***STARE DECISIS*: A UNIVERSALLY MISUNDERSTOOD IDEA**

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Abstract

‘Stare Decisis’ or ‘stay with what has been decided’ has long been understood as a fundamental principle of common law. In the absence of statutory language, it is supposed to provide stability by binding courts to follow earlier case-law of courts at equal or higher levels. By contrast, the continental European or civil law courts have traditionally seen themselves as not bound by case-law at all. In this article, the author argues that both understandings are ultimately wrong. Nowadays, courts all over the world are constantly challenged to find a course between Scylla and Charybdis – between the Empire of Mechanical Jurisprudence on the one side and the Empire of Arbitrary Jurisprudence on the other. The courts in both systems have to ensure that their decisions are objectively correct and subjectively perceived as just and fair. This can mean for a common law court having to deviate from earlier case-law in the name of objective justice although it would seem to fall under *stare decisis*. And it can mean for a civil law court having to follow earlier case-law in the name of equality before the law although there would seem to be no such ‘rule’ per se. For both types of courts, persuasive argument requires acknowledgement and discussion of earlier cases and rational explanations for following or not following them. Reliance on a traditional and narrow interpretation of *stare decisis* – or the absence thereof – can quickly conflict with the need for persuasiveness and ultimately damage the legitimacy of the courts and the legal system as a whole.

Key Words

Precedent; case-law; jurisprudence; justice; rule of law; statutory interpretation; legal reasoning; legitimacy of courts; legitimacy of legal systems; common law; civil law; European Union law as a hybrid system; European Court of Justice

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A. INTRODUCTION

In this article, I will argue against the overstatement of the binding effects of precedent in common law and against the understatement of the relevance of precedent in civil law.¹ I will show that judges and courts in both kind of systems have to acknowledge relevant precedents and then provide persuasive reasons for following or not following them. Blindly following precedent, just as blind application of statutes, is acceptable only in the ‘empire of mechanical jurisprudence’.² Ignoring precedent in the name of judicial independence, on the other hand, is acceptable only in the empire of arbitrary jurisprudence. Legal systems subscribing to the rule of law can neither be mechanical nor arbitrary. They have to care about legitimacy of the judicial process.³ They have to explain themselves and they have to do so persuasively.

B. THE FUNCTIONS OF CASE LAW

In all legal systems, decisions by judges, courts, and other tribunals, first and foremost have the function of providing individual justice to the parties of a specific dispute. In so doing, they apply pre-existing law,⁴ to the extent it is

¹ While my argument is against two extreme positions existing contemporaneously, Roscoe Pound presented a similar argument as early as 1941 against the same two extreme positions alternating with each other: “[W]e must remember that in all legal history the practice of mankind has swung back and forth between tying tribunals down hard and fast by rigid rules of strict law at one extreme, and at the other leaving them free to decide according to unfettered personal discretion.” See R. Pound, ‘What of Stare Decisis?’ (1941) 10(1) *Fordham Law Review* 1, 3.

² The term is taken from Z. Kühn, ‘European Law in the Empires of Mechanical Jurisprudence: The Judicial Application of European Law in Central European Candidate Countries’ (2005) 1 *Croatian Yearbook of European Law and Policy* 55.

³ For a thorough analysis, see N. Huls, M. Adams and J. Bomhoff (eds.), *The Legitimacy of Highest Courts’ Rulings: Judicial Deliberations and Beyond* (T.M.C. Asser Press 2009) in particular the contributions by Huls and Kloosterhuis. The work draws on the work of and indeed includes an essay by Mitchel Lasser to whom I also owe a great debt of gratitude. The present article was inspired by his idea that ‘to define French/American (never mind civil law/common law) difference in terms of formalism vs. realism or in terms of mechanical vs. pragmatic judging is both silly and counterproductive’ and that ‘[i]n debunking the old comparative *clichés*, parallels could begin to be drawn between French and US judicial interpretative practice. Both now emerged as deeply concerned with applying the law in a stable and textually-oriented manner; and both are simultaneously committed to producing pragmatic and socially responsible judicial judgment and doctrines’. He also concluded long before me that the best example of the convergence of the two systems is the European Court of Justice. See also M. de S.-O.-L’E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2004). The quoted passage is from the preface (vi–vii). See also ch. 7 on the European Court of Justice; E. Hondius, ‘Precedent in East and West’ (2005) 23(3) *Penn State International Law Review* 521.

⁴ The obligation to apply pre-existing law – to the extent it does exist – is the very heart of the concept of rule of law. For further discussion of the concept of rule of law, see F. Emmert, ‘Rule of Law in Central and Eastern Europe’ (2009) 32(2) *Fordham International Law Journal* 551; T. Bingham, *The*

relevant to a case at hand. Pre-existing law may come in many forms, including constitutional rules, parliamentary statutes, and administrative regulations. It may also be derived from international agreements, customary rules and principles, as well as earlier judicial decisions. Given this multiplicity of potential sources of law to govern a specific dispute, every legal system needs to establish a hierarchy of rules and ways to resolve potential conflict between different rules on the same level of hierarchy. For example, the constitution of a country will typically be a higher norm than parliamentary legislation or administrative regulations, and consequently override the latter in case of conflict. Similarly, judicial precedents of higher courts are more important than those of lower courts and override the latter. Between several statutes of the same hierarchic level, or between several judicial decisions of the same level of courts, precedence is usually given according to the principles of *lex specialis derogat legi generali* (the more specific rule prevails over more general rules) and *lex posterior derogat legi priori* (the later in time rule prevails over older rules). People spend years at law school and receive additional experiential training to master the process of ‘applying the law’ because it is often difficult to ‘discover’ the legally relevant facts of a case, then to find all applicable rules for that set of facts, and then to apply the rules in a way that is formally correct and perceived by the various stake holders, including the unsuccessful parties to the dispute, as substantively correct, fair, and just. The perception of fairness is quite obviously facilitated, in particular in cases that are not black and white, when the selection of relevant rules and their application to the case at hand is explained in a coherent and logical manner in the decision itself. Persuasion of the stake holders is important for the legitimacy of the entire social and political system, for the sustainability of a society based on voluntary association. Failure to persuade will cause a perception of arbitrariness, uncertainty, bias, and randomness of rewards and punishments.⁵ Eventually it will rip apart the social contract.

Decisions by judges, courts, and other tribunals invariably have another function, namely the creation of norms. Although some legal systems almost encourage judges to develop the law,⁶ while others very nearly prohibit them

Rule of Law (Allen Lane 2010); R.W. Gordon, ‘The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections’ (2010) 11(1) *Theoretical Inquiries in Law* 441; J.R. Maxeiner, ‘Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law’ (2006) 41(2) *Valparaiso University Law Review* 517; R. Stith, ‘Securing the Rule of Law Through Interpretative Pluralism: An Argument from Comparative Law’ (2008) 35(3) *Hastings Constitutional Law Quarterly* 401; R.S. Summers, ‘The Principles of Rule of Law’ (1999) 74(5) *Notre Dame Law Review* 1691; B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004).

⁵ As Ronald Dworkin has said, every court decision, in particular if it is (politically) controversial, ‘must be defended as flowing from a coherent and uncompromised vision of fairness and justice, because that, in the last analysis, is what the rule of law really means’. See R. Dworkin, *A Matter of Principle* (Harvard University Press 1985) 2.

⁶ For example, art. 263 TFEU gives the European Court of Justice ‘jurisdiction’ to ‘review the legality of legislative acts’ of the EU ‘on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application,

from doing so,⁷ a modicum of law-making is inevitable if the judiciary is to fulfil its primary function of providing individual justice.⁸ In this context, we can usefully distinguish easy cases, harder cases, and really hard cases. The easy cases are those where the facts are straightforward and a pre-existing rule is clear and suitable for the case at hand. The pre-existing rule may be statutory law or case law or a combination of the two. All the judge has to do is to apply the rule and to explain, at least briefly, why it is appropriate to be applied. The harder cases are those where there is a pre-existing rule but it is not clear and/or not suitable to be applied to the case at hand. We will discuss in some detail in Section D how a judge can deal with such a situation of uncertainty, and how a judge can deal with rules that don't provide a just and fair solution to a case at hand. Finally, there are the really hard cases, defined by Ronald Dworkin in this

or misuse of powers' (emphasis added). This is understood to include general principles of law, as determined by the Court. Under art. 267 TFEU, the European Court of Justice 'shall have jurisdiction to give preliminary rulings concerning (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions'. The latter is understood to include full review of legislative acts of these institutions.

⁷ Indeed, the French Code Civil of 1804 stipulated in art. 5 that '[j]udges are forbidden to decide by way of a general and rule-making decision the cases submitted to them'. Montesquieu commented on this notion of mechanical application of the law that 'of the three [branches of government], the judiciary is in some measure next to nothing: there remain, therefore, only two'. Quoted in M.A. Rogoff, *French Constitutional Law: Cases and Materials* (Carolina Academic Press 2011) 127 and 135 respectively. By contrast, the development of French administrative law is heavily indebted to case law because of the lack of a code of general principles of administrative procedure and remedies. See e.g. L.N. Brown and J.S. Bell, *French Administrative Law* (5th edn., Oxford University Press 1998) 293–294. The different approaches in French civil and administrative law reflect the belief that civil law, with its highly sophisticated Code Civil, has been determined by the legislature, leaving no room for judicial rule-making, whereas administrative law, without a legislative code, is left to the judges to be developed. The distinction has been maintained, at least in theory, by the division of the courts into courts of civil and criminal jurisdiction, with the *Cour de Cassation* as the ultimate umpire, and administrative courts, presided over by the *Conseil d'Etat*. However, in practice, even the civil courts cannot always avoid rule-making. No matter how wonderful when first conceived, even the Code Civil has developed some grey hairs over the centuries, giving it an outdated feel in some areas; in other areas it does not provide any rules at all for certain problems related to e-commerce or the rights and obligations of same sex couples, to name just a few. If the civil courts were to refuse a decision unless and until the legislature has decided on the matter, they would be culpable of denial of justice.

⁸ Chief Justice Randall T. Shepard of the Indiana Supreme Court recently summarised the broader concern of the judiciary beyond individual justice is as follows: "Are you there to decide cases? Sure you are. But why do people put you there to do that? It is to enforce the rule of law *in ways that will make society healthy*." Quoted in (2012) 23(2) *Indiana Lawyer* 4 (emphasis added). Justice Frank Sullivan of the Indiana Supreme Court, upon his recent retirement, was quoted saying '[e]ven if you are only deciding the case before you, you are writing for the future'. See (2012) 23(3) *Indiana Lawyer* 16. Professor Levi went as far as saying that legal rules are never clear and that the idea that the law is a system of given rules applied by a judge is just a pretense. See E.H. Levi, *An Introduction to Legal Reasoning* (University Of Chicago Press 1948) in particular 1–7. See also M. Shapiro and A. Stone-Sweet, *On Law, Politics, and Judicialization* (Oxford University Press 2002) in particular ch. 2. For discussion what happens after judges have made law, see B.C. Canon and C.A. Johnson, *Judicial Policies: Implementation and Impact* (2nd edn., CQ Press 1999).

way: “When a particular lawsuit cannot be brought under a clear rule of law, laid down by some institution in advance, [for example because it raises a novel question] then the judge has (...) a ‘discretion’ to decide the case either way’.⁹ The one ‘discretion’ the judge does not have is to avoid a decision altogether. Sending the parties away would be denial of justice. However, if the judge does go ahead and render a decision, she necessarily engages in law-making, which is a normative act involving the application of values, and not a mechanical act merely involving the application of facts.¹⁰ And if she does not want to appear arbitrary, essentially just having tossed a coin, or worse, corrupt, giving the victory to the highest bidder, the decision, i.e. which version of the facts has been applied and why, which law is applicable, and how it has to be interpreted, needs to be explained and the explanation needs to be persuasive. In the words of Dworkin:

[The judge’s] opinion is written in language that seems to assume that one or the other party had a pre-existing right to win the suit, but that idea is only a fiction. In reality [the judge] has legislated new legal rights, and then applied them retrospectively to the case at hand.¹¹

⁹ See R. Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) ch. 4 and in particular 81. Dworkin is summarizing – and then criticizing – the position taken inter alia by Hart; see H.L.A. Hart, *The Concept of Law* (2nd edn., Oxford University Press 1994) in particular ch. 7.

¹⁰ This position contradicts positivists like Kelsen, who claimed that ‘justice’ is precisely the strict application of the rules of law but who ignores both the possibility that such strict application is often difficult because of the indeterminacy of facts and laws, and may in some cases lead to blatantly unjust results, and the possibility that a particular situation is not covered by pre-existing law at all. Thus Kelsen ignores the harder and the really hard cases and instead suggests that those questions belong to religion and meta- physics. This, however, is denial of justice. See H. Kelsen, *What Is Justice? Justice, Law, and Politics in the Mirror of Science* (University of California Press 1957).

¹¹ R. Dworkin, *Taking Rights Seriously* (Harvard University Press 1977). On subsequent pages, Dworkin discusses the problem of retroactivity created by his theory. He argues that judicial decisions in hard cases can be based on principle (for example the principle of equality) but should not be based on policy (for example the balancing of interests between a weak company applying for subsidies and a stronger competitor who will not be eligible for those subsidies). See R. Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 82 ff. As the next passage shows, Cardozo has more faith in the judiciary to undertake even a balancing of competing interests, Dworkin’s policy-making, with a high degree of success. I am comfortable with this position. For a contradictory view, mainly based on the notion that values are ‘incommensurable’, i.e. the interests of one person cannot be declared more valuable than those of another person, see J. Raz, *The Morality of Freedom* (Oxford University Press 1986) in particular ch. 13. Therefore, according to Raz, courts are never really free in the hard cases. They have to follow ‘laws of recognition’, ‘directing the courts which laws to apply’, and in the absence of such rules, they have to follow ‘laws of discretion’, ‘guiding their discretion in deciding (partly) unregulated disputes’. See J. Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn., Oxford University Press 2009) ch. 2, in particular 96. However, since Raz admits as sources of ‘laws of discretion’ any sources of law, including custom, he is ultimately not that far from Pound’s ideals, Hart’s principles, Dworkin’s persuasiveness, and Cardozo’s right-minded fairness. As will be shown in the final part of this article, the German Constitutional Court and the European Court of Justice have (independently?) developed a rather elegant way of making this practical.

This quasi-legislative activity is not only necessary to avoid denial of justice, it is also by and large successful, as Cardozo has elaborated:

Acquiescence in such a method has its basis in the belief that when the law has left the situation uncovered by any pre-existing rule, there is nothing to do except to have some impartial arbiter declare what fair and reasonable men, mindful of the habits of life of the community, and of the standards of justice and fair dealing prevalent among them, ought in such circumstances to do, with no rules except those of custom and conscience to regulate their conduct. The feeling is that nine times out of ten, if not oftener, the conduct of right-minded men would not have been different if the rule embodied in the decision had been announced by statute in advance. In the small minority of cases, where ignorance has counted, it is likely to have affected one side as the other; and since a controversy has arisen and must be determined somehow, there is nothing to do, in default of a rule already made, but to constitute some authority which will make it after the event.¹²

With Cardozo, I would agree that it is tolerable that occasionally a decision in a hard case will get things wrong, first because those will be rare cases, much more rare than the appearance of hard cases themselves. Thus, the alternative approach, to deny justice in the absence of rules, would do much greater harm than to allow judicial legislating, if undertaken properly. Second, although a wrong decision will also become a rule for future cases, it is unlikely to stand since future judges and courts will recognise its weakness and deal with it accordingly. As Teubner has explained in his work on self-referentiality of the law and legal *autopoiesis*, the apparent closure of the system of legal rules simultaneously produces a great ‘openness toward social facts, political demands, social science theories, and human needs’¹³ precisely because every new case gives it opportunity for reconsideration, re-formulation, re-definition, and ultimately self-improvement. Provided, of course, we allow this kind of self-improvement by an appropriate understanding of *stare decisis*.

¹² See the fourth lecture of B.N. Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921) 142–143. For a discussion of whatever guides the ‘fair and reasonable men’ in these circumstances, see R.G. Wright, ‘The Role of Intuition in Judicial Decisionmaking’ (2006) 42(5) *Houston Law Review* 1381. Specifically for administrative court review of agencies, but with useful doctrinal arguments, see D. Zaring, ‘Rule by Reasonableness’ (2011) 63(3) *Administrative Law Review* 525.

¹³ G. Teubner, ‘Introduction to Autopoietic Law’ in G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter & Co 1987) 1, 2. For the comprehensive presentation of the theory, see G. Teubner, *Recht als Autopoietisches System* (Suhrkamp 1989).

C. THREE WAYS OF MISUNDERSTANDING *STARE DECISIS*

Literally translated '*stare decisis*' means 'stand by the decision'.¹⁴ The common understanding of the concept is that it obligates judges in common law countries to follow precedent, while judges in civil or statute law countries are not bound by precedent and instead are free to decide each case on its own. In this article, I would like to show that both understandings are wrong and that, in fact, there is little difference, if any, these days between countries supposedly subject to *stare decisis* and others that supposedly are not. And I will try to show that *stare decisis* properly understood is not as such a conservative idea, just as the absence of *stare decisis*, whatever that may be called, is not a particularly liberal idea.¹⁵ There are well reasoned decisions and poorly reasoned decisions. Either of them can be leaning towards more conservative interpretations of law and policy or towards more liberal interpretations. But blindly following precedent or decisions without persuasive reasons are first and foremost bad decisions.¹⁶

Common law provides for '*stare decisis*' in order to bring stability to a system where case law is dominant.¹⁷ Therefore, common law courts 'are slow to interfere with principles announced in (...) former decisions and often uphold them even though they would decide otherwise were the question a new one'.¹⁸ And while a court could deviate from its own precedents, if it has good reasons, '[a] lower court owes deference to those above it; ordinarily it has no authority to

¹⁴ Barron's Law Dictionary translates the expression as 'stand by that which was decided'. Jowitt's Dictionary of English Law is almost the same: 'to stand by things decided'. Black's Law Dictionary is a little more specific and, at least for our purposes, more useful: 'to abide by, or adhere to, decided cases'.

¹⁵ Charles Cooper of the US Department of Justice wrote in 1987 'if there is any principle that is fundamental to the true conservative, if there is any doctrine that is inviolable to the true conservative, if there is any rule that is cardinal to the true conservative, it is *stare decisis*. And if you don't believe me, ask any true liberal'. See C.J. Cooper, 'Stare Decisis: Precedent and Principle in Constitutional Adjudication' (1987–88) 73 *Cornell Law Review* 401, 401. My goal is to show that only the misunderstanding of *stare decisis* makes it a conservative or even just a politicised idea. In fact, I'll go as far as claiming that both the conservative view of strict *stare decisis* and the liberal view of its total absence, are simply stupid ideas.

¹⁶ Indeed US Supreme Court Justice Robert Jackson, long before his appointment to the highest court in the USA, once said that '[t]he judge who can take refuge in a precedent does not need to reason'. The 1937 statement is quoted in C.J. Cooper, 'Stare Decisis: Precedent and Principle in Constitutional Adjudication' (1987–88) 73 *Cornell Law Review* 401, 402. Similarly, in his seminal essay on *stare decisis*, William Douglas begins with the observation that '[m]ost lawyers, by training and practice, are all too apt to turn their interests and their talents toward the finding not the creating of precedents'. See W.O. Douglas, 'Stare Decisis' (1949) 49(6) *Columbia Law Review* 735, 735.

¹⁷ See e.g. F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-based Decision-making in Law and in Life* (Oxford University Press 1991) in particular 181 ff.

¹⁸ Supreme Court of Oklahoma, *Oklahoma County v. Queen City Lodge*, No. 197, 156 P. 2d 340, 345 (1945).

reject a doctrine developed by a higher court'.¹⁹ At least in their extreme forms, the two systems seem diametrically opposed. For common law, the well respected Jowitt's *Dictionary of English Law* provides that '[d]ecisions of higher courts are binding on lower courts. They may also be binding on themselves'.²⁰ By contrast, stability in statute law countries is provided by the statutes, which are binding on the courts and, therefore, it is widely considered that there is no obligation for courts to consider themselves with precedent at all.

In the French legal tradition, judges are supposed to be the mouthpiece of the law, merely pronouncing the law, and not making it themselves.²¹ Statutes do not only provide the stability, they provide the final answer, which is merely to be found by the judges. Subsequent references are once again to the statutes and there is no good reason for referring to precedents because they normally add nothing to the process of discovery of the law. Therefore, published judgments, even by the *Cour de Cassation*, the highest court for all civil and criminal cases in France, to this day are rather short, essentially just providing a summary of the facts, reference to the relevant statutory rules, and the ruling itself, without much or any reasoning.²² In this way, French legal tradition remains faithful to its roots in Roman law.²³ Understandably, there is not only no obligation for judges to analyze precedent,²⁴ there is virtually no incentive for them to consider it at all.²⁵ Eastern Europe to this day suffers from the Communist legacy. On the one hand, during the Stalinist era of the 1950s and 1960s, a small number of special courts and judges were used for political show trials staged by the Communist Party leadership to purge dissidents among their own ranks.

¹⁹ *United States ex. Rel. Shore v. O'Leary*, 833 F.2d 663 (7th Circuit, 1987, with further references). Only exceptionally, a decision of a federal court of appeals or a state appellate court in the United States can be found 'unworthy of publication' and declared 'non-precedential' by a judicial panel, which prevents judges and attorneys in later cases from making reference to it. See e.g. M.M. Serfass and J.L. Cranford, 'Federal and State Court Rules Governing Publication and Citation of Opinions' (2001) 3 *Journal of Appellate Practice and Process* 251. For critical analysis, see R.B. Cappalli, 'The Common Law's Case Against Non-precedential Opinions' (2003) 76 *Southern California Law Review* 755.

²⁰ Jowitt's *Dictionary of English Law* (vol. 2, Sweet & Maxwell 2010) 1765.

²¹ It was again Montesquieu who said that '*le juge est la bouche de la loi*'. In the English translation, 'the judges of the nation are, as we have said, only the mouth that pronounces the words of the law'. See Montesquieu, *The Spirit of the Laws* (1989) 163. See also A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1962).

²² See e.g. E. Steiner, *French Law: A Comparative Approach* (Oxford University Press 2010) 147.

²³ For analysis of precedent in Roman law, see E. Metzger, 'Roman Judges, Case Law, and Principles of Procedure' (2004) 22 *Law and History Review* 243.

²⁴ Nevertheless, even the French legal system knows the concept of 'persuasive authority' and encourages courts to follow precedent if there is jurisprudence constante, i.e. a well established way of handling a particular issue. Yet, there is no obligation to this end and, as can easily be understood, if the precedents are largely without reasoning, they will only be 'persuasive' if the facts are straightforward and identical.

²⁵ Other legal systems in the Roman law tradition follow the same pattern. For Italian law, see M. Cappelletti et al., *The Italian Legal System* (Stanford University Press 1967). For Spanish law, see T. Rodríguez de las Heras Ballell, *Introduction to Spanish Private Law* (Routledge-Cavendish 2010).

The judges, prosecutors and even the defense attorneys were carefully selected and assigned their precise roles. They were people whom the Party trusted and who were able to act out the theater of the trial. (...) In this staged play, it was always the prosecutor who was cast the main role; judges were their obedient servants rather than genuinely independent actors.²⁶

On the other hand:

[T]he regimes in Central and Eastern Europe held hundreds of thousands of lesser known trials, targeting members of the independent intelligentsia, politicians of non-Communist parties, clerics, modest peasants who did not want to submit to collectivization. The trials were prepared in detail, and the accused were forced to confess. Participation of the judges was a mere formality; the decisive role was played by the security service, and the outcomes were in any case decided in advance.²⁷

Both kinds of Communist trials together not only generated widespread distrust of the judiciary. Independent minds among the judges were either forced to retire or dulled into submission and the quality of legal thinking and argumentation suffered accordingly. This was exacerbated with the passage of time because the best and brightest minds in the Communist countries diligently avoided disciplines such as law and political science where they would have to become mindless tools of illegitimate ideologies. And those who did serve in the judiciary took flight to excessive textual positivism and formalism, as will be illustrated shortly.

In Communist times, judgments were no longer published because they were either considered politically sensitive and, therefore, kept secret, or they were simply unworthy of publication because they were irrelevant.²⁸ As a consequence, lawyers in the region unlearned case law analysis. To this day, several Central and Eastern European Countries (CEECs) have 'official collections' where only a small number of decisions are published in edited format. The decisions to be published are selected by high level commissions of the ministries or courts and, together with careful editing, are to ensure that only clear and uncontroversial

²⁶ Z. Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Martinus Nijhoff 2011) 27.

²⁷ *ibid.* Kühn himself refers to J. Pelikán (ed.), *The Czechoslovak Political Trials, 1950-54: Suppressed Report of the Dubcek Government's Commission of Inquiry, 1968* (Stanford University Press 1971). See also A. Czarnota, M. Krygier and W. Sadurski (eds.), *Rethinking the Rule of Law After Communism* (Central European University Press 2005).

²⁸ Z. Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Martinus Nijhoff 2011) 191. See also Z. Kühn, 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement' (2004) 52(3) *American Journal of Comparative Law* 531.

decisions make it out to the general public.²⁹ Private or commercial publications did not exist until the late 1990s, both because there was no market for them, and because the judgments were simply not accessible.³⁰ Nowadays, decisions of constitutional courts are generally accessible, including free online access, but publication of trial court judgments is still the exception and not the rule.

The problems created by the extreme positions on *stare decisis* shall be illustrated with a number of examples. The first is a recent decision from Pennsylvania. The plaintiff had been married and the couple had a daughter. When he found out that his wife had had an affair around the time when the daughter was conceived, he took a DNA test and discovered that the girl was not his daughter. The marriage fell apart and the plaintiff had to pay child support to his ex wife, which he accepted at first because the biological father of the girl was unwilling or unable to support her. However, when the ex-wife proceeded to marry the man she had been unfaithful with, who was also the biological father of the girl, the plaintiff no longer wanted to pay child support. In rejecting the complaint, and thus effectively condemning the plaintiff to pay child support to a married couple living with their own child, to which the plaintiff was not related, the judge declared that he was bound by precedent, albeit frustrated with it at the same time.³¹

Indeed, the case law in Pennsylvania is quite clear, and plaintiff's appeal failed accordingly.³²

The second example was a series of civil cases at first instance trial court in Estonia in 2001. Together with some colleagues, I was trying to help elderly tenants who were being evicted from their apartments. Some of the apartments had been privatised and become the property of the tenants but they were unable, on the basis of their meagre pensions, to pay their utility bills, which had gone up several hundred percent over just a few years. In other cases, the apartments had somehow become the property of local politicians, although restitution claims from pre- World War II owners were sometimes pending. The local politicians

²⁹ Z. Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Martinus Nijhoff 2011) 191.

³⁰ The main exceptions are the decisions of the Supreme or Constitutional Courts, which are nowadays widely published on the internet. However, in the absence of a tradition of case law-based analysis and argumentation, the legal professionals in the region are only slowly beginning to make use of this new source of information. For further information on access to case law, see the various country reports in L. Hammer and F. Emmert (eds.), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (Eleven International 2012).

³¹ *S.A.L. v. M.D.L.*, 968 A.2d 803 (Pa. Super. Ct. 2009). See also Memorandum of 9 March 2010 <http://www.legis.state.pa.us/cfdocs/legis/TR/transcripts/2010_0073_0003_TSTMNY.pdf> accessed 340 September 2012. Similarly, in British common law, it is widely accepted that the binding force of many precedents combined can result in a 'rule' that can only be changed by the adoption of a statute, and until such adoption the rule will be applied by the courts even if it does injustice in a given case. See H.L.A. Hart, *The Concept of Law* (Clarendon Press 1961) ch. 7.

³² *S.A.L. v. M.D.L.*, 601 Pa. 703 (2009). The case was described in some detail in R. Padawer, 'Losing Fatherhood' (*New York Times Magazine*, 22 November 2009) 38 ff.

were either trying to collect ‘their’ rent or were trying to evict the elderly tenants in order to conclude new rental agreements at much higher prices. Since the problems were widespread and affected a significant portion of the most attractive real estate in the old city centre of Tallinn, there had already been numerous court decisions, at least some of which were favourable to our cause. I was surprised, however, when my co-counsel advised me not to make any references in the written brief to the prior case law of this and other courts in Estonia. She explained that the judge might react rather strongly against such an attempt at questioning or restricting her judicial independence.³³ I followed up on this somewhat puzzling explanation and found an opinion poll conducted in Estonia earlier which included the question whether the respondents thought the judges in general were sufficiently independent by now. A majority of randomly selected respondents answered that they thought the judges were actually too independent. When I first wrote about this episode, I argued that judges can hardly be too independent, if independence is properly understood as freedom from outside interference with the administration of justice ‘whether by bribes and personal advantages offered to judges, by public or political pressure exercised on them, or by shortcomings in the administrative procedure, such as biased case allocation. For these very reasons, legal systems that subscribe to the rule of law will foresee criminal sanctions for anyone attempting to influence courts and judges by offering personal advantages, will shield judges from public and political pressure by a system of long-term or life- time tenure, will contain abstract and neutral rules on case allocation and procedural management, and may have other rules to protect the independence of the judiciary’.³⁴

Since the transition countries in Central and Eastern Europe – often with the help of Western partners – had dutifully implemented all the formal safeguards of judicial independence, something else was amiss. The explanation was not hard to find. The interlocutors of the Estonian courts, including the parties to the disputes, a certain professional audience of attorneys, academics, and students, and a limited but growing portion of the public at large, had been observing the practice of the courts with increasing frustration. Specifically in our example of certain types of post-privatisation cases, these interlocutors had seen a series of decisions from different courts coming out in different ways. Sometimes the tenants seemed to prevail in one court, the creditors or owners in another.

³³ Unpublished proceedings on file with the author. See also F. Emmert, ‘The Independence of Judges: A Concept Often Misunderstood in Central and Eastern Europe’ (2002) 3(4) *European Journal of Law Reform* 405.

³⁴ F. Emmert, ‘The Independence of Judges: A Concept Often Misunderstood in Central and Eastern Europe’ (2002) 3(4) *European Journal of Law Reform* 405, 405–406. On judicial independence, see also P.H. Russell and D.M. O’Brien (eds.), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (2001); S. Shetreet and C. Forsyth, *The Culture of Judicial Independence* (BRILL 2011); P.A. Albrecht and J. Thomas (eds.), *Strengthen the Judiciary’s Independence in Europe! International Recommendations for an Independent Judicial Power* (Intersentia 2009).

Sometimes the decisions were reversed on appeal, sometimes not. Sometimes different chambers of the same court would rule differently in seemingly identical cases. Sometimes they would do so on the same day. And sometimes one and the same chamber of one and the same court would decide for the tenant in one case and for the owner in another. And all of this was done essentially without any serious attempt at providing persuasive reasons why the tenant could stay in her apartment in one case, while she could be thrown into the street in another. Unsurprisingly, the public saw only one logic in these patterns, namely that 'justice' in Estonia was for sale to the highest bidder.

The third example is the case of Marcel Vichmann, a former executive officer of Hoiupank, a medium-sized Estonian bank. During the negotiations that led to the take-over of Hoiupank by the larger Hansapank, Vichmann made a series of securities transactions with Hoiupank money that would probably have qualified as insider trading in the West. At the end of the transactions, he transferred some thirteen million US dollars in profits to his personal bank account while the original funds were returned to Hoiupank and eventually became the property of Hansapank. Some months later, after the new owners had reviewed the books and discovered the transactions and the missing profits, Vichmann was accused of embezzlement and fraud and sued for re-payment of the money. The first surprise in the case was the refusal of the public prosecutor to bring charges against Vichmann because she could see no evidence of criminal intent. The real mystery, however, was the outcome of the civil case for repayment of the funds, which ended in total frustration for Hansapank. Neither the trial court, nor the appellate court, and not even the Estonian Supreme Court could find any rules that Vichmann had breached and, therefore, rejected the bank's claim for reimbursement. Quite obviously, the principle of unjust enrichment had not made it yet into Estonian black letter law. Vichmann got to keep the money and, because of the principle of fee shifting in continental European systems, Hansapank got to pay all his legal expenses as well.³⁵

The first example of the child support payments shows an overstatement in common law of the binding effects of precedents. The judge is forced into the role of an agent of actual injustice. Worse, because she is trained in persuasive

³⁵ F. Emmert, 'The Independence of Judges: A Concept Often Misunderstood in Central and Eastern Europe' (2002) 3(4) *European Journal of Law Reform* 405, 406; F. Emmert, 'Administrative and Court Reform in Central and Eastern Europe' (2003) 9(3) *European Law Journal* 288, 295. For other examples of extreme positivism and formalism in Eastern European jurisprudence, see M. Kurkchian, *Civil Courts in Ukraine: Window into Society* (unpublished manuscript on file with the author), presented at The Centre for Socio-Legal Studies Seminar Series at the University of Oxford on 17 October 2011 <<http://www.law.ox.ac.uk/event=11218>> accessed 30 September 2012; M. Barry Fitzmahan, 'Vestiges of Soviet Control Mechanisms in the District Court of Ukraine' (2000) 7(2) *Journal of East European Law* 341. For a good analysis of the zig-zag of reform and counter-reform in the Russian legal system, see P.H. Solomon Jr., 'Threats of Judicial Counterreform in Putin's Russia' in K. Hendley (ed.), *Remaking the Role of Law: Commercial Law in Russia and the CIS* (Juris 2007) 1, with useful further references. See also K. Hendley, "'Telephone Law" and the "Rule of Law": The Russian Case" (2009) 1(2) *Hague Journal on the Rule of Law* 241.

reasoning and expected to explain her decisions, she will more or less openly express her frustration with the system and, thereby, expose its shortcomings and injustice to an audience beyond the parties to the case. Legitimacy of the legal system as a whole gets damaged. The more often this happens, the greater the compounded damage in the eye of the public.

The second example of the claims against tenants in Estonia shows an understatement in civil law of the binding effects of precedents. The judges become agents of perceived injustice. While they may in fact have good reasons for deciding for the applicant in one case and for the defendant in another, they are not trained in persuasive reasoning and they are not expected to explain their decisions, thus not exposing its qualities, inner logic and consistency and therefore its justice and fairness to an audience beyond the judges themselves. Legitimacy of the legal system as a whole gets damaged. The more often this happens, the greater the compounded damage in the eye of the public.

The third example of the embezzlement of employer funds shows a profound inability in either civil law or common law of dealing with a hard case where there is no pre-existing written rule, either in statute or precedent to give guidance. The judges stumble into the role of agents of actual and perceived injustice. Since the judges lack the methodological training to deal with the absence of black letter rules, they resort to excessive formalism and legal positivism. Since they are also poorly trained in persuasive reasoning and not really expected to explain their decisions, they fail to provide even a semblance of acceptable reasons for their decision and come out of it looking like incompetent fools or bribe taking crooks. Legitimacy of the legal system as a whole gets damaged. The more often this happens, the greater the compounded damage in the eye of the public.

In the third and final parts, we will examine what the judges in all three cases should have done differently, for the sake of the parties before them but, more importantly, in the interest of the legal system and society as a whole.

D. MAKING SENSE OF PRECEDENTS AND *STARE DECISIS*

The very notion of rule of law is the primacy of abstract and dispassionate rules over physical force of individuals and even the mighty arm of the sovereign. These rules not only allow individuals *ex ante* to organise their lives and conduct in such a way that they are safe from surprises in their personal and professional dealings. Should a dispute arise between two individuals or between an individual and the state, the same rules provide *ex post* for its settlement in ways that are 'just and fair'. Rule of law, therefore, requires a legislature that provides just

laws, an executive that is bound by them, and a judiciary that applies them in a just and fair manner when disputes over their interpretation arise.³⁶

As I have pointed out elsewhere, pretty much anything we consider positive and/or desirable is in short supply in our world.³⁷ The adoption of just laws is not our greatest problem, however. Laws may be poorly drafted or they may provide poor choices for at least some groups or interests in society. But even the most absolute and misanthropic dictators seem to avoid, with few exceptions, the adoption of manifestly unjust laws. The difference between countries that claim to follow the rule of law and those where such a claim would be preposterous, therefore, lies in the question whether the sovereign - and his family, business partners, cronies, fellow tribesmen... - are bound by the rules like everyone else, and in the question whether there are functioning courts that are generally accessible and able to provide just, fair, and enforceable decisions in reasonable time. As our examples have shown, making sense of precedents and *stare decisis* is key to the legitimacy of the legal system. A system that does not explain itself might still follow the rule of law but it will eventually fail. As Gordon Hewart famously said, '[n]ot only must justice be done; it must also be seen to be done'.³⁸

Doing justice and being seen to be doing justice require that the binding effects of precedent not be overstated in common law and that the relevance of precedents not be understated in civil law. Indeed once we acknowledge the fact that no judge or court is ever bound by precedent³⁹ in the sense of mechanical jurisprudence in common law,⁴⁰ and that any judge or court who ignores precedent in a statue law system does so at the cost of her own legitimacy and

³⁶ For a discussion of different definitions of 'rule of law' and a vote for a reconsideration, see F. Emmert, 'Rule of Law in Central and Eastern Europe' (2009) 32(2) *Fordham International Law Journal* 551.

³⁷ F. Emmert, 'How to and How Not to Introduce Competition Law and Policy in Transitional and Developing Economies' (SSRN, 31 October 2011) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1951609> accessed 30 September 2012.

³⁸ *Rex v. Sussex Justices ex parte McCarthy* (1924), 1 KB 256 [1923] All ER 233 (Hewart J.).

³⁹ This is indeed the true tradition of Roman law, where 'the opinions and advice of those entrusted with the task of building up the law' were only binding if 'all of them agree on a point'. See book 1, no. 7 of the Institutes of Gaius, here quoted from J.H. Merryman, D.S. Clark and J.O. Haley (eds.), *Comparative Law: Historical Development of The Civil Law Tradition in Europe, Latin America, and East Asia* (LexisNexis 2010) 193–194. Interestingly, the same is true for the Islamic Law tradition, where the opinions of the relevant scholars on a point of law – the nearest thing to a precedent from the early years of the development of Islam – were binding only if there was a consensus among these scholars because, as the Islamic Prophet Muhammad reportedly said, 'my community will never agree upon an error'. See J. Berkey, *The Formation of Islam, Religion and Society in the Near East 800–1800* (Cambridge University Press 2003) 147; W. Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009) 22.

⁴⁰ As Richard Posner has pointed out, 'if judges did nothing more than apply clear rules of law (...) to facts that judges and juries determined without bias or preconceptions [then] judges would be well on the road to being superseded by digitised artificial intelligence programs'. See R.A. Posner, *How Judges Think* (Harvard University Press 2008) 5. Since this would be quite disastrous for the employment perspectives of the entire profession, it needs to be avoided at all cost.

potentially that of the entire legal system, we can identify five methods to deal with precedent.⁴¹

First, a judge or court may acknowledge a precedent and follow it by deciding the case before it in the same way, essentially by saying ‘this case is the same in law and fact and, therefore, should be decided in the same way’.

Second, a judge or court may acknowledge a precedent as correct but then proceed to distinguish the case before it on the facts, essentially by saying ‘this case, however, is different in fact because’. A similar result can be achieved by narrowing the precedent, i.e. the judge or court acknowledges the precedent as correct but then proceeds to explain why the case before it is a special emanation of the problem and deserves an exception to the rule of the precedent.⁴²

Third, a judge or court may acknowledge a precedent but then proceed to explain that it is no longer correct and binding because the law has changed, essentially by saying ‘this case, however, is different in law because’.⁴³

Fourth, a judge or court may acknowledge a precedent but then proceed to explain that it is no longer correct and binding because times have changed. In essence, the judge or court is saying that the precedent was correct at the time but can no longer provide good guidance for a particular set of facts because the world around the given set of facts has changed.⁴⁴

Fifth, a judge or court may acknowledge a precedent but then proceed to explain that it is a bad precedent because it was never correct and, therefore, cannot inform the decision in the case before it. Obviously, this is not unproblematic because the court is effectively applying a new rule retroactively to facts that have occurred in the past. Therefore, this would need to be backed up with elaborate and persuasive reasoning why the rule of the precedent was wrong, ideally of the kind that will stand on appeal.

⁴¹ For much more elaborate discussion, see F. Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press 2009).

⁴² Specifically on the latter, see H.L.A. Hart, *The Concept of Law* (Clarendon Press 1961) ch. 7. Of course, if such an exception had never been granted before, the judge or court is incidentally engaging in law making.

⁴³ This should ideally be followed up by reference to some new statutory language. It may be followed up by reference to some new case-law, although reference to an older precedent in the presence of one or several newer precedents is usually only necessary if the older precedent has gained such a high level of notoriety that its omission from the reasoning in a similar case would increase rather than decrease legal uncertainty.

⁴⁴ Pound provides a good example in the realm of tort law. After the development of railroads in America, the courts developed – by case-law – a standard of due care for anyone wishing to cross the rails, the ‘stop, look, and listen rule’. However, ‘what was reasonable when fast trains went forty miles an hour and people crossed tracks in horse drawn vehicles is not overruled by not applying it as a measure of reasonableness when trains go from seventy to one hundred miles an hour (...) and crossing is done in motor vehicles. (...) What was a negligent speed in a horse drawn cart is not a negligent speed in an automobile. What was unreasonable in a rural agricultural society is not necessarily unreasonable in an urban industrial society. What was unreasonable under the circumstances of yesterday may or may not be under the circumstances of tomorrow’. See R. Pound, ‘What of Stare Decisis?’ (1941) 10(1) *Fordham Law Review* 1, 6, 7 and 11 (emphasis added).

Several things should be noted. First, there is no sixth option of not acknowledging at all, i.e. ignoring the precedent. Unless a precedent is so obscure that it is essentially unknown to anyone and everyone who will ever look at and analyze the new case, the precedent needs to be acknowledged and dealt with in one of the five methods listed above, whether the judge or court is part of a common law or a statute law system.

Second, the five methods are progressively more challenging for the judge at hand. Simply following a rule that has already been established and seems to fit the pattern of fact is obviously the easiest way of dealing with a case. It may, however, be unsatisfactory. If so, the judge or court should first try to distinguish the case, argue a narrowing of the rule that leaves room for an exception, or look for a relevant change in the law. Those are the easy cases postulated above. Only if neither of these methods looks promising, the judge or court may want to proceed by arguing a change of times or, most challenging, a fault with the original precedent. Those are the harder cases.

Third, then there are cases where there is no useful precedent (or sufficiently detailed statute) at all. Those are the really hard cases. Since the judge or court cannot deny justice and simply send the parties away, a decision has to be taken one way or another and, as we have seen, it cannot simply be the toss of a coin. Instead, the judge first has to ask herself what would be the just way of deciding between the claims of the parties at hand.⁴⁵ The continental European tradition of a more active involvement of the judge makes this easier in cases where the parties, for whatever reason, do not make the necessary motions. In the common law systems, in particular in the United States, the judge's role as a neutral arbiter between the parties may sometimes limit the choices of the judge to come to a truly fair and just decision. Beyond the actual case at hand, however, the judge or court also has to think whether the decision will make a good precedent, i.e. whether it will be a good rule for future cases with parallel facts. This will

⁴⁵ Since the question whether a decision is 'just' or 'unjust' is a value judgment, the result cannot be objectively measured. However, as presented here, a decision is deemed to be 'just' if it is perceived by the various interlocutors, ideally including the unsuccessful parties, as formally and substantively correct. This, in turn, requires that the decision is persuasive, i.e. that its reasoning is able to persuade those interlocutors that the decision is based first on transparent and neutral procedures suitable to assess the facts and granting all stakeholders an effective right to be heard and resulting in an enforceable decision within reasonable time, and second that the decision is based on all applicable laws and on the values of the society as reflected in the constitution and bill of rights, any applicable international treaties on human rights and fundamental freedoms, and any general principles of law and justice widely shared by the members of that society. My position is in obvious opposition to the classic positivists like Kelsen, as well as the modern formalists like A. Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press 2006). However, I find myself in the good company of various neorealists and other supporters of practical jurisprudence. See e.g. A. Peczenik, *On Law and Reason* (Springer 2009); M. Eisenberg, *The Nature of the Common Law* (Harvard University Press 1991). At the same time, I am aware of the problem of subjectivity of value expressed by the critical legal studies movement, although I believe that a broad-based analysis of constitutional values and human rights can largely avoid this problem.

frequently require a consideration not only of the competing interests of the current plaintiff and defendant but also of the competing interests of various stakeholders in society as a whole. If the judge can explain how her decision in a hard case not only leads to a just and fair result for the parties at hand but also provides a good rule for others to follow in the future, her decision is not only likely to stand on appeal but also to be relied upon by future judges and courts. In this way, the decision will have added to legal certainty and the legitimacy of the legal system as a whole, rather than subtracted from it.

In determining what is just for the case at hand and a good rule beyond it, a diligent judge will look for inspiration in a number of places. If there are statutes covering the subject matter, just not the case at hand, they may provide useful guidance of legislative intent in their text or preamble. Alternatively, recourse to the minutes of parliamentary debates may illuminate the intentions of the legislature regarding certain issues or principles.⁴⁶ By casting a wider net, a judge may successfully catch a relevant principle of law in the constitution or in unwritten customary law. The bill of rights in the national constitution and any relevant international treaties on human rights and fundamental freedoms should always be taken into consideration when it comes to giving meaning to indeterminate language in the law, balancing competing interests, and/or to filling lacunae in the law.⁴⁷ Last but not least, a smart judge will look at solutions already found in other jurisdictions, including other countries, to see whether they may provide good ideas for the resolution of the novel conflict or, as the case may be, whether they at least provide an example of how not to resolve the case at hand,⁴⁸ because... because... because...

⁴⁶ Naturally, this is not unproblematic, not least since it may introduce further uncertainty. Therefore, in the United Kingdom, recourse to Hansard has traditionally been impermissible for judges. For discussion, see D. Miers, 'Citing Hansard as an Aid to Interpretation' (1983) 4(3) *Statute Law Review* 98. For broader discussion, see H. Fleischer, 'Comparative Approaches to the Use of Legislative History in Statutory Interpretation' (2012) 60(2) *American Journal of Comparative Law* 401.

⁴⁷ See F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-based Decision-making in Law and in Life* (Oxford University Press 1991) 41.

⁴⁸ In this context, the well-known hostility of Justice Antonin Scalia of the US Supreme Court to any references to 'foreign judgments', including those of international courts like the European Court of Human Rights, reminds me of a person holding her ears shut and running out of the room screaming for fear of being corrupted by what is being said. While there is obviously no binding effect of foreign precedents on current and future decisions of the US Supreme Court, there is equally obviously only knowledge and wisdom to be gained by pondering what other courts have done and why and whether or not it may be a useful model for one's own decisions. For an example of Scalia's hostility to the globalisation of legal thought see his criticism of Justice Kennedy in *Lawrence v. Texas*, 539 U.S. 558 (2003) 598. See also the debate on 13 January 2005 at American University Washington College of Law between US Supreme Court Justices Antonin Scalia and Stephen Breyer on Constitutional Relevance of Foreign Court Decisions <<http://domino.american.edu/AU/media/mediarelat.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0>> accessed 30 September 2012. For a much more open minded view, see e.g. R. Bader Ginsburg, "'A Decent Respect to the Opinions of [Human]Kind': The Value of a Comparative Perspective in Constitutional Adjudication" (2005) 64(3) *Cambridge Law Journal* 575. Scalia is generally against the search of unexpressed legislative intent and subscribes to a 'philosophy [of] textualism, or originalism, since it

In sum, once we acknowledge that every judge or court, whether in a common or statute law based system, always has all of these methods at her disposal, but at the same time always also has an obligation in law or in fact to actually make use of them, the proper resolution of our sample cases should become quite obvious and relatively easy.

E. Conclusions

After the catastrophic failure of the German legal system during the Third Reich, the first truly democratic constitution for Germany was developed in 1948/49 with Allied support and oversight. It is characterised by a number of safeguards to prevent any risk of Germany returning to totalitarian or racist institutional structures or behavioural patterns. One of the most important safeguards is the establishment of a strong and independent constitutional court which is external to the normal court hierarchy and entrusted primarily with the enforcement of constitutional rights and obligations between the different state organs and between the state and the people.⁴⁹

As early as 1958, in the seminal L $\ddot{u}$ th decision, the Federal Constitutional Court declared that the human rights and fundamental freedoms contained in the constitution have direct effect and, therefore, must be respected by everyone and in all areas of law.⁵⁰ In practice, this is accomplished via interpretation of general

is the original meaning of the text – applied to present circumstances – that should govern judicial interpretation of statutes and the Constitution’. These words by Amy Gutmann can be found in A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1997) vii (with comments from G.S. Wood, L.H. Tribe, M.A. Glendon and R. Dworkin, and a response by A. Scalia). The reader should note that Scalia is providing one of several possible approaches to indeterminate language in the law. He does not provide a solution for the hard cases, however. For a powerful critique of originalism see also H.P. Monaghan, ‘Stare Decisis and Constitutional Adjudication (1988) 4 *Columbia Law Review* 723.

⁴⁹ The complete list of jurisdictional powers of the Bundesverfassungsgericht is contained in art. 13 *Bundesverfassungsgerichtsgesetz* (Law on the Federal Constitutional Court, BVerfGG). An unofficial translation of the law into English by Inter Nationes and is available online at <<http://www.iuscomp.org/gla/statutes/BVerfGG.htm>> accessed 30 September 2012. A shorter summary in English language by the Goethe Institute can be found at <<http://www.goethe.de/in/d/presse/gesetzentexte/e/bvvgg-e-f.html>> accessed 30 September 2012.

⁵⁰ See BVerfGE 7, 198 (L $\ddot{u}$ th), in particular [204]–[207]. For discussion, see e.g. H. Dreier, *Dimensionen der Grundrechte: Von der Wertordnungsjudikatur zu den Objektiv-rechtlichen Grundrechtsgehalten* (Hennies und Zinkeisen 1993).

clauses and indeterminate language in the law⁵¹ in light of the constitutional rights and obligations.⁵²

The doctrine of direct effect of constitutional rights and freedoms in effect turned the German legal system into a hybrid between statutory or civil law and common law.⁵³ This is evidenced by two factors. On the one hand, case law originating at all levels of the judiciary has become so important in Germany that every legal practitioner on a daily basis is working not only with extensive collections of statutory law but also with elaborate and regularly updated commentaries on that statutory law which, in particular, summarise the interpretations given to the statutory language by the courts. On the other hand, a look into the contemporary practice of Austria and Switzerland shows remarkable differences compared to Germany. Although all three countries share the common roots of the Germanic legal system, neither Austria nor Switzerland are anywhere near as hybrid today as Germany. For one, Switzerland did not get drawn into the corruption of the entire legal system during the Third Reich and, consequently, did not see a need for a complete reboot of its legal system after 1945. Secondly, Switzerland does not have a strong and independent constitutional court; the Bundesgericht is more of a federal appellate court and does not have the power to strike down federal laws and/or international agreements for incompatibility with the Swiss Constitution.⁵⁴ And while Austria does have a strong constitutional court, it saw itself as a victim of German aggression during World War II and also did not fundamentally overhaul its legal system after 1945. Both countries, therefore, remain closer to the French – or classic continental European – approach pursuant to which the judge is limited to pronouncing the (statutory) law and prohibited from making it.⁵⁵

⁵¹ Examples of such clauses and language would be the use of ‘for example’ or ‘in particular’, when referring to criteria that may need to be supplemented by constitutional rights and freedoms, and expressions such as ‘reasonable’, ‘fair’, ‘adequate’, ‘suitable’, ‘appropriate’, ‘legitimate’, ‘important’, ‘negligent’, ‘best interest’, ‘public interest’, ‘common good’, ‘good faith’, ‘public safety’, ‘undue hardship’, *etcetera*.

⁵² Indeed, the BVerfG held in *Lüth* that general clauses and indeterminate expressions in any law are the entry gates for the fundamental rights and freedoms of the constitution into parliamentary legislation and administrative regulation (*die ‘Einbruchstellen’ der Grundrechte*). See BVerfGE 7, 198 (*Lüth*) at [206]. The BVerfG quoted the expression from G. Dürig in F.L. Neumann, H.C. Nipperdey and U. Scheuner, *Die Grundrechte* (vol. 2, Duncker & Humblot 1968) s. 525.

⁵³ For further analysis, see V. Fon and F. Parisi, ‘Judicial Precedents in Civil Law Systems: A Dynamic Analysis’ (2006) 26(4) *International Review of Law and Economics* 519.

⁵⁴ The jurisdiction of the Swiss Federal Supreme Court is regulated by art. 189 of the Swiss Federal Constitution. See also W. Haller, *The Swiss Constitution in a Comparative Context* (Dike Publishers 2009) in particular 136–143.

⁵⁵ The impact of the European Convention on Human Rights and Fundamental Freedoms, which has a catalog of fundamental rights and freedoms not unlike many constitutions, and has to be applied with direct effect in all Member States of the Council of Europe, including Switzerland and Austria, has been eroding the differentiation here presented. A similar effect can be seen from Austria’s membership in the EU and the direct effect of EU law in the Austrian legal order.

The European Court of Justice, finally, is the market place of ideas where all European legal traditions meet and sometimes clash. If its judges had always been loyal ambassadors of their respective national legal traditions, by sheer force of numbers, the Court of Justice should be a mirror image of the French *Cour de Cassation*. After all, from 1954, when it deliberated its first cases, until 1973, when Ireland and the United Kingdom joined, the Court only had civilian legal systems represented. And even today, twenty-five out of twenty-seven countries follow more or less clearly in the footsteps of the civilian or statutory or continental European legal tradition. However, the European Court could hardly be further from a system where the judges merely pronounce the laws made by others and precedent is largely irrelevant.

Many factors have influenced and shaped the European Court of Justice and much has already been written about them. In my conclusions, therefore, I wish to highlight only one of them: the European Court cares about its reputation, or as we say as lawyers, it cares about its legitimacy. It does so for a number of good reasons.⁵⁶ First, the European Union is a voluntary association of sovereign states. Its law - whether statutory or case law - will be observed by the Member States and in the Member States only as long as it is made in ways that are formally correct pursuant to the treaties that embody the foundational agreement of the Member States, and as long as it is perceived by the various stake holders as substantively correct, fair, and just. Second, the European Court of Justice for the most part does not have jurisdiction to hear cases brought directly to it by natural or legal persons. By far its most important procedure is the so-called preliminary rulings procedure of Article 267 TFEU in which the powers of the Court of Justice are activated by a request from 'a court or tribunal of a Member State' to provide it with a preliminary decision about 'the interpretation of the Treaties [or] the validity and interpretation of an act of the institutions, bodies, offices or agencies of the Union'.⁵⁷ Thus, the Court of Justice depends upon the voluntary cooperation of the national courts and judges, who will only suspend a procedure pending before them to send one or more questions to the European Court if they agree that this interruption will ultimately result in an outcome that is not only formally required but also substantively correct, fair, and just.

As elaborated earlier, the perception of fair and just in the case of a judgment of the European Court of Justice or any other court is quite obviously facilitated when the selection of relevant rules and their application to the case at hand is explained in a coherent and logical manner in the decision itself. Moreover, since each decision of the Court of Justice does not stand alone but is seen by the

⁵⁶ And with notable success! See e.g. K. Alter, 'The European Court's Political Power: The Emergence of an Authoritative International Court in the European Union' (1996) 19 *West European Politics* 458.

⁵⁷ See art. 267 TFEU. Of course, 'act' includes statutory legislation by the European Parliament and the Council of Ministers of the EU. For further analysis, see e.g. M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (Oxford University Press 2010).

interlocutors of the Court in the Member States and elsewhere in the context of all decisions concerning similar or related questions, the case law overall has to be coherent and logical. Thus, if the Court wishes to decide a case differently from a similar earlier case, it has to explain why the facts are different, why and how the law is no longer the same, why or how the times have changed, or why the earlier decision was incorrect to begin with. Unsurprisingly, therefore, the European Court makes regular and extensive references to its own earlier case law to make abundantly clear how that case law is overall consistent and coherent, and very rarely deviates from an earlier line of cases, unless the facts can clearly be distinguished or the law has changed.⁵⁸ The question whether or not the European Court of Justice is or sees itself in a civil, statutory, or common law tradition really makes no difference at all in this respect.

⁵⁸ Nevertheless, the European Court has not escaped criticism. However, the criticism was not so much directed at the Court's approach to precedent or its method of reasoning. For the most part, the criticism was directed at judicial activism at the Court. The most famous work in this respect is probably still H. Rasmussen, *On Law and Policy in the European Court of Justice* (Springer 1986). This criticism is somewhat unfair, however, because the Court, in particular in the early years of the European integration process, found itself quite often confronted with really hard cases, i.e. cases where there simply was no applicable rule in statutory law or precedent. Given the choice of making law or denying justice, the Court opted for the former, and – predictably – received applause from those interlocutors who agreed with the rule, and condemnation and contempt from those who did not. For a defense of the Court and criticism of Rasmussen, see M. Cappelletti, 'Is the European Court of Justice "Running Wild"?' (1987) 12 *European Law Review* 3. See also H. de Waele, 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment' (2010) 6(1) *Hanse Law Review* 3; J. Basedow, 'The Judge's Role in European Integration: The Court of Justice and Its Critics' in H.W. Micklitz and B. de Witte (eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 65–79.