

INTRODUCTION

In this volume, which contains the 3rd issue of the Proceedings of the 24th IVR World Congress, held in Beijing in the year of 2009, the reader will find a selection of papers presented at that International Congress on the general theme of “The Philosophy of Precedent.” The foundations, legal nature, structure, strength and uses of the case law were vividly discussed at two Special Workshops especially dedicated to the study of legal precedent, where the papers collected in this issue were debated by a large number of scholars from around the world.

The attention that the theme received at the Congress indicates a trend of growing interest on the topic of precedent among legal philosophers, legal theorists and practitioners from all of the legal families and traditions, including those of the so-called Civil Law Systems. Taking into consideration this movement towards the universality of precedent-based reasoning in legal discourses, the essays comprised in this volume attempt to provide an account of legal precedent which explains in a reasonable way the connections between theoretical issues on the nature of precedent and practical queries over its foundations, structure, strength and uses in contemporary legal systems.

In effect, under the influence of authors such as Dworkin, Alexy, MacCormick, Marmor, Waldron and many others, a large part of contemporary legal theory is dedicated to some sort of ‘normative jurisprudence’. One of the main features of such type of legal theory is that it is particularly concerned with the justification of legal decisions and with the rationality of legal reasoning. In this context, it becomes crucial to determine the contents and the argumentative uses of a jurisprudential concept like that of precedent. In fact, it can be argued that some basic legal principles like ‘certainty’, ‘coherence’, ‘fairness’ and ‘impartiality’ are endangered if the law is not applied with some sort of adherence to judicial precedent. The relationship between legal philosophy and legal precedent is one of a dual character. On the one pole, to apply a precedent to a novel case we need a reasoning to justify the connection or similarity between the two cases, and this reasoning can be characterized at least in part as a philosophical argument; on the other pole, there can be no rational coordination in a legal system if its officials or the bodies in charge of its application do not follow their own precedents to a certain extent.

The former pole shows us that one cannot avoid theoretical/philosophical arguments, both of analytical and normative nature, if one is to apply precedents in a rational way. That is to say, there is no clear distinction between theoretical or philosophical arguments on the one hand and strictly legal arguments on the other. When judges refer to a precedent, they are inevitably asked to adduce practical *reasons* in support of the application of the precedent to the novel case. There are multiple ways in which this can be done. First, whenever a judge accepts a precedent which is not binding she must commit herself to the reasons used by the previous court to support the decision that she is quoting: “Taking an affirmative position on a validity claim generates this illocutionary obligation which links reasons to

motives.”¹ Second, any application of a legal precedent needs to be supported by an analogy between cases which requires a complex theoretical discourse about the similarities and the differences between cases. And thirdly, to distinguish and compare precedents judges have the burden of providing reasons to carve exceptions in legal rules or to re-classify the facts of the case in order to leave them out of the scope of a precedent *prima facie* applicable to the case. In all these situations, jurists need practical reasons in order to justify their arguments, claims and decisions.

The latter pole, in turn, shows that the obligation to *consider* precedents (which does not necessarily imply a strict obligation to *follow* every precedent) is a condition of rationality for any legal system. As Neil MacCormick and Robert Summers put it very clearly, to follow precedents is a requirement of practical human reasoning,² for there can be no rational justification of a social practice without universal application of the same rules. It is therefore of vital importance to elucidate the philosophical problems generated by the technique of precedent. Jurists need both a method for interpreting and applying legal precedents and a theoretical apparatus to enable them to determine the force and the status of legal precedent in ordinary legal argumentation. What once was regarded as a doctrine valid only within the boundaries of common law is nowadays correctly perceived as a universal problem of legal philosophy and of its most practical branch: the normative theories of legal argumentation.

With these considerations in mind, the studies compiled in this volume will outline some of the most important aspects of a philosophical theory of precedent. These essays will explore and explain issues such as the structure of legal precedents, their philosophical foundations, their relevance for legal theory and practice and the methodological problems that jurists are likely to face when recognizing, interpreting and following them.

The essays are divided into three sections, being the first on the structure and the foundations of legal precedents; the second on their strength and the practical uses in legal discourse; and the third on the practice of precedents in contemporary legal cultures.

The first section, “On the Structure and the Justification of Precedents,” begins with Pierluigi Chiassoni’s paper, which undertakes a rigorous structural analysis of precedents with a view to reconstruct the core concepts related to precedent-identification and application, which have to do with the definition of the *ratio decidendi*, the interpretation of precedents and their practical relevance. The paper is followed by Marina Gascón’s essay on the notion of self-precedents and the rationality of the legal system. While the traditional approaches to legal precedent consider them as valid due to the authoritative element comprised in the law-making power of the courts, Gascón expounds another element that is equally important to understand the foundations of precedent, which refers to the Kantian principle of universalizability, which is at stake even when there is no authoritative rule determining the obligation to follow precedents, as we can see in the case of self-precedents. Carlos Bernal Pulido and Thomas Bustamante’s papers, in turn, are concerned more spe-

- 1 Klaus Günther, ‘Communicative Freedom, Communicative Power and Jurisgenesis’ (1996) 17 *Cardozo Law Review* 1035, at 1041.
- 2 Neil MacCormick and Robert Summers, ‘Introduction’ in MacCormick; Summers (eds) *Interpreting Precedents* (Dartmouth, Aldershot 1997), 4.

cifically with the structure of precedents and of the arguments based on them in the discourses of justification of legal decisions. Bernal's paper deals with the connection between balancing and precedents in adjudication, particularly in civil law jurisdictions. He observes that in civil law jurisdictions balancing has become one of the most important methods for constitutional reasoning, since the biggest part of the constitutional norms has the structure of principles. None the less, constitutional courts tend to import from the common law the methods of precedent-based legal reasoning, which start from a *ratio decidendi* that has the typical structure of a rule. This is, according to the author, the "precedent-balancing paradox", which can be stated thus: "While the doctrine of precedent requires the application of rules, balancing is the way to apply principles." Yet, by applying Alexy's theory of fundamental legal rights to solve this dilemma, Bernal shows us not only that it is possible to dismantle this paradox, but also that balancing is required to make reasoning with precedents a rational form of legal argument. Bustamante's paper, in turn, starts with Robert Alexy's description of Analogy or Comparison of Cases as a "basic operation in the application of law", in order to show the connections between rules, principles, and analogical application of the rules derived from legal precedents. The main points of the paper are, first, to defend the claim that analogy needs to be grounded on a balancing of the principles which stand behind the rules embedded in the decision taken as a paradigm, and, second, to show that the better way to explain this connection is to understand analogy not as a "basic operation in the application of law", as Alexy does in his recent works, but rather as a judicial development of the law on the basis of balancing.

The second section, on "The Strength and the Uses of Precedents" is less concentrated on analytical issues and more concerned with the pragmatic aspects of precedent-based reasoning. The opening paper, by Larry Alexander, examines how broadly precedents constrain (their scope) and how strongly they do so (their strength). The analysis is mainly directed towards the issue of overruling precedents and the reasons that are given for the fidelity to precedent or for the departure from it, and leads to the conclusion that overruling precedents turns out to be only an instance of the more general problem of the rationality of rule following. The paper is followed by Patricia Perrone Campos Mello's essay, which concentrates on the roles and the limits of a theory of precedents, which is depicted as connected to a set of values such as legal certainty, equality, legitimacy and efficiency in the courts system. The key function of precedents, as the author argues, is to "serve as a filter for legal argumentation, guiding litigants and judges on issues to be discussed and considered in the decision of the case."

The third section, at last, on "Precedents in Contemporary Legal Cultures", attempts to understand how the notion of precedent performs its functions in some of the different legal traditions. The opening paper, by Victoria Iturralde, focuses on civil law systems, where legal theorists still tend to assume that legislation is the "only and exclusive" source of law. Against this expectation, however, precedent may work either as a formal source or a material source of law in these systems, and they do play an active role in the operation of the legal system. Hence, according to the paper, they need a more developed theoretical account on how one is to interpret them in the application of law, which is the object of the inquiry. Zhang Qi's paper, in turn, focuses on the practice of precedent in contemporary China, whose

court system was modified quite recently, in 2005, to establish a more strict approach to legal precedent which rules that some “guiding cases” are to be authoritative. The paper intends to answer, therefore, the questions of how guiding cases are to be found and how one is to evaluate the similarity between cases in the Chinese legal practice. Finally, Ewoud Hondius presents his conclusions on a round-table which he organized in 2006, at the Congress of the International Academy of Comparative Law, as well as some new developments on his empirical research on the different approaches to precedent that are found in contemporary legal cultures. His conclusion, in short, is that there are still conflicting tendencies in civil law and common law approaches to legal precedent.

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