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The (In)evitability of Precedent

Andrea Pin
Department of Public, International and Community Law, University of Padua, Padua, Italy
andrea.pin@unipd.it

Abstract

Drawing mainly from the common law tradition, the article identifies the notion and the normative value of precedent, summarizes its historical development, and distinguishes between its application in the fields of case law, constitutional law, and statutory legislation. It then ponders the pros and cons of precedent-based adjudication and the institutional and ethical requisites for its application. It finally considers the recent phenomena of arbitration courts and para-judicial institutions that patrol the web, which seem to resist the logic and ramifications of precedent-bound adjudication.

Keywords

stare decisis – case law – statutory interpretation – constitutional interpretation – prospective overruling – judicial ethos – arbitration

1 Introduction

Inaugurating the generations-long debate on the rule of law, Dicey stated that precedent is quintessential to the rule of law as understood in England. In other legal systems, he reasoned, courts do not use precedents to adjudicate cases.[1]

1 DICEY, *Introduction to the Study of the Law of the Constitution*, 8th ed., London, 1915, p. 115–116.

Dicey was wrong. Although legal orders treat precedent differently, it is now common knowledge that earlier rulings are extremely important in deciding cases regardless of the specific role that a legal system formally assigns to them.[2] Everywhere, courts employ and deploy precedents in their judicial opinions. When they are not the main compass for deciding cases, they are nonetheless highly valued, as they help courts guess whether and to what extent their rulings are in keeping with a country's tradition and societal expectations.

Precedent is not relevant just to State jurisdictions. The institutional reliance on precedent – and lack thereof – is an important aspect of adjudication everywhere. Where there is a judicial activity, it is probable to find some level of reliance on precedent.

This article provides an intellectual framework to situate the importance of precedents within the legal sphere. It first defines precedent and its status in the context of judge-made law as well as of statutory and constitutional interpretation. Then it enlists a series of benefits that stem from its utilization, as well as the drawbacks that a precedent-bound legal reasoning needs to face. It finally focuses on the legal and institutional prerequisites for a sound application of precedent, thereby explaining why some courts are more apt than others to utilize precedents and to give it dispositive nature. It concludes with some observations about the most recent approaches to precedent in arbitration and in specialized areas such as the Internet, which seem to have developed some degree of hostility to precedent.

Although the article's main ideas apply to civil law as well as common law systems, it primarily focuses on the common law. The common law, in fact, is not just the modern ancestor of precedent-based adjudication: English law and New York State law still play a major role in judicial activities, since they are the most utilized legal frameworks in commercial arbitration.

2 Defining Precedent and its Status

The content and the limits of precedent have been subject to intense analysis. Broadly defined, a precedent in the common law is a rule that is contained in an earlier judicial decision. In itself, the precedent thus does not cover the entire judicial decision, but just the basis of the reasoning and the rationale of the judgment.

2 CROSS and HARRIS, *Precedent in English Law*, 4th ed., 1991, Oxford, p. 3.

Such a broad statement about precedent requires qualification at least from three points of view: the identification of a precedent, its normative value, and its applicability.

As to its identification, a precedent in the common law does not coincide with the exact wording of the ruling that contains the precedent itself. In fact, words only convey what English common law calls *ratio decidendi* – and which is the *holding* in U.S. legalese. Only the *ratio* (or *holding*) can be treated as a rule, or is at least worthy of consideration. Anything that accompanies the *ratio* are mere *dicta* – the way a court expresses itself. *Dicta* lack the normative value of the *ratio*.

Since a judicial rule does not coincide with the words of a ruling, judges looking for precedents will need to extrapolate the substance of the rule from the wording, and ponder whether it applies to the case at stake. They will therefore first reason by analogy, contrast the substance of the rule and the facts it regulates with the case at stake, and then eventually re-apply the rule to it.[3] Such an approach, which starts by identifying the relevant facts of an earlier case and what rule applied to them, is distant from the deductive approach that characterizes the interpretation of written laws, which requires judges to apply abstract rules to the facts of the case.

This methodology of looking for earlier cases, comparing the relevant facts, and extrapolating the specific rule that should apply to a new controversy has not been universally and consistently observed throughout the centuries. This case-focused approach is actually the most frequent approach in common law countries of late modernity, but slowly developed in England, the birthplace of the common law. For centuries, courts did not look for specific cases to draw on and to cite explicitly. They rather looked for more general trends, from which they could infer sufficiently precise rules of thumb.[4] They often needed to satisfy themselves with an approximate rule because they lacked specific information about the facts and rulings of earlier cases.[5] Judges just gave oral rulings, of which bystanders took rough notes that were only of limited guidance to courts. It was just in the 19th century, after judges started writing their own opinions, which were collected and gave a much more reliable basis for judicial research, that courts could be more specific with the precedent they relied upon.[6]

3 PIN, *Precedente e mutamento giurisprudenziale*, Milano, 2017, p. 35.

4 COHEN, "When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach", Washington & Lee Law Review, 2015, p. 483 ff., p. 487.

5 DUXBURY, *The Nature and Authority of Precedent*, Cambridge, 2008, p. 32–34.

6 DAWSON, *The Oracles of the Law*, Westport, 1968, p. 81–82.

The late 19th century cemented the role of precedent in the common law. Economic liberalism, which valued near-absolute certainty about the legal consequences of conduct for the sake of business, compelled judges and judicial parties to focus on the specific cases, rather than general trends. The prevailing legal philosophy of those days provided an additional rationale for identifying and drawing on specific cases: the great positivists Bentham[7] and Austin may not have won their case for the codification of law in England, but their insistence on predictability and the need to consolidate the common law was highly influential.[8] The doctrine of precedent thus crystallized under the pressure of economic liberalism, legal positivism, and the institutional developments within the judiciary.

As for the normative value of precedent, justifications have changed over time. The oldest rationale for the normative value of precedent goes under the name of "declaratory theory".[9] According to this multi-centenary theory, courts' judgments simply reflect social customs and make them consistent, stable, and explicit. Judicial rules – the argument goes – derive their normative value from the social customs they distill through judicial rumination.

Although the declaratory theory has been in steady decline at least for decades now, the rule of precedent has remained firm in several common law countries, as it found other solid bases. Particularly influential has been Hart's theory of law. According to Hart, a legal system is centered around a "rule of recognition" – a proviso that identifies the legal norms in a given legal system.[10] Within Hart's framework, precedents have normative values in common law countries because it is the common law itself that recognizes them as rules. As a result, courts' judgments have remained the engine of the common law although the underpinning theories have changed substantially.

What has changed over time has been the normative force of precedent. When they were only general indications of judicial trends, their role was milder than later, when the pressure of economic liberalism and legal positivism reinforced their normative value. It was in the late 19th century's England that precedent adhered to the most rigid doctrine of *stare decisis* (*et non quieta movere*) – the Latin phrase that recommends not to unsettle rules once they have been defined. The apex of this process was the 1898 House of Lords'

7 MOCCIA, *Comparazione giuridica e diritto europeo*, Milano, 2005, p. 468.
8 *Ibid.*, p. 949.
9 FINNIS, "Judicial Power: Past, Present and Future", Gray's Inn Hall – Judicial Power Project, 20 October 2015, available at <http://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/>, p. 11.
10 HART, *The Concept of Law*, 2nd ed., Oxford, 1994, p. 101.

Judicial Committee ruling that it would not reconsider any of its precedents for any reason: only the Parliament could change the law or even fix an erroneous precedent.[11] However, such an extreme version of precedent did not spread throughout the common law world: the United States adhered to the logic of precedent, but never embraced such a rigid understanding of it.

Prominent expounders of liberalism of the 20th century, such as Friedrick von Hayek, emphasized the importance that laws must be predictable, thus reiterating the importance of having stable precedent.[12] But the extreme version of binding precedent that surfaced in the late 19th century's England did not resist for a long time, after all. The rule itself reflected the needs of economic liberalism, and subsided with it. On a practical level, the rule's limits became clear soon: as judges realized that a precedent was obsolete or unjust, they eagerly looked for differentiating factors that allowed them to artificially distinguish a new case from a precedent, in order not to be bound by it.[13] As a result, although the English common law formally adhered to an extreme version of *stare decisis* for the sake of predictability, certainty, and clarity, it was becoming populated with precedents whose contours were blurred.

In 1966, after some prominent scholars had expressed their dissatisfaction with such a rigid *stare decisis* and the stealth changes in the case law that it prompted, the House of Lords' Judicial Committee rolled back its extreme version of *stare decisis*.[14] In an extra-judicial Practice Statement that was published in the newspapers, the Committee reaffirmed the importance of precedent but stated that it would reconsider its case law if and when needed.

> "Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify

11 House of Lords (UK), *London Tramways v. London City Council*, Judgment of 25 April 1898, AC 375, p. 1.

12 HAYEK, *The Road to Serfdom*, London, 1962, p. 54–56.

13 PIN, *cit. supra* note 3, p. 50.

14 LLOYD, "Precedent, Legislation and Codification", in KEETON and LLOYD (eds.), *The United Kingdom. The Development of its Laws and Constitutions*, London, 1955, p. 20 ff., p. 20.

> their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the special need for certainty as to the criminal law".[15]

The *Practice Statement* broke with the absolute rigidity of *stare decisis*; it did not revolutionize the normative value of precedent in England and Wales, however. As a matter of fact, the reliance on precedent in what has meanwhile become the Supreme Court of the United Kingdom has remained quite high, as overruling is still very infrequent.[16]

A similar consideration of precedent is visible throughout the common law world. The practice of drawing from earlier decisions has remained an important part of this legal culture. Reliance on precedent has proved to be an extremely important element of adjudication and a permanent component of the judicial philosophy of the English common law and of its global progeny.

The scenario and the dynamics change, however, if one looks at the precedent in the field of written laws. Given the expansive role of statutes in the late twenty-century's policies, the survival of a precedent-centered logic has been one of the dominant preoccupations in common law countries for decades. Some have persuasively argued that jurists should come to terms with the fact that this is "the age of statutes", and make the common law evolve accordingly.[17]

Although the common law has certainly passed the test of time, statutory legislation and written constitutions affect the treatment of precedent. Within the field of written laws, precedents do not discharge the same role and therefore do not have the same value. Although how a written rule has been interpreted in the past certainly carries considerable weight, within this framework the *ratio decidendi* is not a precedent but the written rule itself.[18]

15 House of Lords (UK), *Practice Statement,* Statement of 26 July 1966, 3 All ER 77.

16 ANDREWS, "The Supreme Court of the United Kingdom and English Court Judgments", University of Cambridge Faculty of Law Research Paper, 2014, 1 ff., p. 5.

17 CALABRESI, *A Common Law for the Age of Statutes*, Cambridge (Mass.), 1985.

18 PIN, "*Rule of law,* certezza del diritto e valore del precedente", Diritto Pubblico Comparato ed Europeo Online, 2021, p. 67 ff., p. 111.

In fact, heated debates have characterized the standing and importance of the wording of a statute or of a constitution in common law countries. Broadly speaking, common law thinkers and judges share the view that the words of written rules are the controlling factor in interpreting statutes and constitutional texts.[19] As a consequence, adjudication is expected to reflect the written law's will. Precedents still play a pivotal role in the context of statutory and constitutional interpretation, as judicial rulings can clarify and stabilize the legal interpretation of written norms. The society at large is also likely to build its own practices around the judicial interpretation of a written rule. The centrality of the lawmaker's will, however, allows a reconsideration of a written rule's meaning and therefore justifies overruling a precedent that has departed from the true meaning of the legal provision as it was written.[20]

The status of precedent, however, takes different forms if it applies to constitutional or statutory texts. Common law jurisdictions often draw lines between the two, and American scholarship has been especially attentive to this aspect. As a constitution is usually more difficult to change than a statute, precedents on constitutional texts are often understood as being less resilient. In fact, courts are more prone to revisit a constitutional precedent that they find incompatible with the text itself, to resurrect its meaning, while statutory precedents are often understood as stronger and less malleable, as lawmakers can simply reform statutes if they disagree with the judicial precedents that attach to them.[21] *Dobbs*, the widely discussed U.S. Supreme Court's 2022 reversal of course on abortion, showcased the extent to which a precedent can be revisited if and when the majority believes that it is betraying the meaning of the constitution.[22]

American legal academia and judiciary have traditionally carved out a special place for a series of constitutional precedents, which usually go under the name of "suprecedents". The category of superprecedent stems from the belief that some constitutional cases are of such paramount importance and so critical to the survival of the U.S. that it would be unthinkable that the U.S. Supreme Court would overrule them, even if it was just to restore what

19 CRAWFORD and MEAGER, "Statutory Precedents under the 'Modern Approach' to Statutory Interpretation", Sidney Law Review, 2020, p. 209 ff., p. 212.

20 See House of Lords (UK), *National Westminster Bank pc. v. Spectrum Plus Limited et al.*, Judgment of 30 June 2005, UKHL 41, p. 41.

21 BARRETT, "Precedent and Jurisprudential Disagreement", Texas Law Review, 2013, p. 1711 ff., p. 1713.

22 Supreme Court of the United States (USA), *Dobbs v. Jackson Women's Health Organization*, Judgment of 24 June 2022, 597 U.S. ___ (2022).

it believes to be the true meaning of the Constitution itself.[23] The list of such case-law varies, but it usually includes *Marbury v. Madison*, which fleshed out the Supreme Court's power to review the constitutionality of legislation;[24] *McCulloch v. Maryland*, which ruled on the Congress's power to set up a bank;[25] and *The Legal Tender Cases*, which addressed the constitutionality of governmental notes.[26]

3 The Benefits of Precedent

As seen above, exploiting precedent is staple in judicial activity throughout the globe. Theoretical, legal, and institutional reasons make at least some level of reliance on precedent indispensable, regardless of the specific legal status that a legal order accords to earlier rulings.

From a theoretical perspective, the respect of precedent indicates the equal treatment of cases and parties in courtrooms. Re-applying precedents, or at least considering them while adjudicating, is an incarnation of the principle of equality on a diachronic dimension: the respect of precedent ensures that cases alike are treated alike.[27]

Respecting precedent also has many beneficial ramifications. First, keeping up with precedents respects the social need for legal continuity. A thorough consideration of precedent ensures that the society at large follows the same rules, until the political body itself makes the explicit decision to change them.

In legal environments within which precedents are respected, individuals and groups also enjoy the benefit of predictability – a core value of the rule of law since Dicey first coined this expression. Citizens know their rights and duties, and they can reasonably anticipate the legal effects of their conducts. They can organize their lives, run their businesses, and make other fundamental decisions about their lives with a substantial degree of knowledge of what awaits them. Respecting precedents thus boosts individual and collective autonomy, as it allows people to make short and long-term plans for their lives.

23 GERHARDT, "Super Precedent", Minnesota Law Review, 2006, p. 1204 ff., p. 1205.

24 Supreme Court of the United States (USA), *Marbury v. Madison*, Judgment of 24 February 1803, 5 U.S. 137 (1803).

25 Supreme Court of the United States (USA), *McCulloch v. Maryland*, Judgment of 6 March 1819, 17 U.S. 316 (1819).

26 Supreme Court of the United States (USA), *Knox v. Lee*, Judgment of 1 May 1871,79 U.S. 457 (1871).

27 CROSS and HARRIS, *supra* note 2, p. 3.

Such predictability is welcome in any social, political, and economic field, but – as the House of Lords' *Practice Statement* made clear – criminal liability and business planning are especially sensitive areas. As to criminal law, not being prosecuted for having committed something that was lawful when it happened has long been understood as being a litmus test for decent legal civilizations. As to business, the respect of precedent allows one to make strategic economic decisions – a key factor for economic liberalism as well as for the economy at large.

Reliance on precedent also has the benefit of reinforcing the institutional respect and the reputation of the judiciary. If judges respect and reaffirm previous holdings, they show that they do not ground their reasonings on their personal preferences, inclinations, or even their own specific understanding of justice.[28] Reliance on precedent thus mirrors and protects a healthy distance between the institution that delivers judgments and the specific individuals who happen to be sitting on the court when a judgment is delivered.

Finally, the reliance on precedent has the positive effect of distinguishing between law-making and adjudication: a concern that has grown through the centuries. The roots of the common law in England stretch back well before modernity, when the Parliament did not legislate copiously and much of the existing rules were the offspring of judicial activity. After the Parliament became the engine of social and political change by enacting statutes on an ordinary basis, the judiciary could confine itself to adjudicating disputes on the basis of the then existing laws, instead of implementing new ones. This division of labor evidently redirects the calls for legal innovation toward the legislative branch and democratically elected bodies, while judges may discharge their duties on the basis of their professional skills and in a non-political fashion.[29]

4 The Problems with Precedent and the Place for Overruling

Despite its several benefits, *stare decisis* is not a bed of roses. Respect for precedent raises several issues that often suggest its mitigation. Each jurisdiction has found its own way to navigate between respect and departure from precedent; because of the centrality of case law, however, the most articulated reflections

28 KOZEL, "Stare Decisis as Authority and Aspiration", Notre Dame Law Review, 2021, p. 1971 ff., p. 1974.

29 WALDRON, "Separation of Powers in Thought and Practice?", Boston College Law Review, 2013, p. 433 ff., p. 462.

on the value of precedents are found in common law regimes and within common law scholarship.

Respect for precedent may entail the perpetuation of injustice. Pure reliance on precedent urges judges to follow earlier decisions simply because they exist and apply to the case at stake. This approach is the underpinning element of the whole phenomenon of *stare decisis*, after all. In fact, in modern theories – such as Hart's rule of recognition – the normativity of precedent itself lies in its authority, not in its fairness: a precedent controls a case because it is applicable, not because it is just.[30] If it was only a matter of fairness, judges would not need precedent, as they could adjudicate new cases only using their sense of justice as the controlling criterion.

As seen above, the *Practice Statement* made the possibility of overruling precedent official. This novelty discouraged stratagems, such as mitigating or circumventing precedents without overruling them explicitly, which judges had deployed to balance the most granitic *stare decisis* doctrine of the late 19th century. When the *House of Lords* resurrected the possibility of explicitly overturning a precedent, however, a new problem came to the fore: on which grounds could a precedent be overruled?

In common law countries, the reasons that are needed to overrule a precedent are generally believed to be quite grave. In such jurisdictions the legal mentality usually sides in favour of precedent and generates a presumption of continuity: it is those who challenge a precedent who must persuade a court to overrule it. The parties that argue in favour of a precedent thus are at "institutional advantage".[31]

Within the general assumption in favour of precedents, in common law countries the reasons to overrule them span between two extremes. At one end of the spectrum, an overruling can be justified because the precedent is seen as inherently wrong; at the other end, a precedent may be worth of overruling simply because it is now perceived to *have become* wrong or simply inopportune. But even when a precedent is found wrong, it is seldom overruled because of its intrinsic unfairness. Especially in the English common law, a precedent is overruled when it is said to have been given *per incuriam*: in other words, because it departed from an earlier precedent.[32] This logic emphasizes that overruling is not legal innovation, but rather legal restoration: the removal of the precedent resuscitates the earlier rule that was wrongly rejected in the

30 BRONAUGH, "Persuasive Precedent", in GOLDSTEIN (ed.), *Precedent in Law*, Oxford, 1987, p. 222 ff., p. 223.

31 BARRETT, *cit. supra* note 21, p. 1723.

32 FINNIS, *cit. supra* note 9.

past. This strategy is particularly apt for pluralistic societies, where conceptions of justice coexist, differ, and often conflict to a substantial degree: the overruling of a precedent on the basis of its sheer unfairness is almost unavoidably prone to generate controversy in such contexts. An overruling *per incuriam* assuages the legal field because it purports to restore the genuine line of case law, without touching upon issues of justice or fairness.

The most explicit statement of reasons that justify overruling a precedent is probably *Planned Parenthood v. Casey*, which the U.S. Supreme Court decided in 1992.[33] The Court's opinion then enlisted various reasons for striking down a precedent. For each reason, however, the Court emphasized that a proper consideration should be given to the default rule of respecting precedent. Although the list of reasons that justify an overruling is broad, *Planned Parenthood* after all confirms the centrality of precedent:

> "[W]hen this Court re-examines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proved to be intolerable simply in defying practical workability [...]; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation [...]; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, [...]; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification".[34]

The attempts to carve out room for overruling without endangering the general stability of precedent are understandable. Overruling a precedent has powerful consequences, after all. An overruling belies the social reliance on precedent that the very theory of precedent most cherishes. It does so in a very dramatic way, as it changes the applicable law to the case within which it is decided – it changes the law retrospectively. When a court declares an overruling, it may give victory to the party that was supposed to lose when the case started.

33 Supreme Court of the United States (USA), *Planned Parenthood v. Casey*, Judgment of 29 June1992, 505 U.S. 833 (1992).

34 *Ibid.*, p. 854.

A quite natural judicial stratagem to overrule earlier judgments without disrupting social reliance and predictability consists in declaring a prospective overruling: a judicial decision that mitigates the effect of the overruling by limiting its applicability only to future cases.[35] Such a balance, however, is hardly followed in common law courts, which are largely sceptical of it for two different reasons.

On the one hand, a prospective overruling technically declares that a rule should not exist, but it keeps it temporarily alive. In other words, it admits to the existence of an unlawful rule and even applies it.[36] On the other hand, the availability of prospective overruling can instigate judges to become lawmakers. One of the defining characteristics of lawmaking in common law theory is that lawmakers are capable of making law for the future, while judges address issues of justice according to the applicable law at the time of the events at stake. The prospective overruling would encourage judges to overrule more freely, as the consequences of their rulings would not disrupt the past. Moreover, allowing judges to decide when to overrule prospectively would be dangerously selective: judicial evaluations on the pros and cons of overruling retroactively on a case-by-case basis would be flawed and would inevitably harm somebody.[37]

Although the option of a prospective overruling has failed to persuade judges in several common law regimes, the debate is still alive. Those advocating the recourse to prospective overruling argue that this tool would enable judges to correct judicial mistakes while protecting the interests of those who regulated their conducts according to those erroneous rulings.[38] Some believe that a prospective overruling would actually be justified in terms of predictability-one of the core concerns of the respect of precedent. A retrospective overruling, in fact, frustrates the expectations of those who complied with the earlier rulings – i.e., who did exactly what the then-applicable law expected from them – and the society at large. It is not by chance, then, that the U.S. Supreme Court ruling *Dobbs* overruled *Roe v. Wade* and its progeny only after assessing whether a widespread social reliance had developed around the latter.[39]

35 PIN, *cit. supra* note 18, p. 123.

36 CURRIER, "Time and Change in Judge-Made Law: Prospective Overruling", Virginia Law Review, 1965, p. 201 ff., p. 201.

37 *Ibid.*

38 PIN, *cit. supra* note 18, p. 123.

39 Supreme Court of the United States (USA), *Roe v. Wade*, Judgment of 22 January 1973, 410 U.S. 113 (1973).

While most of the problems discussed above have particularly characterized the development of common law regimes, one issue is a common denominator across legal systems. In civil law and common law regimes, in fact, judges can leverage the power of precedent to persuade their readers and the society at large that their decisions are justified and reasoned. In other words, precedents can have a rhetorical value rather than a normative one.

Precedents can be weaponized to dilute a judicial novelty, give the readership the impression that a preordained judicial policy is the obvious and unescapable ramification of earlier decisions that bind the court, or that it reflects broader judicial trends. In other words, precedents can provide partisan adjudication with a veneer of neutrality and authoritativeness.

Such a use of precedent is inevitably selective and often manipulative. It is distant from an authentic usage of precedent. But it is nevertheless well documented in the controversial increase in judicial citations of foreign precedents across the globe in the late 20th century: a practice that has often consisted of taking out of context and misusing precedents decided in different legal orders.[40] This judicial policy is not new, however. It was even used for the sake of justice in very substantial matters. In the U.S., the Supreme Court strategically scheduled the release of key judgments to create precedents that it later exploited to reinforce its arguments and defuse tensions when it proceeded to desegregate schools in the South.[41]

5 The Prerequisites for a Precedent-Bound Judicial Reasoning

The normative value of precedent resides primarily in the self-constraint of courts that rely on their earlier rulings, encouraging the parties to argue considering precedents. For such an environment to effectively operate, there are a series of institutional and deontological requisites that a system must effectively implement and ensure.

Historically speaking, the rule of *stare decisis* became settled in England and Wales in the early modernity when the judicial system absorbed several distinct features. First, as seen above, rulings must be written and made fully available to the public. The *ratio decidendi* is not simply a general maxim: on the contrary, it is the rule that applies to a specific series of controversies, and

40 Among many, see GELTER and SIEMS, "Citations to Foreign Courts – Illegitimate and Superfluous, or Unavoidable? Evidence from Europe", The American Journal of Comparative Law, 2014, p. 35 ff.

41 PIN, *cit. supra* note 18, p. 127.

therefore the facts from which the case arose must be known in order for later judges to assess whether a precedent is binding on them, as well as for people to conduct their lives accordingly.

Second, the system of appellate courts must be in a rather coherent shape for the precedent to have a significant role. The appellate system is necessary because it allows to distinguish between the vertical and the horizontal dimension of precedent. The notion of vertical precedents encompasses the binding effect of higher courts' rulings on lower courts, while a precedent that applies horizontally requires that a court follow its own earlier rulings.

Third, the claims must be precise and well defined in advance before the judicial proceeding begins. For a long while, in England and Wales claims were continuously negotiated among parties during the trial, to the extent that the ruling hardly addressed the initial complaint, and therefore had just a loose normative meaning.[42]

Fourth, a feature of extreme importance for the survival of a precedent-based system is the reasonable level of litigiousness. Too many cases and/or too many appeals often make it impossible for judges to keep track of precedent and avoid conflicting judgments. It is not by chance that common law systems often filter appeal requests to cap the number of controversies in the docket.[43]

Fifth, the duty to keep the slate clean and cap the number of potentially applicable precedents in common law systems does not follow just on the shoulders of judges. Common law regimes spread this preoccupation with the legal profession at large through specific ethical obligations. In several common law countries, barristers and attorneys have the specific obligation to provide the judge with an accurate depiction of the existing case law on a certain subject.[44] Although some slight variations exist among jurisdictions as to which specific precedents should be mentioned by the parties, it is unquestionable that common law lawyers are expected to feed courts with very specific information about relevant precedents.

This rule echoes the largely passive role that the common law gives to judges, especially if compared with the more proactive approach to adjudication in civil law countries. The rule itself, however, has a lot of potential ramifications for the judicial environment at large.

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42 *Ibid.*, p. 35.

43 ANTONIOLLI DEFLORIAN, "Il precedente giudiziario nel common law nel common law inglese," in VINCENTI (ed.), *Il valore dei precedenti giudiziali nella tradizione europea*, Padova, 1998, p. 195 ff., p. 195.

44 PIN and GENOVA, "The Duty to Disclose Adverse Precedents: The Spirit of the Common Law and Its Enemies", Yale Journal of International Law, 2019, p. 239 ff.

As common law practitioners must cite precedents, they will probably articulate their submissions on the basis of precedents.[45] In other words, such an ethical rule gives birth to an unavoidably precedent-bound type of reasoning. Moreover, as practicing lawyers must cite potentially relevant precedents, they will likely seek that a court explicitly overrule the earlier cases it departs from. In fact, unless a precedent is overruled, a practicing lawyer may be expected to cite and address it, whereas an explicit overruling makes the job of lawyers much easier and safer. As a result, judges and lawyers alike develop a specific interest in keeping up with the earlier case-law and in maintaining the chain of precedent clear and as simple as possible.[46]

6 The Interests Driving the Precedent-Based Adjudication

As seen above, the doctrine of precedent requires a shared ethos. It requires judges and legal practitioners to address earlier decisions, ponder whether they apply to analogous facts and if they have survived societal and legal changes. In itself, treating precedents as authorities from a practical perspective is largely dependent upon a variety of factors, without which earlier decisions can at best provide only some general guidance, or, at the worst, can be selectively picked to justify certain judicial outcomes.

Economic liberalism was one of the drivers that solidified precedent in English common law. Its need for certainty and foreseeability boosted *stare decisis*. Interestingly enough, the globalization of markets of the late 20th-early 21st centuries has not always valued precedent in the same way. Although English law and English legal culture are almost always chosen to govern international business negotiations and contracts, such negotiations do not always aim for a consistent application of precedent.[47]

As a matter of fact, many agreements include arbitration clauses. Most of such clauses foresee that English law is applicable, but critically diverge from the average common law court. In fact, such arbitration courts often operate under a duty of confidentiality. This means that they cannot create precedent, their reasoning can be concealed, and therefore later arbitration courts can take very different paths. Although exploiting the common law but refusing the authoritativeness of precedent may sound paradoxical, this practice finds an explanation in the circumstance that confidential business relationships

45 *Ibid.*, p. 277–278.
46 *Ibid.*
47 PISTOR, *The Code of Capital*, Princeton-Oxford, 2019, p. 168 and p. 178.

ending in nondisclosed judgments allow companies to experiment with their business models without suffering too many losses in case they lose an arbitration case.

A de-emphasis on the authoritative role of precedent is clear also in the early stages of activity of the Meta Oversight Board. *Meta* (the company once called Facebook) set up this board for various purposes, but mainly to review the vetting process of Facebook and Instagram. The board of independent experts that Meta pulled together from various backgrounds and territorial proveniences has started issuing judgments on Facebook and Instagram decisions on published posts that do not follow the average doctrine of precedent. Interestingly enough, at the moment the Oversight Board prefers to make contextual analyses of the single cases at stake rather than develop consistent judicial trends and clear precedent. This approach is unlikely to create clear patterns that Facebook and Instagram can easily follow.[48]

Meta Oversight Board moves in an uncharted territory. Born as a check on a big tech superpower's capacity to censor information, it is a pioneering attempt of the infosphere to regulate itself. It is therefore quite significant that it does not seem interested in developing clear precedents that would set the tune for future Meta's vetting policies, but rather prefers making judgments on a case-by-case basis. This judicial policy inevitably keeps the Oversight Board much more at the center stage than a sound and strong precedent-based judicial approach, which would help define the boundaries of Meta's policies and discourage applications that are similar to those that have already been rejected.

7 Conclusion

A certain degree of respect of precedent is grounded in several legal values that cut across jurisdictions and cultures. Fairness requires that similar cases are treated alike; reliance on precedent respects the societal need that law is foreseeable; a sense of institutional humility expects judges to rely on their predecessors' patterns of judgment; consistency in adjudication disincentivizes unnecessary litigation on issues that have already been addressed by the judiciary. Albeit to a different degree, all these aspects are related to basic rule of law principles, and it is therefore quite natural that, with the development of rule-of-law frameworks beyond the State in the late 20th century, the respect

48 GOPAL, "Facebook Oversight Board & the Rule of Law: The Importance of Being Earnest", Business Law Today, 12 October 2021, available at <https://businesslawtoday.org/2021/10/facebooks-oversight-board-the-rule-of-law-the-importance-of-being-earnest/>.

of precedent has become one of the most important aspects of litigation also outside national jurisdictions.

Admittedly, however, a strong respect for precedents has its own prerequisites and ramifications. Precedent-based reasoning works by analogy; it emphasizes the similarities among facts; it generates a proclivity to rely on earlier decisions; it prioritizes predictability and consistency over time, which are particularly valued for business. A precedent-bound judicial reasoning might not be the best option for jurisdictions that aim for context-dependent assessments or are concerned with making the law evolve.