Legislators, Judges, and Professors

Edited by
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Max-Planck-Institut
für ausländisches und internationales
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Beiträge zum ausländischen
und internationalen Privatrecht
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Mohr Siebeck

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Preface

On 4 and 5 December 2015 a symposium was held at the Max Planck Institute for Comparative and International Private Law in Hamburg, in cooperation with the *Association Internationale des Sciences Juridiques* and the *Gesellschaft für Rechtsvergleichung*, under the title "Legislators, Judges, and Professors". It echoes, and is supposed to echo, the title of Raoul van Caenegem's Goodhart Lectures of 1984/85. The present volume collects the papers given on that occasion. A few introductory words on the three organizations involved, and on the choice of topic may be in order.

The *Association Internationale des Sciences Juridiques* was founded in 1950 as a non-governmental organization under the auspices of Unesco. Its ultimate object is "de favoriser la connaissance et la compréhension mutuelle des nations". The statute goes on to state that the *Association* is intended to encourage "le développement des sciences juridiques dans le monde par l'étude des droits étrangers et l'emploi de la méthode comparative". The mission of the *Association* is thus strongly linked to that of Unesco, itself created after the Second World War in the hope that the development of education as well as scientific and cultural exchange would contribute to the building of a new international society. The *Association Internationale des Sciences Juridiques* does not have natural persons as members. Its membership is composed of the national committees, e.g. the *Association Henri Capitant des Amis de la Culture Juridique Française*, the *Società Italiana per la Ricerca nel Diritto Comparato*, the *American Society of Comparative Law*, or the *Gesellschaft für Rechtsvergleichung*. It is mainly through these national committees that the *Association* operates. But it also organizes international colloquia once a year, the last one in Torino on legal pluralism (September 2014).

That brings us to the second organization supporting the present symposium. The *Gesellschaft für Rechtsvergleichung*, one of the members of the *Association Internationale des Sciences Juridiques*, was also founded in 1950. It continues the tradition of the *Internationale Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre* which had been established in 1894 and which suspended its activities in 1933. Its first three presidents after the Second World War were Hans Dölle, Ernst von Caemmerer, and Hans-Heinrich Jescheck. The *Gesellschaft* has about 1,000 members and mainly operates through its seven *Fachgruppen* (subject groups): private law, public law, criminal law, commercial law, European Union law, labour law and social security law, and foundational subjects. The *Gesellschaft für Rechtsvergleichung* holds bi-annual conferences, with the working sessions organized by

the subject groups. The last of these congresses has taken place in Bayreuth in September 2015 under the general theme of law, religion, and culture.

Finally, then, the Max Planck Institute for Comparative and International Private Law in Hamburg. It is one of 83 Max Planck Institutes established under the umbrella of the Max Planck Society throughout Germany and abroad. The mission of the Max Planck Society is foundational research in the natural, life, and social sciences, the arts and humanities. Its tradition reaches back to 1911, when the Kaiser Wilhelm Society for the Advancement of Sciences was founded; it was re-established in 1946 under the name of the distinguished physicist Max Planck. The Max Planck Institute for Comparative and International Private Law was set up in Berlin in 1926; its first director was Ernst Rabel, and it was accommodated in the old *Stadtschloss* (City Castle) of the Hohenzollerns. In 1944 it was evacuated to Tübingen, from where it was moved to Hamburg in 1956. The first two directors after the Second World War were Hans Dölle and Konrad Zweigert. Today, the Institute has three directors conducting research in the fields of comparative private law (including business and competition law) and private international law.

What about the choice of topic for the present symposium? As lawyers we are all interested in various areas of substantive law; and as comparative lawyers we are interested in finding out the differences and similarities between the existing national legal systems. But from time to time we should also think about *how* we think and operate. We should, in other words, look at basic questions of legal methodology: both for the sake of better understanding what we do as lawyers immersed in our own legal systems, and as lawyers attempting to assess and comprehend how foreign legal systems work.
Obviously, a significant amount of work has been done in that respect. First, in a number of countries we find more or less elaborate reflections of legal methodology. But they tend to be inward looking, concerned with the application of the respective national laws. But there are other countries where we have hardly any discourse on legal methodology, or only fragmented discourses. Thus, in England, we find books on the theory of precedent and books on statutory law. In France, legal methodology does not appear to receive the same attention as, for example, the question of how to structure an essay. Second, in recent years a number of studies have been written on how to deal with, how to apply, and how to develop European law and, in particular, European private law. At the same time, of course, European Union law has added a layer of complexity to each of the national legal systems of the EU member states. Thus, it also affects the national legal methodologies, e.g. by requiring an interpretation of national legal rules in conformity with whatever Directive they are based on. Third, there is now also a growing body of literature on how to do comparative law: on the functional method, on postmodern and socio-legal comparative law, legal traditions, legal transplants, legal pluralism, and on the way how to develop comparative arguments.

What is, however, largely lacking is the comparative study of legal methodology itself, i.e. of the way in which lawyers apply, develop, find, argue, communicate, and do research about, the law: a study of comparative legal methodology rather than a methodology of comparative law. The Hamburg Max Planck Institute has, over the past couple of years, started to fill this gap. In a number of symposia, specific questions have been investigated: on how statutes are made, on the procedural framework for developing the law, or on the dialogue between legal scholarship and the courts, to mention three examples. It has always been apparent that we know very little on how other legal systems function and that we need to learn more about it. This is what we want to use the present symposium for. We will be hearing nine colleagues from nine different legal systems in various parts of the world, telling us about their experiences. In order to provide some focus as well as some variety, we have subdivided the general topic of legal methodology and have decided to look at the way in which three of the protagonists of legal development in every legal system operate: judges, legislators, and professors. Half a day, each of them with three interventions, was therefore devoted to the topics of law-making today (key actors, the role of comparative law, new approaches to law-making, etc.), judicial decision-making today (legal style of reasoning, references to academic work, dissenting opinions, specialized courts, etc.), and legal scholarship today (approaches to legal methodology, interpretation and 'development' of the law, traditional canons of interpretation, the integration of extra-legal arguments, etc.). The lectures were given by members of the up-and-coming generation of comparative lawyers from Japan, Turkey, Russia, Switzerland, England, Argentina, the United States, France, and South Africa.

Our sincere thanks go to the nine speakers and to the other participants in the symposium who engaged with the speakers in lively discussions. These discussions have led us at the Max Planck Institute to believe that this line of research should be explored in a more systematic fashion.

Hamburg, June 2016

Jürgen Basedow
Holger Fleischer
Reinhard Zimmermann

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Legal Methodology Today

Abbreviations

AFIP	Administración Federal de Ingresos Públicos
Am. J. Comp. L.	American Journal of Comparative Law
Am. U. L. Rev.	American University Law Review
Ann. Rev. L. & Soc. Sci.	Annual Review of Law and Social Science
ARSP	Archiv für Rechts- und Sozialphilosophie
Art(s).	Article(s)
BGB	Bürgerliches Gesetzbuch (Germany)
BGE	Entscheidungen des Bundesgerichts (Switzerland)
BGer.	Bundesgericht (Switzerland)
BGerR.	Reglement für das Bundesgericht (Switzerland)
BGG	Bundesgerichtsgesetz (Switzerland)
BV	Bundesverfassung (Switzerland)
Cal. L. Rev.	California Law Review
Can. J.L. & Juris.	Canadian Journal of Law and Jurisprudence
cf.	compare
ch.	Chapter
Chi.-Kent L. Rev.	Chicago-Kent Law Review
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJ	Chief Justice
Colum. L. Rev.	Columbia Law Review
CSJN	Corte Suprema de Justicia de la Nación
DCFR	Draft Common Frame of Reference
dir.	directed
Duq. L. Rev	Duquesne Law Review
e.g.	for example
ed.	edited, edition, editor
Edin. L. Rev.	Edinburgh Law Review
ERPL	European Review of Private Law
esp.	especially
etc.	et cetera
EWCA Civ	England and Wales Court of Appeal (Civil Division)
EWCA Crim	England and Wales Court of Appeal (Criminal Division)
f., ff.	following page(s)
Fla. J. Int'l L.	Florida Journal of International Law
Fordham J. Corp. & Fin. L.	Fordham Journal of Corporate and Financial Law
Geo. J.L. & Pub. Pol'y	Georgetown Journal of Law and Public Policy

Geo. L.J.	Georgetown Law Journal
Harv. J.L. & Pub. Pol'y	Harvard Journal of Law & Public Policy
Harv. L. Rev.	Harvard Law Review
Hastings Int'l & Comp.L.Rev.	Hastings International and Comparative Law Review
Hum. Rts. Brief	Human Rights Brief
i.e.	that is
Int'l J. Const. L.	International Journal of Constitutional Law
J. Legal Stud.	Journal of Legal Studies
JCPC	Judicial Committee of the Privy Council
KritV	Kritische Vierteljahresschrift für Gesetzgebung
L. & Bus. Rev. Am.	Law and Business Review of the Americas
L. Rev.	Law Review
Law & Soc. Inquiry	Law & Social Inquiry
LJ	Lord/Lady Justice
Loy. L. Rev.	Loyola Law Review
Md. L. Rev.	Maryland Law Review
Mich. L. Rev.	Michigan Law Review
Minn. L. Rev.	Minnesota Law Review
MP	Member of Parliament
n.	footnote, note
N.Y.U. L. Rev.	New York University Law Review
Nw. U. L. Rev.	Northwestern University Law Review
para(s).	paragraph(s)
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rev. Jur. U.P.R.	Revista Juridica Universidad de Puerto Rico
RTD civ.	Revue Trimestrielle de Droit Civil
s(s).	section(s)
SALJ	South African Law Journal
sch.	schedule
Stan. L. Rev.	Stanford Law Review
Sw. J.L. & Trade Am.	Southwestern Journal of Law and Trade in the Americas
Tex. Int'l L.J.	Texas International Law Journal
Tex. L. Rev.	Texas Law Review
Theoretical Inquiries L.	Theoretical Inquiries in Law
U. Chi. L. Rev.	University of Chicago Law Review

U. Cin. L. Rev.	University of Cincinnati Law Review
U. Miami Inter-Am. L. Rev.	University of Miami Inter-American Law Review
U. Pa. L. Rev.	University of Pennsylvania Law Review
U. Pitt. L. Rev.	University of Pittsburgh Law Review
U. Toronto L.J.	University of Toronto Law Journal
U.K.	UnitedKingdom
UKSC	United Kingdom Supreme Court
U.S./USA	United States (of America)
Va. L. Rev.	Virginia Law Review
Vand. L. Rev.	Vanderbilt Law Review
viz.	namely, that is to say
vol.	volume
Wm. & Mary L. Rev.	William and Mary Law Review
YHGK	Yargıtay Hukuk Genel Kurulu – Supreme Court, Appeal, Grand Civil Chamber (Turkey)
ZACC	South African Constitutional Court Cases
ZBJV	Zeitschrift des Bernischen Juristenvereins
ZEuP	Zeitschrift für Europäisches Privatrecht
ZGB	Zivilgesetzbuch (Switzerland)

Law-Making Today

Law-Making in Japan

Yuko Nishitani[*]

I. Introduction

The basic idea behind this contribution is derived from van Caenegem's "Judges, Legislators and Professors" (1987).[1] In his masterpiece, the author analysed how the law has been formed and developed historically in England, Germany, France and other countries through the interactions of judges, legislators and professors.

Certainly, law-making in civil law countries like Germany and Japan is primarily attributed to the legislature. The methods and the role of legislation in law-making, as well as its ideological, philosophical or policy background is an important subject to be researched. Yet, law is not limited to statutory norms enacted by the Parliament or Diet. Rather, statutory norms are vital-

[*] English translations of Japanese laws are available at <http://www.japaneselawtranslation.go.jp/>.

[1] *Raoul C. van Caenegem,* Judges, Legislators and Professors: Chapters in European Legal History (Cambridge 1987).

ised, interpreted or developed by the judicature, which may establish a judge-made law by rendering a decision in a concrete case. The executive or private actors may also play a role inw law-making. On the other hand, law-making is supported by professors, who clarify legal problems from a systematic, historical or comparative perspective. Based on their expertise, professors may propose a certain interpretation of positive law *(de lege lata)* or possibly put forth an innovative solution *(de lege ferenda)*.

This contribution examines law-making in Japan today, mainly focusing on private law. First, the paper sets out the historical developments and foundations of contemporary Japanese law (II.). Second, the paper examines characteristics, advantages and drawbacks of contemporary law-making in Japan. While the interaction between the legislature, judicature, academia and other actors is explored, the focus of the underlying study is placed on legislation. Particularly as to legislation, the author takes into account her personal experience of being appointed to legislative committees of the Ministry of Justice,[2] bearing in mind that the methods, weight and interests at stake may shift depending on the area of law and the objective of legislation (III.). Third, some final remarks and critical observations conclude this contribution (IV.).

II. Foundations of Japanese Law

The developments of the modern Japanese law can be divided into three phases: (1) the *Meiji* era at the turn of the 20th century, (2) the post-war era, and (3) the developments since 2001.

1. Meiji era

The transplant of Western legal systems was effected after the 1868 *Meiji* Restoration. From 1858, Japan had been forced to sign unequal bilateral treaties with, *inter alia,* the U.S., England, France, Russia and Prussia, acquiescing unilaterally to the grant of the privileges of consulate jurisdiction and the determination of import duty to the foreign powers.[3] In order to convince the foreign powers to abolish the unequal treaties, Japan had to appear as a modern state and reliable trade partner, standing at the same level as the civilised Western countries. To attain this objective, it was indispensable that Japan adopted the most advanced Western legal system. The legislative work, there-

[2] The author acted as a member of the Committee of the Legislative Council on the Reform of Private International Law (2004–2006), on The Hague Maintenance Convention and Protocol (2005–2007), and on the International Jurisdiction in Personal Status Matters and Family Matters (2014–2015).

[3] The unequal treaties were first signed with the U.S., England, France, the Netherlands and Russia (1858), then also with Prussia (1861) and Austria (1869).

fore, was grounded on thorough, extensive comparative legal studies. Experts were invited from France, Italy, Germany and England to take part in the drafting of legislation as counsellors. Conversely, young, competent and promising Japanese jurists were sent abroad to study the advanced Western legal systems.[4]

The *Meiji* Constitution of 1889 largely relied on the Constitution of the German Empire to create the emperor's constitutional monarchy.[5] The Civil Code was first drafted under the auspices of *Boissonade,* taking the French Civil Code, French doctrine and case law as a model, and was promulgated in 1890.[6] Yet, due to the so-called "Codification Dispute"[7], the entry into force of the Civil Code was indefinitely postponed, along with the Commercial Code drawn up by German academic *Rößler* (1890).[8]

The renewed codification was led by Japanese academics, who prepared the draft and served as the brains in the Legislative Council.[9] The New Civil Code (1896 and 1898) adopted the *Pandektensystem* of the Civil Code of Sachsen (1863) and considered comparatively, in its patrimonial parts (1st through 3rd Part; 1896), drafts of the German Civil Code (BGB) and English

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[4] See *Harald Baum/Moritz Bälz,* Rechtsentwicklung, Rechtsmentalität, Rechtsumsetzung, in: Handbuch Japanisches Handels- und Wirtschaftsrecht, ed. by Harald Baum/Moritz Bälz (Köln 2011) 1–29, paras. 12–21. By completing the legislative work, the *Meiji* government succeeded in abolishing the consulate jurisdiction in 1894 and in recovering the right to determine import duty in 1911.

[5] *Kiyoshi Igarashi,* Einführung in das japanische Recht (Darmstadt 1990) 18–20; *Hidemasa Maki/Akihisa Fujiwara,* Nihon Hōseishi [Legal History in Japan] (Tōkyō 1993) 330–331; *Hideo Otake/Hidemasa Maki,* Nihon Hōseishi [Legal History in Japan] (Tōkyō 1975) 286–288.

[6] *Shun-ichiro Koyanagi,* Minpōten no Tanjō [Birth of the Civil Code], in: Minpōten no Hyakunen [Centenary of the Civil Code], vol. I, ed. by Toshio Hironaka/Eiichi Hoshino (Tōkyō 1998) 7–10.

[7] The "Codification Dispute" presumably was a quarrel between progressivists and conservatives, as well as rivalry between the French School and the English School. *Kenzo Takayanagi,* Development of Japanese Law since 1867, in: The Japanese Legal System, ed. by Hideo Tanaka/Malcolm Smith (Tōkyō 1976) 177–182.

[8] Act on Postponement of the Entry into Force of the Civil Code and the Commercial Code (*Minpō Shōhō Sekō-enki Hō,* 10 June 1892). However, unlike the Civil Code, the Commercial Code entered into force on 1 July 1898 due to the delayed reform. It was in force until the New Commercial Code was promulgated on 9 March 1899 and entered into force on 16 June 1899. *Otake/Maki,* Legal History (n. 5) 313. The Old Conflict of Laws Act *(Hōrei)* (1890) shared the fate of the Old Civil Code. *Yuko Nishitani,* Mancini and the Principle of Nationality in Japanese Private International Law, in: Festschrift für Erik Jayme, vol. I (Berlin 2004) 627–643.

[9] The New Civil Code was drafted by *Kenjiro Ume, Masaaki Tomii* and *Nobushige Hozumi,* who had been legally trained in France, Germany or England respectively. The New Commercial Code was drawn up by *Keijiro Okano, Kenjiro Ume* and *Kaoru Tanabe*. *Otake/Maki,* Legal History (n. 5) 307–314.

law, as well as over 30 other foreign legal systems.[10] However, because the codification of the New Civil Code was meant to be an amendment to the Old Civil Code, the provisions of the Old Civil Code grounded on French law largely remained intact.[11] Consequently, even today, the Japanese Civil Code does not follow the *Abstraktionsprinzip* in property law, but provides for an *action oblique* in the law of obligations. On the other hand, the family and succession law part of the Civil Code (4th and 5th Part; 1898) adopted the so-called "House System" to incorporate patriarchal customs and traditions of Japan.[12] Other important statutes, such as the New Commercial Code (1899) and the New Criminal Code (1907), the Civil Procedure Code (1890), the Criminal Procedure Code (1890) as well as other statutes in the field of procedural law were enacted by relying on German law.[13]

2. Post-war era

After completing the modern legal system at the turn of the 20th century, the Japanese legislature became relatively inactive. The exceptions solely concerned individual reforms of the Commercial Code (1911; 1938) and Civil Procedure Code (1926), as well as legislation prompted by economic development[14] and colonial policy in Taiwan (1895), South Sakhalin and the Kwantung-Territory in China (1905), and Korea (1910).[15]

It was not until Japan lost the Second World War that the second wave of legislation arrived. Under the occupation of the Allied Powers led by the U.S. (GHQ/SCAP),[16] the New Constitution was promulgated in 1946 and put into force the following year,[17] with a view to demilitarising and democratising Japan. The Constitution, which has not since been amended, declared that sovereign power resides with the people, turning the emperor into a mere symbol of the nation.[18] Furthermore, the Constitution provided for the renun-

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[10] *Eiichi Hoshino,* Minpō no Susume [Introduction to Civil Law] (Tōkyō 1998) 201–206.

[11] *Koyanagi,* Birth of the Civil Code (n. 6) 15–39.

[12] *Maki/Fujiwara,* Legal History (n. 5) 356–365.

[13] *Otake/Maki,* Legal History (n. 5) 320–328.

[14] For economic considerations, the legislature enacted the Limited Company Act (1938), specific statutes on security and protection of tenants, as well as other statutes in the field of agriculture, labour and social security law. *Otake/Maki,* Legal History (n. 5) 334–361.

[15] *Maki/Fujiwara,* Legal History (n. 5) 398–402; see also *Yuko Nishitani,* Familienrecht in Ostasien – Tradition und Moderne in Japan und der Republik Korea, in: Festschrift für Dieter Martiny (Tübingen 2014) 1179, 1183–1186.

[16] General Headquarters/Supreme Commander for the Allied Powers. The U.S. occupation of Japan lasted from 1945 till 1952.

[17] Constitution of Japan (promulgation 3 November 1946, entry into force 3 May 1947).

[18] Preamble and Art. 1 of the Constitution.

ciation of war[19] and the separation of powers[20], and adopted a detailed catalogue of fundamental rights.[21] In light of the guarantees of individual dignity and sexual equality in the New Constitution, the entire family and succession law was reformed in 1947, abolishing the patriarchal "House System".[22]

For the purpose of democratising economic power in Japan, the GHQ further effected a land reform, dissolved giant business corporations *(zaibatsu)* and enhanced workers' protection. Thus, statutes were enacted or reformed in the fields of land law, commercial law, labour law and social security law. Under the influence of the U.S., the Antitrust Act was enacted (1947) and the corporate law part of the Commercial Code was thoroughly reformed (1948; 1950; 1951).[23]

3. Developments since 2001

Since 2001, the Diet of Japan has passed a series of laws for a comprehensive Judicial Reform *(Shihô Seido Kaikaku),* launched by the *Koizumi* government. The Judicial Reform was primarily designed for "deregulation". The *ex-ante* control of the administration ought to be substituted by the *ex post* control of the judiciary.[24] Against this background, a large number of statutes have been enacted or reformed, touching upon almost all areas of law in Japan, which could have hardly been expected before.

Most notably, with a view to enhancing civic participation, a system of lay judges has been introduced in the field of criminal procedure. Under this system, six lay judges sit with three professional judges in trials of serious criminal offences (2004).[25] Furthermore, in the field of private law, several statutory reforms have simplified the implementation of insolvency proceed-

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[19] Art. 9 of the Constitution.

[20] Arts. 41–82 of the Constitution.

[21] Arts. 11–40 of the Constitution.

[22] Art. 24 of the Constitution; see *Yuko Nishitani,* State, Family and Child in Japan, in: Liber Amicorum Walter Pintens, vol. II (Cambridge et al. 2012) 987, 988–992; *idem,* Kindschaftsrecht in Japan – Geschichte, Gegenwart und Zukunft, ZJapanR/J.Japan.L. 37 (2014) 77, 80–83.

[23] *Baum/Bälz,* Rechtsentwicklung (n. 4) paras. 23–24; for corporate law, see *Masafumi Nakahigashi,* Sengo Senryōka deno America Kaishahō no Keiju [Transplant of the U.S. Corporate Law during the Post-war Occupation], in: Nihonhō no Kokusaiteki Bunmyaku [Japanese Law in International Contexts], ed. by Waseda University Institute of Comparative Law (Tōkyō 2005) 226–248.

[24] "Shihō-seido Kaikaku Shingikai Ikensho – 21seiki no Nihon wo sasaeru Shihō-seido" [Report of the Committee on Reform of the Judicial System: A Judicial System Supporting Japan in the 21st Century] of 12 June 2001, available at <http://www.kantei.go.jp/jp/sihouseido/report/ikensyo/index.html>.

[25] Act on Criminal Trials with Participation of Lay Judges (*Saiban-in no sanka suru Keiji Saiban ni kansuru Hōritsu,* Law No. 63 of 28 May 2004).

ings (2002; 2004)[26] and enabled an effective and expedited procedure in civil and commercial matters (2001; 2003; 2011), personal status matters (2003), family matters (2011) and non-contentious matters (2011).[27] As a mechanism of alternative dispute resolution (ADR), mediation by private organisations was established in 2004,[28] as was lay participation in the labour tribunal.[29] The amendment of the Consumer Contract Act[30] introduced in 2006 a collective action for the injunction of illegal enterprise activity; its scope was extended in 2008.[31] A collective action for the recovery of damages was further instituted in 2013.[32]

The wave of legislation subsequently affected large areas of substantive law. The enactment of the Companies Act in 2005,[33] which abolished the Limited Companies Act[34], was a major reform for the Japanese economy. The new act chiefly aimed to ensure large companies' international competitiveness and enact new rules adapted to the globalised capital market.[35] Yet, since

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[26] The enactment of the 1999 Civil Rehabilitation Act (*Minji Saisei Hō,* Law No. 225 of 22 December 1999) was followed by the entire amendment of the Corporate Reorganisation Act (*Kaisha Kōsei Hō,* Law No. 154 of 13 December 2002) and that of the Bankruptcy Act (*Hasan Hō,* Law No. 75 of 2 June 2004).

[27] Since its extensive amendment in 1996, the Civil Procedure Code has been reformed several times (in particular, Law No. 96 of 4 July 2001; Law No. 108 of 16 July 2003; Law No. 36 of 2 May 2011). In addition, the Act on Procedure in Personal Status Matters (*Jinji Soshō Hō,* Law No. 109 of 16 July 2003), the Act on Procedure in Non-Contentious Matters (*Hishō-jiken Tetsuzuki Hō,* Law No. 51 of 25 May 2011) and the Act on Procedure in Family Matters (*Kaji-jiken Tetsuzuki Hō,* Law No. 52 of 25 May 2011) have been enacted.

[28] Act on Promotion of Use of Alternative Dispute Resolution (*Saibangai Funsō Kaiketsu Tetsuzuki no Riyō no Sokushin ni kansuru Hōritsu,* Law No. 151 of 1 December 2004).

[29] Labour Tribunal Act (*Rōdō Shinpan Hō,* Law No. 45 of 12 May 2004).

[30] Consumer Contract Act (*Shōhisha Keiyaku Hō,* Law No. 61 of 12 May 2000).

[31] The authorised consumer organisations can also institute a collective action for the injunction of activities of the enterprise that run counter to specific statutes regulating business activities of enterprises, i.e., Act against Unjustifiable Premiums and Misleading Representation (*Futō-keihinrui oyobi Futō-hyōji Bōshi Hō,* Law No. 49 of 15 May 1962) or Act on Specified Commercial Transactions (*Tokutei Shōtorihiki ni kansuru Hōritsu,* Law No. 57 of 4 June 1976).

[32] Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers (*Shōhisha no Zaisanteki-higai no Shūdanteki na Kaifuku no tameno Minji no Saiban-tetsuzuki no Tokurei ni kansuru Hōritsu,* Law No. 96 of 11 December 2003).

[33] Companies Act (*Kaisha Hō,* Law No. 86 of 26 July 2005).

[34] Limited Companies Act (*Yūgengaisha Hō,* Law No. 74 of 5 April 1938; abrogated by the Act on Adjustment of Relevant Acts for the Entry into Force of the Companies Act *(Kaisha Hō no Sekō ni tomonau Kankei Hōritsu no Seibitō ni kansuru Hōritsu),* Law No. 87 of 26 July 2005).

[35] See *Masafumi Nakahigashi/Hideyuki Matsui,* Kaishahō no Sentaku: Atarashii Shakai no Kaishahō wo Motomete [The Choice of Corporate Law: In Search of Corporate Law in New Society] (Tōkyō 2010) 165–198.

the deregulation and the flexible organisational structure provided in the Companies Act entailed the risk of malpractice, it was amended in 2014 to strengthen the regulations on corporate governance, particularly by enhancing the use of external directors.[36] This is now complemented by the "corporate governance code" – soft law adopted by the Tokyo Stock Exchange and other stock markets in 2015.[37] The Labour Contract Act was promulgated in 2007 and amended in 2012; this primarily confirmed the principles developed by case law, without providing sufficient protection for employees.[38] A series of reforms took place also in the field of conflict of laws.[39] Other important amendments currently on the legislative agenda include a comprehensive reform of the law of obligations,[40] the modernisation of transport law,[41] and reforms to succession law[42] and consumer contract law[43].

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[36] Act on Partial Amendment to the Companies Act (*Kaisha Hō no ichibu wo kaisei suru Hōritsu,* Law No. 90 of 27 June 2014).

[37] *Hideki Kanda,* Corporate Governance Code: Tokushū ni atatte [Corporate Governance Code: For the Special Issue], Jurisuto [The Jurist] 1484 (2015) 14–17.

[38] *Satoshi Nishitani,* Rōdō Hō [Labour Law][2] (Tōkyō 2013) 38–39.

[39] Act on General Rules for Application of Laws (*Hō no Tekiyō ni kansuru Tsūsokuhō,* Law No. 78 of 21 June 2006); Act for Partial Revision of the Civil Procedure Code and the Civil Provisional Remedies Act (*Minji Soshōhō oyobi Minji Hozenhō no ichibu wo kaisei suru Hōritsu,* Law No. 36 of 2 May 2011); see *Yuko Nishitani,* Internationales Privat- und Zivilverfahrensrecht, in: Handbuch Japanisches Handels- und Wirtschaftsrecht (n. 4) 1211–1286; *idem.,* Die internationale Zuständigkeit Japans in Zivil- und Handelssachen, IPRax 2013, 289–294; for the enactment of international jurisdiction rules in family and status matters, a bill has been submitted to the House of Representatives of the Diet on 26 February 2016: Bill No. 33 *Jinji soshō-hō tō no ichubu wo kaisei suru hōritsu* [Bill on Partial Amendment of the Personal Matters Procedure Act and others] (available at <http://www.shugiin.go.jp/internet/index.nsf/html/index.htm>).

[40] A bill has been submitted to the House of Representatives of the Diet on 4 January 2016: Bill No. 63 *Minpō no ichibu wo kaisei suru Hōritsu-an* [Bill on Partial Amendment of Civil Code] (available at <http://www.shugiin.go.jp/internet/index.nsf/html/index.htm>).

[41] The Committee of the Legislative Council of the Ministry of Justice adopted a recommendation on 27 January 2016: *Shōhō (Unsō/Kaishō kankei) tō no Kaisei ni kansuru Yōkō-an* [Proposal on Reform of the Commercial Code (in relation to Transport and Maritime Commerce) and so on], available at <http://www.moj.go.jp/content/001172144.pdf>.

[42] The Committee of the Legislative Council of the Ministry of Justice, available at <http://www.moj.go.jp/shingi1/housei02_00294.html> is deliberating a reform of inheritance law after the Supreme Court declared the different portion of inheritance for children born in and out of wedlock unconstitutional on 4 September 2013 (see *infra* n. 86). The reform chiefly focuses on the protection of the surviving wife, who will be affected by raising the portion of inheritance for her husband's children born out of wedlock.

[43] The Experts' Committee of the Cabinet Office made a report, which has been molded into a bill and submitted to the House of Representatives of the Diet on 4 March 2016: Bill No. 45 *Shōhisha-keiyakuhō no ichibu wo kaisei suru Hōritsuan* [Bill on Partial Amendment of the Consumer Contract Act] (available at <http://www.shugiin.go.jp/internet/index.nsf/html/index.htm>).

In light of the dynamic movement of legislation, it is not an easy task to find out what constitutes contemporary Japanese law. In the following section, the role of legislators is examined in relation to judges, professors and other stakeholders.

III. Characteristics of Law-Making in Japan

1. Professors

a) Relation to the legislature

While the initiative for legislation in Japan has traditionally been taken by the government, it is the task of professors to understand, interpret and analyse the statutes enacted by the legislature in a historical or comparative perspective, yielding "legal dogmatics" *(Rechtsdogmatik)*. Ideally, this should enable the judges to obtain guidelines for interpreting and applying the statutes to decide the case at hand. In this respect, legal doctrines developed by academics can be an important means to bridge codified law and judge-made law.[44]

Japanese academics traditionally conduct their legal research under the influence of a major foreign legal system. After the wave of legislation during the *Meiji* era, Japanese academics primarily studied German law. In recent years, French law has also become popular in civil law and constitutional law, and U.S. law is predominant in commercial law. The transplant of Western legal systems required and justified comparative legal studies. Yet, the passive attitude of Japanese professors often meant that a critical or analytical study of foreign law was dispensed with. It was certainly stimulating, but also convenient for academics to transform the texts authored "horizontally" in a Western language into "vertically" written Japanese texts. This resulted in a secondary transplant of the Western legal systems as learned law.

After codification, the German late *Pandektistik* penetrated Japanese academia. Hence, the provisions of Civil Code that were originally based on French law started to be interpreted in accordance with the German BGB, particularly as to non-performance of contractual obligations, transfer of ownership and tortious liability.[45] The German "conceptual jurisprudence" *(Be-*

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[44] *Tamotsu Isomura,* Nihon Minpō no Tenkai (4): Gakusetsu no Hatashita Yakuwari [Development of Japanese Civil Law (No. 4): The Role of the Academia], in: Centenary, ed. by Hironaka/Hoshino (n. 6) 506–508; *Thomas Würtenberger,* Grundlagenforschung und Dogmatik aus deutscher Sicht, in: Die Bedeutung der Rechtsdogmatik für die Rechtsentwicklung, Ein japanisch-deutsches Symposium, ed. by Rolf Stürner (Tübingen 2010) 3–22, 5.

[45] See *Zentaro Kitagawa,* Das Methodenproblem in der Dogmatik des japanischen und bürgerlichen Rechts, AcP 166 (1966) 330–342; *idem,* Drei Entwicklungsphasen im japanischen Zivilrecht, in: Die Japanisierung des westlichen Rechts, ed. by Helmut Coing et al.

griffsjurisprudenz), however, was adopted in a superficial way,[46] without due regard to the underlying vision of German academia of creating an abstract system of rights adapted to modern economic liberalism and establishing a constitutional monarchy after the abolishment of feudal states. Following this transplant, conceptual jurisprudence became embedded in the absolutistic, patrimonial state ruled by the emperor and sustained by technocrats in Japan. This yielded logical hermeneutics of positive statutory rules dissociated from ideology and social reality.[47]

Arguably, it was not until *Suehiro* advocated so-called "civil jurisprudence" that Japanese jurists started to take social elements and policy aspects into consideration in developing their legal reasoning. To challenge the exclusive authority of state-enacted law, *Suehiro* focused on "living law"[48] and provided customary law, case law and learned law with normativity and the function of complementing black-letter law, without overturning the primacy of legislation in his legal sources doctrine.[49] *Wagatsuma* developed pragmatic hermeneutics guided by substantive values and legal certainty to accommodate the evolving role of the law of obligations,[50] whereas *Kurusu* adopted legal realism and relativised the binding force of positive law,[51] which was opposed by the scientific jurisprudence of *Kawashima.*[52] Debates on herme-

(Tübingen 1988) 125–142; *Hans-Peter Marutschke,* Einführung in das japanische Recht[2] (München 2010) 121–179.

[46] Western law was transplanted as technical means, without considering its ideological, economic, social or political background. *Izutaro Suehiro,* Kōgi: Hōritsu Shakaigaku [Lecture: Sociology of the Law], in: Suehiro Izutaro to Nihon no Hōshakaigaku [Izutaro Suehiro and Legal Sociology of Japan], ed. by Kahei Rokumoto/Isamu Yoshida (Tōkyō 2007) 37.

[47] *Tetsu Isomura,* Shimin Hōgaku [Civil Jurisprudence], in: idem, Shakai-hōgaku no Tenkai to Kōzō [Development and Structure of Social Jurisprudence] (Tōkyō 1975) 5–23.

[48] In the sense of *Ehrlich*'s "lebendes Recht". See *Eugen Ehrlich,* Freie Rechtsfindung und Freie Rechtswissenschaft (Leipzig 1903; reprint 1973) 34–37.

[49] *Suehiro,* Sociology (n. 46) 46–130. The background of *Suehiro's* doctrine was the fluctuation of social hierarchy as a result of frequent labour and tenant farmer disputes in the 1920s. See *Isomura,* Development (n. 44) 27–33, 101–117; *cf. Kenichi Moriya,* Ein japanisches Beispiel für die Suche nach einer verlässlichen Dogmatik. Der Werdegang der Rechtstheorie Tetsu Isomuras, in: Rechtsdogmatik, ed. by Stürner (n. 44) 34.

[50] *Sakae Wagatsuma,* Shihō no Hōhōron ni kansuru Ichikōsatsu [Some Considerations on Civil Law Methodology], in: idem, Kindaihō ni okeru Saiken no Yūetsuteki Chii [The Prevailing Status of Law of Obligations in Modern Law] (Tōkyō 1953) 477–502.

[51] *Saburo Kurusu,* Hō no Kaishaku Tekiyō to Hō no Junshu [Interpretation and Application of the Law and Observance of the Law], in: Kurusu Saburo Chosakushū [Collection of Saburo Kurusu], vol. I (Tōkyō 2004) 1–43; *idem,* Hō no Kaishaku ni okeru Seiteihō no Igi [The Meaning of Statutes in Legal Hermeneutics], *ibid.* 91–151.

[52] *Takeyoshi Kawashima,* Kagaku toshite no Hōritsugaku [Jurisprudence as a Science], in: Kawashima Takeyoshi Chosakushū [Collection of Takeyoshi Kawashima], vol. V (Tōkyō 1982) 2–61.

neutics later shifted to the contrast between the balancing of interests approach led by *Hoshino*[53] and the formalistic method grounded on legal argumentation advocated by *Hirai.*[54]

Throughout the long period since the enactment of the Civil Code, Japanese academia has gradually developed the notion of "legal dogmatics". Yet, unlike in European legal history, where learned law shaped the transplant of Roman law and the foundation of the *ius commune,*[55] the significance of learned law has had only a limited impact on law-making in Japan.

b) Relation to the judicature

An ideal situation would be that academia develops legal doctine and gives guidance to judges for further law-making.[56] Professors are assumed to have influenced the judicature to a certain extent[57] by developing legal doctrine to create new legal institutions,[58] refine the interpretation of statutory provisions,[59] fill their gaps[60] or even undermine some black-letter rules.[61] Yet,

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[53] *Eiichi Hoshino,* Mipō Kaishakuron Josetsu [Preliminary Considerations on Civil Law Hermeneutics], in: Minpō Roshū [Collection of Contributions to Civil Law], vol. I (Tōkyō 1970) 1–47.

[54] *Yoshio Hirai,* Sengo Nihon ni okeru Hōkaishaku-ron no Saikentō: Hōritsugaku Kisoron Oboegaki [Rethinking Legal Hermeneutics in Postwar Japan: Notes on Fundamental Legal Theories], in: idem, Hōritsugaku Kisoron no Kenkyū [Study on Fundamental Theories of Jurisprudence] (Tōkyō 2010) 57–61; for further detail, see *Nobuhisa Segawa,* Minpō no Kaishaku [Hermeneutics of Civil Law], in: *Minpō Kōza: Bekkan* [Study on Civil Law: Special Volumes], vol. I, ed. by Eiichi Hoshino (Tōkyō 1990) 1–99.

[55] *Antonio Padoa Schioppa,* Storia del diritto in Europa, Dal medioevo all'età contemporanea (Bologna 2007) 77–98.

[56] *Würtenberger,* Grundlagenforschung (n. 44) 11–12.

[57] Traditionally, Japanese court decisions do not cite academic writings but only precedents. Even where the judge has obviously relied on a certain academic opinion, he or she does not mention it, with a view to ensuring his or her neutrality. The only reliable clue for Supreme Court decisions is the comment made and published by the Supreme Court officer who is in charge of doing research and preparing Supreme Court decisions.

[58] The doctrine of "culpa in contrahendo" was introduced from Germany (Supreme Court 18 September 1984, Hanrei Jihō 1137, 51), although the breach of pre-contractual obligations can also be remedied as tort under Art. 709 Civil Code. See *Isomura,* Development (n. 44) 527–528.

[59] For the doctrine of adequate causal relationship to restrict damages for both contractual and tortious claims (*cf.* Art. 249 BGB), see Taishin-in (prior Supreme Court) 22 May 1926, Minshū 5, 386; *cf. Yoshio Hirai,* Songaibaishō-hō no Riron [Theory of the Law of Compensation] (Tōkyō 1971) 76–142.

[60] For "abuse of rights", see Taishin-in 3 March 1919, Minroku 25, 356; Taishin-in 5 October 1935, Minshū 14, 1965. The prohibition of abuse of rights was later inserted as Art. 1 (3) Civil Code in 1947 (Law No. 222 of 22 December 1947).

[61] For paternity presumption (Arts. 722 and 724 Civil Code), see *Sakae Wagatsuma,* Shinzoku Hō [Family Law] (Tōkyō 1961) 221–222; *Zennosuke Nakagawa,* Shinzoku Hō

while the position differs depending on the field, Japanese academics are often inclined to refrain from conducting a critical study of case law, but primarily aim to understand judge-made law immanently, analyse the reasoning and provide a prognosis on how other judges will presumably decide in the future. Seeing that the interests of Japanese academics have generally been geared toward comparative law, they have not very much attempted to establish their own conceptual systems or "legal dogmatics" to guide the judicature.[62] This passive attitude of Japanese academics may possibly be enhanced by the current practice-oriented legal education at law school.[63]

2. *Judges*

a) *Law-making by the judicature*

The Japanese judiciary consists of general courts.[64] They are the Supreme Court (with 15 justices),[65] 8 High Courts, 50 District Courts and 50 Family Courts,[66] as well as 438 Summary Courts. The number of judges in office is currently only 2,944 (excluding Summary Courts judges), a rather small number for the entire Japanese population of 127,298,000.[67] While it is a common understanding that the Japanese judiciary solely takes a passive role in law-making ("passive judicature"),[68] the importance of judge-made law has

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[Family Law][2] (Tōkyō 1967) 363; Supreme Court 29 May 1969, Minshū 23-6, 1064; for further detail, *Nishitani,* Child (n. 22) 996–998; *idem,* Bericht über die japanische Rechtsordnung, in: Familienrechtliche Freiräume, ihre Grenzen und kultureller Wandel, ed. by Martin Gebauer/Stefan Huber (forthcoming 2016); *cf.* Supreme Court 10 December 2013, Minshū 67-9, 1847 (paternity presumption in favour of a transsexual husband).

[62] *Satoshi Nishitani,* Rōdōhō ni okeru Hōritsu, Hanrei, Gakusetsu [Statutes, Case Law and Academic Opinion in Labour Law], in: idem, Rōdōhō no Kisokōzō [Fundamental Structure of Labour Law] (forthcoming 2016).

[63] For Japanese law school education, see, e.g., *Stacey Steele et al.,* contributions to the symposium "Build it and They Will Come": The First Anniversary of Law Schools in Japan, ZJapanR/J.Japan.L. 20 (2005) 5–122.

[64] Art. 76 (2) of the Constitution prohibits the establishment of special courts.

[65] According to the Constitution, the Chief Justice is proposed by the Cabinet and appointed by the Emperor (Art. 6 (2)), whereas the other 14 Justices are appointed by the Cabinet (Art. 79 (1)). Since the 1970s, Justices of the Supreme Court are generally selected from the following groups of legal professions: six judges, four attorneys, two public prosecutors, two government officers (including diplomats) and one academic.

[66] In addition to the main seat, District Courts and Family Courts have 203 regional branches respectively.

[67] There are 1,877 public prosecutors and 35,045 attorneys (as of 31 March 2014). The number of people per judge ranges comparatively from 43,240 (Japan) to 15,511 (UK), 11,244 (France), 9,885 (U.S.) and 3,951 (Germany). See the statistics in the White Paper of Attorneys, available at <http://www.nichibenren.or.jp/library/en/about/data/WhitePaper 2014.pdf> (English).

[68] *Yoichi Higuchi,* Kenpō [Law of Constitution][3] (Tōkyō 2007) 460–465.

often been emphasised by civil law professors.[69] In fact, we can observe some salient features of creative judicial law-making in civil law.

The first example in patrimonial law is the "transfer of ownership for security" *(Sicherungsübereignung)*. The Supreme Court gradually created this innovative legal institution in the light of practical needs,[70] even though case law has often constituted it as a claim between the parties instead of a right *in rem* with third party effects.[71] Second, the judicature has developed a mechanism of protecting a *bona fide* acquirer of immovable property, although the Land Register solely provides a rebuttable presumption. Suppose, A, the true owner of immovable property has agreed or accepted to indicate B, who is the former or prospective owner, as the owner in the Land Register. By taking advantage of the registration, B or B's heir or successor sells the immovable property to a third party C. Insofar as C is a *bona fide* purchaser, A's ownership is held unopposable to C on ground of an arranged false indication pursuant to Article 92 (2) Civil Code *mutatis mutandis*.[72] Third, case law has developed the concept of "duty of care" *(Sorgfaltspflicht)* to protect other persons' life and safety, as a collateral contractual obligation. In its leading case of 1975, the Supreme Court found in favour of a contractual damages claim based on a duty of care, where a tortious claim had already prescribed.[73]

In family law, the legal protection of partnership is limited to marriage. Under the pre-war patriarchal house system, the prospective husband and his parents often lived together with a woman before entering into a formal marriage, with a view to examining in advance whether the woman could be adapted to the house and give birth to a child. After having lived together for years, the woman could readily be repudiated from the house without any compensation. In order to protect such women, the Supreme Court first characterised living together as an engagement and granted damages for non-performance.[74] Later case law has classified it, as far as it was supported by

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[69] See *Taro Kogayu,* Seiteihō to Hanreihō [Statutes and Case Law], in: *Gendaihō no Dōtai* [Dynamics of Contemporary Law], vol. V, ed. by Yasuo Hasebe et al. (Tōkyō 2015) 190–194.

[70] Taishin-in 26 April 1933, Minshū 12, 767; Supreme Court 28 April 1966, Minshū 20-4, 900.

[71] *Hiroto Dogauchi,* Nihon Minpō no Tenkai (3): Hanrei no Hōkeisei. Jōto Tanpo [Development of Japanese Civil Law (No. 3): Constituting Law through Case Law: Transfer of Ownership for Security], in: Centenary, ed. by Hironaka/Hoshino (n. 6) 311–339.

[72] Supreme Court 20 August 1954, Minshū 8-8, 1505; Supreme Court 24 July 1970, Minshū 24-7, 1116.

[73] Supreme Court 25 February 1975, Minshū 29-2, 143.

[74] Taishin-in 26 January 1915, Minroku 21, 49; Taishin-in 21 March 1919, Minroku 25, 492; Taishin-in 23 April 1919, Minroku 25, 693; Taishin-in 11 June 1919, Minroku 25, 1010; for further detail, see *Shuhei Ninomiya,* Nihon Minpō no Tenkai (3): Hanrei no Hō-

both partners as a "quasi-marital" relationship.[75] This has enabled judges not only to refer to the remedy of engagement as before, but also to apply tort rules to grant solatium against a third party for committing adultery with the partner, as well as rules on marital effects *mutatis mutandis* including paternity presumption, joint liability for daily expenditure, presumption of joint ownership and division of assets at the dissolution of cohabitation.[76]

As these examples show, the judicature indeed contributes to law-making, in order to fill gaps or eliminate discrepancies in statutes, or develop innovative principles. In some cases, court decisions have given a creative interpretation to relevant black-letter rules to alter their original meaning (for example, rules on tort in relation to personality rights[77] or paternity presumption[78]), without being followed by a formal legislative act. The judges seem to have taken an active role in order to protect weaker parties, strike a fair balance between the interests of the parties, or ensure security of transactions, where an immediate or sufficient action by the legislature could not be expected. Hence, the significance of judicial law-making should not be underestimated.[79]

b) Control of constitutionality

The denomination of "passive judicature" in Japan is primarily attributable to the control of constitutionality which seldom takes place. Japan has no Constitutional Court. The control of constitutionality is effected by judges of all instances in a concrete case, much like in the U.S.[80] An abstract control of constitutionality *ex post,* as in Germany[81], or *ex ante,* as in France[82], is not provided for. As a corollary, a statute held unconstitutional by the judiciary is not automatically abrogated; this can only be done by a separate legislative act.[83]

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keisei. Naien [Development of Japanese Civil Law (No. 3): Constituting Law through Case Law: Cohabitation], in: Centenary, ed by Hironaka/Hoshino (n. 6) 352–363, 378–394.

[75] Supreme Court 11 April 1958, Minshū 12-5, 789; Supreme Court 8 March 2007, Katei Saiban Geppō 59-7, 63.

[76] Inheritance, however, has never been granted to the cohabiting spouse. For further detail, see *Nishitani,* Japanische Rechtsordnung (n. 61); *Ninomiya,* Development (n. 74) 385–390; *Hiroe Moriyama,* Hikon Fūfu to Junkon Hōri [Unmarried Couples and the Doctrine of Quasi-Marital Relationship], in: *Shin Kazokuhō Jitsumu Taikei* [New Collection on the Practice of Family Law] ed. by Aiko Noda/Taichi Kajimura (Tōkyō 2008) 221–240.

[77] Art. 709 and 723 Civil Code; see Supreme Court 14 April 1981, Minshū 35-3, 620; Supreme Court 11 June 1986, Minshū 40-4, 872; Supreme Court 16 February 1988, Minshū 42-4, 27.

[78] For further detail, see n. 61.

[79] *Kogayu,* Statutes and Case Law (n. 69) 181–187.

[80] Art. 81 of the Constitution.

[81] German Federal Constitutional Court *(Bundesverfassungsgericht).*

[82] French Constitutional Council *(Conseil constitutionnel).* France introduced a limited *ex post* control in 2008.

[83] *Higuchi,* Constitution (n. 68) 453–454.

Alongside limited precedent,[84] in 2008 the Japanese Supreme Court notably declared ex-Article 3 of the Nationality Act unconstitutional. This provision unduly required legitimation for a child born out of wedlock and acknowledged by the Japanese father after birth to obtain Japanese nationality. This rule was considered to violate the equality principle.[85] Further in 2013, the restriction of the portion of inheritance for children born out of wedlock to half of that of children born in wedlock (ex-Article 900 No. 4, 2nd sentence Civil Code) was held unconstitutional for running counter to the equality principle.[86] Nevertheless, in a much awaited decision of 16 December 2015, the Supreme Court did not declare that subjecting only the wife, not the husband, to a waiting time to remarry was unconstitutional in itself. Rather, the Supreme Court held Article 733 (1) Civil Code to be unconstitutional solely to the extent that the wife is required to wait for six months to remarry, although the time limit of 100 days would be sufficient to avoid an overlap of the paternity presumption.[87] In another case from the same day, the Supreme Court denied the unconstitutionality of Article 750 Civil Code that requires spouses to have one common family name, although in most cases this rule obliges *de facto* the wife to give up her family name.[88]

The reasons why there are only a limited number of decisions declaring a statutory provision unconstitutional cannot solely be attributed to the Japanese judicial system, as the activism of the U.S. Federal Supreme Court shows. Presumably, in addition to the overall limited number of cases brought to courts in Japan,[89] we ought to consider that the judiciary generally respects statutes enacted by the Diet. By keeping a distance from politics, the judiciary presumably seeks to uphold its authority and independence from the legislature and the executive.[90]

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[84] See Supreme Court 4 April 1973, Keishū 27-3, 265 (unconstitutionality of stricter punishment for murder committed against one's own or one's spouse's family members in the ascending line [ex-Art. 200 Criminal Code]); Supreme Court 22 April 1987, Minshū 41-3, 408 (unconstitutionality of the Forests Act [*Shinrin Hō*] that denied a division claim [Art. 256 (1) Civil Code] to owners of less than half of the price); Supreme Court 11 September 2002, Minshū 56-7, 1439 (unconstitutionality of Post Act [*Yūbin Hō*] that precluded or limited liability of post workers acting in bad faith or gross negligence).

[85] Art. 14 (1) of the Constitution: Supreme Court 4 June 2008, Minshū 62-6, 1367.

[86] Supreme Court 4 September 2013, Minshū 67-6, 1320.

[87] Supreme Court 16 December 2015, Saibansho Jihō 1642, 1 (to be reported in Minshū).

[88] Supreme Court 16 December 2015, Saibansho Jihō 1642, 13 (to be reported in Minshū); for further detail, see *infra* III.3.

[89] It is a long debated issue whether we should attribute the limited amount of litigation to the mentality and underdeveloped consciousness of Japanese people of their rights, or rather to institutional reasons, particularly the limited number of lawyers (see *supra* n. 67). See *Baum/Bälz,* Rechtsentwicklung (n. 4) paras. 27–49.

[90] *Kogayu,* Statutes and Case Law (n. 69) 191.

From the viewpoint of the constitutional order, this is certainly not objectionable. However, it ought to be borne in mind that there is the immanent risk that the Diet enacts statutes violating the Constitution or disregarding the democratic legislative procedure. The possibility of the judiciary exercising an effective constitutional control would deter dysfunctionality or arbitrary decision-making by the Diet. This is an important watchdog function to be effected by judges, before the nation ultimately rejects the leading parties in an election.[91] As the reverse side of the coin, excessive activism by the judicature certainly ought to be cautioned against in order not readily to overthrow a decision made by the legislature, as the Diet is the highest organ of state power under the Constitution.[92] Yet, the inherent risk that the Supreme Court jeopardises the democratic legitimacy of legislation is alleviated to a certain extent, as all justices are subject to the vote of confidence at the first general election of the House of Representatives following their appointment.[93] Arguably, there is a reasonable balancing of power to uphold the judiciary within the framework of the Constitution, even if the judiciary changes its formalistic position to play a more active role in the control of constitutionality.[94]

3. Legislators

a) Background

During the second half of the 20th century, when the Japanese legislature was less active,[95] law-making was primarily incumbent on the judges and professors. Arguably, academic writings contemplating on the theory and methods of legislation in the 1980s and 1990s[96] did not yield a systematic construction or practical implications for legislation. Yet, in the light of the current wave of legal enactment since 2001, academics have launched fresh studies on theory, philosophy, methods, policy and political dynamics of legislation to make a thorough analysis and evaluation, and possibly give guidance to fu-

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[91] *Tatsuya Yokohama,* Kihanteki Hō Jisshōshugi no Rippō Riron [Legisprudence of Normative Legal Positivism], in: Rippōgaku no Frontier [Frontier of Legisprudence], vol. I, ed. by Tatsuo Inoue (Tōkyō 2014) 58–60.

[92] Art. 41 of the Constitution; see *Yokohama,* Legisprudence (n. 91) 61–62.

[93] Art. 79 (2) of the Constitution.

[94] *Kogayu,* Statutes and Case Law (n. 69) 192–194.

[95] See *supra* II.2. and 3.

[96] See, e.g., *Yoshio Hirai,* Hō Seisaku-gaku [Study of Legislative Policy]^2 (Tōkyō 1995); *Akira Yamada,* Rippōgaku Josetsu: Taikeiron no Kokoromi [Preliminary Thoughts on Legisprudence: Attempts at Systemisation] (Tōkyō 1994); *Naoki Kobayashi,* Rippōgaku Kenkyū: Riron to Dōtai [Study on Legisprudence: Theory and Practice] (Tōkyō 1984).

ture legislation.[97] This area of legal studies is called "legisprudence".[98] The following section sheds light on the role of different actors involved in legislation and the current state of discussion in Japan.

b) Methods of legislation

(1) The role of the government

In today's law-making by the Diet in Japan, the initiative of legislation is usually taken by the government through the Ministries or, in some cases, directly by the Cabinet Office. In the field of private law, the Civil Affairs Bureau of the Ministry of Justice generally plays a leading role in preparing legislation (with some exceptions).[99]

The Ministry of Justice consults with the Legislative Council as a standing body, which establishes a committee of experts on the specific subject-matter. As a rule, a committee includes officers, academics, judges, attorneys, as well as representatives of relevant public sectors or private organisations. In the case of the envisaged reform of the law of obligations,[100] a committee was convened with six officers, 17 academics, four judges, four attorneys and several stakeholders (two from the consumer sector, three from companies – a bank, a retailer and an energy supplier, and one from a trade union).[101] In general, after extensive deliberations in the committee and public consultation, a legislative proposal is finalised by the committee. With the approval of the Legislative Council, the proposal is adopted and elaborated into a bill based on inter-ministerial coordination by the Cabinet, which is then submitted to the Diet.[102]

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[97] For recent comprehensive studies on legislation, see *Tatsuo Inoue*, Rippōgaku no Frontier [Frontier of Legisprudence], vols. I–III (Tōkyō 2014); for pragmatic analyses, see, e.g., *Makoto Nakajima,* Rippōgaku: Joron & Rippōkatei-ron [Legisprudence: Introduction & Legislative Process][3] (Kyōtō 2014); *Masasuke Omori/Kaoru Kamata,* Rippōgaku Kōgi [Lecture on Legisprudence][2] (Tōkyō 2011).

[98] A journal was established under the name "Legisprudence" in 2007, whose title has now been changed to "The Theory and Practice of Legislation". *Tatsuo Inoue,* Rippōrigaku toshite no Rippōgaku: Gendai Minshusei ni okeru Rippō System Saihen to Hōtetsugaku no Saiteii [Legisprudence as Philosophy of Legislation: Reconstruction of the Modern Democratic Legislative System and Reflection on Legal Philosophy], in: Frontier, vol. I (n. 97) 48–51.

[99] As an exception, the reform of the Consumer Contract Act was prepared by the Cabinet Office (see *supra* n. 43). In the field of corporate law, the Ministry of Economy, Trade and Industry (METI), as well as individual members of the Diet increasingly submit bills to the Diet. See *Masafumi Nakahigashi,* Kaishahō Kaisei no Rikigaku [Dynamism of the Reform of Corporate Law], in: Frontier, vol. III (n. 97) 228–233.

[100] See *supra* n. 40.

[101] See <http://www.moj.go.jp/content/001127663.pdf> (as of 23 July 2014).

In this legislative process, which is largely followed also by other Ministries, the key actors are officers who conceive of, schedule and lead the whole process. To this end, the officers inform and instruct members of the Diet of the content, background and policy considerations of the legislative project to obtain approval. Conversely, members of the Diet are also entitled to prepare and submit a bill directly to the Diet. Yet, members of the Diet do not often take advantage of this alternative method of legislation, even though it is increasingly employed for cutting-edge issues (for example, financial law or social security law), possibly with the assistance of private entities, such as companies or non-profit organisations.[103] While in general the Ministries are in a better position to prepare effective legislation due to their capacity, expertise, authority and administrative structure,[104] the members of the Diet could complement the legislative work in some particular areas where the Ministries have less experience or expertise.

Notably at the Ministry of Justice, officers who play a leading role in private law legislation are in most cases judges who temporarily switch their capacity to that of public prosecutor. After completing their legislative task, they generally go back to courts. This was also the case with the current Chief Justice *Itsuro Terada,* who worked at the Ministry of Justice from 1981 to 2005, after starting his career as an assistant judge in 1974.[105] Because the officers are highly qualified, competent and knowledgeable of practice, they perform excellent work in preparing legislation. Yet, this structure might be one of the reasons why the Ministry of Justice tends only retrospectively to confirm existing rules developed by case law, instead of actively proposing innovative rules.

(2) Cabinet Legislation Bureau

During the preparatory work by the Ministries, the "Cabinet Legislation Bureau" (CLB) plays a cardinal role. Once the Ministries conceive of a legislative project, they need to consult the CLB in advance. The CLB examines whether a new statute is necessary, and whether the expected content and procedure is appropriate in its consistency with the Constitution. After con-

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[102] The Cabinet is entitled to submit bills, budgets and other proposals to the Diet (Art. 5 of the Cabinet Act [*Naikaku Hō,* Law No. 5 of 16 January 1947]).

[103] For example, Act on Emergency Measures to Recover the Function of Finance (*Kinyū Kinou no Saisei notame no Kinkyūsochi ni kansuru Hōritsu,* Law No. 45 of 19 June 2013); Long-Term Care Insurance Act (*Kaigo Hoken Hō,* Law No. 123 of 17 December 1997); see *Hideki Kato,* "Rippō System to NPO, Think-tank" [Legislative System, NPO and Think-tank], in: Frontier, vol. II (n. 97) 163–181.

[104] *Omori/Kamata,* Legisprudence (n. 97) 15; *Nakajima,* Legisprudence (n. 97) 29–41, 250–265.

[105] See <http://www.courts.go.jp/english/about/justice/terada/index.html>.

sultation with the legislative committee is completed, the CLB intervenes again to check the legislative proposal and the compilation of the text so that the structure, provisions and wording are coherent with existing statutes. Thus, the CLB is given *de facto* broad discretion and significant political power, which may even restrain the decision-making power of the Prime Minister. As a result, the teeth may be taken out of the legislative proposal that has been carefully conceived of and prepared by the officers and discussed with the experts.[106]

Certainly, this mechanism has also advantages, as the CLB has largely contributed to relieving the judicature of *ex post* constitutionality control by scrutinising the constitutionality of legislative proposals *ex ante*.[107] Yet, the systematic intervention of the CLB jeopardises the transparency and legitimacy of the legislative work, since the Ministries that have the best expertise in the given field do not have the final say.[108]

(3) Stakeholders

Another challenge for the Ministries is how to convince the interest groups of Diet members within the leading political parties, because, as a custom, the bill is subject to party-internal examination before being submitted to the Diet. In particular areas – such as transport, construction, agriculture, trade, national security and education – the interests groups speak for certain public or private entities or Ministries, seeking to obtain financial benefits and votes in return. This process can inappropriately influence and distort legislation, but is unavoidable for the bill to pass the Diet under the current political structure.[109]

Other stakeholders outside the Diet may possibly seek to influence legislation as well. Members of the legislative committee representing a public body or private organisation may speak for trade, industry, the economy or other relevant sectors. Furthermore, attorneys sitting in the legislative committee may assert the position of the bar associations, which can strategically lead to the adoption or omission of specific rules.[110] Arguably, the success and quali-

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[106] *Nakajima,* Legisprudence (n. 97) 81–85; *Nakahigashi,* Dynamism of the Reform (n. 99) 243.

[107] *Yasuo Hasebe,* Kenpō toha Nani ka [What is Constitutional Law] (Tōkyō 2006) 112.

[108] *Cf. Ichiro Kato et al.,* Rippō no arikata [Features of Legislation], Jurisuto [The Jurist] 331 (1965) 30.

[109] *Nakajima,* Legisprudence (n. 97) 110–129.

[110] In deliberating the issue of international parallel proceedings, for example, the representatives of the bar associations in the Committee of the Legislative Council were opposed to adopting specific *lis pendens* rules. The reasoning was that, after Japanese individuals have been sued abroad (particularly in the U.S.), they ought to be able strategically to institute court proceedings against the same party on the same subject-matter before the Japanese courts, in order to block the enforcement of a future foreign judgment.

ty of legislation often depends on whether and how far the officers in charge are able to convince the stakeholders and withhold their opposition.

(4) Professors

Due to the tradition of transplanting Western legal systems, comparative law has always played an important role in legislation in Japan. In this respect, professors greatly contribute to the preparatory work of legislation by writing a comparative law report. In the case of the Ministry of Justice, prior to establishing a committee of the Legislative Council, the officers often organise an informal working group with academics to have preliminary discussions and find out crucial or controversial points and possible solutions. After a legislative committee is established, professors constitute the majority of its members.

The overall influence of academics in the legislative committee is, however, rather limited. Practitioners and other stakeholders often have more to say, as they will be more directly affected by the statute being proposed. Furthermore, the officers in general determine the basic direction and expected outcomes of consultation in advance, in line with the observations of the CLB and the opinions of the interests groups within the leading political parties. The officers can hardly change the bottom line of the envisaged legislation. As a consequence, the comparative law research provided by academics does not have an impact to determine the track of legislative work, unlike the method of legislation during the *Meiji* era. Rather, the study of foreign legal systems could be reduced to a mere cherry-picking tool to find useful legal institutions or means of convincing members of the Diet to accept some principles. This is because the argument that major foreign jurisdictions, such as the U.S., U.K., Germany or France, have adopted the same rules is readily accepted by the decision-makers. Yet, when some clear policy considerations prevail, a comparative law study may well be dispensed with or disregarded in contemplating legislation.

c) Tendency of the legislation

(1) Reserved position of legislators

Although the legislators have become more active since 2001, the way legislation is effected is rather reserved. The preparatory work by the Ministries is often designed only to confirm the principles developed by case law. Furthermore, the legislative work led by the Ministries is primarily geared toward whether and how far social demand exists that requires and justifies a legislative intervention. These decisive social factors are called "legislative

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See *Yuko Nishitani,* International Jurisdiction of Japanese Courts in Comparative Perspective, Netherlands Int'l L.R. 60 (2013) 251, 271–273.

facts".[111] The reference to "legislative facts" prompted legislative work in some areas, particularly when there were fundamental changes or developments in society. For example, with the rapid increase of e-commerce, an exception was introduced in 2001 to the rule on mistake (Article 95 Civil Code), to protect consumers. Pursuant to the new statute, an erroneous, unintended click made by the consumer in concluding a contract on the internet no longer constitutes gross negligence, so that his or her offer or acceptance can be revoked.[112] Further in 2011, with the increasing number of instances of child abuse committed by parents, Article 834 ff. Civil Code were amended to facilitate the deprivation of parental rights and introduce the suspension of parental rights for up to two years.[113]

On the other hand, Article 750 Civil Code remains a delicate issue. According to this provision, spouses are obliged to carry a common family name after marriage. As a matter of fact, about 96.5 % of spouses choose the family name of the husband.[114] This constitutes a serious hindrance for working women, who wish to be recognised by their maiden name to express their identity and uphold their professional recognition. According to some academics, this rule contravenes the personality rights of the wife and is therefore unconstitutional.[115] In 1996, the Legislative Council of the Ministry of Justice approved a proposal made by the committee to introduce an option for spouses to maintain their given family name after marriage.[116] This proposal has, however, no longer been moulded into a bill following the resistance of the leading Liberal Democratic Party (LDP), which argued that it would dissolve family ties and impair the customs and traditions of Japan.[117]

In December 2012, the government conducted an extensive survey relating to the family name. As to the optional separate family name, over 40% of the age group under 59 supported it, while the percentage fell to 33.9% for the

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[111] *Tsuneyuki Yamamoto,* Jitsumu Rippō Enshū [Practical Exercise of Legislation] (Tōkyō 2007) 4.

[112] Act on Special Provisions to the Civil Code Concerning Electronic Consumer Contracts and Electronic Acceptance Notice (*Denshi Shōhisha Keiyaku oyobi Denshi Shōdaku Tsūchi ni kansuru Minpō no Tokurei ni kansuru Hōritsu,* Law No. 95 of 29 June 2001).

[113] Law No. 61 of 3 June 2011; see *Nishitani,* Kindschaftsrecht (n. 22) 97–99.

[114] Statistics on population (2014), available at <http://www.e-stat.go.jp/SG1/estat/List.do?lid=000001137998>.

[115] *Atsushi Omura,* Kazokuhō [Family Law][3] (Tōkyō 2010) 46–54.

[116] *Minpō no ichibu wo kaisei suru Hōritsu-an Yōkō* [Proposal on Partial Amendment of the Civil Code], adopted by the Legislative Council on 26 February 1996, available at <http://www.moj.go.jp/shingi1/shingi_960226-1.html>.

[117] *Atsushi Omura,* Nihon Minpō no Tenkai (1): Minpōten no Kaisei Ko 2-hen [Development of Japanese Civil Law (No. 1): Reform of the Civil Code: Part 4 & 5], in: Centenary (n. 6) 165–167.

generation between 60 and 69, and to 20.1% for over 70.[118] A more recent survey conducted by a newspaper in 2015 shows an increase of support to 60% among people under 60.[119] In light of the divided opinion, however, it is doubtful that this result is sufficient to constitute "legislative facts" and justify a legislative intervention. It would have been incumbent on the judicature to declare Article 750 Civil Code unconstitutional so as to give impulse to its amendment. Disappointingly, on 16 December 2015[120] the Supreme Court held this provision constitutional, on the ground that the underlying legislative policy of indicating the family unit and the child's legitimate status by the common family name is reasonable and therefore not repugnant. Yet, the Supreme Court implicitly invited the Diet to re-examine the appropriateness of this legislative policy. In response, Komeito, the party currently in coalition with the LDP, launched internal deliberations on this issue in February 2016,[121] the result of which is still being awaited.

In the legislative process, respecting "legislative facts" is certainly adequate to reflect the "living law" in the society. However, the surveys conducted by the government to find out "legislative facts" are primarily geared toward subjective factors, such as people's opinion or attitude. Thorough sociological investigations on the objective facts of family relations or children's living conditions are still missing, although they would be crucial for analysing the changing family model and societal demand to justify future law reforms.[122]

Furthermore, relying on the "legislative facts" may unduly hamper developments of legal norms through legislation, insofar as opinion is still divided in the society. Since the CLB strictly follows precedent, a legislative project of the Ministries that changes the *status quo* may be filtered out even before being put on the table. This may pre-empt any attempts to improve existing rules, unless the "legislative facts" sufficiently support the undertaking, or conclusive political or economic considerations prevail to justify the undertaking.[123] As a result, inappropriate provisions that have been criticised by

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[118] *Kazoku no Hōsei ni kansuru Seronchōsa* [Survey on Family Law Institutions], available at <http://survey.gov-online.go.jp/h24/h24-kazoku/zh/z17.html>.

[119] According to the latest survey of the Asahi Newspaper on 10 November 2015, about 60% of the population under 60 support introducing an option of the spouses to maintain a separate family name, but the percentage sinks to 47% for the generation between 60 and 69, and to 34% for those over 70, available at <http://digital.asahi.com/articles/ASHC97592HC9UZPS006.html>.

[120] See *supra* (n. 88).

[121] See the Asahi Newspaper, available at <http://digital.asahi.com/articles/DA3S12204241.html>.

[122] *Omura,* Development (n. 117) 173–175; for further discussion, see *Nishitani,* Japanische Rechtsordnung (n. 61).

[123] See *Nakajima,* Legisprudence (n. 97) 85.

academia are often upheld in legislation, on the ground that no substantial problem has occurred so far.[124] In this respect, legislation in Japan cannot be said to incorporate rational law *(Vernunftsrecht),* as in the enlightenment era in Europe.[125]

(2) Activism of legislators

Under specific and limited circumstances, innovative legislation can take place based on policy considerations or as a result of a successful campaign. In this respect, the enactment of the Transsexual Act (2003)[126] and the introduction of lay judges in criminal procedure (2004)[127] are good examples. Furthermore, the 2014 amendment of the Companies Act was launched by an active intervention of the Ministry of Justice, since major economic and political interests, that required the strengthening of corporate governance, were at stake.[128]

Arguably, an effective and feasible way of enhancing legal development is to accept international standards by joining relevant international instruments. In 2008, after a long deliberation, Japan eventually acceded to the 1980 Convention on the International Sale of Goods (CISG)[129] and adopted the contract rules recognised worldwide, even though in practice the application of CISG is still regularly excluded (Article 6 CISG). Further, in 2014, Japan accepted the 1980 Hague Child Abduction Convention.[130] As a result, the Japanese legal system has assumed the international standard that a wrongful removal or retention of the child in breach of one parent's custody rights is illegal and requires a prompt return of the child to the country of his or her habitual residence.

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[124] For this reason, Art. 22 of the Conflict of Laws Act (2006) has maintained the old-fashioned "double actionability" principle, providing for the application of the *lex fori* in addition to the foreign applicable law for the requirements of tort and the determination of damages. *Yuko Nishitani,* Die Reform des internationalen Privatrechts in Japan, IPRax 2007, 552, 556.

[125] *van Caenegem,* Judges, Legislators and Professors (n. 1) 89–93.

[126] Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (*Sei Dōitsusei Shōgaisha no Seibetsu no Toriatsukai no Tokurei ni kansuru Hōritsu,* Law No. 111 of 16 July 2003); see *Yuko Nishitani,* III. Legal View (Asia): Japan, in: The Legal Status of Transsexual and Transgender Persons, ed. by Jens M. Scherpe (Cambridge *et al.* 2015) 363–389.

[127] See *supra* (n. 25).

[128] See *Saburo Sakamoto,* Heisei 26nen Kaisei Kaishahō [2014 Reform of the Companies Act][2] (Tōkyō 2015).

[129] United Nations Convention on Contracts for the International Sale of Goods, done at Vienna on 11 April 1980 (entry into force 1 January 1988, available at <http://www.uncitral.org/>; accession of Japan 1 July 2008, promulgation 7 July 2008 [Treaty No. 8], entry into force 1 August 2009).

[130] Convention on the Civil Aspects of International Child Abduction, done at The Hague on 25 October 1980 (entry into force 1 December 1983, available at <https://www.hcch.net/>; acceptance of Japan 24 January 2014, entry into force 1 April 2014).

On the other hand, regrettably, there is still a long way to go to abolish the death penalty and to accept many more refugees in Japan (only 11 out of 5,000 applicants were granted asylum in 2014),[131] although it is internationally recognised that the current practice in Japan does not meet international human rights standards.[132]

IV. Final Remarks

Law-making in Japan is shaped by its own legal culture and tradition. None of the three major actors, i.e., legislators, judges or professors, seem to have a strong incentive to take the initiative of actively engaging in law-making and changing the *status quo.* In the absence of superior international bodies such as the European Union or the European Court of Human Rights, there is not sufficient driving force for progressive or innovative law-making in Japan.

As has been examined in this paper, the current legislative process in Japan does not always live up to the standard of transparency and the duty of explanation.[133] Under the present government of Prime Minister *Abe,* a troubling tendency toward nationalism and populism can be observed. On 16 July 2015, several bills on national security and collective self-defence[134] were pushed through the House of Representatives without sufficient debate, although most constitutional law professors in Japan had condemned these bills as unconstitutional, running counter to the renunciation of war and the prohibition of maintaining military forces under Article 9 of the Constitution.[135] Unlike in France or Germany, the Japanese judiciary did not have any immediate means to conduct an abstract control of constitutionality to deter *ex ante,* or set aside *ex post,* unjust legislation.

As this example shows, the task of achieving equitable and reasonable legislative policy cannot be allocated entirely and unequivocally to the executive, nor to the legislature, which has the obligation to act within the framework of the Constitution. Rather, it ought to be examined continuously whether and how the legitimacy of legislation is respected and ensured. With

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[131] See press release of the Ministry of Justice, available at <http://www.moj.go.jp/nyuukokukanri/kouhou/nyuukokukanri03_00103.html>.

[132] *Toshihiro Kawaide,* Kokusai-Keijihō no Kokunaihō heno Eikyō [Influence of International Criminal Law on Domestic Law], in: Gendaihō no Dōtai [Dynamics of Contemporary Law], vol. V, ed. by Atsushi Omura (Tōkyō 2014) 117–118.

[133] *Masaji Kawasaki,* Rippō ni okeru Hō, Seisaku, Seiji no Kōsaku to sono 'Shitsu' wo meguru Taiō no arikata [Interaction between Law, Policy and Politics in Legislation and Measures in relation to its 'Quality'], in: Frontier, vol. III (n. 97) 54.

[134] For further detail, see the website of the House of Representatives, available at <http://www.shugiin.go.jp/internet/index.nsf/html/index.htm>.

[135] See the contributions in: Hōritsu Jihō 1092 (2015) 1–52.

a view to substantiating moral and ethical values in the legislative process, transcending the conventional dichotomy between the law and morality in law-making will be worth contemplating.[136]

[136] *Inoue,* Legisprudence (n. 98) 37–41.

Law-Making in Turkish Private Law

Başak Baysal[*]

I. Introduction

In Turkish private law "law-making" can be referred to as "law-making by judges" or "law-making by legislators".[1] The Turkish Civil Code gives judges the freedom to act as "a law-maker" *(modo legislatoris)*. The judge can act as a legislator under Article 1(2) of the Turkish Civil Code when there is a gap.[2] Turkish judges are not very reluctant to use this exceptional power. Therefore law-making by judges is particularly important in Turkey.

Before analysing law-making by judges and focusing on the matter of case law (III.), one should examine the issue of law-making by legislators in order to have a better understanding of law-making by Turkish judges. In that regard we would like to examine a specific legal instrument concerned with the law-making process in Turkey, i.e. the "Government By-Law on Procedures

[*] The author would like to thank *Melisa Konfidan* (lawyer registered with the Istanbul Bar and PhD candidate at the University of Istanbul) for her second reading.

[1] For a detailed comparison of two law-making mechanisms, cf. *Giacomo A.M. Ponzetto/Patricio A. Fernandez,* Case Law versus Statute Law: An Evolutionary Comparison, Journal of Legal Studies 37 (2008) 379–430, 379.

[2] Cf. *Alfred E. von Overbeck,* Some Observations on the Role of the Judge Under the Swiss Civil Code, Louisiana L. Rev. 37 (1976–1977) 681–700.

and Principles for the Preparation of Legislation". We would also like to draw attention to the enforceability and practicality of this instrument (II.1.). Creating transparency in the law-making process is one of its main aims. Therefore a brief look will be taken at two particularly problematic instances of law-making: the problem of the so-called "bag laws" and that of the abuse of secondary legislation (II.2.). We will conclude with a few remarks on the question of codification of judge-made law in Turkey (IV.). Since in Turkey the role of professors is also important for the law-making process, we will add some observations on this point as well.

II. Law-Making by Legislators

1. Legislative drafting

In Turkish private law, new codes have entered into force in recent years. We have a new Civil Code (2002), a new Act on Private International and Procedural Law (2007), a new Code of Obligations (2011), a new Commercial Code (2011), a new Code of Civil Procedure (2011) and a new Consumer Protection Act (2014). The reasons for such intensive legislative activity are varied, but that activity has certainly raised the importance of the method followed in legislative law-making.

For the preparation of the regulations there is an official procedure to be followed, which is laid down in the "Government By-Law on Procedures and Principles for the Preparation of Legislation".[3] All regulations, including private law regulations, should be drafted and prepared in accordance with the By-Law. The aim of the By-Law clearly is to improve the quality of law-making in Turkey. Probably the most prominent provision in the By-Law is the one on Regulatory Impact Analysis (RIA), which was introduced into Turkish law by the By-Law.[4] In April 2007, a detailed circular (2007/6) was also issued by the government in order to set out the requirements of an RIA.[5]

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[3] *Mevzuat Hazırlama Usul ve Esasları Hakkında Yönetmelik,* Official Gazette of 17 February 2006, no. 26083, available at <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2006/02/20060217.htm&main=http://www.resmigazete.gov.tr/eskiler/2006/02/20060217.htm>. English translations from the By-Law in this paper are largely based on: <http://regulatoryreform.com/wp-content/uploads/2015/02/Turkey-Government-Decree-introducting-RIA-in-Turkey-2006.pdf>.

[4] *OECD,* OECD Regulatory Policy Outlook 2015 (Paris 2015) 206. See also <http://www.oecd.org/gov/regulatory-policy/Turkey-web.pdf>.

[5] Official Gazette 3 April 2007 no. 26482, available at <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2007/04/20070403.htm&main=http://www.resmigazete.gov.tr/eskiler/2007/04/20070403.htm>.

a) Legislative drafting and Regulatory Impact Analysis

Turkey is a member state of OECD (Organisation for Economic Co-operation and Development), and all OECD member states have implemented Regulatory Impact Analysis requirements. According to the definition given by OECD, a "Regulatory Impact Analysis (RIA) is a systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives".[6] According to Article 3 of the By-Law, RIA refers to the preliminary assessment which shows the (future) impacts of the draft on the existing legislation, on social, economic and commercial life, on the environment and on the stakeholders.

The aim of introducing RIA into the Turkish legislative system was to increase the quality and the transparency of regulations and to improve the regulatory process, which is also important for Turkey's integration in the European Union.[7]

RIA is obligatory for all regulations and drafts whose impact is predicted to exceed ten million Turkish Liras (around three million euros) in the event they enter into force (Article 24). Therefore it is applicable to almost all private law regulations. The Prime Ministry may require RIA for regulations whose impact is below ten million Turkish Liras. Nevertheless, matters related to national security and national budget are excluded from the RIA requirement.

In the following section, the main questions concerning the scope of RIA are examined for the process of legislative law-making in Turkey.

b) Important RIA requirements in Turkish law

RIA is a methodology for improving the quality of the technique of making legislation. According to Annex 1 of the By-Law, the following provisions are to be included in the RIA:

"1. Reasons which are necessary for the preparation of the regulations, and whether the type of regulation has been chosen correctly or not.
2. The prospective benefits and costs of the regulation, and whether the benefits justify the costs.
3. Whether the regulation brings an additional financial burden to the budget, and, if so, the approximate cost of it.
[…]
7. Whether parties affected by the regulation have the opportunity to deliver opinions during the process of preparing the regulation.
[…]"

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[6] <http://www.oecd.org/gov/regulatory-policy/ria.htm>.

[7] Standard Summary Project Fiche: Introducing Regulatory Impact Analysis into the Turkish Legal Framework, TR 06 03 06, available at <http://ec.europa.eu/enlargement/pdf/fiche-projet/turkey/2006/part2/tr-06-03-06-introducing-regulatory-impact-analysis-into-the-tk-legal-fwk.pdf>.

The most important conditions in terms of an efficient RIA and to promote a better legislative process in Turkey are:

- taking opinions from affected parties in the preparatory stages of the process;
- drafting legal rules with justifications;
- calculating the costs of the legal rules (economic analysis of law).

(1) Duty of the preparatory commissions and external consultation

External consultation is important not only for the law-making process but also for legal certainty. The law must be clear and comprehensive.[8] In order to reach this aim, the synthesis of different views is crucial.

During the preparation of legislation in the area of private law, the use of *ad hoc* expert preparatory commissions is usual in Turkey. The commission responsible for the preparation of drafts consists of professors of law from both state and private universities, lawyers selected by the Union of Bars, judges selected by the Ministry of Justice, judges from the Supreme Court, notaries public, representatives of the other interest groups and private stakeholders. Generally, professors comprise the majority of the members and one of them will serve as the president of the commission. There are other members as well, but it is mostly the professors' impact that can be seen in drafts. The professors can, in this case, be referred to as having a law-making power.

During the legislative process, every provision should be open to criticism by interested parties, by the relevant sectors, and by representatives of other scholarly views. It should also be borne in mind that the members of parliament often may not understand the technical nature of the legal terms before voting on them.[9] Understanding the effects of private law regulations on social, financial and commercial life before voting is not easy. Most of the time, parliamentarians in Turkey will be discussing topics other than the legislation itself prior to voting. Thus, we see that they do not express their reasoning for accepting or rejecting a provision. This also shows that providing access to opinions from different entities is important during the legislative process.

Therefore, external consultation has a very considerable importance during the legislative process. In the By-Law, systematic and transparent public consultation was demanded for the efficiency of regulations and this is a must for RIA (Article 6 of the By-Law).

Especially Article 6(2) and 6(3) of the By-Law are important provisions for the transparency of the public consultation, and they warrant reproduction here:

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[8] *Guillaume Meunier,* Les travaux préparatoires from a French Perspective: Looking for the Spirit of the Law, RabelsZ 78 (2014) 346–360, 347.

[9] *Brian Christopher Jones,* Don't Be Silly: Lawmakers "Rarely" Read Legislation and Oftentimes Don't Understand It … But That's Okay, Penn St. L. Rev. 118 (2013) 7–21.

"(2) Relevant local administrations, universities, trade unions, professional organizations and non-governmental organizations shall also be consulted about drafts.

(3) Drafts which involve matters of public concern may be made public by the ministry proposing the legislation via the internet, press and media before being submitted to the Prime Minister's office."

The procedure for asking for opinions about the drafts was also regulated in the By-Law. According to its Article 7:

"(1) Ministries, public agencies and institutions may deliver their opinions about drafts within thirty days at the latest, without prejudice to the specific provisions of the relevant laws. The Prime Ministry may shorten this period in an urgent situation. Ministries and public institutions and agencies may demand extra time to deliver opinions. Ministries and public agencies and institutions cannot avoid delivering opinions. If they fail to deliver their opinions in the given period, then their opinions will be assumed to be in the affirmative."

However, this procedure is non-functional. There are several reasons for that. First of all, the draft which is open for public review is usually a completed work, in other words a final draft. External consultation is never used at an early stage of the regulatory process; it is used merely when the work of the commission is completed.

During the creation of the first draft, the authorities who have a direct relevance to the draft are left out; their opinions are not taken. Apart from this, there is a problem in how parties are invited to submit their opinions since there is not a prominent request for the participation in the draft-making process. For instance, a legal opinion could be asked from the universities, with the relevant time frame being stipulated by the By-Law as 30 days.[10] However, the short deadline for this type of request makes it almost impossible to provide detailed opinions. Save for exceptional instances, the opinions are usually prepared in a limited period of time and are consequently far from detailed or satisfactory.

A problem in the preparation of legislation is the very limited number of persons who deal with the preparation of drafts. In Turkey there is a lack of systematic and transparent public consultation and this reduces the quality of draft legislation.[11]

As a result, parliamentarians may vote on a final and technical legal draft produced from the perspective of only a limited number of people in the commission. External opinions of good quality are produced only infrequently. This causes mistakes during the preparatory work on draft legislation, and

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[10] *Gülşah Özkoç,* in: Kanun Yapım Süreci Sempozyumu [Symposium on legislative process], ed. by İrfan Neziroğlu/Fahri Bakırcı, (Ankara 2011) 65–71, 68 f.

[11] For example, for the new Consumer Protection Act there were only 96 consultations, even if this is relatively high in comparison to the other important Acts. See: 6502 Sayılı Tüketicinin Korunması Hakkında Kanun Basın Toplantısı [Press conference on Turkish Consumer Act], available at <http://www.gtb.gov.tr/ >.

last minute lobbying over the final parliament vote cannot be prevented. But it must also be said that the situation today is better than in the past. Especially the drafts of provisions with some economic importance are scrutinized by the parties who will be affected by them.

The signals showing that the law-making process has not been very efficient are numerous: amendments to the codes very shortly after their entry into force, amendments to the codes even before their entry into force, and instances of the cancellation of the legislation's enforcement. The impact of last-minute lobbying efforts during the legislation process can easily be seen.[12]

The genuine external consultation stipulated in the By-Law has been considered only as a formality to be complied with, and it has turned RIA into something existing only on paper rather than in practice. Nevertheless, the role of interest groups and private stakeholders should not be underestimated during the law-making process. Where the aim is to have better draft legislation before it is voted on by members of parliament, the first thing to do is to ensure transparency in the law-making process and to have meaningful and efficient public consultation. Politicians usually do not have enough time to read the drafts and their expertise is not such that they can analyse legal texts before voting on them.[13]

Ultimately, legislation is being prepared by professors and becomes law after being voted on and put into force by parliament, without a proper consultation process. This, in turn, means that professors become indirect legislators.

This part of the discussion should be concluded with notes contained in the OECD 2015 report for Turkey[14] in order to emphasize the importance of external consultation:

"In order to build on the existing legal framework and to improve the regulatory environment, there should be greater enforcement and monitoring of the requirements that have been put in place. The Better Regulation Group could systematically monitor compliance with the By-Law and publish the results to incentivise ministries and regulatory agencies. Making better use of ICT in public consultations to make them 'two-way' and document those who have been consulted would help enable more interactive stakeholder engagement and encourage the consultation process to be more transparent. The practice of ex post evaluation should be systemised to inform new policy design as well as assess the progress of existing interventions."

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[12] For instance, as a result of lobbying of shopping centre landlords after the entry into force of the Turkish Code of Obligations, the enforcement of ten articles related to renting was postponed for five years. See *Murat İnceoğlu,* Kira Hukuku II [Law of lease] (Istanbul 2014) 572 n. 60.

[13] *Jones,* Penn St. L. Rev. 118 (2013) 1, 3, 6.

[14] See *OECD,* Outlook (n. 4) 206.

(2) Justifications

Judges, as interpreters, should first understand the *ratio legis* of a provision they are asked to apply. The drafting material associated with a regulation is the primary source of interpretation. But general justification for the regulations and the justification behind each article is essential. Such justifications must be taken into account in the interpretation of the law.[15]

The legislative drafting process, the development of the draft, the meetings of the commission and the parliament, and especially the justifications provided in the process are crucially important for the interpretation of the law. Including a justification in draft legislation is compulsory in Turkish law. Thus, Article 21(2) of the By-Law provides: "The reasons for preparing the draft shall be clearly stated in the general justification. The reasons for regulating each article shall be clarified in the justification of the respective article."

The second paragraph of Article 21 points to a very specific problem of law-making in Turkey. According to this provision, "justifications for articles shall not be prepared so as to be a repetition of its text". Nevertheless, the justifications for the articles of the new Code of Obligations and for the new Civil Code, for instance, often take that form. However, it also depends on the commission itself; some of the preparatory commissions and the professors involved were very rigorous about the justifications. For example, the general justification and the article justifications in the new Consumer Code are very detailed and very well written. Here again we encounter the role of professors during the legislative process by reason of their influence on the drafting of the respective piece of legislation.

(3) Economic analysis of law

The last part in respect of RIA concerns the benefits and costs of regulations. According to the proponents of an economic analysis of law, RIA has a special importance for obtaining information on the costs and benefits of the adoption of legislation.

Under Article 24 of the By-Law and its Annex, the calculation of the benefits and costs of the regulation is one of the conditions of RIA, and it should be determined whether the benefits justify the costs. Calculating the benefits and costs of the regulation and considering the justification of the costs is a matter of the economic analysis of law. With this provision of the By-Law, the economic analysis of law has been accepted as an approach for the first time in Turkish law.

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[15] *Nihan Yancı Özalp,* Türkiye'de Yasa Yapımı Nicelik Sorunu mu, Nitelik Sorunu mu? [Law-Making in Turkey], Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi 61/1 (2006) 267–295, 274.

The economic analysis of law is a tool that is very controversial in civil law countries given that it is a result-oriented method focused strictly on pragmatism. Civil law jurists do not normally take into consideration an evaluation of social welfare under a pragmatic lens.[16] From the perspective of an economic analysis of law, a legal rule has to contribute to the improvement of social welfare.

What, then, is the role of the Turkish legislator in undertaking RIA when facing on one hand a legally unfair rule and on the other hand decreasing costs? An example might be a rule that would protect competition but would be unfair for consumers. Supporters of an economic analysis would want to accept such rule, provided that its main objective is to protect competition and economic order. However, there is a trend towards "humanizing" the cost-benefit analysis,[17] and thus factors such as human dignity and fairness have to be included in regulatory impact analysis.[18] As the matter is put by Richard Posner:[19]

"The economic approach to law is criticized for ignoring 'justice'. One must distinguish between the different meanings of this word. Sometimes it means distributive justice, - the proper degree of economic equality – and sometimes efficiency. We shall see, among other examples, that when people describe as unjust convicting a person without a trial, taking property without just compensation, or failing to make a negligent automobile driver answer in damages to the victim of his negligence, this means nothing more pretentious than that the conduct wastes resources. Even the principle of unjust enrichment can be derived from the concept of efficiency. And with a little reflection, it will come as no surprise that in a world of scarce resources waste should be regarded as immoral.

But there is more to notions of justice than a concern with efficiency. It is not obviously inefficient to allow suicide pacts; to allow private discrimination on racial, religious, or sexual grounds; to permit killing and eating the weakest passenger in the lifeboat in circumstances of genuine desperation; to force people to give self-incriminating testimony; to flog prisoners; to allow babies to be sold for adoption; to allow the use of deadly force in defense of a pure property interest; to legalize blackmail; or to give convicted felons a choice between imprisonment and participation in dangerous medical experiments. Yet all these things offend the sense of justice of modern Americans, and all are to a greater or lesser (usually greater) extent illegal. An effort will be made in this book to explain some of these prohibitions in economic terms, but most cannot be. Evidently there is more to justice than economics, a point the reader should keep in mind in evaluating normative statements in this book."

Discussions such as these are not very common in Turkish law. Until the coming into existence of this By-Law, the effect of the common law was very lim-

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[16] *Başak Baysal,* Zarar Görenin Kusuru (Müterafık Kusur) [Contributory Negligence] (Istanbul 2012) 20–25.

[17] *Michael A. Livermore,* A Brief Comment on "Humanizing Cost-Benefit Analysis", European Journal of Risk Regulation 1 (2011) 13–17.

[18] *Livermore,* European Journal of Risk Regulation 1 (2011) 13, 14.

[19] *Richard A. Posner,* Economic Analysis of Law[8] (New York 2011) 35.

ited in Turkish law, and thus also the economic analysis of law is a new discussion subject. This may be another reason why RIA exists only on paper.

To sum up, RIA appears to be an important tool for the improvement of policy making, for the quality and maintaining transparency and participation in law-making. Unfortunately, as for the time being, RIA exists mainly only on paper and not so much in practice. Additionally, it should be borne in mind that some RIA provisions reflect an economic analysis of law viewpoint that is controversial in civil law countries.

2. Abuse of legislative power through legislative technique

The problems relating to law-making by legislators also have a political dimension. Turkish legislators usually prefer to use their power to shorten the length of the legislative process. In that respect, they use two main devices, i.e. the so-called "bag laws" and "secondary legislation". These two legislative tools invite discussion as to whether they promote an abuse of legislative technique.

Formally, "bag laws" are designated "Laws on Amending Laws and Statutory Decrees".[20] "Bag law" is the everyday label; it is helpful in pointing out the lack of transparency. The problem with legislation of this variety is that the provisions included refer to different acts of legislation not having any relation with each other.[21] Therefore, "bag laws" are in contradiction with Article 17 of the By-Law.[22] "Bag laws" amend provisions in or add additional provisions to different acts of legislation. During the drafting of "bag laws", proper Commission proceedings are not followed. Apart from not being prepared by experts, "bag laws" are open to last-minute additions, and hidden provisions are also usually inserted in this type of legislation.[23] "Bag laws" are thus contrary to the principles of certainty and predictability of the law.[24]

The other legislative technique mentioned above consists in resorting to secondary legislation. The preferred method for the adoption of EU regulations has been the adoption of the main principles in acts with the detailed

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[20] *Fatih Bakırcı,* TBMM'de Komisyonların Yapı ve İşleyişi: Sorunlar ve Çözüm Önerileri, [Structure of the Commissions of the Turkish Parliament], in: *Neziroğlu/Fahri,* Kanun Yapım Süreci Sempozyumu [Symposium on legislative process] (n. 10) 113–143, 134.

[21] *Şeref İba,* Ülkemizde Temel Kanun ve Torba Kanun Uygulamaları [Bag Law Practice], Ankara Barosu Dergisi 1 (2011) 197–202, 199.

[22] *Bakırcı,* TBMM (n. 20) 135.

[23] *İba,* Ankara Barosu Dergisi 1 (2011) 199/200. For instance, the postponement of the entry into force of ten articles of the Turkish Code of Obligations, mentioned above, was effected by means of a "bag law"; moreover, it was difficult to follow this development, *İnceoğlu,* Kira Hukuku II [Law of lease] (n. 12) 572 n. 60.

[24] *Yancı Özalp,* Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi 61/1 (2006) (n. 15) 272.

rules then being adopted in by-laws.[25] However, in some cases even the main principles are set out in by-laws, and this has been widely criticized in light of the principle of the hierarchy of norms. Provisions in by-laws can be accepted only to the extent that they remain within the limits of the relevant codes, and rules in contradiction with a code should not, therefore, be regarded as valid.In order to prevent this problem and to provide for certainty and predictability of the law, central principles should be adopted solely in acts of proper legislation instead of in secondary legislation such as by-laws.

III. Law-Making by Judges

1. The Turkish judge: Interpreter and/or legislator?

Article 1(2) of the Turkish Civil Code states: "In the absence of a provision, the judge shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that he or she would enact as legislator."[26] This article was inspired by Article 1(2) of the Swiss Civil Code. Academic literature has considered this provision as an expression of the idea that judges benefit from the same sources of inspiration used by the legislator.[27] It must, however, be questioned how free Turkish judges actually are in terms of creating new rules in private law.

In Turkey, one of the main grounds for the adoption of the Swiss Civil Code was its flexibility. This flexibility means empowering judges with the authority to fill gaps.[28] Consequently, Turkish judges could apply their theo-

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[25] A good example is consumer law; for a detailed overview of Turkish consumer law see *Yeşim M. Atamer/Hans W. Micklitz,* Implementation of the EU Consumer Protection Directives in Turkey, Penn St. Int. L. Rev. 27 (2009) 551–607, *Çiğdem Kırca,* Ürün Sorumluluğu [Product liability] (Ankara 2007) 100. Most of the by-laws that entered into force after the Consumer Protection Act's entry into force have provisions contradicting the act: *Başak Baysal,* Tüketici Kredisi (TKHK m.22–31) [Consumer credits], in: Yeni Tüketici Hukuku Konferansı [New Turkish Consumer Law Conference], ed. by Murat İnceoğlu (Istanbul 2015) 273–325, 275–276.

[26] English translation by the author.

[27] *Thomas Kadner Graziano,* Is it Legitimate and Beneficial for Judges to Compare?, ERPL 3 (2013) 698.

[28] *Eugen Huber,* the creator of the Swiss Civil Code, was inspired by the works of *François Gény*. The judge's power to act as a legislator is based on *Gény*'s idea that a Code itself is not self-sufficient; *François Gény,* Méthode d'interprétation et sources en droit privé positif (Paris 1919); *von Overbeck,* Louisiana L. Rev. 37 (1976–1977) 681, 685; *Richard Groshut,* The Free Scientific Search of François Gény, American Journal of Jurisprudence 17 (1972) 16; *Meunier,* RabelsZ 78 (2014) 346, 356; *Kadner Graziano,* ERPL 3 (2013) 698 n. 38; see also *Duncan Kennedy/Marie Claire Belleau,* François Gény aux Etats-Unis, in: François Gény, Mythe et Réalités 1899–1999 Centenaire de Méthode d'In-

retical background and adapt a Code from a completely different culture into their national legal system. After the foundation of the Turkish Republic, and in view of the adoption of the Swiss Civil Code, accepting general rules and giving judges the possibility to become law-makers were very efficient decisions. In Turkey, the confidence placed in judges facilitated the new codes' adaptation process.[29]

According to Article 1(1) of the Turkish Civil Code, "the Code governs all questions of law which come within the letter or the spirit of any of its provisions". Therefore the judge depends on the respective provision and he should interpret the law. He is an interpreter until a gap appears in the regulation; only then he becomes a law-maker.[30] He can then adopt a new rule, which will also be applicable to later cases. Of course, Article 1(2) refers first to customary law, but the application of customary law is rare.

The word "spirit" *(telos, ratio legis)* in Article 1(1) of the Turkish Civil Code should be emphasized,[31] since it indicates a substantial difference with Article 1(1) of the Swiss Civil Code which states: "The law applies according to its wording or interpretation to all legal questions for which it contains a provision". Turkish judges as interpreters thus have greater flexibility in searching out the spirit of the relevant provision. Nevertheless, the risk exists that as the interpreter, searching for the spirit of the code, he may suddenly put on his legislator's hat. In order to avoid this risk, the idea of determining the spirit of the law, and the role of the judge as a legislator should be clearly distinguished in Turkish private law. In their capacity as legislators judges need to find a general rule which will be applicable to future cases and which should be in conformity with all other parts of existing legislation. The judge cannot create a norm that would contradict the legislation and the spirit of the code. Otherwise legal certainty will be jeopardized.

In this process the judge must take into account academic scholarship and judicial tradition. Consequently, a professor, as the creator of scholarship, once again indirectly acts as a legislator. Moreover, the judge is not limited to Turkish scholarship; especially Swiss and German literature are frequently cited, and Turkish judges frequently refer to foreign legislation as a method

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terprétation et Sources en Droit Privé Positif, Essai Critique, ed. by Claude Thomasset/ Jacques Vanderlinden/Philippe Jestaz (Paris et al. 2000) 295–320.

[29] *Halid Kemal Elbir,* L'expérience turque et le problème de l'unification du droit privé, in: Unification du droit, Annuaire d'Unidroit 1953–1955 (1956) 282–303. Cf. for a detailed overview on the reception of the Swiss Civil Code in Turkey *Yeşim M. Atamer,* Rezeption und Weiterentwicklung des Schweizerischen Zivilgesetzbuches in der Türkei, RabelsZ 72 (2008) 723–754.

[30] *Rona Serozan,* Medeni Hukuk Genel Bölüm – Kişiler Hukuku [Civil law] (Istanbul 2015) 145.

[31] *Serozan,* Medeni Hukuk Genel Bölüm (n. 30) 134.

for filling gaps.[32] However, in taking resort to foreign and international sources, Turkish judges do not pursue any systematic approach.

All in all, the role of the judge in Turkish private law should not be underestimated. A good example demonstrating the Turkish experience with judge-made law is offered by the decisions on the adaptation of a contract, where gap-filling was achieved by implementing the German doctrine of "Störung der Geschäftsgrundlage" (breakdown of the basis of the transaction).

2. Adaptation of contract: Judges acting as legislators

As mentioned before, Turkish judges are not very reluctant to act as legislators, and they take it that they have the responsibility to act *modo legislatoris.* Cases on the adaptation of contracts to changed circumstances provide a good example. The interesting point in these cases is that the adaptation of a contract to changed circumstances – first adopted by judges – later became written law.[33]

In contract law, *pacta sunt servanda* is the primary principle and the adaptation of a contract constitutes an exception. The parties should perform their obligations even though difficulties may arise after the conclusion of the contract. Nevertheless, some unforeseeable circumstances may appear after the conclusion of the contract, and insisting on the fulfilment of the obligations may thus be unjust towards the aggrieved party, which would in turn be contrary to the principle of good faith. Consequently, the Turkish Supreme Court accepted and implemented the scholarly views on both private and administrative law in such cases.[34]

The Turkish Supreme Court judges took the view that there was a gap in the code and they subsequently acted as legislators. As held by the Court, that gap should be filled according to the principle of good faith and the German doctrine of *Störung der Geschäftsgrundlage:*[35]

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[32] For instance, several decisions of the 17th Civil Chamber of the Supreme Court refer expressly to the German Civil Code (BGB), § 846; cf. 17th Civil Chamber (Y17.HD) 2 July 2015, 2014/3743, 2015/9401.

[33] Cf. for details, *Başak Baysal,* The Adaptation of the Contract in Turkish Law, in: The Effects of Financial Crises on the Binding Force of Contracts – Renegotiation, Rescission or Revision (Ius Comparatum Global Studies in Comparative Law, vol. 17) (New York et al. 2016) Ch. 19.

[34] YHGK 7 May 2003, E. 2003/13-332, K. 2003/340; YHGK 15 October 2003, E. 2003/13-599, K. 2003/599; YHGK 27 January 2010, E. 2010/14-14, K. 2010-15; YHGK 18 November 1998, E. 1998/13-815, K. 1998/835; *Kemal Tahir Gürsoy,* Hususî Hukukda Clausula Rebus Sic Stantibus – Emprevizyon Nazariyesi [Clausula Rebus Sic Stantibus] (Ankara 1950); *Hasan Erman,* İstisna Sözleşmesinde Beklenilmeyen Haller (BK. 365/2) [Theory of Imprevision] (Istanbul 1979); *Başak Baysal,* Sözleşmenin Uyarlanması [Adaptation of Contract] (Istanbul 2009).

"One of the main principles of contract law is the principle of pacta sunt servanda, which is also supported by the rule of good faith. However […] the basis of the contract will be interfered due to an extraordinary situation and the parties have not taken any precautionary measures for it. Consequently, the judge will adapt the contract by way of taking into account both parties' interests, and the aim will be that the parties' benefits should be balanced according to the principle of good faith."[36]

"The contract will be interfered with in the event of a disturbance of the contractual equilibrium. Where the judge concludes that this is the case, he may increase the obligors' obligation or adapt the contract to the new circumstances by decreasing his obligation and by allowing him to be partially released from his obligation. In other words, the judge interferes the contract."[37]

Thus, the Turkish Supreme Court used the doctrine of adaptation of contracts, the principle of good faith and comparative law as a method for filling gaps.

After these rulings of the Supreme Court, the Turkish legislature enacted a new regulation which was one of the most crucial changes in the new Turkish Code of Obligations. Article 138 of the Turkish Code of Obligations states:[38]

"When an extraordinary situation which is not foreseen and is not expected to be foreseen by the parties during conclusion of the contract arises due to a reason not caused by the obligor and if the present conditions during conclusion of the contract are changed to the detriment of the obligor to such an amount as to violate principal honesty and if the obligor has not discharged his debt yet or has discharged his debt by reserving his rights arising from excessive difficulty of performance, the obligor shall be entitled to demand from the judge the adaptation of contract to new provisions, and to withdraw from the contract when such adaptation is impossible. In contracts including continuous performance, the obligor shall, as a rule, use his right to termination instead of right to withdraw.

This provision shall also apply to debts in foreign currencies."

In justification of Article 138, express reference was made to the doctrine of *Störung der Geschäftsgrundlage*. The legislature thus appears to have intended to introduce the German doctrine with this article into Turkish law. This is not the case, however. The report of the Commission of Justice clearly states:

"The draft does not include the rule for adaptation of contracts for cases other than excessive onerosity. Cases of interference with the basis of the contract like the disturbance of the contractual equilibrium, or frustration of the purpose of the contract, are not included."

Yet, it does not make sense to limit the theory of interference with the basis of the contract in this way so that it would solely apply to cases of excessive onerosity. The reason for the limitation can only be an inadequate examination of the German theory by the Commission of Justice. Using the name of

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[35] YHGK 11 November 2009, E. 2009/14-456, K. 2009/496; YHGK 15 October 2003, E. 2003/13-599, K. 2003/599; YHGK 7 May 2003, E. 2003/13-332, K. 2003/340.

[36] YHGK 27 January 2010, E. 2010/14-14, K. 2010/15.

[37] YHGK 1 July 1992, E. 1992/13-360, K. 1992/425.

[38] Translated by *Çağlar Özel* (Ankara 2013).

the theory but simultaneously rejecting it in substance would be contradictory and such inconsistency would be awkward, to say the least. In fact therefore, the introduction of Article 138 does not constitute an advance of Turkish law; in addition, it is quite obvious that there are still gaps in the law that need to be filled.[39]

The wording of Article 138 of the Turkish Code of Obligations will be challenged by practitioners. In order to enable the correct implementation of Article 138 and not to violate the basic principles of the law of obligations, the courts should render decisions that take into consideration the problems raised by the doctrine. Article 138 does not prevent judges from adopting a more broadly based doctrine.

IV. Concluding Remarks: Codifying Judge-Made Law

The new Turkish codes were prepared with the aim to clarify disputed points in previous case law and legal literature. But it is very questionable whether it is the legislator's job to codify previous judge-made law. Today law-making cannot be seen to be the exclusive business of legislators.[40] According to *Örücü,* "all legal systems are mixed, whether covertly, or overtly", and "there are no pure legal systems in the world".[41]

As explained above, the codification of the doctrine of adaptation of contract resulted in its loss of flexibility on account of the difficulty of defining it. A pragmatic approach should not lead to an institution being made dysfunctional. The contractual parties as well as judges are sometimes better suited to law-making than the legislator, particularly in cases where substantive justice is crucial.

However, trusting judges' law-making is also a political problem.[42] Turkish judges may consider themselves as law-makers especially in private law. At the same time it must be acknowledged that neither in the development of the case law nor in the proper legislative process a systematic approach prevails. In a way, therefore, the judges are merely jumping into the breach and attempt to rescue a situation that is unsatisfactory as a result of the legislative inefficiency.

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[39] An example is the duty to renegotiate the contract.

[40] *Anthony Mason,* Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?, Adelaide L. Rev. 24 (2003) 16–36.

[41] *Esin Örücü,* What is a Mixed Legal System: Exclusion or Expansion?, Electronic Journal Of Comparative Law 12.1 (May 2008), available at <http://www.ejcl.org/121/art121-15.pdf>, 2.

[42] It involves the problem of the separation of legislative and judicial functions, with legislators being elected and judges being appointed by the executive: *Mason,* Adelaide L. Rev. 24 (2003) 16–36.

Reforming the Russian Civil Code

A Search for Better Law-Making

Andrey M. Shirvindt

I. Introduction

The Russian Civil Code in force today, the Civil Code of the Russian Federation, was adopted over the course of the years 1994–2006 in four parts that entered into force separately. The Fourth Part took effect on 1 January 2008.

Right away, a large-scale reform of the Code was set in motion. Not later than 18 July 2008, President Medvedev, a former law professor himself, ac-

ceded to a proposal coming from experts of his consultative bodies (the Council on the Codification and Improvement of Civil Legislation, and the Sergej Alekseev Research Centre for Private Law), who were among those responsible for the Civil Code, and assigned to them the preparation of a Concept for the Development of Civil Legislation and, as a second step, the elaboration of draft amendments to the Code.[1]

Contrary to the initial plan, the respective amendments were adopted not as a single whole but as a number of separate bills during the following years (2012–2015). By now, the changes have been introduced in virtually all the spheres covered by the original programme, except for property law and the law of financial transactions. It does not seem very likely that any further far-reaching changes will take place as a part of this reform.

This paper does not trace the entire law-making process from the moment the idea of the reform first appeared until the enactment of the amendments. Instead, it picks out the most transparent and rationally structured part of this process, i.e. the preparation of the Concept and the draft amendments that started on 18 July 2008 with Edict No. 1108 and resulted in a bill transmitted to the President on 30 December 2010. The bill never became law in that original version; it has been split into several parts and has undergone an array of changes due to dramatic developments and bitter disputes in the course of the internal legislative process. Nevertheless, a significant portion of the amendments proposed in 2010 has been enacted.

The reform has brought about a huge number of changes in just about every sphere of Russian private law. These changes are one of the central subjects discussed by lawyers nowadays and will certainly remain topical for a long time. Aside from these discussions and partly intertwined with them, heated debates have taken place concerning the way the reform has been carried out.

There is, on the one hand, a vast amount of publications – books, articles and interviews – from the experts charged with the preparation of the Con-

[1] Paras. 1, 3, Edict of the President of the Russian Federation of 18 July 2008 No. 1108 "On the Improvement of the Civil Code of the Russian Federation" (Edict No. 1108), Sobranie zakonodatel'stva RF [Collection of the legislation of the Russian Federation], 2008, No. 29 (1st part), item 3482. See, e.g., *Veniamin F. Jakovlev,* Modernizacija Graždanskogo kodeksa Rossijskoj Federacii – razvitie osnovnyx položenij graždanskogo prava [Modernization of the Civil Code of the Russian Federation – Development of Fundamental Rules of Civil Law], in: Kodifikacija rossijskogo častnogo prava 2015 [Codification of Russian Private Law 2015], ed. by Pavel V. Krašeninnikov (Moscow 2015) 10–21, 12; *Aleksandr L. Makovskij,* O kodifikacii graždanskogo prava (1922–2006) [On the Codification of Civil Law (1922–2006)] (Moscow 2010) 58; *Vasilij V. Vitrjanskij,* Reforma rossijskogo graždanskogo zakonodatel'stva: promežutočnye itogi [The Reform of Russian Civil Legislation: Interim Results], Xozjajstvo i pravo [Economy and Law] 3 Annex (2015) 2–80, 5.

cept as well as the draft amendments that provide insight into the reform process. They shed light on the ideas and values underlying the reform not only as to its substance, but also with regard to its protagonists, goals, procedures, methods and sources.

On the other hand, a bulk of scholarly writings has emerged, ranging from detailed positive criticism to radical and emotional statements questioning the whole project and not always avoiding exaggerations and personal attacks. Here too, not only substantive questions but also methodological ones became part of the discourse.

The present paper attempts to sum up the most prominent issues discussed, making them more pointed and supplementing them with further considerations in one aspect or another.

The history of the reform has not been written yet. The main actors, methods, procedures, sources etc. are not always clear. Not being able to fill this gap, the paper – without any claim of exhaustiveness – touches upon some features of the reform that might be attractive for a comparative discussion and for illustrating some general problems of law-making that have been highlighted during the disputes in Russia irrespective of the part they played in this story.

Four issues are addressed: expert groups, the working method, legislative history (or *travaux préparatoires*) and the role of comparative law. Well-known to the comparative legal discourse, these rubrics do not represent any coherent system and serve only to organize the material.

Given that the focus of the paper is not on what has been done but rather on how it has been done, the problems of law-making are discussed with no regard to their actual impact on the quality of the resulting law and with no examination of whether or not and, if so, to what extent the dangers they entail have materialized.

II. Expert Groups

1. The Council, the Research Centre and the ad hoc *working groups*

The draft amendments were developed by two permanent advisory committees, convened under the auspices of the President of Russia, and seven *ad hoc* working groups formed by them.

The two committees are the Council of the President of the Russian Federation on the Codification and Improvement of Civil Legislation and the presidential Sergej Alekseev Research Centre for Private Law.[2] They are closely

[2] On these committees see: Issledovatel'skij centr častnogo prava pri Prezidente Rossijskoj Federacii (1991–2011) [The Research Centre for Private Law under the President of the Russian Federation (1991–2011)] (Moscow 2011).

related, both formally and informally, and share several members. Since their foundation in 1990s, their principal tasks have been to make proposals concerning law reform in the sphere of private law and to give expert opinions on draft amendments in this area. Arguably, the main result of their work is the Civil Code of the Russian Federation.

The team at the Research Centre is built mostly of people with an academic background having doctoral degrees or even postdoctoral qualifications, some of them also with teaching experience. Their duties in the Centre consist primarily in expert analysis on draft legislation.

The Council is composed mainly of judges, high-ranking civil servants and professors, as well as several experts from the Research Centre. Whatever their actual positions, most of the members possess a first-rate academic background. They work on a *pro bono* basis. The total number of members has been growing steadily, totalling more than 40 members since 2014.[3] The members of the Council are appointed by the President, the procedure not being subject to any transparent rules or criteria.

The seven *ad hoc* working groups were composed of the Council members (seven judges of the Supreme Arbitrazh [Commercial] Court of the Russian Federation being among them) and fellows of the Research Centre; apart from that there were external experts mainly from academia and civil service, with a fairly modest participation of legal practitioners. The total number of members was close to 50. Most of the working groups' members had an academic background.[4]

2. Controversies around composition of the groups

Several controversies provoked by the reform pertain directly to the composition of the expert groups. Additionally, there are controversies relating to substantive problems, which might be a consequence of the groups' composition.

a) Lack of access

The lack of objective criteria and transparency in setting up the groups as well as the lack of access to them has been criticized.[5] In fact, neither aca-

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[3] Edict of the President of the Russian Federation of 29 July 2014 No. 539 "On the Approval of the Composition of the Council of the President of the Russian Federation on the Codification and Improvement of Civil Legislation", Sobranie zakonodatel'stva RF, 2014, No. 31, item 4402.

[4] *Aleksandr L. Makovskij,* O Koncepcii razvitija graždanskogo zakonodatel'stva Rossijskoj Federacii [On the Concept for the Development of Civil Legislation in the Russian Federation], in: Koncepcija razvitija graždanskogo zakonodatel'stva Rossijskoj Federacii [Concept for the Development of Civil Legislation of the Russian Federation] (Moscow 2009) 3–15, 9 ff.; *idem*, Centr pritjaženija [The Centre of Attraction], in: The Research Centre for Private Law (n. 2) 18–39, 36 f.

demia nor practitioners had any access to the groups on any transparent basis. These criticisms would seem to raise one of the fundamental issues regarding the legitimacy of expert groups charged by a law-maker with the drafting of legislation: to what extent should they be representative and whom should they represent?

This lack of access may have been one of the main reasons for the emergence of an alternative working group, which was formed within a big law firm and then operated under the umbrella of the Ministry of Economic Development of the Russian Federation and the Moscow International Financial Center.

Still, without downplaying this aspect regarding the formation of expert groups, one should remember that, after all, they are meant to function as working groups which implies, in particular, that they cannot be allowed to become too large and, perhaps also, that there should not be too much disagreement between their members. It is not unlikely that similar considerations (co-)determined the formation of the groups.[6]

b) Public-spiritedness and public interests

The members of the working groups have often emphasized that only an expert body composed mainly of judges and professors is capable of acting professionally and animated by public spirit, objectively and impartially.[7] This emphasis was coupled with scathing criticism directed at the competing project launched and supported by an influential law firm and, allegedly, by big businesses and banks.[8]

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[5] *Vadim A. Belov,* Čto izmenilos' v Graždanskom kodekse?[2] [What Has Changed in the Civil Code?] (Moscow 2015) 8, 218. It has been observed that some competing schools of thought were not involved: *Jurij K. Tolstoj,* O Koncepcii razvitija graždanskogo zakonodatel'stva [On the Concept for the Development of Civil Legislation], Žurnal rossijskogo prava [Journal on Russian Law] 1 (2010) 31–38, 31 f., 38.

[6] Cf. *Aleksandr L. Makovskij,* Kodifikacija graždanskogo prava i razvitie otečestvennogo meždunarodnogo častnogo prava [Codification of the Civil Law and the Development of Russian International Private Law], in: Krašeninnikov, Codification (n. 1) 172–202, 189: the working group on international private law established by the Council in the late 1990s functioned "as a creative living body" and therefore was preserved and vested with the new task of preparing the concept and the draft amendments as part of the reform.

[7] *Aleksandr L. Makovskij,* Ob urokax reformirovanija Graždanskogo kodeksa Rossii [About the Lessons from Reforming the Civil Code of Russia], Vestnik graždanskogo prava [Civil Law Review] 5 (2013) 157–172, 167.

[8] *Veniamin F. Jakovlev,* Interv'ju [An Interview], Juridičeskij mir [Legal World] 2 (2012) 4–9, 4 f.; *Makovskij,* Lessons (n. 7) 165, 167; *Evgenij A. Suxanov,* Problemy kodifikacii zakonodatel'stva o juridičeskix licax [Problems of Codifying the Legislation on Legal Persons], in: Krašeninnikov, Codification (n. 1) 56–70, 62; *idem,* O častnyx i publičnyx interesax v razvitii korporativnogo prava [About Private and Public Interests in the Development of Corporate Law], Žurnal rossijskogo prava [Journal on Russian Law] 1 (2013) 5–9, 5 ff.; *idem,* O Koncepcii razvitija graždanskogo zakonodatel'stva Rossijskoj

Public-spiritedness and acting in the public interest may and indeed have proven problematic in many ways.

Most certainly, public-spiritedness and impartiality have in fact guided the work of the groups. However, no formal mechanism has been established to ensure it. No code of best practice has been enacted; no rules on impartiality, conflicts of interest, etc. have been set. Here too, the lack of transparent procedure and criteria for forming the groups becomes relevant.

It should also be noted that there are no rules that would prevent either Council members or Research Centre fellows as such from engaging in private consulting, working for a law firm, or undertaking any other kind of practical activities. There are no rules, at least no written ones, concerning impartiality, conflicts of interest and the like in either the Council or in the Research Centre.

It has been suggested that the members of the groups, being predominantly professors and judges who are not capable of taking on board economic arguments, tended to establish in the drafts the traditional concepts from textbooks or take them from the legal traditions respected in academia, that is to say, for instance, from Roman and German law, and codify the existing court practice rather than answer real questions posed by practice.[9]

The members of the groups, it has been argued, have taken advantage of their membership to push their personal opinions, introducing them into the Concept and drafts and, thus, satisfying their professional and academic ambitions rather than pursuing public interests.[10] These criticisms, *inter alia,* raise the difficult question, whether members of expert groups should be bound by majority views, by a *communis opinio doctorum*, or whether they may rely on their own professional opinions.

Additionally, one of the basic problems of outsourcing law-making of any kind has become topical. During the sharp debates between the members of the groups and their critics, pre-eminently those that came up with the alternative project, it was noticeable that not just different technical solutions were at stake, but rather different views on both the direction that the future development of Russian law and society should take[11] and even the functions of law in

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Federacii [On the Concept for the Development of Civil Legislation in the Russian Federation], Vestnik graždanskogo prava [Civil Law Review] 4 (2010) 4–21, 14.

[9] *Belov,* What Has Changed (n. 5) 8, 218 f. See also n. 28.

[10] *Belov,* What Has Changed (n. 5) 219; *Dmitrij I. Stepanov,* Novye položenija Graždanskogo kodeksa o juridičeskix licax [The New Provisions of the Civil Code on Legal Persons], Zakon [The Statute] 7 (2014) 31–55, 32.

[11] Symptomatically, one of the draftsmen, the head of the working group on the law of obligations *Vasilij V. Vitrjanskij*, has manifested his discontent with the representatives of the alternative working group, "who insisted on introducing into the bill new provisions, which complied with their views on the development of economic life, without regard to the fact that they contradicted the Concept" (*Vitrjanskij,* Interim Results (n. 1) 6).

society.[12] These discussions were led under such headings as "just vs. efficient", "equality and justice vs. investment climate, regulatory competition and international ratings", "internal legal arguments vs. law and economics", and the like. Not surprisingly, the working groups consisting mainly of judges and professors stuck to the first halves of these opposing pairs.[13] Yet, it was not a conflict between the largely descriptive approach of judges and academia, and the social engineering appetite on the part of critics, but rather a confrontation between two competing social engineering projects. The main question is, of course, whether it is legitimate for a legislator to delegate value judgements of this kind to a group of a-political experts functioning outside the democratic process.

c) Emphasis on hard cases?

In some instances the experts may have forgotten that hard cases make bad law and as a consequence may have overestimated particular problems and overgeneralized approaches developed by the courts.[14] A possible source of this kind of shortcoming is that a judge's professional perspective may be limited or, to put it differently, that his approach may be formed by cases or types of cases he knows; and a supreme court judge may focus primarily on hard cases that constitute the bulk of his work.

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[12] This has been observed, for instance, by *Stepanov,* The New Provisions (n. 10) 31 f. See also *Evgenij P. Gubin,* O predstojaščix izmenenijax v časti I Graždanskogo kodeksa Rossijskoj Federacii i pravovoe regulirovanie predprinimatel'skoj dejatel'nosti [On the Upcoming Amendments to the First Part of the Civil Code of the Russian Federation and the Legal Regulation of Business Activities], Predprinimatel'skoe pravo [Business Law] 4 (2012) 2–5, 3 f.

[13] *Aleksandr L. Makovskij,* "Prežde čem delat' zakon dlja kogo-to bolee privlekatel'nym, nado ponjat', dlja kogo on stanet menee privlekatel'nym" (Interv'ju) ["Before you make a law more attractive for somebody, you have to realize for whom it will become less attractive" (An Interview)], Zakon [The Statute] 5 (2012) 89–96, 89 f.; *idem,* Lessons (n. 7) 158 ff.; *idem,* Centre of Attraction (n. 4) 39; *Evgenij A. Suxanov,* Sravnitel'noe korporativnoe pravo [Comparative Corporate Law] (Moscow 2014) 18 ff.; *idem,* Amerikanskie korporacii v rossijskom prave (o novoj redakcii gl. 4 GK RF) [American Corporations in Russian Law (On the New Version of Ch. 4 of the Civil Code of the Russian Federation)], Vestnik graždanskogo prava [Civil Law Review] 5 (2014) 7–23, 7 ff.; *idem,* Concept (n. 8) 12 ff.

[14] *Anton D. Rudokvas,* Priobretatel'naja davnost' i zaščita dobrosovestnogo priobretatelja v Koncepcii razvitija zakonodatel'stva o veščnom prave [Acquisitive Prescription and Protection of Bona Fide Purchasers in the Concept for the Development of Property Law], Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii [The Herald of the Supreme Arbitrazh Court of the Russian Federation] 7 (2009) 94–113, 100; *Andrej M. Širvindt,* Ssylka na ničtožnost' sdelki kak zloupotreblenie pravom [Invocation of the Nullity of a Legal Transaction as an Abuse of Right], Arbitražnaja praktika [Practice of Arbitrazh (Commercial) Courts] 7 (2015) 24–41.

III. Working Method

1. An outline

The work started in summer 2008, that is after Edict No. 1108 had been issued, with the preparation of the Concept.[15]

Each of the seven *ad hoc* working groups developed a detailed Concept for a certain area. These draft Concepts (over 600 pages in total) were published during winter and spring 2009.[16]

A public discussion in the form of conferences, scholarly writings and internet forum dialogues followed. Foreign experts were consulted. The feedback was taken into consideration, and the final version of the Concept (about 140 pages) was prepared by the presidium of the Council, which in this case consisted of the heads of the *ad hoc* working groups. On 25 May 2009 the Council examined the final version of the Concept. On 7 October 2009 it was approved by the Council chaired by the President of Russia on this occasion.[17] Subsequently, the Concept was published.[18]

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[15] For a brief overview see *Makovskij,* Concept (n. 4) 8 ff.; *idem,* Centre of Attraction (n. 4) 36 ff. See also *Veniamin F. Jakovlev,* O kodifikacii graždanskogo zakonodatel'stva sovremennoj Rossii [On the Codification of Civil Legislation in Modern Russia], in: Osnovnye problemy častnogo prava [Fundamental Problems of Private Law], ed. by Vasilij V. Vitrjanskij/Evgenij A. Suxanov (Moscow 2010) 380–394, 386 f.; *Suxanov,* Concept (n. 8) 7 f.; *Vitrjanskij,* Interim Results (n. 1) 5 f.

[16] Koncepcija razvitija zakonodatel'stva o juridičeskix licax (proekt) [Concept for the Development of Legislation on Legal Persons (Draft)], Vestnik graždanskogo prava [Civil Law Review] 2 (2009) 9–73; Koncepcija razvitija zakonodatel'stva o cennyx bumagax i finansovyx sdelkax (proekt) [Concept for the Development of Legislation on Negotiable Instruments and Financial Transactions (Draft)], Vestnik graždanskogo prava [Civil Law Review] 2 (2009) 75–143; Koncepcija soveršenstvovanija obščix položenij objazatel' stvennogo prava Rossii [Concept for the Improvement of the General Provisions of the Russian Law of Obligations], Xozjajstvo i pravo [Economy and Law] 3 Annex (2009) 4–64; Koncepcija soveršenstvovanija obščix položenij Graždanskogo kodeksa Rossijskoj Federacii [Concept for the Improvement of the General Provisions of the Civil Code of the Russian Federation], Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii [The Herald of the Supreme Arbitrazh Court of the Russian Federation] 4 (2009) 9–101; Koncepcija razvitija zakonodatel'stva o veščnom prave [Concept for the Development of Legislation on Property Law], Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii [The Herald of the Supreme Arbitrazh Court of the Russian Federation] 4 (2009) 104–185; <http://privlaw.ru/sovet-po-kodifikacii/conceptions/>.

[17] Para. 1, Decision of the Council of the President of the Russian Federation on the Codification and Improvement of Civil Legislation of 7 October 2009, in: Concept for the Development of Civil Legislation in the Russian Federation (n. 4) 156.

[18] Koncepcija razvitija graždanskogo zakonodatel'stva Rossijskoj Federacii [Concept for the Development of Civil Legislation in the Russian Federation] (Moscow 2009) = Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii [The Herald of the Supreme Arbitrazh Court of the Russian Federation] 11 (2009) 8–99.

Next came the elaboration of the draft amendments within the same seven *ad hoc* working groups. In accordance with the decision of the Council of 8 November 2010, the resulting draft was published on the websites of the Supreme Arbitrazh (Commercial) Court of the Russian Federation (in several parts during the period between 13 November and 6 December 2010)[19] and the Research Centre.[20]

As stated in the Explanatory Note,[21] a public discussion in the form of international conferences took place, and Russian and foreign experts were asked to give their opinions on the draft. The feedback was taken into consideration.

On 30 December 2010 the draft bill was presented to the President.

2. Problematic aspects

a) Limited transparency

It is not an easy undertaking to give a critical account of the working method outlined above. This is due to a reason which itself amounts to an important feature of this method, i.e. the limited transparency of the process. The transparency issue was present from the beginning of the project: it was addressed expressly by the draftsmen, who showed a clear ambition to be transparent in publishing both the draft Concepts of the *ad hoc* working groups and reports on how the work had been organized.[22] The very idea to prepare, publish and discuss a Concept before the elaboration of draft amendments manifests a commitment to more transparent law-making.[23]

This tendency can partly be explained by the fact that Edict No. 1108 insisted on a public discussion of the Concept.[24] The search for legitimacy may provide the main part of the explanation. It is also worth mentioning that the emergence of the alternative project induced some members of working groups to come up with a series of quite passionate publications making their

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[19] <http://arbitr.ru/press-centr/news/31202.html> (13 November 2010), <http://arbitr.ru/press-centr/news/31505.html> (25 November 2010), <http://arbitr.ru/press-centr/news/31726.html> (6 December 2010).

[20] <http://privlaw.ru/sovet-po-kodifikacii/conceptions/>.

[21] See n. 38.

[22] See e.g. *Makovskij,* Concept (n. 4) 4, 11 ff.; *idem,* Centre of Attraction (n. 4) 37 f. While criticizing alterations to the original version of the bill, Aleksandr L. Makovskij demonstrates dissatisfaction with the low level of transparency at the late stages of the internal legislative process: *Aleksandr L. Makovskij,* Sobstvennyj opyt – dorogaja škola [Learning from One's Own Experience Is an Expensive Way to Learn], in: Aktual'nye problemy častnogo prava [Current Problems of Private Law], ed. by Bronislav M. Gongalo/Vladimir S. Em (Moscow 2014) 24–37, 26, 27 f.

[23] This idea, which was fixed in the presidential edict, came originally from the Council (*Makovskij,* Lessons (n. 7) 170 f.).

[24] Para. 3, subpara. б, Edict No. 1108.

views, which had not remained without influence on the Concept and the draft amendments, as well as many criticisms that they were faced with more clear and pointed. As a result, a lot can be learned about the preparation of the Concepts and the draft amendments from the publications of those charged with these tasks. These are in fact our main source of information about the reform.

Yet, many aspects of the working method remain unclear. Apart from the criteria of the personal composition of the groups, this assessment is also true for aspects such as the division of labour and the coordination of work within and between the *ad hoc* groups, the way in which problems were formulated, and the evaluation of the feedback.

b) Problem formulation

One of the most obscure and debatable aspects of the working method of the groups was the way in which problems were formulated. Edict No. 1108 specified only general objectives of the reform, so that the draftsmen enjoyed a very high degree of freedom in determining what exactly had to be done.[25] According to the Concept this was to be developed after the concrete needs of improving civil legislation had been identified.[26] There is, however, no information as to how exactly this preparatory work was done. The draftsmen would hardly have concealed the fact that a study of commercial and (other) social practices, needs and expectations had been undertaken for this purpose. Nor would a comprehensive regulatory impact assessment have been kept secret.[27] Furthermore, one should not overestimate the potential input from the public discussion of the Concept in this context in view of the way the discussion was organized (see *infra* III.2.d)) . Under these circumstances, case law seems to have been the main source of information about the actual social needs that to some extent could have determined the problem-formulation by the groups. The draftsmen have been criticized for disregarding the needs of practitioners as well as social and legal realities and for being guided, instead, by their personal academic and professional ambitions and preferences, by a purely scholastic way of thinking, and by authorities found in the traditions of academic literature and prestigious foreign models.[28]

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[25] *Suxanov,* Concept (n. 8) 6 f.; *Vladimir A. Slyščenkov,* Proekt izmenenij Graždanskogo kodeksa i principy zakonotvorčestva [Draft Amendments to the Civil Code and Principles of Law-making], Zakonodatel'stvo [The Legislation] 8 (2011) 9–20, 9 f.

[26] Concept for the Development of Civil Legislation (n. 18) 24.

[27] *Slyščenkov,* Draft Amendments (n. 25) 13.

[28] *Pëtr D. Barenbojm,* Zakonoproekt o reforme Graždanskogo kodeksa ignoriruet interesy rossijskix vkladčikov i mirovoj opyt antikrizisnoj raboty na finansovyx rynkax [The Bill on the Reform of the Civil Code Disregards the Interests of Russian Depositors and Ignores the International Experience of Crisis Management on Financial Markets], Pravo i èkonomika [Law and Economy] 11 (2010) 14–19, 14 ff.; *Belov,* What Has Changed (n. 5) 213 ff.; *Oleg M. Ivanov,* Pravo i èkonomika: vmeste ili porozn'? [Law and Economy:

c) Coordination

Establishing different working groups for different subject matters inevitably raises the problem of coordination, both in methods and substance. Even though there is no information on how this problem was dealt with, the silence of the draftsmen may be eloquent, and stylistic differences between different draft Concepts and even between different parts of the Concept in its final version make it plausible that coordination was not a primary concern of the draftsmen.

d) Public discussion

The way the public discussion was made part of the process as well as the way the feedback was "taken into account" represent one of the most problematic aspects of the procedure followed by the draftsmen. It should on the one hand be noted that they were seeking a broad public discussion from the very beginning of the work[29] and later kept stressing that such discussion had taken place in different forms and at different stages of the work, i.e. firstly after the draft Concepts had been published and secondly after the publication of the draft amendments, and that it had been "taken into account".[30] There is

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Together or Apart?], Bankovskoe pravo [Banking Law] 6 (2009) 4–8, 5 ff.; *Artem G. Karapetov,* Zavisimost' uslovija ot voli storon uslovnoj sdelki v kontekste reformy graždanskogo prava [Conditions Dependent on the Will of a Party to a Conditional Transaction in the Context of the Reform of Civil Law], Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii [The Herald of the Supreme Arbitrazh Court of the Russian Federation] 7 (2009) 28–93, 32; *Boris I. Puginskij,* "Graždanskij kodeks napolnen pravovym xlamom iz učebnikov" (Interv'ju) ["The Civil Code is Filled with Rubbish from Textbooks" (An Interview)], Arbitražnaja praktika [Practice of Arbitrazh (Commercial) Courts] 6 (2011) 12–15, 13 ff.; *idem,* O principe dobrosovestnosti v naučnyx publikacijax [About the Good Faith Principle in Scholarly Writings], Predprinimatel'skoe pravo [Business Law] 4 (2011) 5–8, 6; *Anton D. Rudokvas,* Vladenie i vladel'českaja zaščita v Koncepcii razvitija zakonodatel'stva o veščnom prave [Possession and Possessory Remedies in the Concept for the Development of Property Law], Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii [The Herald of the Supreme Arbitrazh Court of the Russian Federation] 5 (2009) 22–53, 27, 29; *Slyščenkov,* Draft Amendments (n. 25) 10 ff., 17, 19; *passim; Dmitrij I. Stepanov,* Reforma graždanskogo zakonodate'stva. Interv'ju nomera [The Reform of Civil Legislation. Interview on the Issue], Jurist predprijatija v voprosax i otvetax [The In-House Lawyer: Questions and Answers] 2 (2011) 11–18, 15, 17; *idem,* The New Provisions (n. 10) 32.

[29] *Aleksandr L. Makovskij,* "Samye udačnye normy zakona roždajutsja iz sudebnoj praktiki" (Interv'ju) ["The Most Appropriate Statutory Provisions Stem from Case Law" (An Interview)], Zakon [The Statute] 8 (2008), 7–11, 10.

[30] See e.g. *Jakovlev,* Codification (n. 15) 386 f.; *Elena A. Pavlova,* Kodifikacija zakonodatel'stva ob intellektual'noj sobstvennosti [Codification of Laws on Intellectual Property], in: Krašeninnikov, Codification (n. 1) 203–218, 216; *Suxanov, Evgenij A. Suxanov,* Problemy reformirovanija Graždanskogo kodeksa Rossii: Izbrannye trudy 2008–2012 gg.

no information on whether the discussion that went on after the final version of the Concept was published was taken into account as well.

On the other hand, it cannot remain unnoticed that neither meaningful and profound discussion nor systematic consideration of its results could have possibly been carried out under the given circumstances.[31] A number of facts have to be kept in mind.

(1) The project aimed at a large-scale reform, bringing at times radical changes in nearly every sphere of Russian private law (significantly revised corporate law, an almost completely new property law, numerous changes to the general rules on legal transactions, prescription, and the law of obligations, etc.).[32] Needless to say, a well thought out and critical analysis of such vast material by the professional community would take a considerable amount of time.

(2) At the first stage, the respective proposals were formulated in the quite abstract and vague[33] form of a Concept. Beyond that they were not always sufficiently substantiated.[34] In some instances the Concept just pointed out that a particular problem had to be considered.[35] Offering a critical assessment of a

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[Problems in Reforming the Russian Civil Code: Selected Works of 2008–2012] (Moscow 2013) 3; *idem,* Concept (n. 8) 7; *Vasilij V. Vitrjanskij,* Obščie položenija o dogovore v uslovijax reformirovanija rossijskogo graždanskogo zakonodatel'stva [General Provisions on Contract in the Context of the Reform of Russian Civil Legislation], in: Krašeninnikov, Codification (n. 1) 71–99, 71. It has also been pointed out that the alternative project was completed without any discussion: *Suxanov,* Problems of Reforming the Russian Civil Code (n. 30) 4; *Vitrjanskij,* Interim Results (n. 1) 19.

[31] *Karapetov,* Conditions (n. 28) 92 f. Cf. *Aleksej Ja. Kurbatov,* Predlagaemye izmenenija norm GK RF o bankovskix sčetax i rasčetax: trebuetsja ispravlenie ošibok [The Proposed Amendments to the Rules of the Civil Code of the Russian Federation on Bank Accounts and Settlements: Error Correction Needed], Bankovskoe pravo [Banking Law] 5 (2012) 29–34, 29: "Unfortunately no detailed discussion of either the Concept […] or the draft amendments based on it […] did happen".

[32] According to *Belov,* What Has Changed (n. 5) 8 f., there is talk of "the new Civil Code".

[33] See e.g. *Slyščenkov,* Draft Amendments (n. 25) 19; *Daniil O. Tuzov,* Obščie voprosy nedejstvitel'nosti sdelok v proekte Koncepcii soveršenstvovanija Graždanskogo kodeksa Rossijskoj Federacii [General Issues regarding the Invalidity of Transactions in the Draft Concept for the Improvement of the Civil Code of the Russian Federation], Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii [The Herald of the Supreme Arbitrazh Court of the Russian Federation] 6 (2009) 6–42, 9.

[34] For criticisms in this regard, see *Belov,* What Has Changed (n. 5) 221; *Karapetov,* Conditions (n. 28) 31, 93; *Oleg I. Krassov,* Recepcija norm zarubežnogo prava – metod razvitija civilističeskoj mysli [Reception of Rules of Foreign Law as the Method for the Development of Civil Law Theory], Èkologičeskoe pravo [Environmental Law] 3 (2013) 34–41, 35; *Rudokvas,* Possession (n. 28) 26, 30, 47; *Slyščenkov,* Draft Amendments (n. 25) 12 f.; 19; *passim; Tuzov,* Invalidity (n. 33) 24, 25.

[35] Concept for the Development of Civil Legislation (n. 18) 35, 36, 121, 148.

document of this kind is a hard task. Moreover, all the efforts of the critics can well go in vain if their analysis focused on the Concept does not meet the resulting draft amendments based on it, or if in the end the respective ideas of the Concept will not be converted into draft amendments at all.

(3) All this work had to be done within a very short time. The feedback was supposed to come within a couple of months in the first stage (when the Concepts of the *ad hoc* working groups were published) and within at most one month and a half in the second stage (when the draft was published). It is quite obvious that the professional community could hardly be expected to come up with a detailed analysis of the Concepts and the drafts within these time limits, even ignoring the natural restrictions posed by the length of the hard-copy publishing process.[36]

(4) As has already been mentioned, the procedure for evaluating feedback was not transparent – a fact that might to a certain extent have been detrimental for both the involvement of the professional community and the evaluation process itself. What has been told is that a considerable number of conferences and discussions took place (the latter occurring both in printed book form and with the use of electronic media), that many comments and criticisms were addressed to the draftsmen (over 500), that foreign experts gave their opinions and that all of this was "taken into account".[37] However, it should not be forgotten that the evaluation is said to have taken place within the same short period of time, by no means sufficient for a comprehensive assessment of the feedback.

IV. *Travaux préparatoires*

1. Available materials

The question of legislative history or *travaux préparatoires* can be approached from two different perspectives, depending on whether the focus lies on the making or the application of law. In the first case the emphasis will be on the texts produced during the elaboration of a bill, i.e. those texts

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[36] Cf. e.g. *Aleksandr K. Goličenkov/Gennadij A. Volkov,* Zemlja, drugie prirodnye resursy i razvitie zakonodatel'stva o veščnom prave [Land, Other Natural Resources and the Development of Legislation on Property Law], Èkologičeskoe pravo [Environmental Law] 5/6 (2009) 2–4, 2: the editors of this special issue of a law journal dedicated to the discussion of the published final version of the concept observe that unfortunately they can publish the contributions only after the approval of the concept (although they had received them beforehand).

[37] See e.g. Explanatory Note (n. 38); *Makovskij,* Concept (n. 4) 11 ff.; *Makovskij,* Centre of Attraction (n. 4) 37 f.; *Suxanov,* Concept (n. 8) 7 f.

which the drafters used as sources of information and perhaps even all the texts and facts which form part of the history of a statute or a rule. The main attention in the second case is paid to those texts and other sources of information on the legislative history which should be – or indeed are – taken into consideration by those who interpret and apply the law, and to this practice of enquiring into legislative history as such. Naturally this paper approaches the topic from the former perspective, with only some remarks being devoted to the standards and practices of statutory interpretation by courts and academia.

Many texts that can be regarded as part and parcel of the law-making process have appeared throughout the period between Edict No. 1108 – which officially initiated the reform and is thereby the first in this series of texts – and the enactment of the respective bills. This bulk of texts includes the seven draft Concepts, the final version of the Concept, the first published version and several later versions of the draft amendments, the Explanatory Note to the bill, dozens of opinions of responsible agencies, and probably much more. A great deal of this material has been published in one form or another.[38]

This is of course not the only type of sources that can help to understand the new law. The reform process has seen the publication of not only a series of commentaries by the draftsmen analysing the draft Concepts and the final version of the Concept, but also articles and books written by them as well as their interviews, lectures and posts in blogs. As the respective amendments became law, commentaries on them began to emerge.

The Concept and the draft amendments were supposed to[39] and in fact did draw inspiration from the existing case law as well as from foreign experiences. Later we will come back to the latter source (see *infra* V.). To get an idea of the role that case law played in the reform, one can simply look at the number of explicit references to court jurisprudence in the Concept.[40] The final version of the Concept makes more than 15 references in total,[41] in three cases proposing to codify the established practice. The respective numbers in the draft Concept on the general provisions are approximately 35 and 15; in the Concept of the working group on the law of obligations 40 and 5. The real number of instances in which the case law exerted influence will surely be higher. Be that as it may, looking into these models can also be helpful for understanding the relevant new rules.

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[38] This material is available on the official website of the State Duma of the Russian Federation:<http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=47538-6>.

[39] Para. 1, subparas. б–д, Edict No. 1108.

[40] See also *Makovskij,* "The Most Appropriate Statutory Provisions" (n. 29) 8 f.

[41] All the numbers mentioned in this paper result from manual counting that was double-checked through computer search. Still, this operation entailed value judgments, so that the figures provided in some cases might slightly deviate from those one would obtain using different criteria.

Besides, opinions expressed by the draftsmen in their scholarly writings long before the reform was put on the agenda are likely to have left their mark on the amended law and, accordingly, consulting this literature can throw light on the motives underlying some of the new rules.

2. The Concept and its functions

Two features are characteristic of the *travaux préparatoires* in the context of this reform. The first one is that a Concept of the reform had been developed; the second is that it was published and publicly discussed before the elaboration of the bill started.

The draftsmen proposed to determine in Edict No. 1108[42] that the reform should begin with the preparation and a discussion of the Concept. This *modus operandi* came as a reaction to the widespread problem of legislative drafting whereby bills are often encountered with no clear idea behind them, and it was meant to become paradigmatic for further large-scale reforms.[43] The intention of the draftsmen was thereby to create a guideline for the elaboration of the draft and for its deliberation throughout the legislative process. The latter expectation was disappointed.[44]

It should be stressed that in the eyes of its authors the primary function of the Concept was to guide the drafting and legislative process. Certainly, this cannot preclude judges and academia from consulting the Concept to understand and interpret the law,[45] but it was not designed for this purpose. One may consider whether concepts of this kind should be drafted with due regard to their possible second function, i.e. to their afterlife and their use in the context of statutory interpretation. The analysis, however, will ultimately depend on the place which legislative history takes in the judicial reasoning process in a given national system.

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[42] Para. 3.

[43] *Makovskij,* Lessons (n. 7) 170 f.; *Jakovlev,* Interview (n. 8) 8. See also *Lidija Ju. Mixeeva,* Razvitie rossijskogo semejnogo zakonodatel'stva trebuet konceptual'noj osnovy [The Development of Russian Family Legislation is in Need of a Conceptual Basis], in: Krašeninnikov, Codification (n. 1) 311 f., 322. About the time when the reform started, *Aleksandr L. Makovskij,* who played a leading role in the current reform as well as in the codification of 1994–2006, expressed his regrets about poor documentation of the legislative history in the latter case, specifically emphasizing the unfortunate lack of information on motives (*Makovskij,* Codification (n. 1) 12).

[44] *Makovskij,* Lessons (n. 7) 170–171.

[45] The draftsmen themselves emphasized the importance of the concept for the interpretation of the amendments, see e.g. *Anton V. Asoskov,* Reforma razdela VI "Meždunarodnoe častnoe pravo" Graždanskogo kodeksa RF [The Reform of Division VI of the Civil Code of the Russian Federation "Private International Law"], Xozjajstvo i pravo [Economy and Law] 2 (2014) 3–28, 4.

There is no clear majority view in Russia on whether the *travaux préparatoires* should play a part in the application of the law, and there is not much evidence that this does in fact happen in the courts. Nor have scholarly writings shown much interest in the matter. The reform under consideration might bring about a change, the Concept being too clear an invitation to reassess the role of *travaux préparatoires,* especially given the fact that the reform has introduced many new concepts and rules that can hardly be understood without reconstructing the underlying grounds.

Having said that, one has to admit that for the moment it does not seem to be happening. As of January 2016, a fairly representative legal database[46] contains about 25 court decisions expressly referring to the Concept. It is in only a couple of cases that the Concept has been used as a means to interpret the law as it stands now or to determine the temporal scope of a particular provision newly introduced into the Code with regard to the motives of the reform as documented in the *travaux préparatoires.*[47] It is only reasonable to suggest that the new case law that does not pay much attention to the Concepts and other relevant materials will almost inevitably develop in directions deviating from the original plans of the legislature. A thorough reconstruction of the legislative history of every single provision might, even if it is done by academia, come too late.

Curiously enough, soon after its publication the Concept, originally just a by-product of the law-making process, acquired yet one more function, which is – in contrast to those mentioned above – independent from the legislative process and the statutory changes. In several cases courts have invoked the Concept as an authoritative text reflecting Russian law as it was before the reform and as it stands after the amendments, a reliable source that specifies some principles of Russian law and some trends of its development. This use of the Concept can be observed in about 20 decisions, the first one dating back to 9 October 2009,[48] i.e. only two days after the Concept had been approved by the Council (7 October 2009), two-and-a-half years before the respective bill was to be adopted in its first reading (27 April 2012) and longer still before different parts of it were to become law. The most recent decision originates from September 2015.[49]

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[46] "Konsul'tantPljus".

[47] The resolution of the 19th Arbitrazh Appellate Court of 19 February 2015, case No. A14-12993/2014; the resolution of the 3rd Arbitrazh Appellate Court of 11 July 2013, case No. A33-19347/2012 and perhaps the resolution of Resolution of the Arbitrazh Court of the Central District of 18 November 2015 No. Ф10-3908/2015, case No. A83-752/2015. Cf. also the ruling of the Krasnodar Territorial Court of 29 January 2015 No. 4Г-12657/2014.

[48] The Decision of the Arbitrazh Court of the Kostroma Oblast of 9 October 2009, case No. A31-3239/2009.

V. Comparative Law

1. Prominent role of comparative inspirations

The reform has placed a high value on comparative law.

Three out of six general objectives set in Edict No. 1108 were concerned with taking into account foreign laws. These were to harmonize Russian law with EU law, to make use of the experiences of European countries that have modernized their civil codes recently and to preserve legal uniformity within the Commonwealth of Independent States.[50]

As has already been mentioned, foreign experts from Austria, Germany, the Netherlands and presumably also from other countries were consulted at least twice. They were asked to answer some crucial questions that had emerged during the work on the Concept,[51] and at the final stage they were invited to give their opinions on the draft.[52]

The Concepts repeatedly refer to foreign and international laws, the references varying between those that cite specific articles of the relevant instruments and those that make reference to a certain national or supranational legal system or even to a majority of developed legal systems. The final version of the Concept invokes the authority of foreign and international experiences in more than 40 instances. This is just a fraction of the real number of comparative inspirations, which becomes evident if one looks at the numbers of references in the initial and more detailed versions of the Concept. For example, the draft Concept on general provisions supports its considerations and proposals with approximately 50 explicit comparative references while the corresponding part of the final version, not very different in substance, confines itself to making just four. The respective ratio found in the part on obligations is 40 to 6

Moreover, there are many instances where borrowings or influences were not indicated by an explicit reference but where they can nevertheless be proven or at least hypothesized. A striking example is given by the proposal (which has not ultimately become law) to recognize that in some situations a modified acceptance can constitute an acceptance and should not necessarily be regarded as a counter-offer, as is the case under Russian law (Article 443 of the Civil Code). The wording of the Concept clearly follows Article 19(2) of the United Nations Convention on Contracts for the International Sale of Goods (CISG), yet there is no reference to any source in this context.[53] Or, to offer another

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[49] The Resolution of the 17th Arbitrazh Appellate Court of 21 September 2015 No. 17АП-11247/2015-ГК, case No. A60-7466/2015.

[50] Para. 1, subparas. в–д, Edict No. 1108.

[51] *Makovskij,* Concept (n. 4) 13; *idem,* Centre of Attraction (n. 4) 38.

[52] Explanatory Note (n. 38).

[53] Concept for the Improvement of the General Provisions of the Russian Law of Obligations (n. 16) 55, 59; Concept for the Development of Civil Legislation (n. 18) 123 f.

example: there are no explicit references to the Draft Common Frame of Reference (DCFR) in either the final version of the Concept or in the Concept of the working group on obligations (in the latter case the DCFR may be taken to be covered by different vague formulas referring to "international projects of unification in the field of contract law" and the like), but quite a few references can be found in an introductory commentary on the working group's Concept that was written by one of the members of that working group.[54]

The main models explicitly referred to include national, supranational and international as well as non-state laws. It is hardly possible to determine precisely to what extent each model influenced the project or any particular part of it. At the same time, to get a first impression one might look at the explicit references in the final version of the Concept and, for instance, in the draft Concepts on the general provisions and on the law of obligations. Apart from pointing in a very general way to, for instance, foreign and international laws or to the experiences of many developed or European legal systems (about 25 references), the final version of the Concept refers more specifically to the German (6), Dutch (2), French (2), Swiss (2) and Ukrainian (1) laws as well as to English and American laws (1) (additionally, in one case the Concept mentions approaches in Austrian and German law differing from the one taken by Russian law and suggests that they should not be followed). Furthermore, there are references to European Union law (11) and to several international instruments: the UNIDROIT Convention on International Factoring (Ottawa, 1988) (1), the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995) (1), and the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001) (1). Soft law is represented by the UNIDROIT Principles of International Commercial Contracts (PICC) (3) and the ICC Uniform Customs and Practice for Documentary Credits (UCP 600) (1).

Apart from making more or less vague allusions to foreign experiences, legal families or groups of legal systems and the like (about 50), the draft Concept on general provisions makes explicit references to a number of national legal systems – German law (more than 40 times), Dutch law (17), Italian (17), French (14), Swiss (12), Austrian (7), Spanish (6), Estonian (1) and Québécois law (1) – as well as to the Roman law (1), "Anglo-Saxon" law (1) and the "Anglo-American" (1) legal systems. It invokes, furthermore, international experiences generally (5) as well as the CISG (1) and the PICC (1).

In the Concept of the working group on obligations, although mention is made of foreign and developed legal systems (13), German law (3) and Dutch law (2), the leading role is undoubtedly assumed by soft law and international instruments. The "international principles of contract law", generally meaning

[54] *Sergej V. Sarbaš,* Ispolnenie objazatel'stv [Perfomance of Obligations], Xozjajstvo i pravo [Economy and Law] 3 (2009) 24–49.

the PICC and the like (10 or 11), PICC (14), the Principles of European Contract Law (5), the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (7), the UNIDROIT Convention on International Factoring (3) and the United Nations Convention on the Assignment of Receivables in International Trade (6), are the main sources of this part of the Concept, at least as far as explicit references are concerned. Here again there is only one instance where the Concept refers to "Anglo-American law".

2. Controversial aspects of the use of comparative law by drafters

Several problems concerning the use of comparative law in the legislative process have become apparent during the discussion.

a) Borrowing as an end in itself

A tendency has been identified to borrow not in order to meet any practical needs or to answer questions that have arisen. Sometimes, at least, the introduction of "classical" notions, concepts and solutions into Russian law and the approximation of Russian law to some of the "highly-developed legal systems" have become end in themselves.[55]

b) Borrowing vs. creating

It has been argued that in many instances the reception of foreign experiences is an easy but ineffective way to solve national (legal) problems. Russian lawyers would be better advised to develop their own approaches that fit the Russian tradition, that are specifically designed to operate within its systematic framework and that meet the actual challenges.[56]

c) The model to follow: civil law or common law?

A further issue that has become a hot topic is the choice of the model to be followed. As evidenced by our analysis of two draft Concepts and the final version of the Concept, English and American laws have played a very modest role if any. In three cases out of four where explicit reference to these legal systems was made, it was restricted to the remark that a given solution can be found in both civil and common law. In the fourth case the "Anglo-Saxon legal system" was invoked in the context of land registration as a contrasting model, to stress the particularity of the Germanic legal family, the

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[55] *Belov,* What Has Changed (n. 5) 213 f., 216 f.; *Karapetov,* Conditions (n. 28) 32; *Krassov,* Reception (n. 34) 37, *passim; Rudokvas,* Possession (n. 28) 30.

[56] *Karapetov,* Conditions (n. 28) 32; *Krassov,* Reception (n. 34) 40; *passim; Slyščenkov,* Draft Amendments (n. 25) *passim.*

"Russian legal system being traditionally regarded as being part of it".[57] The working groups drew inspiration almost exclusively from civil law models, while ideas from the common law were allowed to permeate into the project mainly indirectly, i.e. through civil law systems, international treaties and soft law documents.

The working groups have been criticized for this approach primarily, but not exclusively, in the fields of corporate law and contract law.[58] The main source of contention was whether a reception of common law in Russia, a civil law country, is possible and desirable. Roughly speaking a considerable segment of academia, adhering to tradition, appears to favour transplants solely from the civil law world, while big businesses and some legal practitioners strive for solutions from the common law.

d) Quality of the comparative work

The quality of the comparative work done by the groups was also far from unexceptionable. Four shortcomings seem to be worth emphasizing.

(1) In many cases the working groups concentrated primarily on the black-letter rules, not paying much attention either to the history or the functions of the respective rule at issue, its interdependence with other parts of the system, or to the way it is applied by the courts, let alone to its critical assessment in the national literature.[59]

The draft Concept on the law of obligations explicitly refers to foreign case law as being distinct from a "legal system" only once, and in one case mentions a commentary by the UNCITRAL Secretariat. A look at the commentaries written by the members of the respective working group supports the suggestion that comparative and foreign literature were consulted at best occasionally and only to a fairly modest degree.[60]

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[57] Concept for the Improvement of the General Provisions of the Civil Code of the Russian Federation (n. 16) 15. For a similar attitude among the draftsmen generally, see *Jakovlev,* Interview (n. 8) 5 and in respect of corporate law *Suxanov,* O predmete korporativnogo prava [About the Subject of Corporate Law], in: Gongalo/Em, Current Problems (n. 22) 227–249, 228, 249, *passim; idem,* Problems of Codifying the Legislation on Legal Persons (n. 8) 60; *idem,* Sravnitel'noe korporativnoe pravo [Comparative Corporate Law] (Moscow 2014) 5 ff., 18 ff., *passim; idem,* American Corporations (n. 13) 7 ff.

[58] *Gubin,* On the Upcoming Amendments (n. 12), 4; *Krassov,* Reception (n. 34) 35 f.; *Stepanov,* The Reform (n. 28) 15; *Irina S. Šitkina,* Voprosy korporativnogo prava v proekte federal'nogo zakona o vnesenii izmenenij v Graždanskij kodeks RF [Corporate Law Issues in the Draft Federal Law on the Introduction of Amendments into the Civil Code of the Russian Federation], Xozjajstvo i pravo [Economy and Law] 6 (2012) 3–31, 4 f. The competing project associated with the reform has succeeded in introducing some new sets of rules inspired by common law concepts, such as indemnity, and representations and warranties (406.1 and 431.2 of the Civil Code).

[59] Cf. e.g. *Tuzov,* Invalidity (n. 33) 39 f.

The draft Concept on the general provisions explicitly refers to foreign literature, though not specifying authors and works (about 10 times), and in a general way refers to foreign case law (more than 15 times). It is not clear on what kind of research this data is based, but keeping in mind the pace and the scope of the work, comprehensive and in-depth research can hardly have been done. Spot checks show that at least some comparative references take the relevant foreign rules out of their historical and normative context.[61]

(2) The second deficiency is that a systematic analysis does not appear to have been performed as to whether the individual foreign concepts to be introduced into Russian law are compatible with the latter or as to how these concepts would interplay with other newly introduced concepts, or the original rules.[62]

(3) The third controversial aspect of the use of comparative law by the working groups is that in the majority of cases foreign experiences were invoked to support the solutions proposed, providing no overview of the alternative approaches:[63] the final version of the Concept never mentions alternative solutions, and the draft Concepts do so very rarely – the draft Concept on general provisions does so in half a dozen cases, the draft Concept on the law of obligations only once. Furthermore, the working groups generally remain silent as to how the recommendations formulated without express reference to a foreign model look in comparative perspective (only one exception can be found in the final version of the Concept). There is no evidence that any objective criteria were applied to decide whether to take foreign experiences into account in a particular case and, if so, what solution should be adopted.[64]

(4) Considering the range of the reform as well as its breath-taking pace, mistakes and inaccuracies in comparative analysis are inevitable, even as far the mere description of the actual solutions is concerned. Thus, instances

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[60] *Vasilij V. Vitrjanskij,* Ponjatie objazatel'stva [The Notion of Obligation], Xozjajstvo i pravo [Economy and Law] 3 (2009) 19–24; *Sarbaš,* Perfomance (n. 54); *Aleksandra A. Makovskaja,* Položenija o zaloge [Provisions on Pledges], Xozjajstvo i pravo [Economy and Law] 3 (2009) 49–57.

[61] *Andrej M. Širvindt,* Aktual'nye voprosy predstavitel'stva [Current Issues of Agency (Representation)], Vestnik èkonomičeskogo pravosudija [The Herald of Economic Justice of the Russian Federation] 12 (2015) 61–144, 126 f.

[62] See e.g. *Belov,* What Has Changed (n. 5) 219, 220; *Krassov,* Reception (n. 34) 37 ff.; *Rudokvas,* Possession (n. 28) 29; *Jurij K. Tolstoj,* Problemy soveršenstvovanija graždanskogo zakonodatel'stva i puti ix rešenija [Problems in Improving Civil Legislation and the Ways to Solve Them], Vestnik èkonomičeskogo pravosudija Rossijskoj Federacii [The Herald of Economic Justice of the Russian Federation] 5 (2015) 44–50, 47 f.

[63] See e.g. *Tuzov,* Invalidity (n. 33) 39 f.

[64] See e.g. *Belov,* What Has Changed (n. 5) 219; *Rudokvas,* Possession (n. 28) 26.

have been identified where references in the Concept to foreign experiences turn out to be false.[65]

VI. Final Remarks

What can be learned from this story? The way the reform has been organized as well as the criticism directed against it attests to a conscious search for better law-making within the professional community of lawyers. Even the very question that opens this paragraph and that is emblematic of the indicated discourse, originates from the discussion about the reform.[66]

Another issue is what better law-making is supposed to mean. In the eyes of those responsible for the reform, it means more transparency, more public discussion, more comparative law and more rational structuring of the preparatory work. It means, furthermore, that judges and professors should have the main say. Yet, both these ideals as such (especially as regards the role of judges and academia and the use of comparative law) and the way they were put into practice have become controversial.

It is still another question whether this experience along with its critical assessment will benefit future law-makers – in Russia or elsewhere.

[65] *Karapetov,* Conditions (n. 28) 31, 32 ff.; *Širvindt,* Agency (n. 61) 91.

[66] *Makovskij,* Lessons (n. 7) 157 ff.; *idem,* Learning from One's Own Experience Is an Expensive Way to Learn (n. 22) 24 ff.

Judicial Decision-Making Today

Judicial Decision-Making Today

The Swiss Perspective

Thomas Coendet[*]

[*] A shorter version of this paper was presented at the Max Planck Institute for Comparative and International Private Law in Hamburg as a contribution to the conference "Legislators, Judges, and Professors", which took place on 4 and 5 December 2015. I wish to thank the participants of the conference for their numerous stimulating and motivating comments, and *Matthew Dyson* and *Christoph Hurni* for their very helpful remarks on an earlier version of this paper – the usual disclaimer applies. Technicalities: references to the "Court" are references to the Swiss Supreme Court, references to the "Text" are references to the text of this essay; except where stated otherwise, translations are mine.

I. Introduction

1. Legends

When it comes to judicial decision-making in Switzerland it is hard to avoid some powerful legends. The first is the Frauenfelder legend, the story of a *Doctor iuris* from Konstanz who pleaded at the local court of Frauenfeld in the 16th or 17th century. The fact that he based his argument on Roman law was not well received by the local judges. It led to a statement that at least at its time may have been considered as a *lèse-majesté* of the great commentators of Roman law: Bartolus of Saxoferrato (1314–1357) and Baldus de Ubaldis (1327–1400). Allegedly, the court stated: "Listen, Doctor, we Swiss do not ask about Bartele and Baldele and other Doctors, we have peculiar local customs and laws. Leave, Doctor, leave!"[1]

There is reason to believe that the Frauenfelder legend has found its successor in more recent times, albeit in a much more moderate tone. In 1941 the Swiss Supreme Court[2] examined whether as to an individual right *(subjektives Recht)* based on private law there might be a procedural right to sue that is rooted in public law *(publizistisches Klagerecht)* and which therefore would differ from the underpinning individual right. The Court held: "It is, however, an eccentric construction to consider as the subject matter of the proceedings not the individual right claimed for, but the right to sue relating to it. Such a view has not gained ground in German legal practice and *even less* it deserves to be accepted in Switzerland where a simple and practical approach to law has prevailed ever since."[3] The statement reads like a distant echo of the Frauenfelder legend and its formula of the "simple and practical approach" became proverbial.[4]

Finally, an account of judicial decision-making in Switzerland does not seem possible without referring to Article 1 of the Swiss Civil Code which, next to its marginalia "Application of the Law", reads as follows:[5]

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[1] Cited according to *Peter Liver,* in: Berner Kommentar – Kommentar zum schweizerischen Privatrecht (Bern 1962) Einleitung para. 21 ("Hört ihr, Doctor, wir Aidgenossen fragen nicht nach dem Bartele und Baldele und anderen Doctoren, wir haben sonderbare Landbräuche und Rechte. Naus mit euch, Doctor, naus mit euch!").

[2] Translations often use terms such as "Swiss Federal Court" or "Federal Supreme Court of Switzerland". In this article, I choose to speak of the Swiss Supreme Court or, simply, the Supreme Court to leave no doubt that the Court stands at the apex of the judicial hierarchy.

[3] BGer. 3 April 1941, BGE 67 II 70 E. 2 (emphasis added).

[4] The Supreme Court has used the formula again sixty years later (BGer. 19 January 2001, BGE 127 III 73 E. 5.f; similarly BGer. 25 September 1970, BGE 96 I 602 E. 4).

[5] Art. 1 Schweizerisches Zivilgesetzbuch (ZGB) of 10 December 1907 (official translation).

"[1] The law applies according to its wording or interpretation to all legal questions for which it contains a provision.

[2] In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator.

[3] In doing so, the court shall follow established doctrine and case law."

Notably the second paragraph of this Article has been called "virtually legendary".[6] Not only does it conceptualise the Swiss Civil Code as an "open system" where gaps are accepted as a fact of life, it also establishes the power of the judge to close such gaps. This approach conforms to the wide discretionary power that Swiss private law, at least, confers upon the judiciary,[7] and some scholars even went so far as to equate the position of the (Swiss) judge with Plato's philosopher king.[8]

Legendary stories like these may include a kernel of truth and they have been told time and again to illustrate the specific character of judicial decision-making in the Swiss tradition. However, in this article I will not enquire further as to how much truth and how much legend they actually contain. For a view on judicial decision-making in today's Switzerland such stories, I think, do at best convey a vague idea and at worse they are misleading. At least, they tell us little of what happens on the ground. This is what the present essay attempts to do. It will focus on how judges explain their practice as decision-makers. But before I embark on that topic, something should be said about the scope and the methodology of the enquiry.

2. Scope

German legal theory and methodology draws a well-known distinction between the making of a decision *(Herstellung)* and its presentation *(Darstellung)*.[9] Usually, the distinction serves to criticise the use of traditional legal methodology in judicial decision-making. The argument is that traditional methodology with its forms of argumentation merely contributes to the presentation of a decision whereas the making of the decision, in fact, follows its own ways and standards. At the same time, the distinction clarifies the scope of the present enquiry. In accordance with its title, this article is interested in the *making* of judicial decisions, not in the style of their presentation. The style of court decisions is certainly an interesting field of research, espe-

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[6] *Ernst Kramer,* Der Stil eines zukünftigen europäischen Vertragsgesetzes, ZBJV 144 (2008) 901–921, 909.

[7] See *Kramer,* ZBJV 144 (2008) 901, 909.

[8] *Hans Peter Walter,* Der Richterkönig, in: Festschrift für Pierre Tercier (Zürich 2003) 15–22.

[9] See, e.g., *Klaus Röhl/Hans Röhl,* Allgemeine Rechtslehre[3] (Köln 2008) 610.

cially in a comparative perspective.[10] Yet in this essay, I will try to look behind the rhetoric of court decisions to see whether it is possible to elucidate the actual decision-making process.

With this focus on decision-making the scope of the enquiry is, nevertheless, still too broad. Taken at its word, the title of this essay suggests nothing less than to research the decision-making process in all Swiss courts and for all areas of law. The observations made here will include the perspectives of private, public, and criminal law; they will, however, focus on judicial decision-making in the Swiss Supreme Court. Decision-making in the lower courts will only be mentioned occasionally. More specifically, the enquiry analyses judicial decision-making in Switzerland by looking into two data sets. First, it considers the statements of Supreme Court judges on this matter. Second, it looks into a series of leading cases from about the last fifteen years. The cases cover private, public, and criminal law and most of them are landmark cases of high political, economic, or social importance.

It might be suspected that a focus on such landmark cases may result in a distorted view of the daily business of judicial decision-making.[11] As a matter of principle, I do not share this concern. Rather I think that landmark cases are a good source for seeing how the judiciary reacts to situations where important issues need to be decided. Not looking at those cases will produce blind spots in the analysis of judicial decision-making where knowing how it works seems most relevant.[12] Nevertheless, I think it would be wrong to assume that all cases follow the same pattern. On the contrary, as I will explain later, it seems an important conceptual step to distinguish between "standard cases" and cases that transcend the daily business.[13] In sum, the scope of the enquiry is to analyse the decisions of the Swiss Supreme Court and the statements of its judges on the decision-making process.

3. Methodology

The distinction between making and presentation has yet another significance for present purposes. It suggests that we should be careful not to assume that the reasoning communicated in court decisions coincides with the actual reasoning that led to the decision. The problem following on from this is, of course, that the extent to which we can rely on the primary source we traditionally use to evaluate the judicial process – court decisions – becomes uncertain. What methodology can help us out of this problem?

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[10] See *Hein Kötz,* Über den Stil höchstrichterlicher Entscheidungen (Konstanz 1973); *Friedrich Müller/Ralph Christensen,* Juristische Methodik[3], vol. II (Berlin 2012) 582–588.

[11] In this sense *Hansjörg Seiler,* Praktische Rechtsanwendung (Bern 2009) 17.

[12] See Text at n. 149.

[13] See Text at n. 142.

At first glance, it may seem that the only solution to this problem would be to send out the legal researcher with his or her clipboard to observe and interview judges about their decision-making. This research method has been used for some of the best-known studies on legal methodology in a comparative perspective.[14] Such an extensive empirical approach was not an option for this paper, yet its idea informed the research strategy I adopted.[15] As far as the literature reviewed, I did not focus on traditional methodological books and commentaries but rather on articles contributed by current and former Supreme Court judges. Their views on judicial decision-making provide helpful guidance for determining whether and, if so, how the decision-making process reflects in the Court's decisions. To emphasise the judicial perspective for analysing cases is the first part of the answer to the methodological challenge the distinction between making and presentation implies.

The second part of the answer comes from a comparative perspective of the presentation or, more specifically, the style of supreme court decisions. Such a comparative view suggests that the gap between making and presenting the decision can be larger or smaller. Most clearly this effect can be seen when comparing decisions of the highest French and English courts.[16] In France, the decisions of the *Cour de Cassation* are still presented as if they follow more or less automatically from the code and therefore do not include empirical, political, or comparative observations. At the same time, it is beyond dispute that French courts do account for economic, political, social, and ethical concerns in producing their decisions. The result is, therefore, a rather large gap between making and presenting the judicial decision. English judges, on the other hand, allow us a much closer look at their reasoning in each case. This shows not only in their rather narrative style, but also in their open discussion of policy considerations. This is not to say that there is no gap at all between making and presenting a judicial decision in English courts. But it seems fair to say that the gap is considerably smaller than in France. The decisions of the Swiss Supreme Court lie somewhere in between the English and the French approaches.[17] Thus, if we read them through the

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[14] *Wolfgang Fikentscher,* Methoden des Rechts in vergleichender Darstellung, vol. I (Tübingen 1975) XVII. For a sociological enquiry into the image of judges, see *Thorsten Berndt,* Richterbilder (Wiesbaden 2010).

[15] Nevertheless, it should be mentioned that this article is (to some extent) inspired by the discussions I enjoyed with several judges and clerks of the Supreme Court, and by my own experiences at a court of first instance.

[16] On the following see *Kötz,* Stil (n. 10) 7 ff., 12 ff.; *Müller/Christensen,* Methodik (n. 10) 509 ff.; further the articles of Jean-Sébastien Borghetti and Matthew Dyson in this book.

[17] In the same way *Hans Peter Walter,* Hermeneutik und Rechtspraxis, ARSP (Beiheft 117) 127–140, 134; and (from a broader perspective) *Müller/Christensen,* Methodik (n. 10) 586.

judicial lens, their presentation will also tell us something about how they were made.

In sum, this essay tries to tackle the methodological challenge that comes with the distinction between making and presenting judicial decisions by relying on the two data sets that form its scope: first the judges' elaborations on their decision-making, and second the court decisions they present to the public. Those two data sets are taken mutually to support each other. Analysing the views of judges should allow for a closer reading of the court decisions; and the court decisions, on the other hand, should allow the judges' explanations to be verified, viz. to see whether the judicial self-description enjoys a certain plausibility. Although this may not be the methodology for the most thorough enquiry into the subject matter, it is likely to yield more accurate results than reliance upon some legendary tales.[18]

II. Analysing Judicial Decision-Making

This section unfolds the views of Supreme Court judges on the decision-making process (2.) and summarises the results from the court decisions reviewed (3.). A comparison between the analysis of the judges' statements and their decisions will point out some blind spots in the picture that emerges from this (4.). The section starts with some more general remarks on the procedural and institutional context of the decision-making process (1.) to clear the ground for the subsequent analysis.

1. Context

The institutional and procedural context of judicial decision-making can be divided into rules that apply to all Swiss courts and rules that specifically relate to the Swiss Supreme Court.

a) Swiss courts

Swiss law provides a central methodological provision that aims to set out the guidelines for judicial methodology. This is Article 1 of the Swiss Civil Code, which has been mentioned in the introduction. The provision is said to be relevant in all areas of law and, accordingly, applies to all proceedings before Swiss courts.[19] More will have to be said about the practical relevance

[18] For some thoughts on how to refine the methodology for future research see Text at n. 161.

[19] *Susan Emmenegger/Axel Tschentscher,* in: Berner Kommentar – Kommentar zum schweizerischen Privatrecht (Bern 2012) Art. 1 para. 105; *Heinz Hausheer/Manuel Jaun,* in: Stämpflis Handkommentar (Bern 2003) Art. 1 para. 12.

of both this provision and the scholarly discussion surrounding it later in the essay. A further methodological guideline comes from the principle of equality before the law *(Rechtsgleichheitsgebot).* That principle is enshrined in the Constitution and requires that similar cases be treated equally if there is no reasonable ground *(sachlicher Grund)* to distinguish them.[20]

The Constitution also guarantees the right that a decision be delivered in due time and provides for rules about due process *(rechtliches Gehör).*[21] The latter include, according to the Supreme Court, the right to a reasoned decision: every court must give the reasons for deciding a particular case in the way it did. And the Court goes even further: "an authority must […] list those arguments in the justification of its decision which *actually* support the decision."[22] Taken literally, this proposition would imply nothing less than to erase the difference between making and presenting court decisions. While in reality this will be to some degree wishful thinking, the proposition is supported by several Supreme Court judges on the basis that judges must be transparent about the reasons for disposing of a case *(Methodenehrlichkeit).*[23] Moreover, the Constitution includes the fundamental rule that "federal statutes and international law prevail".[24] The upshot of this rule is that it limits judicial review: no Swiss court, including the Supreme Court, may quash a law enacted by Swiss parliament on the grounds that it conflicts with the constitution. Against this background, one may understand why some scholars have suggested that Switzerland is "not a state under the rule of law, but a democracy".[25] Two further principles to be mentioned in the present context are judicial impartiality and independence; they are also to be found in the Constitution.[26]

Finally, we should note the particular position of judicial clerks in the Swiss legal system. At all levels of the court hierarchy, they play a prominent role in the decision-making process. Yet, as neither the people nor the parliament elect them, clerks do not enjoy the same democratic legitimacy as

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[20] Art. 8 Schweizerische Bundesverfassung (BV) of 18 April 1999; BGer. 12 June 2012, BGE 138 I 305 E. 1.4.5.

[21] Art. 29 paras. 1, 2 BV.

[22] BGer. 23 June 2000, BGE 126 I 97 E. 2.b (emphasis added).

[23] *Martin Schubarth,* Wie entsteht ein Urteil?, recht 10 (1992) 122–127, 127; *Hans Peter Walter,* Zeitgemässe richterliche Rechtsfortbildung, recht 21 (2003) 2–11, 11; *Hans Wiprächtiger,* Rechtsfindung im Spannungsfeld zwischen klassischen Auslegungsregeln und subjektiven Werturteilen, recht 13 (1995) 143–150, 148.

[24] Art. 190 BV.

[25] This *dictum* is ascribed to Peter Noll – see *Hans Peter Walter,* Selbstbewusste Justiz, in: Bernische Verwaltungsgerichtsbarkeit in Geschichte und Gegenwart, ed. by Ruth Herzog/Reto Feller (Bern 2010) 561–586, 565. For a historical perspective on the issue, see *Raoul van Caenegem,* The 'Rechtsstaat' in Historical Perspective, in: *idem*, Legal History: A European Perspective (London 1991) 185–199.

[26] Arts. 30 para. 1, 191c BV.

judges and hence, for constitutional reasons, their official function must *de jure* be limited. According to their experience and competence, clerks will *de facto*, however, perform tasks very similar to a judge.[27] For clerks who work at the Supreme Court, the law sets out their rights and duties in a way that reflects their significance and functions.[28] Thus, the relevant act explicitly holds that judicial clerks contribute to a case's instruction *(Instruktion)* and decision-making. Clerks have the right to advise on cases *(beratende Stimme),* i.e. they are allowed to give their opinion as to the facts and the legal issues during a case's deliberation. The Act further states that clerks provide proposals for, and edit, court decisions. For the reasons mentioned, they perform those tasks under the supervision of a judge, yet in practice they work rather independently. This rather independent position of clerks has been, occasionally, criticised as giving rise to a justice not of judges but of clerks *(Gerichtsschreiberjustiz).*[29]

b) Swiss Supreme Court

The Supreme Court stands at the apex of the judicial hierarchy. With this position comes a particular focus in its decision-making process. Two things must be mentioned. First, the Court is mainly concerned with questions of law, not questions of fact. Thus, as a rule, it can and must rely on the facts as established by the lower courts.[30] Second, the Supreme Court will and must consider the precedential effects of its decisions. The Court's focus is, in other words, broader than just on the case at hand. There are several rules illustrating this.[31] We find specific rules on how the Court's different divisions in public, civil, and criminal law must coordinate with each other in order to change an existing court practice or to set a new precedent, which

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[27] See *Stefan Heimgartner,* Der Richter und sein Gerichtsschreiber, in: Festschrift für Hans Wiprächtiger (Basel 2011) 295–305.

[28] See Arts. 24, 34 Bundesgerichtsgesetz (BGG) of 17 June 2005; Arts. 38, 39 Reglement für das Bundesgericht (BGerR) of 20 November 2006.

[29] *Heimgartner,* Gerichtsschreiber (n. 27) 303; on the workflow at the Supreme Court and the position of judicial clerks in it, see also *Christoph Hurni,* How Arbitration-Friendly is the Swiss Federal Supreme Court?, in: New Developments in International Commercial Arbitration 2012, ed. by Christoph Müller/Antonio Rigozzi (Zürich 2012) 79–107, 83 f.

[30] See Arts. 97, 105, 118 BGG. Applying these rules the Supreme Court must quite often decide what the proper facts of the decision are because the parties may try to slip in new facts in their statements (see, e.g., BGer. 30 October 2012, BGE 138 III 755 E. 3.3 – unpublished evaluation).

[31] We have already come across the principle that similar cases require equal treatment if there is no reasonable ground to distinguish them (see Text at n. 20). The Supreme Court's practice does not, however, show a stringent use of this principle as to its significance for questions of precedent – for a critical review see *Thomas Probst,* Die Änderung der Rechtsprechung (Basel 1993) 98–104.

affect more than one division.[32] Case law then defines the conditions that must be met to change an existing court practice.[33] Finally, there is a special procedure to dispose of cases in which an appeal must obviously be allowed because a lower court decision deviates from the Supreme Court's practice and because there is no reason to re-examine this practice.[34]

Supreme Court judges are elected by the Swiss parliament.[35] They need not be trained lawyers. The Supreme Court itself ruled that the constitutional right to have one's case heard by an independent and impartial judge does not require the judge to be a trained lawyer.[36] This view must be understood against the historical background that the Swiss judiciary did not emerge as just another branch of the administration, but as an independent constitutional body formed by lay-people; a tradition that has left its mark on the judiciary.[37] In today's Supreme Court, however, judges typically are trained lawyers. Cases before the Supreme Court will be decided, as a rule, by a panel of three judges. The panel consists of five judges where legal questions of fundamental importance or certain democratic matters are to be decided, or where a judge requests the larger panel. Appeals, on the other hand, which are obviously not admissible, are dealt with in a more straightforward manner by a single judge.[38] As a matter of fact, deliberation proceeds in writing; oral deliberation, though put first by the Act,[39] is rather exceptional.[40] If the deliberation takes place orally, it is open to the public.[41] Proceedings before the Supreme Court may be held in German, French, Italian, or Romansh.[42]

2. Judges

Occasionally, Supreme Court judges give us an insight into their daily work as decision-makers. The fruit of their reflections on their practice very often

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[32] Art. 23 BGG.

[33] BGer. 24 October 2008, BGE 135 I 79 E. 3.

[34] Art. 109 BGG.

[35] Art. 5 BGG.

[36] BGer. 15 November 2007, BGE 134 I 16 E. 4; on judicial impartiality and independence, see Text at n. 26.

[37] See *Walter,* ARSP (Beiheft 117) 127, 134 f.

[38] For the details, see Arts. 20, 108, 109 BGG.

[39] Cf. Art. 58 BGG.

[40] In 2015 the Supreme Court decided 7,695 cases. 2,677 cases (34.8%) were decided by a single judge. In 58 cases (0.8%) deliberation took place orally, thereof 3 cases (5.2%) were decided by three judges and 55 cases (94.8%) were decided by five judges. In 4,960 cases (64.5%) deliberation proceeded in writing, thereof 4,389 cases (88.5%) were decided by three judges and 571 cases (11.5%) by five judges; see Bundesgericht, Geschäftsbericht (2015) 25.

[41] Art. 59 para. 1 BGG.

[42] Art. 54 para. 1 BGG.

are shorter articles following a public lecture or presentation. As to their analysis of judicial decision-making, it is helpful to introduce the following categories: (a) reflections that clarify the judicial self-image as decision-maker, (b) focal points the judges emphasise in the decision-making process, and (c) statements about methodological aspects of judicial decision-making.

a) The judicial self-image as decision-maker

The image judges paint of themselves in their role as decision-makers can be summarised in the following four keywords: purpose, complexity, habitus, and panels.

Purpose – What do judges see as the central purpose of their duty? Judges do not give a single answer to this question. Three ideas seem particularly important. Foremost, we find the notion that judges are to find the correct decision for the case at hand. They must determine which party succeeds and which one loses.[43] To this focus on the particular case must be added a focus on the decision's implications for the legal development. The judges' second focus thus lies on the effect of precedent.[44] Closely connected to it is an emphasis on legal certainty. Judges see an important aim of their practice as producing and upholding certainty of orientation *(Orientierungssicherheit)* for social life.[45] This third concern comes in different guises: *emphatically*, by stating that "building trust" is the most important duty of the judiciary;[46] *negatively*, by refuting legal theories that undermine legal certainty on a general level;[47] and finally, *philosophically* informed, by suggesting that decisions must be grounded in a specific "form of life" and that "eccentric" and "unexpected" legal constructions are therefore inappropriate.[48]

Complexity – According to the judiciary, judicial decision-making should thus aim to arrive at a correct decision in a particular case which is, at the same time, coherent with legal certainty and the more general development of the legal system. Against this background, judicial decision-making may be characterised as a balancing act between different and not necessarily con-

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[43] *Kathrin Klett,* Kontinuität und Kohärenz, recht 28 (2010) 83–88, 83; *Hans Peter Walter,* Der Methodenpluralismus des Bundesgerichts bei der Gesetzesauslegung, recht 17 (1999) 157–166, 157; *idem,* Die Praxis hat damit keine Mühe… oder worin unterscheidet sich die pragmatische Rechtsanwendung von der doktrinären Gesetzesauslegung – wenn überhaupt?, ZBJV 144 (2008) 126–142, 136.

[44] *Klett,* recht 28 (2010) 83, 83; *Peter Müller,* Gedanken zur richterlichen Rechtsbildung und Rechtsfortbildung, in: Mélanges Robert Patry (Lausanne 1988) 377–390, 377 ff.; *Walter,* recht 17 (1999) 157, 157.

[45] *Klett,* recht 28 (2010) 83, 83; *Walter*, recht 21 (2003) 2, 5.

[46] *Hans Wiprächtiger,* Recht und Richter, in: Festschrift für Peter Gauch (Zürich 2004) 327–334, 332 ("Die Hauptaufgabe der Gerichte liegt vorerst in der Vertrauensbildung").

[47] *Seiler,* Rechtsanwendung (n. 11) 104 ff.

[48] *Klett,* recht 28 (2010) 83, 87.

verging aspirations. It will therefore not be surprising that judges describe this process as complex and demanding. So they reject the idea that a decision is nothing more than a series of logical, mechanical operations.[49] Montesquieu's well-known image of the judge who is but "la bouche de la loi" is considered to be far away from judicial practice.[50] Moreover, it is highlighted that most steps in producing the decision are not performed consciously step by step; this includes the famous looking back and forth *(Hin- und Herwandern des Blicks)* between the facts of a case and the relevant rules and principles.[51] And even a judge who set out to reconstruct the decision-making process explicitly holds that this process proves to be too complex to achieve more than a "truncated reproduction" of the actual thought and decision process.[52] Distance is not only taken from Montesquieu but also from Dworkin's metaphor of judge Hercules. So one judge states: the demand to know everything and always the right thing moves beyond the capacities of any judge and judicial panel.[53] We may paraphrase this as follows: the *real* decision-making process is demanding enough and hence there is not much of a practical point in reaching out to a Herculean ideal. Also it does not help in dealing with complexity that judges are required to reach a plausible decision in due time and in every case. Thus, judges describe and highlight the consequences of time pressure and the obligation always to arrive at a decision.[54]

Habitus – The picture that emerges so far presents judicial decision-making as a rather difficult enterprise that comes with a considerable responsibility. How do judges deal with this; is there a specific judicial habitus? Naturally, the answer tends to vary from judge to judge. Some have suggested distinguishing between "deliberating" and "risk taking" judges. The former emphasise continuity and legal certainty, favouring well-tried theories and established precedent, while the latter are characterised as adventurous and willing to undertake daring innovations.[55] Others declare that judges, especially at the Supreme Court, are well aware of the relativity of their opinion and the fortuity of their influence; this seems to point to a virtue of judi-

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[49] *Klett,* recht 28 (2010) 83, 84; *Müller,* Rechtsbildung und Rechtsfortbildung (n. 44) 381; *Walter,* recht 21 (2003) 2, 5; *Wiprächtiger,* recht 13 (1995) 143, 143.

[50] It should be noted that some legal historians claim this image to be one that prevails throughout history – see *Pio Caroni,* Einleitungstitel des Zivilgesetzbuches (Basel 1996) 68 ff.

[51] *Klett,* recht 28 (2010) 83, 86; the image of looking back and forth between facts and rules goes back to *Karl Engisch,* Logische Studien zur Gesetzesanwendung[3] (Heidelberg 1963) 15.

[52] *Schubarth,* recht 10 (1992) 122, 123.

[53] *Klett,* recht 28 (2010) 83, 83.

[54] *Walter,* ARSP (Beiheft 117) 127, 131; *Martin Schubarth,* Zur richterlichen Rechtsfortbildung, KritV 71 (1988) 86–96, 95.

[55] *Walter,* ZBJV 144 (2008) 126, 127.

cial humility.[56] As to their stance against the executive and the legislature, opinions seem to differ again into more prudent and more avant-garde judges. Hence, the latter are at pains to claim a confident position for the judiciary that should opt not, of course, for judicial revolution but for judicial evolution.[57] The more prudent judges, on the other hand, accentuate a *noble retenue* in political matters and emphasise the need to keep judicial activity within the realm of the positive law.[58]

Panels – Finally, several judges emphasise and describe how they share their role as decision-makers with their colleagues in a judicial panel. They see the panel as an institution that tempers overly innovative ideas and balances the different political inclinations among the court members.[59] The standard view that a panel leads to better decisions because it is fuelled by a diversity of opinions is, however, not taken for granted. Pecking orders and power blocks may do away with this advantage and hence it is stressed that judges must strive to remain independent also within the panel.[60] As one judge puts it: the ideal that a decision-making process becomes a learning process – where the solution becomes something a judge could not have produced on his own – rests upon strong intellectual, moral, and psychological presumptions. For a good deliberation it is characteristic that every judge involved is willing and able to get involved with the opinions of other colleagues and critically to review his or her initial viewpoint.[61]

b) Judicial focal points in decision-making

The observations of the judges reveal three focal points within the decision-making process: practice, precedent, and legal doctrine.

Practice – Legend has it that Swiss law favours a "simple and practical approach".[62] While the ideal of simplicity may be somewhat misleading, the notion of the "practical approach" takes us closer to a first focal point in the judges' reflections on the decision-making process. In a nutshell, we can say

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[56] *Otto Kaufmann,* „Oder"… oder… „und"… ?: Bemerkung zur Bedeutung des Rechtsgefühls in der bundesgerichtlichen Rechtsprechung, in: Mélanges Robert Patry (Lausanne 1988) 367–376, 374; further *Wiprächtiger,* Richter (n. 46) 334.

[57] *Walter*, Selbstbewusste Justiz (n. 25) *passim*; *idem,* recht 21 (2003) 2, 6.

[58] *Müller,* Rechtsbildung und Rechtsfortbildung (n. 44) 390; *Kathrin Klett,* Vom Beruf alte Fragen neu zu stellen – zur vertraglichen Äquivalenz, in: Festschrift für Hans Peter Walter (Bern 2005) 351–366, 365. For further remarks on the judge's character and qualities, see *Walter,* Richterkönig (n. 8) 21; *Wiprächtiger,* Richter (n. 46) *passim*; *Klett,* recht 28 (2010) 83, 87.

[59] *Wiprächtiger,* recht 13 (1995) 143, 150.

[60] *Franz Nyffeler,* Rechtsfortbildung durch das Kollegialgericht, in: Festschrift für Hans Peter Walter (Bern 2005) 99–122, 121 f., *passim*; *Wiprächtiger,* Richter (n. 46) 331.

[61] *Schubarth,* recht 10 (1992) 122, 127.

[62] See Text at n. 3.

that they describe "judicial thinking" as "practical thinking". This focus on practice shows several dimensions. First, judges highlight the importance of the "reality of life" *(Lebenswirklichkeit)* for understanding and applying legal rules.[63] One judge elaborates on this in the following manner: in order to know the reality of life sometimes common sense and one's own experiences will do. However, particularly in specialised areas and technical matters it will often be necessary to refer to publicly available sources to acquire at least some basic knowledge; and, if this is still not sufficient, procedural remedies such as expert hearings may be required to understand the reality behind the rules.[64]

Further, the judges' practical focus becomes apparent in the statement that "legal rules are no ends in themselves […] they must prove their worth in particular cases".[65] Whereas judges from other jurisdictions may agree on what has been said so far, it could be here that the practical approach becomes more distinctively Swiss; and it is also from here that the famous Swiss preference for simple solutions must be understood. Accordingly, judges stress the importance of practical viewpoints and arguments *(Sachgesichtspunkte, -argumente)* and a sense for the concrete practical problems *(Sachprobleme)* of a case, which must not be lost to theoretical constructions.[66] They hold that legal rules must account for the interests and needs of specific social contexts and therefore offer solutions that are suitable for real life and correspond to the existing social expectations;[67] and the view that a legal solution must be practically reasonable is defended vigorously.[68] In sum, there emerges a view of judicial decision-making that closely links real life and legal order, and that distances itself from purely theoretical constructions and arguments, which are not sensitive to practical consequences.

Precedent – As a focal point within the judicial decision-making process, precedent is relevant at least in two ways. Most importantly, it seems to serve a central methodological purpose in the Court's decision-making. Two statements of Supreme Court judges may illustrate this methodological point: "except for new cases, the previous court decisions are the usual starting point";[69] and: "the Supreme Court follows first and foremost its own precedents. It quotes its decisions as if they would have statutory force. Where

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[63] *Klett,* recht 28 (2010) 83, 85; *Walter,* ZBJV 144 (2008) 126, 135; *Nyffeler,* Kollegialgericht (n. 60) 118.

[64] *Klett,* recht 28 (2010) 83, 85 f.

[65] *Klett,* recht 28 (2010) 83, 85.

[66] *Schubarth,* recht 10 (1992) 122, 127; *idem,* Der Richter zwischen Rationalität und Sensibilität, recht 13 (1995) 151–157, 152, 154; *idem,* KritV 71 (1988) 86, 89.

[67] *Klett,* recht 28 (2010) 83, 85, 87.

[68] *Müller,* Rechtsbildung und Rechtsfortbildung (n. 44) 384; *Walter,* ZBJV 144 (2008) 126, 140; *idem,* ARSP (Beiheft 117) 127, 132.

[69] *Schubarth,* recht 10 (1992) 122, 123.

there are no compelling reasons for changing its practice, it follows the latter."[70] The reasons for this approach, so we are told, are to facilitate dealing with the Court's case-load and to promote legal certainty.[71]

For an outsider, two things are particularly striking about these statements. On the one hand, the fact that Supreme Court judges consider it appropriate to describe the role of precedent in such a confident and succinct manner strongly suggests that precedent indeed plays a dominant role in decision-making.[72] On the other hand, the fact that this role is only mentioned *en passant* undersells its importance. In other words, the far-reaching effects of seeking orientation in precedent lack discussion.[73] Yet it would not be entirely fair to assume that judges are completely unaware of those effects. As mentioned earlier, they are specifically concerned about the precedential effects of their decisions and, occasionally, also mention the dangers that result from a flawed starting point:

"The judiciary likes to orientate itself […] by its precedents. This entails the danger that a – perhaps only in its reasoning – doubtful starting decision becomes the basis of a court practice that hardly was intended in the first place."[74]

Besides this methodological point, the second important aspect of precedent in the decision-making process is to define the proper scope of a precedent. On the one hand, this means to define the scope of a *prior* decision. As to this part of the exercise, a decision must be understood in the context of its facts and be compared to the facts of the case at hand.[75] This approach seems in line with the Court's practical focus. On the other hand, the judges' attention turns to the scope of the *present* decision and its effect for future cases. Some judges at this point link the Court's duty to decide cases with its concern for legal development. They endorse the view that the focus on precedential effects is limited according to the legal questions of the case at hand. Questions that must not be decided in order to dispose of the case should therefore not be commented on.[76] This view also corresponds, to some extent, with the judges' practical focus: questions that arouse only theoretical interest and are of no practical effect for a particular case need not be decided.

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[70] *Seiler,* Rechtsanwendung (n. 11) 4.

[71] *Seiler,* Rechtsanwendung (n. 11) 4.

[72] Empirical research conducted as to the decisions of the European Court of Justice shows that references to previous court decisions by far outnumber traditional methodological arguments – see *Müller/Christensen,* Methodik (n. 10) 288 ff.

[73] Critical as to the Swiss discussion also *Probst,* Änderung (n. 31) 116 ff. For a lucid reflection on the issue, see *Ralph Christensen/Hans Kudlich,* Gesetzesbindung: Vom vertikalen zum horizontalen Verständnis (Berlin 2008) ch. 4; *Müller/Christensen,* Methodik (n. 10) 308 ff.

[74] *Schubarth,* KritV 71 (1988) 86, 90.

[75] *Schubarth,* recht 13 (1995) 151, 153.

[76] *Walter,* ZBJV 144 (2008) 126, 138 f.

Legal doctrine – If we recall the Frauenfelder legend[77] and the practical focus of the Supreme Court judges, one might think that Swiss judges still have little use for legal scholarship. Yet again, this would be misleading. Statements such as the following speak a different language: "We orientate ourselves by the doctrine to understand the normative problems of a case, to […] ask the right questions."[78] On a methodological level, the review of legal scholarship is then even presented as the second step of the decision-making process that follows the analysis of previous court decisions.[79] Judges openly recognise that legal scholarship has its role in initiating changes in court practice and they consider a productive dialogue between academia and the judiciary indispensable for achieving an optimal and coherent judicial practice.[80] The judges consequently expect legal scholars to support them where their own capacities are limited, viz. to reflect the law on a meta-case level that enlightens systematic correlations and deepens understanding of the relevant problems.[81]

Scepticism towards legal doctrine comes in three forms. First, in view of its practical outlook the judicial interest in scholarly discussion ceases where the latter does not make a practical difference and is of mere theoretical relevance. The dictum "practice need not worry about this" became a catchphrase for some members of the judiciary.[82] Second, and more importantly, judicial scepticism against legal scholarship can be related to a critical view about solving cases by standardised schemes. This is because too heavy a reliance on conceptual or, for that matter, doctrinal schemes may conceal the particular problems of a case.[83] While those two reasons for judicial reluctance towards doctrinal thought connect to decision-making, a third reason links up with the presentation of the decision. Here, the concern is that decisions must also convince and communicate the law to non-professionals, especially the

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[77] See Text at n. 1.

[78] *Klett,* recht 28 (2010) 83, 86.

[79] *Schubarth,* recht 10 (1992) 122, 123, 125.

[80] *Klett,* recht 28 (2010) 83, 86; *Schubarth,* recht 10 (1992) 122, 126, 127 *in fine*. For a more comprehensive view of the relationship between the Supreme Court and doctrinal criticism, see *Marc Forster,* Die Bedeutung der Kritik an der bundesgerichtlichen Praxis (St. Gallen 1992).

[81] *Klett,* recht 28 (2010) 83, 86.

[82] *Walter,* ZBJV 144 (2008) 126, 127 (who ascribes this sentence to a former Supreme Court judge but obviously endorses it himself); see further *Seiler,* Rechtsanwendung (n. 11) 1 f.

[83] *Schubarth,* recht 13 (1995) 151, 152; this view can also be spotted in a recent decision of the Supreme Court: BGer. 3 June 2015, BGE 141 V 281 E. 3.4.2.2, 4.1.1. The relevance and consequences of using schemes in legal education and legal reasoning is cogently commented upon by *Ulfrid Neumann,* Juristische Methodenlehre und Theorie der juristischen Argumentation, Rechtstheorie 32 (2001) 239–255, 239 f.; further on this issue, see *Thomas Coendet,* Rechtsvergleichende Argumentation (Tübingen 2012) 133.

conflicting parties. A decision should therefore not dwell on legal doctrines more than is necessary for developing the law.[84]

c) Methodological aspects of decision-making

The writings of different Supreme Court judges have so far enlightened their self-image as decision-makers, as well as some focal points in the decision-making process. Can we find behind this a methodology of decision-making that the Swiss Supreme Court applies in its practice? Judges share a critical viewpoint about questions such as this one. They point to the fact that there is no such thing as *the* Supreme Court, but only a combination of different divisions and panels with a number of ever changing participants that each have their own view about the correct methodological approach. This makes it difficult to form and speak of a single and coherent methodological position.[85] (And I should hasten to add that the same *caveat* applies, *mutatis mutandis,* throughout this essay to statements about the courts, the judges, the judiciary, etc.) Nevertheless, we can distil certain methodological points about decision-making at the Supreme Court. The judges' discussion of the matter can be separated into statements about the traditional legal methodology and alternative approaches to it.

Traditional methodology – With the term "traditional methodology" I refer to the rules relating to the application of the law, which follow from the judicial and scholarly discussion of Article 1 of the Swiss Civil Code; the very provision we came across at the beginning of this article.[86] The core of the traditional methodology consists, on the one hand, of the four classical elements for interpreting a statutory rule (viz. a rule's wording, history, systematic context, and purpose) and, on the other hand, of the guidelines for dealing with gaps within the positive law.[87] What role does this traditional methodology play in judicial decision-making? The answers among the judges vary. Yet, there also seems to be some common ground. So it is beyond doubt that none of the judges rejects the traditional methodology altogether. At the same time, judges agree that the four classical elements are not exhaustive but are supplemented by further arguments, most notably practicability and the rule that a particular interpretation should be in line with the constitution.[88]

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[84] *Walter,* ZBJV 144 (2008) 126, 140; further *Klett*, recht 28 (2010) 83, 87.

[85] *Walter,* recht 17 (1999) 157, 159 f.; *Seiler*, Rechtsanwendung (n. 11) 84; further *Wiprächtiger,* recht 13 (1995) 143, 149.

[86] See Text at n. 5.

[87] For an authoritative account of the traditional methodology in Swiss law see, e.g., *Ernst Kramer,* Juristische Methodenlehre[4] (München 2013). For present purposes, it will not be necessary to reflect upon the question of whether judicial practice and doctrine may follow a different methodological standard – on this see *Walter,* ARSP (Beiheft 117) 127, 127 ff.

Finally, as far as they reflect upon it, the judges generally accept that the traditional methodology does not get it quite right when it is supposed to guide or explain the decision-making process. This last point deserves to be considered in some more detail.

First, there is the view that the traditional methodology is "better than its reputation"; against a widespread view, one judge argues, it leads to quite clear results in many cases. This finding is qualified for situations where a case needs to be decided by balancing different conflicting interests; here, the solution must be found in some other way.[89] Another Supreme Court judge states that judges try to interpret the relevant rule according to the classical elements of interpretation, but making sense of a rule is a more complex issue and the realm of defensible solutions broader than the traditional methodology suggests.[90] Another judge discovers how the classical, deductive rules of interpretation move into the background as he asks himself about whether he follows a particular method in his judicial practice.[91] The clearest statement we receive on this point is from a judge who explicitly aims to reconstruct the decision-making process. After having examined several decisions he states laconically: "the concrete decision cannot be found by means of the traditional methodology alone."[92]

Methodological alternatives – Thus, if the decision cannot be found by means of the traditional methodology alone, what are the alternatives? As to this question, it is clear – and not very surprising – that the judges do not develop a fully worked out methodological alternative. They are rather of the opinion that this is the task of legal scholarship and they lament that the existing academic proposals are of little help in coping with the shortcomings of the traditional methodology.[93] The remedies suggested by the judiciary for specific methodological steps in the decision-making process are accordingly modest. Some suggest a more principled and systematic approach to resolving conflicts between differing interpretations of a rule.[94] Another judge describes the decision-making process as an interplay between a judicial preconception and its rationalisation by means of traditional methodology.[95] The

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[88] *Klett,* recht 28 (2010) 83, 84; *Walter,* recht 17 (1999) 157, 163; *Seiler,* Rechtsanwendung (n. 11) 5 f., 129; *Schubarth,* recht 13 (1995) 151, 155; *Wiprächtiger,* recht 13 (1995) 143, 144 f.

[89] *Seiler,* Rechtsanwendung (n. 11) 52 f., 129.

[90] *Klett,* recht 28 (2010) 83, 86.

[91] *Wiprächtiger,* recht 13 (1995) 143, 143.

[92] *Schubarth,* recht 10 (1992) 122, 127.

[93] *Schubarth,* recht 13 (1995) 151, 155; *Seiler*, Rechtsanwendung (n. 11) 129; *Wiprächtiger,* recht 13 (1995) 143, 148.

[94] *Walter,* recht 17 (1999) 157, 164, 165.

[95] *Wiprächtiger,* recht 13 (1995) 143, 143 ff.; the significance of legal preconceptions and judicial sensitivity for decision-making is also discussed by *Kaufmann,* Rechtsgefühl

most specific approach suggests that the decision-making process begins with the Court's precedents that are in a second step tested against the latest views in academia. The scholarly criticism or controversy stimulates the judge's reasoning who then must define the practical problems of the case and assess them by using a wide range of arguments. Among the arguments mentioned are the classical elements of interpretation, "pro and contra" discussion, the analysis of real and imagined cases, and the evaluation of the consequences of different solutions. As to its presentation, the decision should ultimately (openly)[96] discuss what weight has been given to the different arguments and explain why certain arguments prevail. Such a justification should, so the judge concludes, be combined with a continuous willingness to account for persuasive criticism in later cases.[97]

3. Cases

The cases chosen for verifying the judges' self-descriptions are, as pointed out, leading cases from about the last fifteen years. They cover private, public, and criminal law and most of them are landmark cases of high political, economic, or social importance. The topics of the decisions analysed are (in chronological order): whether selling hallucinogenic mushrooms violates food regulations *(Mushrooms),* whether the effects of rescinding a long-term contract (in that case as to sludge) should be limited to the future (the *Sludge* case), whether naturalisation by ballot is in line with the constitution *(Naturalisation),* whether infecting someone with HIV amounts to a serious assault *(HIV),* whether wrongful birth allows for a claim in damages *(Wrongful birth),* whether the seller (in that case of parrots) under Swiss contract law is liable for indirect damage even if not at fault (the *Parrots* case), whether the Swiss financial market authorities were allowed to order UBS to deliver client data to the U.S. authorities *(UBS/USA),* whether Google Street View complies with Swiss data protection laws *(Google),* whether banks must refund to their clients inducements they received for the distribution of investment funds *(Inducements)* and, finally, under what conditions psychosomatic pain gives raise to welfare benefits for invalidity *(IV).*[98] I will discuss the

(n. 56) *passim*; *Seiler,* Rechtsanwendung (n. 11) 54 f., 85 f.; *Schubarth,* recht 13 (1995) 151, *passim*.

[96] In favour of an *open* discussion of the relevant arguments in the *presentation* of the decision, see also Text at, and the references in, n. 23.

[97] *Schubarth,* recht 10 (1992) 122, 127, *passim*.

[98] BGer. 4 July 2001, BGE 127 IV 178 *(Mushrooms);* BGer. 21 February 2003, BGE 129 III 320 *(Sludge);* BGer. 9 July 2003, BGE 129 I 217 *(Naturalisation);* BGer. 27 October 2004, BGE 131 IV 1 *(HIV);* BGer. 20 December 2005, BGE 132 III 359 *(Wrongful birth);* BGer. 28 November 2006, BGE 133 III 257 *(Parrots);* BGer. 15 July 2011, BGE 137 II 431 *(UBS/USA);* BGer. 31 May 2012, BGE 138 II 346 *(Google);* BGer. 30 October 2012, BGE 138 III 755 *(Inducements);* BGer. 3 June 2015, BGE 141 V 281 *(IV).*

decisions by relating them, first, to the focal points the judges have marked out for the decision-making process and, second, by relating them to the judges' statements on the methodological aspects of decision-making.

a) Judicial focal points in decision-making

Practice – Whoever may want to look for examples that reveal the practical focus the judges highlight for the decision-making process will not be disappointed. A number of decisions show how the Court investigates and reasons the issues involved in the case with a close consideration of the facts of life and its practical problems. Thus in the *Google* case the Court concerns itself carefully with the functioning of Street View and the techniques that are supposed to allow the blurring of persons and objects directly referring to them. Against this factual background, the Court then elaborates on the potential of Street View to affect a person's privacy and sets out in detail what measures Google must take in order to comply with Swiss data protection law; it goes so far as to define the height of the camera position Google's cars are allowed to use when mapping an area.[99] The *IV* case is a further example of such practical concerns. The reason for this is clear: the authorities assessing whether a person is entitled to welfare benefits due to psychosomatic pain must rely on the medical expertise of doctors. It is remarkable that the Court not only relies on empirical research for its argument but even uses an entire section to set out in a principled manner how law and medicine ought to cooperate in order to ensure a lawful and convincing practice in this area.[100] Empirical evidence is also used in the *HIV* case where the Court cites studies on the transmission rates of the disease through sexual intercourse.[101] A decision that argues closely to the particular facts of the case can be found in *UBS/USA*. This is because one of the crucial questions was whether not delivering the client data to the U.S. authorities would have, in fact, threatened the stability of the Swiss financial system.[102] The decision on *Naturalisation* is another good example of a careful analysis of the facts. The Court demonstrates how the results of the ballot leave no choice but to conclude that persons with a background from former Yugoslavia were systematically discriminated in comparison to applicants from other countries, and supports this argument by pointing to publications issued before the ballot.[103] The sensitivity of the Court to practical arguments and practicability comes to light in the *Inducements* and the *Sludge* cases. In the decision on inducements the Court works out how such payments may cause conflicts of interest and states

[99] BGer. 31 May 2012, BGE 138 II 346 E. 6, 8, 10.6.2, 10.7, 14.
[100] BGer. 3 June 2015, BGE 141 V 281 E. 3.3.1, 4.3.1.3, 5.
[101] BGer. 27 October 2004, BGE 131 IV 1 E. 2.3, 2.4.
[102] BGer. 15 July 2011, BGE 137 II 431 E. 4.
[103] BGer. 9 July 2003, BGE 129 I 217 E. 2.3.1, 2.3.2.

the rule that regulates such conflicts. It then holds that the bank cannot escape this rule by relying on a particular concept *(Begriff)* to categorise different inducements. Thus, the Court focuses its interpretation of the rule on its practical effect and does not concern itself with doctrinal pigeonholes.[104] In the *Sludge* case, finally, the Court explicitly refers to "reasons of practicability" to limit the effects of rescinding a long-term contract, which has been performed fully or partially, to the future.[105]

Precedent – The judges' statements on the significance of precedent for decision-making are fully vindicated by the cases considered here.[106] Almost all the cases rely heavily on earlier decisions of the Supreme Court. Some decisions explicitly refer to a "constant" or "long-standing" judicial practice,[107] and three decisions participate in a longer case line on a certain topic, which they either start or continue. The *HIV* decision builds on a position the Supreme Court established in the 1990s.[108] The decision on *Naturalisation* is one of two decisions taken on the same day which laid the foundations for a series of further decisions on the issue.[109] The *Inducements* decision, finally, was preceded by three decisions of the Court on the topic.[110] What is interesting is that the last of those three decisions was taken by the Supreme Court's *criminal* law division and differed in its conclusion from the solution that the Court's *civil* law division was to adopt in the *Inducements* decision.[111] In the latter the Court stated that the decision by the criminal law division did not set a precedent on the matter. The case thus shows that neither of the Court's divisions deemed it necessary to apply the special rules on precedent laid down in the Supreme Court Act to coordinate the decisions between different divisions.[112] Further, the Court's focus on precedent prominently surfaces in decisions where it openly declares its intention of creating a precedent for

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[104] BGer. 30 October 2012, BGE 138 III 755 E. 5.4.

[105] BGer. 21 February 2003, BGE 129 III 320 E. 7.1.3.; BGer. 20 December 2005, BGE 132 III 359 E. 3.2; BGer. 3 June 2015, BGE 141 V 281 E. 3.5.

[106] Cf. Text at n. 69.

[107] BGer. 20 December 2005, BGE 132 III 359 E. 4; BGer. 9 July 2003, BGE 129 I 217 E. 1.3.

[108] BGer. 22 February 1990, BGE 116 IV 125; BGer. 20 October 1999, BGE 125 IV 242.

[109] BGer. 9 July 2003, BGE 129 I 217; BGer. 9 July 2003, BGE 129 I 232; BGer. 12 May 2004, BGE 130 I 140; BGer. 4 January 2005, BGE 131 I 18; BGer. 10 May 2006, BGE 132 I 196; BGer. 27 February 2008, BGE 134 I 56; BGer. 7 July 2009, BGE 135 I 265; BGer. 13 April 2011, BGE 137 I 235; BGer. 12 June 2012, BGE 138 I 305.

[110] BGer. 22 March 2006, BGE 132 III 460; BGer. 13 January 2011, Decision 6B_223/2010; BGer. 29 August 2011, BGE 137 III 393.

[111] BGer. 13 January 2011, Decision 6B_223/2010 E. 3.4.5.

[112] On those rules see Text at n. 32.

future cases *(UBS/USA)* or of changing its previous practice *(IV)*.[113] We also find several examples of how the Court defines the scope of a precedent. In the *IV* case it not only establishes a new judicial practice but also defines the effects on medical expert opinions that were delivered according to the previous case law.[114] The view that precedential statements should be limited to the legal questions of the case at hand is applied in a number of cases. Thus, in the *Wrongful birth* case the Court limits its decision to the question of whether damages are available as a matter of principle and does not rule on the issue of how to calculate the damages (because the defendant's appeal did not extend to that point).[115] Similarly, the Court in the *Inducements* case restricts its decision to situations where the bank is subject to an asset management agreement. Other situations – controversially discussed in legal scholarship – are explicitly excluded from the scope of the decision.[116]

Legal doctrine – On the basis of their statements one must assume that the judges hold legal scholarship in rather high esteem;[117] and indeed, we can find references to legal scholarship in the Court's decisions at every turn. In all the cases that were analysed the Court cites academic writing and in most cases the amount of literature reviewed is considerable. Of course, the manner in which scholarship is dealt with and how it affects the decision varies. A decisive scholarly influence can be seen in the *IV* case where the Court from the outset makes it clear that the criticism from medical and legal scholarship is one of the reasons for rethinking the existing court practice.[118] Scholarship enjoys a similar standing in the *Sludge* case where it obviously provides a guiding function for the judiciary. The Court states that scholarship "for good reasons" suggests a theoretical construction that limits the consequences of rescission in situations where the contract is voidable for mistake.[119] In the *Wrongful birth* and *Inducements* decisions we can follow a highly productive dialogue between academia and the judiciary. In both cases, the Court gives a fairly comprehensive overview of the academic discussion in order critically to review and use it in the course of its own argument.[120] The other decisions – *Google*, *UBS/USA*, and *Naturalisation* – show

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[113] BGer. 15 July 2011, BGE 137 II 431 E. 1.2.2 (unpublished evaluation); BGer. 3 June 2015, BGE 141 V 281 E. 1.2; see also BGer. 20 December 2005, BGE 132 III 359 E. 3.2.

[114] BGer. 3 June 2015, BGE 141 V 281 E. 8.

[115] BGer. 20 December 2005, BGE 132 III 359 E. 4.6.

[116] BGer. 30 October 2012, BGE 138 III 755 E. 5.5; for further examples, see BGer. 9 July 2003, BGE 129 I 217 E. 1.3; BGer. 21 February 2003, BGE 129 III 320 E. 5.1, 6.1.

[117] Cf. Text at n. 78.

[118] BGer. 3 June 2015, BGE 141 V 281 E. 1.2.

[119] BGer. 21 February 2003, BGE 129 III 320 E. 7.1.1.

[120] BGer. 20 December 2005, BGE 132 III 359 E. 3.3; BGer. 30 October 2012, BGE 138 III 755 E. 5.1.

how the Court uses academic scholarship as a source for developing and fleshing out its own reflections. Academic criticism, on the other hand, does not always have the effect of inspiring a change of practice as in the *IV* case. Sometimes it is simply neglected, as in the *HIV* case where the scholarly criticism of the Court's practice is reflected only partially,[121] or in the *Parrots* case where the Court seems content merely to state its own view on the matter without taking up the challenge of the academic arguments. Finally, do the decisions show any long-lasting effect of the Frauenfelder legend? Not really. We can at least mention two cases.[122] First, in the *Sludge* case the Court opposes two different doctrinal constructions to limit the effects of rescission and then states that "the dogmatic differences must not be overemphasised" because, in the end, the different constructions lead to "barely different solutions".[123] Second, in the *Wrongful birth* decision, the Court refers to the *purpose* of the contract to assess whether damages can be granted. This reference is, however, rather casual and not followed by a learned discussion as to whether the purpose of a rule in general may be used for the imputation of damage.[124] This is a discussion that has taken place in German legal scholarship and resulted in a sophisticated doctrine *(Normzwecklehre)* that eventually left its mark on judicial practice.[125] In Swiss law, however, such a doctrine is left to the realm of scholarly discussion – this is a pity because it could bring much clarity into some cases; in particular, the Supreme Court's analysis of the *Parrots* case would have benefited from it.[126]

b) Methodological aspects of decision-making

The *Parrots* case provides a good link to the methodological aspects of the decision-making process. Because it is the only case that follows the tradi-

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[121] See *Felix Bommer,* Die strafrechtliche Rechtsprechung des Bundesgerichts im Jahre 2005, ZBJV 144 (2008) 1–37, 7.

[122] It should also be mentioned at this point that the doctrinal concept which is the subject of the second legend introduced in the beginning (i.e. the public right to sue) appears to find some sort of Swiss equivalent in the Supreme Court's latest decisions – see BGer. 16 February 2015, Decision 4A_439/2014 E. 5.4.3.1 ("Rechtsschutzanspruch"); BGer. 25 February 2013, BGE 139 III 126 E. 3.2.3 ("prozessuale Ansprüche").

[123] BGer. 21 February 2003, BGE 129 III 320 E. 7.1.3.

[124] BGer. 20 December 2005, BGE 132 III 359 E. 4.1.

[125] See *Hermann Lange/Gottfried Schiemann,* Schadensersatz[3] (Tübingen 2003) 101 ff., 103; for the foundations of the doctrine, see *Ernst Rabel,* Das Recht des Warenkaufs, vol. I (Berlin 1936) 489–491, 495–510; *Ernst von Caemmerer,* Das Problem des Kausalzusammenhangs im Privatrecht (Freiburg 1956).

[126] For an argument to this effect, see *Thomas Coendet,* Schadenszurechnung im Kaufrecht, recht 26 (2008) 15–26, 19 ff.; for the *Wrongful birth* case the issue has been touched upon by *Hubert Stöckli,* Schutzzwecklehre ante portas?, Haftung und Versicherung 2006, 371–372.

tional methodology in a textbook manner.[127] In addition, the *Mushrooms* decision stays close to tradition and generally relies on the classical elements of interpretation. Yet, it is telling that those two decisions are arguably the least plausible of all the decisions reviewed. In contrast to the other cases – which are all well and, occasionally, even excellently reasoned –, those decisions do not do honour to the Court's great skill in reasoning close to the facts of life and the practical problems of a case. It is indeed a rather peculiar view, which the Court states in the *Mushrooms* case, that something is to be declared food, and therefore subject to food regulation, only because it can be consumed orally.[128] At the minimum, those two cases add further to the view that "the concrete decision cannot be found by means of the traditional methodology alone."[129] Furthermore, given that all the other – by far more convincing – decisions do not rely on the traditional methodology one might even conclude: a *convincing* decision cannot be found by means of the traditional methodology alone.[130]

Nevertheless, it should be noted that we still find traces of the traditional methodology in the other decisions. Thus, the classical elements of interpretation (wording, history, context, purpose) do appear in the Court's reasoning. However, they are used in a fashion that has little to do with the systematic approach of the tradition. The classical elements are used in a strongly diluted and scattered way, and it seems that they are only deployed, if at all, where they contribute a meaningful point to the problem of the case. A good example of a diluted use of the classical elements is the *UBS/USA* case where the Court at one point pieces together a set of grammatical, teleological, historical, and systematic arguments to establish whether the Swiss authorities could order the delivery of the client data.[131] Also, for instance, we find a scattered use in the *HIV* decision where the Court at one stage briefly makes a systematic-historical point and later, on a different question, refers to the purpose of the rule.[132] Finally, in *Google*, *Inducements*, and *Wrongful birth* we do not find any significant use of the classical elements of interpretation at all.

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[127] BGer. 28 November 2006, BGE 133 III 257 E. 2.4, 2.5.

[128] BGer. 4 July 2001, BGE 127 IV 178 E. 3.c; for a criticism, see *Guido Jenny,* Die strafrechtliche Rechtsprechung des Bundesgerichts im Jahre 2001, ZBJV 140 (2004) 1–34, 24 ff.

[129] See Text at n. 92.

[130] This is not to suggest that persuasion should be the standard for a valid (legal) argument; there are much more promising candidates. For an overview, see *Ralph Christensen/Michael Sokolowski,* Die Krise der Kommunikation und die Möglichkeit des juristischen Argumentierens, in: Die Sprache des Rechts, vol. II, ed. by Kent Lerch (Berlin 2005) 105–154, 116 ff.

[131] BGer. 15 July 2011, BGE 137 II 431 E. 2.2, 2.3.

[132] BGer. 27 October 2004, BGE 131 IV 1 E. 3.3, 4.

The Supreme Court's use of the traditional methodology suggests four things. First, it seems to vindicate the judges' claim that there is *some* remaining value to the traditional methodology for the decision-making process; second, that this value – which surfaces above all in the use of the classical elements – is defined rather by the concrete case than by a set of fixed methodological rules; third, that the traditional methodology is, for the essential part, unable to express the complexity of the making and even the presentation of a decision; fourth, that a rigorous use of the traditional methodology does not coincide with the quality of a decision. The Court's use of the classical elements may seem a little fuzzy. Yet it is remarkable that this just as little affects the quality of the decisions as the textbook use of the traditional methodology helps in other cases *(Parrots, Mushrooms)* to arrive at a convincing result.

As to the methodology the Court, in fact, uses to arrive at its decisions, the cases suggest that the approach comes rather close to the one sketched by one of the judges. The Court starts with its precedents, reviews the academic scholarship, and generally focuses on the practical problems of the case. Such a methodological approach would match very well with the significance of the focal points already discussed at length. Moreover, we find modes of reasoning that move beyond the traditional methodology, for instance the balancing of interests;[133] and there are a number of arguments that are usually not included in the classical elements, like references to the constitution,[134] to the economic consequences of a decision,[135] to theoretical arguments,[136] to the practicability of a solution,[137] and to foreign case law and doctrine.[138] Ultimately, the style by which the Court uses those arguments in its decisions suggests that they are already quite important during the decision-making process. In other words, some arguments indicate a comparatively small gap between the making of the decision and its presentation.

4. Blind spots

Although the judges' self-descriptions and the cases reported here sometimes correspond quite well, we should not think that no gap remains between the making and the presentation of a decision. Naturally, we cannot expect that

[133] BGer. 31 May 2012, BGE 138 II 346 E. 10.

[134] BGer. 20 December 2005, BGE 132 III 359 E. 4.3.2, 4.4.2; BGer. 31 May 2012, BGE 138 II 346 E. 9.2; BGer. 3 June 2015, BGE 141 V 281 E. 5.1.1, 5.2.2.

[135] BGer. 15 July 2011, BGE 137 II 431 E. 4.2.

[136] BGer. 21 February 2003, BGE 129 III 320 E. 5.1, 7.1.1.

[137] BGer. 21 February 2003, BGE 129 III 320 E. 7.1.2.

[138] BGer. 21 February 2003, BGE 129 III 320 E. 7.1.2; BGer. 27 October 2004, BGE 131 IV 1 E. 3.2, 3.4; BGer. 20 December 2005, BGE 132 III 359 E. 3.2, 4.3.1, 4.4.1, 4.4.2, 4.7, 4.8; BGer. 30 October 2012, BGE 138 III 755 E. 8.5.

Supreme Court judges will tell us about cases in which they needed to use some special *manoeuvre* to *make* a case fit into the existing legal framework in one or the other way.[139] This last part is concerned with some less dramatic, but nevertheless important issues; it indicates several blind spots in the picture we can see so far.

a) Further participants

What clearly dropped out of the picture are the arguments that the parties and the lower courts contribute to a case. It seems plausible that the judges do not specifically mention them in their self-descriptions because – as in the case of precedents – the necessity of dealing with arguments from those participants simply is too obvious for judicial practitioners. After all, the constitutional right to a reasoned decision, which applies to all Swiss courts, requires a court to address the arguments the parties put forward.[140] Of course, one may argue that the arguments of the parties and the lower courts only come in at a later stage, viz. for the presentation of the decision. The decisions analysed, however, often deal with those arguments in detail and, sometimes, even directly adopt the view of a lower court.[141] Thus, if we consider the style by which those arguments are presented in the decisions, it seems that they already play an important role during the decision-making process.

b) Judicial routine

Largely absent in the judges' observations is the distinction between standard cases and situations where a new legal problem has to be solved. Only one judge – in a statement that must count rather as an afterthought – hints at this distinction:

"The great majority of the cases to be dealt with – before lower courts as well as before the Supreme Court – is nothing else than more or less cumbersome toiling, without legal highlights. In most cases one must draw upon an essentially accepted practice. Here, methodological performance is less asked for than discipline and stamina. These are the decisions, often disrespectfully labelled as routine cases, which nevertheless are to be treated with the same seriousness as the so-called *causes célèbres*".[142]

Legal methodology, as a rule, likes to concern itself with the *causes célèbres*, the landmark cases, or at least with cases where there is something new to say

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[139] Such manoeuvres especially concern the question of how to relate the present case to the previous court practice – for an example see Text at n. 110; *Probst,* Änderung (n. 31) 103 n. 549.

[140] See Text at n. 21; BGer. 23 June 2000, BGE 126 I 97 E. 2.b.

[141] See especially BGer. 20 December 2005, BGE 132 III 359; BGer. 31 May 2012, BGE 138 II 346; BGer. 30 October 2012, BGE 138 III 755.

[142] *Wiprächtiger,* recht 13 (1995) 143, 149 f.

about a legal question;[143] it was no different for most of this essay and I have pointed out why this is so.[144] Yet, a legal methodology that reduces its perspective to new legal questions comes at a high price, because it will – as the statement above makes clear – neither explain nor offer any guidance to a considerable number of cases, if not most of them.

Lying behind the difference between "routine cases" and "causes célèbres" are, I think, two different ways in which legal discourse operates. Those ways of operating can be captured in the concepts of explanation and argumentation. The main idea is as follows: if we know how to decide a case, we do not need to argue about it. If we know something, we do not argue but explain; we face a pedagogic rather than an argumentative task. Thus, where a court can decide a case by merely drawing on an existing court practice, it explains the law as it stands. It is only *after* such explanations are exhausted or challenged by new arguments – submitted, for example, by the parties or legal scholarship – that the court needs to switch into the mode of argumentation.[145]

The two modes of operation may coincide in the same case. For this the *Inducements* case provides a good illustration: the question as to whether banks were to refund to their clients the payments they received for fund distribution was, as a matter of principle, a question to be determined by argumentation; the question, however, as to whether the client in this particular case had waived his rights for a refund could be decided by a straightforward application of the previous case law. On this point, the decision therefore does nothing more than *explaining* the effect of the latest court practice for the case at hand.[146]

The difference between argumentation and explanation may also apply to the entire case. This situation is reflected to some extent in the Court's procedural rules we have seen earlier. Cases in which an appeal must obviously be allowed because (i) a lower court decision deviates from the Supreme Court's practice and (ii) no reason exists for re-examining this practice, can be disposed of in a more straightforward procedure; in particular, the decision requires only a brief justification *(summarische Begründung)*. Appeals that must obviously be dismissed follow the same procedure.[147] A simplified pro-

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[143] The judges' observations provide no exception, see *Müller,* Rechtsbildung und Rechtsfortbildung (n. 44) 380 ff.; *Nyffeler,* Kollegialgericht (n. 60) 116 ff.; *Schubarth,* KritV 71 (1988) 86; *idem,* recht 10 (1992) 122, 123 ff.; *idem,* recht 13 (1995) 151; *Seiler*, Rechtsanwendung (n. 11) 16 ff.; *Walter,* recht 17 (1999) 157, 164 f.; *idem,* recht 21 (2003) 2, 7; *idem,* ZBJV 144 (2008) 126, 140 ff.; *Wiprächtiger,* recht 13 (1995) 143, 145 ff.

[144] See Text at n. 11.

[145] I have presented a more elaborated version of this idea elsewhere – see *Coendet,* Rechtsvergleichende Argumentation (n. 83) 117 ff.; *idem,* Legal Reasoning: Arguments from Comparison, ARSP 102 (2016) issue 3 (forthcoming).

[146] BGer. 30 October 2012, BGE 138 III 755 E. 5, 6.

[147] See Text at n. 34 and for the details Art. 109 BGG.

cedure applies also to cases where the appeal is clearly not admissible; and as to the justification of such a decision we read that it is "restricted to a brief statement of the reason for inadmissibility".[148] In short, we may therefore say that in cases to which such a simplified procedure applies the Court deals with them by using legal explanations.

c) Judicial research

In contrast to standard cases, judges usually concern themselves with leading and landmark cases;[149] and that is no different for legal methodology in general. The cases and the judges' statements have, however, shown that traditional methodology has little to do with the complexity of the making and the presentation of a decision.[150] For some, this will not be very surprising. Writing within the German legal context, Josef Esser argued more than forty years ago that the "academic methodology" means to the judge "neither help nor control".[151] From the Swiss perspective, it does not seem to be much different. Although the cases analysed suggest that the "academic methodology" does have some remaining value, and although judges give some thought to how their judicial methodology works,[152] I think we must describe the method used by the Supreme Court as rather intuitive, as a sort of self-guided practice that is for the essential part not reflected.

That the practice is not reflected shows in the standard cases as well as in those cases where a new legal question needs to be decided. While for standard cases this may be less problematic because they can be *explained* on the basis of an existing practice, the issue becomes more worrying where unresolved legal problems are subject to legal argumentation. What are the courts doing in such cases and what marks the point where the decision can be taken? In view of the political, economic, and social significance of the cases I have listed here, it becomes evident that we should have every interest in answering these questions. Yet, the judges are of course right if they claim that it is not them but rather legal scholarship that should provide the answers.[153] One trajectory to answer the questions has been shown by those scholars who have suggested conceptualising legal methodology as a "theory of practice" *(Theorie der Praxis).*[154]

The idea that theory should reflect practice lays the ground to a recent theory of argumentation I will introduce now in order briefly to sketch a possible

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[148] See Text at n. 38 and for the details Art. 108 BGG.

[149] See references in n. 143.

[150] See Text at n. 90 and following n. 132.

[151] *Josef Esser,* Vorverständnis und Methodenwahl in der Rechtsfindung[2] (Frankfurt am Main 1972) 7; his view has been restated by *Neumann,* Rechtstheorie 32 (2001) 239, 239.

[152] See Text following n. 130 and at n. 95.

[153] See Text at n. 93.

answer.[155] The theory is the same as that underpinning the difference between explanation and argumentation. According to this theory, argumentation comes in when explanations based on our existing knowledge are exhausted. It begins with a situation where we do *not* know what is the right thing to do and where, therefore, we must formulate a thesis as to how to orientate our practical action. For judicial decision-making this means: in a situation where there is insufficient legal knowledge (e.g. no established court practice) to solve a legal problem, the court must define a thesis for solving it. This thesis then needs to be justified and tested in a process of argumentation. For a judicial decision this implies reviewing, especially, the arguments in the previous court practice, the legal doctrine, and the parties' statements, in order to see whether on that basis a solid solution to the legal problem at hand can be constructed. A solution will be solid if it can stand the test of criticism. A court must therefore strive either to refute or to integrate all the objections that are put forward against the solution it has in mind. If no objections remain, the court's argument will be valid. And this validity marks the point in the process of decision-making where nothing more can be done than actually to *take* it.[156]

I will again use the *Inducements* case to illustrate the point: the unresolved problem in the earlier decisions of the Supreme Court was whether banks are to refund their clients the inducements they received for fund distribution. The precedents only concerned situations where the banks paid inducements to external asset managers (i.e. where the banks were not on the receiving end as service providers).[157] The problem that could not be explained by a straightforward application of the previous case law was, therefore, whether the new case called for a similar treatment; this was, in other words, the Court's research question. The thesis that the Supreme Court put forward in its decision was that the cases must be treated equally. In its decision, the Court presents an elaborate solution for that thesis that draws, above all, on previous case law, legal doctrine and the parties' arguments. Within this constructive part of the decision, the Court also *thoroughly* assesses the arguments that can be raised against its thesis. In taking this approach, it can be said that the Court reached a *valid* conclusion as to its research question.

It is that courts have the duty and the power to decide a case even where they do *not* reach a valid conclusion because objections remain. Thus, there

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[154] As a starting point see, again, *Esser,* Vorverständnis und Methodenwahl (n. 151) 7; subsequently *Friedrich Müller/Ralph Christensen,* Juristische Methodik[11], vol. I (Berlin 2013).

[155] *Harald Wohlrapp,* The Concept of Argument (Dordrecht 2014).

[156] For a much more detailed account of this approach from a legal perspective see *Coendet,* Rechtsvergleichende Argumentation (n. 83) 90–132; *idem,* Legal Reasoning: Arguments from Comparison, ARSP 102 (2016) issue 3 (forthcoming).

[157] BGer. 22 March 2006, BGE 132 III 460; BGer. 29 August 2011, BGE 137 III 393.

are cases where this standard for a valid argument will be closer to an ideal than a reality. Nevertheless, this approach seems to be close to what judges have in mind when they are reflecting on their decision-making. It makes sense of the idea that judges strive to make their decision "critique-proof",[158] and of the proposition that a decision should openly discuss why certain arguments prevail and that it should be combined with a continuous willingness to account for persuasive criticism in later cases.[159]

The view that a court should account for persuasive criticism in later cases allows us also to understand why the validity of an argument as to a certain legal problem is intrinsically unrelated to the issue of *res judicata*. As mentioned, courts can and must decide in every case. The importance of argumentation in law, however, goes beyond the single case. Judicial research in the process of argumentation is not just a legal matter but a process that connects law to other contexts of modern society, i.e. to politics, the economy, ethics, family, religion, etc. Thus, in the bigger picture, legal argumentation searches for new orientation not merely within the law, but within society; and this process cannot end with just one case but, indeed, should be a *continuous* discussion in which legal arguments that were once valid are open to challenge. This broader view of legal argumentation seems to fit the judges' self-descriptions, be it in their concern for the precedential effect of their decisions or in the opinion that courts are to produce certainty of orientation in a pluralistic, postmodern, and deconstructivist society.[160]

III. Conclusion

This essay attempts to elucidate judicial decision-making by enquiring into the statements of Swiss Supreme Court judges on the one hand, and their decisions on the other. In relying on those two data sets, the article aims to illustrate how decision-making actually takes place in the practice of today's Swiss Supreme Court. I trust that it says something more than the legendary tales that are always so readily at hand on this matter and that it therefore provides a more solid starting point for further research – further research that is needed, as pointed out in the methodological *caveats* for this enquiry. Overall, there are three important lines for future research:

Empirically, we should try to broaden and deepen the analysis. The cases and processes analysed should include not only the highest courts but also the lower courts. Of great importance is, moreover, an extension of the perspec-

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[158] In the discussion of this paper at the conference in Hamburg, this point has been made by Professor Klaus Hopt based on his own judicial experience.

[159] *Schubarth,* recht 10 (1992) 122, 127.

[160] *Klett,* recht 28 (2010) 83, 83.

tive to questions of fact and the decision-making processes relating to them. For a representative analysis, one must also be careful not to confine oneself to a single area of law, but to consider at least some parts of private, public, and criminal law. A deeper understanding may be achieved by researching court files because here the decision-making process can be traced more fully than by just relying on the published reasons.[161] This is especially instructive in a jurisdiction where no dissenting opinions are published.[162] For a more systematic overview that also includes earlier periods of court practice, one could finally consider incorporating current approaches developed by legal linguistics, which undertake a computer-based analysis of large legal corpora.[163] The aim of all this should be to understand better what happens on the ground, viz. in practice.

Practice, however, can not understand, explain, or criticise itself. For this we need concepts – to borrow Kant's formula "intuitions without concepts are blind".[164] The second line of research should therefore be conceptual. It should include at least the following two tasks. First, we must devise a theoretical concept that allows observing what judicial decision-making is about. In this respect, the analysis carried out for this article has confirmed what has been maintained in legal theory for quite some time: that the traditional legal methodology does not provide an appropriate frame-work for understanding the making (or even the presentation) of a judicial decision.[165] Second, a theory of judicial decision-making may go one step further and look for a concept that allows guiding judicial practice. For both tasks, I have pointed out some blind spots in the picture that emerges from the judges' statements and decisions. I have suggested some concepts based on modern argumentation theory for dealing with those blind spots, and I hope to have shown that it seems worthwhile to track them further.

As a third line of research, it would be interesting to take the enquiry to the comparative level with an international and transnational outlook. To this end, the empirical and conceptual line of research could possibly contribute some ground for comparative reflection. This is not to suggest that the analysis in other jurisdictions should be done in the same way as it was undertaken here. In particular, I would not recommend that the concepts put forward in this article for analysing blind spots in the decision-making process should be taken simply as a template for other jurisdictions. The comparative stimulus I

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[161] I owe this point to a question Eike Hosemann raised in the discussion.

[162] The approach is, of course, confined to jurisdictions that give access to court files for research purposes, and presupposes that the files have not been destroyed.

[163] Zugänge zur Rechtssemantik: Interdisziplinäre Ansätze im Zeitalter der Mediatisierung, ed. by Friedemann Vogel (Berlin 2015) ch. 3.

[164] *Immanuel Kant,* Kritik der reinen Vernunft (Ed. Frankfurt am Main 1974) 98 (B75/A51).

[165] See Text at n. 151.

have in mind is a different one. The approach taken here – with its scope, methodology, concepts, and its (own) blind spots – could perhaps inspire researchers from other legal systems and other fields of law to ask new questions about the process of judicial decision-making in their own systems and fields. And it may be from those questions that a discussion of similarities and differences, in a word, comparison begins.

Judicial Decision-Making in England and Wales

Matthew Dyson[*]

[*] With particular thanks to *Reinhard Zimmermann* and the delegates at the Hamburg Symposium on 4/5 December 2015, as well as *Lord Walker of Gestingthorpe, Sir Rupert Jackson, John Bell* and *Duncan Fairgrieve.*

> *In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years.*[1]

So began the speech of Lord Denning, Master of the Rolls, in *Miller v. Jackson* in 1977 concerning a claim in nuisance and negligence for damage done by cricket balls to new houses nearby. It is perhaps predictable from these opening lines that Lord Denning had held the cricket played at the ground in Durham did not constitute the torts of nuisance or negligence. However, his two colleagues in the Court of Appeal were unpersuaded by his logic and his surprising view of the facts; they found the club negligent. Lord Denning did manage to persuade one of his colleagues that there should be no injunction to prevent cricket being played, only damages in lieu of the injunction. It is an important lesson in not just winning majority decisions, if not on the point of liability, then on the point of remedy. It also shows why Lord Denning, having been promoted to the House of Lords, returned to spend a remarkably long time in the Court of Appeal: to make a majority in the Court of Appeal he had only to persuade one colleague, not the two peers it would require in the House of Lords. In addition, the Court of Appeal was, and still is, the significant appeal court in practice, since the majority of appeals do not then proceed further to the Supreme Court, which hears less than a hundred cases a year.

Individual judicial style and reasoning can vary significantly. This article will focus not on individuals like Lord Denning, but on the wider picture of decision-making (leaving just enough space for a few more revealing anecdotes).[2] The core argument is that judicial decision-making in England and Wales is characterised by a mass of possible authority and influence which judges deal with through a range of relationships, practices and conventions. The careful and deliberate picking through the mass of material is what best describes judicial decision-making in England today. It is certainly not simp-

[1] [1977] QB 966 (CA), 976.

[2] Further general perspectives are available in *Alan Paterson,* Final Judgment: The Last Law Lords and the Supreme Court (Oxford 2013), *Penny Darbyshire,* Sitting in Judgment: The Working Lives of Judges (Oxford 2011) and *Michael Zander,* The Law-Making Process (Oxford 2015) esp. ch. 7.

ly a matter of being a slave to a dry concept of precedent. The article structures this enquiry around six points in decision-making: (I.) What is being decided; (II.) where decisions are made; (III.) who makes the decisions; (IV.) for whom decisions are made; (V.) how decisions are made; and finally (VI.) what form decisions take: writing judgments.

The focus of the paper's exploration will be the senior judiciary, that is, judges in the High Court, Court of Appeal and, perhaps in even more detail, the Supreme Court. In addition, the paper looks at English law: for this purpose, it does not include Scottish law, or the law of Northern Ireland, each of which have substantive, procedural and institutional differences; references to English law does include Welsh law.[3]

I. What is Being Decided

1. Decision-making as law-making

Judicial decision-making primarily means deciding cases; and to the modern English judge, decision-making entails, at times, judicial *law-making*.

The modern view is that judges do make law.[4] In the past, distinguished writers of the common law, such as Matthew Hale, argued that judges merely declared the law, rather than that they played a role in making it.[5] This "declaratory" theory saw the common law as ancient customs and usages made known by the judges, the "living oracles" as Blackstone described them,[6] their judgments evidencing the law, not making it. Although Dworkin[7] and others breathed new life into the declaratory theory, it is generally regarded as defunct. Lord Reid once dismissed it by saying "we do not believe in fairy tales anymore […] for better or worse judges do make law".[8] Virtually the whole of the modern law of tort and contract, for example, was constructed by the judges consciously moulding and adapting the principles of the law in response to the changing usages of society. The same is certainly true of the law of equity.

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[3] Using the simplification "English law" to include "Welsh law" will likely become even less valid over time, particularly as the National Assembly for Wales legislates more.

[4] See, e.g., *Lord Mackay of Clashfern,* Can Judges Change the Law?, Proceedings of the British Academy LXXIII (1987) 285.

[5] *Sir Matthew Hale,* History of the Common Law[6] (London 1820) 89–91.

[6] *Sir William Blackstone,* Commentaries on the Laws of England[13], vol. I (London 1800) 69.

[7] *Richard Dworkin,* Taking Rights Seriously (London 1977).

[8] *Lord Reid,* The Judge as Law Maker, Journal of the Society of Public Teachers of Law (New Series) 12 (1972–1973) 22–29, 22; *Paterson,* Final Judgment (n. 2) 320.

2. Precedent

What, then, is the role of precedent?[9] The term is used in England in a wide sense, to mean any prior decision which is *relevant,* and in a narrow sense to mean the part of any decision which is *binding* on a later court.[10] The wider use is more common and perhaps more useful as a starting point, and we can then go on to ask whether an individual precedent is relevant and binding or persuasive (directly, or by analogy). The divide between *making,* as opposed to *declaring,* law, can also be seen in what justifications one adopts for rules of precedent, that is, the rule that prior decisions should be followed where possible.[11]

On the one hand, there are formal rules. The most important of these rules is that a more senior court of record's decisions bind all courts below. For these purposes, a court of record is a court whose proceedings are recorded, which has a power to fine or imprison for contempt of court and whose powers and existence are separate from the judge(s) who make it up. The formal rules associated with precedent like this have historically been called *stare decisis*, an instruction to "let the decision stand". In practice, the most significant feature is that the Court of Appeal binds all lower courts, save where there are two different Court of Appeal decisions which seem to disagree,[12] when a lower court can select which to follow; the Supreme Court binds all, other than itself. There is one key exception to this, which highlights the fact that English judges acknowledged to be fallible: they are not assumed to *know* the law. As a result, a case does not form a precedent where it is found to have been decided *per incuriam,* in other words through a mistake on the law of the time.[13] This happens rarely, since the judge not only relies on each side to argue to the best of their ability but also reviews and challenges those submissions.

On the other hand, these formal rules do not capture how precedent really works in the minds of judges, advocates and others. For centuries, judges have not usually seen themselves as up against precedent; rather, precedent creates the framework of legal certainty within which legal uncertainty, and

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[9] See generally, *Rupert Cross/J.W. Harris,* Precedent in English Law[4] (Oxford 1990); *Neil Duxbury,* The Nature and Authority of Precedent (Cambridge 2008); *D. Neil MacCormick/Robert S. Summers* (eds.), Interpreting Precedents: A Comparative Study (Aldershot 1997), esp. ch.1 and 10 and particularly *Simon Whittaker,* Precedent in English Law: A View from the Citadel, European Review of Private Law 14 (2006) 705–746.

[10] *Zenon Bankowski/D. Neil MacCormick/Geoffrey Marshall,* Precedent in the United Kingdom, in: MacCormick/Summers, Interpreting Precedents (n. 9) 323.

[11] *Bankowski/MacCormick/Marshall,* Precedent (n. 10) 330–335.

[12] *Young v. Bristol Aeroplane Co.* [1944] KB 7 (CA), including where a later House of Lords (now Supreme Court) decision has impliedly overturned one of those Court of Appeal decisions and where the earlier decision was *per incuriam.*

[13] *Cross/Harris,* Precedent (n. 9) 148–152.

resulting disputes, are framed. The purpose of precedent is not to end the search for the best rule. Rather, precedent seeks to shape the material handed down from previous decisions, remaining faithful to the principles underlying those decisions. Understanding precedent requires the patience to accept that as judges gain experience they will also gain more power, and hopefully, more wisdom, to distinguish, set and even overturn precedents. It is only in simple cases where an English judge would search for an appropriate precedent and apply it without difficulty; cases which in other legal systems might be solved by the simple application of a code provision.

Judges must interpret statutory rules of law in line with precedent. Some interpretation of statute will always be necessary, it is thought, and the same is true of common law rules. The beauty is in solving disputes within the existing framework of the law, and only adding new rules where required. That goal may require careful analysis of the rules of law from whatever source and applying or distinguishing precedents based on their material facts. From late in the nineteenth century, in its days as the highest appeal court, the Appellate Committee of the House of Lords authoritatively stated that it could not overrule itself, only Parliament could.[14] This persisted until 1966,[15] when the House of Lords decided that it could depart from its own judgments; before then it had only been able to distinguish an earlier case, perhaps to the point of 'restricting it to its own facts'. Lord Mackay once explained an English common lawyer's approach thus:[16]

"By allowing the vast bulk of disputes to be settled in the shadow of the law, a system of precedent prevents the legal apparatus from becoming clogged by a myriad of single instances. It reflects a basic principle of the administration of justice that like cases should be treated alike and therefore generates a range of expectations from different participants in the legal process. Rules of law based on a system of precedent are therefore likely to exhibit characteristics of certainty, consistency, and uniformity. But such rules, depending on the practices of the courts, are, by the same token, liable to prove difficult to remove or modify."[17]

Any resistance to change or modification in the system of precedent will somewhat depend on the view of an individual judge. Lord Goff, a particularly distinguished judge from the end of the twentieth century, thought in longer and less solely legal terms. For him, precedent was one of the mechanisms by which legal development by judges was shaped but it was based on the fact that:

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[14] *London Street Tramways Co. Ltd v. London County Council* [1898] AC 375 (HL), 379 per Lord Halsbury LC; the position almost certainly went further back, e.g., *Beamish v. Beamish* (1861) 9 HLC 274; 11 ER 735 (HL).

[15] Practice Statement (1996) 3 All ER 77.

[16] *Mackay,* Change (n. 4) 285

[17] Ibid., 289.

"Seen in the perspective of time all statements of the law, whether by the legislature, or by judges, or by jurists, are no more than working hypotheses. They are, quite simply, temporary approximations which some people in their wisdom have found to be convincing at certain points of time."[18]

Looking at it another way, compared to some countries, English senior courts are not so much correcting earlier judges, as correcting the precedents guiding everyone. The partner of such an approach must be clear reasoned decisions, showing the principle behind the decision, in order for the scope of the precedent to be understood, and of course, high quality and accessible reports of those decisions.

3. What judicial decisions are being made

While they have the power to change the law, most judges spend a very large part of their time doing far less glamorous work. Cases are often about the simple application of rules, rules which are often procedural, sometimes substantive. A significant amount of time is spent 'on the papers' for often standard factual disputes and in proactively guiding cases through the system, known as 'case management'.[19] All trial judges are involved in such procedural questions though they are sometimes focused in the hands of a separate judge, such as a Master of the Queen's Bench Division. So too will costs and other matters have specialised advocates and fora. It is not just trial courts who have to deal with uninteresting matters. Even senior judges can spend a lot of time in judicial administration or on highly fact-dependent disputes. Take a recent claim in occupier's liability for personal injury caused by tripping and falling between an earth path, shrunken perhaps by the years of warm English summers, and the pavement. The failure of defendants to top up the earth had caused a 6 cm gap. The judge said that analysing the case had, "given me a considerable amount of thought in the way that a case often does not."[20] One must have some sympathy for a judge who is forced to find a 6 cm gap thought-provoking.

4. The building blocks of judicial law-making

For novel and/or important issues of law, at least three factors must coincide:

First, *claimant motivation:* litigation is expensive so claimants must be very motivated. Civil actions in higher courts, for example, require counsel and their specialisation, and skill is expensive. The outcome is rarely certain

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[18] *Lord Goff,* Judge, Jurist and Legislature, Denning Law Journal 2 (1987) 79–95, 80.

[19] Especially under the recent Civil Procedure Rules, Criminal Procedure Rules and Family Procedure Rules.

[20] *Butcher v. Southend-on-Sea Borough Council* [2014] EWCA Civ 1556 (CA), [7] per HHJ Yelton.

in advance, and while recovering legal costs if you win is likely, that does not mean all costs will be recovered.[21]

Second, the *Defendant must be amenable to being sued.* First, the defendant must be found able to be brought before the court's jurisdiction and have the resources to satisfy any judgment against him, which very often means being insured or self-insuring. Second, the defendant must also contest the case.

Third, *court-resolution:* litigation must be the appropriate vehicle for legal development, rather than mediation, arbitration or another means; some areas of law have mandatory or discretionary alternative dispute resolution programmes.

These three conditions are not obviously met very often. This is particularly important where the law is uncertain. Judicial decision-making will only be engaged where the matter is uncertain *and* has sufficiently wide-reaching consequences that the litigation risk, cost and effort is worth the final answer. One of the fears in the English bar and bench at the moment is that important cases are not coming to light as much as they did and as much as they should. This affects some areas of law more than others, but it is a wider fear.[22] Judges are not deciding some of the important cases, because litigation is a lower priority in a time of austerity. It is a particular facet of the English judicial mind that it phrases the fear of a lack of litigation of certain cases in terms of *missing out on interesting cases,* but especially as a lack of the cases that *are needed to develop the law.*

5. Extra-judicial decision-making by judges

Judges also perform an important function in decision-making outside of the court room. English society has carved out a specific role for judges in conducting public inquiries, effectively judicial decision-making in a non-judicial context. According to Beatson, 30% of major Commissions and inquiries in the twentieth century were conducted by a judge, with 58% between 1990 and 2005 being chaired by a serving judge.[23] This includes reports which propose and/or otherwise led to legislative developments in the law[24] but extends to some of the most famous *public inquiries* in the last fifty years. For example a recent inquiry was into the actions of the British armed forces in Northern Ireland on Sunday 30 January 1972, known as 'Bloody Sunday'. Lord Saville chaired it, being away from the House of Lords for

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[21] See generally, Civil Procedure Rules, Part 44.

[22] E.g., in civil justice in the County Court: *Darbyshire,* Sitting (n. 2) ch. 11 esp. 227.

[23] *Jack Beatson,* Should Judges Conduct Public Inquiries?, Law Quarterly Review 121 (2005) 221–252, 221.

[24] E.g., *Lord Pearson,* Royal Commission on Civil Liability and Compensation for Personal Injury (London 1978), Cmnd. 7054.

over five years, the report then being published in 2010.[25] These inquiries are good examples of how senior judicial figures are asked to lend their qualities of fact-finding, independence, intellectual ability and good judgment to the public good. It is somewhat surprising that the already overworked judiciary should be called upon to lend their judicial *gravitas* so often, suggesting almost a habituated call or a lack of independent alternatives. Such judicial inquiries also risk jeopardising the independence that the judiciary must have, and thankfully, are generally seen to have: a judge cannot "depoliticise an inherently controversial matter".[26] The inquiries might provide a change, if not a rest, from the arduous court schedule. More importantly, they show judges as being willing to contribute to wider civil society.

Judges also have a tradition of giving lectures or addresses to learned societies and meetings of their legal brethren. There they speak on a variety of topics, including decision-making and, circumspectly, the issues in the decisions they have made. In some cases, senior judges give dozens of such addresses in a year. For example, the Supreme Court website alone holds the texts of 33 lectures given by Supreme Court justices in 2015. Lord Neuberger, President of the Supreme Court, gave 14 of them, and has spoken often in the last few years about aspects of judicial decision-making.[27] In managing such speaking commitments, senior judges will typically have help from judicial assistants or, in certain cases, other support, such as from the Principal Legal Adviser to the Lord Chief Justice and Master of the Rolls, John Sorabji, who can be seen credited in the first footnote in a number of lectures, speeches and reports.[28] Where possible, this article draws on such lectures as useful evidence of what judges are willing to say about their role. While in office judges quite rightly hesitate to speak on contentious substantive issues lest they have to decide a case on them at a later date; judicial method is therefore a safer topic, as are general principles. Given the number of occasions senior judges are asked to speak, it seems the audiences are quite content with this position.

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[25] *Lord Saville of Newdigate/William Hoyt/John Toohey,* Report of the Bloody Sunday Inquiry, Vols. 1–10 (London 2010) HC29-I. This report was itself a significantly fuller treatment than the original inquiry by Lord Widgery, then Lord Chief Justice, in 1972: *Lord Widgery,* Report of the Tribunal appointed to inquire into the events on Sunday, 30 January 1972, which led to loss of life in connection with the procession in Londonderry on that day (London 1972) H.L. 101, H.C. 220. That report had been set up three days after the events and published on 10 April, around 11 weeks later.

[26] Ibid., 235.

[27] <www.supremecourt.uk/news/speeches.html>.

[28] See, e.g., <www.lawgazette.co.uk/analysis/lord-chief-justice-allowed-himself-to-be-labelled-enemy-of-free-speech/60639.fullarticle>.

II. Where Decisions Are Made

Judges themselves have the power to make judicial decisions only when they constitute a court of law, and the power they have there is determined by the powers of that court. Indeed, the re-organisation of the courts to something like their modern form which culminated in the Judicature Acts of 1873 and 1875 was tightly bound up with the development of the modern doctrine of precedent.[29] Furthermore, similar changes in statutory and self-imposed powers went hand in hand with the systematisation of reporting court decisions.[30]

Prior to the Judicature Acts, English courts had theoretically used a *common law* in that the same law was common to the whole country. But there were other ways in which the law was not common. In particular, there were complex and overlapping jurisdictions for many different courts. Today, the powers of different courts are largely set out in statutes, such as the Senior Courts Act 1981, and, for the inferior courts, the County Courts Act 1984 and the Magistrates' Courts Act 1980.

One important example of these courts had been the distinction between courts of "common law" and "Equity" (often called Chancery, as it originated with the Lord Chancellor). Equity was an alternative to the rules of the common law; it was based on principles and flexibility and applied in a separate court system. In particular, it created new *rights* (most famously, through the trust), new *remedies* (such as injunctions and the rectification of a document) and new *procedures* (such as discovery of documents, now known as disclosure). If a claim dealt with both common law and equity, separate actions would have to be brought, one in each appropriate court. After the Judicature Acts, all courts would be competent to exercise both forms of law; equity prevails if there is a conflict with a common law rule.[31] Note that despite the fusion of the administration of common law and equity, there is still a Chancery Division of the High Court; however that is a matter of specialisation, rather than a formal rule, and appeals from all Divisions of the High Court go to the Civil Division of the Court of Appeal.

Today, English law has a unitary court system.[32] All questions of law to be decided by judges will follow a track which ends in the Supreme Court; out-

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[29] *Cross/Harris,* Precedent (n. 9) 24–25. The 1873 Act was to remove the jurisdiction of the House of Lords, but its coming into force was delayed and ultimately that removal was repealed by the Appellate Jurisdiction Act 1876.

[30] E.g., the Incorporated Council of Law Reporting was founded in 1865, with the purpose of preparing and publishing law reports. Prior to that cases were reported in nominate reports, named after the lawyers who did the reporting; the majority of which, from 1220 to 1866, have been collected in the English Reports (ER).

[31] See now the Senior Courts Act 1981, s. 49(1)–(2).

[32] This is a term that is all the more ironic considering that the *sources* for that jurisdiction are spread over so many statutes and practice directions.

side the exceptional circumstance of a 'leapfrog' appeal directly from the High Court to the Supreme Court,[33] all cases will also go through the Court of Appeal, either the Criminal or Civil Division. Within any of these three levels, all the judges could be expected to hear cases in any field of law. That said, there is a tendency for judges to spend a period of time in one area of law, if not one specialised part of a court. We turn now to introduce the different courts in England.[34]

1. United Kingdom Supreme Court (UKSC)

The UKSC is the highest court in England and Wales, and for civil matters, for Scotland as well, since 2009.

Prior to this, from the date of the Judicature Acts the highest court was the Appellate Committee of the House of Lords.[35] There, the judges, Lords of Appeal in Ordinary or *Law Lords,* were also members of the House of Lords as a legislative body; able to speak in debates on legislation, but by convention not voting while sitting as judges. Since the judges were technically speaking in Parliament when handing down their decisions, those decisions were called *speeches* rather than judgments.

Since becoming the 'Supreme Court', and moving to the Middlesex Guildhall just across Parliament Square from the Palace of Westminster,[36] those *Justices* who had been Law Lords remain members of the House of Lords but are now unable to sit or vote in the House. The court is presided over by a President of the Supreme Court, assisted by a Deputy President; its members are Justices of the Supreme Court (JSC, pl. JJSC), and the prenominal Lord, or Lady, is still given. There are only twelve justices of the Supreme Court, though recently retired justices may still sit for a period after retirement.[37] Cases are heard by default in a panel of five but sometimes in a panel of seven and very occasionally as a panel of nine. The outcome of a case is determined by a majority of those on the panel, and it is not possible to abstain on questions relevant to the conclusion of the case. It is possible for an individu-

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[33] Administration of Justice Act 1969, ss. 12 to 16; these provisions are rarely used, typically only where there is a binding precedent from the Supreme Court from which the Court of Appeal could not depart.

[34] For a fuller introduction, see *Penny Darbyshire,* Darbyshire on the English Legal System (London 2014).

[35] The earlier history is more complex, with both Houses of Parliament having shared judicial functions.

[36] After the 1873 Judicature Act, the Law Lords heard cases in the Chamber of the House of Lords but after the neighbouring House of Commons was bombed during the Second World War, the now formally renamed "Appellate Committee" of the House of Lords moved to a nearby committee room during the renovation and stayed there until in 2009.

[37] See Constitutional Reform Act 2005, ss. 23(2) and 38–39; cf., for comparison, seven in the High Court of Australia, s. 5, High Court of Australia Act 1978.

al Justice to hand down a dissenting judgment, or a concurring judgment. The Supreme Court hears around a hundred cases a year, with oral argument rarely lasting more than two days of 4.5 hours each.

2. Judicial Committee of the Privy Council (JCPC)

This court is the highest court in civil and criminal matters for those commonwealth jurisdictions that have chosen to retain it.[38] These are mostly Caribbean states and are joined by the Crown dependencies, such as the Channel Isles, the U.K. Overseas Territories such as Bermuda, Gibraltar and St Helena and occasional rare ecclesiastical disputes within the U.K. Its most common clients today are Jamaica, Trinidad and Mauritius. The jurisdiction of the JCPC was previously much larger, covering all the countries of the British Empire. It is a committee of the larger Privy Council, a group of mostly politicians who have, for centuries, advised the Monarch.[39] It is housed with the Supreme Court and populated largely by the same judges, though others have been appointed to it on an ad hoc basis in the past. To sit on the *Board,* they must be Privy Councillors: many Court of Appeal judges are already Privy Councillors, as indeed are members of the highest appeal courts but other U.K. and Commonwealth judges are sometimes appointed for this purpose. The JCPC continues to hear around fifty appeals a year and therefore still represents a significant portion of time for the judges of the UKSC.[40] For what appears to be the first time, in October 2015 the Privy Council jointly heard a case with the Supreme Court.[41] The Privy Council does not sit within the formal structure of the system of precedent in England and their reports only have persuasive authority there.[42] The court does not apply English law,

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[38] See generally, JCPC Practice Direction 1, available at <www.jcpc.uk/docs/practice-direction-01.pdf>. The JCPC was originally created by the Judicial Committee Act 1833.

[39] The most significant committee of the Privy Council now is the Cabinet, the single most important body within the Government.

[40] A number of cases which has sometimes led to disquiet. In 1990, the senior Law Lord, Lord Browne-Wilkinson blamed city solicitors for taking on Caribbean criminal appeals, particularly death row appeals, *pro bono*: *System Administrator,* Browne-Wilkinson slams City lawyers, The Lawyer (17 May 1990), available at <www.thelawyer.com/browne-wilkinson-slams-city-lawyers/?mm_5683cc7d53a3d=5683cc7d53ae7> (free registration required). He suggested that a quarter of the time of the Appellate Committee of the House of Lords' time was taken up with such appeals. The same question of manpower, with perhaps a similar sentiment, was echoed by Lord Phillips, the first President of the Supreme Court in 2009, *Michael Peel/Jabe Croft*, Privy Council hampers Supreme Court, Financial Times (20 September 2009). Lord Phillips suggested the proportion of the Justices time spent on JCPC cases had reached 40%.

[41] *R v. Jogee* [2016] UKSC 8; [2016] UKPC 7.

[42] The decision is binding within the Commonwealth country from which the appeal was heard.

but, to the best of its ability, it applies the law of the country from which the appeal is heard. Most commonly such countries choose to appoint English solicitors who retain English barristers to argue the case, with a strong tradition of using the same or similar lawyers for a range of cases from that country, which in part builds up some expertise in that country's laws. No other charge is levied on the country from where the appeal comes for the services of the JCPC. Very occasionally the Privy Council has sat in the country from which the appeal was made. Technically the Judicial Committee advises the Queen in Council on how she should reply to the petition, so the decision comes in the form of a report from the Board but in practice it is now often called a *judgment.* From 1966, the Privy Council allowed dissenting opinions, whereas previously the fact of any dissent and who dissented would have been merely noted in the judgment, with no reasoning in dissent actually given. This contrasted poorly with the House of Lords where dissenting speeches were given, and led to pressure for change.[43] This change occurred, coincidentally enough, at the same time that the House of Lords decided that it would be able to depart from its earlier decisions, something the Privy Council had always been willing to do.[44]

3. Court of Appeal of England and Wales

The Court of Appeal has 38 judges, known as Lord/Lady Justices of Appeal (LJ, pl. LJJ)[45] and hears all civil and criminal appeals. The Lord Chief Justice is the head of the Judiciary, and President of the Criminal Division of the Court of Appeal. The Master of the Rolls is the second most senior judicial rank in the Senior Courts, and is President of the Civil Division of the Court of Appeal.[46] Other than this Criminal/Civil division, the Court of Appeal is one court, with the Presidents of the Divisions deciding on who will constitute the three person panels to hear cases. Quite frequently, the chair of a panel will be a Lord Justice of Appeal, and at least one of the other two members will be High Court judges; this has largely been in an attempt to cut the waiting time to hear appeals. More difficult or significant cases might involve a full panel of Court of Appeal judges. The Court of Appeal hears over 2,000 cases a year, though many of the criminal cases are sentencing appeals and less complex than substantive appeals.

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[43] Judicial Committee (Dissenting Opinions) Order 1966, SRO 13 of 1966, rescinding an Order in Council of Queen Victoria of February 1878 reaffirming that deliberations in the Privy Council must be kept secret.

[44] See, e.g., *Gibson v. USA* [2007] UKPC 52; [2007] WLR 2367.

[45] One is on secondment as the Chairperson of the Law Commission of England and Wales, hearing fewer cases.

[46] These two posts are traditionally filled from those who have already ascended to the Supreme Court (previously, House of Lords) who then return to lead the Court of Appeal.

4. High Court

The High Court is the first instance tribunal for significant civil cases. It exists in a collection of forms in London as well as in seven circuits around the country with normally London-based High Court judges travelling to provincial cities to hear cases. Cases are normally heard by one judge, a Mr or Mrs Justice X (and, for example, "Mr Justice Cranston" is written as Cranston J).[47] A court could also sit as a Divisional Court, meaning two judges sit, usually one from the Court of Appeal and one from the High Court; this is most common in public law cases heard in the Administrative Court of the Queen's Bench Division. In addition to High Court judges, each Division of the High Court has masters attached, a master typically dealing with more of the case management and costs side of a case at the beginning and end of the dispute, while the High Court judge deals with the substantive questions of law. In fact, the majority of litigation only really comes before a master or registrar, as they settle before coming to full trial, or are disposed of in a summary trial, mediation or negotiated settlement. The High Court hears over 4,000 cases a year, though this is a small fraction of the litigation started. It should also be noted that there are deputy High Court judges who work part-time as High Court judges; they are typically senior barristers, very often those who have already become Queen's Counsel (though that is not a requirement). Part-time routes like these are increasingly important.[48]

The High Court is the most complex single court, featuring:

1. The Queen's Bench Division (QBD). It is the largest (at 73 High Court judges including a President and Deputy President) and widest Division of the High Court, hearing claims in contract, tort and for the possession of land. Many of its cases, such as negligence claims against solicitors or accountants or claims for possession of land, can be brought in the Chancery Division or in the Queen's Bench Division. Within the Division, there are specialist lists of cases, sometimes expressed as separate court. These courts are staffed typically by judges from the Queen's Bench and Chancery Divisions for a period of time, have special procedures,[49] and are specialised in dealing with particular legal issues. In addition, the QBD hears appeals on points of law from the Magistrates' Court by way of *case stated,* that is, there is no review of the facts at all. The specialised courts are the:
   1. Commercial Court (including arbitration disputes);
   2. Admiralty Court;

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[47] There is now one judge who uses the title Ms Justice, Russell J. It is very rare that there will be a jury: criminal juries would appear in the Crown Court, not the High Court, and civil juries only happen in libel actions, and often not even there.

[48] *Darbyshire,* Sitting (n. 2) ch. 4.

[49] E.g., for the Commercial Court, under Part 58 of the Civil Procedure Rules.

   3. Administrative Court;
   4. Mercantile Court (regional courts for larger commercial disputes); and
   5. Technology and Construction Court.
2. The Family Division. This Division hears cases relating to disputes about family, children and probate. It is a smaller division, with about 19 judges and a stronger representation of women judges; its head is the President of the Family Division.
3. The Chancery Division hears cases concerned with company law, partnership claims, conveyancing, land law, probate, patent and taxation cases, and consists of 18 High Court judges, headed by the Chancellor of the High Court. The Division includes three specialist courts: the Companies Court, the Patents Court and the Bankruptcy Court.

5. County Court and Crown Court

These are the workhorses of the judicial system, resolving the vast majority of disputes. In 2013, around 1.5 million civil claims were heard in the County Court and Magistrates' Court.[50] The *County Court* system was created in 1846 to provide a standard forum across the country for smaller civil disputes. The *Crown Court* presides over the more serious criminal offences, with the most serious offences, such as murder, often having a High Court judge preside. The Crown Court can also feature a jury to decide questions of fact.

The more difficult or significant work in these two courts is undertaken by over 600 circuit court judges through England and Wales. They are professional judges, drawn from senior practitioners, some of whom also sit in specialist jurisdictions like Chancery, Mercantile or the Technology and Construction Court. They are styled as His/Her Honour Judge X (e.g., HHJ Bridge). There are also district judges who deal with the majority of the cases in the county courts, and are full time judges. There are currently over 400 district judges, and a large number of deputy district judges, who sit part-time (for between 15 and 50 days a year). Finally, recorders are part-time judges drawn from practitioners and academics, who are expected to sit for at least 30 days in the year. They tend to sit more in the Crown Court, at least at the beginning of their term of office.

6. Magistrates' Court

The vast majority of criminal cases begin *and* end in the Magistrates' Court; in 2013 they dealt with over 1.6m cases.[51] Cases are decided by a panel of

[50] Court Statistics Quarterly (25 September 2014), available at <www.gov.uk/government/statistics/court-statistics-quarterly-april-to-june-2014> Table 1.1.

[51] Court Statistics Quarterly (n. 50) Table 3.2; almost a third were motoring offences and nearly half involved youth proceedings.

three lay magistrates advised by a magistrates' clerk or by a single legally trained professional district judge (Magistrates Court).[52] This court has significantly lower sentencing powers than the Crown Court.

7. Tribunals

The Tribunals, Courts and Enforcement Act 2007 created a unified structure for 107 tribunals, almost all tribunals in England, with appeal from a First-tier Tribunal to an Upper Tribunal and thence, possibly, to the Court of Appeal. The scope of these tribunals is vast, covering almost all immigration and asylum work, but also such things as School Exclusion, Mental Health and Land Registration. Where necessary, High Court judges can be called in to hear cases, but this is rare. The Senior President of Tribunals is a Court of Appeal judge. The members of these tribunals are known as tribunal judges or, if a layperson, a tribunal member (lay members now account for 1,114 out of 1,490 tribunal members).[53]

8. Other

English judges also spend time as judges on other courts,[54] particularly international courts. Famous recent examples include Sir Gordon Slynn, Sir David Edward and Schiemann LJ, at the European Court of Justice, and Sir Adrian Fulford, now Fulford LJ, who was a judge of the International Criminal Court. Interestingly, those who the U.K. sends to the European Court of Human Rights have tended not to be senior judges at the point of election, though typically leaders in their respective fields: such as Sir John Freeland, Sir Nicholas Bratza and Paul Mahoney. In fact, the latest appointment to the ECJ was from the bar, not the bench, in the person of Christopher Vajda QC in 2012.

As will be apparent, there are many forms of courts and judges and each judge has different experience and specialities. There are also many deputy positions to train and test those who might seek to become permanent or more senior judges. By comparison, there are remarkably few senior judges, that is, a little over 150 judges of the High Court, Court of Appeal and Supreme Court.

The general principle is that the more difficult or significant the case, the more senior the judge to try it should be. Similarly, the more senior the court,

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[52] Previously known as stipendiary magistrates.

[53] *Sir Jeremy Sullivan,* Senior President of Tribunals' Annual Report 2014 (February 2015), available at <www.judiciary.gov.uk/wp-content/uploads/2015/02/senior_president_of_tribunals_annual_report_2015_final.pdf>, 80.

[54] There are a range of others, such as the Court of Protection for financial or welfare matters for people who lack capacity. The tradition has a long ancestry, such as, for instance, Sir Geoffrey Lawrence and Sir Norman Birkett serving as the British judges at the Nuremburg Trials after World War Two, with Geoffrey Lawrence serving as President, and returning to England as Lord Oaksey and as a Law Lord.

the more significant the matter of law before it should be. In addition, first instance courts usually decide all the questions of law in front of them, even if some are logically sub-ordinate to other issues: trial courts would need to make sure that as far as possible even if an appeal is successful on one point, no new trial is necessary to determine others. It also shows that trial courts are, quite sensibly, deciding some questions which are, to them, not determinative of the case as they see it.[55]

A litigant may apply for permission to appeal from a first instance decision and from decisions of higher courts.[56] An appeal from the Court of Appeal to the Supreme Court will first be assessed by the Court of Appeal; if that court refuses, the litigant may petition the Supreme Court itself. The test is whether the appeal will:

> "raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal."[57]

Thus the Court of Appeal is an important gatekeeper for the Supreme Court and comity between the courts is obviously important, for reasons of workload if nothing else.[58]

III. Who Makes the Decisions

Setting out the structure of the courts has already introduced the range of judges in England, but some specific analysis of who those judges are will assist in understanding their decision-making.[59]

1. Place of the Judge in English Society

The identity and characteristics of judges are considered important in English society. Of course, what is actually important in society, rather than what habits are retained without thought, is a difficult question perhaps even more so amongst the English, who are often inclined to tradition. Senior judges are also public figures. This is particularly symbolised by the knighthood and accompanying pre-nominal 'sir' conferred on a man when he is appointed to the High Court; similarly a woman becomes a Dame.

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[55] See, e.g., *Whittaker,* Precedent (n. 9) 718.

[56] See generally, Part 52 of the Civil Procedure Rules and Parts 34 to 44 of the Criminal Procedure Rules.

[57] Supreme Court Practice Direction 3.3.3.

[58] See generally *Paterson,* Final Judgment (n. 2) 209–213.

[59] See generally *John Bell,* Judiciaries Within Europe (Cambridge 2006) ch. 6.

2. Who makes judicial decisions

Given their role in society, it might not be surprising that there has long been a trend of senior judges being white, male and at least middle-class. They have also been old compared to their colleagues in many continental legal systems: even today a lawyer can only become a judge after having worked as a practitioner, with High Court judges typically being over fifty years old on appointment; indeed, at present, the latest statistics show that none are under fifty.[60] At the same time, it must be acknowledged that such statements are generalisations, almost stereotypes, and the reality of the 36,000[61] judicial office holders in England and Wales, of whom only 3,230 are in the courts (the rest being in tribunals)[62] is different and, slowly, changing.[63]

a) Diversity

The gender, race, profession, location, sex, religion, age, disability or other characteristics of the judiciary are important but complex facets of judicial decision-making. According to the 2015 Judicial Diversity Statistics,[64] the position in England remains that the senior judiciary is dominated by older white males. These statistics are published in respect of gender (by which it appears to be mean sex, that is, biological sex, rather than gender), ethnicity, profession and location. Appointment statistics give an insight into other factors, such as disability, age, sexual orientation and religious belief, useful as a snapshot of entry to the judicial career in general.[65] There is some reason to hope for greater diversity in the future as some of the greatest diversity is found in the younger members of the judiciary.[66] Taking just sex and ethnicity as examples, at present:

1. 25% of the judiciary are women, but this breaks down as only 8% (1 judge) in the Supreme Court, 21% (8) in the Court of Appeal and 19% (21) in the High Court. The largest female share is amongst the deputy masters

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[60] *Judicial Office,* Judicial Diversity Statistics 2015 (30 July 2015), available at <www.judiciary.gov.uk/wp-content/uploads/2015/07/judicial_diversity_statistics_20151.pdf>.

[61] *Judicial College,* Judicial College prospectus 2014–2015, Foreword by Lord Thomas.

[62] *Judicial Office,* Judicial Diversity Statistics (n. 60) 4.

[63] See generally, *Darbyshire,* Sitting (n. 2) ch. 3–5.

[64] *Judicial Office,* Judicial Diversity Statistics and Tables 2015, available at <https://www.judiciary.gov.uk/wp-content/uploads/2015/07/Diversity-Tables-20151.xls> particularly Table 1.1.

[65] It is only a general insight, since some of the specific information has been generalised across all judicial posts to protect anonymity: *Judicial Appointments Commission,* Judicial Selection and Recommendations for Appointment Statistics, October 2014–March 2015, Reissued 3 November 2015, available at <jac.judiciary.gov.uk/sites/default/files/sync/news/jac-official-statistics-june2015-revised.pdf>.

[66] Ibid., 5 and 7.

at 40% (22), district judges (County Courts) at 31% (136) and deputy district judges (County Courts) at 37% (230). By comparison, the population of the United Kingdom was 51% female at the time of the last census in 2011.[67]

2. Some 6% of the judiciary are from black or minority ethnic groups, but there is only one such judge in the High Court, and none in the Court of Appeal or Supreme Court.[68] The only appreciable percentages are for recorders (7%), district judges (County Courts) (8%), deputy district judges (County Courts) (6%) and deputy district judges (Magistrates' Courts) (11%). Such minorities made up 14% of the population in 2011.[69]

This lack of diversity sadly mirrors the position in legal practice. For example, women now outnumber men taking law degrees, making up around 65% of the 23,000 places on first law degrees in 2014,[70] roughly 48% of 130,000 solicitors,[71] and 35% of the 15,700 barristers.[72] Nonetheless, only 11–12% of QCs or partners in City firms of solicitors are women.[73] In addition, while 50% of those being called to the bar are women, the Bar Council does not believe that an equal balance at all levels of the profession will be possible soon: fewer women than men actually practice at the bar once called, and more drop out of practice than men.[74] Of those who meet the eligibility criteria to be High Court judges, men outnumber women more than two to one

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[67] *Office for National Statistics,* 2011 Census: Population Estimates for the United Kingdom (27 March 2011) available at <www.ons.gov.uk/ons/dcp171778_292378.pdf>; for this purpose, including Scotland and Northern Ireland, but it is good evidence of rough parity in England and Wales.

[68] In point of fact, since this data was compiled, the first female Asian judge has been appointed to the High Court: <www.judiciary.gov.uk/announcements/high-court-judge-appointment-cheema-grubb/>.

[69] *Nomis,* Official Labour Market Statistics, Table KS201EQ, available at <http://www.nomisweb.co.uk/census/2011/KS201EW/view/2092957703?cols=measures>.

[70] *The Law Society,* Trends in the solicitors' profession Annual Statistics Report 2014 (April 2015) 35.

[71] 160,300 solicitors are on the Solicitors' Roll, but only 130,300 have Practicing Certificates; 14% of solicitors on the roll are from ethnic minorities: *The Law Society,* Trends in the solicitors' profession Annual Statistics Report 2014 (April 2015) 7–8.

[72] The very interesting report by the Bar Council sets out the steady decline in the proportion of women at the bar. It includes, interestingly, a final category after "QCs" of "Judges", showing that judicial office is still, plausibly, described as a career stage for barristers: *Bar Council,* Snapshot: The Experience of Self-Employed Women at the Bar (London 2015) 11.

[73] *Lord Neuberger,* Rainbow Lecture 2014 on Diversity (12 March 2014), available at <https://www.supremecourt.uk/docs/speech-140312.pdf>, [16].

[74] *Bar Council,* Momentum Measures: creating a diverse profession, summary of findings (London 2015), available at <www.barcouncil.org.uk/media/378213/bar_council_momentum_measures_creating_a_diverse_profession_summary_report_july_2015.pdf>, 2.

and only 6% are of those eligible are from Black, Asian or Minority Ethnic (BAME) backgrounds.[75]

The lack of diversity in the English judiciary, particularly its higher echelons, does not compare well with many other countries, whether from common law, civil law or other traditions. For example, the U.S. Supreme Court has had women, black, Italian American and Hispanic judges for much longer than the highest court in England; the Australian High Court currently has four men and three women; and Dame Sian Elias, the Chief Justice of New Zealand since 1999, sat in one of the last appeals from New Zealand to the Privy Council,[76] having been the first woman to sit in the JCPC, in 2001,[77] three years before the first woman sat as a judge in the House of Lords.

The link between judicial diversity and the quality of judicial decisions is a difficult one to prove and this is not the place to attempt it. There have recently been some impressive attempts at showing the value of diverse judicial experience, particularly sex and gender, on judicial decision-making[78] and particularly in judgments.[79] There are some characteristics which are seen as more relevant or significant than others, without it being explained why they are more so than others. For present purposes, decision quality is one way to understand the role of the judge, and the one this paper will focus on, using reported judgments as the evidence of judicial decision-making. Yet it should not be forgotten that judges do more than make decisions in isolation from society. First, judges represent and administer justice so they themselves should be selected in the most just fashion possible. It is patently unjust that the judiciary be open only to people with certain characteristics. Second, it is also illogical from an instrumental end, since if merit is indeed blind to such characteristics, by definition the judiciary is not selecting the most meritorious candidates. Third, the more the judges are able to understand the society in which they are to perform their judicial tasks, the better judges they will be; some part of that understanding must be predicated on an effective representation of that society, and having an appropriately diverse judiciary is a logical way to achieve that. Finally, society itself may further be engaged with, trust and respect the judiciary where it can recognise itself in them. It is certainly

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[75] *Judicial Appointments Commission,* Judicial Selection (n. 65) table 8. The term for, but not the content of, 'minorities' appears to differ in different sources.

[76] *Pora v. R* [2015] UKPC 9, [2016] 1 Cr App R 3 (PC).

[77] Hearing three cases between 29 January and 6 February, all concerning New Zealand: *O'Neil v. Commissioner of Inland Revenue* [2001] UKPC 17, [2001] 1 WLR 1212 (PC); *Valentines Properties Ltd v. Huntco Corp. Ltd* [2001] UKPC 14; *Glasgow Harley (A Firm) v. McDonald* [2001] UKPC 18, [2001] 2 AC 678 (PC).

[78] For a recent and impressive attempt to do so and more information on judicial appointment, see *Erika Rackley,* Women, Judging and the Judiciary (Abingdon 2012).

[79] Feminist Judgments: From Theory to Practice, ed. by Rosemary Hunter/Clare McGlynn/Erika Rackley (Oxford 2010).

difficult to subscribe to the alternative view, that the status quo is the only logical position, that no one but white older males is suitable to be a senior judge, or, less stridently, that there would not be benefits to having others as judges. This issue has reached national media attention, particularly famously now with a split, perhaps somewhat one-sided, in the Supreme Court.[80]

The current approach in England, and in many other countries, appears to be to focus officially on "merit", and include a specific reference to diversity. This does not attempt to prove the link between diversity and the quality of judgments, it merely assumes a link, and the need for action, but leaves that action to take place in a personal calculation on the part of the selectors. The most recent form, noted below under appointment, is to consider diversity a relevant criterion when candidates are of equal merit. This, of course, does not inform what constitutes "merit", other than imply that a contribution towards diversity is "merit" nor, perhaps, that overcoming significant discrimination in society itself is *merit* either. More recently, the Judicial Appointments Commission has launched a pilot programme to help those from non-traditional backgrounds to apply for 14 deputy High Court judge positions.

Part of the difficulty with the diversity of the bench is that for centuries senior judges have come from the upper levels of the bar,[81] which has historically been a difficult career to start, requiring significant private funds and the ability to absorb the risk of failing. While this picture has been improving, slowly, with scholarships from the Inns of Court and pupillage awards from Chambers, there are ever more students obtaining qualifying law degrees with no significant growth in the bar. Other routes are being considered; some are even being promoted by senior judges, such as training as a legal executive as a route to legal work in practice.[82]

b) Legal background

In general terms, judges will have been distinguished practitioners of English law and as judges they are expected to be able to handle any case given to them but their individual experiences and caseloads are very varied.

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[80] E.g., *Lord Neuberger,* Rainbow Lecture (n. 73), arguing that merit was the partner, not the antithesis, of diversity. See also *Baroness Hale,* Women in the Judiciary, The Fiona Woolf Lecture for the Women Lawyers' Division of the Law Society (27 June 2014), available at <www.supremecourt.uk/docs/speech-140627.pdf>; cf. *Lord Sumption,* Home Truths about Judicial Diversity, Bar Council Law Reform Lecture (15 November 2012), available at: <www.supremecourt.uk/docs/speech-121115-lord-sumption.pdf>.

[81] Today, only one High Court judge is from a career other than a barrister, *Judicial Office,* Judicial Diversity Statistics and Tables (n. 64) particularly Table 1.1., and only one Law Lord had been a solicitor, not a barrister: Lord Collins of Mapesbury.

[82] *Lord Neuberger,* Rainbow Lecture (n. 73) [25].

First, perhaps surprisingly to those outside England and Wales, until relatively recently, aspiring lawyers could enter legal practice immediately after secondary education via an extended on-the-job training process. It was not until the 1970s that a law degree (whether three year undergraduate or conversion after another degree) was required for legal practice; even then, it was to be followed by a vocational training period (typically of a year) before traineeship as a lawyer.[83] Part of the reasoning behind this was that for many years it was widely assumed that English law was not an academic subject but a practical one. English law was best learnt on the job and through patient and perhaps painful experience. A prior degree was still very common, but it was taken for its rigour, range or prestige, not for substantive legal knowledge. This tradition continues today and many of our senior judges did not read law. This includes the current President of the Supreme Court, Lord Neuberger, who studied Chemistry and then worked as a merchant banker, and Lord Sumption, who read and then taught History at the University of Oxford;[84] Lord Sumption was interviewed in Counsel Magazine in 2012 and said:

"The problem is that we have a generation of lawyers, and this applies to solicitors as well as barristers, who are coming into the profession with much less in the way of general culture than their predecessors. It is very unfortunate, for example, that many of them cannot speak or read a single language other than their own. I think the difficult thing about practising law is not the law but the facts. Most arguments which pretend to be about law are actually arguments about the correct analysis and categorisation of the facts. Once you've understood them it's usually obvious what the answer is. The difficulty then becomes to reason your way in a respectable way towards it. […] This is why the study of something involving the analysis of evidence, like history or classics, or the study of a subject which comes close to pure logic, like mathematics, is at least as valuable a preparation for legal practice as the study of law. Appreciating how to fit legal principles to particular facts is a real skill. Understanding the social or business background to legal problems is essential. I'm not sure current law degrees train you for that, nor really are they designed to."[85]

Cultural, linguistic, evidential and logic-based components are necessary to be a good advocate; they are also widely seen as important for a judge. However, the idea that a law degree does not develop those elements as well as a degree in history, classics or maths is open to significant doubt. In any case, each lawyer will be distinctive in various ways, with a mix of abilities and

[83] See generally, *Andrew Boon/Julian Webb,* Legal Education and Training in England and Wales: Back to the Future?, Journal of Legal Education 58 (2008) 79–121, 87 and *C. F. Parker,* Whatever happened to Ormrod, Journal of the Society of Public Teachers of Law (New Series) 3 (1974) 199–206.

[84] Lord Clarke studied economics and then law at King's College, Cambridge; until recently King's College, Cambridge, did not normally allow undergraduates to enter to read law, only to convert to law after having studied another subject and having done well for normally two years.

[85] *Stephen Turvey/Matthew Lawson,* In conversation with Lord Sumption, Counsel Magazine (8 July 2012) 16.

interests. In particular, it seems likely that, five or ten years into practice, having read law or some other subject will not have made much difference to the quality of that lawyer. The substantive knowledge will be far more specialised than law degrees can provide and the practical ability to get up to speed on new areas of law quickly will be essential.

What, then, does an aspiring lawyer study at university? In the last century or so some did study law but many did not. One of the traditional routes was to read classics at Oxford or Cambridge, before beginning work as a lawyer in practice, though that route is somewhat less common today. There was also a strong tradition of senior judges having practiced at the bar and then gone into politics, particularly for the Conservative Party, often as Attorney-General, Solicitor-General[86] or Lord Chancellor;[87] perhaps the last example of this pattern was Lord Simon of Glaisdale, who retired from the House of Lords in 1977.[88]

In addition, some senior judges who did study law did not originally study law in England. The most significant example of this was between 2000 and 2005, when three of the twelve Law Lords had studied law at a university in South Africa, learning a Roman-Dutch system of law, before coming to England. Two of those, Lords Steyn and Hoffmann, had meteoric and almost perfectly contemporaneous rises through the ranks of the bar and bench, becoming High Court judges in 1985, Court of Appeal judges in 1992 and Law Lords in 1995, and both serving until retirement (for Lord Hoffmann that was in 2007, four years later than Lord Steyn). The third was Lord Scott, whose similarly meteoric but slightly later rise also started, as Lord Hoffmann's did, with studying law at the University of Cape Town. However, after that Lord Scott chose Trinity College, Cambridge, rather than the Bachelor of Civil Law at Oxford, before accepting a teaching fellowship at the University of Chicago and, ultimately, being called to the Chancery bar and bench, sitting as a Law Lord between 2000 and 2009. Thus Lords Scott and Hoffmann also had English law degrees (though Lord Steyn did not). It would have been possible to constitute a panel of five out of twelve in the House of Lords entirely from Law Lords whose first law degrees were not in common law, but in Scottish or South African law.[89] The author has not found such a

[86] A recent example being Sir Ross Cranston, and a rare example of a Labour Party member in this pattern.

[87] Lord Mackay of Clashfern being one of the most significant recent examples.

[88] *Stephen M. Cretney,* Simon, Jocelyn Edward Salis, Baron Simon of Glaisdale (1911–2006), in: Oxford Dictionary of National Biography (Oxford January 2010), <www.oxforddnb.com/view/article/97207>.

[89] The Scottish Law Lords, while these three South African-trained lawyers were in office, were Lord Hope and Lord Clyde, who both took Classics degrees at Cambridge and Oxford respectively, before proceeding to take a law degree at the University of Edinburgh.

case;[90] it is nonetheless entertaining to imagine how English law might have been *civilised* had there been. Of course, the same is true in reverse, with, for instance, significant Scots lawyers becoming leading English common lawyers on appointment to the House or Lords or Supreme Court, with one example, Lord Reid, being commonly thought of as the 'helmsman of the [English] common law', an example of the amalgamating power of the English common law.[91]

Having obtained a qualifying degree, lawyers go on to take the vocational qualifications for practice and then proceed through on-the-job training to learn how to be practitioners. For barristers, the most likely profession for the senior judiciary, this period of training was also a form of instruction in the cultural attitudes of the bar. It brought together the chambers, collections of self-employed barristers who share buildings and administration, and the Inns of Court, learned and professional societies. Those Inns were responsible for legal education prior to the growth of university legal provision.[92]

Once at the bar, the traditional path was quite broad, with a junior barrister taking whatever work was available, often while more senior barristers were engaged on other cases or in rare moments of holiday. This was obviously even more the case for Scots judges, working in a smaller and less specialised system. In England, this generalisation tended to give way to specialisation as a means of making one's name, with sometimes very significant specialisation at the peak of a career at the bar. However, if the barrister becomes a judge, his or her career will once again become that of a generalist, being expected to deal with a very large range of different disputes.

Barristers take great pride in advocacy. Some specialise more in writing opinions and in other forms of paper advocacy but most relish the engagement with opposing counsel and the judge in oral hearings. There is clearly a theatrical element to it, though the modern trend in person and on paper is away from arcane or eccentric behaviour as well as formulaic or overly complex language. The English bar is spread around the country but is strongly concentrated in London.

Many barristers aspire to go to the bench. It is prestigious and seen as a great honour. Nonetheless, it clearly requires a strong sense of duty. The work

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[90] However, there were many where four of the panel were from this group, including the significant tort case of *Marcic v. Thames Water Utilities* [2003] UKHL 66, [2004] 2 AC 42 (HL) featuring Lords Steyn, Hoffmann, Hope and Scott and presided over by Lord Nicholls.

[91] *Thomas Broun Smith,* Reid, James Scott Cumberland, Baron Reid (1890–1975), in: Oxford Dictionary of National Biography (Oxford 2004, online edn, January 2008) <http://www.oxforddnb.com/view/article/31595>. See generally, *Paterson,* Final Judgment (n. 2) 233–246.

[92] See, e.g., *J. H. Baker,* The Legal Profession and the Common Law (2013); *idem,* The Law's Two Bodies: Some Evidential Problems in English Legal History (Oxford 2001).

is demanding. Great care must be taken with every task and any criticism born stoically and silently. The work will usually take judges around the country for significant periods of a judge's first five or more years. It is also paid quite well but still at a small fraction of the rate earnt by many practitioners.

Finally, even though it is said that judges should be generalists, the senior judiciary at least is often known personally for the cases and experience they have. Justices of the Supreme Court are described as being "a commercial judge", "a family judge" or similar. There is a sense that the spectrum of law should be represented on the court, so when one Justice retires, one of the considerations discussed amongst the legal profession at least, is how to continue to have appropriate expertise, both in areas of law and with respect to different legal systems within the United Kingdom, a point picked up in the next section.

c) Appointment

One of the longer term shifts in the English judiciary has been towards transparency and a formalised process of training judges. The first of these, transparency, is particularly important in the process of appointment. Since April 2006,[93] the Judicial Appointments Commission (JAC) has made the recommendations for all judicial appointments except the Supreme Court Justices which are done by special committee (with a JAC member) and, since 2013 most court appointments below the High Court and First-tier and Upper Tribunal, where it is the Lord Chief Justice and Senior President of Tribunals who do so (those heads of the court services themselves recommended by the JAC).[94] The JAC itself has fifteen members, with a lay Chairman and five other lay members, the rest being judicial or legally qualified. All posts are advertised. The criteria for appointment are set out in statute, though they are admittedly somewhat vague. Selection must be made "solely on merit", appointment predicated on "good character".[95] In 2013, a further provision was added,[96] making clear that neither the word "solely", nor the relevant equality legislation,[97] prevents the purpose of increasing diversity among the judiciary or tribunal membership when selecting one of two candidates of equal merit.

The JAC replaced a system where the Lord Chancellor, a Government Minister, would enquire as to eligible candidates and make appointments to judicial office. The Lord Chancellor and his staff took so called 'secret

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[93] Constitutional Reform Act 2005, Part 4.

[94] Crime and Courts Act 2013, s. 20 and Sch. 13, Part 4 (see also, for amendments to the JAC, Part 3).

[95] Constitutional Reform Act 2005, s. 63(2) and (3).

[96] Ibid., s. 63(4), inserted by the Crime and Courts Act, s. 20 and Sch. 13, s. 10. A similar provision applies to selection for the Supreme Court.

[97] The Equality Act 2010.

soundings' from the judges before whom candidates would typically have appeared, a process representing and entrenching the preference for senior judicial appointments to be from the bar. That system was not widely criticised for the quality of those appointed, but it was opaque and did not ensure that the judiciary represented the wider population. The movement to transparency has been matched by moving the appointment of Queen's Counsel, the title for senior barristers, to an independent panel of at least nine, with strong lay involvement.[98]

d) Career Development

Two aspects of career development are particularly important. First, there is a growing recognition of a sense of career within the judiciary. It is no longer the case that the English bench is simply recruited from the bar, though nor is it entirely true that the bench is, at its higher levels, a profession in itself. There is now a process of testing, acclimatisation and perhaps, training, for senior judicial office. As already noted, a first step is becoming a deputy judge, at whatever level, such as a deputy district judge, or one position, such as district judge, being a common step before becoming a circuit judge. Similarly, an aspiring High Court judge will now normally have spent time as a deputy High Court judge. In addition, a judge might aspire to move through different placements geographically or by specialism, gaining experience and responsibility. There may even be the possibility of moving up the narrow pyramid from the High Court through to the Court of Appeal and Supreme Court: from 110 High Court judges, to 38 Court of Appeal judges and 12 Justices of the Supreme Court. Of course, even then, by longstanding convention, two of those Justices are Scottish and one from Northern Ireland,[99] leaving nine, while one of the current Justices was recruited directly from the bar.[100]

Second, the aim of judicial development is also clearly recognised in ongoing legal training.[101] Training is now undertaken by the Judicial College,

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[98] See, e.g., <www.qcappointments.org/>.

[99] In its modern form, it can be seen obliquely in s. 27(8) of the Constitutional Reform Act 2005, which adds, in addition to merit and other criteria, that appointments must ensure that "between them, the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom." Since for legal purposes England and Wales have largely been united, there has been no separate Welsh judge. Since that unity has been slowly loosening, particularly through the greater legislative powers of the National Assembly for Wales, the possibility of a Welsh Justice of the Supreme Court should not be discounted.

[100] It has happened before, only rarely, e.g., Lord Reid was appointed to the House of Lords straight from the bar (and sitting as an MP for a Scottish constituency), though he had held the legal offices of Solicitor General for Scotland and Lord Advocate. He served from 1948 to 1975 and was famed as one of the greatest British judges in the twentieth Century (it is said that he accepted a move from the House of Commons to the *Judicial*

which in April 2011 subsumed the separate training bodies for the courts and tribunals.[102] It is chaired by a Court of Appeal judge and covers judges below the High Court, for whom attendance at one seminar a year is mandatory.[103] This commitment is laudable and the courses offered involve some excellent instruction by leaders in the field, often distinguished academics. Nonetheless, the core to professional development is a personal process, reflective and perhaps collaborative with peers. That process is strongly affected not only by the personal attitude and motivation of the individual judge, but also by the workload and conditions of that judge. Certainly the mechanism of sitting with more senior judges offers opportunities to develop, as does hearing novel, difficult or significant cases; both of which are decided by the head of the court division. What appear to be high-flying judges, on their way towards the Supreme Court, do seem to have a pattern of sitting in distinguished company to hear important cases. It is unclear whether this is simply a matter of reputation or perhaps a matter of distinguishing cause from effect.

e) Indirect homogenising factors

There are also likely significant other factors which tend to pull judicial decision-making in common directions. It should be noted immediately that judges do not have any union activity per se, but judges can collectively play a strong role in legal development by other mechanisms.[104]

Some of these directions are to be lauded, such as standards of professional conduct, clarity of writing and reasoning, independence and so forth. Some of the factors are similarly good things, such as the training of the Judicial College, the engagement with academic work, respect for well-crafted argumentation and the sense of collegiality and public duty amongst judges.

There are other homogenising factors which are not necessarily good things or bad things in themselves. The experience at the bar tends to encourage the qualities respected by barristers. These include laudable features like professionalism, confidentiality and precision, but it is also a particular professional form which is traditional, slow to change and does not appear as diverse as the

House of Lords, at the suggestion of a Liberal not a Conservative Prime Minister, only after not receiving adequate encouragement about his political prospects within the Conservative party: *Smith,* Baron Reid (n. 91); Lord Wilberforce was appointed to the House of Lords from the High Court in 1964, and served with distinction until 1982 (having read Classics at New College, Oxford, before being awarded a prize fellowship at All Souls College, Oxford).

[101] Though its effectiveness is open to doubt: *Darbyshire,* Sitting (n. 2) ch. 6.

[102] *Judicial College,* Prospectus (n. 61).

[103] High Court judges are not obliged to attend, but are welcome to, with some seminars marketed specifically to them: *Judicial College,* Prospectus (n. 61) 10.

[104] *Bell,* Judiciaries (n. 59) 320–322. There is the Judges Council, a form of representative body.

rest of England and Wales. Such homogenising factors can be traced even further back in the lives of judges. For instance, according to a report by the Social Mobility and Child Poverty Commission in 2014, 75% of senior judges studied at Oxford or Cambridge (or both) compared to 1% of the public in general.[105] While 'Oxbridge' is more diverse than the bar, and largely meritocratic, it is still only a pair of universities with significant history and traditions in common. Prior to that 71% of senior judges studied at independent schools (that is, fee-paying schools), compared to 7% of the population as a whole.[106] Such schools include incredibly expensive and exclusive ones, like Eton; most if not all of these schools have some scholarships for the talented who do not have the means to pay. In fact, 14% of judges went to one of just five "public" schools, meaning the 'elite' of the independent schools: Eton, Westminster, Charterhouse, Radley or St Paul's Boys' School.[107]

As stated at the beginning of this section, it is hard to know how differences in diversity, or legal training, might affect judicial decision-making. The hope, arguably not misplaced, is that a system of judicial preparation and experience should be able to assist in retaining the best qualities of the judiciary, while adding to its strengths.

f) Which judge hears the case

Justice should, famously, be blind; but there is nonetheless truth in the idea that litigants might prefer one of her judicial servants to hear their case over another. This concerns the way a particular judge deals with questions of case management and how to be effective and efficient. It might also be about that judge's experience or perceived views on the substantive legal matter or the underlying policy reasons. Certainly, counsel across the country waiting to see who would be listed to hear their cases have judges they would prefer and ones they would prefer not to have. It may be that arguments are phrased differently in an attempt to appeal to one judge compared to another. Indeed, the replacement of a Supreme Court judge, when one listed falls ill just before trial, can generate extended discussion over whether this will improve one side's chance of success. Litigants may seek to arrange the case in order to improve the chances of one judge, or decrease the chances of another. Such efforts are part of the tactical game of litigation, though of course sometimes both parties would prefer not to have a particular judge, again, for procedural or substantive reasons. There are calculations of risk and strategy, many of which are based on a mix of experience and assumption. It does not appear that counsel widely expect cases with certain judges to be decided unfairly, but more that

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[105] *Social Mobility and Child Poverty Commission,* Elitist Britain (London 2014) 10.
[106] Ibid.
[107] Ibid., 47.

counsel seek to maximise their perceived chances of success which might include a particular judge being seen in a positive or negative light.

In extreme cases, a party might seek to disqualify a judge on the basis of bias. The leading case on such an application is from 1999, *Locabail v. Bayfield,* and featured a remarkable Court of Appeal: the heads of the three divisions (the Lord Chief Justice, the Master of the Rolls and the Vice-Chancellor, as the title then was).[108] The core test was threefold: (1) if a judge had a direct personal interest, more than *de minimis*, in the outcome of proceedings, bias was presumed to exist and he was automatically disqualified from hearing the case, regardless of his knowledge of his interest in the matter and any judgment already handed down would be set aside but a fully informed party could waive the right to have the judge disqualified; (2) where alleged, it was for the reviewing court, personifying the reasonable man, to decide where there was a real danger of bias; the court should consider all the evidence and could receive a statement from the judge (a statement only: the judge could not be cross-examined); and (3) that a judge aware of possible bias should disclose to the parties appropriate information and, if the parties assented, they could not later challenge his deciding the case.

Bias is rare, though there are one or two famous examples where there was sufficient appearance of it to merit action. Just prior to the case just mentioned, *Locabail,* there was a significant case of this kind in the House of Lords. The House of Lords decided to reinstate a warrant to arrest General Augusto Pinochet, the former head of state of Chile, at the request of a Spanish judge alleging various crimes against humanity during his dictatorship.[109] The panel in the House of Lords had included Lord Hoffmann while Amnesty International (AI) had been granted permission to intervene in the case. In fact, Lord Hoffmann, while not being a member of AI itself, was an unpaid director and chairman of AIC Ltd, a charity which was wholly controlled by AI. One of the objects of AIC Ltd was to campaign to end the kinds of crimes against humanity of which General Pinochet was accused. Lord Hoffmann's link to AI was discovered after judgment, and an appeal to the House of Lords was successful on the grounds of apparent bias.[110] A more light-hearted but still regrettable story could be told about Peter Smith J. The story concerns the judge refusing to recuse himself from deciding a competition dispute involving, amongst other things, British Airways and delays to lug-

[108] *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.* [2000] QB 451 (CA). See also *Porter v. Magill* [2002] 2 AC 357 (HL).

[109] *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* [2000] 1 AC 61 (HL). See also *Paterson,* Final Judgment (n. 2) 156–157 on the effect of these events on relationships amongst the senior judiciary and the measures taken to respond.

[110] *R v. Bow Street Metropolitan Stipendiary Magistrate* [2000] 1 AC 119 (HL).

gage.[111] In earlier proceedings, he had spent an extensive period trying to ascertain why his own luggage had disappeared on a British Airways flight, apparently to determine if there was evidence of a connection to the dispute which would disqualify him from sitting. These examples highlight the delicate balance required of judges: having some minimal interest in an issue, or a dispute with a party to litigation, was apparently enough, if handled incorrectly, to lead to serious consequences.

3. Collegial decision-making

Each judge in a case has the responsibility to hear the evidence and decide legal questions with appropriate care. However, this obligation plays out differently when the decision-making takes place in panels of judges. It may be that the majority of Court of Appeal and Supreme Court decisions are now based on a single judgment in some form, but there is much in the view of English justice that:

> "[English] appellate courts consist of a number of judges who happen to be sitting on the same bench, whereas courts such as the CJEU consist of a single bench which happens to comprise more than one judge."[112]

Alan Paterson's work on the Supreme Court is the benchmark for understanding collegial decision-making.[113] He divided up the stages of this discourse as the preparatory stage, the oral hearing, the first conference between judges, and the drafting stage. As there is not sufficient space to do justice to his extensive analysis, the focus here will be on the process of individual discussion. First, a brief note on the make-up of the panels. The general view is that the composition of a panel would not matter greatly for the outcome of the case, though it should be admitted that there is some evidence from a legal realist study that that general view is flawed.[114] In the Supreme Court, the panels are essentially decided by the senior administrator to the court, the Registrar, who mixes experts in that area of law with non-experts and shares the load and interest of the cases.[115] For a common law court at the apex of the system, to sit in panels is actually quite unusual: the High Court of Australia, the U.S., Canadian and New Zealand Supreme Courts all sit *en banc*,

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[111] *Emerald Supplies v. British Airways* [2015] EWHC 2201 (Ch).

[112] See, e.g., *Lord Neuberger,* Tweaking the Curial Veil, The Blackstone Lecture 2014 (15 November 2014), available at <www.supremecourt.uk/docs/speech-141115.pdf>, [9].

[113] *Paterson,* Final Judgment (n. 2) ch. 3–4.

[114] See generally *David Robertson,* Judicial Discretion in the House of Lords (Oxford 1998) esp. ch. 1, 2 and 10. See recently *Richard Buxton,* Sitting En Banc in the New Supreme Court, Law Quarterly Review 125 (2009) 288–293, esp. 288.

[115] *Lord Neuberger,* Tweaking the Curial Veil (n. 112) [46]–[48]. See, too, *Bruce Dickson,* The Processing of Appeals in the House of Lords, Law Quarterly Review 123 (2007) 571–601, 589–591; *Paterson,* Final Judgment (n. 2) 70–73.

all members of the court deciding each case together. For example, since the first case in the U.K. Supreme Court in 2009, there has been a significant number of cases that have been heard in panels larger than the normal five, specifically, panels of seven or nine.[116] Larger panels strengthen the authority of the Court to decide difficult cases or change the law. The greater the size of the panel, the greater the authority of the court and the less chance of an appeal on the same matter being heard or successful in the near future. That is in part because of the court's respect for the earlier panel, but also because more and more of the judges would have already heard the issues once and would have to have their minds changed sufficiently at the stage of grant of permission to appeal and then again at the time of the hearing itself. The size and composition of the panel will also clearly have an impact on how the discussions on the resolution of the case play out.[117]

Paterson's extensive study of the House of Lords and Supreme Court has shown how varied and vital discussions amongst the justices are. They can vary from judge to judge and even from location to location. To take just one example, personal interactions have always been important, perhaps particularly so in the world before discussion and debate took place so frequently by emails. The office of Lord Brown in the House of Lords was perfectly positioned next to the kitchen *and* the secretaries so that when other Law Lords went to get tea or coffee, social interactions and chance (or deliberate) discussions could take place.[118] This, Paterson suggested, was part of why Lord Brown was commonly in a majority decision.

The process of discussion usually starts on the papers, with the court agreeing who would write a first draft judgment. This is the task of the judge presiding over the panel. That is partly decided by interest, seniority and the inclination of the court on the issues, but also by wider criteria such as involving newer or more junior judges and the burdens of each judge. The Supreme Court and Privy Council have now adopted the practice of the Court of Appeal, and begin proceedings with a short pre-hearing meeting followed by extensive discussions after the hearing; in the Court of Appeal the presider decides in advance who will write the judgment; in the Supreme Court the presider does so only after the hearing.[119] That difference in timing is because in the Supreme Court (and Privy Council) each judge will give a 'mini-judgment' giving his or her view, with the most junior always going first:

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[116] An estimate from manually counting cases is 18% having had 7 judges and 4% having had 9 though the total percentage may have been higher initially, at about 30%: see generally, *Andrew Burrows,* Numbers sitting in the Supreme Court, Law Quarterly Review 129 (2013) 305–309.

[117] *Paterson,* Final Judgment (n. 2), see also 74, 82.

[118] *Paterson,* Final Judgment (n. 2) 157–158; see also the table on 153; see generally 167–169.

[119] *Lord Neuberger,* Tweaking the Curial Veil (n. 112) [24]–[28].

based on these discussions the first attempt at a lead draft is to be written.[120] The judge allocated to draft the judgment (who might be thought of as almost a 'reporting judge' in some other systems), then produces a draft. The process of reviewing that draft will help to crystallise the views of each judge and to set the stage for the discussions between judges.[121] This process is highly constrained by time in the Court of Appeal, where the sheer number of cases typically precludes extensive discussion. In the Supreme Court, such discussion is the norm. Ultimately, the judges on the panel will have to decide whether that first draft becomes the single judgment of the court, a majority judgment or a minority one. Each judge will have to decide whether to be a co-author, concur or write alone, whether with the majority or a minority. This process of personal decision-making does not stop a judge from discussing another's draft, or offering his or her draft to others to persuade them or reduce their work load. It can sometimes even be a tactical game: delay in drafting could lose a judge his or her status, or gain it.[122] Such discussions are private in England, and public discussions would be very unlikely at present.[123] It appears that the Supreme Court have recently agreed to include in their drafts all hyperbole and insult one another's draft they wish, on the condition that it is removed before the judgment becomes public, thus to have the fun of reading the insult amongst colleagues, not the sting of having it read outside the court.[124]

A judge's status or intentions may also change, from majority to minority or *vice versa,* and from continuing with a draft or discarding it in the face of other judgments. For example, in a case to decide the proprietary interests in a family home, Lord Walker once said that much of his draft was made redundant in the face of the draft of Baroness Hale, upon which he could not improve.[125] Perhaps even more poignantly, for the development of criminal law at least, Lord Mustill declined to give the sole dissenting speech on the difficult topic of secondary liability. He said:

"There are some instances where the delivery of a minority opinion is a duty, the performance of which is not simply a matter of record, but also makes an important contribution

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[120] *Ibid.*

[121] E.g., *Darbyshire,* Sitting (n. 2) 350.

[122] *Paterson,* Final Judgment (n. 2) 127–130, 134.

[123] See, e.g., *Lord Neuberger,* Sausages and the Judicial Process: the Limits of Transparency, Annual Conference of the Supreme Court of New South Wales, Sydney, Australia (1 August 2014), available at <www.supremecourt.uk/docs/speech-140801.pdf> [8].

[124] *Lord Neuberger,* UK Supreme Court decisions on private and commercial law: The role of public policy and public interest, Centre for Commercial Law Studies Conference 2015 (4 December 2015), available at <www.supremecourt.uk/docs/speech-151204.pdf>, [26].

[125] *Stack v. Dowden* [2007] 2 AC 432 (HL), [14] per Lord Walker, adding 25 paragraphs on the theoretical underpinnings of the law.

to the future understanding and development of the law. This is not such a case. Doctrinally the differences may be considerable, but their practical significance is likely to be small, or perhaps even non-existent. What the trial judge needs is a clear and comprehensible statement of a workable principle, which he or she will find in the speech of my noble and learned friend, Lord Hutton."[126]

Many criminal lawyers would have greatly wished to see this draft, as most likely did the Supreme Court when, 16 years later, it came to discuss the same matter again after years of practical effectiveness tinged by theoretical doubt.[127] When done well, a dissent can sharpen the majority's position and even become tomorrow's law;[128] a concurrence can bring out complexity and perspective without reducing clarity, perhaps even as a 'tactical assent' subvert the majority's view for the future.[129] Done badly, even senior judges struggle with unravelling the resulting mess of individual opinions. In 2006, Carnwath LJ, before being promoted from the Court of Appeal to the Supreme Court, famously asked:

"Was it necessary for the opinions of the House [of Lords] to have come to us in the form of six substantive speeches, which we have had to subject to laborious comparative analysis to arrive at a conclusion? Could not a single majority speech have provided clear and straightforward guidance, which we could then have applied directly to the case before us?"[130]

Indeed, there is a modern trend away from individual judgments and towards greater composite judgments or judgments of the whole court.[131] Criminal courts already prohibit this for reasons of certainty for the defendant. Other courts are pushed in this direction by the workload of cases.[132] In the past, having one lead judgment, even one with which all the other judges agreed, to some extent preserved the individuality of judge's voice. The increasing use of composite, single or grouped judgments may well increase the clarity of

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[126] *R v. Powell; Daniels* [1999] 1 AC 1, 11–12.

[127] *R v. Jogee* UKSC 2015/0015, 25–28 October 2015.

[128] In one instance, almost literally: *OB(FC) v. Aventis Pasteur* [2008] UKHL 34; [2008] 3 CMLR 10 (HL) (11 June 2008) cf. *O'Byrne v. Aventis Pasteur MSD Ltd* [2010] UKSC 23; [2010] 1 WLR 1412 (HL) (15 April 2010); *Lord Kerr,* Dissenting Judgments – self indulgence or self sacrifice?, The Birkenhead Lecture (8 October 2012) available at <www.supremecourt.uk/docs/speech-121008.pdf>.

[129] *Paterson,* Final Judgment (n. 2) 110–112.

[130] *Doherty v. Birmingham City Council* [2006] EWCA Civ 1739 (CA), esp. [62].

[131] E.g., *Lord Neuberger,* No Judgment – No Justice, First Annual BAILII Lecture (20 November 2012), available at <www.supremecourt.uk/docs/speech-121120.pdf>, [22]–[29].

[132] See, e.g., *Roderick Munday,* 'All for One and One for All': The Rise to Prominence of the Composite Judgment in the Civil Division of the Court of Appeal, Cambridge Law Journal 61 (2002) 321–350, cf. *Darbyshire,* Sitting (n. 2) 343–345; *Paterson,* Final Judgment (n. 2) 94 suggesting 55% of Supreme Court judgments are now single-author majority-decision judgments. See also *James Lee,* A Defence of Concurring Speeches, Public Law (April 2009) 305.

the text. The fear is that is reduces the clarity of the legal thinking, as one judgment must speak with multiple voices. This has not been the English tradition in the past, much though it might suit other legal systems.

IV. For Whom Are Decisions Made

Three different audiences for judicial decisions are particularly important for understanding how those decisions are made and how they are presented: the audiences below, in the legal profession, and the audience above.

1. Audience below

English judges prioritise their role as the resolver of a dispute. They place great importance on solving, so far as possible, the legal issues in disputes presented to them. The audience of a judicial decision is not just the litigants at hand, it is also all actual and potential litigants on that issue and, at times, all possible litigants: for a system that cares about the practical and the predictable perhaps more than the systematic, there is a much-treasured maxim that for every case that comes to court there are a thousand in the wings, each relying on the outcome of the case before the courts. In particularly important cases in certain fields, this audience includes wider society and government, both nationally and internationally. Judges also take the view that judgments should enable the reasonably intelligent non-lawyer to understand the relevant issues, decision and reasoning.[133]

2. Audience in legal profession

Judges see themselves as part of the wider legal community and their judicial decision-making contributes to the functioning of that community. This is not only in interpreting and creating the law which lawyers apply. Beyond the substantive law, judges also signal to lawyers which arguments and ideas are of interest to them, and which are not worth pursuing. They ruminate on the future direction of the law, and small clues in their interactions during the hearing and their written judgments give some indication of what they find more interesting or valuable for the future. Lord Devlin called these 'rumblings from Olympus'.[134] Of course, judges are also to varying degrees sensitive about their standing in that same wider legal community. Their office grants authority and respect, but they personally value the estimation of the community in which they serve. This might best be thought of as a negative

[133] See, e.g., *Lord Neuberger,* No Judgment – No Justice (n. 131) [11].
[134] *Patrick Devlin,* The Judge (Oxford 1979) 11.

test: that each judgment is a test of a judge's abilities but that unless there is reason to think otherwise, a judge will not fear failure in that test.

3. Audience above

The wider legal community includes a judge's seniors within the judiciary and, potentially, Parliament in considering whether to introduce legislation to affect the result of the decision. The decision should be correct and well-reasoned ('appeal-proof'); if not correct, then certainly well-reasoned. First instance judges might often expect an appeal and be sanguine about that expectation. By comparison, given how proportionally rare it is for an appeal from the Court of Appeal to be heard, judges there pay even greater attention to such appeals and the behaviour of the Supreme Court in hearing and deciding them.

V. How Decisions Are Made

Having analysed what is being decided, where, by and for whom, we can now turn to ask how judicial decisions are made. This is a vast topic, but we might look at the relevant starting point, the judge and other legal actors and themes within decision-making.

1. What is the starting point for judicial decision-making?

English law may have more formal sources on judicial decision-making than many other countries and that might be part of why there is a morass of material facing any judge before he can come to a decision.[135]

The first step is to characterise the issue to be decided. This may sound familiar to the many continental lawyers. In fact, this is not quite a matter of following the map of the law to find the right general field of application. In fact, the first step for an English judge is a careful and close look at the facts. The facts, once properly understood, determine how legal rules are engaged. This slight difference in emphasis is important. It should not be forgotten that judges rely on the two opposing sides and their counsel for much of the 'leg-work' in describing the facts, but ultimately the judge will decide amongst competing views or propose to counsel alternative analyses.

Knowing the formal authorities, that is, statutes and cases, is the next step. Such statutes and cases are typically long, detailed and specific. The number of each is also proliferating dramatically. For case law in particular, the number of published decisions has exploded since the neutral reporting of decisions, particularly through the British and Irish Legal Information Institute

[135] See, e.g., *Whittaker,* Precedent (n. 9) 722–723.

website in 2001.[136] There is now no filter by a law reporter, and the expectation of checking all reported cases has become an expectation to check all neutrally-reported cases. To quote Lord Neuberger, speaking generally in praise of the shift:

"It is extraordinary how quickly we have moved from the problems of lost important documents on disclosure, and unreported important cases, still with us twenty years ago, to the present problems of a plethora of potentially relevant, but ultimately irrelevant, electronic documents, and a plethora of apparently relevant, but ultimately unimportant, reported cases."[137]

Perhaps the most common starting point is still to look for the "leading case". This case sets out the relevant law and principles in applying it. It is true that some areas of law are now primarily legislative but even then it is quite commonly the case that the statute will have needed application and exploration, and the case that does so will be turned to immediately after the statute. In some pockets of English law, legislation has developed to be almost code-like in its comprehensiveness and coherence. English law might become more codified in the future, but the most likely body to achieve this, the Law Commission of England and Wales, does not have the political support to proceed on a large scale. The Law Commission is currently working on a sentencing code and perhaps success there will encourage other larger projects. One significant codification success came from outside the Law Commission: the new rules of procedure for civil law, criminal law and family law. They are almost codes, though there is still underlying legislation which the rules themselves cannot alter. They also have official 'commentaries' of sorts, in the form of Practice Directions, to fill out the detail of the rules. It is a telling example of the practical approach of English lawyers that rules of procedure and evidence can come close to codification while the substantive law cannot.

2. Judge as 'umpire'

The judge is typically faced with two opposing sides and is there to decide between them. The role of the English judge is not as the omniscient master of the common law, but more as a wise journeyman solving a dispute between two more junior artisans or, in the language of cricket, an umpire. Unlike the referee in football, the cricket umpire stands above the fray, not running with the players, but equally, an umpire is not simply passive. Like a football referee, he does not merely react to the claims (such as the batsman being out) and actions (such as a ball bowled wide) of the teams, rather, he retains an overall control of the game. Denning LJ once put it thus:

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[136] <www.bailii.org>.

[137] *Lord Neuberger,* No Judgment – No Justice (n. 131) [45].

"[i]n the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question 'How's that?' His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon L.C. who said in a notable passage that 'truth is best discovered by powerful statements on both sides of the question'?"[138]

In fact, English judges typically find the truth by navigating more than just two sides. We turn now to consider the range of legal actors who play a role in judicial decision-making.

a) Counsel

The dialogue between bar and bench is a key feature of judicial decision-making. Many a judge, listed to hear a dry or difficult case, has been consoled by seeing the names of one or more strong advocates as counsel. Judges, barristers and solicitors are part of the same profession and share a sense of culture, duty and respect. The English system favours polite and respectful interactions. While there are certainly judges known occasionally to display a haughty attitude the general rule is of respect for hard work, intellect and preparation, with tolerance for difficult and time-pressured situations. It is also not uncommon for retired judges to return to the Chambers they had been associated with prior to their elevation to the bench, as mediators, arbitrators and similar.

Judges value good advocacy, though it is hard to say precisely how it will affect their decision-making.[139] Certainly having two sides each presenting strong arguments and engaging in extensive discussion with the bench is viewed as the paradigm way to rigorous justice. Yet where one advocate is weaker or less experienced, proceedings do not go the way of a football or cricket match with vastly mismatched teams. Rather, the judge will have to work even harder to decide the merits of the case. Judges can research aspects of the case themselves but the convention is that this should be put to counsel for comment. Indeed, not 'having had the benefit of counsel's argument' on a particular point is one which will reduce the potential precedential scope and force of a decision.[140] The rule might be weakening now, particularly to the extent that a judge could rely on a case which was relevant but which counsel

[138] *Jones v. National Coal Board* [1957] 2 QB 55 (CA), 63.

[139] For discussion, see *Paterson,* Final Judgment (n. 2) 49–65.

[140] Lord Denning's practice to the contrary was famously rebuked by the other Law Lords: *Rahimtoola v. Nizam of Hyderabad* [1958] AC 379 (HL), [398] per Viscount Simonds. Denning spent a summer researching, time wasted in this particular case; Denning took Viscount Simonds' remark as a reprimand from his new colleagues: *Paterson,* Final Judgment (n. 2) 20.

had failed to discuss.[141] In the relatively recent past, this practice has developed even further as an exercise in mutual trust. The Supreme Court and Court of Appeal's practice is that judgments in draft be circulated to counsel in the strictest confidence before being handed down: this can assist with finding any small syntactical, grammatical or factual errors but also operates as a check for any rare cases where an advocate feels that points are made which had not been discussed in court or on the papers.[142] Some 'mirroring' occurs here, as quite commonly judges will 'lift' sections from counsel's submissions and insert them straight into a judgment, though this is predominantly the case in matters of fact and in lower courts where time pressure is even more extreme than in the Supreme Court.

Judicial decision-making increasingly turns on advocates' papers, and not just oral advocacy. A key step was to require a 'skeleton argument', or colloquially 'skelly', giving the outline argument in advance. This is a chance to persuade the judge earlier, as well as require some disclosure of authorities and argument to the other side. The use of skeleton arguments developed particularly in the 1980s, and they are now standard practice.[143] In addition, a 'bundle' of the relevant documents must be provided.[144] According to Munby J, now President of the Family Division:

"In the more spacious days of my legal youth, judges rarely pre-read very much. Often, much of the first day of any High Court case of even moderate length was taken up by an opening during which counsel took the judge, *vive voce* [sic], through the bundle, reading out everything which either he or his opponent thought might conceivably be relevant. All that has long since been swept away. Skeleton arguments became the norm and then in due course extensive judicial pre-reading of bundles."[145]

Failure to provide papers which comply with the rules on form and content lead can lead to judicial exasperation. According to Munby J, rules on form, clarity and concision were not simply for the benefit of judges, they were:

"simply a reflection of the increasing burdens being imposed upon judges at all levels in the family justice system who, faced with ever-increasing and almost intolerably overloaded lists, are required – and, I emphasise, willingly agree – to undertake a workload, much of it in their own time, which even their comparatively recent judicial ancestors would have found astonishing."[146]

The sanctions for failing to abide by these formal obligations, failures which can clearly infuriate judges for the delays they cause, include costs and 'nam-

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[141] *Paterson,* Final Judgment (n. 2) 21–28.

[142] See, e.g., *Lord Neuberger,* Tweaking the Curial Veil (n. 112) [14].

[143] *Zander,* Law-Making Process (n. 2) 388–392.

[144] See, e.g., *Criminal Practice Directions 2015* [2015] EWCA Crim 1567, esp. 50.E.8-12; Civil Procedure Rule 39.5 and associated Practice Direction 39A.3.1-10.

[145] *In re X and Y (Bundles)* [2008] EWHC 2058 (Fam), [5].

[146] *X and Y,* [4]; see also, [2].

ing and shaming' in court. One such example for failure to get what was 'not rocket science' right can be seen in *Inplayer Ltd v. Thorogood* in 2014:

"[52] […] So far, unfortunately, this message has failed to reach the profession. Mild rebukes to counsel and gentle comments in judgments have no effect whatsoever. Therefore, with regret, I must speak more bluntly."

"[55] […] A good skeleton argument (of which we receive many) is a real help to judges when they are pre-reading the (usually voluminous) bundles. A bad skeleton argument simply adds to the paper jungle through which judges must hack their way in an effort to identify the issues and the competing arguments. A good skeleton argument is a real aid to the court during and after the hearing. A bad skeleton argument may be so unhelpful that the court simply proceeds on the basis of the grounds of appeal and whatever counsel says on the day."[147]

In that case, costs for the skeleton, itself '35 pages of rambling prolixity' were denied. In milder cases, it might be sufficient simply to say, as one Court of Appeal judge did recently:

"Intending no discourtesy to counsel, I have not dealt with submissions which did not seem to go to any of the issues which we have to decide. In one telling phrase Ms Hall described her submissions as appearing to throw legal principles about like confetti."[148]

Alan Paterson's first work[149] on the role of the House of Lords, published in 1982, showed that advocates are vital cogs in the judicial machine particularly for the constraints they could impose on the court: the selection and timing of appeals, and the selection of arguments to be run or not run. Paterson's most recent work focuses on what had changed since then, particularly in the transition to the Supreme Court. There are specific qualities to the relationship at that level, not only in the potential legal consequences, but also in how the exchanges took place: in parts an 'academic seminar', an 'Oxbridge tutorial' (which side the tutor and which the star pupil?), an 'informed dialogue', a 'dialectic between Bench and Bar' and a 'conversation between gentlemen on a subject of mutual interest'.[150] The precise tone set by the court has varied over the years, with the current attitude seeming to be respectful and patient of most errors excepting particularly the sin of overrunning and stealing someone else's time, whether another counsel's or the court's. Counsel in the higher courts are, in Paterson's terms, 'repeat players' with 'repeat-player clients'.[151]

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[147] [2014] EWCA Civ 1511 (CA), [52]–[57] per Jackson LJ, with specific agreement by Lewison and Treacy LJJ, at 63 and 64 respectively.

[148] *Finance and Business Training Limited v. The Commissioners for HM Revenue and Customs* [2016] EWCA Civ 7 (CA), [68] per Arden LJ.

[149] *Alan Paterson,* The Law Lords (London 1982).

[150] *Paterson,* Final Judgment (n. 2) 32–38, esp. 33.

[151] *Paterson,* Final Judgment (n. 2) 16.

b) Interveners

Arguments may come to the court not only from counsel for the parties, but also from interveners.[152] They are particularly relevant to the higher courts, and their increasing appearance (up to 40% of cases) in the Supreme Court is particularly interesting. Interveners are commonly charities and public interest bodies but also include government departments. Intervenors normally hire counsel to provide written submissions and, if called upon, to present oral argument. Interveners add more pages to the work of the courts but this is justified if, in Lord Hoffmann's words:

"their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. […] An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made."[153]

The fact of interventions can permit the court to position itself as more competent to carry out legal change: it will have heard wider submissions than just the parties' interests dictated and thereby come a little closer to an investigative body.

c) Litigants and litigants in person

As has already been noted, litigants strongly affect how judicial decision-making takes place. They drive forward the cases and some litigants, such as insurance companies, can be particularly keen to control the litigation. Judges might well doubt the value of bringing the claim, particularly in personal matters. To take one recent case brought to establish, amongst other things, a beneficial interest in the family home after a couple's separation:

"I wish to repeat, with the utmost clarity, to each of these parties that they have already expended a truly absurd amount of money on litigating about the aftermath of their relationship. I assume that, at times at any rate, that was a relationship which gave them both happiness and pleasure. […] I very strongly urge each of these parties, who are advised by highly experienced lawyers, to bend every endeavour to now seeing if they cannot resolve their differences. If they cannot, I will proceed, […] but I am only willing to do so in a time and costs proportionate way, and limiting the documentation in the way that I have described."[154]

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[152] See, e.g., *Lorne Neudorf,* Intervention at the UK Supreme Court, Cambridge Journal of International and Comparative Law 2 (2013) 16–32; and *Baroness Hale,* Who Guards the Guardians, Public Law Project Conference 2013 (14 October 2013), available at <www.supremecourt.uk/docs/speech-131014.pdf>, 6–16.

[153] *E v. Chief Constable of the Royal Ulster Constabulary and another (Northern Ireland Human Rights Commission and others intervening)* [2009] 1 AC 536 (HL), [2]–[3].

[154] *Seagrove v. Sully* [2014] EWHC 4110 (Fam), [56]–[57] and Note following, per Holman J. See particularly also *J v. J* [2014] EWHC 3654 (Fam).

The parties settled the next morning. The threat not to pay the parties' legal costs or look at excessive documentation is one of the key tools, with blunt language like this a further escalation.

The situation is perhaps worse when there is no legal counsel. There has been a significant rise in litigants in person, a litigant who represents him or herself and does not engage counsel, over the last ten years. The increase has been particularly significant since the substantial and repeated cuts to legal aid, the state support for those engaged in litigation, and hence less wealthy litigants often cannot afford lawyers' fees. According to the Lord Chief Justice in 2016, "[o]ur system of justice has become unaffordable to most. In consequence there has been a considerable increase of litigants in person for whom our current court system is not really designed."[155] The problem is such that a number of County Court and Crown Court judges wrote a 170 page freely-accessible document, with a foreword by the Master of the Rolls, as a guide for a litigant in person.[156] A report in 2016 by the House of Commons Library found that the most recent reductions, in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, has led to an increase in litigants in person.[157] That Act had removed legal aid for civil and private law children and family cases. The Ministry of Justice does not keep detailed data on the rise in litigants in person, but the information available from the family courts likely signifies a rise across the civil courts.[158] The report suggested that there had been a 22% increase in litigants in person in cases involving contract with children, a 30% increase in family cases overall and a staggering 80% of all family court cases started between 2013–2014 had at least one party who did not have legal representation. A report by the House of Commons Justice Committee, a standing Select Committee drawn from across the political parties, concluded that even more than the increase in the number of such litigants was the qualitative change in the litigants.[159] Senior judges gave evidence that, previously, many litigants in person had chosen to conduct the litigation themselves and had the skills and confidence to do so; now many

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[155] *Lord Thomas,* Lord Chief Justice's Report 2015 (London 2016), available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/lcj_report_2015-final.pdf >, 5.

[156] *HHJ Edward Bailey et al.,* A Handbook for Litigants in Person (2013), available at <www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/A_Handbook_for_Litigants_in_Person.pdf>.

[157] *Gabrielle Garton Grimwood,* Litigants in person: the rise of the self-represented litigant in civil and family cases (London 2016).

[158] Criminal legal aid is more strongly protected, but even there, the fees paid to lawyers have been repeatedly cut with resulting impact on the size, specialisation and, it is feared, quality of the criminal bar.

[159] *House of Commons Justice Committee,* Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, Eighth Report of Session 2014–15, HC 311 (London 2015), esp. [99]–[113].

litigants in person are there as there are no alternatives. Their evidence suggested that such persons are a particular burden in the case management stages, as well as potentially slowing down and complicating the oral proceedings; their paperwork was long, unintelligible and, in many places, simply bad, making points which no lawyer would have thought arguable.[160]

d) Academics

Academics are recognised for their contribution to the strength and development of English law.[161] Many judges and advocates think that academic work can provide effective and cheap or free analysis though practice certainly varies. One role for academics has been in giving shape to the law, making connections across ideas, as much as practical situations. Their works, often in tandem or symbiosis with the works of practitioners, have, slowly, in the last forty to fifty years, come to structure English law more. They are particularly valued for also being freer (not, as some think, free) from the same time constraints that practitioners and judges work under, so giving a longer and wider view on issues. For senior judges, the academic community is one worth engaging with for their work, albeit with the acceptance that one definitely cannot please even *most* of them just *some* of the time.

'Academic' has many meanings. Regrettably, in few circles does it automatically suggest 'valuable' or 'intellectually rigorous'. Most commonly in everyday use it is used as the opposite of 'practical' or 'useful'. The same fate has befallen the legal debates undertaken by lawyers-to-be, at university and as trainee lawyers, called 'moots', with laypeople (at least, somewhat well-educated laypeople) calling a question unable to be resolved and with a strong hint of unimportance, a 'moot point'. Certainly even senior judges, particularly in fields of law with heavy practical demands, like the juries of criminal law, can be heard to deprecate 'academic' solutions. Perhaps the best way to think of 'academic' is in terms of a set of skills and practices which

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[160] Cf. *Liz Trinder et al.,* Litigants in person in private family law cases, Ministry of Justice Analytical Series (London 2014) 23–34, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf>. See particularly *Darbyshire,* Sitting (n. 2) 237–248, 310–313.

[161] See esp. *Paterson,* Final Judgment (n. 2) 213–221; *Neil Duxbury,* Jurists and Judges: An Essay on Influence (Oxford 2001), esp. ch. 1 and 5; *Alan Rodger,* Judges and Academics in the United Kingdom, University of Queensland Law Journal 29 (2010) 29–41; *Alexandra Braun,* Burying the Living?, The Citation of Legal Writings in English Courts, American Journal of Comparative Law 58 (2010) 27–52; *eadem,* Judges and Academics: Features of a Partnership, in: From House of Lords to Supreme Court – Judges, Jurists and the Process of Judging, ed. by James Lee (Oxford 2010) 227–253; *Jack Beatson,* Legal Academics: Forgotten Players or Interlopers?, in: Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry, ed. by Andrew Burrows/David Johnston/Reinhard Zimmermann (Oxford 2013) 523–541.

can lead to particular kinds of outputs, such as case comments, articles and books. This understanding, mirroring the focus on the skills and practices of judges and practitioners, helps to introduce the different levels of the interaction between academics and judges.

First, it should not be forgotten that many judges spent time as academics; particularly famously Lady Hale, Lords Goff, Hoffmann, Collins and Rodger, Maurice Kay LJ, Beatson LJ, Cranston J and Singh J. As already noted, many judges write, albeit typically with caution, good academic or quasi-academic works even while in office and certainly afterwards. Sometimes wearing, or having worn, many hats can become a problem. In one famous incident, Megarry J, a prolific writer, learned lawyer and expert in, amongst other things, the law of real property, had occasion to decide a case on an easement which dealt with a controversy he himself had addressed when writing one of the leading treatises on land law. His judgment in court disagreed with his treatise. He included a paragraph at the end of the judgment noting that such a treatise had no more or less value for being written by someone now a judge, but:

"The process of authorship is entirely different from that of judicial decision. The author, no doubt, has the benefit of a broad and comprehensive survey of his chosen subject as a whole, together with a lengthy period of gestation, and intermittent opportunities for reconsideration. But he is exposed to the peril of yielding to preconceptions, and he lacks the advantage of that impact and sharpening of focus which the detailed facts of a particular case bring to the judge. Above all, he has to form his ideas without the aid of the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law is tough law."[162]

In fact, the Court of Appeal in effect agreed with Sir Robert Megarry in the treatise, rather than Megarry J, but he personally had the fortune to be able be right no matter which way the Court of Appeal decided.[163]

Second, academics can play a role directly as counsel before judges. Some academics are also practitioners, typically practicing as barristers. This is particularly evident in public international law and public law, but happens elsewhere as well. Academics are increasingly door tenants at established chambers, such that they rarely actually appear as counsel, but will provide academic support for specific cases or more generally for the chambers.

Third, academics have also taught law and other subjects to the judges of today. They teach the practitioners, judicial assistants and other legal actors who play a role in judicial decision-making. This teaching *might* even shape substantive understanding and legal skills.

Fourth, academics can also play a role with judges as discussants and lecturers, at scholarly events, whether named lectures, or at more informal settings like after-dinner speeches.

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[162] *Cordell v. Second Clanfield Properties Ltd.* [1969] 2 Ch. 9, 16.

[163] *St. Edmundsbury and Ipswich Diocesan Board of Finance v. Clark (No. 2)* [1975] 1 WLR 468, 479 (CA).

Fifth, academic works can be sources of legal rules or arguments. The position seems to have changed significantly, and, from an academic's point of view, largely but not exclusively for the better. Academic works are never authoritative per se, though some senior academics have managed a powerful status: it was once commonly said that Sir Guenter Treitel's word on contract was worth more than that of a High Court judge. There is a humbling subtext to this apparent compliment: perhaps the foremost living academic expert on contract law was, at the height of his powers, still only just better than one of over a hundred High Court judges, judges who were not generally specialised in contract law.

These five forms of influence show that academic work does not need to be cited to a court or in a court judgment to be important. Academic works might have been used behind the scenes, and there are many good reasons to think they have been. English judges today even seem willing to acknowledge openly academic works they have found useful.

It is particularly important to understand how the perhaps even greater morass of academic sources come before judges. Academic sources can be dense, part of diverse and convoluted discourses and often only apparently relevant to legal practice. Judges face a distinct problem in finding and assessing all the possible academic sources. With established and respected academics, the name and the title might merit a look. Many judges read through the traditionally strong generalist law journals as well as any specialist journals in their field, whether through the court library or paying via the reasonably sized publications expenses they have. Judges will commonly develop specialist expertise, including knowing the academic contributions or who to ask for recommendations. However, the primary medium and filter for materials to be selected to come before the courts is through citation in the arguments of counsel. How counsel find their sources is a mix of the same factors with perhaps even more chance. Counsel value two aspects of academic work: factual matters, such as academics having done the legwork on the current law or its origins, and constructive matters, such as generating, assessing and supporting arguments which could be used in court. Counsel are typically short on time. They turn easily to the established practitioner treatises,[164] to leading journals, particularly those perceived to be useful to practice like the Law Quarterly Review, as well as professional databases which might be searched by more junior counsel or pupils. They sometimes commission work from academics, and not infrequently for friendship or the importance of the case academics assist by reviewing and commenting on submissions or acting as sounding boards for ideas.

[164] These are not commentaries in the continental tradition but they do systematise and structure a field of law.

When it comes to actual citation in court, English law seems to be in a period of transition.[165] The old rule can be summed up by a note in *Taylor v. Curtis* in 1816, where it was said that "[b]ooks of living authors are not usually to be cited",[166] though the rule implied exceptions by the word "usually". Even until the 1980s, only the truly eminent might be cited in court while alive and only a few others upon death.[167] A powerful example of such an eminent expert was Glanville Williams, who largely changed the law of impossible attempts in criminal law.[168] The reasons against general citation of academic works had ranged from the institutional, such as that academics have at times been engaged in a different task to courts and used much more divisive and aggressive means than the polite discourse of the courts, through to the very weak, such as that one cannot ask an academic for clarification.[169]

The new position is of increasing citations of established and more junior scholars. The shift seems to have started in the 1990s, perhaps most prominently in some difficult cases involving the English law of restitution, and spearheaded by Lord Goff, a former law fellow at Lincoln College, Oxford.[170] Lord Goff had been building towards this deployment of academic sources. In his famous Maccabaean Lecture in 1983, he noted that for jurists, "the formulation of legal principles is one of their main functions' though for hundreds of years that had been the task of the judge."[171] Lord Goff's view was that "different though the judge and jurist may be, their work is complementary; and that today it is the fusion of their work which begets the tough, adaptable system which is called the common law." He also thought codification should be the work of jurists, rather than legislators, providing analysis and epitomes which can be departed from by a judge with good reason.[172] Three years later he noted that leading jurists and texts like *Benjamin on Sale* and *Dicey and Morris on Conflict of Laws* had meant that "the ground has been cut from the feet of the Benthamite movement for codification in this country by the growth in stature of the English jurist"; England was 'in the age of the legal

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[165] See generally, *Braun,* American Journal of Comparative Law 58 (2010) 27.

[166] *Taylor v. Curtis* (1816) 6 Taunt. 608, 610; 128 ER 1172, 1173 note 1.

[167] *Duxbury,* Jurists and Judges (n. 161) 78–82.

[168] *Glanville Williams,* The Lords and Impossible Attempts, or Quis Custodiet Ipsos Custodes?, Cambridge Law Journal 45 (1986) 33–83, cf. *R v. Shivpuri* [1987] AC 1 (HL), 23.

[169] E.g., *Lord Neuberger,* Judges and Professors – Ships Passing the Night?, RabelsZ 77 (2013) 233–250, [18]–[27].

[170] See particularly *Woolwich Equitable Building Society v. Inland Revenue Commissioners* [1993] AC 70 (HL), esp. 163–64 and *Kleinwort Benson Ltd v. Lincoln City Council* [1999] 2 AC 349 (HL).

[171] *Robert Goff,* The Search for Principle, Proceedings of the British Academy LXIX (1983) 169, 171, citing Blackstone as a possible exception but he too was later appointed to the bench.

[172] Ibid., 174.

textbook. It is the textbook which provides the framework of principle within which we work.[173] While Lord Goff was singing to his home choir, as it were, there is truth to his early descriptions of this situation.

From Lord Goff, the role of academic work was taken forward by Lord Bingham as Senior Law Lord and has largely been continued. At the Supreme Court, another of Lord Bingham's drives was promoting the use of judicial assistants, recent university graduates, who also brought a fresh openness to academic work. Bingham had worked with such assistants in the Court of Appeal and copied the practice when he became Senior Law Lord in the House of Lords.[174]

It may be that the modern position still needs to settle at the right level. Academics still derive some standing from their work being cited with approval and some write in the hope of persuading judges of particular arguments.[175] That course has a slightly higher chance of rational engagement and success than writing to persuade politicians. Judges themselves seem to accept the value of academic work, and that that value should be admitted when used (such admission not always having been the case). Judges appear to enhance their own standing, and that of their judgments, by engaging appropriately with significant academic work in a similar way to engagement with counsel's argument. An academic source is more likely to be cited where the source is on point and which the court and counsel have found useful, though not necessarily correct. Of course, that citation may only be to an academic source which succinctly sets out the law, rather than something which has affected the judge's decision-making. Even when cited, academic sources are normally worked into the arguments of counsel and from there potentially, the judge's reasoning. Perhaps the least helpful form of this is where a judge cites the source to derive authority not from that specific source, but merely from being a judge who has read such sources. That is, in part like adding an extensive list of works to a bibliography when those works have not actually contributed to the argument of the essay.

e) Judicial Assistants

The institution of judicial assistants is relatively new,[176] brought to the House of Lords by Lord Bingham, when he moved from being Lord Chief Justice to

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[173] *Goff,* Judge (n. 18) 92.

[174] See, e.g., *Co-Operative Group (CWS) Ltd. v. Pritchard* [2011] EWCA Civ 329 (CA), [32] and footnote 20 as an example of a judicial assistant finding academic material for the court.

[175] Though without the institutional structure of a dedicated discussion of upcoming cases, cf. *Arlie Loughnan/Shae McCrystal,* Before the High Court, History and Counter-History: 25 Years of Writing for the High Court, Sydney Law Review 37 (2015) 569–593.

being Senior Law Lord at the turn of the century.[177] The House of Lords offices only had space for four, but the Supreme Court has increased this to eight, while the Court of Appeal also has recently expanded and may soon reach one assistant per judge. The role of judicial assistants has been developing in this short time. Originally they would assist with organisational tasks, draft briefing memos and help to take some of the practical burden away from senior judges. Today, it is quite common for the assistants to be sounding boards and discussants, seeing not only their judge's draft judgment, but that of other judges, and providing comment and critique on all of them. The judicial assistant will commonly be asked to research specific points for the judge, check material provided to the court for accuracy and comprehensiveness and perhaps even look at foreign law materials. Judicial assistants normally sit behind the Supreme Court judges during hearings, taking notes and being ready to discuss events in court afterwards. Nonetheless, English judges still write their own opinions, not the judicial assistants.

f) Juries

A further actor in the judicial decision-making chain may, at trial, be the members of a jury. In the Crown Court in more serious criminal cases and in civil courts, in certain defamation cases, a jury will be the primary fact-finder. The judge must guide proceedings to ensure that the jury are in a position to answer the factual questions in the case. In criminal cases, writing the directions to a jury is a special form of judicial writing, requiring accessibility, clarity and comprehensibility. The relationship with counsel also differs, since counsel will be seeking to persuade jury members, tailoring their presentation and selection of arguments to that end. Judges may be left picking up the pieces, having to determine the legal consequences of the jury's findings, such as deciding on the sentence if a jury convicts, even when not agreeing with their decision on the facts.

g) Legislators

One of the most delicate relationships affecting judicial decision-making is that between judge and legislator.[178] The core issue over who has authority to decide which questions will be familiar to readers around the world. The rele-

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[176] See, generally, *Tetyana Nesterchuk,* The View from Behind the Bench: The Role of Judicial Assistants in the UK Supreme Court, in: Essays in Memory of Lord Rodger of Earlsferry (n. 161) ch. 11 and *Roderick Munday,* Of Law Clerks and Judicial Assistants, Justice of the Peace 171 (2007) 455–460.

[177] *Paterson,* Final Judgment (n. 2) 247–257.

[178] *Paterson,* Final Judgment (n. 2) ch. 7; *Lord Bingham,* Maccabaean Lecture in Jurisprudence: The Judges: Active or Passive, available at <http://www.law.cf.ac.uk/newsandevents/transcripts/271005.pdf>.

vance of precedent as a form of law to compare with legislation has already been noted.[179] Generally the judicial position has traditionally been deference to Parliament in their powers and in interpreting those powers. As a matter of legal theory and most likely, judicial fact, judges use a rule of recognition of Parliamentary authority through legislation.[180] This deference has met for the most part with respect for the independence of the judiciary and judicial decisions from politicians. Of course, in both cases there have been examples to the contrary, where courts have skilfully and subtly denuded a statute of meaning because the meaning intended was unacceptable,[181] and cases where Parliament has promptly overturned by legislation a decision of the courts.[182] Yet overall, the relationship is largely one of professionalism in public and, for the most part, in deed. It must nevertheless be admitted that amongst lawyers, Parliamentary law-making is often seen as rushed, politicised and prone to lack logic or coherence, perhaps far more so than judicial law-making.

One of the most significant activities in practice for judges is what role courts can play in *interpreting* statutes. Statutory interpretation is a vital activity for legal actors in England, particularly judges.[183] Statutes are texts like any other, requiring interpretation and application. In case of dispute, judges are called upon to interpret those words within the wider setting of the legal system's other rules and canons of interpretation. In some cases, courts have stretched the meaning of words to breaking point, yet within the constitutional structure of the United Kingdom, it is only very rarely that a court will be in a position to determine some constitutional questions which would be common to the highest courts of other countries, such as whether a particular statute is constitutional or not.[184]

A similarly interesting relationship can occur between the courts and other law reform bodies, such as the Law Commission. Many senior judges have

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[179] *Whittaker,* Precedent (n. 9) 736–738.

[180] *H. L. A. Hart,* The Concept of Law (Oxford 1961) esp. 97–107.

[181] A famous example being *Anisminic Ltd. Appellant v. Foreign Compensation Commission* [1969] 2 AC 147, deciding that a tribunal's flawed decision was not a 'determination' protected by the clause ousting the jurisdiction of the courts, a ruling likely against Parliament's intention in passing the ouster clause.

[182] One of the very rare examples of what appears to be retroactive legislation being the Compensation Act 2006, ss. 3 and 16, esp. s. 16(3)–(4) cf. *Barker v. Corus* [2006] 2 AC 572 (HL).

[183] See, generally, the classic study by *Zenon Bankowski/D. Neil MacCormick,* Statutory Interpretation in the United Kingdom, in: Interpreting Statutes: A Comparative Study, ed. by D. Neil MacCormick/Robert S. Summers (Aldershot 1991) 359–406; *Thomas Lundmark,* Charting the Divide between Common Law and Civil Law (Oxford 2012) ch. 8: Statutes and their Construction; *Stefan Vogenauer,* Die Auslegung von Gesetzen in England und auf dem Kontinent. Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen (Tübingen 2001); *Robertson,* Judicial Discretion (n. 114) ch. 3.

spent time on the Law Commission, including three of the current members of the Supreme Court, two of whom having served as its chairperson.[185] The reports of the Commission, along with Parliamentary debates, are two of the most significant sources of information on the interpretation of unclear statutory provisions.

3. Themes within decision-making

Judicial decision-making is, as will be more than apparent by now, inherently complex and varied by individual and group dynamics. All that can be attempted here is to outline ten brief themes on how English judges decide cases.

1. *Independence.* Judges must be independent from politics, from parties and from anything but justice. Generally, English judges have a good reputation for independence. For instance, since the creation in 1701 of the current procedure to remove a judge,[186] an address from both Houses of Parliament, it has never been used on an English High Court or Court of Appeal judge (though it has on Irish judges in the early nineteenth century). Instead, behind the scenes pressure might well be applied, as indeed happened to Lord Denning after a book he published while in office contained material which was thought to be too close to racism. Independence is a very wide concept: in a recent speech, Lord Neuberger has argued that judges should not publicly discuss their own decisions after those decisions have been handed down as it makes the judge into an advocate, a far cry from the independent and detached decider of the case as the judge had been.[187] That said, English judges are well aware that they exist within a delicate constitutional structure and are generally perceived not to go much beyond their mandate.[188]
2. *Openness.* English judges value an open and accessible judicial process, with Lord Hewart CJ's maxim from 90 years ago still ringing true today: "justice should not only be done, but should manifestly and undoubtedly

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[184] For the closest recent example, turning on whether two procedural Acts, the Parliament Acts of 1911 and 1949, were validly used to pass the Hunting Act 2004, see *R (Jackson) v. Attorney General* [2006] 1 AC 262.

[185] See, e.g., *James Lee,* The Etiquette of Law Reform, in: Fifty Years of the Law Commissions: The Dynamics of Law Reform, ed. by Matthew Dyson/James Lee/Shona Wilson Stark (Oxford 2016, forthcoming).

[186] William III, 1700 & 1701: An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject, III. The provision is now contained in section 11(3) of the Supreme Court Act 1981

[187] *Lord Neuberger,* Decisions on private and commercial law (n. 124) [23].

[188] A fuller discussion of this important point is not possible here. See, e.g., *Paterson,* Final Judgment (n. 2) 304–311.

be seen to be done."[189] While not all of the judicial process takes place in public, the core argument of the case and the judgment handed down should be comprehensive, clear and accessible in language and location. In addition, the Supreme Court televises its hearings, streaming them live online[190] and from 2015 hosts a recording for future viewing. In 2013, the Court of Appeal allowed video cameras into the court for the first time.[191] The tradition of oral argument has been part of this openness. Orality is increasingly constrained by cost and time management, the concomitant being increasing reliance on detailed written arguments and, indeed, court closures on grounds of austerity.

3. *Efficiency.* Judges are under extreme time pressure. Anecdotally, in the Court of Appeal, five to eight simple appeals might be heard in one day, and judgment would be expected the same day. The pressure may be slightly less in the civil division, but only slightly and judges are sometimes forced to have an outline draft judgment even before the oral hearing.[192] The time pressures on the court led to the promotion of *fuller* papers and skeleton arguments which in turn enabled a more complete view to be taken before the oral hearing. To remain sane, one appeal judge told the author he worked every weekend so that he never started a week with a judgment from the previous week unwritten and certainly had few or none left for the holidays.[193] More generally, recent figures from the Organisation for Economic Co-operation and Development suggest that England and Wales is performing below average in dealing with cases quickly, with a trial length at first instance of between 350 and 400 days compared to an average of 240 days.[194]
4. *Willingness to learn and adapt.* Good judges adapt to the limitations inherent in their work, whether of their time or expertise, of the case's evidence or argumentation or other factors. In particular, they learn from counsel and their peers and they even learn from themselves. Good judges accept that judicial reasoning is iterative, where an initial idea is honed and retested against the evidence and other arguments, possibly changing shape

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[189] *R v. Sussex Justices* [1924] 1 KB 256 (KBD), 259, a case on bias where the acting clerk to the magistrates had retired with the magistrates in order to answer any questions they might have on the law but he was, outside of the court, a member of the firm of solicitors who was acting for the alleged victim in a civil claim based on the same events as those in the case before the magistrates.

[190] E.g., <www.supremecourt.uk/live/court-01.html>.

[191] Pursuant to the Crime and Courts Act 2013, s. 32.

[192] *Darbyshire,* Sitting (n. 2) 344. The hearing might well change the judge's mind.

[193] See, too, *Paterson,* Final Judgment (n. 2) 148–149 on the practice of Lord Bingham as Senior Law Lord.

[194] OECD (2013), "What makes civil justice effective?", OECD Economics Department Policy Notes, No. 18 June 2013, 11.

but always improving in strength.[195] In fact, it is particularly important that a judge is able to self-correct him- or herself as much, if not more, than to learn from others.[196]

5. *Non-investigative on substance, but determinative in case management.* Even when they do their own investigations, judges do so only on the law, not on factual matters. They do, however, take a much more active role in how the case is proceeding, to control demands on judicial time as well as fairness to the parties.
6. *Generality of legal understanding and fidelity to the facts.* All judges are expected to handle a wide range of disputes, without losing the ability to specialise and master briefs in remarkably short time. The factual matrix of the case looms large in the mind of a good judge. Ultimately, the case has to be decided and an outcome reached, and that requires careful application of the law to those facts. While this fidelity is vital, it does not preclude analogical reasoning. Indeed, one of the most important steps in judicial reasoning is to work out how proposed solutions will work in specific fact patterns, as a means of testing out the correctness and value of that solution.
7. *Practical justice over the coherence of the system.* It might tentatively be stated that English judges start out trying to solve a problem in front of them and enough attention to that end, with both sides arguing it fully, will mean the system looks after itself. The legal system's coherence is of greater interest to the more senior courts, such as the Supreme Court and Court of Appeal, but even there, there are not the same pulls to consistency of principle, rather than consistently practical solutions, that some other legal systems may have. The phrase "hard cases make bad law" is only one form of the underlying fight for justice.
8. *Values* and *Principles.* Any group of legal actors can take different views on what values to hold and how to balance them against legal principle, and judges are no different.[197] As Lord Neuberger has put it, it is:

> "inevitable that a judge's particular outlook and temperament will sometimes play a part in his or her decision-making. Of course, there is a limit to how far it is proper for judges to be influenced by their views, and all good judges have learnt to keep their prejudices and hobby-horses under control when sitting on the bench. But even on a relatively technical legal point […] there are judges who are temperamentally

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[195] See, e.g., *Lord Neuberger,* Sausages and the Judicial Process (n. 123) [21].

[196] *Lord Neuberger,* 'Judge not, that ye be not judged': judging judicial decision-making, F A Mann Lecture 205 (29 January 2015), available at <www.supremecourt.uk/docs/speech-150129.pdf>, [12]–[13].

[197] An interesting example is Lord Macnaghten, who, though a strong believer in freedom of contract, could not stand fraud or sharp practice. Even so, he was scrupulously fair even when others were perhaps not, as can be seen particularly in *Salomon v. Salomon* [1897] AC 22 (HL).

> inclined to give greater relative weight to commercial reality than other judges. Or when it comes to the never ending tussle between certainty and fairness, there are judges who lean more towards fairness than others, although the differences may change depending on the area of law."[198]

The best judges can do is seek to make those decisions explicit. Judges certainly seek the underlying legal principle in any dispute, guided by the precedents near the issue in question.[199]

9. *Internationalism.* The modern English judge rarely goes a week without some international dimension to his or her work. English law has long had a strong commercial relevance which has brought in international elements, but the law of the European Union and public international law are now at least as significant in their own ways. Comparative law is an important dimension, even once one moves beyond common law traditions, such as the frequent references to Australia, Canada and the USA.[200]
10. *Judgment* and *soundness.* Tenth and finally, there is some difficulty in defining the quality called "judgment" or "soundness" that all good judges have. The distinguishing feature of top practitioners is that though they may know the law less well, on a particular topic, than their juniors, they have the judgment to see what arguments work and why. That quality is all the more important in judges. It is typically something honed over the years at the bar that almost all judges themselves have spent.

VI. What Form Decisions Take: Writing Judgments

We have now come full circle to the formal expression of judicial decision-making and what it can tell us about how and why decisions are made. Here too, English law has been changing over the last two decades.[201] Judgments are becoming slightly more like reports of investigations, rather than individual and personalised judgments. The use of paragraph numbering can make the text more like a set of bullet points, rather than a coherent prose. In some cases detailed exploration of the facts is put into an appendix or simplified. According to Lord Rodger, the movement away from *ex tempore* judgments and to written ones changed the apparent audience, from those in court to

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[198] *Lord Neuberger,* Tweaking the Curial Veil (n. 112) [48]; see also *Baroness Hale,* Maccabaean Lecture in Jurisprudence: A Minority Opinion, Proceedings of the British Academy 154 (2007) 319.

[199] See, e.g., *Goff,* Principle (n. 171) (1983).

[200] See, e.g., *Elaine Mak,* Judicial Decision-Making in a Globalised World (Oxford 2013); *Paterson,* Final Judgment (n. 2) 221–233.

[201] See *Roderick Munday,* Judicial configurations: permutations of the court and properties of judgment, Cambridge Law Journal 61 (2002) 612–656, 612–613.

everyone who might come across the case; cross-referencing, tables, appendices and footnotes have made judgments into "what to all intents and purposes amount to academic articles, mini-treatises".[202] That said, there remains significant individualism to judgments and no set requirements or extensive training in writing them. There is a drive towards shorter judgments and a more accessible writing style. For example, including an opening summary and other signposts, particularly for longer judgments and reducing any lingering 'APK', the 'Anxious Parade of Knowledge' seen in lists of authorities which really only bolster a judge's attempts to claim authority.[203] There has also been a noticeable trend away from *ex tempore* judgments towards *reserved* judgments, where the court has considered the case and written the judgment with more time for reflection and phrasing and thus, typically, greater precedential scope and force.

The content and writing of judgments might be telling us something about judicial attitudes. For example, based on the length of their judgments, it would certainly seem that English judges believe in formally explaining all the aspects of the question before them. Judgments in the higher courts start with a description of the facts and the procedural history of a length to enable anyone coming to the issues without any prior knowledge to understand the process so far in more than enough detail to understand the case itself. It proceeds to set out the arguments of counsel, often without comment, before moving to analyse the legal position, at which point most if not all the key submissions from counsel will be accepted or rejected in a reasoned way. After this comes what might be seen as the operative part of the judgment. 'Operative' does not mean that there will simply be a key paragraph – the reasoning may be spread over several paragraphs, but it is typically a crescendo in the reasoning until the decision on the law is stated. The final section, often short, gives the outcome of the proceedings and any related orders. Historically the most senior judge would give judgment first but the move to the Supreme Court has freed them, at least, from this and the leading majority judgment is now reported first, that usually being the one with the facts of the case summarised.[204]

This length in judgments is revealing, especially since other common law jurisdictions can manage with shorter judgments. It cannot be denied that judges might well like to write shorter judgments but do not always have the time.[205] Some judges attempt to meet this challenge by standardising, writing the early parts of a judgment, including facts and argument based on agreed

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[202] *Lord Rodger,* The Form and Language of Judicial Opinions, Law Quarterly Review 118 (2002) 226–247, 237.

[203] *Lord Neuberger,* No Judgment – No Justice (n. 131) [16]–[21].

[204] *Paterson,* Final Judgment (n. 2) 93.

[205] E.g., *Darbyshire,* Sitting (n. 2) 353–354.

facts from the parties, leaving the final section, the decision, to be written up after that decision has been made. In any case, English judges certainly believe in giving the reader of a judgment all the key information. The audience of the judgment is not just the legally trained, or even the specialist in this case. The audience is wider and, specifically, includes the parties. This suggests a style which strives, so far as possible, for accessible and fully explained judgments.

The tradition of engaging strongly with counsel's argument is one element which adds length to English judgments. This is more than just a courtesy, it is often an engagement with the mode of argumentation, which is the very thing that makes the judge interested. While an academic might be interested in principles and ideas, it seems an English practitioner, including a judge, is most interested in what arguments work at resolving legal issues. The phrasing of a case, of a claim, are vital, and thus engaging with counsel is both immediately useful, polite and, ultimately, an exercise in honing arguments for the legal community. It may well be true that the material on the facts and counsel's argument are easier to set out at length, particularly because the judgment may well borrow from counsel's own submissions. Indeed, the modern trend is to reduce the factual discussion significantly, often with agreed facts and issues. This may leave the precise reasoning of the judge less fully explained, or even deliberately hidden at times, but this hardly detracts from the attempt to publish and express that reasoning clearly.

VII. Conclusion

The English judge faces an overwhelming task of separating out the mass of sources and possible influences. There are a number of actors assisting in this task, counsel having done so largely alone for so many years, now joined by the academic and, in the highest courts, by the judicial assistant. The work has evolved particularly from the modern roots in the eighteenth century through significant shifts in the last two or three decades. The number of judges has expanded significantly, with more part-time judges and a slowly diversifying senior judiciary. The core obligation of any judge remains a difficult path to navigate: resolving disputes through principle, developed through an engagement with the decisions of his peers and forebears. Perhaps, just perhaps, judges are more willing to stop and, if not ask, at least accept, directions from academics. Something that has not changed is the longstanding respect for the ability and work of judges. Even the academic discourse which involves stridently criticising judicial decisions is made up of academics who do not envy the work, the responsibility or the difficulty of the decisions judges face.

This article can only scratch at the surface of English judicial decision-making. At the very same time as the conference giving rise to this paper was taking place, at a conference in the Supreme Court Lord Neuberger was recalling a story about the great judge, Sir Robert Megarry. Megarry gave a speech on his retirement from the Chancery bench, discussing the role of a first instance judge in the judicial hierarchy:

"[Megarry] said that in his many years as a first instance judge, he had been upheld, reversed, not followed, disapproved, overruled, distinguished, followed, considered, approved, and doubted, but he had never, but never, had the indignity of being explained."[206]

The reader will hopefully forgive that this 'academic' article has not even attempted to impose that indignity on the myriad judges of England.

[206] *Lord Neuberger,* Decisions on private and commercial law (n. 124) [22].

Judicial Decision-Making in Latin America

Unveiling the Dynamic Role of the Argentine Supreme Court

Agustín Parise[*]

I. Introduction

Law is shaped by a number of actors. Those actors interact, evolve, and perform fundamental roles in society. Judges are fundamental actors for the

[*] The drafting of this paper benefited from comments from the symposium's participants and attendees, mainly *Matthew Dyson, Michele Graziadei, Jan Peter Schmidt, Sjef van Erp,* and *Reinhard Zimmermann*. The author thanks *Gonzalo Lopez Martinez* for sharing his expert knowledge on the official collection of decisions of the Argentine Supreme Court. The author is indebted to Julieta Marotta de Parise for her research assistance, and for her suggestions and constructive criticisms.

All decisions of the Argentine Supreme Court were retrieved from <www.csjn.gov.ar>. That website includes digital images of the official collection of decisions for the period 1863–1985 and digital copies of decisions since 1994. This paper includes, where possible, references to the official collection of decisions. When citing journal articles, the numbers in square brackets indicate pin-points in the online version of the respective journal.

shaping of law: they develop the law while undertaking their judicial function, and they must be clearly aware of that creative activity.[1] They must be self-conscious of their role as operators of a system of social control within a social reality, since judges are after all active organs of society.[2] Raoul van Caenegem asked in his seminal book – while undertaking an historical approach to the role of judges, legislators, and professors – who

> "[...] were these judges, what did they stand for and what was their contribution to the political power-game that is endemic in every society? [...] [P]eople, pressure groups and classes will be seen struggling with each other for power: controlling the law is the way to control society."[3]

And yet, what about the role of those actors today? In order to answer these questions a first step must be taken: a step that focuses on legal methodology and the differences and the similarities between legal systems.[4] There is currently a need to know the way in which each actor operates, and then eventually understand the current power-struggle between them. There is a need to know how judges, legislators, and professors operate today, and only then it will be possible to understand the current impact of the activities of each actor.[5]

Acting requires a level of commitment. Judges must know the environment in which they operate and their role, since each judge operates in a certain time and space.[6] This paper will address the role of Argentine judges today, actors in a specific time and space, and will focus on the activities of the *Corte Suprema de Justicia de la Nación* (Argentine Supreme Court).[7] The paper will cover, in particular, the operation of the current Argentine Supreme Court, with a focus on private law. Copious literature exists on the political role of the Argentine highest court throughout the different decades.

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[1] *Julio Cueto Rúa,* El buen juez de primera instancia, Academia 4:8 (2006) 195–209, 200, 202.

[2] *Cueto Rúa,* Academia 4:8 (2006) 195, 196–202; and *María Rosa Cilurzo,* La Corte Suprema de Justicia de la Nación en la interpretación de variables (mutables), La Ley 2006-E, 850 [13].

[3] *R. C. van Caenegem,* Judges, Legislators and Professors: Chapters in European Legal History (Cambridge 2002) 68.

[4] That statement may encapsulate the purpose of the symposium in which this paper was presented, and was conveyed in the invitation extended to the participants by Reinhard Zimmermann on 6 June 2014.

[5] See the reference to impact in *van Caenegem,* Judges, Legislators and Professors (n. 3) 84.

[6] *Miguel Ángel Ciuro Caldani,* Reflexiones sobre el papel del juez en la cultura occidental (con especial referencia a la Argentina actual), available at <biblioteca.cejamericas.org>, 1.

[7] For information on the structure of the Supreme Court, see, *Ricardo Gil Lavedra,* Cambios en la Corte, La Ley 2004-E, 1234 [2–3]. For an explanation on the internal operation of that Court, in English, see *Gretchen Helmke,* Courts under Constraints: Judges, Generals, and Presidents in Argentina (Cambridge 2005) 179–180.

Attention was devoted, for example, to its role in defending the rule of law, and to its independence or its image of confidence amongst citizens.[8] Other fundamental aspects will be considered in this paper, since they may also help better understand the current role of judges in the development of law in Argentina.

This paper will be dived into three main parts. First, it will offer introductory remarks on the role of judges in legal development (II.). It will present a brief introduction to aspects of the Argentine judicial structure and to the place of the Argentine Supreme Court within that structure. Secondly, the paper will focus on the activities and role of the Argentine Supreme Court. It will concentrate on developments in the area of private law, while looking at the logical genesis of decisions, style, the reasoning behind decisions *(motivación),* references to academic works, references to comparative law, the use of dissenting opinions, and the value of precedents (III.). This second part will be the core of the paper. The findings for this actor should then be placed, in further studies, in contrast to that of the two other actors that van Caenegem identified in his book. Thirdly, this paper will undertake a snapshot of the activities of the Argentine Supreme Court by looking at court decisions from the first semester of 2015 (IV.). That snapshot should help to compare theoretical knowledge and information with the daily life of the highest court. The entire paper will aim to provide a broader understanding of the current role of judges as actors in Argentina. Comparative-law remarks will be offered where suitable, aiming to extend the scope of the paper to other Latin American jurisdictions. It should be noted that those remarks will aim to provide information on individual aspects and not to offer generalisations or abstractions that could be applied to Latin America in general.

II. Judges and Legal Development

Judges play an important role in legal development. They were incorporated within the structure of modern states by democratic societies, and have the ability to create guidelines for coexistence within those structures.[9] Judges

[8] See, for example, *Jonathan M. Miller,* Courts and the Creation of a "Spirit of Moderation": Judicial Protection of Revolutionaries in Argentina, 1863–1929, Hastings Int'l & Comp. L. Rev. 20 (1997) 231–329; *Christopher J. Walker,* Judicial Independence and the Rule of Law: Lessons from Post-Menem Argentina, Sw. J.L. & Trade Am. 14 (2007) 89–118; *Christopher J. Walker,* Toward Democratic Consolidation?, The Argentine Supreme Court, Judicial Independence, and the Rule of Law, Fla. J. Int'l L. 18 (2006) 745–806; and *Helmke,* Courts under Constraints (n. 7).

[9] *Carlos Enrique Camps,* Jurisprudencia obligatoria y doctrina legal en la Corte bonaerense, Jurisprudencia Argentina 2004-II, 1164 [6–9].

must be equidistant, impartial, and objective;[10] and their discussions should be shared with and by colleagues, members of the bar, political leaders, intellectuals, and members of social groups.[11] Their discussions are to be placed within a social context, as judges offer a guarantee for the right of defence to all parties and are conductors of the different processes.[12] They are indeed custodians of republican institutions,[13] while they are neither only historians nor soothsayers.[14]

1. Judges and society

The activities of judges are undertaken before the eyes of society, and their decisions are published, analysed, discussed, and challenged.[15] Furthermore, judges are members of society; they are not selected from an esoteric sect.[16] Justices of the Argentine Supreme Court state guidelines, values, and creeds that prevail in Argentine society, such as the protection of the right of property when facing economic crises.[17] Augusto M. Morello correctly stated that "justices offer signs and criteria that reflect changes in society."[18] Globalisation triggered a new regional trend in Latin America in which judges tend to fill *lacunae* left by the activities of legislators and of the executive.[19] Judges have gained a more active social participation, helping to fulfil the effective protection of fundamental rights.[20] They do not hesitate to step-in when sensing a lack of action from legislators or the executive.[21] Currently they deal

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[10] *Marcelo J. López Mesa,* El juez en el proceso. Deberes y máximas de experiencia, La Ley 2012-C, 1269 [1]. See also *Augusto M. Morello,* Una justicia civil para el siglo XXI, La Ley 2006-F, 906 [2].

[11] *Jorge Orlando Ramírez,* Cómo los jueces dictan sentencia, La Ley 2007-F, 1434 [1–2].

[12] *López Mesa,* La Ley 2012-C (2012) 1269 [1]. See also *Morello,* La Ley 2006-F, 906 [2].

[13] *Morello,* La Ley 2006-F, 906 [3].

[14] *López Mesa,* La Ley 2012-C, 1269 [9].

[15] *Genaro R. Carrió,* Notas sobre Derecho y Lenguaje (5th ed., Buenos Aires 2011) 106–107.

[16] *Carrió,* Notas (n. 15) 106–107.

[17] *Morello,* La Ley 2006-F, 906 [3].

[18] *Augusto M. Morello,* La Corte Suprema: Ayer, hoy y mañana, Jurisprudencia Argentina 2003-IV, 1193, cited by *Mario Masciotra,* El activismo de la Corte Suprema de Justicia (Argentina), in: El Papel de los Tribunales Superiores, coord. by Roberto Omar Berizonce et al. (Santa Fe 2006) 73–114, 114.

[19] *Roberto O. Berizonce,* Nuevos principios procesales y su recepción en los ordenamientos jurídicos nacionales (influencias del Derecho Internacional de los Derechos Humanos), Anales de la Facultad de Ciencias Jurídicas y Sociales 9:42 (2012) 257–289, 283; and *Masciotra,* El activismo de la Corte Suprema (n. 18) 75.

[20] *Berizonce,* Anales de la Facultad de Ciencias Jurídicas y Sociales 9:42 (2012) 257, 283; and *Masciotra,* El activismo de la Corte Suprema (n. 18) 75.

[21] *Jorge Luís Portero/Eduardo O. Magri,* El caso "Thomas". La Corte Suprema de Justicia de la Nación Argentina puso las cosas en su lugar. Los efectos no deseados de la

with matters that the Argentine Constitution had expressly reserved for the two other branches.[22] Society currently expects judges eventually to revise actions of the legislature and of the executive,[23] even though judicial review was implemented in Argentina already in the case *Sojo*[24] as early as 1887, following the model of *Marbury vs. Madison*.[25]

In Argentina – as in other Latin American jurisdictions and beyond – judges occupy the vertex of the procedural triangle, and their paramount role is to decide in all cases.[26] First, the *Código Procesal Civil y Comercial de la Nación* (Code of Civil Procedure) establishes in Article 34 the duties of judges.[27] That Article states, *inter alia,* the duty to render reasoned decisions. Furthermore, Article 163 of that same procedural code likewise establishes that final decisions must include reasons.[28] Second, the *Código Civil y Comercial* (Argentine Civil and Commercial Code), which took effect on 1 August 2015, currently the world's most recent civil code, states in Article 3 that judges must resolve matters that are submitted to them by means of decisions rendered according to reason.[29] The principle of Article 3 finds constitutional reception in Articles 17, 18, and 33 of the Argentine Constitution.[30] The Argentine Civil and Commercial Code also welcomes the constitutionalisation of private law: a communion between constitution, public law, and

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ampliación de las fronteras de la justiciabilidad sobre la gobernabilidad democrática, La Ley 2010-C, 717 [11–12].

[22] *Portero/Magri,* La Ley 2010-C, 717 [11–12].

[23] *Portero/Magri,* La Ley 2010-C, 717 [11–12].

[24] CSJN 22 September 1887, *Eduardo Sojo, por recurso de Habeas Corpus, contra una resolución de la H. Cámara de Diputados de la Nación,* Fallos 32:120.

[25] *Helmke,* Courts under Constraints (n. 7) 176.

[26] *Adolfo Alvarado Velloso,* El Juez: Sus deberes y facultades, Los derechos procesales del abogado frente al juez (Buenos Aires 1982) 3, 175–176. The paramount role of judges is to render decisions, as has been stated as early as 1871 in Articles 15 and 16 of the Argentine Civil Code. See *Cecilia Mayo de Ingaramo,* Reglas del sentenciar, La Ley 2003-D, 1144, [1]; and *Jorge Horacio Alterini,* Relatividad de los derechos en concreto, Antijuridicidad circunstanciada, Quid del llamado abuso del derecho, La Ley 2014-C, 1012 [1–2].

[27] Art. 34, Ley 17 454 (Código Procesal Civil y Comercial de la Nación), available at <www.infojus.gob.ar>; and *Roland Arazi,* Derecho procesal civil y comercial, Partes general y especial[2] (Buenos Aires 1995) 48–51.

[28] Art. 163, Ley 17 454 (Código Procesal Civil y Comercial de la Nación), available at <www.infojus.gob.ar>.

[29] Código Civil y Comercial Argentino (Buenos Aires 2014) 5. See also *Alfredo Rafael Porras,* Decisión razonablemente fundada: principio de razonabilidad, La Ley Gran Cuyo (December 2014) 1178 [1–5].

[30] Arts. 17–18, 32, Constitución de la Nación Argentina, available at <www.infojus.gob.ar>. See also *Ramiro Rosales Cuello/Tomás Marino,* Regulación legal de la tutela judicial efectiva y el debido proceso, ¿Es posible esa regulación dentro del Código Civil?, La Ley 2014-E, 880 [5].

private law.[31] A harmonisation is experienced since conflicts of public interest are resolved.[32] That harmonisation and communion can be perceived, for example, in consumer law.[33] The new code calls for new judges who must be interested in the new paradigms of private law, and who will secure the successful implementation of the new text.[34] New judges must consider the context when applying a code that is built on new principles, and they must look at the national and supranational legal framework.[35] New judges must be eager to look around and to update their practices.[36] The new code can also be considered a third generation code. It may be described as globalist, since the secession from Spanish provisions was already left behind with the previous code, together with the differentiation from other Latin American jurisdictions. A degree of globalisation is welcomed today in Latin America.[37]

Judges play a political role in Argentina. Jonathan M. Miller proved that in Argentina courts played an important part in the political developments during the period between 1860 and 1920.[38] The Argentine Supreme Court at that time contributed to "stabilizing political influence and [acted as] a soother of political passions in a way that even the U.S. Supreme Court probably did not."[39] Later, in the 1980s, the Argentine Supreme Court was a main actor in the events dealing with the reestablishment of democracy and the development of the rule of law.[40] More recently, that Court again had the chance to highlight the link between law and politics.[41]

Practical experience and the challenges faced by the Argentine Supreme Court show that judges are actors of the political process, rendering decisions

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[31] *Rosales Cuello/Marino,* La Ley 2014-E, 880 [5].

[32] *Berizonce,* Anales de la Facultad de Ciencias Jurídicas y Sociales 9:42 (2012) 257, 283.

[33] *Rosales Cuello/Marino,* La Ley 2014-E, 880 [5]; and *Berizonce,* Anales de la Facultad de Ciencias Jurídicas y Sociales 9:42 (2012) 257, 283.

[34] *Soledad Varillas,* El Juez del Nuevo Código Civil y Comercial, available at <www.escuelamagistratura.gov.ar/opinion-justicia-salta.php?IdOpinion=71>.

[35] *Soledad Varillas,* El Juez del Nuevo Código Civil y Comercial (n. 34).

[36] *Soledad Varillas,* El Juez del Nuevo Código Civil y Comercial (n. 34).

[37] On generations of codes, see generally *Agustín Parise,* Civil Law Codification in Latin America: Understanding First and Second Generation Codes, in: Tradition, Codification and Unification: Comparative-Historical Essays on Developments in Civil Law, ed. by J.M Milo et al. (Cambridge 2014) 183–193.

[38] See generally *Miller,* Hastings Int'l & Comp. L. Rev. 20 (1997) 231.

[39] *Miller,* Hastings Int'l & Comp. L. Rev. 20 (1997) 231, 232.

[40] *Eduardo Oteiza,* Reflexiones sobre la eficacia de la jurisprudencia y del precedente en la República Argentina, Perspectivas desde la CSJN, in: Cortes Supremas: Funciones y recursos extraordinarios, coord. by Eduardo Oteiza (Santa Fe 2011) 363–407, 365.

[41] *Marcos A. Sequeira,* La causa "Candy" y el rol de la Corte Suprema de Justicia de la Nación: primero decido, luego razono, La Ley Suplemento Especial Candy S.A. c. AFIP s/acción de amparo (July 2009) 45 [1–2].

in, among others, social and political cases.[42] The Court creates policy: that is a natural and unavoidable fact.[43] For example, the Court protected the integrity of property rights from the impact of inflation and was a forerunner for divorce in Argentina, before the pertinent law was enacted.[44] The Argentine Supreme Court stated in the 1961 case of *Manzanares*[45] that judges are servants of the law for the fulfilment of justice and that they contribute to its production jointly with legislators.[46] Likewise, Carlos S. Nino stated that judges must undertake the control of the democratic procedure.[47] In other words, judges must "divide the bread of justice in the best possible way."[48]

The ability of judges to create law has long been debated.[49] In Argentina, following the Montesquieu conception, it was traditionally argued that judges did not create law.[50] That conception, however, has been overcome.[51] For example, in 1957 the Argentine Supreme Court welcomed the *amparo* (i.e. summary proceedings to secure constitutional protection), and it did so ten years before the enactment of the relevant legislation and forty years before its reception by the Argentine Constitution.[52] The *amparo* offers an example of the creation of legal norms by means of judicial activity.[53] The decisions of judges, especially from the highest court, may result in the elaboration of real "juridical rules."[54] It should be noted that the 1994 constitutional reform demands judges in Argentina to look at international documents (among others, the American Convention on Human Rights) while fulfilling their roles.[55]

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[42] *Oteiza,* Reflexiones sobre la eficacia (n. 40) 365.

[43] *Alberto B. Bianchi,* Una meditación acerca de la función institucional de la Corte Suprema, La Ley 1997-B, 994 [8–9].

[44] *Bianchi,* La Ley 1997-B, 994 [8–9].

[45] CSJN 8 February 1961, *Recurso de hecho deducido por el recurrente en la causa Manzanares, Juan Carlos* – su adopción, Fallos 249:37.

[46] § 5 of the vote of the majority. See also *Eduardo Luis Tinant,* En torno a la justificación de la decisión judicial, La Ley 1997-E, 1395 [2].

[47] *Carlos S. Nino,* Fundamentos de Derecho Constitucional (2nd reprint, Buenos Aires 2002) 693, cited by *Pablo Luis Manili,* Una disidencia republicana y una tensa espera de una decisión final de la Corte Suprema en el caso de las candidaturas "testimoniales", La Ley 2009-C, 601 [9–10].

[48] *Alejandro Alberto Fiorenza,* ¿Cuándo es justa una sentencia?, La Ley Suplemento Doctrina Judicial Procesal (September 2014) 9 [2].

[49] *Carrió,* Notas (n. 15) 106.

[50] *Bianchi,* La Ley 1997-B, 994 [5–6].

[51] *Bianchi,* La Ley 1997-B, 994 [5–6]; and *Masciotra,* El activismo de la Corte Suprema (n. 18) 113.

[52] *Bianchi,* La Ley 1997-B, 994 [5–6].

[53] *Bianchi,* La Ley 1997-B, 994 [5–6].

[54] *Luis Méndez Calzada,* Rol de la jurisprudencia entre las fuentes subsidiarias de derecho en la legislación argentina, La Ley Online AR/DOC/5226/2010 (2010) [9].

[55] Art. 75, § 22, Constitución de la Nación Argentina, available at <www.infojus.gob.ar>. See also *Oteiza,* Reflexiones sobre la eficacia (n. 40) 366.

They must therefore attend to both the constitutionality and the "conventionality" of rules.[56] Judges may "create" law also by means of teaching. It is not rare in Argentina for judges to teach at university level, though those teaching activities should not conflict with or be detrimental to their role in court.[57] Teaching enables judges to further their legal education in their areas of expertise and decision-making.[58] Judges therefore should undertake teaching activities since they can offer students a *vademecum* of examples about the application of the law, and hence offer the means to understand and foresee changes in the law.[59]

A comparative law note may be appropriate at this point. A network of Latin American judges was created in 2006, and it aims to develop mechanisms for judicial cooperation and integration.[60] That network includes representatives from 18 countries from South and Central America, the Caribbean and Mexico, and even from the Supreme Court of Spain.[61] It may offer a forum for developing awareness about the judge's role in society, and it may trigger awareness on the role of judges as active participants in social life.

2. Argentine judicial structure

The Argentine Supreme Court occupies the paramount position within the Argentine judicial structure.[62] Argentina is a federal republic, as stated in the Argentine Constitution,[63] being the second largest country in South America, with a population of about 40 million inhabitants.[64] It is divided into 23 prov-

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[56] See, for example, *María Gabriela Abalos,* Las cortes supremas provinciales y su lealtad con la Corte Suprema Nacional y con la Corte Interamericana de Derechos Humanos, La Ley Gran Cuyo (October 2014) 929 [1]; *Silvina Beatriz Trebucq,* El control de convencionalidad: Su ejercicio por parte de los tribunales nacionales, La Ley 2011-B, 1186 [1–2]; *María Alejandra Bottoni/Marcelo Julio Navarro,* El control de constitucionalidad en la jurisprudencia de la Corte Suprema de Justicia de la última década, La Ley 2011-B, 1112; and *Mariana Catalano,* Control local de constitucionalidad, La Ley NOA (June 2011) 563 [6].

[57] *Gonzalo Álvarez,* Las Resoluciones 504 y 505/03 de la Corte Suprema de Justicia. Sus consecuencias en la docencia universitaria, La Ley Suplemento Actualidad (7 July 2003) 1 [1].

[58] *Daniel Alberto Sabsay,* El ejercicio de la docencia por parte de los magistrados en la reciente interpretación de la Corte Suprema de Justicia de la Nación, La Ley 2003-F, 1479 [2].

[59] *Camps,* Jurisprudencia Argentina 2004-II, 1164 [6–9].

[60] Red Latinoamericana de Jueces, available at <www.redlaj.net>.

[61] Red Latinoamericana de Jueces (n. 60).

[62] It has been correctly stated that the Argentine structure should not be strange to legal scholars that are familiar with that of the U.S. See *Daniel Brinks,* Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?, Tex. Int'l L.J. 40 (2005) 595, 606.

[63] Art. 1, Constitución de la Nación Argentina, available at <www.infojus.gob.ar>.

[64] *Germán C. Garavano,* Información & Justicia III (Buenos Aires 2011) 15.

inces and the Autonomous City of Buenos Aires. Argentina inherited the continental European system of law from Spain. In public law, however, especially in constitutional law, it followed the U.S. model.[65]

The Argentine Supreme Court started to operate in 1863, and it is placed at the vertex of the federal judicial structure.[66] Courts are divided according to subject matter (social security, criminal, civil and commercial, among others);[67] and at the federal level they are structured in three levels: Supreme Court, federal courts of appeal, and federal district courts.[68] The Argentine Supreme Court fulfils several roles; among others, it is the highest federal court, a branch of the state, the head of the federal judicial structure, the final interpreter of the Argentine Constitution, the guarantor of constitutional control, the creator of policies, and the guardian of the political process.[69]

The Argentine Supreme Court is a court of constitutional guarantees, as correctly pointed by Germán J. Bidart Campos.[70] That highest court secures the compliance with constitutional provisions, and it therefore offers justices a fundamental role in the dynamics of state government.[71] The Argentine Supreme Court is not a specialised constitutional court, and it is not divided into chambers.[72] Five justices sit in the Court.[73] It should be noted that in a

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[65] *Ricardo Zorraquín Becú,* La recepción de los derechos extranjeros en la Argentina durante el siglo XIX, Revista de Historia del Derecho 4 (1976) 325–359, 357.

[66] *Miller,* Hastings Int'l & Comp. L. Rev. 20 (1997) 231, 238; and *Masciotra,* El activismo de la Corte Suprema (n. 18) 73.

[67] *Alejandro M. Garro,* Judicial Review of Constitutionality in Argentina: Background Notes and Constitutional Provisions, 45 Duq. L. Rev. 45 (2007) 409–421, 411.

[68] See the clear diagram of the federal structure in *Garavano,* Información (n. 64) 35. The organisation of federal courts is established in Decree-Law 1285 of 1958.

Art. 1, Decreto-Ley 1285 of 1958, available at <www.infojus.gob.ar>. See *Garro,* 45 Duq. L. Rev. 45 (2007) 409, 411; *Garavano,* Información (n. 64) 36; and *Helmke,* Courts under Constraints (n. 7) 175. The provincial structure of courts is also divided into three levels: *Garro,* 45 Duq. L. Rev. 45 (2007) 409, 411.

[69] See the aspects highlighted by *Mario E. Kaminker,* Algunas ideas sobre ciertos instrumentos útiles para mejorar la eficiencia de las cortes, in: Oteiza, Cortes Supremas (n. 40) 191–210, 192; and *Masciotra,* El activismo de la Corte Suprema (n. 18) 73.

See also *Eduardo D. Craviotto,* La Corte Suprema de Justicia de la Nación y la Constitución Nacional, La Ley 1994-D, 901 [4–5]; *Bianchi,* La Ley 1997-B, 994 [3–4]; and *Estela B. Sacristán,* El rol docente de la Corte Suprema (En torno al artículo 11 de la acordada 4/207), La Ley 2009-F, 1102 [1].

[70] *Germán J. Bidart Campos,* La Corte Suprema: El Tribunal de las Garantías Constitucionales (Buenos Aires 1984) 14, cited by *Sequeira,* La Ley Suplemento Especial Candy S.A. c. AFIP s/acción de amparo (July 2009) 45 [1–2].

[71] *Roberto Omar Berizonce,* Sobrecarga, misión institucional de los tribunales superiores y desahogo del sistema judicial, in: Berizonce et al., El Papel de los Tribunales Superiores (n. 18) 433–470, 470.

[72] Art. 23, Decreto-Ley 1285 of 1958 states that the Supreme Court may be divided into chambers. See also *Víctor Bazán,* Justicia constitucional y protección de los derechos

number of Latin American jurisdictions the control of constitutionality is, contrary to the position in Argentina, in the hands of specialised constitutional courts.[74] Their creation was influenced by the European models during the second half of the twentieth century.[75] Changes started in Latin America in the 1980s with the enactment of new constitutional texts highlighting a number of fundamental rights and establishing paramount places for constitutional matters.[76] The scenario is diverse across Latin America. For example, specialised constitutional courts were established outside the judicial branch in Chile, Ecuador, Guatemala, and Peru, while constitutional courts were established within the judicial hierarchy in Bolivia and Colombia.[77] Furthermore, autonomous constitutional chambers were established within the highest courts in Costa Rica, El Salvador, Honduras, Nicaragua, Paraguay, and Venezuela.[78] Finally, constitutional matters are dealt with by the highest courts in Brazil, Dominican Republic, Mexico, Panama, and Uruguay.[79]

3. Procedural triangle and extraordinary appeal

The procedural triangle places the Argentine Supreme Court at its vertex. Argentines are not reluctant to litigate. For example, 4.5 million claims were filed in the year 2008 in Argentina alone, with 45% of those claims being filed in the federal courts and in the province of Buenos Aires.[80] That number is significant in light of the total population. Courts are slow in Argentina, with delays of approximately half a decade before reaching a decision.[81] The Argentine Supreme Court deals with a backlog of cases, showing a signifi-

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fundamentales en Argentina, in: Justicia Constitucional y Derechos Fundamentales Aportes de Argentina, Bolivia, Brasil, Chile, Perú, Urugua y Venezuela 2009, ed. by Víctor Bazán/Claudio Nash (Montevideo 2010) 15–32, 16.

[73] Art. 21, Decreto-Ley 1285 of 1958 (reformed by Art. 13, Ley 26 853), available at <www.infojus.gob.ar>.

[74] *Ángel Ester Ledesma,* Algunas reflexiones sobre la función de los tribunales de casación, in: El Papel de los Tribunales Superiores (Segunda Parte), coord. by Roberto Omar Berizonce et al. (Santa Fe 2008) 57–74, 60–61.

[75] *Ledesma,* Algunas reflexiones (n. 74) 61.

[76] *Jorge L. Esquirol,* The Turn to Legal Interpretation in Latin America, Am. U. Int'l L. Rev. 26 (2011) 1031–1072, 1032.

[77] *Ledesma,* Algunas reflexiones (n. 74) 61–62; and *Eduardo Ferrer Mac-Gregor,* La Suprema Corte de Justicia de México (de tribunal de casación a tribunal constitucional), in: Berizonce et al., El Papel de los Tribunales Superiores (n. 18) 351–432, 358.

[78] *Ledesma,* Algunas reflexiones (n. 74) 61; and *Ferrer Mac-Gregor,* La Suprema Corte (n. 77) 358.

[79] *Ledesma,* Algunas reflexiones (n. 74) 61–62; and *Ferrer Mac-Gregor,* La Suprema Corte (n. 77) 358.

[80] *Garavano,* Información (n. 64) 25.

[81] *Garro,* Duq. L. Rev. 45 (2007) 409, 411.

cant difference to some common law jurisdictions.[82] Some scholars therefore claim that the Argentine Supreme Court should only resolve a limited number of very significant cases, following the example of the U.S. Supreme Court.[83] The backlog in Argentina continues even after Law 23 774 included in 1990 a filter (somewhat similar to the U.S. writ of *certiorari*)[84] established in Article 280 of the Code of Civil Procedure.[85] That type of writ of *certiorari* allows now in Argentina to decline extraordinary appeals in a discretionary manner.[86] It should be noted that the backlog is negatively affecting the time required to resolve cases and the quality of decisions: justices are not machines.[87]

The Argentine Constitution states in Article 116 the jurisdiction of federal courts.[88] According to that provision the federal judicial structure will be activated when dealing with, *inter alia,* matters ruled by the Argentine Constitution, by national laws, and by international treaties. Claims can reach the

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[82] *Helmke,* Courts under Constraints (n. 7) 177; and *Gil Lavedra,* La Ley 2004-E, 1234 [2–3].

[83] *Alberto F. Garay,* El recurso extraordinario por sentencia arbitraria, Propuesta para un manejo más ágil, La Ley Suplemento Constitucional (August 2010) 27 [1].

[84] *Helmke,* Courts under Constraints (n. 7) 178; and *Gil Lavedra,* La Ley 2004-E, 1234 [2–3]. See, for example, the statistics for the period 2006–2008. There were 13,454 cases pending decision in the year 2008. *Kaminker,* Algunas ideas (n. 69) 191, 193–194. See also the decline of cases after a peak reached with the economic crisis of 2001, as reflected in the statistics in *Adolfo Rivas,* El acceso a la Corte, in: Oteiza, Cortes Supremas (n. 40) 251–267, 263.

[85] Art. 280, Ley 17 454 (Código Procesal Civil y Comercial de la Nación), available at <www.infojus.gob.ar>.

[86] *Bianchi,* La Ley 1997-B, 994 [5–6]; *César D. Yáñez,* La nueva Corte Suprema de Justicia de la Nación – Ley 23 774, La Ley 1990-C, 841 [1–3]; and *Garay,* La Ley Suplemento Constitucional (August 2010) 27 [7]. On the criticisms of Art. 280 see *Arazi,* Derecho procesal (n. 27) 536. Justice Eugenio R. Zaffaroni stated that the filters still do not work properly. See *Eugenio R. Zaffaroni,* El rol de la Corte, El parlamentarismo, Inseguridad y sistema judicial, La Ley Suplemento Actualidad (6 November 2008) 1 [1].

[87] *Eduardo Néstor de Lázzari,* La denegación de recursos extraordinarios que versan sobre cuestiones insustanciales o carentes de trascendencia, in: Oteiza, Cortes Supremas (n. 40) 93–105, 94.

[88] Article 116 in Spanish reads: "Corresponde a la Corte Suprema y a los tribunales inferiores de la Nación, el conocimiento y decisión de todas las causas que versen sobre puntos regidos por la Constitución, y por las leyes de la Nación, con la reserva hecha en el inc. 12 del Artículo 75: y por los tratados con las naciones extranjeras: de las causas concernientes a embajadores, ministros públicos y cónsules extranjeros: de las causas de almirantazgo y jurisdicción marítima: de los asuntos en que la Nación sea parte: de las causas que se susciten entre dos o más provincias; entre una provincia y los vecinos de otra; entre los vecinos de diferentes provincias; y entre una provincia o sus vecinos, contra un Estado o ciudadano extranjero." Art. 116, Constitución de la Nación Argentina, available at <www.infojus.gob.ar>.

Argentine Supreme Court particularly by means of original jurisdiction[89] or extraordinary appeal.[90] Article 117 of the Constitution indicates that original jurisdiction – following the U.S. constitutional model – is activated when dealing with ambassadors, ministers, and foreign councils, and in cases where Argentine provinces are involved.[91] An extraordinary appeal[92] before the Argentine Supreme Court is available in the cases established in, *inter alia,*[93] Article 14 of Law 48 of 1863[94] – as stated in Article 256 of the Code of Civil

[89] See Art. 255, Ley 17 454 (Código Procesal Civil y Comercial de la Nación); and Decreto-Ley 1285 of 58, both available at <www.infojus.gob.ar>. See also *Arazi,* Derecho procesal (n. 27) 518.

[90] *Helmke,* Courts under Constraints (n. 7) 176; and *Arazi,* Derecho procesal (n. 27) 36. A *per saltum* is also allowed as an extraordinary appeal, according to Articles 257bis and 257ter of the Code of Civil Procedure. In that type of extraordinary appeal the Supreme Court activates its competence before the lower instances are exhausted. It may be therefore visualized as a "jump" of a case towards the Supreme Court. See Arts. 257bis–257ter, Ley 17 454 (Código Procesal Civil y Comercial de la Nación), available at <www.infojus.gob.ar>; *Arazi,* Derecho procesal (n. 27) 537–538; *Masciotra,* El activismo de la Corte Suprema (n. 18) 74; and, generally, *Pablo Luis Manili,* El per saltum, En la jurisprudencia de la Corte Suprema, La Ley 2012-F, 810.

[91] Article 117 in Spanish reads: "En estos casos la Corte Suprema ejercerá su jurisdicción por apelación según las reglas y excepciones que prescriba el Congreso; pero en todos los asuntos concernientes a embajadores, ministros y cónsules extranjeros, y en los que alguna provincia fuese parte, la ejercerá originaria y exclusivamente." Art. 117, Constitución de la Nación Argentina, available at <www.infojus.gob.ar>. See also *Helmke,* Courts under Constraints (n. 7) 176; and *Garavano,* Información (n. 64) 36.

[92] They are generally submitted before the lower court that has to decide if the appeal is granted to the higher court. See, for example, Art. 285 of Ley 17 454 (Código Procesal Civil y Comercial de la Nación), available at <www.infojus.gob.ar>; and *Helmke,* Courts under Constraints (n. 7) 177. The extraordinary appeal in Argentina follows the U.S. model; while other countries in Latin America follow other models, such as Brazil that looked at the Swiss model. See *Augusto M. Morello,* Recursos extraordinarios: visión comparada brasileña-argentina, Doctrina Judicial 1995-2 (1995) 441 [9].

[93] See also Art. 24, Decreto-Ley 1285 of 1958, available at <www.infojus.gob.ar>.

[94] Article 14 in Spanish reads: "Una vez radicado un juicio ante los Tribunales de Provincia, será sentenciado y fenecido en la jurisdicción provincial, y sólo podrá apelarse a la Corte Suprema de las sentencias definitivas pronunciadas por los tribunales superiores de provincia en los casos siguientes:

1° Cuando en el pleito se haya puesto en cuestión la validez de un Tratado, de una ley del Congreso, o de una autoridad ejercida en nombre de la Nación y la decisión haya sido contra su validez.

2° Cuando la validez de una ley, decreto o autoridad de Provincia se haya puesto en cuestión bajo la pretensión de ser repugnante a la Constitución Nacional, a los Tratados o leyes del Congreso, y la decisión haya sido en favor de la validez de la ley o autoridad de provincia.

3° Cuando la inteligencia de alguna cláusula de la Constitución, o de un Tratado o ley del Congreso, o una comisión ejercida en nombre de la autoridad nacional haya sido cuestionada y la decisión sea contra la validez del título, derecho; privilegio o exención que se

Procedure[95] – and in the cases created by the court itself. On the one hand, Article 14 of Law 48 was inspired by Section 25 of the U.S. Judiciary Act of 1789,[96] and therefore invites extraordinary appeals when a decision denies the validity of a treaty or law of the Argentine Congress; when a decision affirms the validity of a provincial provision conflicting with a federal one; and when a decision states the invalidity of a right that derives from the Argentine Constitution, or a treaty, or law of the Argentine Congress.[97] On the other hand, the Supreme Court created cases representing federal matters and relating to situations that: affect the community at large *(gravedad institucional);* represent a gross mistake in applying the law and an arbitrary appreciation of evidence *(sentencia arbitraria);* or result in applying formalistic rituals that may frustrate the application of the law *(exceso ritual manifiesto).*[98] Extraordinary appeals deal with matters of law and not fact, and aim to offer a remedy to the violations of constitutional provisions and national legislation.[99] The use of extraordinary appeals increased drastically during the past half century. For example, they comprised 57% of decisions rendered during the period 1974–1983 and 99% of the decisions rendered during the period 1984–1997.[100] The snapshot under IV. will focus on extraordinary appeals during the period of January to July 2015.

A final note on the societal value of the highest court appears to be relevant. The Argentine Supreme Court must be ready to act according to the requirements and circumstances of every time and of every society.[101] Accordingly, it established specialised offices to deal with access to justice, domestic violence, crimes against humanity, and even, since 2009, with law and economics.[102] It should be noted that the level of public respect for the

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funda en dicha cláusula y sea materia de litigio." Art. 14, Ley 48, available at <www.infojus.gob.ar>.

[95] Art. 256, Ley 17 454 (Código Procesal Civil y Comercial de la Nación), available at <www.infojus.gob.ar>; and *Arazi,* Derecho procesal (n. 27) 519–523.

[96] *Helmke,* Courts under Constraints (n. 7) 176; and *Héctor O. Sagretti,* Adecuación de los fallos pronunciados por los tribunales inferiores a los dictados por Corte Suprema de Justicia de la Nación, La acusación mantenida durante el debate como presupuesto para una sentencia condenatoria, Correcta interpretación del caso "Marcilese" como pauta para la resolución en casos futuros, La Ley Córdoba (February 2003) 45 [1–3].

[97] See also *Arazi,* Derecho procesal (n. 27) 519–520.

[98] *Arazi,* Derecho procesal (n. 27) 520–525.

[99] *Arazi,* Derecho procesal (n. 27) 520; and *Helmke,* Courts under Constraints (n. 7) 177.

[100] *Helmke,* Courts under Constraints (n. 7) 177; see also *Gil Lavedra,* La Ley 2004-E, 1234 [2–3].

[101] *Masciotra,* El activismo de la Corte Suprema (n. 18) 74.

[102] *María Sofía Sagüés,* El análisis económico del derecho en la jurisdicción constitucional: ponderación de la Unidad de Análisis Económico de Derecho de la Corte Suprema de Justicia de la Nación Argentina, La Ley 2009-F, 1114 [1]; and *Mario Cámpora/Marcelo*

Argentine judiciary has fluctuated throughout the decades. It has been traditionally high until it experienced a decrease in the 1990s.[103] During the past decade it appears to have risen again.

III. Judicial Decision-Making and the Argentine Supreme Court

Each judge operates and constructs decisions in a particular way. Knowing how justices of the Argentine Supreme Court operate and how they construct their decisions may help to understand their current role as key actors in the development of law. This section, therefore, looks at a number of aspects that relate to how the Argentine Supreme Court operates: the logical genesis of decisions, style, the reasoning behind decisions, references to academic literature, references to comparative law, the use of dissenting opinions, and the value of precedents.

Society expects the justices of the Argentine Supreme Court to be renowned jurists, while also encompassing a political dimension and acting as public figures.[104] Justices also need to be aware that because of their decisions political changes can occur, and they should strive for the good of society at large.[105] In Argentina, justices are appointed by the President with the approval of the Senate.[106] The composition of the Argentine Supreme Court has naturally changed several times.[107] For example, during the first presidency of Juan Domingo Perón in the 1940s a number of justices were impeached

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Julio Navarro, Audiencias públicas ante la Corte Suprema, Una instancia novedosa de participación pública, La Ley 2009-F, 824 [2].

[103] *Jonathan M. Miller,* Evaluating the Argentine Supreme Court under Presidents Alfonsín and Menem (1983–1999), Sw. J.L. & Trade Am. 7 (2000) 369–433, 372.

[104] *Rita A. Mill,* Efecto vertical y horizontal de la jurisprudencia, in: Oteiza, Cortes Supremas (n. 40) 455–492, 482.

[105] *Mill,* Efecto vertical y horizontal (n. 104) 455, 482.

[106] Art. 99, § 4, Constitución de la Nación Argentina, available at <www.infojus.gob.ar>. See also *Garavano,* Información (n. 64) 36; and *Arazi,* Derecho procesal (n. 27) 45. For an English language explanation of the appointment procedure, see *Brinks,* Tex. Int'l L.J. 40 (2005) 595, 608–609.

[107] For some of the recent changes, see *Alfonso Santiago,* Actualidad en la jurisprudencia de derecho constitucional la Corte Suprema desde el pacto de Olivos hasta nuestros días – Principales fallos institucionales 1994–1999, La Ley 2000-A, 1069 [1]; *Yáñez,* La Ley 1990-C, 841 [1–3]; *Alberto B. Bianchi,* El derecho constitucional en la jurisprudencia de la Corte Suprema entre 2003 y 2007, La Ley 2008-B, 717 [1–2]; and *Eduardo Oteiza,* La Corte Suprema de Justicia de la Nación y el sistema interamericano de protección de los derechos humanos, in: Berizonce et al., El Papel de los Tribunales Superiores (Segunda Parte) (n. 74) 339–366, 343. On the members of the first Argentine Supreme Court, see *Miller,* Hastings Int'l & Comp. L. Rev. 20 (1997) 231, 242–244.

and forced to resign.[108] There was an almost constant alteration between democratic and dictatorial governments in Argentina until 1983,[109] and that fact also had an impact on the composition of the highest court. It should not be ignored that a number of justices used to respond, perhaps in a significant degree, to the will of the executive.[110] It should be also noted, for the purpose of the analysis below, that the current members of the Argentine Supreme Court are deemed to have an academic profile.[111]

1. Logical genesis

Justices choose between the propositions of plaintiffs and defendants when rendering their opinions and they opt for the one they deem closer to law and justice.[112] That process represents the logical genesis of their opinions.[113] Joaquín Escriche indicated that the word for decision (i.e., *sentencia*) derives from the Latin word *sentire,* meaning to feel. Justices therefore state what they feel, either by convicting or absolving a party in a certain case.[114] Decisions aim to bring legal certainty to the rights and duties of the parties,[115] and hence the Code of Civil Procedure states in Article 163 that decisions in Argentina must comprise three aspects: the description of the claims *(relación de la causa),* the grounds *(fundamentación),* and the decision *per se.*[116] In private law, justices must decide within the scope offered by Chapter 1 of the

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[108] *Helmke,* Courts under Constraints (n. 7) 15. See, for example, the impeachment and retirement of justices during the presidency of Néstor C. Kirchner, in *Brinks,* Tex. Int'l L.J. 40 (2005) 595, 609–611; and *Jonathan M. Miller,* A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process, Am. J. Comp. L. 51 (2003) 839–885, 870.

[109] *Helmke,* Courts under Constraints (n. 7) 15; *Bottoni/Navarro,* La Ley 2011-B, 1112 [1]; and *Becky L. Jacobs,* Pesification and Economic Crisis in Argentina: The Moral Hazard Posed by a Politicized Supreme Court, U. Miami Inter-Am. L. Rev. 34 (2003) 391–434, 407.

[110] See, the example, the statements by a number of justices appointed by Carlos S. Menem in *Mugambi Jouet,* The Failed Invigoration of Argentina's Constitution: Presidential Omnipotence, Repression, Instability, and Lawlessness in Argentine History, U. Miami Inter-Am. L. Rev. 39 (2008) 409–462, 446.

[111] *Bianchi,* La Ley 2008-B, 717 [1–2].

[112] *Selmar Jesús Acciarresi,* Reconocimiento y ejecución de sentencias extranjeras, La Ley Suplemento Doctrina Judicial Procesal (3 October 2011) 1 [2].

[113] *Acciarresi,* La Ley Suplemento Doctrina Judicial Procesal (3 October 2011) 1 [2].

[114] *Joaquín Escriche,* Diccionario Razonado de Legislación y Jurisprudencia (Paris 1851) 1452. See also *Alfredo Lemon,* El umbral constitucional de la sentencia (de los recaudos que debe cumplir un pronunciamiento judicial para ser constitucionalmente válido), La Ley Córdoba (1991) 469 [1–2].

[115] *Ernesto Cionfrini,* Elementos para el análisis jurisprudencial, in: Colección de Análisis Jurisprudencial Derecho Constitucional, dir. by Daniel Alberto Sabsay (Buenos Aires 2005) 3–11 [1].

Preliminary Title of the Argentine Civil and Commercial Code. There, in Articles 1–3, justices are reminded of their duty to render reasoned decisions in every case.[117]

The Argentine Supreme Court traditionally follows either the literal, teleological, or systematic interpretation of legal rules.[118] Interpretation by the Supreme Court was initially more exegetical and then tended to be more teleological.[119] Decisions – as stated by the Argentine Supreme Court – must offer proper reasons.[120] They are the reasoned application of the law to the facts that have been proved during the proceedings.[121] The Supreme Court therefore stated that a decision should be a reasoned derivation of the applicable law.[122] Judges must subsume the facts of a case to the applicable law. Accordingly, they will first present the position of the parties and then assess the value of the evidence according to their reasoned opinion *(sana crítica).*[123] Once the facts are determined, the judges will undertake the subsumption that will lead to the conclusion for a specific case.[124]

Subsumption was inherited from the continental European systems and follows a deductive process.[125] It is a logical operation and functions by using the facts of a case as minor premises and the applicable rules as major premises.[126] Justices know which the major premises are because of the principle *Iura novit curia,*[127] and they are therefore free to resort to the rules they con-

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[116] Art. 163, Ley 17 454 (Código Procesal Civil y Comercial de la Nación), available at <www.infojus.gob.ar>; *Arturo R. Yungano,* La sentencia judicial, La Ley 1995-A, 1014 [4–5]; and *Cionfrini,* Elementos para el análisis (n. 115) [4–7].

[117] Código Civil y Comercial Argentino (Buenos Aires 2014) 5.

[118] *Emilio A. Ibarlucía,* Una lección de Derecho Constitucional, Doctrina Judicial (21 August 2013) 24 [2–3].

[119] *Elida Susana Lombardi,* Interpretación de la ley, in: Colección de Análisis Jurisprudencial, Derecho Civil, Parte General, dir. by Carlos A. Ghersi (Buenos Aires 2003) 39–55 [13].

[120] *Fiorenza,* La Ley Suplemento Doctrina Judicial Procesal (September 2014) 9 [2].

[121] *Cionfrini,* Elementos para el análisis (n. 115) [1].

[122] *Fiorenza,* La Ley Suplemento Doctrina Judicial Procesal (September 2014) 9 [2]; and *Hugo Zuleta,* La fundamentación de las sentencias judiciales: una crítica a la teoría deductivista, Isonomía 23 (October 2005) 59–95, 59.

[123] Art. 386, Ley 17 454 (Código Procesal Civil y Comercial de la Nación), available at <www.infojus.gob.ar>. On *sana crítica,* see *José Ignacio Ondarcuhu,* Sana crítica – Lógica, experiencia y sentido común, La Ley 2013-C, 367 [1–2].

[124] *Alejandro C. Verdaguer,* Las formalidades del proceso civil, Consideraciones lingüísticas y argumentativas, La Ley 2014-D, 1161 [3]; and *Cionfrini,* Elementos para el análisis (n. 115) [1–4].

[125] *Cionfrini,* Elementos para el análisis (n. 115) [1–4].

[126] *Lemon,* La Ley Córdoba (1991) 469 [1–2]; and *Mariangel Argañaraz/Sebastián Monjo,* La aplicación del argumento a contrario o del argumento analógico en las sentencias del STJ de Córdoba y de Jujuy, La Ley Córdoba (May 2012) 349 [1].

[127] *Fiorenza,* La Ley Suplemento Doctrina Judicial Procesal (September 2014) 9 [1–2].

sider most relevant.[128] Logic and rational rules offer a real constitutional guarantee for the reasons of decisions, and logic is ultimately transformed into an instrument of justice, security, and order.[129] As a corollary, justices must evaluate the facts of a case, analyse the reasonableness of that case, consider alternative means for solutions, opt for one alternative, write their judgment, properly offer the reasons for that judgment, and hence avoid arbitrariness.[130] Genaro R. Carrió stated that arbitrary decisions are those in which there is a lack of normative reasoning, being merely an act of will.[131]

2. Style

Style is also important when unveiling how the Argentine Supreme Court operates and constructs decisions, since writing and citing correctly indicates the level of respect and professionalism of every actor.[132] Argentine decisions must be accessible for their audience; and they must therefore be clear, complete, legitimate, and logical.[133] The proceedings of the 2006 *Congreso Iberoamericano de Capacitación Judicial* (Ibero American Congress of Judicial Training) state that the language of decisions should be such that it can be understood by the audience they are aimed at.[134] The language should bring justices closer to their communities rather than isolating them.[135] Justice Elena I. Highton de Nolasco of the Argentine Supreme Court recently pleaded in favour of drafting judgments in clear and precise language.[136] Some scholars even advocate the inroduction of rules that would require the use of clear language and no Latin terms, while simplifying semantic constructions and avoiding the use of terms that would seem foreign to society.[137] Finally, it should be noted that Argentine decisions must be in writing, even if they

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[128] *Julio O. Chiappini,* La congruencia procesal salvaguardada por el principio iura novit curiae, La Ley Buenos Aires (July 2012) 615 [1–2].

[129] *Jorge Alejandro Amaya,* La seducción política del derecho, Doctrina Judicial (10 October 2012) 7 [1]; and *Claudio D. Gómez,* El deber de fundamentación y algunas patologías en las sentencias a la luz de la Jurisprudencia del Tribunal Superior, La Ley Córdoba (2006) 421 [8].

[130] See generally chapter XII of *Agustín Gordillo,* Tratado de derecho administrativo y obras selectas, Tomo 6, Libro 1: El método en derecho[2] (Buenos Aires 2012).

[131] *Genaro R. Carrió,* El Recurso Extraordinario por sentencia arbitraria[3] (Buenos Aires 1983), cited by *Amaya,* Doctrina Judicial (10 October 2012) 7 [1].

[132] *Walter F. Carnota,* La jurisprudencia de la Corte y sus citas: cuando lo formal hace a lo sustancial, La Ley 2007-F, 1433 [2].

[133] *Lemon,* La Ley Córdoba (1991) 469 [4].

[134] *Nadia Aguayo,* Derecho Público y Lenguaje, La Ley 2012-B, 893 [5].

[135] *Aguayo,* La Ley 2012-B, 893 [5].

[136] *Aguayo,* La Ley 2012-B, 893 [5].

[137] *Francisco Verbic,* Motivación de la sentencia y debido proceso en el sistema interamericano, La Ley 2014-A, 867 [6].

might first be expressed orally.[138] Similarly, decisions must be in writing in other Latin American jurisdictions, such as Brazil.[139]

Argentine decisions may be divided for clarity into two parts. On the one hand, decisions should include the legal bases *(considerandos),* with all the reasons that lead to a conclusion.[140] On the other hand, decisions should include a dispositive part, with the resolution for a specific case.[141] That division assumes a certain logical structure; it helps to identify the parties and their claims, to appreciate the reasoning, arguments, and value judgments by justices.[142] It should be noted that the dispositive part must be written without blank spaces to avoid confusions and alterations.[143]

Justices should follow a number of rules relating to style when drafting decisions. The 1952 *Reglamento para la Justicia Nacional* (Argentine Judicial Rules) states in Article 44 that decisions should contain no incomplete citations or pages, must cite precisely the provisions and resolutions they invoke, and must cite the official collection of Argentine Supreme Court decisions (i.e. *Fallos*) when referring to decisions of that court.[144] That does not happen always in practice, however.[145] Some justices take "poetic liberties," and sometimes just refer to the names of parties when dealing with emblematic cases.[146] Citing the official collection would bring legal certainty, something needed in Argentina, as parties would then be able to know exactly what is being addressed: be it the vote of the majority, concurring votes, or dissenting opinions.[147]

Style requirements are also in place for parties. For example, when submitting an extraordinary appeal before the Supreme Court, and according to Article 1 of the *Acordada* (Argentine Supreme Court Decree) 4/2007 petitions should not exceed 40 pages with 26 lines each, with font not smaller than size 12.[148] That petition should also have a cover page with the relevant information to identify the case.[149] According to Articles 8 and 9 of that same Decree, parties are required to list the legislation and the cases cited.[150]

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[138] *Cionfrini,* Elementos para el análisis (n. 115) [4–7].

[139] *Cionfrini,* Elementos para el análisis (n. 115) [4–7].

[140] *Chiappini,* La Ley Buenos Aires (July 2012) 615 [2].

[141] *Chiappini,* La Ley Buenos Aires (July 2012) 615 [2–3]; and *Cionfrini,* Elementos para el análisis (n. 115) [4–7].

[142] *Cionfrini,* Elementos para el análisis (n. 115) [4–7].

[143] *Chiappini,* La Ley Buenos Aires (July 2012) 615 [2–3]; and *Julio O. Chiappini,* Ofrecimiento de prueba tras la contestación de la demanda, La Ley Suplemento Doctrina Judicial Procesal (2 July 2012) 29 [2].

[144] Art. 44, Acordada 17.12.1952, available at <www.infoleg.gov.ar>.

[145] *Carnota,* La Ley 2007-F, 1433 [1].

[146] *Carnota,* La Ley 2007-F, 1433 [1].

[147] *Carnota,* La Ley 2007-F, 1433 [1].

[148] Art. 1, Acordada 4/2007, available at <www.infoleg.gov.ar>.

[149] Art. 2, Acordada 4/2007, available at <www.infoleg.gov.ar>.

Generalisations are difficult when working with case studies, since the resulting research has to demonstrate that the selected cases are representative of other cases where similar occurrences may take place.[151] It can be stated, nevertheless, that important cases of the Argentine Supreme Court are decided in long decisions and with multiple votes. For example, the 2013 case *Grupo Clarín*[152] on antitrust law, which was covered by the media for an extensive period of time, ended in a decision that extended over 391 pages, with six different votes.[153] Another example is found in the 2003 case *Provincia de San Luis,*[154] dealing with the 2001 economic crisis. On that occasion the highest court rendered a 168 page decision. That inclination towards delivering in important cases long decisions motivated a scholar to claim that decisions may include a "mosaic" of different votes.[155]

3. Reasoning

Reasoning of decisions is one of the pillars of the rule of law.[156] Francesco Carnelutti stated that it "consists of the construction of reasoning that suffices for a sensible person to reach the same conclusions from the facts perceived by the judge."[157] The duty to offer reasons for decisions has several explanations. There is a need to justify the power by means of the reasonableness of the resulting decisions.[158] Moreover, the foundation of each decision may be subject to revision.[159] In addition, reasoning offers a bulwark against arbitrariness and judicial despotism.[160] Finally, decisions must convince the parties that justice has been done and, as far as decisions serve as examples, they may become a source of law.[161]

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[150] Arts. 8–9, Acordada 4/2007, available at <www.infoleg.gov.ar>.

[151] *Bob Hancké,* Intelligent Research Design: A Guide for Beginning Researchers in the Social Sciences (Oxford 2009) 61.

[152] CSJN 29 October 2013, *Grupo Clarín SA y otros v. Poder Ejecutivo Nacional y otro* – acción meramente declarativa, file G. 439. XLIX. REX.

[153] See also *Juan Vicente Sola,* El largo camino del caso "Grupo Clarín", La Ley 2013-F, 37 [1].

[154] CSJN 5 March 2003, *San Luis, Provincia de v. Estado Nacional* – acción de amparo, file S. 173. XXXVIII ORIGINARIO.

[155] *Mill,* Efecto vertical y horizontal (n. 104) 455, 492.

[156] *Gómez,* La Ley Córdoba (2006) 421 [1].

[157] *Francesco Carnelutti,* Estudios de Derecho Procesal, Tomo II (Buenos Aires, 1952) 321, cited by *Alvarado Velloso,* El Juez (n. 26) 206.

[158] *Osvaldo Alfredo Gozaíni,* Deberes de los Jueces – La motiviación de la sentencia, Art. 34, Inciso 4° del Cód. Procesal Civil y Comercial de la Nación, in: Colección de Análisis Jurisprudencial Elementos de derecho Procesal Civil, dir. by Osvaldo Alfredo Gozaíni (Buenos Aires 2002) 15 [1–2].

[159] *Gozaíni,* Deberes de los Jueces (n. 158) [1–2].

[160] *Gozaíni,* Deberes de los Jueces (n. 158) [1–2].

[161] *Gozaíni,* Deberes de los Jueces (n. 158) [1–2].

A path was followed in Argentina towards the reasoning of decisions, and it is currently implicitly and expressly addressed in the legal framework. In the colonial period there was no need to offer reasons, following the Spanish tradition.[162] Starting in 1790 in France, a number of jurisdictions started to require reasoning, something that was then developing in the U.S. and in other parts of Europe.[163] In Argentina reasoning was to wait until the 1850s.[164] Even though the matter was not explicitly addressed in the Argentine Constitution, justices had to offer reasons for their decisions; this was based on, *inter alia,* Articles 17 (on property rights) and 18 (on due process).[165] Furthermore, since the 1994 constitutional reform, justices in Argentina must also apply the human rights treaties that were incorporated into the national legal framework.[166] Those treaties help justices interpret rules in a manner that highlights the value of human personality.[167] For example, reasoning is one of the due guarantees underlying the American Convention for Human Rights,[168] and it is therefore an obligation for all Argentine judges and for all judges that operate within that inter-American system of human rights.[169] Reasoning is expressly required in the Code of Civil Procedure[170] and in a number of provincial constitutions and provincial codes of proce-

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[162] *Abelardo Levaggi,* La fundamentación de las sentencias en el derecho indiano, Revista de Historia del Derecho 6 (1978) 45–73, 45–50; and *Gozaíni,* Deberes de los Jueces (n. 158) [1].

[163] *Víctor Tau Anzoátegui,* Acerca de la fundamentación de las sentencias en el derecho patrio, Revista del Instituto de Historia del Derecho Ricardo Levene 13 (1962) 181–198, 182; and *Alterini,* La Ley 2014-C, 1012 [3].

[164] *Tau Anzoátegui,* Revista del Instituto de Historia del Derecho Ricardo Levene 13 (1962) 181, 182.

[165] Arts. 17–18, Constitución de la Nación Argentina, available at <www.infojus.gob.ar>. See also *Raúl Eduardo Fernández,* El control de logicidad de las resoluciones judiciales, La Ley Córdoba (March 2011) 117 [1]; *Francisco J. D'Albora,* Fundamentación de la sentencia y recurso extraordinario, Doctrina Judicial 1990-1 (1990) 865 [1–2]; *Santiago José Gascón,* Fundamentación de resoluciones judiciales. Notas sobre seguridad jurídica y prescripción, La Ley Gran Cuyo (April 2009) 230 [1]; *Lemon,* La Ley Córdoba (1991) 469 [4–9]; *Gozaíni,* Deberes de los Jueces (n. 158) [1–2]; and *Alvaro S. Coleffi,* El defecto de fundamentación en las sentencias, La Ley Buenos Aires (2003) 808 [2–3].

[166] *Gustavo Javier Alterini,* Quid de la aplicabilidad retroactiva de la jurisprudencia penal más benigna de la Corte Suprema de Justicia de la Nación – Su admisibilidad en el recurso de revisión a la luz de los Pactos Internacionales sobre Derechos Humanos constitucionalizados, La Ley 2006-B, 744 [6].

[167] *Alterini,* La Ley 2006-B, 744 [6].

[168] Art. 8.1 and Art. 66.1, American Convention on Human Rights "Pact of San Jose, Costa Rica", available at <www.oas.org>; and *Mario Masciotra,* Deber de fundar las sentencias, La Ley 2013-F, 1002 [5].

[169] *Verbic,* La Ley 2014-A, 867 [1].

[170] *Alvarado Velloso,* El Juez (n. 26) 205.

dure.[171] Furthermore, the new Argentine Civil and Commercial Code states in Article 3 that judges must resolve matters submitted to them by means of reasoned decisions.[172] Decisions must therefore be elaborated in Argentina according to reason.[173] The highest court even stated that decisions must offer reasons according to facts and to law, since otherwise they would be arbitrary.[174]

The requirement of reasoning was introduced in almost all Latin American codes of procedure.[175] There is usually no express constitutional reception, yet it is possible to be inferred from the constitutions of Bolivia, Brazil, Chile,[176] Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay, and Venezuela.[177] Ecuador and Peru make express references to reasoning in their constitutions; and the Dominican Republic, while making express reference to reasoning, seems to require it only for criminal law.[178] Finally, it can be mentioned that the *Estatuto del Juez Iberoamericano* (Statute for Ibero-American Judges) states in Article 41 that judges have the inescapable obligation to offer proper reasons for their decisions, hence offering a guarantee for the legitimacy of their activity and the rights of the parties.[179]

4. Academic writing

The valuable work of scholars offers solid arguments for justices and parties.[180] Criticism has been raised – already a decade ago – that many authors were cited in the decisions of the Argentine Supreme Court, with the Court not always checking the level or quality of those references.[181] The Argentine Supreme Court was also criticised for occasionally drafting extensive passages that might be suitable as parts of books or treatises but not as parts of the

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[171] *Osvaldo A. Gozaíni,* Nulidad de la sentencia por defectos de fundamentación, Doctrina Judicial 1994-1 (1994) 1041 [1–2]; *Lemon,* La Ley Córdoba (1991) 469 [4–9]; and *Masciotra,* 2013-F (2013) 1002 [2].

[172] Art. 3, Código Civil y Comercial Argentino (Buenos Aires 2014) 5; and *José Pablo Descalzi,* El derecho procesal en el Código Civil y Comercial unificado, Doctrina Judicial (10 December 2014) 7 [2–4].

[173] *Porras,* La Ley Gran Cuyo (December 2014) 1178 [1–5].

[174] *Alberto Néstor Cafetzóglus,* La imperceptible extrema gravedad de la sentencia arbitraria, La Ley 2008-A, 1149 [1–2]. See also *Gozaíni,* Deberes de los Jueces (n. 158) [1–2].

[175] *Verbic,* La Ley 2014-A, 867 [2].

[176] Each jurisdiction has its own particularities. For example, for information on the reasoning of decisions in Chile, see *Daniela Accatino Scagliotti,* La Fundamentación de las sentencias: ¿un rasgo distintivo de las judicatura moderna?, Revista de Derecho [Valdivia] 15 (December 2003) 9–35.

[177] *Verbic,* La Ley 2014-A, 867 [3].

[178] *Verbic,* La Ley 2014-A, 867 [3].

[179] Art. 41, Estatuto del Juez Iberoamericano, available at <centroandinodeintegracion.org/estatuto-juez-iberoamericano-2>.

[180] *Camps,* Jurisprudencia Argentina 2004-II, 1164 [12–13].

obiter dictum of their decisions.[182] It should also be noted that for many years the Supreme Court only cited dead authors, in order to avoid retractions or that they might be parties in future proceedings before that tribunal.[183]

Which authors are cited by the Argentine Supreme Court naturally depend on the subject matter of the case being addressed, and references can therefore be very diverse. The following examples do not aim to indicate a trend or a prevailing type of reference by the Argentine Supreme Court, they only aim to show the diversity with regard to the academic writing used by the Court when making decisions. In public law, references to U.S. authors are abundant, and are found especially during the first decades of the Argentine Supreme Court's existence.[184] References can be very diverse. For example, the 1992 leading case *Ekmekdjian*[185] offers a comparative law journey with an array of references from across the globe, including, for example, references to André Tunc,[186] Lord Denning,[187] or Felix Frankfurter,[188] and to a multiplicity of international law documents.[189] Later, the 2005 case *Itzcovich*[190] cited an article by John Rawls that was published in the *Harvard Law Review* and dealt with social justice.[191] More recently, in the 2009 case of *Arriola,*[192] on possession of drugs, the court cited Thomas Hobbes,[193] John Locke,[194] Ronald Dworkin,[195] and even Lucius Annaeus Seneca.[196]

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[181] *Jorge Reinaldo Vanossi,* Filosofía de los valores constitucionales, política institucional, y técnica jurídica, en las cortes supremas y tribunales constitucionales, La Ley 2005-C (2005) 989 [9–10].

[182] *Vanossi,* La Ley 2005-C, 989 [9–10].

[183] *Vanossi,* La Ley 2005-C, 989 [9–10].

[184] See generally *Jonathan M. Miller,* The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith, Am. U. L. Rev. 46 (1997) 1483–1572.

[185] CSJN 7 July 1992, *Miguel Ángel Ekmekdjián v. Gerardo Sofovich y Otros,* Fallos 315:1503.

[186] § 5 of the vote by Justices Enrique Santiago Petracchi and Eduardo Moliné O'Connor.

[187] § 27 of the vote of the majority.

[188] § 6 of the vote by Justices Petracchi and Moliné O'Connor.

[189] See also *Oteiza,* La Corte Suprema (n. 105) 344.

[190] CSJN 29 March 2005, *Itzcovich, Mabel v. ANSeS* – reajustes varios, file I. 349. XXXIX. R.O.

[191] § 11 of the vote by Chief Justice Ricardo L. Lorenzetti. See also *Adela M. Seguí,* Reseña de los votos del Doctor Ricardo Lorenzetti, La Ley Suplemento Actualidad (23 August 2007) 1 [1].

[192] CSJN 25 August 2009, *Arriola Sebastian y Otros* – Causa n° 9080, file A. 891. XLIV. RHE.

[193] § 13 of the vote by Chief Justice Lorenzetti.

[194] § 13 of the vote by Chief Justice Lorenzetti.

[195] § 32 of the vote of the majority.

Justices of the Argentine Supreme Court are also prolific authors. For example, Chief Justice Ricardo L. Lorenzetti and Justice Eugenio R. Zaffaroni are leading authors in their fields of expertise. Furthermore, justices have been involved in legislative efforts, such as the drafting of the Argentine Civil and Commercial Code, which was undertaken by a group of jurists lead by Chief Justice Lorenzetti, Justice Highton de Nolasco, and also Judge Aída Kemelmajer de Carlucci.[197] It should therefore be no surprise that courts also cite the work of scholars who are also judges. For example, the seminal 1991 decision in *Peralta,*[198] that followed an economic crisis, cited the work of Justice Alfredo Orgaz.[199] This, again, is certainly not an exception.

The Argentine Supreme Court also refers to dictionaries when elaborating decisions. For example, again in *Peralta,* the Supreme Court used the *Diccionario de la lengua española* (Spanish Dictionary) of the Spanish Royal Academy to define the key term "emergency."[200] The use of dictionaries by the U.S. Supreme Court and the highest courts in Argentina, Costa Rica, and Mexico precipitated a study that examined the use of those auxiliary tools for the period of 1995–2006.[201] That study showed that the dictionary of the Spanish Royal Academy was cited in 272 decisions of those three Latin American courts.[202] The list also included 10 dictionaries, including the already mentioned nineteenth-century work of Escriche, which is regularly subject to revision and new editions.[203] Dictionaries can be used by courts like life jackets on a boat: not always needed, but extremely useful on a specific occasion.[204] The shared civil law roots help explain the dissemination of dictionaries across jurisdictions. For example, the Argentine Supreme Court cited French and

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[196] § 18 of the vote by Justice Carlos S. Fayt. A reference to these four authors is available in *Lucas S. Grosman,* El maximalismo en las decisiones de la Corte Suprema. El caso Arriola, La Ley Suplemento Constitucional (5 August 2010) 53 [9].

[197] *Julieta Marotta/Agustín Parise,* On Codes, Marriage, and Access to Justice: Recent Developments in the Law of Argentina, Journal of Civil Law Studies 7 (2014) 237–269, 247.

[198] CSJN 27 December 1990, *Luis Arcenio Peralta y Otro v. Nacion Argentina (Ministerio de Economia – B.C.R.A.),* Fallos 313:1529.

[199] § 7 of the vote of the majority.

[200] § 46 of the vote of the majority. A reference to that use of the dictionary is available in *Ricardo L. Lorenzetti,* Estado de derecho y estado de necesidad. Una reflexión acerca de la Constitución y los derechos individuales, La Ley 2001-C, 1382 [5].

[201] *Sergio D. Stone,* A Study of Dictionaries in U.S. and Latin American Courts, Colorado Lawyer 36 (August 2007) 115–119.

[202] *Stone,* Colorado Lawyer 36 (August 2007) 115, 117.

[203] *Stone,* Colorado Lawyer 36 (August 2007) 115, 115–118.

[204] This expression was borrowed from *Michele Graziadei,* Il giudice e il dizionario, in: Studi in onore di Aldo Frignani: Nuovi orizzonti del diritto comparato europeo e transnazionale, ed. by Gianmaria Ajani et al. (Naples 2011) 859–867, 867.

Spanish dictionaries, but also U.S. dictionaries; while the court in Costa Rica cited publications from Argentina, Colombia, Mexico, and Spain.[205]

5. *Comparative law*

Placing actors within a broader international and comparative discourse and narrative may help to understand their current role. The Argentine Supreme Court has had a long tradition benefiting from the use of comparative law. After all, as Justice Ginsburg of the U.S. Supreme Court stated, comparative law involves "sharing with and learning from others."[206] Argentine courts have frequently reached out to foreign law, especially in constitutional law matters.[207] It is therefore not rare to encounter references to foreign cases in an Argentine decision.[208]

The Argentine Supreme Court used to look – and still looks – at the U.S. Supreme Court. That can be explained in constitutional matters since, for example, the Argentine and U.S. constitutional models resemble each other: Argentine Law 48 is similar to the U.S. Judiciary Act;[209] *Marbury* inspired *Sojo,*[210] where the constitutional control is similar to judicial review;[211] the U.S. *certiorari* resembles that of Argentina;[212] and the rules of the U.S. Supreme Court are similar to those of the Argentine Supreme Court Decree 4/2007 dealing with extraordinary appeal.[213] Miller has proved that U.S. rules experienced authority in Argentina as they were considered a prestigious

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[205] *Stone,* Colorado Lawyer 36 (August 2007) 115, 118.

[206] *Ruth Bader Ginsburg,* "A decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication (1 April 2005), available at <www.asil.org/events/AM05/ginsburg050401.html>, cited by *Ganesh Sitaraman,* The Use and Abuse of Foreign Law in Constitutional Interpretation, Harv. J.L. & Pub. Pol'y 32 (2009) 653–693, 654.

[207] *Graciela Rodriguez-Ferrand,* The Impact of Foreign Law on Domestic Judgments: Argentina (March 2010), available at <www.loc.gov/law/help/domestic-judgment/argentina.php>; and *Zorraquín Becú,* Revista de Historia del Derecho 4 (1976) 325, 359.

[208] *Rodriguez-Ferrand,* The Impact of Foreign Law (n. 207).

[209] *Roberto Omar Berizonce,* Las funciones de la Corte Suprema: en el tránsito hacia un nuevo modelo, in: Oteiza, Cortes Supremas (n. 40) 107–138, 108.

[210] *Sojo,* 22 September 1887, Fallos 32:120.

[211] See, amongst others, *Roberto Saba,* Constitutions and Codes, a Difficult Marriage: The Unusual Merging of the American Constitutional Law Tradition with the Continental Law Tradition, Rev. Jur. U.P.R. 77 (2008) 285–310, 290; *Carlos F. Rosenkrantz,* Against borrowings and other nonauthoritative uses of foreign law, Int'l J. Const. L. 1 (2003) 269–295, 274; *Miller,* Am. U. L. Rev. 46 (1997) 1483, 1553–1561; *Walter F. Carnota,* Doscientos años de Justicia constitucional (A propósito del Bicentenario de "Marbury v. Madison"), La Ley 2003-B, 1111 [3–4]; and *Jorge Alejandro Amaya,* El caso "C.": Lecturas constitucionales y procesales constitucionales, La Ley 2013-C, 179 [3].

[212] *Berizonce,* Las funciones de la Corte (n. 209) 107, 108–109.

[213] *Berizonce,* Las funciones de la Corte (n. 209) 107, 108–109.

foreign model during the nineteenth century.[214] The North-American authority seemed to guarantee that a local court would enjoy immediate support whenever it invoked U.S. law and practice.[215] The U.S. constitutional model quickly became an instrument of faith,[216] though already in the early twentieth century the Argentine Supreme Court had developed its own jurisprudence and had started to abandon the cultural dependency on the U.S.[217] The Argentine Supreme Court used to cite – and still occasionally cites – U.S. cases, when lacking precedents in a specific area.[218] A few examples may be mentioned. In the 1934 case *Avico*[219] the Argentine Supreme Court dedicated two-thirds of an extensive ruling to the analysis of U.S. cases,[220] such as *Blaisdell.*[221] In the 1991 case of *Peralta* already mentioned above, the Argentine Supreme Court again referred to doctrine that had been transplanted into *Avico* from *Blaisdell.*[222] Ten years later, in another economic crisis, this time in the cases of *Bustos*[223] and *Massa,*[224] the Argentine Supreme Court made reference once more to *Blaisdell,*[225] as stated in *Avico.*[226]

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[214] *Rodriguez-Ferrand,* The Impact of Foreign Law (n. 207).

[215] *Miller,* Hastings Int'l & Comp. L. Rev. 20 (1997) 231, 236.

[216] *Miller,* Am. U. L. Rev. 46 (1997) 1483, 1485; and *Rosenkrantz,* Int'l J. Const. L. 1 (2003) 269, 277.

[217] *Zorraquín Becú,* Revista de Historia del Derecho 4 (1976) 325, 346.

[218] On the use of U.S. cases by the Argentine Supreme Court see, amongst others, *Rosenkrantz,* Int'l J. Const. L. 1 (2003) 269, 270–276, 290–291; *Abelardo Levaggi,* La interpretación del derecho en la Argentina en el siglo XIX, Revista de Historia del Derecho 7 (1979) 23–121, 104; and *Gregorio Badeni,* Las doctrinas "Campillay" y de la "real malicia" en la jurisprudencia de la Corte Suprema de Justicia, La Ley 2000-C, 1244 [11]. References to U.S. cases by the Argentine high court have occasionally been incorrect, inavertedly or not. See *Miller,* Am. J. Comp. L. 51 (2003) 839, 880–882; and *Santiago L. Capparelli/Mario A. Capparelli,* El caso "Bustos": su lamentable alejamiento de "Smith" y "Provincia de San Luis" y su equivocado sustento en fallos de la Suprema Corte Norteamericana, La Ley Suplemento Actualidad (12 April 2005) 1 [1–6].

[219] CSJN 7 December 1934, *Don Oscar Agustin Avico contra don Saúl G. de la Pesa, sobre consignación de intereses,* Fallos 172:37.

[220] *Rosenkrantz,* Int'l J. Const. L. 1 (2003) 269, 276.

[221] See, for example, the references to *Blaisdell* (*Home Building & Loan Assn. v. Blaisdell,* 290 U.S. 398 (1934)) at § 8 of the opinion of the majority. See also *Rosenkrantz,* Int'l J. Const. L. 1 (2003) 269, 276; and *Horacio Spector,* Constitutional Transplants and the Mutation Effect, Chi.-Kent L. Rev. 83 (2008) 129–145, 135–144.

[222] § 40 of the vote of the majority; and *Spector,* Chi.-Kent L. Rev. 83 (2008) 129, 136.

[223] CSJN 26 October 2004, *Bustos, Alberto Roque y otros v. Estado Nacional y otros* – amparo, file B. 139. XXXIX.

[224] CSJN 27 December 2006, *Massa Juan Agustin v. Pen-Dto 1570/01 y Otro* – Amparo ley 16.986, file M. 2771. XLI. REX.

[225] In *Bustos* the reference is at § 18 of the vote of Justice Fayt; while in *Massa* the reference is at § 5 of the vote of Justice Carmen M. Argibay.

[226] *Spector,* Chi.-Kent L. Rev. 83 (2008) 129, 144.

References naturally were not – and are not – made only to U.S. law. International human right treaties have also become authoritative in Argentina. Authority has been sought by the Supreme Court in those instruments, especially starting from the 1990s onwards, when those instruments helped local decisions to attain legitimacy.[227] Also, the decisions of the Inter American Court of Human Rights have started to be considered authorities.[228] In the 2000s, the Argentine Supreme Court showed a growing tendency to offer reasons for its decisions based on international precedents, even making these foreign precedents a reason to trigger local changes.[229] The net is also cast towards Europe. For example, in the 1994 case of *Cafés La Virginia*[230] – that impacted on the activities dealing with Mercosur – the Argentine Supreme Court cited the European case of *Van Gend & Loos*.[231] In private law references are also made to French scholars and the authors dealing with the different codes; and to French, German, and Italian decisions.[232] Spanish works have also, naturally, been mentioned by the Argentine Supreme Court.[233] Other decisions have mentioned, for example, the works of Jeremy Bentham, Friedrich Carl von Savigny, and Johannes Voet, and the Latin-American works of Augusto Teixeira de Freitas.[234]

Michal Bobek stated that a complex interplay of legal and extra-legal factors helps determine whether judges use comparative arguments.[235] Yet, in Latin America, as Jan Peter Schmidt mentioned, the "[...] frequent recourse to foreign legal sources does not seem to follow any clear methodological criteria. Already the choice of a legal system to which a writer or a court refers to often appears to be rather arbitrary."[236] On similar lines, an Argentine scholar

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[227] *Miller,* Am. J. Comp. L. 51 (2003) 839, 865.

[228] *Carlos María Folco,* Apuntes sobre Derechos Humanos, celeridad procesal y la doctrina prospectiva en la jurisprudencia de Corte, La Ley 2010-E, 812 [4].

[229] *Bianchi,* La Ley 2008-B, 717 [36–38]; and *Germán González Campaña,* Efectos de la jurisprudencia internacional en el derecho argentino (crisis de la supremacía constitucional) in: Oteiza, Cortes Supremas (n. 40) 409–454, 453.

[230] CSJN 13 October 1994, *Cafés La Virginia S.A.* – apelación (por denegación de repetición), Fallos 317:1287.

[231] § 29 of the vote of Justice Antonio Boggiano. See also *Santiago,* La Ley 2000-A, 1069 [36]; and *Jacquelina E. Brizzio/José Emilio Ortega,* Integración y solución de conflictos: perspectivas y propuestas para el Mercosur, Revista de Derecho del Mercosur 1999-2 (1999) 67 [14–15].

[232] *Levaggi,* Revista de Historia del Derecho 7 (1979) 23, 105–107; *Zorraquín Becú,* Revista de Historia del Derecho 4 (1976) 325, 359; and *Rodriguez-Ferrand,* The Impact of Foreign Law (n. 207).

[233] *Levaggi,* Revista de Historia del Derecho 7 (1979) 23, 105–107.

[234] *Levaggi,* Revista de Historia del Derecho 7 (1979) 23, 105–107.

[235] *Michal Bobek,* Comparative Reasoning in European Supreme Courts (Oxford 2013) 36.

[236] *Jan Peter Schmidt,* The "Principles of Latin American Contract Law" against the background of Latin American legal culture: a European perspective, at 16, unpublished

mentioned in 2012 that the citations to international law have become an uncontainable fashion for the Argentine Supreme Court, and that such a fashion encompasses serious risks.[237] It can be concluded – together with Alfredo M. Vítolo – that Argentina experiences a trend of "precedent shopping."[238]

The current composition of the Argentine Supreme Court confirms an interest in comparative law. Chief Justice Lorenzetti is member of the Argentine Association of Comparative Law and a member of the International Academy of Comparative Law.[239] Furthermore, the Argentine Supreme Court created a research office for comparative law that can be traced back to 1992, and is named *Oficina de Referencia Extranjera*.[240] That office provides translation and reference services, it facilitates access to foreign decisions and also, e.g., holds foreign law reviews.[241] It should be noted that the highest court of Peru created a similar office that furthers the study and knowledge of comparative law.[242]

6. Dissenting opinions

The value of dissenting opinions is another aspect that helps to understand the current role of Argentine justices as actors in the development of law. Secrecy of judicial deliberation applied in colonial Latin America because they followed the Spanish and Portuguese systems.[243] After independence a number of Latin-American jurisdictions drew heavily on the U.S. constitutional system.[244] Judges, therefore, currently have a right to announce their dissents,

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manuscript, presented at the conference *The Future of Contract Law in Latin America,* held on 25 June 2015 at Keble College, Oxford.

[237] *Manuel J. García-Mansilla,* Un truco de magia constitucional demasiado evidente – Omisiones, debilidades y (Ho)(E)rrores del "Roe v. Wade" Argentino, Revista de Derecho de la Familia y de las Personas 4:4 (May 2012) 173 [6].

[238] *Alfredo M. Vítolo,* La Posibilidad de Perdonar a los Responsables de Cometer Crímenes de Lesa Humanidad, Anales de la Academia Nacional de Ciencias Políticas 34:II (2007) 5–64, 6, cited by *García-Mansilla,* Revista de Derecho de la Familia y de las Personas 4:4 (May 2012) 173 [13].

[239] See <http://iuscomparatum.info/members/all-members/>.

[240] See Acordada 4/2015 and Acordada 51/2009, both available at <www.csjn.gov.ar>; *Rodriguez-Ferrand,* The Impact of Foreign Law (n. 207); and *David S. Law,* Judicial Comparativism and Judicial Diplomacy, U. Pa. L. Rev. 163 (2015) 927–1029, 972.

[241] Acordada 4/2015, available at <www.csjn.gov.ar>; and *Rodriguez-Ferrand,* The Impact of Foreign Law (n. 207).

[242] *Law,* U. Pa. L. Rev. 163 (2015) 927, 1014.

[243] *Kurt H. Nadelmann,* The Judicial Dissent: Publication v. Secrecy, Am. J. Comp. L. 8 (1959) 415–432, 420.

[244] *Nadelmann,* Am. J. Comp. L. 8 (1959) 415, 421; and *Sergio Verdugo R.,* Aportes del modelo de disidencias judiciales al sistema político, Pluralismo judicial y debate democrático, Revista de Derecho Universidad Católica del Norte 18:2 (2011) 217–272, 219, 224.

for example, in Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, Peru, Uruguay, and Venezuela.[245]

A number of Latin American jurisdictions – similarly to some common law jurisdictions – adopted a rule of transparency by which the votes of the minority are also made available, allowing the dissenting judges to freely express their ideas and opinions.[246] As already mentioned, Argentina did not adopt a system of forced unanimity with lack of publication of dissenting opinions.[247] This is contrary to other civil law systems (among others, France),[248] and transparency therefore applies in Argentina even though it is a civil law jurisdiction.[249] The Code of Civil Procedure states that decisions of the Supreme Court must be drafted in an impersonal form, regardless of whether justices who dissent from the vote of the majority render their votes separately.[250] Experts and other justices tend to know who the author of the majority opinion is, even when it is kept anonymous.[251]

Dissenting opinions may open the door for the reception of future legal doctrines in Argentina.[252] This happens also in other jurisdictions (among others, in the U.S.),[253] since, as Peter Häberle correctly stated, dissenting opinions may promote or accelerate constitutional change.[254] For example, the doctrine of actual malice was first introduced in Argentina only by means of two dissenting votes in the 1991 case of *Vago*.[255] Decisions of the Argen-

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[245] *Nadelmann,* Am. J. Comp. L. 8 (1959) 415, 421; and *Verdugo R.,* Revista de Derecho Universidad Católica del Norte 18:2 (2011) 217, 219, 224.

[246] *Verdugo R.,* Revista de Derecho Universidad Católica del Norte 18:2 (2011) 217, 219, 224.

[247] *Verdugo R.,* Revista de Derecho Universidad Católica del Norte 18:2 (2011) 217, 218; and *Walter F. Carnota,* Las disidencias judiciales en materia de seguridad social, Revista Derecho del Trabajo (April 2011) 949 [1–5].

[248] *Verdugo R.,* Revista de Derecho Universidad Católica del Norte 18:2 (2011) 217, 218; and *Carnota,* Revista Derecho del Trabajo (April 2011) 949 [1–5].

[249] *Verdugo R.,* Revista de Derecho Universidad Católica del Norte 18:2 (2011) 217, 224.

[250] Art. 281, Ley 17 454 (Código Procesal Civil y Comercial de la Nación), available at <www.infojus.gob.ar>; and *Arazi,* Derecho procesal (n. 27) 538.

[251] *Helmke,* Courts under Constraints (n. 7) 180.

[252] Argentine cases that are analysed in law reviews often consist of multiple votes. See *Germán González Campaña,* La Corte reconoce la obligatoriedad de la jurisprudencia internacional (¿Sigue siendo Suprema?), La Ley 2005-B, 801 [6]; and *Amaya,* La Ley 2013-C, 179 [1–2].

[253] *Carnota,* Revista Derecho del Trabajo (April 2011) 949 [1–5].

[254] *Peter Häberle,* El Estado Constitucional (Buenos Aires 2007) 158, cited by *Carnota,* Revista Derecho del Trabajo (April 2011) 949 [1–5].

[255] CSJN 19 November 1991, *Vago, Jorge Antonio c. Ediciones de La Urraca S. A. y otros,* Fallos 314:1519. See, for example, §§ 11–12 of the vote of Justices Fayt and Rodolfo C. Barra. See *Marcela I. Basterra,* La Corte se pronuncia a favor de la libertad de expre-

tine Supreme Court, as may be expected, refer to previous dissents, as in the 2009 case of *Patiño,* where aspects of a previous dissent are incorporated into the vote of the majority.[256] In the 2000s, the decisions of the Supreme Court did not reflect a significant degree of dissent and showed more unity;[257] while in the previous decade dissent occurred more often.[258] A number of famous dissents can be named,[259] and scholars even refer to "lucid"[260] or "coherent"[261] dissents. For example, the already-mentioned 2013 case of *Grupo Clarín* on antitrust law included a dissenting vote that was deemed by some scholars as doctrinally well-grounded and substantial.[262]

As expected, seminal cases include a diversity of votes. For example, the above-mentioned 2004 case of *Bustos,* dealing with the 2001 economic crisis, offers three partially concurring and individual votes,[263] and a dissenting opinion.[264] Justice Zaffaroni, who stepped down from the Argentine Supreme Court in January 2015, stated that

> "this is a [Supreme] [C]ourt with very defined personalities, with diverse trajectories, experiences and formation, with different specialization, and it is therefore not easy to reach majorities [...]. There is pluralism, [...] and that is ultimately the guarantee of independence."[265]

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sión, reafirmando la doctrina dela real malicia – El caso "Locles", Revista de Derecho de la Familia y de las Personas 2:9 (October 2010) 257 [3].

[256] CSJN 27 May 2009, *Patiño Raul Osvaldo v. Gobierno Pcia. de San Juan (Unidad de Control Prev.)* – amparo por mora de la administracion, file P. 2602. XXXVIII. ROR. See *Carnota,* Revista Derecho del Trabajo (April 2011) 949 [1–5].

[257] *Bianchi,* La Ley 2008-B, 717 [36–38]; and *Rivas,* El acceso a la Corte (n. 84) 251, 263.

[258] *Santiago,* La Ley 2000-A, 1069 [39–40].

[259] See the "top ten" dissents on social security in *Carnota,* Revista Derecho del Trabajo (April 2011) 949 [1–5].

[260] *Carnota,* Revista Derecho del Trabajo (April 2011) 949 [1–5].

[261] *Daniel Alberto Sabsay,* Luces y sombras en el fallo de la Corte sobre la LSCA, La Ley 2013-F, 34 [2].

[262] Scholars have referred to the vote of Justice Fayt. See *Pablo Luis Manili,* Una disidencia ajustada a derecho, La Ley 2013-F, 30 [2].

[263] Those were the votes by Justices Boggiano, Zaffaroni, and Elena I. Highton de Nolasco.

[264] The dissent was by Justice Fayt. See also *González Campaña,* La Ley 2005-B, 801 [6].

[265] The text in Spanish reads: "Esta es una Corte con personalidades muy definidas, con trayectorias, experiencias y formaciones distintas, especialidades diferentes, con lo cual no es fácil lograr la mayoría [...]. [H]ay pluralismo, [...] esto es en definitiva la garantía de independencia." *Zaffaroni,* La Ley Suplemento Actualidad (6 November 2008) 1 [1].

It should be noted, however, that even when pluralism may be beneficial, the system of dissents offers an additional burden for the workload of the courts, and the time of justices indeed represents a scarce resource.[266]

7. Precedents

There is no horizontal or vertical *stare decisis* in Argentina,[267] though there are hybrid versions.[268] The sceptical attitude towards the doctrine of *stare decisis*is related to the civil law heritage of Argentine law.[269] In Argentina, the unconstitutionality of a provision is decided only *inter partes* for a specific case, and hence its determination is "difuso" (i.e., non-centralized).[270] From an early time the Supreme Court adopted the tradition of citing its own precedents in later decisions and that tradition still prevails.[271] It should be noted that horizontal *stare decisis* might help to maximise procedural economy and to expedite the work of the court.[272]

Horizontal *stare decisis* refers to the obligation of courts to follow their own precedents; while vertical *stare decisis* refers to the obligation of lower courts to follow the precedents of their superiors.[273] Santiago Legarre explained that in Argentina vertical *stare decisis* may be deemed a *soft principle* while horizontal *stare decisis* may be deemed a *relaxed policy*.[274] The Argen-

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[266] *Verdugo R.,* Revista de Derecho Universidad Católica del Norte 18:2 (2011) 217, 247–248.

[267] *Santiago Legarre,* La obligatoriedad horizontal de los fallos de la Corte Suprema Argentina y el stare decisis, Derecho Público Iberoamericano 4 (April 2014) 237–254, 252; *Dafne Ahe/María Eva Miljiker,* Algunos mitos sobre el funcionamiento del sistema continental: El caso de la Argentina y la regulación de la responsabilidad del Estado, La Ley 2007-A, 753 [13]; *Julio César Rivera/Santiago Legarre,* La obligatoriedad de los fallos de la Corte Suprema de Justicia de la Nación desde la perspectiva de los tribunales inferiores, La Ley Online 0003/012959 [2]; and *Santiago Legarre,* Precedent in Argentine Law, Loy. L. Rev. 57 (2011) 781–791, 787.

[268] *Legarre,* Derecho Público Iberoamericano 4 (April 2014) 237, 252. See also *Oteiza,* Reflexiones sobre la eficacia (n. 40) 386. For a brief evolution that highlights that lack of certainty regarding the vertical and horizontal value of precedents, see *Oteiza,* Reflexiones sobre la eficacia (n. 40) 381–386.

[269] *Saba,* Rev. Jur. U.P.R. 77 (2008) 285, 290.

[270] *Bazán,* Justicia constitucional (n. 72) 15; *Portero/Magri,* La Ley 2010-C, 717 [3]; and *Bottoni/Navarro,* La Ley 2011-B, 1112 [2].

[271] *Legarre,* Derecho Público Iberoamericano 4 (April 2014) 237, 249–250; and *Oteiza,* La Corte Suprema (n. 105) 343.

[272] *Abalos,* La Ley Gran Cuyo (October 2014) 929 [10].

[273] *Santiago Legarre/Julio César Rivera,* Naturaleza y dimensiones del "stare decisis", Revista Chilena de Derecho 33:1 (2006) 109–124, 113.

[274] *Legarre,* Loy. L. Rev. 57 (2011) 781, 785. On vertical stare decisis, see *Santiago Legarre/Julio César Rivera,* La obligatoriedad atenuada de los fallos de la Corte Suprema y el stare decisis vertical, La Ley 2009-E, 820 [1–7].

tine Constitution does not provide for vertical *stare decisis,* though it is common for lower courts to know and follow the decisions of the Supreme Court.[275] A departure from the opinion of the Supreme Court can occur when "new arguments" are found by the lower court.[276] The Argentine Constitution likewise does not provide for horizontal *stare decisis,* though courts feel inclined to subscribe to prior decisions at the appeal level.[277] It must be noted that it is not unusual for the Argentine Supreme Court not to allow its own precedents, especially if there is a change in the composition of the court. On those occasions justices would for example claim: "The Argentine Supreme Court in its current composition takes the view that it should not follow the decision in case X."[278]

A number of Latin American jurisdictions have adopted mixed systems in which the above-mentioned non-centralized ("difuso") constitutional control is followed, while applying a type of vertical and horizontal *stare decisis* for their rulings.[279] For example, Brazil has the *súmulas vinculantes* for the Federal Supreme Tribunal and for the Supreme Tribunal of Justice.[280] These are summarised doctrines of the opinions of the courts in specific subject matters that are binding for that court and other tribunals.[281] Colombia, since the 1991 constitutional reform, started to introduce the use of precedents, and decisions on constitutionality have *erga omnes* effect and are binding for future cases.[282] Chile has been more conservative and has shown reluctance towards

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[275] *Legarre/Rivera,* La Ley 2009-E, 820 [1–7]; *Legarre,* Loy. L. Rev. 57 (2011) 781, 786; and *Abalos,* La Ley Gran Cuyo (October 2014) 929 [5]. It should be noted that the 1949 Constitution, enacted during the presidency of Juan Domingo Perón, called for vertical *stare decisis*. See *Legarre/Rivera,* La Ley 2009-E, 820 [1–7]; *Oteiza,* Reflexiones sobre la eficacia (n. 40) 381; and *Miller,* Am. J. Comp. L. 51 (2003) 839, 871. Also, there was recently a short period of time in which vertical *stare decisis* applied to social security decisions. For an evolution of vertical *stare decisis* in Argentina, see *Legarre/Rivera,* La Ley 2009-E, 820 [1–7].

[276] *Legarre,* Loy. L. Rev. 57 (2011) 781, 786–787. See also *Amaya,* La Ley 2013-C, 179 [3–4]; and *Irene Carolina Espeche,* Doctrina plenaria y jurisprudencia de la CSJN, La Ley Suplemento Doctrina Judicial Procesal (June 2012) 21 [1].

[277] *Legarre,* Loy. L. Rev. 57 (2011) 781, 787.

[278] *Ahe/Miljiker,* La Ley 2007-A, 753 [14].

[279] *Roberto O. Berizonce,* Los efectos vinculantes de las sentencias emanadas de los Superiores Tribunales – Tendencias en el derecho iberoamericano, La Ley 2006-D, 1077 [1–3]; and *Berizonce,* Sobrecarga, misión institucional de los tribunales (n. 71) 433, 453.

[280] *Berizonce,* La Ley 2006-D, 1077 [1]; *Berizonce,* Sobrecarga, misión institucional de los tribunales (n. 71) 433, 453–456; and *José Carlos Barbosa Moreira,* A recente reforma da constituição brasileira e o supremo tribunal federal, in: Berizonce et al., El Papel de los Tribunales Superiores (n. 18) 555–569, 562–563.

[281] *Kaminker,* Algunas ideas (n. 69) 191, 204.

[282] *Berizonce,* La Ley 2006-D, 1077 [3]; and *Jorge Andrés Contreras Calderón,* El precedente judicial en Colombia: Un análisis desde la teoría del derecho, Revista Facultad de Derecho y Ciencias Políticas 41:115 (2011) 331–361, 335.

recognition of a rule of precedents.[283] Things, however, may change in Chile regarding precedents, mainly on the horizontal level.[284]

IV. Snapshot of the Argentine Supreme Court (January–July 2015)

The Argentine Supreme Court, unlike the U.S. Supreme Court for example, renders thousands of decisions per year.[285] Some of those decisions are emblematic for the ideals they encapsulate, the understanding of the law, and the interpretation of the role of justices.[286] It is common knowledge that decisions of the highest courts entail special significance that tends to exceed the specific case.[287]

It is possible to take snapshots of courts at different times and places. An important snapshot of the activities of the Argentine Supreme Court might be made with regard to the decisions relating to one of the economic crises.[288] The litigation that derived from the 2001 economic crisis was massive, with the filing of 210,188 *amparos*.[289] This was after cash payments were suspended and savings were first blocked, then converted into Argentine pesos, and ultimately devalued *(corralito)*.[290] When looking at that crisis an Argentine scholar stated that "we are dealing with a Tribunal that is much more

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[283] See generally *Álvaro Pérez Ragone/Paula Pessoa Pereira,* Función de las cortes supremas de Brasil y Chile en la generación y gestión del precedente judicial entre lo público y lo privado, Revista de Derecho de la Pontificia Universidad Católica de Valparaíso 44 (2015) 173–214.

[284] *Pérez Ragone/Pessoa Pereira,* Revista de Derecho de la Pontificia Universidad Católica de Valparaíso 44 (2015) 173; and *Pablo Bravo-Hurtado,* Hacia los precedentes en Chile: reforma procesal civil y fuentes del derecho, Revista Chilena de Derecho 40:2 (2013) 549–576, 567.

[285] *Helmke,* Courts under Constraints (n. 7) 182.

[286] *Grosman,* La Ley Suplemento Constitucional (5 August 2010) 53 [1].

[287] *Eduardo Oteiza,* Introducción, in: Oteiza, Cortes Supremas (n. 40) 9–13, 9.

[288] On the economic crisis, see generally *Emilio A. Ibarlucía,* La pesificación de las obligaciones ajenas al sistema financiero, Las distintas soluciones arbitradas por la Corte Suprema, La Ley 2008-D, 272; and *Ignacio Hirigoyen,* Bank Crisis in Argentina: The Constitutionality of Bank Deposits Pesification, the Massa Case, L. & Bus. Rev. Am. 14 (2008) 53–78. See also, amongst many others, *Enrique M. Falcón,* La función política y los tribunales superiores, in: Berizonce et al., El Papel de los Tribunales Superiores (n. 18) 19–72, 57–60; *Bianchi,* La Ley 2008-B, 717 [24–28]; and *Raúl Gustavo Ferreyra,* Reglas constitucionales en serio, La Ley 2003-C, 973 [1].

[289] *Horacio Spector,* Don't Cry for me Argentina: Economic Crises and the Restructuring of Financial Property, Fordham J. Corp. & Fin. L. 14 (2009) 771–823, 773.

[290] *Spector,* Fordham J. Corp. & Fin. L. 14 (2009) 771, 773; and *Hirigoyen,* L. & Bus. Rev. Am. 14 (2008) 53, 61.

concerned with the protection of non-patrimonial rights than of patrimonial rights."[291] That could be the snapshot for that court at that time, even when the same scholar had a similar impression again in 2012.[292] Yet snapshots may show different courts, especially if their composition is altered. Justices do refer to changes when the composition of the Supreme Court is altered. For example, Justice Zaffaroni stated that often it depends on the justice to whom a case is referred and that the Argentine Supreme Court might change its decisions, depending on its composition.[293]

The following snapshot of activities of the Argentine Supreme Court looks at the first semester of 2015, from 1 January to 1 July. It shows the Supreme Court in action, and helps to illustrate the application of the topics addressed in the previous sections of this paper. The snapshot does not allow a conclusive assessment, as it only shows a moment in time; thus it has only an informative value. It is indeed a short-lived court, since it started to operate on 1 January 2015[294] but one of its members – Justice Carlos S. Fayt – stepped down already on 11 December 2015.[295] The composition of the Supreme Court for that period, due to two vacant seats, comprised Chief Justice Lorenzetti and Associate Justices Highton de Nolasco, Fayt, and Juan Carlos Maqueda.[296] The snapshot looks only at extraordinary appeals in civil and commercial claims.[297] Decisions were retrieved from the website of the Supreme Court.[298] It should be noted that full-text decisions of the Argentine Supreme Court have been available online since 1994, while decisions are also available on hard-copy in the official collection, having been published since 1864.[299]

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[291] The text in Spanish reads: "[…] nos encontramos ante un Tribunal mucho más preocupado por la protección de los derechos no patrimoniales que de los derechos patrimoniales." *Bianchi,* La Ley 2008-B, 717 [36].

[292] *Alberto B. Bianchi,* La jurisprudencia de la Corte Suprema en 2012, La Ley Suplemento Especial Análisis de la Jurisprudencia de la Corte Suprema (16 April 2013) 1 [33].

[293] *Zaffaroni,* La Ley Suplemento Actualidad (6 November 2008) 1 [2].

[294] It should be noted that courts are closed in January in Argentina due to legal holydays *(feria judicial).*

[295] *Adrián Ventura,* Después de 32 años, Fayt se retira hoy de la Corte Suprema Se hace efectiva la renuncia que presentó en septiembre; hay dos vacantes en el tribunal, La Nación (11 December 2015).

[296] For more information on the justices of the Argentine Supreme Court, see <www.csjn.gov.ar/autoridades.html>.

[297] The analysis excludes decisions that reached the highest court by means of *quejas.* See n. 92 of this paper.

[298] See <www.csjn.gov.ar>.

[299] It should be noted that the official collection is currently interrupted (c. 2012), though efforts are being devoted to resume the publication. Digitalisation started in 2004 as a means to enable members of society to "audit" the acts of government, offering transparency and publicity. See Acordada 24/2013, available at <www.infoleg.gov.ar>. See also

1. Commercial decisions in extraordinary appeals

The Argentine Supreme Court rendered 23 commercial decisions that responded to an extraordinary appeal during the period 1 January to 1 July 2015. In seven[300] of those decisions, however, the appeal was rejected by means of the Argentine *certiorari* as established in Article 280 of the Code of Civil Procedure. Accordingly, the snapshot covers 16 commercial decisions of the Supreme Court.[301]

Sacristán, La Ley 2009-F, 1102 [4]. For more information on the official collection of decisions, see *Miguel Danielián,* La misión de las editoriales jurídicas, La Ley 1992-C, 1196 [10].

[300] The seven decisions are: CSJN 30 June 2015, *J.C. Marsano S.R.L. v. Obra Social del Personal de la Ind. del Cuero y Afines* – ejecutivo, file COM 24698/2013/CS1; CSJN 16 June 2015, *Bocles, Alberto Adrián v. Citibank N.A.* – ordinario, file COM 39194/2011/CS1; CSJN 12 May 2015, *Sanovo Internacional AIS v. Ovoprot Internacional S.A.* – ordinario, file CSJ 582/2010 (46-S)/CS1; CSJN 14 April 2015, *Comisión Nacional de Valores v. Mercado de Valores de Mendoza S.A. (Bonfiglio)* – apelación art. 60, ley 17 811, file FMZ 81134862/2010/CS1; CSJN 14 April 2015, *Euroar S.A. si quiebra* – incidente de reclamo de intereses, file CSJ 204/2014 (50-E)/CS1; CSJN 7 April 2015, *Damnificados Financieros Asociación Civil para su Defensa v. Bco. Patagonia Sudameris S.A. y otros* – sumarísimo, file CSJ 27/2013 (49-D)/CS1; and CSJN 19 February 2015, *Vélez, Miguel Ángel v. Sanabria, Oscar y otros* – ejecución prendaria, file CSJ 288/2014 (50-V).

[301] The 16 decisions are: CSJN 30 June 2015, *Witcel SA v. Citibank NA* – sumarísimo, file CSJ 5!2013 (49-W)/CS1; CSJN 30 June 2015, *Search S.A. cl GE Healthcare Argentina S.A. (antes GE Sistemas Médicos de Argentina S.A.) y otros* – ordinario, file cs. 726/2013 (49-SI/CS1; CSJN 16 June 2015, *Antico, Sebastián Alberto v. Bierwerth, Gustavo Roberto* – ejecutivo, file COM 35225/2010/CS1; CSJN 12 May 2015, *Telecom Personal S.A. v. Proconsumer* – solicitud de inhibitoria, file CCF 7538/2013/CS1; CSJN 12 May 2015, *Telecom Personal S.A. v. Asociación Protección Cons del Mercado Común del Sur* – solicitud de inhibitoria, file CCF 5938/2013/CS1; CSJN 12 May 2015, *Telecom Personal S.A. v. Asociación Protección Consum del Mercado Común del Sur* – solicitud de inhibitoria, file CCF 6455/2013/CS1; CSJN 12 May 2015, *Telecom Personal S.A. v. Asociación Protección Cons del Mercado Común del Sur* – solicitud de inhibitoria, file CCF 6275/2013/CS1; CSJN 12 May 2015, *Telecom Personal S.A. v. Asociación Protección Cons del Mercado Común del Sur* – solicitud de inhibitoria, file CCF 6836/2013/CS1; CSJN 12 May 2015, *Telecom Personal S.A. v. Asociación Protección Cons del Mercado Común del Sur* – solicitud de inhibitoria, file CCF 6073/2013/CS1; CSJN 12 May 2015, *Telecom Personal S.A. v. Asociación Protecc Consumidores Mercado Común del Sur y otro* – solicitud de inhibitoria, file CCF 6946/2013/CS1; CSJN 12 May 2015, *Telecom Personal S.A. v. Asociación Protección Cons del Mercado Común del Sur* – solicitud de inhibitoria, file CCF 5401/2013/CS1; CSJN 12 May 2015, *Consumidores Financieros Asociación Civil para su Defensa v. El Progreso Seguros S.A.* – ordinario, file CSJ 1224/2013 (49-C)/CS1; CSJN 12 May 2015, *Consumidores Financieros Asociación Civil para su Defensa v. Prudencia Cia. Argentina de Seguros Generales S.A.* – ordinario, file COM 38044/2011/CSI; CSJN 21 April 2015, *D.G.I. v. Iberá S.A. Inversiones y Mandatos – c*obro de pesos, file CSJ 658/2011 (47-D)/CS1; CSJN 17 March 2105, *Berkholtz, Jerónimo de la Cruz* – recurso directo – lealtad comercial – ley 22 802, file CSJ 310/2014 (50-B)/CS1; and CSJN

Commercial decisions indeed refer to prior cases. Most commercial decisions refer to the opinion of the Attorney General, whom the justices of the Argentine Supreme Court follow in their opinions.[302] It should be noted that references to the opinion of the Attorney General are not limited to commercial law, and are not rare in the decisions by the Supreme Court. Another significant number of commercial decisions refer to decisions of the Supreme Court, occasionally citing in the required style.[303]

The length of the commercial decisions is homogenous. Commercial decisions have an average length of 2–4 pages, with the exception of two decisions that extend for 10[304] and 9[305] pages. The first of these decisions offers initially a detailed account of the facts. It then states that the matter is of a federal nature, by referring to Article 14 of Law 48 and to a number of precedents as published in the official collection. The Supreme Court then refers several times to its own precedents. For example, in § 8 it points to the court's position regarding the power to control banking activities by the Central Bank of Argentina.[306] The second of these decisions also initially offers a

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10 February 2015, *Asociación Protección Consumidores del Mercado Común del Sur v. Loma Negra Cía. Industrial Argentina S.A. y otros,* file CSJ 566/2012 (48-A); CSJ 513/2012 (48-A)/RH1 & CSJ 514/2012 (48-A)/RH1.

[302] See, for example, CSJN 12 May 2015, *Telecom Personal S.A. v. Proconsumer* – solicitud de inhibitoria, file CCF 7538/2013/CS1; CSJN 12 May 2015, *Telecom Personal S.A. v. Asociación Protección Cons del Mercado Común del Sur* – solicitud de inhibitoria, file CCF 5938/2013/CS1; CSJN 12 May 2015, *Telecom Personal S.A. v. Asociación Protección Consum del Mercado Común del Sur* – solicitud de inhibitoria, file CCF 6455/2013/CS1; CSJN 12 May 2015, *Telecom Personal S.A. v. Asociación Protección Cons del Mercado Común del Sur* – solicitud de inhibitoria, file CCF 6275/2013/CS1; and CSJN 12 May 2015, *Telecom Personal S.A. v. Asociación Protección Cons del Mercado Común del Sur* – solicitud de inhibitoria, file CCF 6836/2013/CS1.

[303] A number of decisions refer to the official collection, and in Spanish the text reads: "Tal omisión determina que deba dejarse sin efecto la resolución respectiva (Fallos: 315:283; 316:2491; 317:1364, y más recientemente, Fallos: 328:1141, entre otros)." CSJN 12 May 2015, *Telecom Personal S.A. v. Proconsumer* – solicitud de inhibitoria, file CCF 7538/2013/CS1.

[304] CSJN 21 April 2015, *D.G.I. v. Iberá S.A. Inversiones y Mandatos* – cobro de pesos, file CSJ 658/2011 (47-D)/CS1.

[305] CSJN 10 February 2015, *Asociación Protección Consumidores del Mercado Común del Sur v. Loma Negra Cía. Industrial Argentina S.A. y otros,* file CSJ 566/2012 (48-A); CSJ 513/2012 (48-A)/RH1 & CSJ 514/2012 (48-A)/RH1.

[306] The relevant text in Spanish reads: "Que esta Corte ha sostenido que la regulación de la actividad financiera y bancaria, asumida por el Estado Nacional; delega en el Banco Central el llamado 'poder de policía bancario', con las consiguientes atribuciones para aplicar un régimen legal específico, dictar normas reglamentarias que lo complementen y ejercer funciones de fiscalización de las entidades (Fallos: 319:110) y que, en ese marco, resulta inaceptable la aplicación de las reglas del derecho común en desmedro de aquéllas, de neto corte publicístico, que regulan específicamente la actividad bancaria y financiera,

brief account of the facts of the case. It then states that the matter is of a federal nature as indicated in Article 14 of Law 48, since there was an arbitrary decision and the Supreme Court therefore cites its own precedents. That second decision is also interesting since it rejects a class action – which was recently introduced, with some particularities, in Argentina[307] – citing again its own precedents.[308]

The snapshot demonstrates that in those specific commercial decisions the traditional logical genesis and style are respected, together with the reasoning of the decisions. There are, however, no references to academic works or to comparative law, and neither do the justices resort to dissenting opinions. It should be highlighted that the Supreme Court does indeed invoke its own precedents.

2. Civil decisions in extraordinary appeals

The Argentine Supreme Court rendered 47 civil decisions that responded to an extraordinary appeal during the period of 1 January–1 July 2015. In eleven[309] of those decisions, however, the appeal was rejected by means of the

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con olvido de la peculiar naturaleza que reviste esta actividad (Fallos: 325:860)." CSJN 21 April 2015, *D.G.I. v. Iberá S.A. Inversiones y Mandatos* – cobro de pesos, file CSJ 658/2011 (47-D)/CS1.

[307] See generally *Andrés Gil Domínguez,* Derechos colectivos y acciones colectivas, La Ley 2009-C, 1128.

[308] The relevant text in Spanish reads: "Esta circunstancia, que marca una clara distinción con otros supuestos examinados por esta Corte – en los que la relación entre el proveedor del servicio y el consumidor no aparecía intermediada –, impide afirmar que el comportamiento que se imputa a las demandadas haya afectado, de igual forma, a todos los sujetos que integran el colectivo que se pretende representar y, por lo tanto, no permite tener por corroborada, con una certeza mínima, la existencia de efectos comunes que, conforme la doctrina sentada en el precedente "Halabi" (Fallos: 332:111), permitan tener por habilitada la vía intentada." CSJN 10 February 2015, *Asociación Protección Consumidores del Mercado Común del Sur v. Loma Negra Cía. Industrial Argentina S.A. y otros,* file CSJ 566/2012 (48-A); CSJ 513/2012 (48-A)/RH1 & CSJ 514/2012 (48-A)/RH1.

[309] The 11 decisions are: CSJN 9 June 2015, *O'Agata, Domingo Alberto v. D' Agata, José* – acción posesoria, file CSJ 84/2015/CS1; CSJN 9 June 2015, *B., C. C. v. D. C., F. C.* – divorcio, file CSJ 5028/2014/CS1; CSJN 21 April 2015, *Repetto, Julio Pablo v. Díaz, Julio Argentino y otros* – daños y perjuicios (acc. trán. c/ les. o muerte = accidente de tránsito, lesiones o muerte), file CSJ 527/2014 (50-R)/CS1; CSJN 14 April 2015, *Vergara, Marcelo Ernesto v. Bortolin, María Belén y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CSJ 196/2014 (50-V)/CS1; CSJN 14 April 2015, *Cáceres, Matías Tomás v. Ramírez, Gustavo Javier y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CSJ 558/2014 (50-C)/CS1; CSJN 14 April 2015, *Jorge, Carlos Alberto y otros v. Satti, Sebastián Andrés* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 56279/2009/CS1; CSJN 14 April 2015, *Amelong, Juan Daniel* – cancelación matrícula del Colegio de Abogados, file CSJ 316/2014 (50-A)/CS1; CSJN 7 April 2015, *Vega, Raúl Antonio v. Banco Nacional de Desarrollo y otro* – daños y perjuicios, file CSJ 527/2013 (49-V)/CS1; CSJN

Argentine form of *certiorari*. Accordingly, the snapshot covers 36 civil decisions of the Argentine Supreme Court.[310]

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7 April 2015, *Mirkin, Enrique Horacio v. Raghsa S.A. – escrituración,* file CIV 27759/2010/CS1; CSJN 3 March 2015, *Santangelo, Víctor y otro v. Instituto Autárquico Provincial del Seguro de Entre Ríos* – ordinario, file CSJ 285/2014 (50-S); and CSJN 3 February 2015, *Villamea, Félix v. Empresa Tabacalera Nobleza Piccardo SAlC y F* – ordinario – recurso directo, file CSJ512/2013 (49-V).

[310] The 36 decisions are: CSJN 16 June 2015, *Núñez, Jorge Rubén y otros v. Turismo El Puente S.A.* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 75003/2009/C81; CSJN 9 June 2015, *Seva, Leonilde Adela v. Construcciones Serna S.R.L. y/u otro*s – daños y perjuicios, file CSJ 284/2013 (49-S)/CS1; CSJN 2 June 2015*, López, Mirta Noemí v. Micro Ómnibus Quilmes S.A.C.I.F. y otros* – daños y perjuicios, file CIV 43697/2008/CS1; CSJN 2 June 2015, *Ramirez Al varenga, Elíseo y otros v. Transporte Tomás General Guido y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 104741/2004/CS1; CSJN 2 June 2015, *Broglia, Delia Noemí y otro v. Línea 10 S.A. y otros* – daños y perjuicios (acc. tran. v. les. o muerte), file CSJ 364/2014 (50-B)/CS1; CSJN 27 May 2015, *M., M. S.* – guarda, file CIV 90032/2013/CS1; CSJN 13 May 2015, *Correa, Claudia Maria y otros v. Mónaco, José y otros* – daños y perjuicios, file CSJ 1416/2004 (40-C)/CS1; CSJN 13 May 2015, *S., D. el R., L. M.* – reintegro de hijos y alimentos, file CSJ 977/2012 (48-S)/CS1; CSJN 12 May 2015, *Medina, Ramón Humberto v. Stay, Sergio Domingo y otro*s – daños y perjuicios*,* file CIV 40300/2006/CA2-CS1; CSJN 12 May 2015, *Hermosid, Susana Irene v. Kolocias SA (Línea 553) y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 76687/2007/CS1; CSJN 12 May 201, *Fleita, Claudia Noemí v. Juarez Miguel y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 40791/2009/CS1 5; CSJN 4 May 2015, *Oviedo, Sonia Raquel v. Juan B. Justo SATCI Línea 34 y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 60793/2010/CS1; CSJN 4 May 2105, *Holder Bueno, Karen Kaate y otros v. La Vecinal de Matanza SACI de Microómnibus y otros* – daños y perjuicios (acc. trán. c/ les. o muerte) – ordinario, file CSJ 110/2014 (50-H) ICS1; CSJN 29 April 2015, *Balbuena Marcelo Fabián v. Microómnibus La Colorada Línea 178 y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 11466/2003/CS1; CSJN 29 April 2015, *Caminos, Julio César y otro v. La Primera de Grand Bourg SATCI y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 28134/2009/CAI-CS1; CSJN 29 April 2015, *Wierna, Luis Ricardo y otros v. Telecom Argentina SA y otros* – programas de propiedad participada, file CCF 701/2010/CS1 – CA1; CSJN 21 April 2015, *Á1varez, Griselda Mabel v. Transporte Sol de Mayo CISA y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 44325/2006/CS1; CSJN 21 April 2015, *Deluca, Mario Norberto v. Veraye Ómnibus S.A. y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 59758/2005/CS1; CSJN 14 April 2015, *Di Palma Ramires, Álvaro v. Laura Alejandra de Tejería y otro* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 100221/2008/CS1; CSJN 7 April 2015, *Da Silva Pirreira, Darío Armando v. ADF Travel S.R.L. y otro*s – daños y perjuicios (acc. trán. sin lesiones), file CIV 17685/2011/CS1; CSJN 7 April 2015, *Castro Fernández, José v. Transporte Automotor Plaza S.A.C.I. y otros* – daños y perjuicios (acc. trán. sin lesiones), file CIV 111675/2009/CS1; CSJN 25 March 2015, *Aybar, Nélida Ester v. La Primera de Grand Bourg SATCI Línea 440 y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 75960/2008/CA1 – CS1; CSJN 25 March 2015, *Ortega Alifraco, Marilina Inés v. Microómnibus General San Martin y otro* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 9283/2006/CS1 – CA1; CSJN 25 March 2015, *De Lima, Ana Karina v.*

Civil decisions do refer to prior cases. Twenty-nine decisions (all but seven)[311] point to similar precedents.[312] Some were decided, in clusters, on the same day.[313] That might help to explain how the Argentine Supreme Court can

General Tomás Guido SACIF L. 570 y otros – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 75523/2009/CS1; CSJN 10 March 2015, *Luque Santo y otros v. Empresa de Transporte Villa Ballester y otros* – daños y perjuicios, file CIV 43138/2009/CS1; CSJN 10 March 2015, *Álvarez Comotti, Alejandro Martín v. Casquero Eduardo y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 13613/2005/CS1; CSJN 3 March 2015, *Pereira, Walter Fabián y otro v. López, Carlos Alberto y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 68489/2008; CSJN 3 March 2015, *Rojas, Lyliana Noemí v. Micro Ómnibus General Pacheco S.A. y otros* – daños y perjuicios (acc. tran. v. les. o muerte), file CIV 60026/2008/CS1 – CA1; CSJN 19 February 2015, *Marín, Andrea Alejandra v. General Tomás Guido S.A.* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 47660/2010/CS1; CSJN 10 February 2015, *Reina, Claudio Fabián v. Compañía Microómnibus La Colorada y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 114603/2009/CA1 – CS1; CSJN 10 February 2015, *Tapia Puyen, Violeta v. Microómnibus Norte S.A. y otras* – daños y perjuicios (acc. trán. v. les. a muerte), file CIV 82438/2009/CS1; CSJN 10 February 2015, *Agüero, Juan Carlos v. Veraye Ómnibus S .A. y otro* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 7032/2009; CSJN 10 February 2015, *Barberi, Alejandro Antonio y otro v. Gral. Tomás Guido S.A.C.I.F.* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 56480/2008; CSJN 10 February 2015, *Luchia Puig, Horacio Miguel v. Crespo, Rafael Antonio y otros* – cobro de honorarios profesionales, file CSJ 358/2014 (50-L); CSJN 3 February 2015, *García, María Elena v. Transporte Automotor Plaza S.A.C.I. y otros* – daños y perjuicios (acc. trán. sin lesiones), file CIV 36760/2011/CS1; and CSJN 3 February 2015, *Quiroga, Jorge v. Transportes Los Andes S.A.C.I. y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CSJ 54/2014 (50-Q).

311 The seven decisions are: CSJN 9 June 2015, *Seva, Leonilde Adela v. Construcciones Serna S.R.L. y/u otros* – daños y perjuicios, file CSJ 284/2013 (49-S)/CS1; CSJN 27 May 2015, *M., M. S.* – guarda, file CIV 90032/2013/CS1; CSJN 13 May 2015, *Correa, Claudia Maria y otros v. Mónaco, José y otros* – daños y perjuicios, file CSJ 1416/2004 (40-C)/CS1; CSJN 13 May 2015, *S., D. el R., L. M.* – reintegro de hijos y alimentos, file CSJ 977/2012 (48-S)/CS1; CSJN 29 April 2015, *Wierna, Luis Ricardo y otros v. Telecom Argentina SA y otros* – programas de propiedad participada, file CCF 701/2010/CS1 – CA1; CSJN 21 April 2015, *Á1varez, Griselda Mabel v. Transporte Sol de Mayo CISA y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 44325/2006/CS1; and CSJN 10 February 2015, *Luchia Puig, Horacio Miguel v. Crespo, Rafael Antonio y otros* – cobro de honorarios profesionales, file CSJ 358/2014 (50-L).

312 The Supreme Court refers, in Spanish, mainly to: "[...] los precedentes 'Nieto' , 'Villarreal' y 'Cuello' (Fallos: 329:3054 y 3488; 331:379 y 330:3483) [...]." See, for example, CSJN 2 June 2015, *López, Mirta Noemí v. Micro Ómnibus Quilmes S.A.C.I.F. y otros* – daños y perjuicios, file CIV 43697/2008/CS1.

313 See, for example, CSJN 12 May 2015, *Medina, Ramón Humberto v. Stay, Sergio Domingo y otros* – daños y perjuicios, file CIV 40300/2006/CA2-CS1; CSJN 12 May 2015, *Hermosid, Susana Irene v. Kolocias SA (Línea 553) y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 76687/2007/CS1; and CSJN 12 May 2015, *Fleita, Claudia Noemí v. Juarez Miguel y otros* – daños y perjuicios (acc. trán. c/ les. o muerte), file CIV 40791/2009/CS1.

cope with thousands of cases in one single year. The references to precedents in civil decisions follow the style of the court by referring to the official collection.

The length of the civil decisions is also homogenous, since all decisions have an average length of 2–4 pages. It is worth noting two aspects. First, there are two civil decisions indicating that Chief Justice Lorenzetti adheres to his own vote as expressed in a prior decision.[314] The indication offers an example of a dissenting opinion. Second, there is a civil decision of the Argentine Supreme Court in which a reference is made to the 1989 Convention on the Rights of the Child.[315]

The snapshot shows that, in those specific civil decisions, traditional logical genesis and style are respected, as well as the reasoning of decisions. Precedents are invoked, international law also, and dissenting opinions also appear. There are, however, no references to academic works.

V. Closing Remarks

Judges are active members of society and important actors in legal development. The justices of the Argentine Supreme Court as discussed in this paper embody a prime example of that important role. The role of Argentine judges can now be compared with that of the other two actors identified by van Caenegem in his seminal book. The interplay of judges, legislators, and professors can then be explored in future studies. This paper has also offered comparative remarks that may help analyse some aspects of the role of judges in other Latin American jurisdictions, even if those remarks do not suffice as generalisations or abstractions that could be applied to all of Latin America.

The paper first focused on the role of judges and legal development. The paper indicated that judges are part of the structure of modern states and that they have the ability to create guidelines for coexistence within that structure.

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[314] TheSupreme Court states, in Spanish, that: "El juez Lorenzetti se remite a su voto en la última causa citada." See CSJN 7 April 2015, *Castro Fernández, José v. Transporte Automotor Plaza S.A.C.I. y otros* – daños y perjuicios (acc. trán. sin lesiones), file CIV 111675/2009/CS1; and CSJN 3 February 2015, *García, María Elena v. Transporte Automotor Plaza S.A.C.I. y otros* – daños y perjuicios (acc. trán. sin lesiones), file CIV 36760/2011/CS1.

[315] The Supreme Court stated, in Spanish, that: "Que dada la importancia que el factor tiempo tiene en estos asuntos, este Tribunal estima conveniente encomendar a la magistrada de grado a obrar con la premura y la mesura que el caso amerita en la resolución definitiva del conflicto, de modo de hacer efectivo el mencionado interés superior de la menor que como principio rector enuncia la Convención sobre los Derechos del Niño, y de evitar que pueda prolongarse aún más la incertidumbre sobre la situación de la niña y su posibilidad de crecer en el seno de una familia." CSJN 27 May 2015, *M., M. S.* – guarda, file CIV 90032/2013/CS1.

The paper further explained the role of judges in society and placed them at the vertex of the procedural triangle. The Argentine Supreme Court occupies a paramount position within the Argentine judicial structure. Attention was also devoted to the fact that Argentina inherited the continental European system of law from Spain, yet in public law (and especially in constitutional law) it followed the U.S. constitutional model. That first part also included information on the Argentine federal jurisdiction and the extraordinary appeal to the Supreme Court.

The activities and the dynamic role of the Argentine Supreme Court were the focal points of the second part of this paper. Attention was devoted to typifying aspects of the decisions of the Supreme Court, and hence to unveiling the way the justices operate and put together their decisions. That approach offered a perspective on the logical genesis of decisions, style, the reasoning of decisions, references to academic works, references to comparative law, the use of dissenting opinions, and the value of precedents. All those aspects, when amalgamated, offer a unique look into the methodology of the Supreme Court in its judicial decision-making capacity: a court that is keen to observe rules of reasoning and style, is used to referring to academic writings and comparative law, is familiar with dissenting opinions, and is accustomed to looking at precedents.

A snapshot of the activities of the Argentine Supreme Court, during the first half of 2015, was provided at the end of this paper. In that way, the theoretical knowledge and information could be applied to the daily life of the Supreme Court. The snapshot focused on decisions resulting from extraordinary appeals in civil and commercial claims. The snapshot can also help to explain how the Argentine Supreme Court deals with case overload, a problem that is endemic among many courts in Latin America and beyond.

The paper aimed to provide a broader understanding of the current role of judges as actors in Argentina. It should generate awareness on at least three paramount points. First, it must be noted that the efforts of all actors, including judges, should aim at the common good.[316] Second, it must be noted that the incorporation of supranational norms and systems of control by supranational organisations offers a new reality in the production and application of the juridical order.[317] Actors should be aware of that new context: it is after all their new habitat. Finally, it must be noted that the Argentine Supreme Court offers a laboratory of constitutional law,[318] but also of private law and every area of law the justices touch upon in their decisions.

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[316] *Hans Reichel,* La ley y la sentencia: orientación acerca de la doctrina actual sobre fuentes del derecho y aplicación del último (Madrid 1921) 146.

[317] *Jorge L. Salomoni,* Acerca del fallo "Simón" de la Corte Suprema de Justicia de la Nación, La Ley 2005-D, 1340 [6].

[318] *Bianchi,* La Ley 1997-B, 994 [3–4].

Legal Methodology Today

On the Very Idea of Legal Methodology

Aditi Bagchi[*]

I. The Concept of Legal Method is Simultaneously Ambiguous and Laden

The idea of legal method *in this or that country* is ambiguous in one respect that this symposium anticipates, i.e., that different actors in a legal system will deploy distinct methods. Thus, each participant in this symposium comments not just on a single jurisdiction but also on the role of one type of actor – judges, legislators or professors. Of particular interest here, the concept of legal method is also ambiguous because it can be either normative or descriptive. That is, it might refer to a procedure of decision-making or legal application that legal actors regard as binding on themselves. Or it might describe the process by which law is in fact applied, which might be quite at odds with the self-understanding of any actor within the system.[1]

The concept is laden because it presumes – or at least implies – the existence of a unitary method that can be described in general terms. In particular, when we inquire about the methodology of a jurisdiction, like the United States, the implication is that there is a method that is deployed across the fifty federated states, irrespective of subject matter and the particular vertical location of an actor within the system. It does not imply, of course, that the

[*] Many thanks to *Reinhard Zimmermann* and the Max Planck Institute for Comparative and International Private Law for the invitation to participate in this symposium. Thanks also to all participants for the lively conversation about a quite different paper which gave rise to this one.

[1] *Stephen M. Feldman,* The Rule of Law or the Rule of Politics? – Harmonizing the Internal and External Views of Supreme Court Decision Making, Law & Soc. Inquiry 30 (2005) 89–135, 91: "The internal-external debate goes to the very heart – or perhaps, more precisely, to the apex – of American jurisprudence."

method is literally identical in all contexts. Obviously, all actors do not apply law in exactly the same way. But the idea of legal method in a jurisdiction suggests that there is at least some meta-framework that relates methods across the jurisdiction in the way we might expect decision-making criteria to vary systematically at different levels of appellate review.

An American legal scholar is especially sensitive to these two features of the question posed in this symposium because of two features of American legal culture: pragmatism and pluralism. American pragmatism generates as much interest in the manner in which laws are actually applied as any formal norms governing their application. We do not accord priority to the latter. And because American law, like our other central institutions and practices, is essentially pluralistic, we do not aspire to a universal legal method, even one that is conceptually netted. Instead, we tend to regard it as an asset of our system that multiple approaches co-exist, allowing live legal debate about appropriate methods in separate subjects. Thus, we have ongoing, robust debates about statutory interpretation,[2] constitutional interpretation,[3] common law reasoning and the appropriate weight accorded to precedent,[4] economics and other social sciences,[5] moral philosophy,[6] and the opinions of foreign

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[2] See *William N. Eskridge, Jr./Philip P. Frickey/Elizabeth Garrett,* Legislation: Statutes and the Creation of Public Policy[3] (Eagen 2001) 669–1098 (describing theories); *John F. Manning,* Textualism and the Equity of the Statute, Colum. L. Rev. 101 (2001) 1–127; *Antonin Scalia,* A Matter of Interpretation: Federal Courts and the Law (Princeton et al. 1997); *William N. Eskridge, Jr.,* Dynamic Statutory Interpretation (Cambridge 1994); *Philip Frickey,* From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation, Minn. L. Rev. 77 (1992) 241–267; *Daniel A. Farber,* Statutory Interpretation and Legislative Supremacy, Geo. L.J. 78 (1989) 281–318; *Jonathan R. Macey,* Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, Colum. L. Rev. 86 (1986) 223–268.

[3] *Erwin Chemerinsky,* The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review, Tex. L. Rev. 62 (1984) 1207–1261, 1234–1236 (describing six major theories of constitutional interpretation). See also Congressional Research Service 15 February 2011, Report to Congress, Selected Theories of Constitutional Interpretation: "Whether it is necessary to have a unified method of constitutional interpretation to analyze all aspects of the Constitution is itself a matter of debate."

[4] See *H. Jefferson Powell,* The Rationality of the Common Law, Notre Dame L. Rev. 64 (1989) 767–771, 768: "appropriate relationships among choice, discretion, and doctrine in common law decision making are" subject to disagreement, as are "the nature and authority of precedent and over the common law courts' recurrent claim that their decisions are based on reason rather than on will". See also *Melvin Aron Eisenberg,* The Nature of the Common Law (Cambridge 1988); *Thomas C. Grey,* Holmes on the Logic of the Law, in: The Path of the Law and Its Influence, ed. by Steven J. Burton (Cambridge 2000) 133–157, 137.

[5] See, e.g., *Tom Ginsburg,* Economic Analysis and the Design of Constitutional Courts, Theoretical Inquiries L. 3 (2002) 49–86, 53; *Andrew S. Gold,* A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty, Md. L. Rev. 66 (2007) 398–474; *John J. Flynn/James F. Ponsoldt,* Legal Reasoning

courts.[7] These debates do not take place outside the gates of legal institutions, or between those who would defend the status quo and those would overturn it. Most methods under discussion are actually in use. Each side of a debate can usually identify at least one judge as its public leader.

The aim of most academic work on legal method is to win more judges into its particular camp, with respect to the particular subject matter that is an academic author's expertise. Of course, the primary audience for academic work is other academics. But judges in the United States are appointed or elected judges at late stages in their careers and often remain in contact with law schools throughout their tenure as judges. Judicial chambers are staffed by young law clerks who have only recently graduated from law school. Many of these clerks were editors of law reviews, in which most legal academic work is published, in the years immediately prior to their clerkship. Thus, there is natural discourse between academia and the practicing legal profession, including judges.

The result is that the absence of agreement upon a legal method as such is not merely academic. It is characteristic of American legal practice. While all judges (in law), including American judges, decide cases by reference to pre-existing substantive law, whether precedent or statute, substantive law is inevitably indeterminate. Its indeterminacy is a function of open-endedness in the substantive law itself but it also reflects indeterminacy in the method by which substantive legal norms are applied. After all, if the latter were fixed, we would be able to predict reliably how gaps or ambiguities in substantive law will be resolved. It is because even the meta-norms are indeterminate that the outcomes of legal cases can be unpredictable.

These are commonplace assumptions in American legal scholarship. But they do not apply to American law alone. They are rather observations about

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and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes, N.Y.U. L. Rev. 62 (1987) 1125–1152, 1130–1131.

[6] See, e.g., *Francisco J. Urbina,* Is It Really That Easy? – A Critique of Proportionality and "Balancing As Reasoning", Can. J.L. & Juris. 27 (2014) 167–192, 179: "Is it really enough for legal categories to allow for unconstrained moral reasoning, so as to make always possible that the morally relevant reasons that ought to bear on the case could feature in the judge's reasoning?"; *Kate Stith/José A. Cabranes,* Fear of Judging: Sentencing Guidelines in the Federal Courts (Chicago 1998) 82 (embracing open-ended moral judgment in sentencing).

[7] *Hadar Harris,* "We Are the World" – Or Are We?, The United States' Conflicting Views on the Use of International Law and Foreign Legal Decisions, Hum. Rts. Brief 12, 3 (2005) 5–8. For opposing views, see, e.g., *John O. McGinnis,* Foreign to Our Constitution, Nw. U. L. Rev. 100 (2006) 303–329; *Diarmuid F. O'Scannlain,* What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?, Speech at the Institute of Advanced Legal Studies of the University of London (11 October 2004), Notre Dame L. Rev. 80 (2005) 1893–1909.

the limits of law as a legal institution and they apply even to those systems that would self-describe as subject to fixed legal methods aimed at minimising or even eliminating legal indeterminacy – systems in which indeterminacy might be regarded as something of an embarrassment, anomalies that are usually the product of imperfect judicial application of legal norms. Most American legal scholars would be highly sceptical about an aspiration to determinacy, and therefore, claims about fixed legal method in any jurisdiction. The comments in this essay, then, are intended to imply scepticism about the idea of a fixed legal method anywhere. Nevertheless, as discussed below, certain features of the U.S. legal and political system are especially hospitable to multiplicity and contextualisation of legal method. Outside of treating precedent as binding (but even then, to what degree?), neither federal law nor state law presumes to instruct judges to decide cases by one established method. Norms of legal process, understood here as the rules of decision-making and not the rules of procedure, are not binding legal norms themselves. Where a given legal method might operate at least as a Platonic ideal in some foreign systems of law, in the United States there is no singular ideal to which all judges must pay homage.

In its portrait of American thinking and practice on the question of legal method, the claims of this essay must therefore turn not on legal doctrine but rather various institutional pillars of American law, most notably our federal structure, the simultaneous reliance on common law, statutes, administrative law and state and federal constitutions, and the limits of appellate review. One might come away with a sense of political and intellectual chaos – and I will take seriously the risks to the rule of law. But I hope ultimately to defend the unsettled character of legal method in the United States.

In the next two Parts, I will elaborate on the challenges that pragmatism and pluralism pose for the very idea of legal methodology. Part II discusses the implications of legal realism and empirical research on Americans' self-understanding of their legal methods. Part III identifies subject specialisation as one driver of pluralism of method. It also discusses the deep challenge of disagreement about method, including how such disagreement relates to other profound differences in how we think about the nature of law. It argues that these disagreements are most productively and appropriately harboured within legal institutions. In Part IV I consider whether the state of affairs I have described is consistent with the rule of law. (It is.) Part V concludes.

II. Pragmatism and Legal Methodology

The most important body of work on legal method across subject matter in the United States is the literature known as American legal realism. A major school of thought always has various strands but its major tenets hold that

judges bring values and biases to the law; they respond to the facts of a given dispute outside those implicated by applicable legal doctrine; and they take into account the policy implications of legal rules and case outcomes.[8] The way in which these factors affect judicial decision-making is principled but not easily patterned. Judges bring their idiosyncrasies to their caseload; it is part of the reason why prospective plaintiffs and defendants shop for the most hospitable forum by way of their choice of law, choice of forum and initial claim filing. Rules evolve over time, sometimes through tweaks and extensions, sometimes through express overturning of old rules. But they are in all events, irrespective of their initial form (case law or statute), adaptive to peculiar facts and broad social shifts. Law is regarded as appropriately responsive to these considerations because it is not just a means by which to resolve ripe disputes but also a tool for directing social behaviour.[9] There has been push back on realism, some of which I will discuss below in Part IV. But today "[a]ll major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all realists now."[10]

Importantly, this is true not only of scholars but of many judges too. For example, the prominent federal appellate judge Richard Posner frequently defends a realistic, pragmatic approach to judging. In the context of interpretation, he would advance the purpose of a statute while recognising it as a legislative compromise. He spurns elaborate canons of interpretation.[11] The intellectual climate is such that judges can acknowledge the broad-ranging nature of legal reasoning without undermining their own authority.

Lest the tenets of realism be taken for granted, recall its primary conceptual adversary, formalism. Formalism "describes legal theories that stress the importance of rationally uncontroversial reasoning in legal decision, whether from highly particular rules or quite abstract principles."[12] On a formal approach to legal reasoning, legal method is a less ambiguous concept. We would expect the law to direct judges in largely determinate ways. It would be possible to describe the method by which law is applied step by step.

There are, in fact, step by step methods of decision-making proffered in almost all areas of the law. One might resolve a contract dispute by first as-

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[8] See *Brian Leiter,* Rethinking Legal Realism: Toward a Naturalized Jurisprudence, Tex. L. Rev. 76 (1997) 267–315 (discussing how legal realism holds that judges respond to facts of cases and broad policy objectives); *Hanoch Dagan,* The Realist Conception of Law, U. Toronto L.J. 57 (2007) 607–660.

[9] See *Laura Kalman,* Legal Realism at Yale: 1927–1960 (Chapel Hill 1986); *Victoria Nourse/Gregory Shaffer,* Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?, Cornell L. Rev. 95 (2009) 61–137, 71–94 (discussing variants of legal realism).

[10] *Joseph William Singer,* Legal Realism Now, Cal. L. Rev. 76 (1988) 465–544.

[11] *Richard Posner,* Reflections on Judging (Cambridge 2013).

[12] *Thomas Grey,* Langdell's Orthodoxy, U. Pitt. L. Rev. 45 (1983) 1–53, 9.

certaining the validity of the contract, interpreting the contract to assess the defendant's obligation, reviewing the factual record to determine whether there has been a breach, and then awarding expectation damages. But even such an innocuous account is grossly unsatisfactory, since the validity of the contract turns on a whole host of questions. Interpretation is not subject to any stable hierarchy of interpretive principles. The relevant factual record has few *a priori* boundaries, since everything might speak to how parties understood their bargain. And because expectation damages is not always the appropriate remedy, even the choice of remedy, let alone the amount of damages, requires difficult factual assessments and open-ended equitable reasoning about adequate mitigation or the propriety of an injunction. It is not that there is *no* legal process; it is just that the process described at such a high level of generality is not determinative of outcomes and illuminates little.[13] We would expect first year law students to learn the general outlines of this process but the primary aim of legal education is to teach students to "think like a lawyer" through inductive reasoning, itself learned by reading and discussing hundreds of cases. All the action is in the *application* of general principles. The 'real' legal method must account for the criteria that bring judges to final decisions, and formal principles do not capture *that* method.

More recently, another disciplinary development reinforces American pragmatism about law: growing interest in, if not fascination with, empirical research.[14] Empirical research is increasingly pervasive in the academy. It is also highly influential in legislative and administrative rule-making, and policy-makers are usually the target audience of this kind of work. Empirical work is less often cited as a basis for judgment in cases, though it may be, especially in the context of administrative and constitutional law.

Empirical research tends to the pragmatic because it puts front and centre the consequences of a legal rule. A decision-maker that invokes such research necessarily regards herself as a choosing among possible legal outcomes, and regards that choice as dependent on its likely social effects rather than controlled by earlier cases or background rules. Its instrumentalist stance is an outgrowth of realism, and the rising supremacy of empiricism as a method in legal scholarship portends of more unabashed realism in judicial decision-making as well.

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[13] *Karl N. Llewellyn,* Some Realism about Realism – Responding to Dean Pound, Harv. L. Rev. 44 (1931) 1222–1264, 1239–1242: "[I]n any case doubtful enough to make litigation respectable[,] the available authoritative premises […] are at least two, and […] the two are mutually contradictory as applied to the case at hand." See also *Karl N. Llewellyn,* Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed, Vand. L. Rev. 3 (1950) 395–406, 401–406.

[14] *Shari Seidman Diamond/Pam Mueller,* Empirical Legal Scholarship in Law Reviews, Ann. Rev. L. & Soc. Sci. 6 (2010) 581–599 (describing pervasiveness of empirical work).

For now, the star of empirical research shines most brightly within the academy. However, its spiritual cousin, cost-benefit analysis, has already entrenched itself in both case law and among policy-makers. Some judges expressly engage in cost-benefit type reasoning to assess the best legal rule, or even liability, in a given case. For example, Learned Hand famously held that a person is negligent only if the burden of precaution is less than the probably injury.[15] Contemporary judges are probably more likely to embrace cost-benefit analysis. Posner has written to defend it as an instance of legal reasoning, describing it as "important in every department of thought and certainly in legal reasoning."[16] It is used not only in areas akin to economic regulation but in the criminal law and constitutional law contexts as well.[17]

Cost-benefit analysis invokes the disciplinary framework of economics, but considered as express means-end reasoning, it fits into common law reasoning without much fanfare. Even when deontological principles constrain its application, one of the lessons of legal realism was that consequentialism has always been a part of judicial reasoning. When it appears to displace the application of precedent or ordinary conceptual analysis, however, cost-benefit analysis is more controversial. While its proper bounds are unsettled – and its application by judges therefore inconsistent – because other modes of legal reasoning are open-ended, cost-benefit analysis at least has a role to play where those other more conventional types of argument appear inconclusive. Anticipating that courts will sometimes use cost-benefit-style argument, lawyers briefing a case will offer those arguments in the course of their advocacy.

Academics have a larger role to play in cost-benefit analysis than agencies or congressional committees do in the promulgation of administrative rules or drafting of legislation. Academics supply rival cost-benefit analyses, or perhaps more often, offer studies on either the benefits or costs that policy-makers can either incorporate or learn from in their own independent analyses. These studies are usually the purview of empirical scholars. But academic contributions to cost-benefits analysis are just as important for the critical checks they offer by way of scholarship that critiques latent assumptions, analytic flaws and the inherent limits of empirical work.[18]

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[15] *United States v. Carroll Towing Co.,* 159 F.2d 169, 173 (2d Cir. 1947): "[T]he owner's duty […] to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL."

[16] *Richard A. Posner,* The Jurisprudence of Skepticism, Mich. L. Rev. 86 (1988) 827–891, 852.

[17] See, e.g., *Herring v. United States,* 129 S. Ct. 695, 700 (2009) (applying the exclusionary rule under Fourth Amendment where benefits outweigh its costs).

Together legal realism, empirical scholarship and cost-benefit analyses demonstrate the distinctive influence of pragmatism, and its consequentialist orientation, on American legal method. These do not crowd out more traditional methods of rule application, fact pattern comparison, and conceptual analysis. But the pragmatic strain runs sufficiently deep that no characterisation of legal method can identify a series of decision steps adequate to explain legal outcomes.

III. Pluralism and Legal Methodology

Students trained in the law of a foreign system are often taken aback, when they arrive as graduate students in the United States, to find that subjects that are taught together as conceptually bound in their home country are taught almost as if unrelated in the United States. That is an exaggeration, of course – professors are likely to make conceptual connections between subject matters – but in basic course design it is indeed an important deficiency of American legal education that we do not offer students enough opportunity to reflect on *law* as such, and the ways in which various subjects relate and possibly support (or undercut) one another.

Besides unduly narrowing our perspective on the particular legal questions that engage any one scholar or practitioner, among the costs of such compartmentalisation is that insights buried within the literature on one subject might take years to cross into the literature of another – even closely related subjects such as contracts and torts, which in many other systems would be studied together as the law of obligations. The scholarly distance between apparently unrelated subjects, or between largely common law subjects, on the one hand, and largely statutory subjects, on the other – like contracts and environmental law, or torts and constitutional law – is still greater. The methods deployed for resolving disputes in common law are so dissimilar to the methods used to apply statutes or administrative regulations that commonalities are easy to overlook.

Yet there is one silver lining to this otherwise unfortunate state of affairs. And that is that the relative separation of literatures, together with the sheer scale of legal academia in the United States (reflective of both the research orientation of relatively well-funded American universities and the very high per capita supply of lawyers), allow robust debates about legal methodology

[18] See, e.g., *Frank Ackerman/Lisa Heinzerling,* Priceless: On Knowing the Price of Everything and the Value of Nothing (New York 2004); *Robert Frank,* Why is Cost-Benefit Analysis So Controversial?, J. Legal Stud. 29 (2000) 913–930; *Robert Kuttner,* Everything for Sale (Chicago 1997); *Steven Kelman,* Cost-Benefit Analysis: An Ethical Critique, Regulation 5 (1981) 33–40.

to flourish in multiple intellectual sites. Debates about the best methods of interpretation rage in the literature on contract law, international law, administrative law, statutory law and constitutional law. Debates about the appropriate level of scrutiny on appellate review are live with respect to both patent law and administrative law. Debates about the relevance of social scientific studies take place with respect to both criminal law and antitrust law. These bodies of literature are not actually silos (and most courts have general jurisdiction), so insights and conceptual advances in one area do eventually spread elsewhere. But though there is cross-fertilisation, these remain quite distinct literatures. Normative assumptions and prevailing methodologies differ importantly among them. The result is really a thousand flowers blooming, even if proponents of a given view within one body of literature will tend to regard at least some of the rival views in their own field as mere weeds.

The first pluralism of method in the United States is thus a pluralism that stems from a high degree of specialisation. Academic separation of subject matters dovetails with independent meta-rules for each subject matter area. Standing alone, this institutional feature of the American legal academy makes it difficult to speak of an "American legal method". But pluralism runs deeper.

Perhaps even more foundational to pluralism in method is the extra-legal status of norms concerning legal method. While each judge may subscribe to a set of decision-making rules, and while lawyers and judges learn from each other (no one is starting from scratch), these rules are not binding law. Thus, pluralism is not merely a function of divergence among subject matter areas. Its most important source is disagreement.

The incorporation of disagreement about law into legal discourse is profoundly democratic (although certainly not a distinctive feature of American law).[19] Such incorporation appears in quite disparate moments in law, often in the form of acknowledging the uncertainty that results from disagreement. For example, the so-called American rule holds that each party must cover its own costs. There are multiple justifications for this rule, including lowering the costs of bringing claims to ensure access to justice. But one way to understand the rule is that it acknowledges that the party who wins a case is not (or at least, *ex ante*, was not) entirely in the right, and the other side entirely in the wrong. Most cases that actually end up in litigation, and most that rack up substantial litigation costs, are subject to some uncertainty in outcome. Were the outcome entirely predictable, it would not be rational for the expected loser to go to court. By having each party bear its costs, the system in some way acknowledges that notwithstanding the binary character of most judgments of liability, in fact there is usually room for reasonable disagreement about the validity of claims.

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[19] See generally *Jeremy Waldron,* Law and Disagreement (Oxford et al. 1999).

Disagreement about substantive legal norms is costly and undermines the rule of law. It fails to give persons notice about prospective liability, renders actual litigation outcomes arbitrary and unpredictable, and renders legal norms opaque and unsuited to transparent public justification. Disagreement poses these dangers only because people disagree not just about what the law should be but what it actually is. For better and for worse, open-ended substantive norms – including but not limited to unabashedly open-ended constitutional language and common law precedent – often require reference to normative analysis even to resolve law "as it is". Even those who would regard themselves as strict positivists will find it necessary to interpret legal norms in a way that makes sense of them, perhaps the best sense of them. Legal practitioners are thus regularly called upon to engage in reasoning that inevitably implicates their background values and commitments. Judges usually resist, though, casting their legal judgments as the product of their own idiosyncratic value set. When it comes to substantive legal norms, disagreement is cast in epistemic terms. Whether in briefs on either side of a claim, or in the majority and dissenting opinions of a multi-judge panel, conflicting views are presented as alternatives in which only one side is correct *as a matter of law*.

Disagreement about legal methods is not handled in this way. While some judges will attempt to defend their method and criticise that used by others, for the most part, judges simply (but openly) apply some method. We might think they proceed as if there were no disagreement. But since we know that judges are well aware of methodological diversity, the better inference to be drawn from the application of a method with only the occasional defence or even articulation of it is that judges do not feel compelled to arrive at a common understanding of legal method in the way they rightfully regard it as imperative to resolve substantive legal norms. Disagreement about legal method is not one that the system regards as inherently problematic and so public adjudication does not require persistent effort to argue it away.

We should not mistake the sustainability of disagreement about legal method with its insignificance. To the contrary, disagreement about method can reveal fundamental differences regarding the nature of legal authority or the foundational justification for an area of law. For example, disagreement about constitutional interpretation reveals that many legal scholars and practitioners – and many Americans more generally – take the authority of the Constitution to derive historically from the agreement among its original authors.[20] Others – again, judges, lawyers, and citizens – reject any such

[20] *Keith E. Whittington,* The New Originalism, Geo. J.L. & Pub. Pol'y 2 (2004) 599–613, 599; *Randy Barnett,* Restoring the Lost Constitution: The Presumption of Liberty (Princeton 2004); *Antonin Scalia,* Originalism: The Lesser Evil, U. Cin. L. Rev. 57 (1989) 849–865, 854.

claim to historical authority and regard the authority of the document as dependent on its resonance with the political morality of contemporary society.[21] A deeper disagreement about the supreme source of law is harder to imagine. But it is sustainable because originalists and living constitutionalists alike agree on the application of constitutional norms to the vast majority of substantive constitutional questions. Of course, their methodological disagreement does generate disagreement on how to resolve many important substantive questions; indeed, the choice of whether to look back to the original intent of constitutional drafters or update constitutional rights by reference to contemporary social movements is heated because it would seem to dictate divergent results on some key contemporary issues, whether the constitutionality of gun control or the scope of the federal government.[22] But constitutional law remains is recognisable as a body of *law* in which lawyers offer arguments intelligible to those across the ideological spectrum because divergent methodologies converge on substantive law to a great extent.

Similarly, to take an example in private law, consider theories of contract and the interpretive strategies they recommend. Many judges, lawyers and citizens take contractual obligations to be a species of promise or validated by consent, or presumptively welfare-improving to the extent they are voluntary; on these theories, party intention is the essential benchmark for contractual obligation. For this reason, interpretation is mostly an exercise in deciphering the parties' intentions as they were expressed in communications between them, especially in any written document that memorialises their agreement.[23] Others are more sceptical about the controlling nature of the parties' intention

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[21] *Jack Balkin,* Living Originalism (Cambridge 2011); *David Strauss,* The Living Constitution (Oxford 2010); *Bruce Ackerman,* 2006 Oliver Wendell Holmes Lectures: The Living Constitution, Harv. L. Rev. 120 (2007) 1737–1812; *Thomas C. Grey,* Do We Have an Unwritten Constitution?, Stan. L. Rev. 27 (1975) 703–718.

[22] For mutually responsive example of the debate, see *Lawrence B. Solum,* We Are All Originalists Now, in: Constitutional Originalism, ed. by Robert W. Bennett/Lawrence B. Solum (Ithaca 2011) 1–77; *James E. Fleming,* Are We All Originalists Now?, I Hope Not!, Tex. L. Rev. 91 (2013) 1785–1813.

[23] See, e.g., *Peter Benson,* Contract as a Transfer of Ownership, Wm. & Mary L. Rev. 48 (2007) 1673–1731, 1727 (asserting that what a contract has transferred is "decided by the parties' intentions and interests as manifested in their mutual assents, reasonably interpreted, at contract formation"); *Brian Langille/Arthur Ripstein,* "Strictly Speaking – It Went Without Saying", Legal Theory 2 (1996) 63–81 (arguing that contract gaps can be filled contextually without deviating from party intent); *Seana Shiffrin,* Must I Mean What You Think I Should Have Said?, Va. L. Rev. 98 (2012) 159–76 (discussing the best interpretation of performance obligation based on what promisors most likely had in mind). For a more extended discussion of the relationship between promissory, consent and legal economic theories of contract, on the one hand, and the priority of party intention in contract interpretation, on the other, see *Aditi Bagchi,* Contract as Procedural Justice, Jurisprudence 7 (forthcoming 2016).

and more inclined to infuse substantive reasonableness into the reading of a contract, rendering the contract more equitable or compliant with background market practice.[24] These approaches to contract law are very different in how they conceive of contract as a practice, and the essential purposes they ascribe to contract law as a state institution. But they sit comfortably together. Judges sometimes exhort on the primary anchor of party intention[25] and sometimes casually observe that a contract is fairer read one way than another.[26] They can do so because the vast majority of the time even judges that assign somewhat different weight to party intention and reasonableness in construction will read contracts similarly. The stability and reliability of contract law is not seriously undermined by what turns out to be marginal disagreement about how contracts should be interpreted, even though that disagreement is driven by fundamental underlying questions about contract law.

It is a happy fact that disagreement about the method by which to apply substantive legal norms is not systemically debilitating because it is hard to imagine a way to avoid such disagreement which is not itself unsavoury from the standpoint of liberalism or democracy. One might be tempted to wish that the disagreement would simply be resolved. But given the connection between legal method and jurisprudential views about the nature of law, how can we expect to resolve deep disagreements about method without resolving those prior questions about the nature of law? And would we even wish to resolve the latter, inasmuch as it does not threaten the justice of state institutions?[27] A liberal society should be suspicious of certain types of consensus as likely to be disingenuous and coerced. That brings us to an alternative to either open disagreement or actual consensus: hidden disagreement. Hidden

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[24] See, e.g., *Eyal Zamir,* The Inverted Hierarchy of Contract Interpretation and Supplementation, Colum. L. Rev. 97 (1997) 1710–1803.

[25] See, e.g., *Joyce v. DLA Piper Rudnick Gray Cary LLP,* 382 Ill.App. 3d 632, 636–637 (2008): "The primary goal of contract interpretation is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous terms"; *Clark v. Sputniks, LLC,* 368 S.W.3d 431, 441 (Tenn. 2012): "the primary rule of contract interpretation is to ascertain and give effect to the intent of the parties".

[26] *Sutton v. East River Sav. Bank,* 55 N.Y.2d 550, 555 (1982): "Our goal must be to accord the words of the contract their 'fair and reasonable meaning'"; *Tessmar v. Grosner,* 23 N.J. 193, 201 (1957): "Even where the intention is doubtful or obscure, the most fair and reasonable construction, imputing the least hardship on either of the contracting parties should be adopted […] so that neither will have an unfair or unreasonable advantage over the other […]"; *Columbia Propane, L.P. v. Wisconsin Gas Co.,* 661 N.W.2d 776, 787 (Wis. 2003): "In ascertaining the meaning of a contract that is ambiguous, the more reasonable meaning should be given effect on the probability that persons situated as the parties were would be expected to contract in that way as opposed to a way which works an unreasonable result.

[27] The next Part will consider in greater detail the compatibility of such disagreement with the rule of law.

disagreement is not only potentially undemocratic where it radically privileges the view of some, it is also illiberal inasmuch as it suppresses certain views, their expression and their development. Over the course of years, reigning theories of legal method shift – and our understanding and practice improves. This is a faster, smoother process informed by feedback on what works and what does not because disagreement about legal method is manifest in divergent practices all along.

We can observe a kind of synergy between the two limits to the idea of legal method identified here, i.e., pluralism and pragmatism. Each permits the other; perhaps each even reduces to the other. Because people disagree about the best methods and that disagreement is accommodated, we can only describe method in pragmatic terms. Because we do not attempt to impose formal principles and elevate them to the status of binding meta-norms, disagreement persists and diversity of method results.

IV. Legal Method and the Rule of Law

One might get carried away with either pluralism or pragmatism and the resulting chaos would seriously undermine the rule of law. If judges regard themselves and are perceived as authorised to abide by just any legal method that comports with their personal jurisprudence, then their judgments will be unpredictable and unaccountable. Substantive legal norms are too indeterminate standing alone to guide either private actors bound to comply or judges charged with their application.

Also basic to the rule of law is transparency. If sweeping disagreement under the rug risks masking the true nature of legal reasoning, the alternative of openly applying inconsistent methods undermines transparency too. The law would become indecipherable. Predicting case outcomes would become more of a social science than an exercise in a normative thinking, the peculiar variety in which lawyers are specially trained.

Scholars are already sensitive to the risks to the rule of law. For example, Eric A. Posner and Adrian Vermeule have observed that "analysts who speak both as political scientists and as legal theorists must be careful not to switch their hats so rapidly that they end up attempting to wear two hats at the same time."[28] It is important that legal scholars be capable of moving between an internal perspective on the law, in which they explain legal rules in ways consistent with system actors' self-understanding, and an external perspective, which identifies independent variables which actors whose decision-making is at issue would reject as operative. Without the former, legal schol-

[28] *Eric Posner/Adrian Vermeule,* Inside or Outside the System?, U. Chi. L. Rev. 90 (2013) 1743–1797, 1797.

arship becomes irrelevant. It would be critical but offer little guidance to actors interested in directing the law in one direction or another, including directions favoured by an author offering an external critique. On the other hand, internal perspectives should not exhaust legal scholarship or the latter will become stagnant and self-congratulatory. Major shifts in law usually require a step back; only a critical eye achieved by distance appreciates problematic patterns and dubious premises in the law. Each perspective has its place. But legal observers should be clear about which mode they are in or there will cease to be an internal perspective in which people, especially judges, feel bound by norms.

Fortunately, the picture of American legal method on offer here is more restrained than in such a dystopia. The very pragmatism that cuts against a highly formalised decision process also restrains judges who might be tempted to implement a method hatched in thin air. Although many important aspects of legal method are non-binding, some key principles are set in stone. Precedent is binding, even if there are no fixed criteria justifying deviation, and even if it is ambiguous whether courts are bound just by express legal rules stated in prior cases or must also give substantial weight to *dicta* or implicit treatment of facts in cases with similar fact patterns. Interpretation is an exercise constrained by language, even if the degree of constraint, its relationship with construction, and the relative significance of the intentions of speaker and audience are in doubt. Even if judges are understood to reason inductively, taking into account an unspecified set of considerations and moving the law forward with an eye to its practical consequences, "respect for the governing rules is not optional."[29]

This is not to say that there is detailed common method, after all. The express rules of legal method are too general to satisfy rule of law needs. What fills the gap between systemic need and prevailing abstract directives are underspecified but well-understood behavioural norms. Lawyers and judges are socialised in legal reasoning. They are familiar with the range of considerations that are appropriate, the rhetorical moves with which those factors are accorded the particular weight they bear in a given decision, and the general ways in which variations among possible method align with a range of background values served by law. Lawyers' arguments for their clients comply with the norms that constrain argument out of self-interest. Judges similarly comply in order to preserve the perceived legitimacy of their authority, as well as their perceived competence, before citizens, the bar, and appellate courts. Actors within the system know that there are boundaries and standards that govern decision-making even where there are few express rules. Alt-

[29] *Cass R. Sunstein/Adrian Vermeule,* Libertarian Administrative Law, U. Chi. L. Rev. 82 (2015) 393–473, 473 (commenting on the limits of legal realism in the context of administrative law).

hough legal realists emphasised the choices available to judges, the manipulability of legal rules and the influence of political and moral values, they never denied the work that legal rules do or the desire and ability of judges to abide by those rules.[30] Even in an area like administrative law that is highly politicised (because regulations usually follow a public process and are hotly contested) and appear at special risk of deteriorating into lawless political arenas, professional norms of legal reasoning have helped to institutionalise and streamline decision-making in ways that render the subject recognisably one within law.[31]

V. Conclusion

Comparative study of legal method is an important project for many reasons. One reason is that legal method is a window into legal culture, or subtle facets of a system that pervasively shape the practice of law. Another reason is that legal systems may learn from what works well or has proven dysfunctional elsewhere. Still another, perhaps less obvious reason is that it might turn out that prevailing self-understanding of the method in a legal community fails to capture the reality of how law is applied there, and the disjuncture between self-understanding and reality comes to light only when the accounts of method in foreign systems highlight other possibilities.

The discussion here has aimed to advance these three purposes. The inductive, flexible character of method in the United States is indicative of endemic pragmatism and pluralism. These features of the system are self-conscious but also may be inevitable given the state of disagreement on basic questions about law and the unwillingness of actors in the system either forcibly to resolve that disagreement or hide it behind the façade of apparently determinative formal rules.

There is, however, a real risk to the rule of law when the pragmatism and pluralism described here run amok. The system manages to deliver a fair degree of predictability and transparency by way of soft norms. But American jurists may need to be especially sensitive to the appearance of *ad hoc* or politicised decision-making that would undermine the authority of courts in the long run. Some other systems might manage disagreement while better preserving rule of law values.

Finally, there is the challenge to self-understanding. Here there are again two lessons. To the extent this article itself buys too readily into the narrative

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[30] See *Brian Tamanaha,* Understanding Legal Realism, Tex. L. Rev. 87 (2009) 731–785.

[31] See *Daniel Ernst,* Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940 (Oxford 2014) 143–144.

of pragmatism and pluralism, one might wonder whether the soft norms that ensure basic rule of law actually undercut the primary narrative. Perhaps there is more formalism and homogeneity than American legal actors – especially legal scholars – like to think. On the flip side, inasmuch as the systemic and cultural factors that I have suggested drive pragmatism and pluralism are not peculiarly American, other legal systems that purport to espouse more formal methods of decision-making might fit their own descriptions less perfectly than jurists in those systems would ordinarily suppose. Pragmatism and pluralism are always characteristic of legal method to some degree, not just in the United States.

Legal Methodology and the Role of Professors in France

Professorenrecht is not a French word!

Jean-Sébastien Borghetti

I. Introduction

For the purpose of this contribution, legal methodology will be understood quite simply as designating the way in which lawyers solve a given case: how they approach it, and how they reason in order to decide which solution should be given to it from a legal point of view.[1] In that perspective, legal methodology is highly dependent on how professors understand and teach the law,[2] since it is something one starts learning when training to become a lawyer. And, in France at least, this training starts at university.

The example professors set as far as legal methodology is concerned, and how lawyers are trained, will be different from one country to another, for a host of reasons, which have to do with history, culture, sociology, etc. Among

[1] One of the very few existing French textbooks specifically devoted to legal methodology *(méthodologie juridique)* offers the following definition: "la méthodologie juridique est l'étude des procédés et des méthodes que les juristes sont amenés à pratiquer dans leurs activités de recherche, de création et d'application du droit et, plus généralement, pour parvenir à la solution des problèmes juridiques"; see *Jean-Louis Bergel,* Méthodologie juridique (Paris 2001) 18. A Belgian author defines it more straightforwardly as "le raisonnement à suivre pour parvenir au droit": *Xavier Dijon,* Méthodologie juridique – L'application de la norme (Diegem 1996) no. 1.

[2] On French law professors, how they understand themselves and how they define themselves together as "doctrine", see the thought-provoking work of *Philippe Jestaz/ Christophe Jamin,* La Doctrine (Paris 2004).

all these factors, one deserves to be singled out, as is suggested by the very choice of the contributors to the "legal methodology" part of this book: one professor from a "common law" legal system, another one from a "civil law" legal system and a third one from a "mixed" legal system. Such a panel clearly conveys the idea that legal methodology is influenced, of course not exclusively, but nevertheless significantly, by the nature of the legal system in which it develops. This, actually, seems rather obvious. It is nearly a *cliché* to say that legal reasoning, and its close cousin legal methodology, vary depending on the nature of the legal system.

In so-called "civilian", or "continental", legal systems, the typical mode of legal reasoning, when faced with a case, would or should be mostly deductive: first identify the likely applicable rule(s), then check that its (or their) conditions of application are met, and finally see what results the application of the rule(s) gives. This approach typically stresses the importance of interpretation as a way to determine the exact meaning and scope of application of the rules that may be relevant.

On the other hand, in so-called "common law" systems, a given case should typically be solved not by applying a general rule to it, but by finding the solution reached in a previous, similar case. Issues of interpretation can of course also arise in such systems, be it when the *ratio decidendi* of a previous case needs to be clarified or when a statutory provision is to be applied, but more emphasis is probably laid on the issue of distinguishing cases from each other: when are the facts under study different enough from those of a previous case in order to indicate that the solution of that latter case is not to be applied?

Consequently, in France, a "civil law" country, legal methodology should reflect the importance of general rules, and the deductive process that leads from that general rule to the solution of a given case. Yet things are not as it seems they should be. In particular, the way law is taught in French law faculties tells another story. Legal teaching in France focuses on case law, in a way which is quite surprising from a continental perspective. This tells us something about the "real nature" of French law. To look at legal methodology, and especially the way in which it is taught in French law faculties, is actually an interesting way to challenge the common assumptions about French law.

The teaching of law in France should therefore be briefly presented (II.), as it reflects some not-so-obvious features of French law, especially the importance of judicial law-making, and the latter's impact on the role of professors (III.). Some concluding remarks will then be offered (IV.).

II. The Teaching of Law in France

Legal methodology is not the subject of a specific course in the typical French legal curriculum (1.), and one should look at the emblematic academic exercise in French law faculties, namely the *commentaire d'arrêt,* in order to understand where the focus of methodological training lies (2.).

1. Legal methodology in the legal curriculum

It should be noted, at the outset, that there is no official program for legal studies in France. Indeed, there is no equivalent of the German *Staatsexamen,* whose program would *de jure* or *de facto* set a norm for the contents of teaching in law faculties. There are of course professional exams for the legal or judicial professions, such as the entrance exams to bar schools *(écoles d'avocats),*[3] the entrance exam to the national school for magistrates (*École nationale de la magistrature,* known as ENM),[4] or the *agrégation des universités,*[5] which most law professors have gone through in order to find a position. These are quite distinct exams, however, and specific preparation courses exist for each of them. There is therefore no unique exam, which all "full" lawyers must go through. In theory, therefore, each French law faculty could have its own unique curriculum. Yet, in practice, this is not the case. Law curricula across France show a high degree of uniformity. There are only minor differences from one law faculty to another, and a student changing faculties in the course of his typical five-year curriculum should normally not struggle to find his bearings when he arrives in his new faculty.

This being said, there is comparatively little interest in the issue of legal methodology in France, at least apparently. Significantly, there is only a handful of contemporary textbooks on the subject.[6] The obvious explanation for this situation is that legal methodology is usually not a distinct subject in French law faculties. It is normally dealt with in the broader context of the first-year course called "introduction to law" *(introduction au droit),* which

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[3] There are 15 of them across France (including those in the French overseas territories).

[4] This exam is actually a competitive exam *(concours),* in the sense that only a predefined number of candidates are allowed to succeed.

[5] Also a competitive exam.

[6] See, especially, *Bergel,* Méthodologie juridique (n. 1); *David Bonnet,* L'Essentiel de la méthodologie juridique[3] (Paris 2015); *Véronique Champeil-Desplats,* Méthodologies du droit et des sciences du droit (Paris 2014); *Frédéric-Jérôme Pansier,* Méthodologie du droit[6] (Paris 2013). The second and fourth of these textbooks focus on the specific exercises, which law students must complete at university. Only the first and third take a broader approach, quite independently from those exercises. There has only been one edition of *Bergel*'s book, however, which dates back to 2001. This obvious lack of commercial success should not be interpreted as an indication of the book's intrinsic qualities, but rather offers another illustration of the lack of interest in the subject of legal methodology.

can be found in all law faculties (albeit sometimes under different names). The content of this course is usually quite eclectic, although it often includes a general presentation of what law is, an introduction to basic legal notions, a description of what French lawyers call the sources of the law (legislation, case law, etc.), an introduction to the law of evidence, and some explanations on legal methodology. But this part on legal methodology, in the strict sense of the term, is usually rather short. It typically deals with the interpretation of statutes and with what may be called the legal syllogism. This is not much, especially considering that the full "introduction to law" course typically lasts only one semester.[7]

Does that mean that students in French law faculties learn no methodology, but only rules, which, presumably, they should then know and be able to recite by heart? I hope and think not – even though this is apparently the image which many lay people have of legal studies. The apparent neglect of legal methodology in the typical French legal curriculum rather points to the fact that this is not a subject that is initially taught in courses. Legal methodology is not first of all a matter of theory. It is quite practical, and is mostly about how a lawyer should react when faced with a concrete case. Of course, there can be lectures on the subject, but legal methodology is something that is learned primarily by doing. There is a lot of common sense in it, admittedly, but common sense is not innate, and one needs to acquire it, or at least to develop it. This is not done by reading a book, or listening to a lecture, but by practising. To see how legal methodology is taught in a given legal system, one should therefore look first of all at the exercises students have to do in the course of their legal training.

2. Commentaire d'arrêt, the typical academic exercise

In Germany, the typical academic exercise is the *Falllösung,* which is in line with what can be expected from a "continental" legal system, as this exercise is mostly about subsumption, i.e. the implementation of the legal syllogism. Surprisingly, however, solving cases is not the typical academic exercise in French law faculties. It does exist, under the name *cas pratique* ("practical case"), but it is in no way as common as in Germany, and it is not as formalised, especially from a methodological point of view. The main exercise in French law faculties, and certainly the most typical one, which has been frightening generations of French students, and which is extremely puzzling for foreign students coming to France, is the *commentaire d'arrêt,* i.e. the task of commenting on a judicial decision, or writing a case note.[8]

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[7] In most faculties, such a course would be 36 hours long, not counting the seminars *(travaux dirigées)* that come along with it.

[8] For a comparison of *Falllösung* and *commentaire d'arrêt,* see *Claude Witz,* Exercices et épreuves en usage dans la formation des juristes allemands, source d'inspiration pour les

Why is the *commentaire d'arrêt* so important in French law faculties? French lawyers, surprisingly, seldom ask the question. The exercise seems to have been there forever, and thus appears to be natural. Yet there are reasons to doubt that this exercise has always been practised in French law faculties, and it would be interesting to conduct some research on when it appeared. What can be said, at any rate, is that the *commentaire d'arrêt* makes sense in relation to the style of French judicial decisions, or rather French supreme courts' decisions (for, in practice, it is almost exclusively supreme courts' decisions which are made the subject of a comment).[9]

At this point, a few words about the French legal and judicial system should be said, so that the typical style of French supreme courts' decisions is better understood.[10] There is in France a sharp divide between private law and public law. Substantive law normally varies according to whether the defendant is a private or a public person. Besides, civil courts, which have jurisdiction in private law matters, are distinct from administrative courts, which deal with questions pertaining to public law.

The *Cour de cassation* stands at the top of the civil courts' system. It is not an appellate court, and does not appraise facts, or consider evidence. It takes the facts as the lower courts have established them, and checks that the relevant rules of law have been correctly applied to these facts. A ruling by an appellate court containing an error of law, if referred to the *Cour de cassation,* is quashed, and the case is then submitted to another appellate court in order to be decided anew. If the appellate court's decision is found to contain no error of law, it is confirmed and cannot be further contested. The decisions of the *Cour de cassation* are usually very terse (no more than a page in terms of standard editing formats). The Court sticks to a formal mode of reasoning and does not give the substantive reasons underlying its choices. It will say whether a provision has been correctly interpreted by the lower court or not, and it might even possibly establish a new rule, but it will not explain why it adopted a particular interpretation, or created a new rule. Some explanations can sometimes be found in the reports of the magistrates who have prepared the court's decision, but these reports are only occasionally made public and have no authority *per se*.

The administrative courts' system is to a large extent analogous to that of the civil courts. At its top stands the *Conseil d'État*. Although the powers of the latter may vary depending on the type of litigation, its role is normally the

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Facultés françaises, in: Mélanges en l'honneur du professeur Gilles Goubeaux (Paris 2009) 579–588.

[9] In the French legal terminology, an *arrêt* is a decision by an appellate or supreme court, whereas a *jugement* is a decision by a first instance court.

[10] For an excellent introduction to French law, in English, see *John Bell/Sophie Boyron/Simon Whittaker,* Principles of French Law[2] (Oxford 2008).

same as that of the *Cour de cassation*. It does not appraise facts or evidence and only quashes appellate courts' rulings for errors of law. The *Conseil d'État*'s decisions are also quite terse, but the preparatory reports are normally more easily available than those of the *Cour de cassation*.

It is the characteristics of the decisions of the *Cour de cassation* and the *Conseil d'Etat* that explain the importance of the *commentaire d'arrêt*. These decisions, especially those of the *Cour de cassation,* are extremely elliptic. What the Court basically says is: "This is the rule that applies in the case under scrutiny, and this is the result of the application of this rule in the present case" – but it does not say what methodology and reasoning were followed in order to go from the facts to the rule, and from the rule to the decision. This silence is precisely the reason why *commentaires d'arrêt* are needed.[11] A *commentaire d'arrêt* is basically an explanation of a French supreme court decision.

French students often believe that the *commentaire d'arrêt* is an exercise that was devised by sadistic professors in order to chastise them. This is not the case. Admittedly, the *commentaire d'arrêt* has become a major tool to test students, if not the main one, and there might be something slightly neurotic in the way it is sometimes presented as the legal exercise *par excellence*.[12] The *commentaire d'arrêt,* however, was not designed first of all as a means to test students. It developed as an academic exercise for *professors,* who took to commenting on judicial decisions in an increasingly developed fashion in the course of the 19th century.[13] After the reformation of French law in the Napoleonic era and the establishment of the *Cour de cassation* in 1804, judicial decisions were initially reported without comment or explanation, or only very short, anonymous ones. As time went by, however, (some) comments accompanying (some) decisions published in the law reports became lengthier and started to be signed. These comments or case notes became a recognised type of academic publication, for which some law professors, known as *arrêtistes,* became well-known.[14]

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[11] French lawyers do not always seem to be aware of it; see, however, *Witz,* Exercices et épreuves en usage (n. 8) 586: "l'une des raisons du rôle prépondérant joué par le commentaire en droit civil s'explique par le style lapidaire de la Cour de cassation".

[12] For criticism of the importance given to *commentaires d'arrêt* in French law faculties, see *Witz,* Exercices et épreuves en usage (n. 8).

[13] On the development of case notes in French legal literature, and how it came to be regarded as the doctrinal exercise *par excellence,* see *Edmond Meynial,* Les Recueils d'arrêts et les Arrêtistes, in: Le Code civil 1804–1904. Livre du centenaire (Paris 1904) 173–204; *Evelyne Serverin,* De la jurisprudence en droit privé (Lyon 1985) 108–122.

[14] The most famous one is probably *Joseph-Émile Labbé* (1823–1894), on whom see *Nader Hakim,* Joseph-Émile Labbé, in: Dictionnaire historique des juristes français (XIIe–XXe siècle), ed. by Patrick Arabeyre/Jean-Louis Halpérin/Jacques Krynen (Paris 2007)

It seems very likely that those case notes, which law professors wrote for legal periodicals, were the inspiration for the *commentaire d'arrêt,* which those same professors then imposed on their students as an academic exercise.[15] At any rate, case notes by academics and *commentaires d'arrêt* by students[16] have a common *raison d'être:*[17] simply, that French judicial decisions need to be explained, or rather to be *understood* and explained. Published case notes are intended to help legal practitioners understand the meaning and scope of judicial decisions; *commentaires d'arrêt* are intended to ensure that students are able to understand French supreme court decisions, and grasp everything that, although not written within them, is essential to catch their full meaning and scope.

An example might help to understand why the decisions of French supreme courts call for such explanation. In 2006, in the *Myr'ho* case, the *Cour de cassation* handed down a very surprising decision,[18] which basically says that any breach of contract may serve as the basis for a claim in tort by a third party against the contracting party in breach.[19] The decision is 380 words long, and does no more than give the facts of the case, state the above-mentioned rule,[20] and affirm that this rule was correctly applied in the appellate court's judgment under scrutiny. It gives no explanation as to the reasons why the *Cour de cassation* adopted such a general rule, even though it is not to be found in the *Code civil* and is quite surprising, to say the least.

Commentators of the decision are therefore left with the difficult task of explaining and trying to justify the decision. More precisely, they should identify the exact legal question that was at stake in the case, the different

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441–442; *Christophe Jamin,* Relire Labbé et ses lecteurs, Archives de philosophie du droit 37 (1992) 247–267.

[15] *Serverin,* De la jurisprudence en droit privé (n. 13) 169.

[16] Case notes written for legal periodicals are usually called *notes de jurisprudence,* but can also be called *commentaires d'arrêts*. It is widely accepted that published case notes and *commentaires d'arrêts* written by students in the course of their training are in essence the same exercise, even though the formal requirements that apply to the latter are much stricter.

[17] See *Roger Mendegris,* Méthodes du droit. Le commentaire d'arrêt en droit privé (Paris 1975) 1.

[18] Cass. ass. plén. 6 October 2006, n° 05-13255, Bull.ass.plén. 2006, n° 9.

[19] For a presentation and discussion of this decision, in English, see *Jean-Sébastien Borghetti,* Breach of contract and liability to third parties in French law: how to break deadlock?, ZEuP (2010) 279–303.

[20] The exact formulation is: "le tiers à un contrat peut invoquer, sur le fondement de la responsabilité délictuelle, un manquement contractuel dès lors que ce manquement lui a causé un dommage". This can be translated as "a third party to a contract may, on the basis of tortious liability, invoke a breach of contract whenever this breach has caused him harm" (this translation of this sentence is to a large extent borrowed from *Bell/Boyron/Whittaker,* Principles of French Law (n. 10) 339).

answers that can be given to this question, the answers that had been suggested in case law and doctrine before this case was decided (in France, but also possibly elsewhere), the reasons which probably prompted the *Cour de cassation* to choose the solution it adopted, the exact scope of application of the rule formulated in the case, the cases that should be distinguished, etc. Commentators should thus basically start by looking upstream, reconstructing the reasoning of the judges in the case, and then look downstream at the consequences of the decision. This implies substantial interpretation work, but it is the decision that is under scrutiny, and not a legislative provision.[21]

Myr'ho is of course an exceptional decision, since judgments by the highest courts are usually not so ground-breaking. This extreme example, however, may help to understand how French students get trained in legal reasoning, and more generally how French professors work, when they explain decisions to their students or in case notes. Through their *commentaires d'arrêt,* French lawyers endeavour to "unfold" decisions by the French supreme courts, i.e. to make explicit what is implicit in them. It should therefore come as no surprise that one of the oldest and most enduring textbooks in French law faculties, whose successive authors have been among the greatest private lawyers, is a collection of case notes on the most important decisions handed down by the *Cour de cassation* since the 19th century.[22] In his preface to the first edition of this book, which has been reproduced in all subsequent decisions, the initiator of this project, *Henri Capitant,* clearly explained that judicial decisions have become a source of the law, which legal students must learn to know, to understand, but also to criticise.[23]

Of course, most of these comprehension and explanation efforts could be dispensed with if the French supreme courts made their reasoning explicit.[24] The idiosyncratic terseness of their decisions is also the reason why the *com-*

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[21] There are actually fairly technical rules on how to interpret a decision by the *Cour de cassation*. A clear presentation of them can be found in *Jean-François Weber,* Comprendre un arrêt de la Cour de cassation rendu en matière civile, Bulletin d'information de la Cour de cassation, n° 702, 15 May 2009, 6–17 (accessible at <http://www.courdecassation.fr/IMG/pdf/Bicc_702.pdf>).

[22] *Henri Capitant/François Terré/Yves Lequette,* Les grands Arrêts de la jurisprudence civile[1], vol. 1 (Paris 2015); *Henri Capitant/François Terré/Yves Lequette/François Chénédé,* Les Grands Arrêts de la jurisprudence civile[13], vol. 2 (Paris 2015). After the example of this book, collections of commented on "great decisions" have been established in most branches of French law.

[23] *Henri Capitant,* Préface de la première édition (1934) (n. 21) vii–x.

[24] A thorough reform of the *Cour de cassation* is currently under consideration, which, if adopted, will probably result in a change in the style of the Court's decisions. It will then be interesting to see what impact, if any, this change will have on the use of *commentaires d'arrêt* and on case notes. Some years will probably need to pass before this change is felt.

mentaire d'arrêt has no real equivalent in most other legal systems.[25] Obviously, if one looks at England, for example, there is no need to reconstruct the reasoning behind a Supreme Court decision, since it is all laid out for the reader in a lengthy judgment.[26]

All this, of course, raises a couple of questions: why is so much attention devoted to judicial decisions in the French legal system; and is this interest not misguided in view of the fact that in a "continental" legal system the focus should normally be on legislative rules rather than on judicial decisions that are only intended to apply or interpret the former? The answer to these questions, however, is that this interest in judicial decisions is but only a consequence of their importance in the French legal system, and is not, therefore, misguided.[27] The importance of *commentaires d'arrêt* is actually a sign that judicial law-making is much more important in France than could be expected (and than is usually admitted).

III. Judicial Law-Making in France and the Role of Professors

To put things bluntly, I think that it is wrong to present French law, as is often done, as a typical "continental" legal system, i.e. a system based on legislative provisions, where, in *Raoul van Caenegem*'s famous triptych,[28] the most important actor is the legislature, and judges are only intended to interpret and apply rules written by the legislature, under the guidance of professors. Furthermore, this traditional presentation of French law has not become wrong as a result of the evolution that has taken place over the last decades. It has been wrong from the outset, i.e. from 1804, when the *Code civil* was adopted.

At this point, however, a *caveat* is required. French law, just like any other modern legal system, has become extremely complex, with significant differences existing between the various branches of the law. Some branches –

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[25] The fact that decisions of lower French courts are more developed is also one of the reasons (though not the only one) why they are only rarely made the subject of a comment or case note.

[26] This does not mean, of course, that such a decision cannot and should not be commented on, and that the reasoning that led to it cannot be criticised, or even regarded as misleading. But substantive reasons are given by the Court, which constitute at least a plausible explanation for the decision, whereas such reasons are usually absent in French supreme court decisions.

[27] See *Serverin,* De la jurisprudence en droit privé (n. 13) 169: "La méthode du commentaire d'arrêt est sans aucun doute le meilleur indicateur de la place de la jurisprudence à l'intérieur du système juridique".

[28] *Raoul van Caenegem,* Judges, Legislators and Professors: Chapters in European Legal History (Cambridge 1987).

usually those that have most recently been regulated – are made mostly of very detailed rules laid down by the legislature, the government or the European Union, and leave comparatively little room to judges. Criminal law also stands apart, given the specific need for legal certainty in that field, which restricts the courts' discretion. The subsequent developments do not concern these branches, but they do apply to at least two other branches of the law, which are extremely important in practice, and which form the basis of any French lawyer's training: general civil law (in the "continental" sense of the term) and administrative law.

In these two areas, the judge never was, and never was intended to be, the "mouth of the law", as the French conception of the judge is often put. This is especially clear as far as administrative law is concerned. This branch of the law is almost exclusively judge-made, and it may be interesting to recall why this is so. In a very famous decision of 1873 in the *Blanco* case, the *Tribunal des conflits* (TC), whose role it is to settle conflicts of jurisdiction between the civil and administrative courts, decided that the rules of the *Code civil* were not applicable to the Government's actions, and that other rules had to be applied.[29] But what were these other rules, and where could they be found? They actually did not exist in 1873, and the *Conseil d'Etat* has had to work them out since that time, in case after case – a process that bears some resemblance to the way in which English courts have developed the common law. The *Blanco* case thus represents the birth of French administrative law, which has been judge-made law from the outset.[30]

The judge's role is not as obvious in French civil law, but it is nevertheless wrong to say, as some do, that the draftsmen of the *Code civil* intended to restrict this role as much as possible. The "preliminary address on the first draft of the *Code civil*" by *Portalis,* one of the Code's four draftsmen, is proof to the contrary. This famous text, which reflects the spirit in which the code was drafted, makes it very clear that the lawyers behind this masterpiece of legislation intended and expected the courts to play a significant role not only in the application of civil law, but also in its development. *Portalis* is actually so explicit that he deserves to be cited at some length:

"A code, however complete it may seem, is no sooner finished than thousands of unexpected questions present themselves to the magistrate. For these laws, once drafted, remain

[29] TC, 8 February 1873, D. 1873, 3, 17, conclusions David: "Considérant que la responsabilité, qui peut incomber à l'État, pour les dommages causés aux particuliers par le fait des personnes qu'il emploie dans le service public, ne peut être régie par les principes qui sont établis dans le Code civil, pour les rapports de particulier à particulier; Que cette responsabilité n'est ni générale, ni absolue; qu'elle a ses règles spéciales qui varient suivant les besoins du service et la nécessité de concilier les droits de l'État avec les droits privés".

[30] Of course, many legislative rules do apply in the field of administrative law, but they have played a limited role in the latter's development.

as written. Men, on the other hand, never rest. They are always moving; and this movement, which never ceases and whose effects are variously modified by circumstances, continually produces some new fact, some new outcome.

Many things are therefore necessarily left to the authority of custom, to the discussion of learned men, to the arbitration of judges.

The function of the statute is to set down, in broad terms, the general maxims of the law, to establish principles rich in consequences, and not to deal with the particulars of the questions that may arise on every subject.

It is left to the magistrate and the jurisconsult, fully alive to the overall spirit of laws, to guide their application.

Hence, in all civilised nations one always sees, alongside the sanctuary of laws and under the watchful eye of the lawmaker, the formation of a body of maxims, decisions and doctrine that is refined daily by practice and by the impact of judicial deliberations; that continually grows from all the knowledge acquired; and that has constantly been regarded as the true supplement of legislation.

[...]

The lawmaker must keep a watchful eye on jurisprudence;[31] it can enlighten him, and he, for his part, can improve it; but jurisprudence there must be. In this vastness of the diverse subjects that constitute civil matters, and the judgement of which entails, in the majority of cases, less the application of a specific enactment than the combining of several enactments that lead to, rather than contain, the decision, one can no more do without jurisprudence than without laws. Now, it is to jurisprudence that we leave those rare and exceptional cases that cannot fit within the framework of a reasonable legislation, the too-volatile and too-contentious particulars that must not occupy the lawmaker, and all the subjects it would be futile to try and foresee, or whose hasty prediction could not be free of risk. It is left to experience to continually fill the voids we leave. The codes of peoples are made over time; but, strictly speaking, we do not make them."[32]

That the courts were intended from the outset to play a major role in the development of civil law is also clear from the very way in which the provisions of the French *Code civil* are drafted. As is well known, they are often quite lofty, and many of them look like stating principles, rather than rules, in the English sense of the term. A good example is Article 1382, which states that "every act whatever of man that causes damage to another, obliges him by whose fault it occurred to repair it",[33] i.e. that every fault that causes damage to somebody, obliges the author of that fault to repair that damage. It is hard

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[31] The original French word "jurisprudence" has been retained in the translation, as it is difficult to carry its full meaning in a single English word or expression. *Jurisprudence,* in French, has different shades of meaning, but, in this context, it is used to designate both judge-made law and the activity of the courts.

[32] *Jean-Étienne-Marie Portalis,* Discours préliminaire du premier projet de code civil. The translation is borrowed from the website of the Canadian Ministry of Justice, <http://www.justice.gc.ca/eng/abt-apd/icg-gci/code/index.html>.

[33] "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer." The translation of this Article is borrowed from the English translation of the *Code civil* accessible on the French law official website Legifrance, <www.legifrance.gouv.fr>, and written by *David W. Grunning*.

to be more general. And the *Code civil* gives no definition of fault, damage or causation. With such a broad provision, it is impossible to do without the courts. They are needed to flesh out the principle formulated in the text.

The way in which the *Code civil* is drafted calls for judicial intervention. This is something which often seems to be overlooked nowadays, but which French lawyers were very much aware of one century ago, when they celebrated the hundredth anniversary of the Code and reflected on its interplay with case law and the historical evolution of French law. In his contribution to the *Festschrift* published on the occasion of that anniversary, *Raymond Saleilles,* one of the greatest French lawyers of the time, quite appropriately wrote:

> "It must therefore be made clear: Despite our public law principles, so distrustful of the power of the judiciary in the aftermath of the Revolution, and despite the then undisputed dogma of the separation of powers, which was mostly directed against possible inroads by the courts, the French *Code civil* was written and formulated in such a way that it could only function with the help of a bold and flexible jurisprudence,[34] which could fill in the gaps of the text and adapt its provisions to all successive needs that could possibly arise."[35]

What is striking, though, is that since 1804, when the *Code civil* was adopted, and even though the courts have had all the time necessary to flesh out the principles contained in the code, especially in the field of the law of obligations, they have more often than not declined to do so. In many instances, they have chosen to stick to the principles as they are formulated in the Code, without developing more focused rules from them. They have even, in some cases, developed new general principles, as in *Myr'ho*.

The above-mentioned Article 1382 of the *Code civil* is a good example of this approach. To this day, there is no official definition in the case law of fault, damage or causation. And this is true in many other fields of the law of obligations. On the vital issue of contractual damages, for instance, French courts, and especially the *Cour de cassation,* have never established precise rules on how to calculate them. This stands in stark contrast to the situation in England, where the courts have developed detailed rules on damages, and especially on how to assess them.[36] In Germany as well, there are precise rules and distinctions on how to calculate damages (*kleiner Schadensersatz* and *großer Schadensersatz, konkrete Schadensberechnung* and *abstrakte Schadensberechnung, Differenzmethode* and *Austauschmethode,* etc.), which

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[34] On the meaning of the word "jurisprudence", see n. 31.

[35] *Raymond Saleilles,* Le Code civil et la méthode historique, in: Le Code civil 1804–1904: Livre du centenaire (Paris 1904) 95–129, 104. He also wrote: "Et comment ne pas s'apercevoir des larges pouvoirs laissés au juge, […] devant un texte comme […] celui de l'art. 1382" (op. cit., 102).

[36] This is illustrated by the fact that whole books can be devoted to the subject of contractual damages: see, e.g., *Adam Kramer,* The Law of Contract Damages (Oxford 2014). To write a nearly 600-page long book on this subject in French law would be simply impossible.

may now be found at least in part in the BGB, but which were originally mostly judge-made.[37] In the end, the solutions reached by French courts and their English or German counterparts may actually not be very different, if only because there is much fairness in many of the rules developed in England and Germany, and French courts probably sometimes apply these rules without even being aware of them. But, by not developing or stating such rules, which would flesh out the general provisions of the *Code civil*, the *Cour de cassation* has managed to retain a great amount of discretion.

Judicial discretion is, I think, an essential factor in the French context.[38] The truth is that the *Code civil* grants the courts great discretion, and that the *Cour de cassation* has endeavoured to retain most of it by refusing to develop what could be called intermediate rules, which would flesh out many of the general principles contained in the code. French lawyers and professors are thus left with those general principles, the cases in which they have been applied, and the solutions that have been found in those cases. The result of this is that French law, at least the French law of obligations, is actually very casuistic: it is made of general principles and individual solutions, but has comparatively few of these intermediate rules that would substantially limit the judges' discretion. This is especially clear in tort law, where there are extremely general rules, like the one in Article 1382 of the *Code civil,* but also a great amount of casuistry.

In this context, the academic focus on case law is quite natural. Law is found to a large extent in cases, and professors have acknowledged this fact by studying these cases. That is actually the reason that led to the creation of the *Revue trimestrielle de droit civil,* which has for a very long time been the most prestigious civil law journal in France. In the first article of the *Revue, Adhémar Esmein,* a law professor and one of its founders, very clearly explained that French civil law developed through case law and that its study should thus focus on jurisprudence: "C'est elle qui est la véritable expression du droit civil; elle est la loi réelle et positive, tant qu'elle n'a pas été changée".[39] Up to this day, the greatest part of any issue of the *Revue* is devoted to case notes.

This academic focus on case law puts the courts, and judges, in a superior position as compared to professors. In some countries, like Germany, it looks as though there is a real dialogue between judges and professors. Judges discuss professors' ideas, and adopt some of them, while professors discuss

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[37] For a very interesting comparative study on the issue of contractual damages, see *Zoé Jacquemin,* Payer, réparer, punir, Étude des fonctions de la responsabilité contractuelle en droit français, allemand et anglais (Paris 2015).

[38] On the issue of judicial discretion in a comparative perspective, see *Carine Signat,* Le Pouvoir discrétionnaire du juge et l'inexécution du contrat, Étude de droit comparé franco-allemande (Paris 2014) 54–269.

[39] *Adhémar Esmein,* La Jurisprudence et la doctrine, RTD civ. 1 (1902) 5–19, 12.

judges' decisions. In France, the relationship is to a large extent one-sided. Professors discuss judicial decisions, and spend a lot of time doing so, given the cryptic nature of these decisions; but judges do not pay that much attention to what professors write. Quite apart from the unwritten rule that forbids the citation of academic opinions in judicial decisions, a look at preparatory reports indicates that French judges, even though they are of course not unaware of the existence of academic opinions, do not discuss them at length, and usually do not devote very much attention to them.

IV. Concluding Remarks

If a rather provocative note is to be allowed at the end of this contribution, I would say that, in the competition between judges, legislators, and professors, it is definitely the former, who, in France, have won – at least in the fields of administrative law and civil law. Administrative law is for the most part a judicial creation. In civil law, at the outset, the legislature gave judges the upper hand in future law-making, by drafting very general provisions; and judges, instead of following the professors' indications and fleshing out these general rules by developing "intermediary rules", have chosen to retain as much discretion as possible. As a result, professors have found themselves to be less a source of inspiration for the courts than commentators and analysers of the way in which judges exercise their discretion. French law is assuredly no *Professorenrecht,* and I am not quite sure that it should be regarded, first of all, as a written legal system, i.e. a system based on legislative rules and provisions. I would even venture to say that judges in France actually have greater power than in common law systems, for their power is not fully acknowledged, and the checks and balances that have been developed in common-law systems to rein in the power of the courts have not yet been developed in French law.

It is, of course, an open question whether the reform of French contract law, which is now under way, will change this situation, at least in the field of the law of obligations. Will the balance of power shift back to the legislature, as well as, to a certain extent, to professors, and thus, in any case, away from judges? I would think not, for it takes more than a limited reform to alter the deeper trends of a legal system. However, *qui vivra verra*.

The Death of Doctrine?

Private-Law Scholarship in South Africa Today

Helen Scott[*]

I. Introduction

As my title suggests, I have chosen to narrow the brief I was given by focusing on private-law scholarship in South African law today, and in particular on doctrinal scholarship. This is of course not to suggest that private-law

[*] I am very grateful to my colleagues *Anton Fagan, Hugh Corder, Martin Fischer, Lesley Greenbaum, Andrew Hutchison, Fatima Osman, Mohamed Paleker, Alistair Price* and *Danie Visser* for their help in writing this chapter. The views expressed here are of course my own. I would also like to thank my research assistant, *Nokulunga Zondi*.

academics in South Africa engage exclusively in doctrinal scholarship, or that it is uniquely valuable. However, the trajectory which South African doctrinal scholarship has followed over the course of the last hundred years is itself a subject worthy of study. In essence, while formerly it occupied a pre-eminent position, edging out virtually all other forms of inquiry, it now appears to be in retreat. This claim necessitates an immediate *caveat:* the decline of doctrinal private-law scholarship in the twenty-first century is clearly not a phenomenon confined to South Africa.[1] The reasons for it must accordingly be found at least partly in the wider context of legal systems worldwide. Nevertheless, certain features specific to the South African legal order appear to have given this trajectory a distinctive local shape. It is those features and that shape which constitute the focus of this chapter.

The term 'doctrine' is widely used throughout the English-speaking legal world, but it is seldom defined, at least by those who engage in doctrinal scholarship.[2] Thus I will begin with my own attempt at a definition, one which is at least partly specific to common-law – that is case-based – legal systems.[3] By 'doctrinal scholarship' I mean scholarship that adopts an internal point of view; that examines the case-law chiefly through critical engagement with the rules and principles of which that law is itself composed, although this does not of course preclude other yardsticks; and that proceeds from the starting point that case-law is authoritative by virtue of the fact that it obeys its own interior logic. It is rule-bound rather than result-driven; retrospective rather than prospective in its orientation. It must be distinguished from scholarship which takes an external point of view; which is empirical or socio-legal in its approach; and whose audience is typically the legislature or policy-maker.[4] It must be distinguished also from scholarship which is wholly theoretical; which addresses private-law subjects such as contract, tort or unjustified enrichment from a distance, ignoring the fine texture of specific

[1] See, e.g., *Andrew Burrows,* Challenges for Private Law in the 21st Century, paper presented at a conference entitled "Private Law in the 21st Century" held in Brisbane on 14–15 December 2015.

[2] Cf. *Burrows,* Challenges for Private Law (n. 1) 10, although Burrows himself provides a compelling account of the doctrinal method. However, there appears to be an increasing body of theoretical writing concerned with the question, what is doctrinal scholarship? See e.g. *Mátyás Bódig,* Legal Theory and Legal Doctrinal Scholarship, Canadian Journal of Law and Jurisprudence 23 (2010) 483–514; *idem,* Legal Doctrinal Scholarship and Interdisciplinary Engagement, Erasmus Law Review 8 (2015) 43–54.

[3] Cf. the sense in which the terms 'la doctrine' or 'la dottrina' are used in France and Italy respectively: see *Alexandra Braun,* Judges and Academics: Features of a Partnership, in: From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging, ed. by James Lee (Oxford 2011) 227–253, 228.

[4] Cf. *Aditi Bagchi,* On the Very Idea of Legal Methodology (in this book), section II.

legal rules.[5] Thus 'doctrinal scholarship' means engaging with the law in essentially the same way that judges do – that is, from the inside. Indeed, the relationship between doctrinal scholar and judge is that of partners in a joint enterprise.[6] The difference between them is to be found not in the content of their pronouncements or the method adopted, but rather in the goal pursued: whereas a judge seeks only to decide the case before her, the common-law scholar's focus is a much wider one; not the solving of a particular legal puzzle, but the explication of the body of rules of which an individual case is merely a part.

That much is general. However, it seems that there are subtle variations in the form of doctrinal scholarship across the common-law world broadly defined: its South African incarnation is significantly different from that which prevails elsewhere, e.g. in England and Wales, as well as obviously different from that found in the civilian world. I will begin by setting out the characteristic features of South African doctrinal scholarship as it has existed over the course of the last century, identifying also its distinctive failings. Next, I will set out why I believe that doctrinal scholarship still has an important contribution to make to the contemporary South African legal order, despite (or even because of) the profound changes brought about as a result of the democratic transition in 1994. However, I will describe also what I believe to be the greatest threat to doctrinal scholarship in South African today, namely a crisis in the authority of the common-law rules on which doctrinal reasoning depends. I will conclude that the traditional partnership between doctrinal scholars and judges endures, but in a new form: to the extent that judges neglect consistency and coherence, the distinctive values of doctrinal scholarship, scholars can fill the void.

II. The South African Law Professor

1. "With us the position is different": South Africa's mitigated doctrine of precedent

As is well known, South Africa's common law has its roots in the uncodified civil law, specifically the *ius commune* expounded by the jurists of the Republic of the United Netherlands and in particular the province of Holland in

[5] Although "there is indisputably a very difficult question for every doctrinal lawyer as to how deep a theory one needs to have in order to make sense of the law while remaining intelligible to those who have to decide and argue about particular facts." See *Burrows,* Challenges for Private Law (n. 1) 9.

[6] See *Peter Birks,* The Academic and the Practitioner, Legal Studies 18 (1998) 397–414; *Braun,* Judges and Academics (n. 3).

the seventeenth and eighteenth centuries.[7] Superimposed on to that civilian substrate, however, is a substantial layer of English law, both substantive and, especially, procedural. In fact, the most significant and lasting legacy of English colonial rule for the common law of South Africa is the adoption of the doctrine of precedent or *stare decisis*.[8] Thus the principal source of common-law rules in modern South Africa is judicial decisions, subject always to the overriding authority of the Constitution of 1996.[9] On the other hand, although they are rarely invoked, even today the old authorities of Roman-Dutch law remain technically authoritative in themselves.[10] This means that the South African common law is 'mixed' not only in terms of the substance of its legal rules but also in terms of the formal sources of its law.

The differences between the South African doctrine and its English parent are elusive. On the one hand, there are certain technical distinctions: the decisions of divisions of the High Court do not bind other divisions, although they are persuasive; nor has the Supreme Court of Appeal (formerly the Appellate Division) ever been bound by its own prior decisions.[11] On the other hand, in *Fellner v. Minister of the Interior*[12] Centlivres CJ said,

"The rule stare decisis has been applied with great rigidity in England, the reason probably being that English common law has been built up largely on decided cases: hence the reverence for judicial decisions. But with us the position is different: our common law rests on principles enunciated by the old writers on Roman Dutch law. Consequently there is no reason why we should apply the rule with the same rigidity as it is applied in England."

This sense that judicial decisions rest on a bedrock of principle has had an important effect on the nature of adjudication in South Africa. As the passage

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[7] See, e.g., the overview by *Reinhard Zimmermann,* Roman Law in a Mixed Legal System, in: The Civil Law Tradition in Scotland, ed. by Robin Evans-Jones (Edinburgh 1995) 41–78, 45 ff. On the precise scope of 'Roman-Dutch law' see *D. P. Visser/D. B. Hutchison,* Legislation from the Elysian Fields: The Roman-Dutch Authorities Settle an Old Dispute, SALJ 105 (1988) 619–636.

[8] *Zimmermann,* Mixed Legal System (n. 7) 47 ff.

[9] Thus in *S v. Thebus and another* 2003 (6) SA 505 (CC), it was held by the Constitutional Court that, "[s]ince the advent of constitutional democracy, all law must conform to the command of the supreme law, the Constitution, from which all law derives its legitimacy, force and validity. Thus, any law which precedes the coming into force of the Constitution remains binding and valid only to the extent of its constitutional consistency" (para. 24, footnotes omitted). See also *Pharmaceutical Manufacturers Association of South Africa and another: In Re Ex Parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC) at para. 44.

[10] For a recent example, see the judgment of Madlanga J in *Paulsen and Another v. Slip Knot Investments777 (PTY) Ltd* 2015 (3) SA 479 (CC) at paras. 47 ff.

[11] See, e.g., *François du Bois,* Sources of law: common law and precedent in: Wille's Principles of South African Law[9], ed. by François du Bois (Cape Town 2007) 64–99, at 76–77 and 86 ff.

[12] 1954 (4) SA 523 (A) 529.

quoted above suggests, the existence of a source of common-law rules apart from case-law affords an external perspective on such case-law which itself weakens the doctrine of precedent. It encourages the view that judicial decisions are authoritative only insofar as they reflect the higher rationality of the law. In this way, South Africa's 'mitigated' doctrine of *stare decisis*[13] evokes that which prevailed in England until the early 19th century, rather than the stricter form of precedent now recognised there.[14] This is reflected in the style in which judgments are written. With the important exception of the decisions of the Constitutional Court, South African judgments are frequently shorter and more axiomatic than their English counterparts. Indeed, there is a tendency for South Africa courts to treat *rationes decidendi* as abstract legal rules, equivalent to statute, and to reason deductively from those *dicta*. This is obviously quite distinct from the analogical reasoning characteristic of the English common law.

The flexible approach to precedent which characterises South African legal culture affects not only judicial reasoning but also the character of academic legal writing. Of course, South African law professors do not now and have never enjoyed the exalted status of their nineteenth-century German counterparts. At the same time, the role of the law professor during the twentieth century in South Africa has been markedly active rather than reactive, especially when compared to English scholars during the same period.[15] Examples of such opinion makers are many, whereas one struggles to identify an English scholar prior to Peter Birks who enjoyed comparable influence on the courts during his lifetime.

2. The formative period: De Villiers, Maasdorp, Wessels and Wille

The last quarter of the nineteenth century and first quarter of the twentieth was undoubtedly the formative period in the development of the modern South African common law, dominated by several hugely influential judges: (John) Henry de Villiers (later Baron de Villiers), John (later Sir John) Kotzé and James Rose Innes are obvious examples.[16] Innes was educated in South Africa, and was deeply learned in the Roman-Dutch law, although self-

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[13] *Zimmermann,* Mixed Legal System (n. 7) 52.

[14] See, e.g., *J. H. Baker,* An Introduction to English Legal History[4] (London 2002) 196–204.

[15] See, e.g., *Reinhard Zimmermann/Daniel Visser,* South African Law as a Mixed Legal System, in: Southern Cross: Civil Law and Common Law in South Africa, ed. by Reinhard Zimmermann/Daniel Visser (Cape Town 1996) 1–30, at 11–12.

[16] See generally *Stephen D. Girvin,* The Architects of the Mixed Legal System, in: Southern Cross (n. 15) 95–139, especially at 119–133. Regarding the contribution of John Kotzé in particular, see *Reinhard Zimmermann/Philip Sutherland,* "…a true science and not a feigned one": J.G. Kotzé (1849–1940), Chief Justice der Südafrikanischen Republik (Transvaal), Zeitschrift der Savigny-Stiftung für Rechtsgeschichte 116 (1999) 147–194.

taught; De Villiers, on the other hand, learnt his law at the Middle Temple in London. A careful study of his judgments on contractual mistake during the final decades of the nineteenth century led me to conclude that they were largely founded on the leading English contract textbooks of the time: Stephen Leake's *Elements of the Law of Contracts* (first published in 1867)[17] and Frederick Pollock's *Principles of Contract* (first published in 1876).[18] Indeed, this period is associated with the profound Anglicisation of the Roman-Dutch sources, an egregious example being De Villiers CJ's flirtation with the doctrine of consideration during the last decades of the 19th century.[19] Speaking more generally, however, this was the period in which South African private law formed its distinctive character at the hands of certainly highly creative and influential judicial officers. One factor which accounts for the tremendous intellectual self-confidence displayed by these judges must be the effective absence of any scholarly legal tradition in South Africa at this time.

However, the position was already changing. It is significant that the *Cape Law Journal,* now the *South African Law Journal,* was founded in 1884.[20] Roman-Dutch law began to be taught at the South African College, now the University of Cape Town, in 1859, when JH Brand was appointed the first professor of law.[21] These dates are thrown into relief by a comparison with academic culture in England at the time. The *Law Quarterly Review* was founded only in 1885, and it was not until the second half of the nineteenth century that Oxford and Cambridge began offering degrees in English law.[22] Nor has South Africa ever known any functional equivalent to the Inns of Court which dominated legal education in England for so long, although the original Charter of Justice of 1827 required judges to be British barristers, and reserved eligibility to practise at the Bar to those who had been admitted as barristers in England or to the degree of Doctor of Laws at Oxford, Cambridge or Dublin.[23] From early in the twentieth century South Africa began to produce legal writers whose substantive influence approached that of the old

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[17] *Stephen Martin Leake,* The Elements of the Law of Contracts (London 1867).

[18] *Frederick Pollock,* Principles of Contract at Law and in Equity (London 1876). For details, see *Helen Scott,* Unjust Enrichment in South African Law: Rethinking Enrichment by Transfer (Oxford 2013) 46–51.

[19] See, e.g., *Dale Hutchison,* Contract Formation, in: Southern Cross (n. 15) 165–194, at 166–173.

[20] *Zimmermann,* Mixed Legal System (n. 7) 50.

[21] Ibid.

[22] See, e.g., *Baker,* English Legal History (n. 14) 170–172.

[23] The Charter was amended in 1858 so as to authorise the Supreme Court to admit to practice persons who had obtained a "Certificate of the Higher Class in Law and Jurisprudence". See *Denis V. Cowen,* The History of the Faculty of Law in the University of Cape Town, 1859–1959: A chapter in the story of the survival and growth of the Roman Dutch law in South Africa, Acta Juridica 1959, 1–19, at 6 and 8–9.

authorities.[24] Melius de Villiers' *The Roman and Roman-Dutch Law of Injuries*[25] was treated as hardly less authoritative than a citation of Voet, on whose treatment of *iniuria* it was directly based. Indeed, a crude search reveals close to two hundred citations of that work in the South African Law Reports to date. Broadly the same can be said of Maasdorp's *Institutes of Cape Law,*[26] Sir John Wessels' *The Law of Contract in South Africa,*[27] and George Wille's *Principles of South African Law*.[28]

3. Twentieth century: the age of the scholar

This tendency was not confined to the quasi-institutional writers of the late nineteenth and early twentieth centuries. Any list of mid-twentieth-century South African law professors must begin with JC de Wet, in particular his work on contract and criminal law.[29] In the sphere of delict in particular, the scholarship of Robin McKerron, Tom Price, Paul Boberg, Johannes van der Walt, Nico van der Merwe and Pierre Olivier has exercised huge influence on the courts. One example must serve to illustrate this important point.

In *Maisel v. Van Naeren*[30] it was held at first instance, largely on the strength of academic writing by Melius de Villiers and Tom Price, that *animus iniuriandi* constituted an essential element of liability in defamation, and that it should be understood to comprise not only an intention to produce the consequences of the act complained of but also an accompanying wrongful state of mind, or consciousness of wrongfulness.[31] This rule was understood

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[24] Nor does South Africa appear ever to have recognised the convention against the citation of living authors as authorities in court. For the position in England, see *Alexandra Braun,* Burying the Living?, The Creation of Legal Writings in English Courts, American Journal of Comparative Law 58 (2010) 27–52.

[25] *Melius de Villiers,* The Roman and Roman-Dutch law of injuries: a translation of Book 47, Title 10, of Voet's Commentary on the Pandects, with annotations (Cape Town 1899).

[26] *A. F. S Maasdorp,* The institutes of Cape law: being a compendium of the common law, decided cases and statute law of the Colony of the Cape of Good Hope, in four volumes (Cape Town 1903).

[27] *J. W. Wessels,* The Law of Contract in South Africa, in two volumes, ed. by A.A. Roberts (Durban 1937).

[28] Published at Cape Town in 1937.

[29] See, e.g., *Reinhard Zimmermann/Charl Hugo,* South African Legal Scholarship in the 20th Century: The Contribution of JC de Wet (1912–1990), in: A Man of Principle: The Life and Legacy of JC de Wet, ed. by Jacques du Plessis/Gerhard Lubbe (Cape Town 2013) 3–22, at 4–7.

[30] 1960 (4) SA 836 (C)

[31] See e.g. the extensive discussion of academic literature by De Villiers AJ at 842 ff. The articles cited there include *T. W. Price,* Animus Injuriandi in Defamation, SALJ 66 (1949) 4–30 and *Melius de Villiers,* Animus Injuriandi: An Essential Element in Defamation, SALJ 48 (1931) 308–311.

to co-exist with the stereotyped defences of justification, fair comment and privilege, inherited from English law. Thus proof of a genuine mistake on the part of the defendant as to the existence of a privileged occasion was held to be sufficient to defeat the plaintiff's claim, on account of the absence of *animus iniuriandi*. The position was more fully theorised in *Wentzel v. SA Yster en Staalbedryfsvereniging:*[32] here it was held on the strength of writing by Boberg, van der Merwe and Olivier amongst others that the 'stereotyped' defences of English law referred to wrongfulness rather than *animus iniuriandi*.[33] As in the *Maisel* case, the result was to duplicate the established defences of English law in a series of 'putative defences' to *animus iniuriandi:* mistake as to privilege, mistake as to truth etc. That these decisions were manifestly inconsistent with pre-existing case-law, in terms of which the stereotyped defences had been understood to rebut the presumption of *animus iniuriandi,* did not prevent their correctness from being subsequently assumed by the Appellate Division.[34]

This seismic shift in the pre-existing common law was justified in part by these writers' claim to be re-establishing the original Roman-Dutch position, at least insofar as their understanding of *animus iniuriandi* was concerned.[35] Indeed, it seems that this was an instance of the so-called 'purist' movement's drive to reassert the Roman-Dutch law in the face of pervasive English influence.[36] The project of returning the common law to its Roman-Dutch roots was of necessity driven by scholars rather than judges, given that it required sustained and detailed inquiry into historical sources written in Latin and Dutch. That is undoubtedly part of the explanation for the enthusiasm with which the South African courts embraced academic learning during this period. However, it would be a mistake to attribute this phenomenon exclusively to the influence of the purist movement. Even today, in the Constitutional era, there is a tendency on the part of the courts to cite textbooks, such as the modern editions of *Wille's Principles,* as if they constituted binding authority. The LAWSA series, a continually updated digest of South African law organised alphabetically, is treated similarly. This tendency is encouraged by the form that many South African textbooks take: rather than the

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[32] 1967 (3) SA 91 (T)

[33] *Anton Fagan,* The Gist of Defamation in South African Law in: Iniuria and the Common Law, ed. by Eric Descheemaeker/Helen Scott (Oxford 2013) 169–195, 177–178, 179–180.

[34] *Fagan,* Gist of Defamation (n. 33) 178–179.

[35] Cf. Fagan, who points out that in their conceptualisation of stereotyped defences such as privilege as defences to unlawfulness rather than fault, these writers were consciously deviating from Roman-Dutch law. See *Fagan,* The Gist of Defamation (n. 33) 182–183.

[36] See, e.g., *Eduard Fagan,* Roman-Dutch Law in its South African Historical Context in: Southern Cross (n. 15) 33–64, 60–64.

narrative style typically adopted by common-law textbooks,[37] South African delict textbooks such as Neething, Potgieter and Visser's *Law of Delict* typically take the form of a series of abstract, quasi-legislative propositions. Discussion of cases is generally confined to voluminous footnotes.[38]

4. A clash of legal cultures: the case of wrongfulness

It is not difficult to see the potential for conflict inherent in this attitude. What if the courts were to diverge from orthodoxy as propounded by the professor? An example of such divergence can be found in the debates surrounding the nature of wrongfulness in the South African law of delict over the course of the last fifty years. As we have already seen, prominent delict scholars of the mid-twentieth century advanced a certain conception of the law which rested on a number of key propositions: first, that fault and wrongfulness constitute distinct requirements for delictual liability; second, that whereas subjective considerations are confined to the fault inquiry, wrongfulness is determined wholly objectively, according to whether the defendant's conduct was *ex post facto* unreasonable; and third, that intention requires consciousness of wrongfulness. It was essentially these propositions that underlay the shift in the understanding of the *animus iniuriandi* requirement in defamation described above. As Anton Fagan has shown, these three ideas are clearly derived from German Pandectist scholarship.[39] However, to those propositions can be added two further, closely related claims: that the wrongfulness of conduct is determined exclusively with reference to its consequences and, finally, that fault presupposes wrongfulness. As Fagan has also shown, these two further propositions are of more uncertain origin. He argues that the idea that the wrongfulness of conduct is determined exclusively with reference to its consequences derives from the *Erfolgsunrechtslehre* which until the late 1950s was accepted as valid by the overwhelming majority of German delict scholars.[40] However, it has since fallen out of favour in its country of origin, due to serious conceptual difficulties.[41] Moreover, as Fagan has also shown, this consequentialist analysis did not fit the South African case law at the time at which it appeared. In fact, taken in the round, the case-law of the twentieth century clearly supports the proposition that negligent conduct is wrongful where the defendant is found to have been under a duty to act without negligence. The existence of such a duty is determined not

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[37] See, e.g., *E. Peel/J. Goudkamp,* Winfield & Jolowicz on Tort[19] (London 2014).

[38] *Johann Neethling/Johan Potgieter,* Neethling, Potgieter and Visser's Law of Delict[7] (Durban 2015).

[39] *Anton Fagan,* The German Origins of a South African Dogma about Delict, RabelsZ 76 (2012) 967–993, at 968–979.

[40] *Fagan,* RabelsZ 76 (2012) 967, 978–979.

[41] *Fagan,* RabelsZ 76 (2012) 967, 980–985.

according to the objective consequences of the defendant's conduct, but rather according to whether it is reasonable to impose liability in respect of such conduct.[42]

In an article published in the *South African Law Journal* in 2005, Anton Fagan presented these conclusions. Since the appearance of that article, and several others making broadly the same points,[43] they have become still further entrenched in South African law, having been unequivocally accepted in a series of Supreme Court of Appeal and Constitutional Court judgments.[44] Thus in *Le Roux and Others v. Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae),*[45] speaking in general terms about the concept of wrongfulness, Brand J said:

"In the more recent past our courts have come to recognise, however, that in the context of the law of delict: *(a)* the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and *(b)* that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct [which is part of the element of negligence], but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct."[46]

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[42] See the cases cited by *Fagan,* RabelsZ 76 (2012) 967, at 987–988. On the other hand, in cases of intentional harm-doing, wrongfulness is determined according to the *ex ante* reasonableness of the defendant's conduct. Thus the justification ground of self-defence will apply where a reasonable person in the defendant's position would have believed that the victim posed a danger and that the means of defence used were commensurate with that danger: *Fagan,* RabelsZ 76 (2012) 967, 989–990.

[43] *Anton Fagan,* Rethinking Wrongfulness in the Law of Delict, SALJ 122 (2005) 90–141. See also *Daniel Visser,* Compensation for pecuniary loss – the actio legis Aquiliae, in: Wille's Principles of South African Law[9] (Cape Town 2007) 1094–1160, at 1098; *François du Bois,* Getting Wrongfulness Right: A Ciceronian Attempt, in: Developing Delict: Essays in Honour of Robert Feenstra, ed. by T. J. Scott/Daniel Visser (Cape Town 2000) 1–48, at 28.

[44] Regarding Aquilian liability see, e.g., *Trustees, Two Oceans Aquarium Trust v. Kantey & Templar* 2006 (3) SA 138; *Shabalala v. Metrorail* 2008 (3) SA 142 (SCA); *McIntosh v. Premier, Kwazulu-Natal* 2008 (6) SA 1 (SCA); *Loureiro and others v. iMvula Quality Protection* (Pty) Ltd 2014 (3) SA 394 (CC) at [51] ff.; *Country Cloud Trading CC v. MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) at [20] ff.; regarding self-defence see, e.g., *Mugwena v. Minister of Safety and Security* 2006 (4) SA 150 (SCA). See also *R. W. Nugent,* Yes, it is always a bad thing for the law: a reply to Professor Neethling, SALJ 123 (2006) 557–563.

[45] 2011 (3) SA 274 (CC) at para. 122.

[46] See also *Fritz Brand,* Reflections on wrongfulness in the law of delict, SALJ 124 (2007) 76–83, at 80–81; *Roux v. Hattingh* 2012 (6) SA 428 (SCA) at [33]. It is not clear,

It is difficult to imagine a more ringing endorsement of the proposition advanced by Fagan *et al.* Yet in their discussion of the *Le Roux* case in the 2011 volume of the *Annual Survey of South African Law,* Johann Neethling and Johan Potgieter commented as follows:

"[T]he assertion by Brand AJ that 'what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct' is incorrect."[47]

Although they do cite certain case-law in support of this view,[48] their argument is mainly axiomatic. For example, they simply say: "[t]he reasonableness of the defendant's conduct generally plays an important part in determining wrongfulness in our law."[49]

As Fagan himself notes,

"[E]ven though the scholars tell us...that their views are required by 'logic', that they are 'theoretically pure', that they are necessary to 'avoid confusion' (or so as not to 'obscure the distinction') between wrongfulness and negligence, and that their denial will 'undermine the legal-theoretical foundations of our law of delict' and create a 'conduit for legal uncertainty', they provide no argument to justify these assertions. It would seem, therefore, that the consequentialist analysis of wrongfulness has established itself as a dogma of modern South African delict scholarship. In other words, it is an analysis believed to be valid mainly because of the authority of those who initially proposed it […]"[50]

The result of this dogmatic approach is a troubling bifurcation between the work of the courts and that of doctrinal scholars. It seems that the latter sometimes regard themselves as formal as well as substantive authorities – not so much holders of the *ius respondendi* as licensees under the Law of Citations.[51] Indeed, it sometimes appears that there are two rival conceptions of the role of the law professor at work in South Africa today. On the one hand, the 'common-law' approach sees legal scholars offering different explanations for the available data, that is, the cases. Disagreement here is generally amicable, since it is assumed that there is likely to be more than one plausible account. Indeed, it sometimes takes on an almost ludic quality. On the other hand, the 'civilian' approach treats the professor as one who expounds the

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however, that this conception of wrongfulness applies to the law of defamation, the context of these remarks. See further the justified criticism of *Johann Neethling/Johan Potgieter,* The Law of Delict, Annual Survey of South African Law 2011, 747–845, at 808–809.

[47] *Neethling/Potgieter,* Annual Survey 2011, 747, 809.

[48] *Neethling/Potgieter,* Annual Survey 2011, 747, 809–810, as well as the fuller discussion *Neethling/Potgieter,* Delict (n. 38) at 80 ff.

[49] They appear unwilling to accept Fagan's distinction between unintentional and intentional harm-doing.

[50] *Fagan,* RabelsZ 76 (2012) 967, 992.

[51] See, e.g., *H. F. Jolowicz/Barry Nicholas,* Historical Introduction to the Study of Roman Law[3] (Cambridge 1972) 374 ff., 452–453.

truth about the law. Although case-law of course forms part of the subject-matter of this analysis, as we have seen, its authority depends to a large extent on its continuity with the wider civilian tradition. Disagreement here has the potential to become acrimonious, since in questioning your account of the law I implicitly accuse you of being wrong-headed or ill-informed.

To some degree, then, this is an intractable clash of legal cultures – a further consequence of South African private law's mixed heritage. Yet even accepting the point made earlier in this section, that South Africa's version of the doctrine of precedent is a somewhat mitigated one, the proper working of the partnership between courts and academia depends on consensus as to their respective roles. If there is to be genuine dialogue between the doctrinal scholar and the common-law judge, the former must recognise the formal authority of the latter. In other words, the civilian conception of the law professor's role is sustainable in modern South Africa only insofar as it accords due weight to the cases.

III. Private-Law Scholarship in the Twenty-First Century I: The Continuing Importance of Doctrine

1. Rationalising the uncodified ius commune

What, then, is the role of doctrinal scholarship in contemporary South Africa? In fact, there are two respects in particular in which the South African legal order appears to need doctrinal scholars more than ever.

On the one hand, as we have seen, South African private law has its roots in the uncodified civil law of early modern Europe. In fact there is still much work to be done in order to rationalise the ancient forms of action inherited ultimately from Roman law. Given the relative paucity of litigation, and thus the relatively small number of decided cases, especially in marginal subjects, imaginative doctrinal scholarship is vital; only through wide-angled scholarly analysis can the scattered fragments of which much South African private law consists be converted into a coherent and normatively defensible system of causes of action.[52] Of particular value in this respect is the appropriate use of comparative law, particularly models drawn from the civilian world. I have already given an example of the misuse of comparative law in doctrinal legal

[52] Indeed, it seems that marginal subjects (like unjustified enrichment) in small jurisdictions (like South Africa) are acutely in need of restatement, akin to the Restatements produced by the American Law Institute or the restatements of the English law of unjust enrichment and contract recently produced by Andrew Burrows: see *Andrew Burrows,* A Restatement of the English Law of Unjust Enrichment (Oxford 2012); A Restatement of the English Law of Contract (Oxford 2016). See also *idem,* Challenges for Private Law (n. 1) 12–16.

reasoning: namely, what appears to have been the wholesale adoption of the German *Erfolgsunrechtslehre* by South African delict lawyers in the mid-twentieth century. However, recent examples of the highly creative and constructive use of comparative sources in order to systematise the South African common law can be found in the two books on unjustified enrichment published recently by Danie Visser and Jacques du Plessis respectively.[53] Although their treatments differ in many respects, both have used the Wilberg/von Caemmerer taxonomy of the German law of unjustified enrichment in order to try to make sense of the disorderly and sometimes irrational South African common law. At a lower level of generality, both have drawn heavily on the individual enrichment claims of German law – the *Leistungskondiktion* and *Rückgriffskondiktion* in particular – in order to rationalise the complex rules regulating the restitution of enrichment by transfer and the restitutionary liability arising from the payment of another's debt.[54] I have argued, on the contrary, that the South African law of enrichment by transfer is best analysed in terms of reasons for restitution, 'unjust factors' such as mistake, compulsion and minority, as in the case of the English law of unjust enrichment.[55] That there is so much room for rational disagreement between academics about the best analytical framework to adopt shows just how undetermined the South African law of enrichment really is, and what an important role doctrinal lawyers have to play in systematising it.

2. "The normative influence of the Constitution must be felt throughout the common law"

It is, however, in the context of the Constitution of 1996 that South African doctrinal lawyers face their greatest challenge. The South African Bill of Rights applies to all law and binds not only the state[56] but also natural or juristic persons,[57] at least in certain circumstances.[58] As such, it imposes an obligation on the courts when applying a provision of the Bill of Rights to a

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[53] *Daniel Visser,* Unjustified Enrichment (Cape Town 2008); *Jacques du Plessis,* The South African Law of Unjustified Enrichment (Cape Town 2012)

[54] For a summary of these innovations see *Helen Scott,* Rationalising the South African law of enrichment, Edin. L. Rev. 18 (2014) 433–451, at 435–440.

[55] See generally *Scott,* Unjust Enrichment (n. 18).

[56] Section 8(1).

[57] Section 8(2).

[58] On the direct horizontal application of the South African Bill of Rights see, e.g., *Iain Currie/Johan de Waal,* The Bill of Rights Handbook[6] (2013) 45–50. However, as Currie & De Waal explain at 45–48, section 8(2) has been rendered near-redundant as a result of the wide interpretation given by the courts to section 39(2). Direct horizontality is thus "a dead letter". See further *Alistair Price,* The influence of human rights on private common law, SALJ 129 (2012) 330–374; *Nick Friedman,* The South African common law and the Constitution: Revisiting horizontality, SALJ 131 (2014) 63–88.

natural or juristic person to apply, or if necessary develop, the common law in order to give effect to the rights set out in the Bill of Rights.[59] However, in addition, section 39(2) of the Bill of Rights obliges courts to develop the common law in order to promote the spirit, purport and objects of the Bill. This section has been applied both in cases in which a rule of the common law is inconsistent with a constitutional provision and in cases where, although the rights enumerated in the Bill of Rights are not obviously implicated, the common-law rule in question nevertheless falls short of or deviates from its spirit, purport and objects.[60] In this second kind of case, the courts are required to adapt the common law "so that it grows in harmony with the 'objective normative value system' found in the Constitution."[61] Accordingly, section 39(2) thus understood requires that all common-law rules be examined individually by the courts in order to determine whether they require development in this way.[62] The phrase "spirit, purport and objects of the Bill of Rights" in particular invites us to reflect on the deep normative framework on which the Bill rests; indeed, "to infuse all South African law with the spirit of [the Bill's] fundamental values so that the legal system can promote a society based upon human dignity, freedom and equality."[63]

In carrying out this task, the courts rely heavily on doctrinal lawyers: both to elucidate the current state of the law, often with reference to comparative, historical or theoretical arguments, and to work through the constitutional arguments in favour of its development. In particular, "the process of assessment call[s] upon legal historians to locate the origins and role of existing

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[59] Section 8(3)(a)

[60] On the indirect application of the Bill of Rights to disputes governed by the common law see e.g. *Currie/De Waal,* Bill of Rights Handbook (n. 58) 60–65.

[61] Moseneke J in *S v. Thebus and another* 2003 (6) SA 505 (CC) at para. 28, quoting *Carmichele v. Minister of Safety and Security* 2001 (4) SA 938 (CC) at para. 54.

[62] Although cf. para. 39 of the *Carmichele* judgment. Nevertheless, the interpretation of section 39(2) given here, based *inter alia* on the decisions of the Constitutional Court in *Carmichele v. Minister of Safety and Security* 2001 (4) SA 938 and *Everfresh Market Virginia (Pty) Ltd Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) is now widely accepted: see again *Currie/De Waal,* Bill of Rights Handbook (n. 58) 60–65. But cf. *Anton Fagan,* The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's Development, SALJ 127 (2010) 611–627, as well as the subsequent exchange between Professor Fagan and Dennis Davis: *Dennis Davis,* How many positivist legal philosophers can be made to dance on the head of a pin?, A reply to Professor Fagan, SALJ 129 (2012) 59–72; *Anton Fagan,* A straw man, three red herrings, and a closet rule-worshipper – a rejoinder to Davis JP, SALJ 129 (2012) 788–98.

[63] *Dennis Davis,* Democracy and Deliberation: Transformation and the South African Legal Order (Cape Town 1999) 162. Or as O'Regan J expressed it in *K v. Minister of Safety and Security* 2005 (6) SA 419 (CC) at para. 17, "the normative influence of the Constitution must be felt throughout the common law".

doctrine in order that the constitutional mandate […] be implemented."[64] The scrutiny of the South African common law prompted by section 39(2) is continuous with the much wider project of examining the deeper moral justifications for domestic legal rules, as for example in contemporary corrective-justice scholarship. Nevertheless, this project remains doctrinal in the sense that I initially defined that term, in that its goal is the justification or criticism of common-law rules relative to the rights enumerated in the Bill, or relative to the norms and principles implicit in it.[65] A modest example of this enterprise can be found in my own recent critique of the as-yet-undisturbed common-law rules regarding liability for seduction.[66] According to the South African common law as it currently stands, a woman[67] has a claim against her seducer under the *actio iniuriarum* as well as a claim for any patrimonial loss suffered as a result of the seduction.[68] These rules rest on two premises, both of which were unexceptional at the time of the Roman-Dutch writers:[69] first, that female virginity is an economic asset; second, that women are incapable of exercising a valid choice in this regard. Yet it does not seem that either of these assumptions has currency in modern South African society. Indeed, these rules seem obviously at odds with Constitutional values, insofar as they undermine the autonomy of women by disregarding their consent to sexual acts.[70] Thus the implications of the Bill of Rights are clear: the common-law

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[64] *Davis,* Democracy and Deliberation (n. 63) 129. In fact Davis is speaking here of section 35(3) of the Interim Constitution of 1993, the precursor to section 39(2). It is unclear whether this claim was accurate at the time it was made. However, it is fair to say that it accurately describes the current position, i.e. the implications of section 39(2) as interpreted by the Constitutional Court. See now also *Dennis M. Davis/Karl Klare,* Transformative Constitutionalism and the Common and Customary Law, South African Journal on Human Rights 26 (2010) 402–509.

[65] For a precise discussion of the difference between the rights enumerated in the Bill and the object of those rights, see again *Fagan,* SALJ 127 (2010) 611, 612–618.

[66] For details and further sources, see *Helen Scott,* Compensation for harm to the personality – the actio iniuriarum, in: Wille's Principles of South African Law[10], ed. by Graham Bradfield (Cape Town 2016, forthcoming) ch. 43 at section III.3.

[67] Injurious seduction is possible only in respect of women who are both unmarried and virginal.

[68] *Scott,* Compensation for harm to the personality (n. 66) at section III.3.

[69] See, e.g., *Hugo Grotius,* Inleidinge tot de Hollandsche Rechts-geleerdheid 3.35.8.

[70] Indeed, given that the right to dignity is enshrined in section 10, it is doubtful whether these rules are consistent with the Bill of Rights itself. Furthermore, the fact that only women can sue is clearly inconsistent with section 9 of the Bill of Rights, which prohibits unfair discrimination on grounds of sex. Thus it is at least a question whether section 8(3)(b) might be the appropriate provision to apply here, in order to invalidate this common-law rule. However, in the context of litigation, these rights would necessarily be asserted by the defendant against the plaintiff qua right-holder in order to defeat her claim. Given this context, it is likely that this issue would be treated under the rubric of section 39(2).

rule should be abrogated.[71] As this example demonstrates, in examining the historical underpinnings of common-law rules and exploring their relationship to the values of the Bill of Rights, doctrinal lawyers can play a vital role in the transformative project envisioned by section 39(2).

IV. Private-Law Scholarship in the Twenty-First Century II: Doctrine in Decline?

The picture of transformative constitutionalism painted in the previous section is not an inaccurate one. However, it must be admitted that it is somewhat optimistic. While it is true that doctrinal scholarship still has much to offer the South African courts – indeed, that it is more important than ever – there are in fact unmistakeable signs that it is in decline.

1. "Out of fashion": the general decline of private law

As I have already conceded, the reasons for this are not confined to the South African context.[72] Some are associated with the decline of private-law scholarship more generally, and indeed of private law itself. Regarding the latter, the rise of arbitration (as opposed to formal litigation) in cases involving private parties and the increasing regulation by the state of formerly wholly private arenas such as compensation for work-place injuries,[73] road traffic accidents,[74] and the protection of personal information[75] are larger socio-political developments which inevitably impact private law as an academic discipline. Regarding the university context in particular, an important factor here is the ongoing diversion of intellectual resources out of private law into other areas of legal scholarship, notably public law and indigenous African law. The former is the natural site of the titanic struggles between the government and its antagonists which increasingly characterise South African political life: here of course the Constitution itself is central.[76] The latter, having been ignored by

[71] On the operation of the doctrine of precedent in the context of section 39(2), see *Currie/De Waal,* Handbook (n. 58) 63–65 as well as *Du Bois,* Common law and precedent (n. 11) at 91.

[72] Cf. *Burrows,* Challenges for Private Law (n. 1) 4–12.

[73] Compensation for Occupational Injuries and Diseases Act 130 of 1993.

[74] Road Accident Fund Amendment Act 19 of 2005.

[75] Protection of Personal Information Act 4 of 2013.

[76] One example among many is the litigation recently concluded between the opposition political parties the Economic Freedom Fighters and the Democratic Alliance and the President of South Africa, Jacob Zuma, along with several other co-respondents, regarding impermissible expenditure by the state on his Nkandla homestead (specifically, expenditure not justified by security considerations). In fact, it is arguable that this is a matter for the law of unjustified enrichment: see *Danie Visser,* Nkandla explained: can the law of

mainstream legal scholarship for so long, is now the focus of one of the most pressing questions confronting the South African legal order, namely whether indigenous customary law and European common law can continue to run in parallel tracks, or whether the latter should be displaced by the former, and if so to what extent.[77] Added to these are several more prosaic difficulties: the lure of commercial practice[78] and the disproportionate undergraduate teaching load typically borne by private-law scholars, given that the bulk of the South African LLB curriculum is made up of bread-and-butter private law subjects taught through lectures to large classes.[79] There is also the not inconsiderable factor of changing trends in legal scholarship: bluntly, doctrinal private law is out of fashion, in South Africa as elsewhere.[80] However, as I have already indicated, I do not believe that any of these factors has been decisive in the decline of doctrinal scholarship in South Africa. The explanation for that phenomenon is to be found not in the decline of private law generally, or in the pull of other academic disciplines, but in a crisis in the authority of the common-law rules on which doctrinal reasoning depends.

1. The effect of section 39(2): a crisis in the authority of common-law rules

To the extent that this is a crisis also in the legitimacy of the pre-1994 common law, it is of course not a new problem, but rather one which dates back at least to the political transition in South Africa in the early nineties – in-

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unjustified enrichment provide the key to whether the President has an obligation to reimburse the state?, in: Essays in Honour of Johann Neethling, ed. by Johan Potgieter/Johann Knobel/Rita-Marie Jansen (Durban 2015) 529–544. However, thus far it has been dealt with exclusively within the framework of the respondents' Constitutional duties. Cf. *Burrows,* Challenges for Private Law (n. 1) 4–5.

[77] See e.g. *Christa Rautenbach,* South African Common and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition, Journal of Comparative Law 3 (2008) 119–132.

[78] Cf. *Burrows,* Challenges for Private Law (n. 1) 5.

[79] See *Georgina Pickett,* The LLB Curriculum Research Report (2010, commissioned by the South African Council on Higher Education) ch. 3. At pp. 13–14 one finds a helpful table reflecting the HEQF credit weighting attached to those LLB courses which are mandatory at all seventeen universities in South Africa. Thus one is able to determine (admittedly rather roughly) both which courses predominate within the South African LLB and what weight is attached to them. Of the fifteen courses listed, seven are traditionally situated within private law departments; four are public-law courses; a further three (Criminal Law, Criminal Procedure and Evidence) are often hived off into a criminal-justice cluster; only one (Business Law, or Corporation Law as it is called at the University of Cape Town) is generally situated within the department of commercial law. As for credit weightings, here too the median weightings for private-law courses are generally higher.

[80] Cf. *Burrows,* Challenges for Private Law (n. 1) 5–6: "[M]y perception is that the new appetite for different styles of legal scholarship has itself served to undermine the position of private law."

deed, it is inherent in the South African legal order as it has existed since the European colonisation of southern Africa.[81] While the dismantling of apartheid legislation such as the Population Registration Act[82] was obviously a precondition for the negotiations which led up to the first democratic election in 1994, the future of the common law was less clearly pre-ordained: could legal rules based ultimately on Roman and Roman-Dutch legal texts, as interpreted by the courts of colonial and apartheid-era South Africa, continue to bind? If not, in the absence of systematic legislative enactment, what would take their place? It appears that the framers of the Bill of Rights envisaged that the Constitution would be directly applied, both vertically and ("if, and to the extent that, [a provision of the Bill of Rights] is applicable") horizontally, through the medium of the common law. Thus the main engine of the transformation of the common law would be section 8. The courts would apply, or if necessary develop, the common law in order to give effect to the rights in the Bill. However, as we have already seen, it is in fact section 39(2) – which envisages the indirect application of the Bill by the courts – that has driven this process. Perhaps in conflict with its literal meaning ("[…] when developing the common law […] every court […] must promote the spirit, purport and objects of the Bill of Rights"), it has been interpreted by the Constitutional Court to mean that the courts are obliged to develop the common law in order to promote the spirit, purport and object of the Bills of Rights.[83] Thus the dominant imperative is not the application of Constitutional rights themselves, but rather the infusion of the common law with the *values inherent in the Bill*. It is certainly arguable that such a piece-by-piece reworking of the common law constitutes a necessary stage in the evolution of a new South African legal culture. However, it cannot be denied that in practice this exercise has run into difficulties.

As we have seen, there are indeed cases in which common-law rules are clearly inconsistent with the values inherent in the Bill. Indeed, in my view the affirmative duty on the state recognised in the seminal case of *Carmichele v. Minister of Safety and Security* itself constitutes a legitimate application of section 39(2):[84] whereas the pre-existing common-law position – in terms of

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[81] See e.g. *Zimmermann/Visser,* Mixed Legal System (n. 15) 7–9.

[82] Act 30 of 1950. It was repealed on 28 June 1991 by the Population Registration Act Repeal Act 114 of 1991.

[83] See section III above.

[84] Ms. Carmichele was brutally attacked by a young man who had been charged with rape but released on bail. Although her claim was initially dismissed, the Minister was ultimately held vicariously liable in delict for the negligent failure of his employees, local police-officers and prosecutors, to prevent the crime from occurring. The case was heard twice in the High Court, although only the second of these judgments is reported – *Carmichele v. Minister of Safety and Security and Another*2003 (2) SA 656 (C) – once in the Constitutional Court – *Carmichele v. Minister of Safety and Security and Another (Centre*

which no such duty would have been imposed – gave expression to certain core liberal values, the post-*Carmichele* legal position, particularly as expressed in the *Van Duivenboden* case, gives greater weight to human dignity, to life and to personal security.[85] Those values, channelled through the pre-existing common-law concept of wrongfulness, clearly point towards a more expansive legal duty on the part of the state.[86] However, in truth such cases are relatively rare. Generally speaking, the rules of the South African common law already give expression to those values.[87] Or, to put the matter in less complacent terms, the values inherent in the Bill are simply too general to be determinative of specific legal questions. In most cases, the spirit, purport and objects of the Bill of Rights provide no real guidance in choosing between different ways of developing a particular common-law rule. They offer a tantalising vision of what South African society could become, but no specific instructions to the courts for turning that vision into reality.

2. Two illustrations: K v. Minister of Safety and Security and Lee v. Minister of Correctional Services

This point is well illustrated by the decision in *K v. Minister of Safety and Security.*[88] According to South African law, in order for vicarious liability to attach to an employer for the delict of his employee, it must be shown that the delict was committed by the employee while acting 'within the course and scope of his or her employment'. This phrase encompasses, in the first instance, acts committed by the employee in the exercise of the functions to which she was appointed, including such acts as are reasonably necessary to carry out her employer's instructions. However, the matter becomes more difficult when a delict is committed by an employee outside the normal performance of her duties. This difficulty is particularly pronounced where the wrongdoer is pursuing her own interests exclusively, and even more pronounced where her wrongful conduct is intentional. Prior to the decision of the Constitutional Court in *K v. Minister of Safety and Security,* liability was

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for Appeal Legal Studies Intervening) 2001 (4) SA 938 (CC) – and twice in the Supreme Court of Appeal – *Carmichele v. Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA) and *Minister of Safety and Security and Another v. Carmichele* 2004 (3) SA 305 (SCA).

[85] *Minister of Safety and Security v. Van Duivenboden* 2002 (6) SA 431 (SCA). For an account of the pre-existing common-law position, see *Dale Hutchison,* Aquilian Liability II (Twentieth-Century), in: Southern Cross (n. 15) 595–637.

[86] See *Currie/De Waal,* Handbook (n. 58) 61–63 on the three ways in which section 39(2) can be applied, especially at p. 62 where they describe the third method, "to give constitutionally-informed content to open-ended common-law concepts, such as 'public policy' or 'contra bonos mores' or 'unlawfulness'."

[87] See, e.g., *NM and others v. Smith and others* 2007 (5) SA 250 (CC)

[88] 2005 (6) SA 419 (CC).

not imposed in such cases.[89] However, in *K* the Constitutional Court relied on section 39(2) to develop the pre-existing common law, holding the state vicariously liable in respect of a rape committed by three on-duty policemen after a young woman, stranded in the early hours of the morning, accepted their offer of a lift home. Giving the judgment of the Court, O'Regan J held, first, that the existing common-law rule was as follows:

"It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course and scope of his employment, and that in deciding whether an act by a servant does so fall, some reference is to be made to the servant's intention… The test in this regard is subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test."[90]

However, she said, the second part of this test should not be applied in a mechanical way.[91] In answering the question whether the link between delict and employment was sufficiently close, a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights, as required by section 39(2):[92]

"The objective element of the test which relates to the connection between the deviant conduct and the employment, approached with the spirit and objects of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms but other norms as well. It requires a court to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not."[93]

In articulating the reasons for her decision, O'Regan J relied on three arguments. First, the policemen who raped Ms K all bore a statutory and constitutional duty to prevent crime and protect members of the public. That duty rested also on their employer, the state, and they were employed by it to per-

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[89] See, e.g., *K v. Minister of Safety and Security* 2005 (3) SA 179 (SCA)

[90] Quoting Jansen JA in *Minister of Police v. Rabie* 1986 (1) SA 117 (A) 134, at para. 31 in the *K* judgment. But in fact the so-called *Rabie* test does not appear to have been widely applied prior to *K:* the only clear instance is *Minister van Veiligheid en Sekuriteit v. Japmoco BK h/a Status Motors* 2002 (5) 649 (SCA) at para. 11. For criticism of O'Regan J's account of the pre-existing common law see *Anton Fagan,* The Confusions of K, SALJ 126 (2009) 156–205, especially 167–173.

[91] See, e.g., at para. 22: "If one looks at the principle of vicarious liability through the prism of s 39(2) of the Constitution, one realises that characterising the application of the common-law principles of vicarious liability as a matter of fact untrammelled by any considerations of law or normative principle cannot be correct. Such an approach appears to be seeking to sterilise the common-law test for vicarious liability and purge it of any normative or social or economic considerations."

[92] See *K v. Minister of Safety and Security* at para. 32, as well as paras. 15–20 and 21–23.

[93] See *K* at para. 44.

form that duty.[94] Second, the policemen, who were on duty and in uniform, had caused the victim specifically to place her trust in them by offering to assist her, in accordance with police standing orders.[95] The Court

"must take account of the importance of the constitutional role entrusted to the police and the importance of nurturing the confidence and trust of the community in the police in order to ensure that their role is successfully performed. In this case, and viewed objectively, it was reasonable for the applicant to place her trust in the policemen who were in uniform and offered to assist her."[96]

Third,

"the conduct of the policemen which caused harm constituted a simultaneous commission and omission. The commission lay in their brutal rape of the applicant. Their simultaneous omission lay in their failing while on duty to protect her from harm, something which they bore a general duty to do, and a special duty on the facts of this case."[97]

O'Regan J concluded that,

"these three inter-related factors make it plain that viewed against the background of our Constitution, and, in particular, the constitutional rights of the applicant and the constitutional obligations of the respondent, the connection between the conduct of the policemen and their employment was sufficiently close to render the respondent liable."[98]

On its face, the outcome in the *K* case appears richly justified by these arguments. But on closer examination, it is very difficult to say what the *ratio* of the decision really is – on what rule it depends. The existence of a statutory and constitutional duty on the part of the police to prevent crime and protect members of the public clearly militates in favour of liability in general terms. However, it permits no discrimination between cases in which liability should be imposed (as in *K* itself) and those in which it seems that it should not be: for example, where a policeman has committed an act of domestic violence in his own home.[99] As for the second argument relied on by O'Regan J, that Ms K had placed her trust in the policeman as she was entitled to do, and that this trust relationship should be nurtured, in my view this argument contains the germ of a general rule capable of justifying the *K* decision – I shall return to this point below. However, the Court failed sufficiently to spell out its implications for the rules of vicarious liability – as stated, it simply appears to constitute an additional reason (if any were needed) for the delictual liability of the

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[94] See *K* at para. 51.

[95] See further at para. 51: "One of the purposes of wearing uniforms is to make police officers more identifiable to members of the public who find themselves in need of assistance."

[96] *K* at para. 52.

[97] *K* at para. 53.

[98] *K* at para. 53.

[99] Cf. *Attorney-General for the British Virgin Islands v. Hartwell* [2004] 1 WLR 1273.

policemen themselves. As for the third argument, this too amounts to the claim that where policemen commit the very sort of crime from which they are charged to protect their victim, this constitutes an additional reason for their liability. Again, it is hard to see how this argument justifies the imposition of vicarious liability on the state, however outrageous the wrongdoers' behaviour. Indeed, it is hard to say in what respect exactly O'Regan J "developed the law". It appears that in the *K* case the effect of section 39(2) was to compel a particular outcome, namely a finding of liability on the part of the state, rather than a change in the common-law rules governing vicarious liability.[100]

Moreover, just as it is difficult to discover the *ratio* of the *K* case itself, it is difficult to formulate a rule which is capable of explaining the cases in which *K* has been followed. In *F v. Minister of Safety and Security and others*[101] liability was imposed in respect of a rape by a policeman who was off duty (in fact on standby), dressed in plain clothes, driving an unmarked police car, and who had taken active steps to conceal his status from his victim.[102] Thus while there were clear similarities in the facts of the two cases, in *F* the evidence suggested that Ms. F's decision to accept a lift from the wrongdoer had been reached independently of the fact that he was a policeman – in other words, the 'trust element' relied on in *K* itself appeared to be absent. Nevertheless, liability was imposed. According to the Chief Justice, giving the judgment of the majority,

> "several interrelated factors have an important role to play in addressing the question whether the Minister is vicariously liable for the delictual conduct of Mr Van Wyk. The normative components that point to liability must here, as *K* indicated, be expressly stated. They are: the State's constitutional obligations to protect the public; the trust that the public is entitled to place in the police; the significance, if any, of the policeman having been off duty and on standby duty; the role of the simultaneous act of the policeman's commission of rape and omission to protect the victim; and the existence or otherwise of an intimate link between the policeman's conduct and his employment. All these elements complement one another in determining the State's vicarious liability in this matter."

Again, it is hard to see what weight to attach to each of these arguments, or indeed to appreciate what their individual force might be. Similar criticisms can be levelled against the decision of the Supreme Court of Appeal in *Minister of Defence v. Von Benecke*[103], in which the state was held vicariously liable for the actions of an employee of the Ministry who had stolen rifle parts, ammunition and magazines which were subsequently used to commit an armed robbery.[104]

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[100] See, e.g., paras. 11, 14, 18 and 23.

[101] 2012 (1) SA 536 (CC).

[102] When she asked him why there were police dockets in the vehicle he replied that he was a private detective: see *F v. Minister of Safety and Security* at para. 10.

[103] 2013 (2) SA 367 (SCA).

As these decisions illustrate, in practice transformative constitutionalism can sometimes amount to nothing other than result-driven jurisprudence: apparently socially progressive, claimant-centred decisions which are not, however, justified according to any rule of general application.[105] The fact that the claimant's constitutional rights have been violated – in the *K* and *F* cases, rights to bodily integrity, privacy, dignity and self-worth, freedom, and equality, "a cluster of interlinked fundamental rights treasured by our Constitution"[106] – appears to translate directly into a successful claim. Common-law rules which do not produce that result are assumed to be bad and are disregarded. Thus the effect of section 39(2) as interpreted has been to introduce a much looser approach to common-law rules, creating a general air of indeterminacy in the law. Indeed, even in areas in which section 39(2) has not been directly invoked, its effect has been to undermine rule-based reasoning. Here, rather than the purported development of legal rules under the aegis of section 39(2), we see the use of the existing common law to achieve outcomes mandated directly by equity or social justice: rules are formally invoked in support of certain outcomes, but in fact the internal logic of the law is not respected; rules are distorted in order to produce desirable results. Thus in *Lee v. Minister of Correctional Services,*[107] where the plaintiff had contracted tuberculosis while incarcerated in Pollsmoor Prison, and where it could not be demonstrated that his illness had probably been caused by the (undoubtedly negligent) failure of the prison authorities to implement appropriate measures to prevent the spread of TB, a majority of the Constitutional Court held that the but-for or *sine qua non* test for factual causation had been satisfied, relying on context-free interpretations of phrases in several leading judgments.[108] Again, it is difficult to disagree with the inarticulate premise of this decision, that where the state flagrantly violates its duties to the public it ought to be sanctioned. But the result of this decision has been to render the ordinary test for factual causation in South African law radically unclear.[109]

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[104] For further discussion of this case see *Helen Scott,* Strict Liability in: Wille's Principles of South African Law (n. 66).

[105] This point is forcefully made with respect to a trio of earlier Constitutional Court decisions by *Stu Woolman,* The Amazing, Vanishing Bill of Rights, SALJ 124 (2007) 762–794, especially his introductory remarks at 762–765.

[106] See *F* at para. 55. In the *K* case O'Regan J held that Ms K's s rights to security of the person, dignity, privacy and substantive equality were all implicated: see, e.g., para. 18.

[107] 2013 (2) SA 144 (CC).

[108] For criticism of the *Lee* decision see *Anton Fagan,* Causation in the Constitutional Court: *Lee v. Minister of Correctional Services* Constitutional Court Review 5 (2013) 104–134; *Alistair Price,* Factual Causation after Lee*,* SALJ 131 (2014) 491–500.

[109] See, e.g., the subsequent attempts to interpret it in *Oppelt v. Head: Health, Department of Health Provincial Administration: Western Cape* [2015] ZACC 33; *Mashongwa v. PRASA* [2015] ZACC 36.

Whatever the merit of the goals pursued, offering spurious justification for judicial decision-making can only be destructive of the law's legitimacy.

3. Constructive interpretation

Faced with the erosion of doctrine in this way, doctrinal scholars lose confidence in their project. On the one hand, given the degree of indeterminacy in cases in which section 39(2) is invoked, it is difficult to continue to engage with the common law in the way that doctrinal scholars traditionally have done, that is, as a system of rules.[110] On the other hand, if rule-based arguments become mere pretexts for decisions in fact reached on wholly different grounds, subjecting these decisions to doctrinal scrutiny seems fruitless. What value can 'solving hard conceptual puzzles, understanding the fine detail of the law, and producing rigorous and elegant legal interpretations'[111] have if the courts themselves are no longer playing that game? Doctrinal lawyers have no choice but to abandon doctrinal scholarship for associated fields such as jurisprudence (in both its analytical and political forms) and substantive legal theory (the study of the deep normative justifications for legal rules).[112]

However, in fact I do not believe that such a pessimistic conclusion is justified. If we accept that rule-based decision-making is a desirable feature of a legal system based on precedent, to the extent that the courts decline to justify their decisions relative to rules of general application it must be for doctrinal scholars to provide such rules. Thus in my analysis of the *K, F* and *Von Benecke* cases for the 10th edition of *Wille's Principles of South African Law,* I attempted to furnish a rule capable of explaining these important cases, arguing that where an employee is employed to do a particular job which carries with it an increased risk that a particular species of delict will be committed, then if he does indeed commit that delict there is sufficiently close connection between the delict and his employment for vicarious liability to attach.[113] This

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[110] It is also striking how little reference the majority of the Constitutional Court in *F,* for example, made to the considerable body of high-quality doctrinal writing prompted by the decision in *K*. See, e.g., *Fagan,* SALJ 126 (2009) 156–205; *Stephen Wagener,* K v. Minister of Safety and Security and the Increasingly Blurred Line Between Personal and Vicarious Liability, SALJ 125 (2008) 673–680.

[111] *Burrows,* Challenges for Private Law (n. 1) 5.

[112] A review of the *South African Law Journal* (South Africa's leading generalist law journal) over the course of the last five years yielded fewer than twenty instances of doctrinal scholarship on any aspect of the law of obligations. On the other hand, law and economics appears to have gained almost no purchase in South African legal academia.

[113] See *Scott,* Strict Liability (n. 104) at section II.1(a)(ii). That this rule was explicitly relied on by the Supreme Court of Canada in *Bazley v. Curry* [1999] 2 SCR 534 and *Jacobi v. Griffiths* [1999] 2 SCR 570, decisions extensively cited by O'Regan J in the *K* case,

appears to be the true import of the second argument relied on by O'Regan J, that Ms K had placed her trust in the policemen who raped her. Moreover, it is capable of explaining the outcome in the *Von Benecke* case – given that the thieving employee's job involved access to dangerous weapons stockpiled by the defendant, weapons not otherwise freely available, it seems clear that his employer had created the risk which eventuated[114] – and even that in the *F* case, at least if the majority's finding that Ms F accepted a lift from Van Wyk precisely because of his status as a policeman is accepted.[115] Similarly, my colleague Alistair Price has argued in respect of the decision in *Lee* that it is best understood as an expression of the 'material contribution to risk' rule developed in other jurisdictions, specifically in England and Wales. According to this rule it is sufficient for a finding of factual causation that the defendant materially contributed to the risk of the harm's occurring. Price argues that the application of this rule is justified in cases, such as *Lee,* which involve the systematic failure of the state to provide an obligatory government service.[116] Thus academics treat as authoritative the progressive outcomes in key judicial decisions such as *K, F* and *Lee,* but take upon themselves the responsibility of justifying those decisions in terms of rules of general application. The partnership between judge and doctrinal scholar characteristic of common-law systems endures, but in a different form.

In the language of Dworkin, each time a judge decides a case she ought to seek to make of the law the best that it can possibly be.[117] As I suggested in the introduction to this chapter, the task of the doctrinal scholar is essentially the same, but with a wider scope. Of course doctrinal scholars in South Africa should continue to carry out their regular functions: to criticise judicial decisions as imperfect expressions of the rules and principles of the law; to point the way for future decisions; and, exceptionally, to seek to show that a decision cannot be substantively correct in the context of the legal system as a whole, even while it continues formally to bind.[118] But in some cases at least, it seems that the first duty of the South African scholar is to "look a judge in the eye and have the courage to tell him exactly why he is right."[119]

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appears to lend it greater weight. However, for criticism of this argument in the South African context, see *Fagan,* SALJ 126 (2009) 156, 199–204.

[114] "It goes without saying that because of the enormous potential for public harm inherent in the inadequate preservation and control of arms, the department […] should not in general be able to avoid liability […]" (at para. 24); "That the risk should fairly fall on its creator when the public is exposed to weaknesses in its systems or frailties in its personnel is merely reciprocal to the powers that the defence force exercises […]" (at para. 26).

[115] See especially paras. 78–82.

[116] *Price,* SALJ 131 (2014) 491, 495 ff.: "A constructive interpretation of *Lee*".

[117] *Ronald Dworkin,* Law's Empire (Cambridge 1986) ch. 7.

[118] See again the account of the common-law doctrinal method provided by Burrows in *Burrows,* Challenges for Private Law (n. 1) 10.

V. Conclusion

Perhaps the overarching theme of this chapter has been the way in which common-law judges and doctrinal scholars, notionally partners in a joint enterprise, can nevertheless talk past each other; much of it has been devoted to describing the different ways in which that partnership or conversation can break down. Historically, doctrinal legal scholars have exerted a high degree of influence over the decisions of the South African courts; indeed, at times they appear to have regarded themselves as law-making authorities in their own right, in open competition with the judiciary. There is still much work for doctrinal lawyers to do in contemporary South Africa, specifically in rationalising the ancient actional categories of the uncodified civil law and in testing common-law rules for compliance with Constitutional rights and values. However, their influence is now considerably lessened. Increasingly the courts themselves do not speak the language of doctrinal law, in that they do not justify their own decisions according to rules of general application. At best, the conversation is rather one-sided.

Nevertheless, I have argued that doctrinal scholarship still has a vital role to play in the context of the South African legal order. Understanding *what the law is* – that pursuit of the values of consistency and coherence which is the distinctive genius of doctrinal scholarship – is indispensable in the context of a legal system based on precedent. To the extent that judges neglect this question, doctrinal scholars can fill the void. The equivalence of doctrinal scholarship with 'legal formalism' has led to its being reviled as socially conservative, both in South Africa and elsewhere.[120] Arguably doctrinal analysis devoid of any awareness of the wider social, economic, political or theoretical context of law is deficient.[121] Yet it can only be absurd to suppose that the quest for transparent rationality in law is somehow innately regressive. It is in advancing that cause that South African doctrinal lawyers can make their greatest contribution yet.

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[119] This quote (with minor amendments) is taken from the preface to *Ben McFarlane,* The Structure of Property Law (Oxford 2008).

[120] In the South African context see, e.g., *Davis,* Democracy and Deliberation (n. 63) 130 ff.

[121] Although it is equally true that "[l]egal scholarship must focus on what it can do better than other disciplines." See *Bódig,* Erasmus Law Review 8 (2015) 43, 54.

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