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# Reasoning with Previous Decisions: Beyond the Doctrine of Precedence

Jan Komárek\*

**Abstract:** '[A] relative absence of skills in case analysis' is said to be 'the Achilles heel of civil-law methods'. This article takes issue with this view and shows that the continental European tradition has its own ways of dealing with cases. These techniques can appear different from the common law 'case law method', but are no less rational and intellectually sophisticated. The reason for the rather conceited attitude of some comparatists lies in the dominance of the common law paradigm of precedent and the accompanying 'case law method'. If we want to understand how courts and lawyers in different jurisdictions use previous judicial decisions in their argument, we need to move beyond precedent to a wider notion, which would embrace practices and theories existing in legal systems outside the Common law tradition. This article presents the concept of 'reasoning with previous decisions' as such an alternative and develops its basic models.

The article firstly points out several shortcomings of limiting the inquiry into reasoning with previous decisions by the common law paradigm (1). On the basis of numerous examples provided in section (1), I will present two basic models of reasoning with previous decisions: case-bound and legislative (2). The following section seeks to explain why the common law paradigm has for so long dominated most debates on reasoning with previous decisions (3). Finally, a normative defence of the legislative model, based on the experience of the continental European tradition will be offered (4).

**Keywords:** common law tradition, civil law tradition, United States Supreme Court, European Court of Justice, precedent, reasoning with previous decisions, judicial lawmaking, judicial authority

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## INTRODUCTION

‘[A] relative absence of skills in case analysis’ is said to be ‘the Achilles heel of civil-law methods’.<sup>1</sup> In this article I want to take issue with this view and show that the continental European tradition has its own ways of dealing with cases.<sup>2</sup> These techniques can appear different from the common law ‘case law method’, but are no less rational and intellectually sophisticated. The reason for the rather conceited attitude of some comparatists, I will suggest, lies in the dominance of the common law paradigm of precedent and the accompanying ‘case law method’.<sup>3</sup> It explains why the German legal comparatist Stefan Vogenauer once said that ‘the highly developed case law theory of Anglo-American jurisdictions has no counterpart on the Continent’,<sup>4</sup> or why John Dawson observed that there is no ‘workable case law technique’ in French law.<sup>5</sup> In my view, if we want to understand how courts and lawyers in different jurisdictions use previous judicial decisions in their argument, we need to move beyond precedent to a wider notion, which would embrace practices and theories existing in legal systems outside the common law tradition. This article presents the concept of ‘reasoning with previous decisions’ as such an alternative and develops its basic models.

A wider inquiry into reasoning with previous decisions is important outside comparative law, too. Decisions of the European Court of Justice (the ECJ), continental constitutional courts, or highest courts in general play an important role in their respective legal and political systems. The limitations of the dominant paradigm of precedent are highlighted by the fact that even courts in common law jurisdictions adopt a whole variety of models of reasoning with previous decisions as the common law enters ‘the age of statutes’.<sup>6</sup> Not only comparatists, but also constitutional scholars, students of supranational adjudication and legal theorists would therefore benefit from shifting from ‘precedent’ to a wider notion of ‘reasoning with previous decisions’, suggested here.

In order to support this claim, I will firstly point out several shortcomings of limiting the inquiry into reasoning with previous decisions by the common law paradigm (1). On the basis of numerous examples provided in section (1), I will

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<sup>1</sup> ‘Comment’ in A Scalia and A Gutman (eds), *A Matter of Interpretation: Federal Courts and the Law* (Princeton, Princeton University Press, 1997), 102.

<sup>2</sup> In the limited space of this article I do not discuss some important differences between particular jurisdictions within the common law tradition, so much as I use the term ‘European continental tradition’ to refer to jurisdictions as different as e.g. German or French.

<sup>3</sup> The best example of a work entitled to suggest a general theory of precedent but mostly concerned with English legal doctrine and theory is N Duxbury, *The Nature and Authority of Precedent* (Cambridge, Cambridge University Press, 2008). MJ Gerhardt, *The Power of Precedent* (Oxford, Oxford University Press, 2008) focuses in turn on the United States Supreme Court.

<sup>4</sup> Stefan Vogenauer, ‘Sources of Law and Legal Method in Comparative Law’ in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2006), 895.

<sup>5</sup> JP Dawson, *The Oracles of the Law* (Ann Arbor, The University of Michigan Law School, 1968), 413.

<sup>6</sup> See G Calabresi, *A Common Law for the Age of Statutes* (Cambridge, Mass., Harvard University Press, 1982).

present two basic models of reasoning with previous decisions: case-bound and legislative (2). The following section seeks to explain why the common law paradigm has for so long dominated most debates on reasoning with previous decisions (3). Finally, a normative defence of the legislative model, based on the experience of the continental European tradition will be offered (4).

## 1. THE COMMON LAW NOTION OF PRECEDENT AND ITS LIMITATIONS

Common law theorists stress the distinction between the text of a precedent decision and the rule which is to be derived from (or is ‘implicated’ in) it. According to John Gardner, it ‘is the rule *as used* rather than the rule *as stated*’.<sup>7</sup> Gardner notes that ‘judges often do formulate the rule, or aspects of the rule, for which they regard their case as standing’,<sup>8</sup> but at the same time he insists that ‘[t]he rule that a case stands for is a rule that supports the ruling in the case, and it is supported by the rationale in the case, *even if these cannot be reconciled with the judge’s attempted formulation of the rule*’.<sup>9</sup> The process of inducing the rule ‘implied’ in precedent decision, the much celebrated ‘case law technique’, is commonly known as the search for the ‘ratio’ (or ‘holdings’) of the case, distinguished from mere ‘dicta’.<sup>10</sup> When looking for the ratio of a case, it is not what the court *said* which matters; it is what it *decided*.

Another peculiarity of common law reasoning with previous decisions concerns its reliance on real-life facts. Many theories of how to discern the ratio (or holdings) of a precedent decision from mere dicta, or how to distinguish two cases, are based on identifying the facts that were material to the original decision.<sup>11</sup> Justice Cardozo’s opinion in *MacPherson* is thus justly regarded as the prime example of common law reasoning.<sup>12</sup>

The case dealt with the liability of manufacturers for their products to those who use the products, but are in no contractual relationship with the former. Throughout his opinion Cardozo dealt with a great number of previous decisions that pointed in different directions. Finally, he formulated the principle governing

<sup>7</sup> J Gardner, ‘Some Types of Law’ in DE Edlin (ed.), *Common Law Theory* (Cambridge, Cambridge University Press, 2007), 68. To be fair, Gardner’s contribution was published in a collection that does not aim at generality (as its very title suggests).

<sup>8</sup> *Ibid.*, at 70.

<sup>9</sup> *Ibid.*, emphasis added.

<sup>10</sup> For a recent overview of various theories see Duxbury, n 3, 76-90.

<sup>11</sup> Duxbury, n 3, 83, referring to judgments and academic literature, notably to MC Dorf, ‘Dicta and Article III’ (1994) 142 *University of Pennsylvania Law Review* 1997, 2036-37, n. 143, and MI Abramowicz and M Stearns, ‘Defining Dicta’ (2005) 57 *Stanford Law Review* 953, 1052-55, esp. 1055.

<sup>12</sup> It features in leading works on legal reasoning such as EH Levi, *An Introduction to Legal Reasoning* (Chicago; London, The University of Chicago Press, 1961), 8-27 and F Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, Mass.; London, Harvard University Press, 2009), *passim*.

manufacturer's liability for products, the nature of which was 'such that it [was] reasonably certain to place life and limb in peril when negligently made'.<sup>13</sup> However, among the previous decisions of the New York Court of Appeals was *Losee v. Clute*,<sup>14</sup> which involved an injury caused by an explosion of a steam boiler. Steam boilers would seem to fall into the category of things the nature of which 'is such that it is reasonably certain to place life and limb in peril when negligently made'; yet the court in *Losee v. Clute* did not find the manufacturer liable. The decision therefore seemed to contradict Cardozo's formulation of the principle of liability, which he claimed followed from the previous case law of the Court. In order to overcome this obstacle, Cardozo explained that *Losee* 'must be confined to its special facts'.<sup>15</sup> In Cardozo's view:

[i]t was put upon the ground that the risk of injury was too remote. The buyer in that case had not only accepted the boiler, but had tested it. The manufacturer knew that his own test was not the final one. The finality of the test has a bearing on the measure of diligence owing to persons other than the purchaser.<sup>16</sup>

Cardozo's ability to navigate among previous decisions, making fine distinctions based on their facts in order to reach a conclusion that he favoured, is justly regarded as the paradigmatic example of common law reasoning, which guaranteed him a place among the giants of the discipline. The close attachment to 'real-life situation' is often taken as a distinctive feature of common law, separating it from the continental European tradition, which is said to focus on abstractions.

Consistently with this characterization, some commentators observe that 'facts are brusquely treated' in most decisions of the ECJ.<sup>17</sup> It would therefore seem impossible to use the ECJ's decisions in a similar fashion as common lawyers use precedents. In reality, the opposite is true, especially in cases which involve sensitive questions where the ECJ apparently wants to limit the impact of its ruling in other cases. For example, in *Trojani*<sup>18</sup> the ECJ defined the issue to be decided as 'whether a person in a situation such as that of the claimant in the main proceedings can claim a right of residence'.<sup>19</sup> Replying to this, the ECJ made several observations concerning the particular circumstances of Mr. Trojani and distinguished his case from its previous decision in *Bettray*.<sup>20</sup> The distinction was made on the basis of its facts, starting with a statement not dissimilar to that

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<sup>13</sup> *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916), 389.

<sup>14</sup> 51 N.Y. 494 (1873).

<sup>15</sup> *MacPherson*, n 13, 386.

<sup>16</sup> *Ibid.*

<sup>17</sup> See M De S-O-L'E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford, Oxford University Press, 2004), 105.

<sup>18</sup> Case C-456/02 *Trojani* [2004] ECR I-7573.

<sup>19</sup> *Ibid.*, paragraph 13.

<sup>20</sup> Case 344/87 *Bettray* [1989] ECR 1621.

uttered by Cardozo when distinguishing *Losee* from *MacPherson*.<sup>21</sup> In the ECJ's words, the conclusion in *Betray* 'can be explained only by the particular characteristics of the case in question'.<sup>22</sup>

Especially in constitutional adjudication, but also when interpreting statutes, concrete facts, however, often do not matter. This is true for courts in common law jurisdictions as well. Consider *Gonzales v. Raich*,<sup>23</sup> where the US Supreme Court overturned the Court of Appeal's decision, which 'placed heavy reliance' on the Supreme Court's earlier decision in *United States v. Lopez*.<sup>24</sup> In *Lopez* the Supreme Court found a provision of the federal Gun-Free School Zones Act<sup>25</sup> to be in violation of the Commerce Clause.<sup>26</sup> Among the reasons for striking the Act down was the fact that '[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce'.<sup>27</sup> In *Gonzales* courts examined whether Congress can rely on the Commerce Clause to prohibit the local cultivation and use of marijuana in compliance with state law. The Court of Appeal came to a negative conclusion; the Supreme Court disagreed.

Justice Stevens, who wrote the opinion for the Supreme Court's majority, drew three principal distinctions between *Gonzales* and *Lopez*. First, in contrast to *Lopez*, where 'the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety', in *Gonzales* the Court was asked 'to excise individual applications of a concededly valid statutory scheme'. For Stevens this distinction was 'pivotal', because the Court had often reiterated in its decisions that '[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class'.<sup>28</sup> Second, Stevens observed that while the Gun-Free School Zones Act 'was a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone [,] did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity', the statutory scheme under review in *Gonzales* was at the opposite end of the regulatory spectrum. It was 'a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances"'.<sup>29</sup> Finally, Stevens stressed that, unlike the activities at issue in *Lopez*, those regulated by the challenged provision were quintessentially economic'.<sup>30</sup> We see that it is not the facts of *Lopez*, but the legislative provisions of the Controlled Substances Act and the

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<sup>21</sup> See text to n 15.

<sup>22</sup> *Betray*, n 20, paragraph 19.

<sup>23</sup> 545 U.S. 1 (2005).

<sup>24</sup> 514 U.S. 549 (1995).

<sup>25</sup> 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V).

<sup>26</sup> U.S. Const., Art. I, § 8, cl. 3.

<sup>27</sup> *Lopez*, n 24, at 567.

<sup>28</sup> *Gonzales*, n 23, at 23.

<sup>29</sup> *Ibid.*, at 23-24.

<sup>30</sup> *Ibid.*, at 25.

Gun-Free School Zones Act, on the basis of which Stevens distinguished *Gonzales* from *Lopez*. Distinctions are made on grounds of relevant features of the legislative provisions concerned, not the real-life facts.

When constitutional courts review legislation for its constitutionality, they can do so in an abstract context – on a petition of constitutionally qualified actors<sup>31</sup> raised independently of a particular ‘case or controversy’.<sup>32</sup> There is no factual background in such cases, only legislative provisions that are to be compared with another set of abstract norms, the constitution. Similarly, when the ECJ adjudicates on a Member State’s infringement of EU law, it often only examines the compatibility of national legislative provisions with European directives or Treaty articles. Does that mean that the ECJ or continental constitutional courts cannot employ the proper ‘case law method’?

The English comparatist Simon Whittaker indeed thinks so, which is mistaken.<sup>33</sup> Even in the absence of facts, European courts simply proceed similarly as Justice Stevens did in *Gonzales*, highlighting the importance of some features of the previous decision which make it relevant (or not) in the present dispute. In *Meilicke and Others*,<sup>34</sup> for example, the ECJ examined German tax rules’ compatibility with (now) Article 63 TFEU. It was argued that the German rules were in substance the same as the rules existing in Finland which were earlier declared incompatible with EU law in *Manninen*.<sup>35</sup> The ECJ’s response to the German government’s argument that conclusions reached by the ECJ in *Manninen* were not applicable in the case of the German legislation in question (because of the difference between the two legislative schemes) represents this model:

it should be noted that the tax credit under the German tax legislation at issue in the main proceedings, like that under the Finnish tax legislation detailed in *Manninen*, is designed to prevent the double taxation of German companies’ profits distributed to shareholders by setting off the corporation tax due from the company distributing dividends against the tax due from the shareholder by way of income tax on revenue from capital. The end result of such a system is that dividends are taxed in the hands of the shareholder only to the extent that they have not already been taxed as distributed profits in the hands of the company.<sup>36</sup>

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<sup>31</sup> For a typology of continental constitutional courts’ jurisdiction see V Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (New Haven, Yale University Press, 2009), 7-8.

<sup>32</sup> ‘Case or controversy’ refers to the requirement concerning federal courts’ jurisdiction enshrined in Article III of the US Constitution.

<sup>33</sup> See S Whittaker, ‘Precedent in English Law: A View from the Citadel’ (2006) 14 *European Review of Private Law* 705, 741.

<sup>34</sup> Case C-292/04 *Meilicke and Others* [2007] ECR I-1835.

<sup>35</sup> Case C-319/02 *Manninen* [2004] ECR I-7477.

<sup>36</sup> *Meilicke and Others*, n 34, paragraph 21.

The common law ‘case-law method’ however seems to be undermined by the process called ‘textualization of precedent’.<sup>37</sup> Peter Tiersma recently observed that ‘lawyers are paying much closer attention to the exact words of opinions than they did in the past’.<sup>38</sup> In his view, ‘[t]he words of an opinion are not evidence of the law, as they once were. They are the law’.<sup>39</sup> The ‘*O’Brien* test’, concerning permissible restrictions on symbolic speech acts, can serve as an example.<sup>40</sup> The test indeed sounds more like a legislative amendment to the Constitution’s Free Speech Clause<sup>41</sup> than a judicial opinion:

[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct ... a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>42</sup>

Much earlier on, in 1927, the legal realist Herman Oliphant had already lamented the practice of ‘*stare dictis*’ - following what was said and not what was decided by a previous court – and related this kind of reasoning to the ‘Langdellian formalism’ of 19<sup>th</sup> century legal thinking.<sup>43</sup> Nevertheless, despite the apparent and rather widespread occurrence of ‘textualized precedents’, there is very little theory concerning reasoning with them. Instead, ‘textualized precedents’ are often viewed with suspicion, as if relying on previous judicial decisions in this way was illegitimate.<sup>44</sup>

The text of judicial decisions matters in adjudication before European courts too. Every EU lawyer knows how to read the judgments of the ECJ: to start with the bold part at the end of the judgment (at least if it is a preliminary reference case).<sup>45</sup> In most instances (but not always!) this will enable the lawyer to understand what the ‘rule of the decision’ was. The different formulae and tests EU lawyers know (the ‘*Dassonville* formula’,<sup>46</sup> defining obstacles to free movement of goods; the ‘*Plaumann* test’,<sup>47</sup> on the standing of private parties to challenge EU

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<sup>37</sup> PM Tiersma, ‘The Textualization of Precedent’ (2007) 82 *Notre Dame Law Review* 1187.

<sup>38</sup> *Ibid.*, 1278.

<sup>39</sup> *Ibid.*

<sup>40</sup> It is used in one of the critiques of such reasoning, R Nagel, ‘Formulaic Constitution’, (1985) 84 *Michigan Law Review* 165, 176.

<sup>41</sup> ‘Congress shall make no law ... abridging the freedom of speech...’.

<sup>42</sup> *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968) as quoted by Nagel, n 40, 176.

<sup>43</sup> H Oliphant, ‘A Return to *Stare Decisis*’ (1926-1930) 6 *American Law School Review* 215.

<sup>44</sup> See JM Stinson, ‘Why *Dicta* Becomes Holding and Why It Matters’ (2010) 76 *Brooklyn Law Review* 219.

<sup>45</sup> Preliminary reference (Article 267 TFEU) is arguably the most important procedure for the development of EU law – not only are most decisions of the ECJ delivered in this procedure; they are also the most important.

<sup>46</sup> Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5.

<sup>47</sup> Case 25/62 *Plaumann v Commission* [1963] ECR 95, paragraph 4.



measures; the ‘*Schöppenstedt* formula’,<sup>48</sup> concerning the liability of the EU for damages caused by its acts of legislative nature, etc.) are all used in this fashion. The cut-and-paste approach to reasoning with previous decisions, whereby the ECJ reproduces whole passages of previous judgments without mentioning their context, is dominant.<sup>49</sup> This leads to a very textual approach to the ECJ’s previous decisions, exemplified by the opinion of Advocate General Kokott in *UTECA*. She felt the need to mention ‘slight differences of wording’ between two judgments cited in support of her argument.<sup>50</sup> Statements of the ECJ are interpreted as if they were legislated rules and differences in wording, not in the circumstances of cases, are deemed relevant in reasoning with previous decisions.

This should not mean, however, that the ECJ’s decisions ‘do not yield any ratio’, as one legal theorist suggested,<sup>51</sup> or that the ECJ does not even employ any meaningful case law technique and everything it says in its decisions has the same legal relevance.<sup>52</sup> These conclusions are based on the traditional common law notion of precedent, which has led their authors to ignore other possible models of reasoning with previous decisions.

The foregoing examples suggest that the common law notion of precedent is too narrow. It ignores the rich argumentative practices employed by lawyers and courts in both legal traditions. The following section therefore presents a wider notion of ‘reasoning with previous decisions’. As we will see, it embraces both the more traditional notion of common law precedent and other models of reasoning.

## 2. MODELS OF REASONING WITH PREVIOUS DECISIONS

On the basis of the examples provided in the previous section, we can distinguish two opposing models of reasoning with previous decisions: case-bound and legislative.<sup>53</sup> Cases like *MacPherson*<sup>54</sup> best represent the case-bound model. Facts are determinative under this model. They inform not only the previous court when

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<sup>48</sup> Case 5/71 *Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975, actually formulated only in Joined Cases 83/76, 94/76 and 4/77, 15/77 and 40/77 *HNL and Others v Council and Commission* [1978] ECR 1209, paragraph 4.

<sup>49</sup> See K McAuliffe, ‘Hybrid Texts and Uniform Law? The Multilingual Case Law of the Court of Justice of the European Union’ (2011) 24 *International Journal for the Semiotics of Law* 97 or U Sadl, ‘Form, Formalism and Formulas: Exploring the “Poor Reasoning” of the Court of Justice’, forthcoming.

<sup>50</sup> Opinion of Advocate General Kokott in Case C-222/07 *UTECA* [2009] ECR I-1407, fn 103.

<sup>51</sup> See Duxbury, n 3, 71, fn 53: ‘Indeed, not every case is intended to yield a *ratio*. Generally, for example, the decisions of the European Court of Justice contain no *ratio* and will bind only the parties to the case’.

<sup>52</sup> See A Arnulf, *The European Union and its Court of Justice* (2<sup>nd</sup> edition, Oxford, Oxford University Press, 2006), 631.

<sup>53</sup> R Siltala, *A Theory of Precedent: From Analytical Positivism to a Post-Analytical Philosophy of Law* (Oxford and Portland, Ore., Hart, 2000), 65-108 and 233-248 offers a more sophisticated typology. I would submit, however, that all his models would fall into either of my more general models.

<sup>54</sup> N 13.

taking the decision, but also subsequent ones, when extracting the rule ‘implicated’ in the previous decision. On the basis of the factual circumstances, lawyers and judges can distinguish previous decisions and avoid their normative implications for cases they argue or have to decide.

This direct presence of facts distinguishes reasoning with previous decisions in the ‘classical’ common law context from reasoning in the context of the application of statutes or the constitution. The latter often leaves facts behind and focuses on interpreting legal provisions in a fairly abstract context. However, this does not automatically mean leaving the whole context of the case behind, too. In *Gonzales v. Raich*, a case concerning judicial review of generally applicable norms (in that case acts of Congress), the Supreme Court emphasized what it had actually decided in a previous case - *United States v. Lopez* – to reach its conclusion.<sup>55</sup> Similarly in *Meilicke* the ECJ distinguished its previous decision in *Maninen* on the basis of differences between statutory schemes involved in the two cases.<sup>56</sup> We can therefore distinguish two variants of the case-bound model: fact-intensive and norm intensive.

The ECJ’s formulas (like *Plaumann*) or the Supreme Courts tests (such as *O’Brien*),<sup>57</sup> epitomize an opposing model, the legislative one.<sup>58</sup> Not only reasoning, but often also the drafting of a decision operates in a fashion closer to the process of legislation than deciding a case.<sup>59</sup> Edward Levi captures the crucial feature of legislating in the following way: ‘[t]here is no mechanism, as there is with the court, to require the legislature to sift facts and to make a decision about specific situations’.<sup>60</sup> Legislators deliberate on the text of a legislative provision, and they can have very different situations in mind, with different solutions prescribed by the provision they eventually vote on, and, as Levi continues, ‘the precise effect of the bill is not something upon which the members have to reach agreement.’<sup>61</sup>

The fact that a decision is written in the statutory language does not however mean that it will be always used in the legislative mode. *O’Brien* served us as an example of the Supreme Court’s decision, which is often applied in the legislative mode.<sup>62</sup> The case itself concerned a young man who was condemned for burning his draft card in protest against the Vietnam War.<sup>63</sup> Having formulated the test

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<sup>55</sup> See text to nn 23-30.

<sup>56</sup> See text to nn 34-36.

<sup>57</sup> See text to nn 40-48.

<sup>58</sup> I owed a great deal to F Zénati, *La jurisprudence* (Paris, Dalloz, 2001), when developing this model (and overcoming my own preconceptions concerning reasoning with previous decisions limited to the common law tradition).

<sup>59</sup> Distinguishing legislation from other types of law is not a straightforward issue, but I have no space to dwell on this further. For a helpful exploration of this topic see Gardner, n 7.

<sup>60</sup> Levi, n 12, 31.

<sup>61</sup> Ibid. It is true that sometimes draft Bills such as the English Law Commission’s Draft Criminal Code can be accompanied by a list of hypothetical cases and solutions based on the proposed rules. See N MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford, Oxford University Press, 2005), 208.

<sup>62</sup> N 40.

<sup>63</sup> Title 50, App., United States Code, Section 462(b).

quoted above,<sup>64</sup> the Supreme Court found no conflict of the relevant statute with the Free Speech Clause and confirmed his conviction.

In a later case, *Collin v. Smith*,<sup>65</sup> the Court of Appeal for the Seventh Circuit found unconstitutional the requirement on the organizers of a Nazi march to obtain liability insurance for possible damage related to the march. The *O'Brien* test was applied by the Court. The majority of the Court, however, carefully analysed the relevant circumstances of the Supreme Court's decision in *O'Brien*:

[The insurance requirement] is most assuredly not facially neutral towards First Amendment activity, which is what *O'Brien* requires. *O'Brien* was convicted of destroying his draft card. The pertinent statute, [...], criminalized nothing more, and in no way restricted the right to speak or demonstrate against the draft or the Vietnam War. The Court emphasized that the statute 'on its face deals with conduct having no connection with speech [...]'. The *O'Brien* test, then, deals only with situations where such nonspeech conduct is entwined with speech elements and a restriction on that conduct creates merely "incidental limitations" on protected activity. The limitations here totally and directly prohibit the First Amendment activity; calling them 'incidental' manner restrictions does not make them so. Moreover, *O'Brien* did not involve a prior restraint, nor does the dissent's analysis give more than cursory recognition to the increased burden of justifying such restraints.<sup>66</sup>

The majority of the Court hereby explains why the liability insurance requirement is of a different nature than the prohibition on destroying draft cards. Although the language of *O'Brien* invites to reasoning in the legislative way, the Court of Appeal's majority opted for the case-bound model and reached a different conclusion from the dissenter.

The possibility to move from one model to another depends on the content of the previous decision – whether it contains enough legally relevant information to re-contextualize the test which is otherwise used in reasoning in the legislative way. Such re-contextualization and the shift to another model of reasoning are possible with relatively little information on the previous decision, as the following example from the ECJ's jurisprudence shows.

In *Greenpeace and Others v Commission*,<sup>67</sup> the applicants invited the (then) Court of First Instance (now the General Court) to 'free itself from the restrictions'<sup>68</sup> which the case law beginning with *Plaumann* had imposed on standing of private parties. In support of their contentions the applicants stressed that 'their interests affected by the contested decision are not economic, as has been the case in

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<sup>64</sup> See text to n 42.

<sup>65</sup> 578 F.2d 1197 (7<sup>th</sup> Cir. 1978). The Supreme Court denied certiorari: *Smith v. Collin*, 439 U.S. 916 (1978).

<sup>66</sup> *Ibid.*

<sup>67</sup> Case T-585/93 *Greenpeace and Others v Commission* [1995] ECR II-2205.

<sup>68</sup> *Ibid.*, paragraph 49.

almost all the judgments [which applied *Plaumann*], but of a quite different kind, relating to environmental and health protection'.<sup>69</sup> The context in which the ECJ decided *Plaumann* became important in the argument made by the applicants in a later case. They used the ECJ's decision in *Plaumann* in their argument in the case-bound mode in order to challenge the restrictions imposed on their standing by the *Plaumann* formula, in spite of the long-established status and relative briskness of the ECJ's reasoning.

Reasoning with previous decisions is always an affair of two actors: the previous decision maker and the subsequent reasoner. The latter is not only courts, although the judicial context is explored the most when legal reasoning is examined.<sup>70</sup> The previous court can influence the model to be used for reasoning with its decisions by the style of its own reasoning and the amount and the type of information included in the decision.<sup>71</sup> These are determined by outside factors too: the conception of 'proper' judicial reasoning differs from one jurisdiction to another, so French (or Italian) courts are far less flexible than other courts discussed here. If the previous court chooses very abstract language containing canonical formulations of the rules that led to the decision, if it does not provide enough information concerning the context of the case, it will induce the legislative model. But if the content of the decision (and the way it is reported) allows one to 'mine' more information on the case, it means that subsequent reasoners can use the previous decision in the case-bound mode, as we have seen.

In some jurisdictions, however, this re-contextualization and the shift from the legislative to the case-bound model are not possible. In Italy, for example, very often only headnotes are reported and reasoning with previous decisions thus focuses exclusively *on the text of a headnote* as opposed the context of the case that led to the decision. This practice is sometimes criticized as 'case positivism'<sup>72</sup> or 'headnote positivism'.<sup>73</sup> However, much of this criticism results from the failure to understand that the legislative model is based on a different notion of judicial authority, which does not put emphasis on deciding concrete cases and controversies.<sup>74</sup>

The possibility of re-contextualization makes the use of headnotes attached to case reports in the US (or other common law jurisdictions) different from that on the European continent. Headnotes make reasoning with previous decisions more efficient. They summarize the case and the principal reasons that led to the decision. They are particularly important when the ruling of the court (and the interpretation of the relevant legal norms it provided) is relatively uncontroversial.

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<sup>69</sup> Ibid.

<sup>70</sup> In fact, most of the literature on legal reasoning concerns judicial reasoning, despite obvious differences in other legal (and non-legal) actors' attitudes to previous judicial decisions. See, however, 'Symposium: Stare Decisis and Nonjudicial Actors' (2008) 83 *Notre Dame Law Review* 1339.

<sup>71</sup> See TJ Heytens, 'Doctrine Formulation and Distrust' (2008) 83 *Notre Dame Law Review* 2045.

<sup>72</sup> See Z Kühn, 'Precedent in the Czech Republic' in E Hondius (ed.), *Precedent and the Law* (Brussels, Bruylant, 2007), 385-386, with references to other authors.

<sup>73</sup> See Siltala, n 53, 135-143.

<sup>74</sup> See section 4.

HLA Hart put it succinctly: ‘In the vast majority of decided cases there is very little doubt [as to the rule of the case]. The head-note is usually correct enough’.<sup>75</sup> Reliance on headnotes is quite natural, since the need to analyse every case in detail (in order to ascertain the rule which it contains) would make reasoning with previous decisions inoperable. Headnotes therefore promote the legislative model of reasoning with previous decisions.

Brian Leiter criticizes HLA Hart for making this point and states rather dismissively that ‘every first-year litigation associate knows that this approach to precedent would be a recipe for disaster [since to] extract holdings without regard to the facts of the case - which are all a headnote typically provides - is mediocre lawyering’.<sup>76</sup> However, Leiter’s remark is detached from an everyday legal practice, where headnotes make reasoning with previous decisions much more efficient. As shown above, it is often (and in the appellate adjudication perhaps always) possible to do ‘proper’ lawyering and contest the interpretation of the decision implicit in its headnote. The legislative model will then be replaced by the case-bound model once the reasoner wants to contest the rule as formulated by the previous court (and summarized in the headnote).

Interestingly, focusing on headnotes instead of the whole decision is not completely unknown to lawyers in the United States either. Although the US Supreme Court discourages reliance on syllabi (headnotes),<sup>77</sup> in West Virginia the production of syllabi is a constitutional requirement,<sup>78</sup> and in Ohio the law provides that it is the syllabus of the Ohio Supreme Court’s decisions which states the law, not the whole opinion.<sup>79</sup> The reasoning with syllabi nevertheless appears to take into account the context of the case and does not lead to the dominance of the legislative model. For example in *DeLozier v. Sommer*, the Ohio Supreme Court held that:

Where court reaches a conclusion on a constitutional question not necessary to the disposition of the case, and bases that conclusion on facts unrelated to

<sup>75</sup> HLA Hart, *The Concept of Law* (2<sup>nd</sup> ed, Oxford, Clarendon Press, 1994), 134.

<sup>76</sup> B Leiter, ‘Legal Realism and Legal Positivism Reconsidered’ (2001) 111 *Ethics* 278, 297.

<sup>77</sup> Every opinion of the Supreme Court is accompanied by the following note: ‘[w]here it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337.’

<sup>78</sup> West Virginia Constitution, Article 8-4.

<sup>79</sup> On the origins of this rule see WM Richman and WL Reynolds, ‘The Supreme Court Rules for the Reporting of Opinions: A Critique’ (1985) 46 *Ohio State Law Journal* 313. The Rules were amended in 2002 to hold that ‘[t]he law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including footnotes’. The syllabus still takes precedence ‘if there is disharmony between the syllabus of an opinion and its text or footnotes’. See Rule 1 of the Ohio Supreme Court Rules for the Reporting of Opinions (May 2002), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/reporting/Report.pdf> (19/10/2011).

the controversy before it, that conclusion does not necessarily attain the compelling force of law even though made a part of the syllabus of the case.<sup>80</sup>

Another case illustrates the importance of facts for reasoning with previous decisions. In *Bishop v. Fullmer* the Court of Appeal of Ohio ruled that ‘the syllabus of the Supreme Court states the law with reference to the *facts upon which it is predicated* and will not be regarded as controlling in another case in which the *controlling facts are totally different*, even though the legal questions involved are identical’.<sup>81</sup> The concept of adjudication, inseparable from the context of the case, thus leads to the use of headnotes in a case-bound mode.

On the other hand, the use of common law terminology such as ‘dicta’ does not turn the legislative model of reasoning into the case-bound model. In a recent article concerning the occurrence of obiter dicta in the judgments of the Cour de cassation, Sébastien Tournaux observes that the ‘obiter dicta constrain the lower courts with the same force as judicial rules created in a more classical way through the interpretation within the framework of the case’.<sup>82</sup> He later rejects the view that obiter dicta can be derived from the Cour’s silence on a certain matter. In such case, the author explains, ‘the source of the normative content thus identified would be rather difficult to ascribe to *the will of the Cour de cassation*’.<sup>83</sup> So, despite the fact that it is possible to identify parts of the Cour’s judgments that can be qualified as mere dicta (since they are not determinative for the result), it is what the Cour says, and not what it decides, that matters.

### 3. THE MODELS AND JUDICIAL AUTHORITY

The widespread use of both models of reasoning with previous decisions in both legal traditions raises two questions. First, why has the common law paradigm of precedent so much dominated comparative and theoretical legal scholarship? Second, the legislative model gives courts a rather unfettered law making power, which seems to contradict the basic premises of continental legal tradition. Yet, it appears quite usual in the Continental European adjudication. The answers to these questions, as we will see, deal with different perspectives on judicial authority.

Legislative model of reasoning with previous decisions corresponds to the hierarchical ideal of authority, envisaged by Mirjan Damaška in his comparative

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<sup>80</sup> 38 Ohio St. 2d 268, 271. One can find opposing statements too. In *Ward v. Swartz*, 25 Ohio App. 175, 180 (1927), the Court stated that ‘[o]biter dictum of Supreme Court opinion carried into syllabus shows court’s intention to declare it law’.

<sup>81</sup> 112 Ohio App. 140, 142-143 (1960), emphasis in the original.

<sup>82</sup> ‘L’obiter dictum de la Cour de cassation’ (2011) *Revue trimestrielle de droit civil* 45, no 41.

<sup>83</sup> *Ibid.*, no 15.

study of authority.<sup>84</sup> In the system organized according to the hierarchical ideal, the decisions of the highest courts were not treated as exemplars of how a life situation had been resolved in the past so that the case sub judice could be matched with these examples of earlier decision making. Rather, what the judge was looking for in the ‘precedent’ was *a rulelike pronouncement of higher authority*, the facts of the case stripped to their shadows.<sup>85</sup>

The authority of judicial decisions in the hierarchical ideal derives from their position in the judicial echelon. Although Damaška contends that neither ideal coincides with a particular legal tradition,<sup>86</sup> the highest courts in Continental European legal systems embody the hierarchical ideal. The view that whatever the Cour de cassation or the ECJ say in their decisions is equally authoritative, since it expresses their will,<sup>87</sup> corresponds to this understanding of authority.

Case-bound model, on the other hand, sits comfortably with the ideal of authority based on coordination, whereby the shared experience of legal officials, their attachment to ‘real-life’ situations and ‘common sense’ is important.<sup>88</sup> Previous decisions represent ‘the accumulated wisdom of men taught by immediate experience in contemporary life - the battered experiences of judges among brutal facts’.<sup>89</sup> Rules implicated in previous decisions have been ‘tested’ in real life, which gives them authority to be followed in future similar cases. This belief in the power of experience over the power of logic (or a system), to paraphrase Justice Holmes’ famous motto,<sup>90</sup> is fundamental to the common law tradition.

Cases are thus understood as experiments providing courts with authority independent from their position in the institutional hierarchy.<sup>91</sup> They are viewed as ‘natural outcomes’ imposed on decision makers by the individual circumstances of particular cases. To be valid, however, the results of the test – the legal rule - must be strictly limited to the conditions of the original case. Subsequent reasoners will thus focus on what courts decided rather than what they said in their previous decision and will prefer the case-bound model.

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<sup>84</sup> See MR Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven; London, Yale University Press, 1986), 18-23.

<sup>85</sup> *Ibid.*, 33-34, emphasis added.

<sup>86</sup> *Ibid.*, 17.

<sup>87</sup> On the Cour see text to n 83; on the ECJ see text to n 52.

<sup>88</sup> Damaška, n 84, 23-28.

<sup>89</sup> Oliphant, n 39, 225.

<sup>90</sup> OW Holmes, *The Common Law* (Boston, Little & Brown, 1881), 1: ‘[t]he life of the law has not been logic: it has been experience’.

<sup>91</sup> See CC Collier, ‘Precedent and Legal Authority: A Critical History’ [1988] *Wisconsin Law Review* 771, 817: ‘An experiment may be viewed as a question posed, under carefully controlled conditions, to nature. The experimental conditions are like the facts of a legal case, and nature’s answer, properly understood, may (the scientist hopes) be formulated as a law. Likewise in legal analysis, the point of studying varied fact patterns and their adjudicated results is to extract “the law” from them. The results of an experiment serve, both in law and in science, as a decisive, empirical test of some more general doctrine or principle’.

Despite the criticism of such belief,<sup>92</sup> it is deeply ingrained in the debates on judicial reasoning and the role of courts in general, especially in the US. It was explicitly laid down as the ‘case or controversy’ requirement on the jurisdiction of federal courts in the US Constitution.<sup>93</sup> It has a strong currency in public, academic and ultimately judicial discourse. Judge Roberts (today the Chief Justice), thus, claimed in the nomination hearings before the Congress Judiciary Committee that he was ‘not sent there to make law’, but to ‘take whatever case comes before [the Court] and just decide the case’.<sup>94</sup> Judicial minimalism, with its emphasis on deciding cases narrowly and shallowly, as opposed to broad and deep rulings,<sup>95</sup> has a long history in the US legal thinking.<sup>96</sup> The legislative model of reasoning with previous decisions appears inherently suspicious to an American minimalist. Criticism concerning how much the court says (‘the rise of unnecessary rulings’)<sup>97</sup> or the failure to distinguish between holdings and dicta,<sup>98</sup> which both imply scepticism towards the legislative model of reasoning with previous decisions, is not unusual.

The close attachment to the case-bound model responds to the concern of the undemocratic nature of law created by judges. In an article suggestively entitled ‘Adjudication as Representation’,<sup>99</sup> Christopher Peters submits that ‘*under certain conditions*, [adjudicative lawmaking] ensures constructive participation through interest representation and thus is not inherently undemocratic’.<sup>100</sup> The requirement that ‘precedential decisions bind only future parties who are similarly situated to the parties to the original action’<sup>101</sup> is among the ‘certain conditions’ that enable representation through adjudication. In a subsequent article Peters observes that ‘[th]e more similar the facts of the precedential case and the subsequent case, the more similar the interests of the representative and subsequently bound litigants are likely to be - and thus the greater the likelihood that the representative litigants will adequately represent the subsequent litigants’

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<sup>92</sup> See F Schauer, ‘Do Cases Make Bad Law?’ (2006) 73 *University of Chicago Law Review* 883.

<sup>93</sup> Article III, Section 2, Clause 1.

<sup>94</sup> Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109<sup>th</sup> Cong. 333 (2005) (statement of John G. Roberts, Jr., J., D.C. Circuit).

<sup>95</sup> See CR Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass., Harvard University Press, 1999).

<sup>96</sup> Sunstein’s work can be seen as a continuation of Alexander Bickel’s notion of judicial ‘passive virtues’ [see AM Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, Bobbs-Merrill, 1962)], which can in turn be traced back to James Thayer, ‘The Origin and Scope of the American Doctrine of Constitutional Law’ (1893) 7 *Harvard Law Review* 129. For an excellent overview of these theories see C Bateup, ‘The Dialogic Promise. Assessing the Normative Potential of Theories of Constitutional Dialogue’ (2006) 71 *Brooklyn Law Review* 1109.

<sup>97</sup> See T Healy, ‘The Rise of Unnecessary Constitutional Rulings’ (2005) 83 *North Carolina Law Review* 847.

<sup>98</sup> See n 44.

<sup>99</sup> C Peters, ‘Adjudication as Representation’ (1997) 97 *Columbia Law Review* 312 (providing and defending the basic argument). A more condensed presentation of Peters’ argument is contained in ‘Assessing the New Judicial Minimalism’ (2000) 100 *Columbia Law Review* 1454, 1477-1492.

<sup>100</sup> Peters (1997), n 99, 312, emphasis added. It also depends on a particular understanding of democratic lawmaking. See *ibid.*, 320-34 and also Peters (2000), n 99, 1477-1480.

<sup>101</sup> Peters (1997), n 99, 312.



interests'.<sup>102</sup> In essence, to make judicial lawmaking 'democratic' in Peters' understanding of the term, legal reasoners must resort to the case-bound model of reasoning with previous decisions.

The focus on 'deciding cases', which underlies the case-bound model of reasoning, does not correspond to the true nature of the Supreme Court, however. The present Supreme Court delivers only around 80 opinions a year and has the power to select its cases<sup>103</sup> and is widely seen as a political, not judicial institution.<sup>104</sup> Yet, as we have seen, many US scholars remain deeply sceptical to the legislative model of reasoning and try to square the circle of having the court of this nature, which is at the same time expected to decide cases in the traditional, common law fashion.

The position of Continental European highest courts was different from their very inception. They were established as creatures of a distinct kind from ordinary courts, having a unique mission in the legal system. The French *Cour de cassation* has always played the role of the 'secular arm of the legislator': a body authorized by the legislator to supervise lower courts' faithful application of the law. Its mission was, in Robespierre's words, not 'to judge the citizens, but to protect enacted laws'.<sup>105</sup> Similarly the *Reichsgericht* (the predecessor of the current German Federal Supreme Court) was formed to impose uniformity in the application of law in the newly established German Empire's laws.<sup>106</sup> Similarly European constitutional courts founded during the second half of the 20<sup>th</sup> century have acted (at least in their foundational periods) as the guardians of the (r)evolutionary transformation from a totalitarian regime to democracy. They built their authority (and legitimacy) on premises other than deciding individual cases<sup>107</sup> and have been consistently holding that they are not part of the ordinary judiciary. Finally, the ECJ, and especially its preliminary ruling procedure, reflects an understanding of the ECJ as a superior authority on the interpretation of EU law that is distinct from national courts – despite all talk of 'judicial cooperation and dialogue'.<sup>108</sup> It was described as essentially a French creation, whose 'ideological origins are to be found in the ambition of eighteenth- and nineteenth-century rationalists, for a

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<sup>102</sup> Peters (2000), n 99, 1514.

<sup>103</sup> In the October 2008 Term, the US Supreme Court had referred to it 8,966 cases and disposed of 7,822, while 1,144 cases have remained on its docket (*The Journal of the Supreme Court of the United States, October Term 2008*, <http://www.supremecourt.gov/orders/journal/jnl08.pdf> at II).

<sup>104</sup> See for example RA Posner, 'Foreword: Political Court' (2005) 119 *Harvard Law Review* 31.

<sup>105</sup> F Zénati, 'La nature de la Cour de cassation' *Bulletin d'information de la Cour de cassation* No 575, 15 April 2003, available at [www.courdecassation.fr](http://www.courdecassation.fr). See in more detail J Komárek, 'Judicial Lawmaking and Precedent in Supreme Courts', *LSE Law, Society and Economy Working Papers* 4/2011, <http://ssrn.com/abstract=1793219>, 16-20

<sup>106</sup> See Dawson, n 5, 446.

<sup>107</sup> Some of them have jurisdiction to decide on constitutional complaints, however. On the overview of Continental European constitutional courts' jurisdiction see Comella, as cited in n 31.

<sup>108</sup> See J Komárek, "'In the Court(s) We Trust?'" On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure' (2007) 32 *European Law Review* 467.

“despotism” of the law ... that would ultimately dispense with the messiness, brutality, and particularism of politics’.<sup>109</sup>

How is it possible, however, that such understanding of courts and the accompanying preference of the legislative model seems to be at home on the European continent? The model seems to contradict the widespread view of the civil law tradition, which assumes that, naïvely or self-deceptively, judges do not make law<sup>110</sup> and excludes previous judicial decisions (‘precedents’) from the class of the sources of law.<sup>111</sup>

A short reply could be that these views are mere caricatures. For most of its history, European legal thinking never denied that judges make law and acknowledged that it is inevitable, given the limitations of positive law and the ambiguity of legal language. This was admitted by the authors of all the principal codifications in continental Europe, although later theories presented codes as ‘complete’ or ‘gapless’.<sup>112</sup> Requiring that a decision which ‘made law’ in a particular case be followed in other cases is a very different matter, however. It depends on the conception of sources of law or legal arguments that can be made before courts in particular legal systems.<sup>113</sup> These can, to a certain extent, be prescribed by positive law, such as the provisions of some great codes which were adopted in the 19<sup>th</sup> century in continental Europe.<sup>114</sup> In the interests of the centralization of the lawmaking power in the hands of either the new regime (as in France) or an enlightened monarch (as was the case of the Austrian or Prussian codification),<sup>115</sup> previous decisions of courts were sometimes excluded from the class of the sources of law.<sup>116</sup>

Today, it is not controversial to include previous judicial decisions among the sources of law anymore. The continental legal thinking however continues to

<sup>109</sup> A Pagden, ‘Introduction’ in *ibid.* (ed.), *The Idea of Europe: From Antiquity to the European Union* (Cambridge, Cambridge University Press, 2002), 29.

<sup>110</sup> Montesquieu’s famous dictum that judges are ‘no more than the mouth that pronounces the words of the law’ (Baron Charles de Secondat Montesquieu (AM Cohler, BC Miller and HS Stone eds and trans), *The Spirit of the Laws* (Cambridge, Cambridge University Press, 1989) (1748), 163) is often quoted as not correctly describing the role of judges in continental legal systems ‘any more’. In fact, Montesquieu never meant that judges had no discretion when deciding cases and the quotation was taken out of the context of his argument (concerning English judges above all) and started to live a life of its own: see KM Schönfeld, ‘Rex, Lex et Judex: Montesquieu and *la bouche de la loi* revisited’ (2008) 4 *European Constitutional Law Review* 274.

<sup>111</sup> Lasser, n 17, who admirably disproved many an American misconception of civilian judging, committed the same error. See J Komárek, ‘Questioning Judicial Deliberations’ (2009) 29 *Oxford Journal of Legal Studies* 805, 809-811.

<sup>112</sup> See GA Weiss, ‘The Enchantment of Codification in the Common-Law World’ (2000) 25 *Yale Journal of International Law* 435, 456-462.

<sup>113</sup> Continental legal scholarship seems to focus on the former, the notion of the ‘sources of law’, whereas its Anglo-American counterpart focuses on the latter, ‘authorities’.

<sup>114</sup> F Gény (J Mayda transl), *Method of interpretation and sources of private positive law* (Baton Rouge, Louisiana State Law Institute, 1963), 153 ff.

<sup>115</sup> See Weiss, n 112, 456-458.

<sup>116</sup> See specifically on the exclusion of previous judicial decisions as sources of law Hans W Baade, ‘*Stare Decisis* in Civil Law Systems’ in AT Von Mehren, JAR Nafziger and S Symeonides (eds), *Law and Justice in a Multistate World: Essays in Honour of Arthur T. von Mehren* (Ardsley, Transnational Publishers, 2002), esp. 539-546 and, in general, P Jestaz, ‘Les sources du droit: le déplacement d’un pôle à un autre’ (1996) 27 *Revue générale du droit* 7.

present previous decisions as ‘binding in fact’ at most, which can be seen as the response to the democratic problem of judicial lawmaking. It would not, however, satisfy those, who believe that adjudication indeed brings life into the abstract world of legislation, which is why the case-bound model can be seen superior and better reflecting the value of law making by courts. In the following section I will show that legislative model, if complemented by other factors, can realize these ideals as well, although in a very different way than the case-bound model.

#### 4. THE LIFE OF LAW IN THE LEGISLATIVE MODEL

The continental exclusion of judicial decisions from the category of sources of law is sometimes suggested to go back to the Justinian maxim ‘*cum non exemplis, sed legibus iudicandum est*’ – ‘decisions should be rendered in accordance, not with examples, but with the laws’.<sup>117</sup> In Allen’s influential *Law in the Making*, first published in 1927,<sup>118</sup> it was ‘taken as the epitome of the deductive principle of judicial reasoning, widely accepted at the present day on the Continent’.<sup>119</sup> This remark, together with Allen’s reference to French law as an example of this phenomenon, however ‘astonished’ Allen’s contemporary, the French comparatist Edouard Lambert,<sup>120</sup> who is mostly known to Americans through his book on government by the judiciary.<sup>121</sup> Before describing the role of previous decisions in the French legal system, Lambert argues what this article proposes too, more than 80 years later: the case method (as Lambert referred to it) ‘may present itself, and effectively it does so, in diverse forms’.<sup>122</sup> The difference in presentation should not lead to the conclusion, so quickly made by many comparatists, that no case law method exists beyond the common law tradition.

It is almost as if the maxim lay at the root of the perceived continental disregard for not only judicial decisions, but reasoning from experience (in the form of ‘examples’ referred to by the maxim) as such.<sup>123</sup> Experience, however, has been no less important for continental legal thinking than it is in the common law tradition. It is the *way* in which experience, contained in previous decisions in

<sup>117</sup> C. 7.45.13. See Dawson, n 5, 122-124. S Vogenauer, ‘An Empire of Light? Learning and Lawmaking in the History of German Law’ (2005) 64 *Cambridge Law Journal* 481, 489: ‘[o]n a formal level the emergence of a doctrine of stare decisis [in 18<sup>th</sup> century Germany] was made impossible by Justinian’s exhortation to adjudicate on the basis of legislation rather than examples’.

<sup>118</sup> TS Allen, *Law in the Making* (Oxford, Clarendon Press, 1927).

<sup>119</sup> *Ibid.*, 117.

<sup>120</sup> See E Lambert and MJ Wasserman, ‘The Case Method in Canada and the Possibilities of Its Adaptation to the Civil Law’ (1929) 39 *Yale Law Journal* 1, 13.

<sup>121</sup> *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis: l’expérience américaine du contrôle judiciaire de la constitutionnalité des lois* (Paris, M. Giard & Cie, 1921). For more on Lambert’s personality see C Jamin, ‘Saleilles’ and Lambert’s Old Dream Revisited’ (2002) 50 *American Journal of Comparative Law* 701.

<sup>122</sup> Lambert and Wasserman, n 120, 14.

<sup>123</sup> See D Priel, in the review of LL Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (Cambridge, Cambridge University Press, 2005), (2007) 57 *Journal of Legal Education* 579, 588-589.

particular cases, is being used on the continent that distinguishes continental from common law and which leads to the preference of the legislative model of reasoning. To understand this, we would have to travel deeply (if only briefly in this article) into the history of the continental legal thinking – to Roman law and the medieval period of its reception (or re-discovery) on the continent.

Roman law survived into modern times mainly thanks to *jurisconsults*, professional lawyers of the classical period.<sup>124</sup> They spoke to each other in abstractions and the concrete cases and examples were only in the background of their maxims; but this does not mean that concrete (and particular) cases were not important.<sup>125</sup> Medieval glossators, who brought Roman law back to life on the European continent, presented Roman law as a comprehensive and perfect system, but it was only them who systemize the mass of material inherited from *jurisconsults*. The alleged comprehensiveness provided Roman law with authority over the often chaotic and incoherent body of customary ‘peoples’ law.<sup>126</sup> The systemization was also required in the interest of effective teaching and learning at universities established in Southern Europe in the twelfth century. Harold Berman notes that ‘[m]odern European law students, who study Roman law as it has been systematized by Western university professors ... , sometimes find it hard to believe that the original texts were so intensely casuistic and untheoretical’.<sup>127</sup> In Berman’s view, it is the ‘very conceptualism of Roman law that is held up by way of contrast to the alleged particularism and pragmatism of English and American law’.<sup>128</sup> Similarly as *jurisconsults*, the later European lawyers were interested in the abstractions one could make from concrete examples and did not invent the whole system of law from the scratch. The so much criticized reliance on headnotes<sup>129</sup> is just a continuation of this way of using previous decisions – as a source of abstraction, which is later used in legal argument instead of the decision itself.

Common law is said to ‘work itself pure’ through experience – but so does civil law – although by different means and by employing different actors, most importantly the learned jurists. This mode of thinking, linking abstract propositions to concrete examples, was not lost – even at the time of great codifications which sought to break radically with the past and cut the previous sources of law (including Roman law) from the legal discourse.<sup>130</sup> The periods of the disdain of judicial decisions were relatively short, and to speak of the French approach to case law as a ‘deviation’<sup>131</sup> is unjust, to say the least. Apart from the

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<sup>124</sup> On the process of the reception of Roman law in Europe see e.g. see R Zimmermann (who then argues that in Germany the situation was quite different), *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (Oxford, Oxford University Press, 2001).

<sup>125</sup> Dawson, n 5, 115 describes them as essentially case law lawyers.

<sup>126</sup> See HJ Berman, ‘The Origins of Western Legal Science’ (1977) 90 *Harvard Law Review* 894, 898.

<sup>127</sup> *Ibid.*, 906.

<sup>128</sup> *Ibid.*

<sup>129</sup> See text to nn 72 and 73.

<sup>130</sup> On the continuing relevance of Roman law even after the codes were adopted see Zimmermann, n 124, 1-8.

<sup>131</sup> See Dawson, n 5, 263 and John H Merryman, ‘The French Deviation’ (1996) 44 *American Journal of Comparative Law* 109.

relatively short period after the Revolution, French lawyers always paid great attention to judicial decisions, to such an extent that it was called ‘adoration’ or even a ‘cult’ of *la jurisprudence*.<sup>132</sup>

Another reason that made continental lawyers particularly receptive to abstraction and the legislative model of reasoning was the bifurcation of the judicial decision in an individual case and the authoritative statement of law. Again, the roots of this bifurcation can be found in the organization of judicial process in the Roman classical period.<sup>133</sup> Both judicial officials, the *praetor* and *iudex*, were laymen, and the only professional lawyers were *jurisconsults*, who advised both of them (and sometimes the parties as well). ‘Law’, as the Romans understood it, was formulated by *jurisconsults*, not within the process of adjudication. Later their consultations were even made binding.<sup>134</sup> Thus the statement of law was detached from the decision in the case to which it related or even from an official process of adjudication. This bifurcation has been present in a number of procedural arrangements throughout the history of continental civil procedure.<sup>135</sup> Preliminary references to the ECJ or constitutional questions are modern reincarnations of those much older procedures. They share the abstract nature of the authoritative statements of law delivered outside the context of concrete disputes.

The bifurcation between the decision in the case and the authoritative statement of law materializes also in the way review mechanisms have been construed in civilian procedures. Both major review procedures – cassation in France and revision in Germany – were at their inception intended to focus on questions of law.<sup>136</sup> Their purpose was to control the correct application of law, not providing justice in individual cases. The highest courts in France and Germany were therefore interested in legal questions that could be approached in an abstract way, rather than deciding cases and leading the lower instances by example. This explains why obiter dicta are as authoritative as the rest of the decision, for the simple reason that they were pronounced by the highest court.<sup>137</sup> That is also why some French scholars look with scepticism at the use of a case-

<sup>132</sup> See R Colson, *La fonction de juger: Étude historique et positive* (Paris, LGDJ, 2006), 156, 157.

<sup>133</sup> On the Roman formulary process (as it is called) see E Metzger, ‘Roman Judges, Case Law, and Principles of Procedure’ (2004) 22 *Law and History Review* 243.

<sup>134</sup> See Dawson, n 5, 109.

<sup>135</sup> Examples of such procedures comprise various mechanisms of establishing custom to be applied in a dispute before a judge (*Weistum* in Germany, Dawson, n 5, 154-156 or *enquête par turbe* in France, *ibid.*, 270); references (*Sprüche*) to senior city courts (*Schöffen*), *ibid.*, 128; the famous *référé législatif* in post-revolutionary France (references from the Cour de cassation to the Parliament of questions of interpretation of enacted laws), *ibid.*, 378-379; references to law faculties - *Aktenversendung* - in Germany, *ibid.*, 200-207). It is true that there are similar procedures in the common law world, such as certification from US federal courts to state courts of questions of interpretation of state law. On this see RA Cochran, ‘Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study’ (2003) 29 *Journal of Legislation* 157.

<sup>136</sup> See SMF Geeroms, ‘Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not Be Translated...’ (2002) 50 *American Journal of Comparative Law* 201, 204-208 and 214-218.

<sup>137</sup> See text to nn 82-83.

bound model of reasoning by courts – be it the ECJ<sup>138</sup> or the French *Conseil constitutionnel*.<sup>139</sup>

Finally, but no less importantly, legal doctrine played the decisive role in making continental law more abstract and systemized. Learned lawyers established themselves as powerful legal actors in the process of the reception of Roman law, which began in Italy in the 11<sup>th</sup> century and spread across Europe.<sup>140</sup> Despite occasional attempts to eliminate the legal professoriate's power, legal doctrine has retained an important role in most continental jurisdictions.<sup>141</sup> Legal science has never achieved such exalted status in England or the United States, and it is no coincidence that scholars in the latter took their inspiration from Germany in order to obtain recognition by both the academic world and legal professions.<sup>142</sup>

To sum up, the bifurcation of authoritative statements of law and judicial decisions in individual cases, together with the important role of legal doctrine, therefore played the crucial role in the adoption of the legislative model of reasoning with previous decisions. Law, as 'implicated' in judicial decisions was always stripped of the context of the particular case or controversy, and to be authoritative it had to be transformed – systemized – and put into an abstract formula by actors other than courts. This, however, does not make the method of dealing with previous decisions 'deficient'<sup>143</sup> or 'primitive',<sup>144</sup> as some comparatists from the common law tradition suggest. It only makes it different, as Edouard Lambert observed more than 80 years ago.<sup>145</sup>

This also to a great extent responded to concerns over the purported 'maximalism' of the legislative model. Judicial decisions and their pronouncements were constantly remoulded by other actors. The principal reason why the French legal thinker François Géný insisted that *jurisprudence* should not have the same force as legislation or even customary law was the fact that its creation would be exclusively in courts' hands. Even if *jurisprudence* could contribute to establishing a custom, it could never be equated with it, since the latter required recognition from other actors.<sup>146</sup> In Germany, on the other hand, the law as pronounced by

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<sup>138</sup> L. Coutron, 'Style des arrêts de la Cour de justice et normativité de la jurisprudence communautaire' (2009) *Revue trimestrielle de droit européen* 643, 669-675.

<sup>139</sup> See O Pfersmann, 'Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective' (2010) 6 *European Constitutional Law Review* 223, 241-248.

<sup>140</sup> On the influence of Roman law in continental Europe and the role of legal scholars see eg F Wieacker (T Weir transl), *A History of private Law in Europe* (Oxford, Clarendon Press, 1995), passim.

<sup>141</sup> On German legal science see Vogenauer, n 117 and S Vogenauer, 'An Empire of Light? II: Learning and Lawmaking in Germany Today' (2006) 26 *Oxford Journal of Legal Studies* 627; on the role of legal doctrine in France see P Jestaz and C Jamin, 'The Entity of French Doctrine: Some Thoughts on the Community of French Legal Writers' (1998) 18 *Legal Studies* 415; in IA Braun, 'Professors and Judges in Italy: It Takes Two to Tango' (2006) 26 *Oxford Journal of Legal Studies* 665.

<sup>142</sup> See M Reimann, 'A Career in Itself: The German Professoriate as a Model for American Legal Academia' in *ibid.* (ed.), *The Reception of Continental Ideas in the Common Law World, 1820-1920* (Berlin, Duncker & Humblot, 1993).

<sup>143</sup> See n 1.

<sup>144</sup> Dawson, n 5, 415.

<sup>145</sup> See text to n 122.

<sup>146</sup> See particularly Géný, n 114, 250.

courts was to be authoritative only if ‘approved’ by legal scholars who presented themselves as the representatives of the nation and its consciousness.<sup>147</sup>

This conceptualization of the legislative model, based on the Continental European experience, faces several problems today, however. Courts became much more important for the production of legal norms. The highest courts, both ordinary supreme courts and constitutional courts, self-consciously make law, and the legal doctrine does not seem to be able to play the same part as in the past.<sup>148</sup> ‘Adversarial legalism’, a regulatory style which relies on courts and judicial process,<sup>149</sup> contributes to the significant rise of the importance of courts in the production of legal norms. This suggests that the continental method of reasoning with previous decisions is in crisis. The question is whether, in the light of the experience of the common law tradition, the adoption of its ‘case law technique’ and the case-bound model of reasoning with previous judicial decisions is the right cure. The exploration of both models presented here suggests that it is not.

## CONCLUSION

The proper understanding of how lawyers use previous decisions in legal argument requires going beyond the common law tradition’s idealized theory of precedent. This theory focuses on what judges decided instead of what they said in cases which mostly involve concrete, ‘real-life’ situations. However, as this article showed, the practice of judicial institutions across legal traditions is much richer than the idealized picture. Legal reasoners (judges and lawyers alike) often use judicial decisions in a way that resembles reasoning based on legislated texts. The idealized common law theory views such practices with suspicion and fails to acknowledge their legitimate place among the methods of legal reasoning. This leads to overlooking the rich history of using previous judicial decisions in legal argument on the European continent together with its sophisticated conceptualization. Instead, European lawyers are said to lack the skills of reasoning with previous judicial decisions.

This article presented an alternative to the dominating common law paradigm: the broader concept of ‘reasoning with previous decisions’ and its two basic models, case-bound and legislative. The ties between the concrete model adopted and the judicial authority prevailing in each legal tradition were further

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<sup>147</sup> See Vogenauer, n 117; Reimann, n 142; and HP Haferkamp, ‘The Science of Private Law and the State in Nineteenth Century Germany’ (2008) 56 *American Journal of Comparative Law* 667.

<sup>148</sup> See Vogenauer, n 141. On German legal doctrine’s uncritical reception of the Federal Constitutional Court’s rulings see B Schlink, ‘German Constitutional Culture in Transition’, (1994) 14 *Cardozo Law Review* 711, 734.

<sup>149</sup> The term comes from RA Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, Mass., London, Harvard University Press, 2001); RD Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Cambridge, Mass., London, Harvard University Press, 2011) explores the spread of this phenomenon in the EU.

examined. The key distinction between the two traditions lies in the *conceptual* separation of the function of the highest courts on the European continent. These were established in order not to adjudicate real-life disputes, as their common law counterparts originally were, but to say what the law is and to control the application of law by lower courts. The separation of constitutional courts or the ECJ from ordinary or national courts follows the same pattern of separation of deciding disputes from making law in the context of adjudication.

Contemporary supreme courts in common law jurisdictions are of course functionally separated from other courts as well. Nobody expects them to decide individual disputes that do not have wider relevance for the legal and political system. However, the insistence on supreme courts' making law 'as judges make it' puts them into an uncomfortable position. Their legitimacy is constantly challenged by the dilemma of acting as courts and at the same time making law. The wider understanding of reasoning with previous decisions, suggested here, can provide a useful starting point for addressing this problem. It also suggests that when it comes to reasoning with previous decisions and the role of courts in political systems, there is something to be learnt from Europeans.