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Precedent in East and West*

Ewoud Hondius**

I. Introduction

Throughout Europe, academics have been active over the past decade in a half studying the desirability and feasibility of harmonizing private law.¹ The question may be raised—and that is precisely the question I wish to address here—whether or not even a fully harmonized private law will be applied the same way all over Europe. I will argue that this is not necessarily the case. In various legal systems, the law in action and the law in the books may differ from one another to varying degrees. Courts may interpret uniform law in line with national traditions.² One of these traditions has to do with precedent. The English common law, as is well known, is based on cases, whereas civil law systems are based on legislation. Furthermore, there are conflicting theories on the importance of precedent.³ In this paper, I will explore to what extent these different approaches are converging in a Uniting Europe.⁴ In fact, there are actually three approaches. I will argue that in civil law systems, two trends are discernable. In Western Europe, precedent plays an important role in practice, even when this is not always acknowledged in legal writing. In Central and Eastern Europe,

* Work in progress. I earlier wrote on this subject in the *Mélanges Marcel Fontaine* (Bruxelles, 2003) and I hope to expand my research in a general report to be submitted to the Utrecht Congress of the International Academy of Comparative Law in 2006.

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1. See ARTHUR HARTKAMP ET AL., TOWARDS A EUROPEAN CIVIL CODE, (The Hague: Kluwer/Nijmegen: Ars Aequi, 3rd ed. 2004).

2. HARTMUT HAHN, NATIONALE AUSLEGUNGSMETHODEN, VERGLEICHEND BETRACHTET—EUROPÄISCHE ANFORDERUNGEN AN DIE METHODENLEHRE, ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 163-170 (2003).

3. See URS PETER GRÜBER, METHODEN DES INTERNATIONALEN EINHEITSRECHTS 275-328 (Tübingen: Mohr ed., 2004).

4. Mark Van Hoecke predicts that “The Europeanisation of private law will slowly, but thoroughly, influence theory building in the various jurisdictions.” See MARK VAN HOECKE, EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 398 (Oxford: Hart ed., 2004).

however, the practice is different. In the former socialist nations, precedent was not only denied a place as source of law, but the courts have often adhered to this doctrine—and perhaps still do—in fact. I will argue that this is not desirable, even apart from the question of harmonization. A possible fourth group of jurisdictions—those where western law has been exported beyond its host jurisdictions and where in the words of Patrick Glenn the problem of corruption has assumed massive proportions⁵—will be left out in this paper.

II. Structure of this Paper

In the common law, cases have always been the cornerstone of the legal system. *Stare decisis* is an age-old tradition. In civil law systems the courts are but the “bouche de la loi.” Although in civil law jurisdictions, case-law plays an increasing role in the process of “Rechtsfortbildung,” this is hard to reconcile with the classical division of the *trias politica*, where it is the legislature’s monopoly to lay down rules.

The notion of the history of precedent alluded to in the aforementioned words, I must admit, until recently was mine. This conception, however, is false, as I shall try to explain in the first Part of this paper, first with regard to the common law and then with regard to West European law and Central and East European law. Regarding civil law, I will start by mentioning, by way of example, a legal system well-known to myself, that of the Netherlands, and more in particular its legal writing. I will then briefly engage in an excursion into other civil law systems, before venturing into the situation in Central and Eastern Europe. Having surveyed the law as it is, I will then in a second Part venture into a look into the future, first with regard to the common law, then West European law and finally Central and East European law. I will conclude this essay with a prognosis for the future of precedent in Europe.

This paper is limited to private law, although some of the findings may also be valid for criminal law and public law. For reasons of time and space I have refrained from analysing the role of precedent in the practice of the two main European courts, the European Court of Justice in Luxemburg and the European Court of Human Rights in Strasbourg.⁶

The subject of “precedent” may seem somewhat out of tune with the general theme of this conference: “Globalization, regionalization and

5. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD/SUSTAINABLE DIVERSITY IN LAW 247 (Oxford: University Press ed., 2000).

6. There is reason to believe that at least the first mentioned court adheres to the French legal method of dealing with cases. See STEFAN VOGENAUER, DIE AUSLEGUNG VON GESETZEN IN ENGLAND UND AUF DEM KONTINENT 1481 (Tübingen: Mohr Siebeck 2001).

transplants in commercial and consumer law.” However, I would submit that it may throw light on issues which are discussed in other papers for this conference, such as those on a CISG Digest,⁷ harmonization of product liability case-law,⁸ and the *ius commune* casebooks.⁹

III. The Status Quo and Its Development

In this section I will try to describe some of the principal developments relating to precedent.

A. *Precedent in the Common Law*

Earlier, in Section II, I mentioned the widespread belief—or at least what I myself believed until recently—that precedent and common law are interchangeable. This belief, as most lawyers from common law background already know, happens to be erroneous. The system of precedents is much younger than the common law itself, it is not uncontested and it is subject to erosion. Historically speaking, precedent is much younger than one might think. “Prior to the mid- or late nineteenth century, judges in England did not regard themselves bound by earlier decisions (. . .).”¹⁰ According to the thinking of the time of Bracton in 1256, “the law was not to be found in individual cases; rather the case decisions in their totality were a reflection of the law.”¹¹ Among other factors, the rise of the printed text and the establishment of a hierarchy of courts combined in the sixteenth century to shift the nature of legal reasoning to the common law.¹² Other elements which contributed to the rise of *stare decisis* were the growing custom of giving reasons for decisions and the improvement in the quality of law reporting.

7. Peter Winship, *Digesting the CISG Case Law: Implications for Uniform Interpretation*, Paper for the International Academy of Commercial and Consumer Law (Riga, Aug. 12-14, 2004).

8. Mads Andenas, *Problems of Harmonizing European Private Law—Product Liability as a Case*, Paper for the International Academy of Commercial and Consumer Law (Riga, Aug. 12-14, 2004).

9. Walter Van Gerven, *Convergence, a New and Open Method of Approximation of Private Law*, Paper for the International Academy of Commercial and Consumer Law (Riga, Aug. 12-14, 2004).

10. J. DAVID MURPHY, ROBERT RUETER, *STARE DECISIS IN COMMONWEALTH APPELLATE COURTS* 3 (Toronto: Butterworths 1981).

11. Thomas Lundmark, “Soft” *Stare Decisis: The Common Law Doctrine Retooled for Europe*, in REINER SCHULZE, RICHTERRECHT UND RECHTSFORTBILDUNG IN DER EUROPÄISCHEN RECHTSGEMEINSCHAFT 161-168 (Ulrike Seif ed., Tübingen: Mohr 2003).

12. David J. Ibbetson, *Case-law and Doctrine: A Historical Perspective on the English Common Law*, in REINER SCHULZE, RICHTERRECHT UND RECHTSFORTBILDUNG IN DER EUROPÄISCHEN RECHTSGEMEINSCHAFT 27, 33 (Ulrike Seif ed., Tübingen: Mohr 2003).

Only in 1898 was the binding force of precedents accepted,¹³ although everyone was not completely convinced. For instance, Lord Denning, known for his dissenting opinions, engaged in an epic battle with precedents.¹⁴ Before him, Lord Wright had already criticised the—now relinquished—theory whereby the House of Lords was bound by its own decisions.¹⁵ Moreover, there has always been opposition in academic circles:

Judges owe their fidelity, not to the pronouncements of predecessors, but to the law. They might not now identify that as ancient custom, and in practice they will usually discover it in the law reports, but they are ultimately free to reject a precedent if they do not believe it represents the law.¹⁶

The prevailing view on precedent does give courts some discretionary power: “most cases coming to appellate courts for decision allow judges considerable scope for avoiding precedents which would result in injustice or an otherwise inappropriate decision.”¹⁷

We should keep in mind that the notion of “precedent” in the *common law* stands for two different meanings:

In English law, the concept of “precedent” covers two ideas that are closely connected. In the broad sense, precedent involves treating previous judicial decisions as authoritative statements of the law which can serve as good legal reasons for subsequent decisions. In the narrow sense, precedent (often described as *stare decisis*) requires judges in specific courts to treat certain previous decisions, notably of superior courts, as a binding reason.¹⁸

The system of precedent has a number of exceptions; Holdsworth already mentioned these in 1934.¹⁹ But, on the whole, the system of precedent seems well established in common law countries, which in the European

13. London Tramways Co. v. London County Council, AC 375 (1898).

14. See M. ADAMS, TUDSCHRIFT VOOR PRIVAATRECHT 13, 37-40 (2002).

15. Lord Wright, *Precedents*, Cambridge L.J. 122 (1944).

16. Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, in LAURENCE GOLDSTEIN, *PRECEDENT IN LAW* 73, 87 (Oxford: Clarendon 1987). See also A.L. Goodhart, *Precedent in English and Continental Law*, LAW QUARTERLY REVIEW 40-65 (1934).

17. CATRIONA COOK ET AL., *LAYING DOWN THE LAW* 79 (London: Butterworth, 5th ed. 2001). The authors refer to a decision of the Australian *High Court* in which notwithstanding a two hundred year old precedent rape within marriage was held possible. *Id.* at 107. In addition, the authors discuss the court's rejection of *vicarious liability* in *Rylands v. Fletcher*. *Id.* at 109.

18. John Bell, *Sources of Law*, in PETER BIRKS, *ENGLISH PRIVATE LAW* 1, 29 (Oxford: Oxford University Press 2000).

19. RUPERT CROSS AND J.W. HARRIS, *PRECEDENT IN ENGLISH LAW* 125 (Oxford: Clarendon, 4th ed. 1991) (quoting 50 LAW QUARTERLY REVIEW 180 (1934)).

Union include Cyprus, England, Ireland, Malta and Scotland, the latter being a mixed legal system.

B. Precedent in a Civil Law Jurisdiction: The Netherlands

From a historical perspective, the era of *ius commune* was one in which there was a system of precedents on the European continent, as has been set out by Jan Drion in his inaugural address at Leyden University.²⁰ With the entry of the codification principle on the continent, the system of precedents was all but abolished. In fact, the Prussian Code of 1794 held that “auf altere Aussprüche der Richter bei künftigen Entscheidungen keine Rücksicht genommen werden (soll)” (in future cases, old decisions shall not be taken into consideration).²¹ In France, as well as other countries with a system of cassation, courts only had to take into account another court’s decision after a *renvoi* by the Court of cassation.²² Precedents were something of the past, at least in theory. In practice, case-law always remained of interest, especially after well-known academics started to write annotations.²³

How does one reconcile this practice with the theory of the *trias politica*? In his Ph.D. thesis, defended at the Erasmus University Rotterdam, Kottenhagen seeks to find a solution for the dilemma.²⁴ He arrives at the conclusion that a Dutch judge is bound to follow precedents “unless he can show why this precedent is wrong, outmoded, unjust or distinguishable.”²⁵ In the footsteps of Vranken,²⁶ Haazen argues that precedents should be “sort of binding,” which should be sufficient to speak of a binding effect, while at the same time providing sufficient flexibility to allow the courts to deviate.²⁷ Rijpkema has argued that even if the legislature is democratically controlled, it hardly makes legislation more democratic than judge-made law.²⁸ Woltjer has also analyzed the dilemma in terms of the *trias politica*.²⁹ There appears to be a *communis opinio* that

20. J. Drion, *Stare decisis/Het gezag van precedenten*, in VERZAMELDE GESCHRIFTEN VAN J. DRION 142-170 (Deventer: Kluwer 1968).

21. *Id.* at 152.

22. *Id.* at 147 (this is in fact slightly more nuanced).

23. In the Netherlands Eduard Maurits Meijers and Paul Scholten, who both became annotators for the *Nederlandse Jurisprudentie*, were of major importance in this regard.

24. R.J.P. KOTTENHAGEN, *VAN PRECEDENT TOT PRECEDENT* 389 (Arnhem: Gouda Quint 1986).

25. *Id.* at 312.

26. J.B.M. VRANKEN, C. ASSER’S HANDLEIDING TOT DE BEOEFENING VAN HET NEDERLANDS BURGERLIJK RECHT/ALGEMEEN DEEL ** 190 (Zwolle: W.E.J. Tjeenk Willink, 1995).

27. O.A. HAAZEN, *ALGEMEEN DEEL VAN HET RECHTERLIJK OVERGANGSRECHT* 340 (Tilburg 2001).

28. PETER RIJPKEMA, *RECHTERSRECHT* 232 (Den Haag: Boom 2001).

29. A.J.T. WOLTJER, *WETGEVER, RECHTER EN HET PRIMAAT VAN DE GELIJKHEID* 527

in Dutch law there is a light variant of precedent.³⁰ As to the theoretical foundation of this system, the opinions are divided.³¹

C. *Precedent in Other Civil Law Jurisdictions*

Are the developments in the Netherlands an example of what is happening in other civil law systems? Not completely, but the differences are only marginal. In Belgium, when it looks as if the *Cour de cassation* is unaware of any precedents, in fact it is the conclusions of the *Parquet général* and the *mercuriales* of the *procureur-général* which serve as a functional equivalent.³² In France, a strict division between law and fact still has the consequence that courts of appeal are not considered to provide precedents. In Germany, legal authors sometimes argue that once the *Bundesgerichtshof* has overturned previous caselaw, this will apply retroactively to the date of the entry into force of the legislation concerned to all cases arisen prior to the decision.³³ As for the theory behind this, authors are divided between Fikentscher's "Theorie der Fallnorm"³⁴ and Bydlinski's "Lehre von der subsidiären Verbindlichkeit des Präjudizienrechts."³⁵ For a more extended analysis, I refer to the study by MacCormick and Summers³⁶ and to a volume edited by Vincenti.³⁷ According to many authors, a convergence is taking place: "common law and civil law practice, each in like fashion to the other, likewise admit of justified departures from precedent."³⁸ This convergence also is apparent from a number of recent publications on the legitimacy of the judge.³⁹

(Den Haag: Boom).

30. I. Giesen, *De 'achterblijvers' van de rechtsontwikkeling: over verouderde rechtspraak en hoe er weer vanaf te komen*, WPNR Nr 6494 (2002) (appears to defend the contrary). *But see* WPNR Nr. 6507 (2002) (Giesen's Post Scriptum, under my reaction, of which this paper is a further elaboration).

31. There is an abundance of philosophical writing on this theme. *See* RAIMO SITTALA, *A THEORY OF PRECEDENT/FROM ANALYTICAL POSITIVISM TO A POST-ANALYTICAL PHILOSOPHY OF LAW* (Oxford: Hart 2000).

32. Isabelle Rorive, *Le revirement de jurisprudence/Etude de droit anglais et de droit belge* 504, 520 (Bruxelles: Bruylant 2003).

33. *See* ANDREAS HELDRICH, *50 JAHRE RECHTSPRECHUNG DES BGH—AUF DEM WEG ZU EINEM PRÄJUDIZIENRECHT?/FESTVORTRAG ZUM 50-JÄHRIGEN BESTEHEN DES BGH* 497-500 (2000).

34. W. Fikentscher, *Präjudizienbindung*, *Zeitschrift für Rechtsvergleichung* 518 (1985).

35. FRANZ BYDLINSKI, *JURISTISCHE METHODENLEHRE UND RECHTSBEGRIFF* 501-515 (Wien: Springer, 2d ed. 1991).

36. D. NEIL MACCORMICK, ROBERT S. SUMMERS, *INTERPRETING PRECEDENTS* (Dartmouth: Ashgate 1997).

37. UMBERTO VINCENTI, *IL VALORE DEI PRECEDENTI GIUDIZIALI NELLA TRADIZIONE EUROPEA* (PADOVA: CEDAM 1998).

38. MacCormick and Summers, *supra* note 36, at 531, 535.

39. In 2002, this was one of the subjects on the agenda of the Sixteenth Comparative Congress of the *Académie Internationale de Droit Comparé*. *See, e.g.*, The national

D. Precedent in Central and Eastern Europe

So far, this paper has presented the place of precedent in common and civil law as one evolving from two conflicting trends: the common law trend towards precedent, although recently showing a slight recoil, and the civil law trend away from precedent, with a slightly earlier a tendency towards recognition of precedent. Where does this leave the legal systems of Central and Eastern Europe? The answer can be short: they are back where the civil law countries stood some fifty years ago: "the post-communist judicial methodology is much closer to the narratives of the European legal culture that prevailed in the nineteenth century."⁴⁰ One of the reasons for this can be found in the writings of communist writers. In the former Czechoslovakia, the role of precedent was denied on the ground that as a source of socialist law, it would go against the principle of democratic centralism.⁴¹ In this view, judge-made law is incomprehensible, beyond the reach of the vast masses of population. Likewise, the Hungarian Eörsi emphasised that the socialist legal system consisted exclusively of written law.⁴² The situations in the German Democratic Republic⁴³ and Estonia⁴⁴ were very similar. A problem also was the paucity of reported cases. One author, writing about Russian tort law, had to resort to newspaper clippings to find out about lawsuits against the government.⁴⁵ Only in Poland, the writing of Wróblewski may have been influential in the use of precedent.⁴⁶

Kühn suggests that the type of cases decided by courts in Central and Eastern Europe, often very simple, was much different from that in Western Europe:

reports of J.L.M. Gribnau, *Legitimacy of the Judiciary*, in NETHERLANDS REPORTS TO THE SIXTEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 25-45 (Antwerpen: Intersentia 2002); BARTHELÉMY MERCADAL, LA LÉGITIMITÉ DU JUGE, REVUE INTERNATIONALE DE DROIT COMPARÉ 277-291 (2002); ANDREAS VOBKUHLE, GERNOT SYDOW, DIE DEMOKRATISCHE LEGITIMATION DES RICHTERS, JURISTEN ZEITUNG 673-682 (2002).

40. ZDENEK KÜHN, *WORLDS APART/WESTERN AND CENTRAL EUROPEAN JUDICIAL CULTURE AT THE ONSET OF THE EUROPEAN ENLARGEMENT* (2004).

41. *Id.* (quoting BOGUSZAK, *ZÁKLADY SOCIALISTICKÉ ZÁKONNOSTI V CSSR* 144 (Praha 1963)).

42. G. EÖRSI, *COMPARATIVE CIVIL (PRIVATE) LAW/LAW TYPES, LAW GROUPS, THE ROADS OF LEGAL DEVELOPMENT* 547 (Budapest 1979).

43. Inga Markovits, *Children of a Lesser God: GDR Lawyers in Post-Socialist Germany*, 94 MICH. L. REV. 2270 (1996).

44. F. Emmert, *The Independence of Judges: A Concept Often Misunderstood in Central and Eastern Europe*, 9 EUR. J. OF L. REF. 405 (2002).

45. Donald D. Barry, *Tort law and the State in Russia*, in GEORGE GINSBURGS ET. AL, *THE REVIVAL OF PRIVATE LAW IN CENTRAL AND EASTERN EUROPE/ESSAYS IN HONOR OF F.J.M. FELDBRUGGE* 179, 187 (The Hague: Nijhoff 1996).

46. Jerzy Wróblewski, *The Judicial Application of Law* (Kluwer 1992).

Complex issues of international litigation, or of administrative, constitutional or commercial law, either did not arise in the socialist state or the task of resolving them was transferred from courts to other bodies. For instance, East German judges handled a caseload consisting 51% of family law issues, while the caseloads of their West German counterparts contained only 13.7% of similar cases.⁴⁷

Kühn further observes the status of the judiciary:

It was impoverished, lacking in prestige, with very problematic education, ignored by the elites, who generally did not join the judiciary, either before or after the anti-communist revolution. The judiciary continued to be a predominantly female profession, which was, however, not the sign of flourishing gender equality.⁴⁸

According to this author, since the fall of communism the old philosophy of bound decision-making continues:

The ordinary courts in the Czech and Slovak republics, and most other post-communist nations, have never acted as one might expect transitional courts would act. With the exception of the constitutional courts, the post-communist courts have continued their formalist reading of the law. When it was necessary to solve a more difficult case, they often saved themselves by disposing of the case on purely formalist grounds.⁴⁹

Kühn informs us about his own experience in the Czech Republic:

It is not rare to find a judge, especially in the lower courts in both the Slovak and Czech Republics, who refuse during trial even any reference to precedent or legal science because she is not "bound by them" and, therefore, they are without any importance for her reasoning, which remains independent of anything but the letter of the law.⁵⁰

Not all experiences are negative. Peter Solomon informs us about the admirable performance of administrative courts in post-Soviet Russia, notwithstanding a dramatic growth of jurisdiction and of caseload.⁵¹

IV. The Future

What does the future hold in stock for us? Are the common law and

47. ZDENEK KÜHN, *WORLDS APART/WESTERN AND CENTRAL EUROPEAN JUDICIAL CULTURE AT THE ONSET OF THE EUROPEAN ENLARGEMENT* (2004).

48. *Id.*

49. *Id.*

50. *Id.*

51. Peter H. Solomon Jr., *Judicial Power in Russia: Through the Prism of Administrative Justice*, 38 L. & SOC. REV. 549-581 (2004).

the civil law converging and is it simply a question of time before Central and Eastern Europe's backlog is overcome? In the following sections of this paper, I will answer these questions.

A. *Common Law: The Future*

It seems as if the very strict adherence to *stare decisis* has slightly declined over the past half century. Recently, there seems to be more room for divergence. On the basis of a number of cases which attracted much popular attention, Harris has concluded that precedents should be easier to depart from:

The presumption to date has been that *stare decisis* values should prevail over the overruling of "merely wrong" precedents. I think that the presumption should be reversed in favour of the overruling of wrong precedents unless their retention can be justified in the circumstances by overriding *stare decisis* values.⁵²

B. *Western Europe: Towards Convergence with the Common Law?*

Many writers in civil law countries seem to be of the opinion that the future lies with a system in which precedent plays a larger role, as compared with legislation. Adams, for example, argues for a culture of attributing binding effect to judicial precedents.⁵³ I do not share this view. It seems to me that the notion of the primacy of precedents of one single Supreme Court in a legal system no longer is adequate. There are two arguments which I can give. First, the central position of courts—and the rather humble role of legal writing—is changing. In most European countries, Constitutional courts or councils have gained importance. If one reads recent overviews of Belgian or German case-law, the importance of the decisions of the Arbitration Court (Belgium's Constitutional Court) and the *Bundesverfassungsgericht* (Germany's Constitutional Court) is overwhelming. But the Belgian *Cour de cassation* and the German *Bundesgerichtshof* will also have to follow the decisions of the two European courts: the Luxembourg Court of Justice—including its Court of first instance—of the European Union and the Court of Human Rights in Strasbourg. The Marx case is an example of a European decision of the

52. B.V. Harris, *Final Appellate Courts Overruling their Own "Wrong" Precedents: The Ongoing Search for Principle*, 18 LAW QUARTERLY REVIEW 408, 427 (2002). The author develops a number of "considerations relevant to deciding whether to defer to or overrule precedent." *Id.* at 422.

53. MAURICE ADAMS, *STARE DECISIS ET QUIETA NON MOVERE/RECHTSZEKERHEID EN DE GEBONDENHEID AAN PRECEDENTEN IN HET ENGELSE RECHTSSYSTEEM. LESSEN VOOR ONS?* 13, 50 (2002).

latter court which has exerted considerable influence in Belgium. In the future, a system of federal European courts under the two Luxemburg courts is also imaginable.

Apart from this formal argument, there also is a substantive argument. The changes in norms and values, in theories as to finding the law, nowadays are so rapid, that case-law—which often takes a long time to be submitted to a legal system's highest court—simply cannot cope with them. Legal writers will have to fill the gap. They should formulate general principles and fit in the various bodies of case-law developed by the traditional highest civil courts, the newly formed constitutional courts and the European courts. Attributing *stare decisis* to the decisions of one of these courts no longer fits into this system. This will mean that established precedents, which have not yet been challenged in the courts, may well lose their value, because they are at variance with the newly developed general principles, such as that of non-discrimination,⁵⁴ equality,⁵⁵ or proportionality.

So far, I have addressed purely national questions of precedent. In Europe, however, there is a growing body of community law. It does not make sense that this law is being interpreted in different ways and by way of different systems of reasoning in the various jurisdictions. In this regard, civil law jurisdictions have much to learn from common law courts, where the use of precedents from other common law jurisdiction, if only as persuasive precedents, is by no means exceptional.⁵⁶ Recently, English courts have even accepted continental cases as—persuasive—precedents.⁵⁷ Civil law courts rarely take into account what is happening over the border. I would suggest that the blame does not lie exclusively with the courts. Legal academics have a task in preparing the use of comparative law. A most important part of this is the collection of cases, assembling these into a database and providing translations into easily accessible languages.⁵⁸

54. See, e.g., NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY 309 (Antwerpen: Intersentia 2002).

55. DENIS BERTHIAU, LE PRINCIPE D'ÉGALITÉ ET LE DROIT CIVIL DES CONTRATS 475 (Paris: LGDJ 1999).

56. A famous example is the case of *Donoghue v. Stevenson*, AC 562, All ER 1 (HL) (1932), where a New Jersey case was used.

57. See cases such as *White v. Jones*, 2 AC 207, 2 WLR 187(1995); *Fairchild v Glenhaven Funeral Services*, 3 WLR 89 (2002); and BASIL MARKESINIS, COMPARATIVE LAW IN THE COURTROOM AND CLASSROOM/THE STORY OF THE LAST THIRTY-FIVE YEARS 273 (Oxford: Hart 2003) (quoting *Greatorex v. Greatorex*, 1 WLR 1970 (2000)).

58. Some examples are the several collections of cases relating to the Vienna Sales Convention and the one on the EU directive on product liability, set out by Thomas Lundmark, "Soft" *Stare Decisis: The Common Law Doctrine Retooled for Europe*, in REINER SCHULZE, ULRIKE SEIF, RICHTERRECHT UND RECHTSFORTBILDUNG IN DER EUROPÄISCHEN RECHTSGEMEINSCHAFT 161, 168 (Tübingen: Mohr 2003).

C. *Central and Eastern Europe: We Shall Overcome*

Should the status of precedent in Central and Eastern Europe continue in its present form? In order for their legal systems to react quickly to new developments, it is essential that they follow their Western civil law counterparts. How should this be accomplished? I will not try to give an exhaustive answer to this question, but will simply come up with some suggestions.

First, legal doctrine is important in this matter. It is essential that the importance of case law is stressed in national books on legal methodology. Second, cases should be reported far more often than what is presently done. Until recently, the number of law reviews or other publications devoted to reporting of cases has been very limited. Additionally, it was often viewed that reporting a case gives it more weight. Therefore, such cases must be carefully selected, preferably by justices in the Supreme Court. Since the process of selection takes a considerable time, cases are reported with considerable delay.⁵⁹ I do not suggest that this selection process be abolished, but rather that it shall be supplemented by law reports for specific areas that are based on voluntary submissions by judges and attorneys. The argument that this will cost very much, in this era of electronic law reports is no longer valid.

Third, in order for the reported cases to have any impact, they should be annotated. This is the lesson to be learned from Western Europe. The annotations of the two grandmasters of Dutch civil law, Meijers and Scholten, revolutionised the place of case law in the Netherlands. In France, it is still virtually impossible for an outsider to fathom the relevance of a case handed down by the *Cour de cassation* without case notes. This is easier said than done. At first, courts may not like others criticising their opinions and this may reflect upon the annotators. This in turn may shy away possible annotators who do not wish to jeopardise their career.

Fourth, legal education should take into consideration the importance of case-law as authoritative. The impression one gets from legal education in Central and Eastern Europe is that precedent is not taught at all. Exchange students, upon arrival in Western Europe, in their classroom papers do not report cases, unless by way of example. The place of case-law in the legal education of Slovakia becomes clear from the following quotation:

During my early studies at a faculty of law in Slovakia, I do not remember reading a single court decision. Case law had always been considered as source of law only in the common law system, and not

59. EMILIA CAPRNDOVA, IMPORTANCE OF CASE LAW/COMPARATIVE STUDY OF ENGLISH, GERMAN AND SLOVAK LAW 44 (Utrecht 2004).

ours, although it was admitted, that decisions of the Slovak Supreme Court are de facto been followed. This phrase de facto, but not de iure was repeated many times, without actual introducing any court decision or pointing out its real importance in our legal order. Rather, it was stressed, that Slovak law is not based on court decisions; they are binding only for specific parties, not generally. They are definitely not sources of our law. As the role of case law had considerably been neglected, and this was presented as the reality in all civil law countries, I got the impression, that whole continental Europe does not use them at all.⁶⁰

And to quote yet Kühn again:

Legal academia supports the old dogmas of the inferior role of the judiciary and of parliamentary sovereignty. During the first ten years of the Czech Constitutional Court's existence (1993-2003) the prevailing attitude of the educators at the Czech law schools was oriented strongly against the Constitutional Court. The Constitutional Court is often considered a symbol of poor reasoning, as it openly employs value reasoning instead of textual arguments.⁶¹

Fifth, if we wait for the current generation of law students to move into key positions in society, it will take another twenty to thirty years before Central and Eastern European countries have caught up. We should therefore also provide continuing legal education to the present holders of key positions.⁶²

D. *The Future of Precedent*

What may we learn from the developments sketched above? There seem to be conflicting tendencies in civil and common law. On the European continent, there was a system of precedents before the codification in the nineteenth century. Because of the primacy, which at the turn of the eighteenth century was attributed to legislation, precedent lost its importance. But, because of idleness of the legislature in the area of private law, the courts gradually regained some of their former positions. In this, the courts were helped by legal writing, which in its annotations provided case-law with terms of reference and allowed practitioners to see its importance. Legal theory comes to the conclusion that there is once again a light version of the system of precedent, although with exceptions and ways

60. *Id.* at 4.

61. ZDENEK KÜHN, *WORLDS APART/WESTERN AND CENTRAL EUROPEAN JUDICIAL CULTURE AT THE ONSET OF THE EUROPEAN ENLARGEMENT* (2004).

62. I am myself involved in a MATRA project supported by the European Union, which aims at helping Czech judges to cope with case law. The project includes funding of a law report, *Jurisprudence*.

out.

Not all civil law systems are in the same state of development. Especially lagging behind are the systems of Central and Eastern Europe, which still suffer from their socialist past. In the *common law* systems, the development has been the reverse. Until the nineteenth century, there was no system of precedent. Only recently has it been accepted that the courts should also follow “wrong” precedent. In this sense, there is a major difference with the *civil law*, where courts are not bound to follow wrong precedent.⁶³ The difference, however, is diminishing—witness the recent call in the *common law* by B.V. Harris for reversal of the main rule.⁶⁴

Most authors predict that the future lies in the common law, which will gradually extend its theory of precedent first to Western and then to Central and Eastern Europe. I do not share this view, but I do agree that equality and predictability justify adherence to at least a limited theory of *stare decisis*.⁶⁵ I also agree that legal theory should take into account that the law does not evolve within itself. I do, however, oppose the introduction in civil law jurisdictions to a strict system of precedent as may still be found in common law systems. Instead, I advocate a system based on persuasive authority of cases as contextualised by legal doctrine.

63. That continental courts, unlike their common law counterparts, do not consider themselves bound by “wrong cases” is apparent from cases such as Hoge Raad 7 March 1980, *Nederlandse Jurisprudentie* 1980, 353, in which the Dutch Supreme Court accepted that its view had for a long time not been observed by lower courts.

64. B.V. Harris, *Final Appellate Courts Overruling their Own “Wrong Precedents:” The Ongoing Search for Principle*, 118 *LAW QUARTERLY REVIEW* 408, 427 (2002).

65. Thomas Lundmark, “Sofi” *Stare Decisis: The Common Law Doctrine Retooled for Europe*, in REINER SCHULZE, ULRIKE SEIF, *RICHTERRECHT UND RECHTSFORTBILDUNG IN DER EUROPÄISCHEN RECHTSGEMEINSCHAFT* 166 (Tübingen: Mohr 2003).

