence of the Judiciary, which is the usual danger, thought to come with judicial accountability) of making a judge accountable is to require them to publish reasons. A good, practical way of doing this is to ground judgments, in whole or in part, on precedents. For this means that a judgment must demonstrate a link between the current judge›s decision and those taken on the same point, by other judges.. The reader of the later judgment is thus enabled to check whether there is a consistency between the current and earlier

judgments. The judgment should be able to demonstrate either such consistency or, alternatively, that there are exceptional facts or changed circumstances, which justify lack of consistency. But what if the judge can demonstrate no such consistency or exceptional facts and circumstances? In that case, his or her judgment is shown up as suspicious. This is a form of accountability.

A very practical point worth noting is that in many civil law countries, with career judiciaries, promotion of a judge from a lower court is hampered if that judge has been often reversed by a higher court. Naturally, one of the most frequent ways in which this can come about would be because that judge had failed to follow a higher court›s precedent. In short, this does some form of pressure in favor of following precedents. But this seems a way of inculcating respect for precedent, which is haphazard and otherwise undesirable, because of its implications for judicial independence.

To return to the main theme of this paper: within the civil law system, our particular focus is the impact of precedent as regards International and transnational law. This type of law has increased exponentially in international law through the case law of the International Court of Justice (ICJ)[(1)]; in international criminal law through the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR)[(2)]; in

(1) In discussing precedent in the ICJ, Mohamed Shahabuddeen, a judge in the ICJ, states: 'the fact that the doctrine of binding precedent does not apply means that decisions of the Court are not binding precedents; it does not mean that they are not 'precedents'. The term occurs in the jurisprudence of the Court; it occurs also in the pleadings of counsel and in the writings of publicists.", see Mohamed Shahabuddeen, *Precedent in the World Court*, (Cambridge UP, 2007), pg. 2.

(2) On the role of 'precedent' in international criminal tribunals see Aldo Zammit Borda (2013), 'The Direct and Indirect Approaches to Precedent in International Criminal Courts and Tribunals', 14 Melb. J. pp. 608-642.

international trade law through the World Trade Organization (WTO) Panel and Appellate Body Reports[1]etc.[2] If this is to operate fairly and effectively, naturally, Governments, businesses and private persons would expect common standards. Some of these will come from the conventional or other instruments which have been agreed. But, as argued earlier, this will usually not be enough to provide consistency in every instance. We shall test this contention in relation to EU law, in Part 2. But given space, similar points could be made in a number of different areas of international law with the proliferation of many international tribunals.

In relation to this transnational environment, there would seem to be at least two particular reasons why some sort of precedent system is likely to grow up.

First, if one were dealing with an exclusively national milieu, there would be some differences in subjective, individual views, between Judge A and B, even coming from the same national and legal culture and class. But, in general, this could be expected to be not as great as those between two judges coming from very different jurisdictions. In short, where one is dealing with transnational or international law, being interpreted, whether by the ICJ or the ECJ with varying national composition, or by

(1) For a discussion on WTO dispute settlement reports and their relevance for subsequent cases see Peter Van den Bossche, Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 3rd Ed., (Cambridge UP, 2013), pg. 51-53.

(2) For a more general discussion on the influence of 'precedent' among different tribunals see Nathan Miller (2002), 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals', 15 Leiden J. Int'l L., pp. 483-526.

different national courts, the need for precedent is greater than in the national milieu.(1)

There is a second reason why precedent is especially important in the transnational or international field. At a basic level, most international agreements or arrangements engage, directly or indirectly, the question of sovereignty. Necessarily, in ratifying the agreement, a state must give up some level of sovereign authority. And it does so on the basis that it is giving up only the same amount as is sacrificed by the other member states. Take, as an example, a major plank in the framework of EU Law. Assume that a Directive has not been implemented in domestic law and the question arises as to whether, nonetheless, that Directive has ‹Direct Effect› or engages ‹›State Liability›, in a national court. It will naturally be expected that, whatever is the answer,*the same answer* will be given to that question, whichever state has failed to implement the Directive. To make this happen, some sort of effective precedent system, is, we believe, required.

A Serbian episode dealing with adherence to European Court of Human Rights case law[2], provides a case study of these difficulties and of how the idea of precedent provides what may be found to be the best practical solution on offer.An editorial published by the Serbian State Television titled “The roads to justice lead to Strasbourg” analyzes the problem of having complaints

(1) Some treaties specifically require for uniformity of interpretation in their text, for example, Article 7 (1) of the UN Convention on Contracts for the International Sale of Goods (CISG) states that “in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application…”. For a discussion on uniformity of CISG interpretation see Vivian Grosswald Curran, Ed., Comparative Law: An Introduction, (Carolina Academic Press, 2002), pg. 113-117.

(2) The European Court of Human Rights is a court based in Strasbourg, France, and rules on alleged violations of the European Convention of Human Rights. The Court has delivered more than 10 000 judgments that are binding on countries concerned.

by citizens that different judges in different courts on similar cases adopt different decisions in respect of issues which have been settled by the European Court of Human Rights.(1)In dealing with the problem, the then Minister of Justice of Serbia states "it is clear now that it is actually up to the Appeal Courts deciding on appeals from Basic and Higher Courts to establish legal certainty by having unified decisions of courts". However, in addressing the problem, the President of the Supreme Cassation Court considers this to be a "practical issue" and thus again illustrating the different approach that civil lawyers have on the issue of "admitting the existence of precedent or case law" in their legal system. Such recognition, at least in theory, in some legal circles would amount to "blasphemy".

The Serbian example brings out an inevitable difficulty. At one extreme, one may have the traditional English style doctrine, by which, for instance until 1966, the House of Lords could not go against its own precedent, however out of date or wrong-headed; the law was trapped in a kind of Sisyphus-cycle, condemned to repeat its mistake endlessly, unless released by legislation. This led to some anomalies in the law which at some points were sorely in need of law reform. Against this, the advantage of precedent is consistency and predictability which may have to be purchased at the price of some injustice and inflexibility in unexpected individual cases. Plainly, there is a balance here to be drawn which brings the maximum of predictability with the minimum of injustice.

(1) See "The road to justice leads to Strasbourg", Serbian State Television, November 22, 2013, available online at: http://www.rts.rs/page/stories/sr/story/125/Društvo/1451866/Putevi+pravde+vode+u+Strazbur!.html, accessed July 2015.

PART 2: EUROPEAN UNION LAW

This is a big subject. Given time and material, one could consider at least the following four situations:

a) Does the ECJ follow its own previous decisions?

b) Do national courts follow ECJ's rulings?

c) Do national courts follow their own previous rulings on EU points?

d) Do national courts follow the rulings of other national courts, on EU points?

Beyond these major questions, second order issues beckon, especially because of the existence of multi-tiered hierarchies of courts. For instance, as regards *a)* what is the position if one is asking whether the General Court follows its own rulings or those of the ECJ.(1) Next, within member states national court hierarchies, is the position regarding the following precedent different from that where purely domestic law points are involved? We are not getting into these second order questions, nor into issues *c)* and *d)*, identified above, but are confining ourselves to *a)* and *b)*.

As a general observation, it is worthnoting that the amount of legal originality, which went into the institutional architecture of the EU, has probably not received sufficient study or praise(2) The example which is relevant here is the Preliminary Ruling

(1) But see, for example, Case T-85/09 Kadi v Commission (Kadi III) [2010] ECR II-5177, at paras 121, 123: 'The General Court … takes the view that … the appellate principle itself and the hierarchical judicial structure which is its corollary generally advise against the General Court revisiting points of law which have been decided by the Court of Justice... The General Court considers that in principle it falls not to it but to the Court of Justice to reverse precedent in that way.'

(2) It is true that there were ideas swirling around within the community of 'international association' thinkers, during the idealistic period before World War I. But the point is that the EU actually made it happen and made it work.

(commonly referred to as Article 267[1] by which a domestic court faced with a difficult point of EU law interpretation may or, in some cases, must refer it to the ECJ for its ruling, on that point only. The ECJ decisions springing from this jurisdiction by far outnumber and probably exceed in influence, those decisions which emanate from its Direct Jurisdiction. Partly for this reason, we are concentrating on the Preliminary ruling jurisdiction.

The essential idea underlying Article 267 is that the EU requires uniform legal conditions, throughout the 28 Member States: this is the law's contribution to the idea that there should be a 'level playing pitch'.

In a transnational legal order, the basic method in which the objective of consistency from the court is to put into effect is usually that there is, at the head of the system of legal interpretation, a transnational court (in the EU, this is the European Court of Justice), whose judges are appointed by each of the member states. The administration of the specific legal order is shared between this transnational court and the national courts of each member state.

Working from first principles, in the interests of consistency one would anticipate some form of precedent system, by which the rulings of the ECJ would be followed not alone in the instant case but in all other similar cases, whether before the ECJ or in all national courts.

When one looks to the law, one finds that this expectation is confirmed. The firmest ground, as one might expect, is to be found in the UK where the relevant statute states: '…the courts are directed by statute to determine any EU law point 'in accor-

(1) Art. 267 of the Treaty on the Functioning of the European Union. The provision was originally Art. 177, and subsequently 234, of the Treaty of Rome, 1957.

dance with the principles laid down by and any relevant decision of the European Court'[1], though with nothing said about any other court.

But what of the ECJ itself and of the mainstream civil, national courts? While there is no equivalent statutory instruction to that in the UK, according to two civil law writers:

'Normally, it is taken for granted that the Court of Justice will follow the precedents it has established. … References to previous cases have become very frequent, which is probably not only due to the fact that there is more previous case law to refer to but also to the fact that since 1973 some of the Courts' judges come from a legal system in which the binding force of previous cases is accepted. In a number of cases, the Court will simply refer to previous judgments and then rule that: 'since there is nothing in the present case capable of leading to a different conclusion, it is proper to reply to the same effect.'[2]

And in the case of national courts, it is also the expected practice to follow the rulings of the ECJ, in earlier, relevant cases: 'In some preliminary rulings, the Court has even sent a copy of a previous decision to a national court which had asked a similar question, or it may, by reasoned order, simply refer to that previous decision in conformity with Article 10(43) of its Rules of Procedure.'[3]

(1) European Communities Act, 1972, s. 3(1). Nothing on the point is said in the (equivalent) Ireland European Communities Act, 1972.

(2) Schermers and Waelbroeck, op. cit.Judicial Protection in the European Union, 6th Ed., (Kluwer Law International, 2001), para. 263. See, also Lenaerts, Van Nuffel et al, European Union Law, 3rd Ed., (Sweet & Maxwell, 2011); para 6.25, p 311: 'This (tacit) recognition of precedent goes to the creation of a hierarchical relationship between the Court of Justice and national court which was not necessarily created by the treaties, and an entrenchment of the place of the Court as a 'constitutional' court of the Union.'

(3) Schermers and Waelbroeck, para 263.

a. Practical Operation: 'Extracting the Precedent'

In this field, many substantive questions come disguised as issues of practical organization,. Among these are:how to 'extract the precedent'; meaning of 'persuasive'; reliable system of law-reporting, agreement on which are the courts whose judgment may be adopted as precedents.

Let us elaborate on the first item on this list.This refers to the fact that the critical part of the process is determining what was the character and width of the rule, which was established in the earlier case. The difficulty here arises from the fact that two cases never have exactly identical facts so that the judge in the case before the court (usually called the 'present' case) has to reach a decision as to how the facts in an earlier case compare with the facts of the present case. The judgment needs to carry out this exercise in order to decide whether the facts of an earlier case are sufficiently similar to those of the present case to be regarded as a precedent.

In the average common law hearing and judgment, probably too much time goes into the exercise of dissecting out the precedent. In part, it is an attempt, by a virtuoso display of unrealistically fine line-drawing, to conceal the fact that subjective decision-making is going on. In addition, the fact that lawyers are paid by the day prolongs the proceedings. Worst of all is the almost incredible fact that, in multi-member courts, not only are dissenting judgments, but even separate assenting judgments allowed.

But this does not justify the rush to the other extreme, which has occurred in civil law courts. Most common law text books on EU Law, written by common law authors, comment dismis-

sively on the 'formalistic' way (referring mainly to their treatment of precedents) in which ECJ civil law judgmentsare written. A typical comment is that of Professor Hartley:

'.... The [ECJ] does follow its previous decisions in almost all cases. The case-law of the European Court is just as important for the development of Union law as that of English courts is for modern English law...However, though lawyers and Advocates General have always cited copious precedents, the Court itself used to refer to its previous decisions only in rare instances.One almost got the impression that it was trying to disguise the extent to which it followed precedent: sometimes it would reproduce sentences, or even whole paragraphs from previous judgments, without quotation marks or any acknowledgement of source. Today, the position has changed though the Court cites precedents only if they support its reasoning: it does not normally cite them in order to distinguish them.'(1)

It was even said, at one time that, an earlier case which went in the opposite direction from the law which the court was adopting, was often included in the list of precedents as if it supported the court's decision; or was simply not mentioned.(2) Because of such casual and covert practices, there is generally no indication of whether the court in the present case has or has not adopted the earlier case as a precedent.The evil of such practices is that they leave future courts and lawyers, trying to get guidance from a judgment, in doubt as to whether to prefer the law in the present or the earlier case. If the earlier case, was not mentioned in the present case, does this amount to 'implicit overruling' or, al-

(1) Trevor C. Hartley, *The Foundations of European Union Law*, (Oxford UP, 7th ed, 2010), pg. 80-81.

(2) See, to the same effect, A. Arnull, 'Owning up to fallibility: precedent and the Court of Justice'. C M L Rev 30 247, 1993.

ternatively, should it be said that the instant case misunderstood or neglected the earlier case. If the second analysis is the one to be adopted,does it follow that the law laid down in the earlier case continues in existence,as a rival to the law in the present case? Either way, the outcome of the most recent court's cavalier treatment of the earlier authority is doubt in the law. And doubt is pretty well the worst thing which can be said about law. A second criticism focuses on the fact that if the judge in the present case in fact relies an earlier case, but does so silently, then the party who has lost because of thisreliance can reasonably claim that they had no opportunity to argue before the judge, that the rule ought not to have been followed, for instance because it was not relevant or the law was out of date. This is a significant erosion of the 'legitimacy' of the judgment and, thus, is a departure from the Rule of Law.

Now,the civil lawyer's response to these lines of criticism may be to say that the decision of a judge is not *the law*. This takes us back to the heart of this paper: we believe that, by now, even in civil law courts, at least where EU law is concerned, previous decisions should be takenas a source of law. If this view be fully accepted, then, as we elaborate in Part 3, there are certain implications for the way in which courts write their judgments on points of law. In this particular instance, if a court wishes to overrule a previous precedent or has to choose between divergent lines of precedent, then it should expressly say which line it is accepting and whether any previous authority is being overruled.[1]

(1)Hartley op cit, 81-82 gives a graphic example.

b. Other Pressure Points

A good deal of attention has been given to the distinction between a 'binding precedent' and a 'persuasive precedent', the first term meaning that a later court *must* follow the earlier precedent, whilst the other term means only that a later court would have to have a good reason not to follow the precedent. For a number of reasons, we respectfully differ and take the view that this categorisation merely adds extra terminology, but no useful substance, to the law. In the first place, one of the last champions of 'binding precedent', raised the white flag 50 years ago(1), when the (UK) House of Lords' acknowledged that it was no longer 'bound' to follow its own previous decisions.So, by today almost all precedent systems are 'persuasive', though no doubt, some are more persuasive than others.

More important, the distinction between a 'binding' and a 'persuasive' was always a rather 'academic' distinction. Our reason for this rather *realpolitik* remark is that, even in its rigorous common law form, there were many ways in which a judge could and sometimes did, manipulate the precedents in earlier decisions and, so, reach the conclusion, based on personal preference. One example, just given, is the distinction between 'binding' and 'persuasive precedents'. Other examples include: the recognition of a court as one whose rulings are of persuasive authority; or distinction between '*res judicata*' and '*obiter dictum*'; ignoring a precedent as unreliable because the judge had not had earlier precedents presented by the advocate ('*per incuriam*'). We need not go into these matters in further detail. The essential point here is that they may be used as 'Trojan horses', to admit judicial subjectivity and lose consistency and predictability, in the other

(1) The historic 'Practice Statement' is quoted in Zweiger and Kötz, *op. cit.*, pg. 261.

words, the very outcome which the precedent system, operated properly, is designed to avoid. They amount to pressure points in the precedent system, which, need to be carefully policed.

These are difficult matters to get right. And, in order to do so, the type of criticism mentioned in the previous paragraphs need to be taken into account. This is something which should be called to mind when considering the type of education considered in Part 3. One should add that, despite its centuries of experience, the common law has by no means resolved perfectly the sort of problems mentioned. Perhaps the migration of precedent to the civil law jurisdictions which are not weighed down by centuries of tradition, will provide an opportunity, for improvement at these points. Perhaps, too go back to the problem of 'extracting the precedent',civil law judges would feel able to experiment with one obvious, but curiously neglected, solution. This is for any higher court writing a judgement, itselfto provide an authoritative summary to guide later courts as to what precedent it considers it has laid down.

PART 3: CONCLUSION

Voltaire in an uncharacteristically blood thirsty passage, remarked that the second edition of his book would be bound in the hide of those who did not accept the first edition. But we are more temperate and make, for the precedent principle, merely Victor Hugo's claim that, there is nothing as powerful as an idea whose time has come.(1) In a transnational world, it is a simple way of implementing the basic policy that justice must not only be done; it must be seen to be done. It is too protean an idea to be dismissed as a trespasser from the common law world.

Roman law, which is considered to be the basis of the civil law tradition, was based on case law; so there is an element here of the return of a long-lost relative and it is likely, that in the civil law jurisdictions, precedent will soon spread into exclusively domestic law territory. The challenge for civil law scholars is to develop a form of precedent, stripped of common law excesses, which is fit for purpose, in the modern and increasingly transnational legal world.

Nowhere is this more important than in legal education. One can say that the development of a rigorous focus on precedent, in its various form, provides a most useful focal point in legal education. In the first place, precedent is system which varies from one jurisdiction to another and from one historical era to another. Thus it affords a useful basis for comparison. Most important of all, it is useful for a student to fasten on to how precedents occur in one case and how they develop or fail to do so, in later cases. This is an excellent way of focusing a law student's attention on a number of features. The first of these is that the operation of a

(1) V. Hugo, *Histoire d'un Crime* (The History of a Crime) [written 1852, published 1877], Conclusion, ch. X. Trans. T.H. Joyce and Arthur Locker [1].

legal rule has to be observed in relation to the facts thrown up by society and its characteristic situations as these changes. An incidental advantage here is that, especially at the start, some students find law a rather dry subject. Case law brings in a dimension of human interest, readily capturing attention which might otherwise be tempted to stray. Next, a keen focus on the facts which either distinguish one case from another or alternatively make them similar, is a convincing way of drawing out the factors which fix the scope and character of the law. Finally, determining exactly is the rule established by the precedent and tracing its development through later cases offers an exercise in close legal reasoning which is good intellectual training for the young lawyer.

May we suggest, as a summary of the earlier Parts, that there have already been developments in law and legal systems, which have increased the use of precedents in civil law jurisdictions. Over the practicing life-time of the present cohort of students, this change is likely to increase and needs to be made more systematic. This development probably calls for some reform of university legal education in many civil law jurisdictions.

References:

- A. Arnull, 'Owning up to fallibility: precedent and the Court of Justice'. C M L Rev 30 247, 1993;
- Anthony Arnull, The European Union and its Court of Justice, 2nd Ed., (Oxford UP, 2006);
- Aldo Zammit Borda (2013), 'The Direct and Indirect Approaches to Precedent in International Criminal Courts and Tribunals', 14 Melb. J. pp. 608-642;
- Austrian ABGB of 1811;
- Case T-85/09 *Kadi v Commission* (Kadi III) [2010] ECR II-5177;
- Constitution of Croatia;
- Constitution of Kosovo;
- Constitution of R. of Albania;
- Constitution of R. of Macedonia;
- European Communities Act, 1972;
- European Convention of Human Rights 1950;
- French Civil Code of 1804;
- German BGB of 1900;
- Hondius, 'Precedent and the Law', in (eds.) Boele-Woelki & van Erp, *General Report of the XV11th Congress of the International Academy of Comparative Law* (2006);

http://www.rts.rs/page/stories/sr/story/125/Društvo/1451866/Putevi+pravde+vode+u+Strazbur!.html, accessed July 2015;

- Ireland European Communities Act, 1972;
- James Crawford, *"Brownlie's Principles of Public International*

Law", 8th Ed., (Oxford UP, 2012);

- Lenaerts, Van Nuffel et al, *European Union Law,* 3rd Ed., (Sweet & Maxwell, 2011);

- Lord Cooper, 'The Common Law and the Civil Law - A Scot's View', 63 Harv. L. Rev. 468, 470 (1950);

- Mohamed Shahabuddeen, Precedent *in the World Court*, (Cambridge UP, 2007);

- Nathan Miller (2002), 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals', 15 Leiden J. Int'l L., pp. 483-526;

- Peter Van den Bossche, Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 3rd Ed., (Cambridge UP, 2013);

- Schermers and Waelbroeck, *Judicial Protection in the European Union*, 6th Ed., (Kluwer Law International, 2001);

- Statute of the International Court of Justice;

- Stefan Vogenauer, 'Sources of Law and Legal Method in Comparative Law', in Mathias Reimann, Reinhard Zimmermann, Editors, *The Oxford Handbook of Comparative Law*, (Oxford UP, 2006);

- Swiss civil code of 1912;

- "The road to justice leads to Strasbourg", Serbian State Television, November 22, 2013, available online at:http://www.rts.rs/page/stories/sr/story/125/Društvo/1451866/Putevi+pravde+vode+u+Strazbur!.html, accessed July 2015;

- Treaty of Rome, 1957;

- Treaty on the Functioning of the European Union;

- Trevor C. Hartley, *The Foundations of European Union Law*, (Oxford UP, 7th ed, 2010);
- UN Convention on Contracts for the International Sale of Goods (CISG);
- V. Hugo, *Histoire d'un Crime* (The History of a Crime) [written 1852, published 1877], Conclusion, ch. X. Trans. T.H. Joyce and Arthur Locker [1];
- Vivian Grosswald Curran, Ed., *Comparative Law: An Introduction*, (Carolina Academic Press, 2002);
- Zweigert & Kötz, *Introduction to Comparative Law* (0xford UP, 1998).

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