The Doctrine of Precedent in English and Norwegian Law – Some Common and Specific Features

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1 Introduction[1]

The purpose of this article is to *describe and systematize* some similarities (section 2) and differences (section 3) between the English and the Norwegian doctrines of precedent. With respect to similarities I will also make some *evaluations*, by criticizing what I regard as some common weaknesses in the English and Norwegian doctrines (section 4).

One should at the outset notice an extension of the subject outlined: By the word "doctrine"[2] in the present context is usually meant what learned lawyers, including judges, *say about* how lawyers, especially judges, should reason when they use previous cases as a source of law.[3] In addition to discussions of these statements, I will inquire into and offer some views on how judges *actually deal with* previous cases in the judicial decision-making process, and *why* this process proceeds as it does. This factual context is necessary for a good understanding of the doctrines.

The main focus of this article is on *long-term features* of the doctrines and practice of precedent in the English and Norwegian systems. By analogy with such distinctions as 'climate-weather' in meteorology and 'structure-cycle' in economics, one could say that the article investigates the climate and structure of the English and Norwegian doctrines and practice of precedent – with the proviso that in relation to recent changes it may at present be uncertain whether

1 I would like to thank director-general Inge L. Backer, Ministry of Justice, for comments on the content, and Patrick N. Chaffey, University of Oslo, for comments on my English.

2 I use double quotation marks (" ") , in addition to their regular uses otherwise, to signify that I am talking about linguistic entities (words, phrases, sentences), and single quotation marks (' ') to signify that I am talking about meaning entities (criteria, concepts, propositions).

3 I use "lawyer" as a translation of the Norwegian "jurist", that is, as denoting persons using their law degree professionally, be it in public or private positions or as self-employed persons.

a change refers to climate and structure, or whether it is a fluctuation of weather-like/cycle-like character within the existing climate and structure (see for example section 3.1.4 (i) below).

2 Some (Basic) Similarities

2.1 The basis of the doctrine of precedent (i): values and norms

English and Norwegian lawyers to a large degree appeal to the same values and norms when justifying or criticizing the practice of the courts concerning precedent.[4]

The main arguments traditionally given *for* a (more or less) strict doctrine of precedent, are:

> The need for certainty and reliability (predictability)
>
> The value of equality before the law (formal justice)
>
> The fear of the retroactivity of judicial legislation (judge-made law)[5]

The main arguments traditionally given *against* a (more or less) strict doctrine of precedent, are:

> The need for flexibility, for example changing the rules with changing social conditions
>
> The need for reasonable results in the particular case (substantive justice)

These values and norms are characterized by being *morally, politically and legally* relevant. More specifically, I will draw attention to two aspects: The said values and norms constitute an extra-legal basis for the doctrine of precedent; and they have the function of connecting law, morals and politics.

2.2 The basis of the doctrine of precedent (ii): judicial practice

2.2.1 Another similarity between the English and the Norwegian doctrines of precedent concerns the *empirical facts* that lawyers point to when asked about the *legal basis* of the doctrine (in contrast to the values of mixed moral, political

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4 See Goodhart, *Precedent in English and Continental Law*, on the reasons traditionally given to justify the English doctrine of precedent; Cross, pp. 29–32 (30–33), on the retroactivity of judge-made law. See also the use of some of the arguments in *the Practice Statement of 1966 from the House of Lords*, cited in section 3.1.2 (2) below. – For the reasons as used in Norwegian law, see Eckhoff, *Rettskildelære* [the doctrine of the sources of law], 1st ed. pp. 158–60; 3rd ed. pp. 152–55; see also Augdahl, *Rettskilder* [sources of law], pp. 263–65; Andenæs, *Innføring i rettsstudiet* [introduction to the study of law], pp. 89, 114–17; Fleischer, *Rettskilder* [sources of law], pp. 165–68.

5 See also section 3.4 below, about prospective overruling as a means of alleviating this aspect of judge-made law.

and legal character, mentioned in the preceding section): The rules of precedent are seen essentially as rules of *judicial practice*.[6]

The term "(judicial) practice" deserves some attention, since it is commonly used about rather different matters (sections 2.2.2–2.2.5).

2.2.2 Every judicial decision directly decides only the *particular case*. However, it is common ground in the English and Norwegian legal systems that such particular decisions can be used as a legal basis for *general rules*.

In this latter function, judicial decisions should be seen as having two aspects. First, every judicial decision is part of a possible rule-generating practice in that it falls into line with or crosses other judicial decisions concerning the *substantial rules* (in this context, including the law of evidence). Second, a judicial decision is part of a possible rule-generating practice to the extent that it falls into line with or crosses other judicial decisions concerning the *rules of precedent*.

2.2.3 The judicial decision is seen as a basis for rules of precedent even if the judge does not make any statements about these rules: His decision serves as a basis for the establishment, affirmation or correction of the rules of precedent, simply because his opinion makes use of earlier judgments as authoritative arguments in the case at hand. Such "*doings*" are seen as just as acceptable a legal basis for the rules of precedent as explicit "*sayings*".

This distinction is important, because, as I will argue below, the "doings" of the judge are not infrequently *at variance with* his "sayings" in the context of using previous judgments as a source of law.

2.2.4 Whether a precedent-practice is in the form of "doing" or "saying", it can manifest itself as a *slow evolution* of the rules of precedent through a series of judicial decisions, or as more *abrupt changes*. – I will later mention two occurrences of this latter type of change in the practice of the English courts.[7] Such abrupt changes have provoked discussion about the basis of the English rules of precedent.[8] – In the practice of Norwegian courts, such abrupt changes are unknown, and so there has been no corresponding discussion about the basis of the Norwegian doctrine.

2.2.5 The Norwegian Act no. 2 of June 25th 1926 ("To amend the law relating to Høyesterett")[9] does not represent any exception to the preceding description of how judicial practice functions as a legal basis for the doctrine of precedent. The Act only *presupposes* that Høyesterett as a rule follows its own previous

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6 Cross, pp. 22–23 (24–25); Eng, *Does the Doctrine of Precedent Apply to Judicial Arguments Concerning the Doctrine of Sources of Law?*, section 2.1 with further references; see also the same work, section 3.2.

7 See section 3.1.2 (1)(ii) on the dispute between Lord Denning in the Court of Appeal and the House of Lords, and section 3.1.2 (2) on *the Practice Statement of 1966 from the House of Lords*.

8 Cross and Harris, pp. 104–8, 113–16.

9 "Høyesterett" is the name of the Norwegian Supreme Court.

decisions and that it has the competence to overrule the same decisions. The Act *does not constitute the basis* either for a duty to follow or for a competence to overrule. *Nor does it place any restraints on* Høyesterett's competence to delimit its own competence to overrule, that is to say, on Høyesterett's competence to create a doctrine of precedent addressed to itself.

> The relevant provision is § 1. This provides that a member of an ordinary division of Høyesterett, consisting of five members, can require that a case shall be decided in plenary session when two or more members of the ordinary division wish to overrule a previous decision by Høyesterett (whether this previous decision is one of an ordinary division or one of a plenary session).

2.3 Judicial decision viewed as an instance of a general and binding rule: "the ratio decidendi"

A further similarity between the English and the Norwegian doctrines of precedent is the central role in both doctrines of the following two basic premises:

(i) Every judicial decision concerning a question of law can be seen as an "instance" ("manifestation", "articulation", "expression", or something similar) *of a general rule* in the sense of a set of general conditions (necessary and/or sufficient) for a legal consequence.

(ii) It is *this rule* of the earlier case, and *not the words* (formulations), that is *binding* on the judge in a later case.

> The second premise can be illustrated by the difference in this respect between case law and statute law: The judge in a later case has competence, and is at liberty, to reformulate the rule for which the earlier case is seen as authority. But he does not, of course, have the competence to reformulate the wording of a statute. – This is the legally rationalized background of the fact[10] that rules based on case law do not have any fixed wording. In addition, the actual wordings given by lawyers (the courts, counsel, legal theory, etc.) are often fragmented, vague, and refer to value judgements, although without explicitly saying so. Take as an example the rules concerning when two potentially contracting parties shall be deemed to have moved from the stage of preparation to that of being legally bound: These rules have in both systems all the characteristics mentioned.

The binding rule of the earlier case is sometimes called "*the ratio decidendi*". This is also the meaning of the phrase when used in this article.[11] In this *wide sense*, the phrase refers to the binding rule of the case, whether that rule is expressly stated, obviously implied, dimly recognized by the judge of the case,

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10 Llewellyn, *The Bramble Bush*, p. 47; Eckhoff, *Rettskildelære*, 1st ed. pp. 189–90; 3rd ed. pp. 173–74.

11 One should notice the one-way relationship: All rules of earlier cases viewed as binding are called "rationes decidendi". But not all rationes decidendi are called "binding" (section 3.3 below). – Later on I will question the presupposition that every case has a ratio decidendi in the form of a set of general conditions (necessary and/or sufficient) for a legal consequence (section 2.4.3.3).

or later constructed by judges of later cases, by counsel, by legal theory, or by other lawyers.[12]

One should be aware that the phrase "ratio decidendi" is used in various ways. Especially one should distinguish the wide sense used in this article, from a *narrower sense*, according to which the phrase only refers to the rule expressly stated or obviously implied by the judge as decisive for his judgment.[13]

This distinction between the wide and the narrow sense of "ratio decidendi", a distinction within factual legal use of the phrase, is important in order to *avoid pseudo-dis/agreements*:[14] Much discussion both of particular cases and of precedent in general has probably been obfuscated by a failure to distinguish between, and to keep separate, these two senses of "ratio decidendi".[15]

2.4 The search for the ratio decidendi

2.4.1 Introduction

From the two common and basic premises mentioned in the previous section – first, the binding rule "behind" every case, and second, the imperfect wording of these rules by the judges – there follows a *problem in common*: How does one find these binding rules? Or, in more technical terminology: How does one find the ratio decidendi of a case?

> The two basic premises and the resulting problem are more *explicitly formulated* in the English doctrine than in the Norwegian.[16] But the premises and the problem constitute vital elements in the Norwegian doctrine as well,[17] as can be

12 Goodhart uses "ratio decidendi" in this wide sense, see *Determining the Ratio Decidendi of a Case*, especially pp. 162–68.

13 Llewellyn uses "ratio decidendi" in this narrower sense, see *The Bramble Bush*, pp. 45, 52, 66; *The Case Law System in America*, pp. 14–15. Cross probably does the same, see pp. 76–78 (72–74), but I find his exposition unclear on this point. – MacCormick assumes that the narrow sense is the predominant one among judges and practitioners (in the English system), see *Legal Reasoning and Legal Theory*, p. 86. – See also some remarks below on the legal usages in the Norwegian system (at the end of section 2.4.3.1).

14 Accordingly, the following statement of Cross seems ill-judged: "[T]he distinction [between the narrow and wide sense of "ratio decidendi"] is one which does not need to be drawn in the majority of cases", see Cross, p. 78 (74).

15 Or the corresponding two senses of other terms used to designate the binding rule of a case. Another such term much in use is "principle"/ "prinsipp". The same ambiguity, between the wide and the narrow sense, mars the use of this term as well.

16 See e.g. Cross, p. 49 (48–49): "[I]t is comparatively seldom that a judge expressly indicates the proposition on which he relies as ratio decidendi, yet legal theory demands that there *should* be a ratio decidendi in *all* cases in which the judgment contains more than factual statements or reasoning on the facts" (my italics). See also Llewellyn, *The Bramble Bush*, p. 42 (compare pp. 42–44, 66): "Our legal theory does not admit of single decisions standing on their own"; and further, Eckhoff, *Rettsvesen og rettsvitenskap i U.S.A.* [legal practice and jurisprudence in the U.S.A.], pp. 136 ff, p. 247.

17 See the Norwegian doctrine as described in Eckhoff, *Rettskildelære*, 1st ed. ch. 6 (especially section IV; pp. 162–69); 3rd ed. ch. 7 (especially sections III–IV; pp. 138–48). See also Gaarder, *Domstolene og den alminnelige rettsutvikling* [the courts and the evolution of the law], especially pp. 241–57.

witnessed when Norwegian lawyers reason about or use judicial decisions as a source of law.

There seems to be much *disagreement and uncertainty* as to which criteria are *in fact used* when generating the ratio decidendi. Interwoven with this factual disagreement and uncertainty, there is probably also disagreement as to which criteria *should be used* when generating the ratio decidendi.

In describing the doctrines on these points, I find it convenient to sort their elements onto two levels: First, a basic and often tacitly presupposed view with respect to the status of the general and binding rule (section 2.4.2). Second, some more concrete statements as to which criteria are used or should be used in identifying this rule (section 2.4.3).

2.4.2 Law viewed as found (declared) and not as created: "the declarative point of view"

Both in the English and the Norwegian legal systems there is a strong tendency to *talk as if the rule "behind" the judicial decision is found (declared), not created*. – This way of speaking we may term "*the declarative point of view*".

Our interest here is in *the modern version* of the declarative point of view, according to which the judge finds the law in previous judicial decisions or in other sources of law. – In *judicial decisions*, the tendency to adhere to this view is strong: Even when the judges make law, they speak as if they only declare it. This is made possible by the declarative point of view being deeply ingrained in the language and practice of *lawyers in general*, without necessarily being consciously or systematically articulated.

Today it is quite common to find authors on judicial reasoning making statements to the effect that the declarative point of view is false and that this is a well recognized fact.[18] Such statements need to be supplemented in two respects.

First, one should be aware that the declarative point of view, by definition (in the usual meaning of the expression "declarative" in this context), is *not* bound to any special theory about where or how to find the law which is assumed to have an independent existence. That is to say, one must distinguish between dis/agreement about where or how to find the law, and dis/agreement about whether the law is found at all, or created by the judge. Only the latter dis/agreement is about the declarative point of view. So, it is logically *possible* to side with for example Cross in his critique of authors who say that the judge finds the law in usages and customs (Hale and Blackstone),[19] *and* at the same time be in agreement with the declarative point of view of these authors. And it

18 Some examples: Cross (and presumably Harris as co-author of the fourth edition) states that "the declaratory theory no longer holds sway", see Cross, p. 24 (26), compare pp. 26–33 (27–34). Atiyah, Simpson, Andenæs and Eckhoff state that "we all know that" judges make law, see Atiyah, *Pragmatism and Theory in English Law*, p. 154, compare p. 160; Simpson, *Innovation in Nineteenth Century Contract Law*, p. 247; Andenæs, *Rettsteori og rettspraksis* [jurisprudence and judicial practice], p. 411; Eckhoff, *Rettskildelære*, 1st ed. p. 193; 3rd ed. p. 177.

19 Cross, p. 26 (27–28).

seems to me that present legal doctrines, including the present English and Norwegian doctrines of precedent, *often entertain just this position* as an important part. – It is this position that I refer to when speaking of "the modern version" of the declarative theory.

Second, in declaring the declarative point of view to be dead, one should pay attention to a distinction between the declarative point of view as a *description*, to be judged by its truth or falsehood, and the declarative point of view as an *instrument with other functions*, which may, like other beliefs, have much vitality independent of its truth or falsehood:

One thing is to kill off the declarative point of view in *learned books*, by showing that it does not give a correct picture of how judicial reasoning in fact proceeds; that is to say, by showing that this point of view is false when seen as a description (as "a theory"). This, I think, has been done in a convincing manner by several authors (section 4.2.2 below).

Something else is to remove the declarative point of view from *the language of practising lawyers* (judges, counsel, civil servants, etc.). This has shown itself to be much more difficult. As a consequence, legal theory and legal practice have split: On reflection most lawyers would probably be willing to reject the declarative point of view as false. However, as part and parcel of legal language and legal practice *lawyers can hardly avoid expressing the declarative point of view*, when participating in legal argument. Further, as a psychological corollary, they can hardly avoid the states of *belief and confidence* in this point of view, since legal language is their most important tool.

> It falls outside the scope of this article to demonstrate these assertions in detail. Suffice it here to sketch the outlines of the argument:
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> First, in order to see how *legal language* is structured around the declarative point of view, one should consult some specimen of justificatory legal argument and study how legal language takes the responsibility away from the person arguing and places it elsewhere. – Either legal language places the responsibility on the world as it objectively is: For example, a contract is said "to be made by the parties" or to "come into existence"; or the act of the defendant is said "to be" negligent. – Or legal language places the responsibility on other persons, having more legitimacy as creators of rules than the judge in the present case: It places the responsibility on the legislative body (the validity of a rule or particular solution is said to depend on whether it "is in agreement with the intention of parliament"); on the unknown judges of earlier cases (a rule is said "to be the ratio" of an earlier case and this case is said "to be strictly binding", "to have coercive authority", or the like); or on unknown individuals or forces (customs, natural law).
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> Second, in order to see how *legal practice* enforces the application of this declarative legal language, one should reflect on the content of some typical legal roles in the present English and Norwegian legal systems, for example those of judge, counsel or civil servant. Then one can see how the occupation and execution of these roles severely limit the possibilities in a particular case of arguing that the legal problem has many possible justifiable solutions. – "To argue that this or that is the correct view, as academics, judges, and counsel do, is to *participate* [Simpson's italics] in the system, not simply to study it scientifically. *For the purposes of action* [my italics] the judge or legal adviser must of course choose between incompatible views, selecting one or other as the law, and

> the fiction that the common law provides a unique solution is only a way of expressing this necessity."[20]

This survival of the declarative point of view in legal language and thinking, despite repeated and seemingly valid theoretical attacks, is a symptom of this point of view having important functions other than the descriptive one (section 4.2.3 below). It is this practical level of existence, together with the nondescriptive functions, that I wish to direct attention to, by speaking of the declarative point of view as being "deeply ingrained in the language and practice of lawyers in general".

2.4.3 Some statements from the literature

In this subsection, I shall cite or refer to some examples of statements from English and Norwegian literature. – The aim is to illustrate *the main content of the doctrines concerning how to identify the binding rule.*[21] I have singled out three elements of the doctrines for special attention: – The view that the ratio decidendi is *necessary* for the conclusion (section 2.4.3.1). – How *the facts of the case operate both as a source of and limit to* the rationes that can be accepted (section 2.4.3.2). – The basic assumption that the ratio decidendi is always a *set of general conditions* (necessary and/or sufficient) for a legal consequence (section 2.4.3.3).

2.4.3.1 The purported necessity of the ratio; the relativity-question

The following statement by Cross illustrates how essential the criterion concerning the necessity of the ratio is to the doctrine:

> "The main problem of this chapter [entitled "Ratio decidendi and obiter dictum"] can be stated quite simply. Is it possible to do appreciably more than say that propositions of law which a judge appears to consider *necessary* for his decision are ratio and all other legal propositions that emerge from his judgment are dicta? It will be submitted that it is not possible to do appreciably more than this, although some valiant attempts have been made to go further" (my italics).[22]

After having discussed some criteria suggested in legal theory,[23] Cross offers what is said to be "a tolerably accurate description of what lawyers mean when they use the expression [ratio decidendi]":

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20 Simpson, *Common Law and Legal Theory*, p. 97.

21 See also section 3.1.2 (1)(i) below on statements from the English *courts* on the same question. – On the subject of Anglo-American literature, readers of Norwegian should also consult Eckhoff, *Rettsvesen og rettsvitenskap i U.S.A.*, pp. 131–58 (especially pp. 137–40, on, among others, Oliphant, Wambaugh and Goodhart); pp. 246–49 (on Chipman Gray); pp. 259–60 (on Cardozo); and p. 264 (on Bingham).

22 Cross, p. 49. – I believe the distinction between necessary and unnecessary arguments to be descriptively just as inadequate as other "either-ors" in the doctrine of precedent, a point that will be argued in section 4.1 below.

23 Cross, pp. 53–59 (52–57) (about Wambaugh's test); pp. 66–76 (63–71) (about Goodhart's method).

> "The ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as *a necessary step* in reaching his conclusion, having regard to the line of reasoning adopted by him, or a *necessary part* of his direction to the jury" (my italics).[24]

The qualification "having regard to the line of reasoning adopted by [the judge]" draws attention to the relativity of a necessity-requirement: necessary *in relation to what*? – This relativity-question is the underlying problem in many discussions on how to identify the binding rule.

> A complex answer to the relativity-question is the "material fact"-method of Goodhart: "[T]he principle of the case [can] be found by determining (a) the facts treated by the judge as material [that is, as legally relevant], and (b) his decision as based on them."[25] – A simpler answer to the relativity-question is exemplified by the following passage: "If we take seriously the idea that a ratio decidendi is a proposition of law necessary to a decision ... this must mean necessary as a premise in an argument employed to justify the decision. It would be odd if a legal proposition used in reaching a decision were to fail to be a ratio whenever someone could think up an argument by which the decision might have been justified, which would not have required that proposition."[26]

Allen offers the following definition of "ratio decidendi":

> "In its simplest form [the ratio decidendi] may be said to be the principle or principles, deduced from authority, on which the Court reached its decision; or, negatively, the principle or principles *without which* the Court would not have reached the decision that it did reach."[27]

As to the certainty possible in identifying the ratio decidendi, he adds:

> "[S]implicity, as in most definitions, is deceptive, and it disappears when we add, as we are bound to add, that the governing principle may be derived, or believed to be derived, from a number of different sources – from a single preceding case 'on all fours', from a series of preceding cases which are believed to lay down a consistent principle, from analogy from preceding cases, from the common law, or perhaps from natural justice as conceived by the common law. Deductive decision from authorities is never, and cannot ever be, a mechanical process. Every ratio is an interpretation of authorities ... The ratio is ... in a constant state of flux, and I venture to agree with Mr. Cross that it is not susceptible of any precise and comprehensive definition."[28]

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24 Same work, p. 76 (72).

25 Goodhart, *The Ratio Decidendi of a Case*, p. 119; *Determining the Ratio Decidendi of a Case*, p. 169. – One problem raised by this answer is how to draw the line between material and immaterial facts, see *Determining the Ratio Decidendi of a Case*, pp. 174–79. Another problem is how these facts generate a principle, see the same work, pp. 179–80.

26 Evans, *On Case Law Reasoning*, p. 89 (Evans' italics omitted).

27 Allen, *Law in the Making*, p. 259.

28 Same work, pp. 259–60.

Both previous and current *Norwegian doctrine* defines the binding part of the decision as the rule *necessary* for the judgment.[29] Current doctrine has also, in the name of realism, tried to take a closer look at what courts actually do. However, any search for the courts' "doings" has in this context tended to end up with their "sayings". The main cause is that legal theory still takes the reasons given for the judgment as the basis for its statements as to how the judges think.

This sets limits to realism: When the doctrine is based in this way on the courts' verbal behaviour, the idea of the ratio decidendi as a rule necessary for the judgment invariably crops up, although in more sophisticated forms. Compare the *three alternative ways* that current legal theory enumerates, when stating how the Norwegian courts identify the binding part of a previous judicial decision:[30] – First, to search for a rule both expressly stated in the opinion of the previous decision and necessary for the outcome of the decision. – Second, to construct a rule that one thinks the previous decision "must" be seen as an instance of. The element of necessity ("must") is here often only a misnomer for the choice made by the judge in the later case, or by other lawyers making the construction, concerning which rule ought to be used. – Third, to compare the facts of the previous case with the facts of the case at hand. To give substantial guidance, this method presupposes (i) a standard of similarity, and (ii) a rule or decision concerning the kind and degree of similarity required for the previous case to have authority in later cases. These two presuppositions often seem not to be fulfilled: It seems hard to find any systematic relations between the ways lawyers compare the facts of cases and their invoking of previous cases as authorities.

Although all three ways of identifying the binding rule are found in the opinions of Norwegian courts, the second way (constructing what one sees as the best rule) is less used than in English (and American) practice. – This I see as a manifestation of Norwegian courts' preferring to say as little as possible at a more general level about how they reason (section 3.1 below).

2.4.3.2 The facts of the case as a source of and limit to the possible rationes; "distinguishing"

A problem with definitions of "ratio decidendi" like those cited above, is that they do not take sufficient account of the fact that a given fact-situation can be viewed and described in a logically infinite number of ways.

It is common ground in the English and Norwegian doctrines that the binding rule *must have a connection* to the facts of the case: These facts function both as a *source* of and *limit* to the rules that could be accepted as the ratio(nes) of the case. For example, the judge in a case concerning the validity of a contract does

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29 Aubert, *Om den dømmende Magts Virksomhed som Kilde til Udviklingen av vor Ret* [on the judicial function as a source of the evolution of our law], p. 76; Platou, *Forelæsninger over Retskildernes Theori* [lectures on the theory of the sources of law], p. 116, compare pp. 109–16; Berg, *Prejudikater* [precedents], p. 24; Gaarder, *Domstolene og den alminnelige rettsutvikling*, p. 241; Eckhoff, *Rettskildelære*, 3rd ed. ch. 7 III, compare pp. 146–48.

30 Eckhoff, *Rettskildelære*, 1st ed. pp. 162–69; 3rd ed. pp. 138–44; Fleischer, *Anvendelse og fortolkning av dommer* [application and interpretation of judicial decisions], pp. 39–50 (181–90); *Rettskilder*, p. 171.

not have the *competence* to say anything about the existence or content of rules in family law.

> Llewellyn succinctly states *the basic view* of the competence of the court (a view equally prevalent in the English doctrine): "[One] of the vital elements of our doctrine of precedent is this: that any later court can always reexamine a prior case, and under the principle that *the court could decide only what was before it*, and that the older case must now be read with that in view, can arrive at the conclusion that the dispute before the earlier court was much narrower than that court thought it was, [and] called therefore for the application of a much narrower rule. Indeed, the argument goes further. It goes on to state that no broader rule could have been laid down ex-cathedra, because to do that would have transcended *the powers of the earlier court*" (my italics; Llewellyn's italics omitted).[31]

Such attitudes concerning the limiting force of the facts of the case become effective through *the practice of distinguishing*.

> Compare the following statement by Harris: "The general objection to [the] approaches [of Goodhart and Cross] to the identification of rationes decidendi is that they do not adequately deal with the time-honoured common law technique of 'distinguishing'. A judge may say of an earlier decision, binding within the hierarchy, that what was said there does not bind him since the case is distinguishable on its facts. By this he may mean either that *the true ratio* of the earlier case is *narrower* than the earlier judge's statement; or, where the statement imposed some limiting condition which the present judge wishes to discard, that the true ratio is *wider* than the earlier statement. Since all agree that the words of the earlier judge are not to be treated like the words of a legislature, this distinguishing process appears to be unstoppable by any definition of ratio decidendi" (my italics).[32]

The practice of distinguishing the case has demonstrated that the doctrinal criteria for the relationship between the ratio(nes) of the case and the facts of the case provide much *leeway*. On reflection one sees that this *must be so*. A doctrine of precedent cannot furnish criteria which invariably pair one and only one rule to the facts of a case: A given fact-situation can always be viewed and described in a logically infinite number of ways, in an infinite number of perspectives combined with an infinite number of abstraction-levels. As a consequence, the same fact-situation can be used as a starting-point for generating a logically infinite number of rules.

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31 Llewellyn, *The Bramble Bush*, p. 52; see also pp. 44–45, 47, 66. – See further Simpson, *The Ratio Decidendi of a Case*, who tries to explicate the concept of 'ratio decidendi' by taking the competence of the judge as his starting-point, pp. 160 ff., compare pp. 156–59 and p. 167. – I assume that both Llewellyn and Simpson use the term "power" to include what I term "competence": a capacity, founded on norms ("norms of competence"), to create new norms.

32 Harris, *Legal Philosophies*, p. 167.

To illustrate, we may pick three (i–iii) descriptions (combinations of perspective and level of abstraction) from the case of *Donoghue v. Stevenson*.[33]

(i) In "*everyday language*", the facts of the case could be summarily stated as follows: The plaintiff visited Minchella's cafe in Paisley with her friend, who ordered ginger beer for her. Minchella opened the bottle, which was opaque. The plaintiff drank some of the beer. When pouring out the rest, the decomposed remains of a snail floated out with the ginger beer. The plaintiff suffered shock and gastric illness.

There was no relation in contract between the plaintiff and the manufacturer of the ginger beer. The contested legal point was whether the manufacturer could still be held liable, as being under a duty of care in relation to the plaintiff. – The plaintiff had to appeal to the House of Lords, who decided in her favour by a majority of 3 to 2.

(ii) For the plurality, Lord Macmillan stated the following *transformation of the facts* of the case: "I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his products" (p. 620). – Here, the plaintiff has become "member of the public" and "consumer"; and the bottle of ginger beer has become "article of food and drink" and "manufactured with the intention of its being consumed by members of the public in the form in which it is issued".

(iii) Still for the plurality, Lord Atkin stated a *further transformation* of the facts, known as the "neighbour principle": "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question" (p. 580). – Here, the plaintiff and the manufacturer have become "neighbours"; and the bottle of ginger beer has become "[the product of] acts or omissions which you can foresee would be likely to injure your neighbour".

Every imaginable ratio decidendi is therefore *underdetermined* by the criteria of the doctrine: These criteria always allow a *choice* as to which ratio to prefer.[34] – A ratio claimed to be the "only correct one" is never so by virtue of the doctrinal criteria alone, but always by virtue of an *interest-oriented* choice made by those claiming the ratio's "correctness".[35] Against such statements as to correctness, the following questions are therefore valid and should be asked: Which interests

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33 [1932] A.C. 562.

34 Jolowicz, *Lectures on Jurisprudence*, pp. 256–59; Stone, *The Ratio of the Ratio Decidendi*, especially pp. 603–04, 605–07, 612–14; Twining and Miers, *How To Do Things With Rules*, p. 276 and pp. 286–91; Eckhoff, *Rettskildelære*, 3rd ed. pp. 143–44, and, more implicitly, 1st ed. pp. 162–169. For a similar view of the American doctrine, see Llewellyn, *The Rule of Law in our Case-Law of Contract*, especially pp. 1243–48 and 1258.

35 The meanings of terms like "choice" and "decision" when used to characterize judicial behaviour, will be elaborated in section 4.2.2 below.

can defend the particular statement with respect to the ratio of the case? Further, given that some interests of this kind are specified: Can they outweigh the interests that speak in favour of choosing another ratio?

> As to terminology, one should notice that the term "distinguishing" sometimes seems to be used synonymously with "narrowing the area of the ratio decidendi", and in contrast to "expanding the area of the ratio decidendi of the case".[36] This way of speaking is, I think, unfortunate, since it invites mixing up two matters which should be kept apart: First, the area of application of *the rule* (ratio decidendi). Second, the area of application of the *concepts constituting the rule*. – There is *no necessary relation between the narrowing or widening of the two*: The area of application of a rule can be expanded by narrowing a concept constituting the rule, when this concept is part of *a proviso* in the rule. – For this reason I prefer to take "*distinguishing*" in its intuitive sense of splitting up the concepts constituting a rule, and say that this technique *can be used both to expand and to narrow the rule* in question.[37]

2.4.3.3 The ratio as a set of general conditions (necessary and/or sufficient) or as "reasoning by example (analogy)"?

In the preceding discussion, I have presupposed the common and basic assumption (section 2.3 above) that the *ratio decidendi* is always a general rule in the sense of a *set of general conditions* (necessary and/or sufficient) for a legal consequence, the relevant points having been possible to make without questioning this presupposition. – However, at this stage, building on the preceding discussions and tentative conclusions, one is in a position to *question this assumption*.

One should reach back and combine two elements in the preceding analysis:

(i) The rules of case law do not have any fixed and authorized wordings (section 2.3 above)

(ii) The competence of the judge with respect to the precedent-aspect of his decision, is limited by the facts of the case (section 2.4.3.2 above)

The consequence of (i) is that *interpretation* in the strict sense has a minor role to play in case law, compared to its role in statute law:[38] In case law, the process of mapping the linguistically reasonable meaning alternatives of an authorized verbal formulation recedes into the background.

As a consequence of (ii), the process of interpretation tends to be *replaced by* a process of *reasoning by example (analogy)*:[39] In case law, a mapping of similarities and dissimilarities between the facts of the previous case and the

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36 Llewellyn, *The Case Law System in America*, p. 46; Hart, *The Concept of Law*, 1st ed. p. 131; 2nd ed. p. 135; Fleischer, *Anvendelse og fortolkning av dommer*, pp. 33–34 (176–77).

37 This is also the terminology of Harris in the citation above (in the text at note 32).

38 Simpson, *The Ratio Decidendi of a Case*, pp. 157–58, 162. – By "case law" I refer to rules which have their main source in judicial decisions; that is to say, these decisions do not centre their reasoning on interpretation of statutory texts.

39 Simpson, *The Ratio Decidendi of a Case*, pp. 171–72, (75). – On reasoning by example (analogy) in the context of the doctrine of precedent, see Cross, 182–88 (92), (192–96 (99)); Eckhoff, *Rettskildelære*, 1st ed. pp. 168–69; 3rd ed. pp. 140, 143. Both Simpson and Cross pay tribute to Levi, *An Introduction to Legal Reasoning*, which offers a more general discussion of the role of reasoning by example (analogy) in legal thinking.

case at hand, tends to become the dominant way of *thinking*. – Such comparison (reasoning by example) is not governed by rules in the sense of propositions setting necessary and/or sufficient conditions for the solution, but by guidelines, i.e. rules in the sense of propositions saying which aspects of a case are *ir/relevant* qua arguments in a process of weighing and balancing, or what *weight* typically to give these aspects qua relevant arguments.[40] So, in the narrow sense of "ratio decidendi" (see section 2.3 above) a case *need not have* a ratio in the form of a *set of general conditions* (necessary and/or sufficient) for a legal consequence. – In contrast, it is, of course, always possible to construct a rule that the case can be seen as an instance of, regardless of whether that rule was psychologically present to the judge or not. So, in the wide sense of "ratio decidendi" every case *can be given* a ratio in the form of a set of general conditions for a legal consequence.[41]

However, reasoning without sets of general conditions does not necessarily find corresponding expression in the *justification* given for the decision: I venture the hypothesis that much talk about sets of general conditions in opinions of judges is more a way of complying with expectations perpetuated by the doctrine, than expressions of what the judge thinks necessary to make a reasoned decision in the case at hand.

3 Some (Basic) Differences

3.1 The basis of the doctrine of precedent (iii): the verbal role of the courts in shaping the doctrine

3.1.1 When talking about similarities, I started with *the basis of the doctrines*. I pointed, first, to the similarity in values and norms used to justify and criticize the practice of the courts regarding precedent (section 2.1), and second, to the similarity that both systems regard the doctrine of precedent as based on judicial practice (section 2.2).

When talking about differences, I will also start with the basis of the doctrines. More specifically with the *form* that the judicial practice takes in the two systems: Does it take the form of *nonverbal* behaviour (only), or of *verbal* behaviour (also)? – At this juncture one instantly meets a very marked difference between the two systems (section 3.1.2).

A further question is whether this difference corresponds to any difference in the *factual influence* of the courts on the content of the doctrine of precedent (section 3.1.3). Finally one can ask how likely it is that differences, if any, will continue to exist in the future (section 3.1.4).

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40 The concept of 'guideline' will be elaborated in note 104 below with accompanying text (sections 4.1.2–4.1.4).

41 Another question is whether it is always possible to construct a set of general conditions covering more than one case. I submit that this is often not possible, but giving my reasons would go beyond the scope of this article and is anyhow not necessary for a discussion of the questions raised.

3.1.2 In the Norwegian system, the courts prefer to *say as little as possible at a general level* about how they reason.

> As to Høyesterett and its style of writing opinions, one may gain some general impressions from an analysis of dissenting opinions in the period 1961–65, made by Andenæs and Kvamme: Out of a total of 1517 cases, 222 had dissenting opinions. Out of the 222 dissent-cases, 74 were clearly related to questions of law. In more than half of these (39), the legal point of dissent was either (a) not discussed at all, the judge just declaring which of the competing rules he would use; or (b) the judges advanced different legal reasons without saying that they disagreed with each other.[42] For these reasons it was found extremely difficult to relate the legal disagreements in the opinions to the different types of legally relevant arguments (Andenæs and Kvamme distinguish between statutory texts, parliamentary and pre-parliamentary materials of statutes, previous judicial decisions, and considerations relating to justice and policies), as well as to the relative weight of the arguments.[43]

This reticence of the Norwegian courts is no less marked when it comes to *the use of previous cases as a source of law*. – I venture the hypothesis that the reticence of the courts and the minor role given to the study of cases in Norwegian legal education (in contrast to the focus on case study in the Anglo-American tradition), mutually reinforce one another into making the doctrine of precedent one of the least developed elements in Norwegian jurisprudence: Norwegian lawyers tend to speak with conspicuously more analytical refinement and interest about other sources of law than judicial decisions.[44]

In the English system, the courts are comparatively more outspoken.[45]

> "Whereas under most systems the judgment is formal, brief and to the legal point, the British judge may expatiate on what he is doing and why he is doing it and its consequences; and because of his prestige he is listened to."[46]

This discursive style of the English judges is exercised not only in discussions of substantial law, but also in *discussions of the doctrine of precedent*. In the latter

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42 Andenæs and Kvamme, *Om grunner til uenighet om rettsspørsmål* [on reasons for disagreement concerning questions of law], pp. 25–29.

43 Same work, p. 41. – See further, Eckhoff, *Rettskildelære*, 1st ed. pp. 17–18; 3rd ed. p. 16; Gaarder, *Domstolene og den alminnelige rettsutvikling*, p. 235; C. Smith, *Domstolene og rettsutviklingen* [the courts and the evolution of the law], pp. 293–7.

44 To illustrate, one could for example point to a discussion from the last few years about the relevance and weight of statements from parliament, concerning the interpretation of statutes already in force ("etterarbeider"); see Eckhoff, *Rettskildelære*, 3rd ed. pp. 80–84 with further references.

45 The qualification "comparatively" should be stressed, because the English courts, like the Norwegian ones, express themselves in language apt to conceal the gradualities and the role of personal decision in judicial reasoning; see sections 4.1–4.2 below on these topics.

46 Lord Devlin, The Sunday Times of August 6th 1972. Here cited from Griffith, *The Politics of the Judiciary*, p. 196. – On the style of English judical opinions in a comparative perspective, see Wetter, *The Styles of Appellate Judicial Opinions*, pp. 32–35; Goutal, *Characteristics of Judicial Style in France, Britain and the U.S.A.*, pp. 46–51, 61–65, 71–72.

case, it is perceived partly (1) in their opinions in individual cases, and partly (2) in their making extrajudicial statements as to the relevance and weight of judicial decisions as a source of law.

(1) In the *individual cases*, the English courts more often than the Norwegian reason in an explicit and principled way about the different questions raised by the doctrine of precedent. To illustrate, I shall present some examples, grouped around three major questions in the doctrine of precedent (i–iii).

(i) First, the question of *criteria for identifying the ratio decidendi*, as contrasted with the obiter dicta, of a case:

> "It is well established that if a judge gives two reasons for his decision, both are binding. It is not permissible to pick out one as being supposedly the better reason and ignore the other one; nor does it matter for this purpose which comes first and which comes second. But the practice of making judicial observations obiter is also well established. A judge may often give additional reasons for his decisions without wishing to make them part of the ratio decidendi; he may not be sufficiently convinced of their cogency as to want them to have the full authority of precedent, and yet may wish to state them so that those who later may have the duty of investigating the same point will start with some guidance. This is a matter which the judge himself is alone capable of deciding, and any judge who comes after him must ascertain which course has been adopted from the language used and not by consulting his own preferences."[47]
>
> "It is impossible to treat a proposition which the court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is another ground stated upon which, standing alone, the case might have been determined."[48]

(ii) Another central question in the doctrine of precedent is *which courts bind which*. The most important case on this question is *Young v. Bristol Aeroplane Co*:[49] A full Court of Appeal laid down that as a general rule it is bound by its own decisions, while at the same time defining three exceptions, explicitly said (p. 729) to be exhaustive, thus formulated in the headnote of the case:

> "(1.) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow;
>
> (2.) the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords;
>
> (3.) the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam, e.g., where a statute or a rule having

47 Devlin J. in *Behrens v. Bertram Mills Circus Ltd*., [1957] 2 Q.B. 1 at p. 25. Cited in Cross, p. 41 (41–42).

48 *Commissioner of Taxation for New South Wales v. Palmer* [1907] A.C. 179 at p. 184. Cited in Cross, pp. 86–87 (82). Other examples of statements concerning the identification of ratio decidendi, are cited in Cross, pp. 55, 59, 62, 63, 84 (54, 57, 60, 61, 80).

49 [1944] K.B. 718.

> statutory effect which would have affected the decision was not brought to the attention of the earlier court."[50]

Subsequently a disagreement developed between Lord Denning as the head of the Court of Appeal, and the House of Lords, concerning the extent to which the Court of Appeal could depart from its own previous decisions. In *Davis v. Johnson*[51] the House of Lords rejected other exceptions than those based on *Young v. Bristol Aeroplane Co*., and this seems to have settled the question for the time being.[52]

(iii) A third question concerns *exceptions* to the coercive authority of an otherwise binding precedent. The exceptions in *Young v. Bristol Aeroplane Co*. can be cited in this connection also. See (ii) above.

In conclusion, I return to the general point: The examples now given of statements from the English courts on questions of precedent (i–iii), are seen as rather *ordinary within the English legal system*. In contrast, they would be *very unusual within the Norwegian system*, and would probably be seen by many Norwegian lawyers as inappropriate for a Norwegian judge to make.

(2) In its so-called "*Practice Statement*" from 1966, the House of Lords gave general guidelines concerning previous court decisions as a source of law. The statement reads as follows:

> "Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from previous decision when it appears right to do so.
>
> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than in this House."[53]

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50 The case is discussed in Allen, *Law in the Making*, pp. 241 ff.; Cross, pp. 113–14 (108–10) (the general rule), pp. 136–44 (143–52) (the exceptions).

51 (1979) A.C. 264.

52 Cross and Harris, pp. 109, 143–54, especially 152–53. – For a discussion of some arguments concerning whether the Court of Appeal should be bound by its own decisions, see Rickett, *Precedent in the Court of Appeal*, pp. 147–55. – Lord Denning gives his own views on the doctrine of precedent in *The Discipline of Law*, pp. 285–314. *Davis v. Johnson* is discussed on pp. 297–300.

53 [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77; Cross, p. 109 (104); Harris, *Legal Philosophies*, p. 157. – Paterson, *The Law Lords*, pp. 143–69, gives an account of the origin of the Practice Statement and of the attitudes of the Law Lords towards it, together with a discussion of its effects. – On the situation before 1966, see the same work, pp. 132–43; Allen, *Law in the Making*, pp. 253–57. – In *British Railways Board v. Herrington* [1972] A.C. 877, the House

At the present time it is unthinkable that the Norwegian Supreme Court would issue such a statement.

3.1.3 The differences now mentioned are easy to recognize, as they concern different styles of writing judicial opinions. However, in terming the differences "*verbal*" (see the heading to section 3.1), I raise the following question: Do these differences correspond to differences in *factual influence* on the content of the doctrine of precedent? To this question I think the answer is no: Both in the English and the Norwegian systems it is the courts' own behaviour that constitutes the factual basis of any rules of precedent (section 2.2 above). One should keep this basic fact in mind when mapping such differences as discussed in this section, that is to say, differences as to whether the rules are (also) formulated by the courts themselves, as in the English system, or mainly in legal theory, as in the Norwegian system.

3.1.4 Will the differences now described (section 3.1.2), and supposed to exist mainly on the verbal level (section 3.1.3), also hold in the future? – Factors which seem relevant in considering this question may also throw some light on the preceding discussion:

(i) The present Chief Justice of the Norwegian Supreme Court has on several occasions expressly stated a wish for the court to participate more actively in the evolution of the law.[54] It remains to be seen whether he can and will effectuate such a *change in the role of Høyesterett*. – A change in the said direction implies a more outspoken and principled way of writing judicial opinions, and *may* thereby cause the style of writing in Høyesterett to draw nearer to the discursive English style. – However, even if a change in the role of Høyesterett should occur and even if the change should cause the style of writing in Høyesterett to draw nearer to the discursive English style, the difference will probably remain that Høyesterett would not issue any extra-judicial statements concerning judicial policy, as the House of Lords did in issuing the Practice Statement of 1966.

(ii) Differences in style of legal thinking and style of writing judicial opinions may be narrowed by way of both systems' incorporating the same elements. At present, especially two elements seem likely to have this standardizing function: arguments from human rights and arguments from European Community law.

As to the latter, there are two characteristics of the *legal side of co-operation with or through the EC* that may tend to bring about a more standardized

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of Lords arguably for the first time applied the doctrine of the Practice Statement, in that three judges explicitly said that an earlier decision of the House was wrongly decided (pp. 898, 911, 930) and in that the earlier decision was not followed. For some examples from the ensuing practice of overruling in the House, see Harris, *Towards Principles of Overruling*, pp. 143–46 (see also p. 141 including note 34 and pp. 179–80, on *British Railways Board v. Herrington*, which Harris does not see as an example of overruling).

54 C. Smith, *Domstolene og rettsutviklingen* (1975). – After having taken office as Chief Justice (in 1991), Mr. Smith has confirmed that he still holds the view expressed in the said article, see *Høyesteretts stilling i samfunnet* [the place of Høyesterett in society], especially pp. 785, 787, 789, 790–91.

"European legal thinking" (but other factors can of course pull in the opposite direction):

First, *the supremacy* of Community law over national law, whether on the level of national statute law or on the level of national constitutional law. The English legal system is thereby facing, through the practice of the European Court of Justice, a legally functional equivalent to a national constitution ranking above and used to censor the rest of the legal system. – This legal structure is new in the English legal system, but well known in Scandinavia and on the Continent.

Second, *the quantity* of Community law.

In viewing these two characteristics of Community law together, I believe one has identified a force that will strongly *tend to unify legal thinking* throughout Europe – not only as regards *substantial law*, but also as regards rules about *how to generate* substantial law, including the various national doctrines of precedent.[55] Probably this force will also tend to unify the way European lawyers *express* themselves.

(iii) The discursive style of the English judiciary has been linked to *the way the judges are recruited*.[56] For high judicial office (the House of Lords, the Court of Appeal, and the High Court) the judges are without exception selected from among barristers with at least fifteen to twenty years at the Bar.[57] – This English policy of recruitment contrasts sharply with the policy in Norway, the majority of judges in Norway being selected from various public positions (civil service, police, prosecuting authorities or universities).[58] There are no signs of any marked change in this possible source (viz. the policy of recruitment) of the different ways of writing judicial opinions.

3.2 The degree of detail and preciseness in the formulation of the doctrine. The significance of law reporting; extent and content

3.2.1 The next difference I will mention is that the English doctrine of precedent is *formulated in a more detailed and precise manner* than the Norwegian doctrine (section 3.2.2). The doctrinal difference as to which courts bind which does probably correspond to a difference in practice. This difference is probably the most important one between the two systems (section 3.2.2 (ii)).

To explain this difference, one must also take a look at similarities and differences in *law reporting*: – First, at the *extent* to which cases are reported, and the reliability of the reports (section 3.2.3). – Second, at the *content* of the law reports: the basic structure of what is being reported (section 3.2.4), dissenting behaviour (section 3.2.5), and opinion style (section 3.2.6).

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55 Lord Slynn of Hadley, *What is a European Community Law Judge?*, pp. 240–44; Bengoetxea, *The Legal Reasoning of the European Court of Justice*, p. 66.

56 MacCormick, *Legal Reasoning and Legal Theory*, p. 11; Atyiah, *Review of Bell, Policy Arguments in Judicial Decisions*, p. 345.

57 Paterson, *Becoming a Judge*, pp. 268–69. See also the references in the previous note.

58 Aubert, *Rettens sosiale funksjon* [the social function of the law], p. 232; U. Torgersen, *The Role of the Supreme Court in the Norwegian Political System*, pp. 226–27, 230–31; R.N. Torgersen, *Dommerutnevnelser* [appointment of judges], pp. 1270–71.

3.2.2 A comparison between the English and Norwegian doctrines of precedent shows that the English doctrine is formulated in a more *detailed and precise* manner than the Norwegian. The comparison yields this result with regard to all the three major questions in the doctrine of precedent already mentioned (section 3.1.2 (1) above) and the corresponding rules purporting to answer these questions (i–iii).

(i) The rules providing *criteria for identifying the ratio decidendi*, contrasted with the obiter dicta, of a case. – Despite the necessity of asking questions about such criteria (when starting from some basic premises deeply ingrained in the language and thinking of lawyers, see sections 2.3 and 2.4.1 above), it is much less debated in the Norwegian doctrine than in the English (Anglo-American) doctrine (compare the citations in section 2.4.3 above).

(ii) The rules concerning *which courts bind which*. – Here we find the similarity that neither the House of Lords nor Høyesterett is regarded as bound by its own previous decisions,[59] at the same time as these decisions are regarded as binding on all other courts in the system.[60] – But in addition to this common element, the English doctrine contains rules on the binding force of judicial decisions at lower levels,[61] for example the rules relating to the Court of Appeal, cited above (section 3.1.2 (1) (ii)). Such rules *do not have any counterpart* in the Norwegian doctrine of precedent. There, the general attitude is that judicial decisions of courts other than Høyesterett may have *some* precedent-weight, but that these decisions never (re)present arguments that must be followed.[62] One *cause* of this difference can probably be traced to differences with regard to law reporting in the two systems (section 3.2.3 (4) below).

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59 See *the Practice Statement of 1966*, cited in section 3.1.2 (2) above, whereby the House of Lords changed the rule according to which it was bound by its own previous decisions, a rule definitely established in *London Tramways v. London County Council*, [1898] A.C. 375 (see Cross, p. 107 in note 4 (102 in note 22) on the correct reference to the case).

60 Cross, p. 7 (6); Harris, *Legal Philosophies*, pp. 156–57; Eckhoff, *Rettskildelære*, 1st ed. p. 152–53; 3rd ed. pp. 135, 312. – Fleischer, *Rettskilder*, pp. 178–79, maintains that the outlined distinction between Høyesterett and the lower courts in relation to the bindingness of a previous decision from Høyesterett, is unsound in a normative perspective, his main counterargument being that the distinction makes the law dependent upon which court makes the decision and that this again depends on such accidental features as whether a party to the case has time and money to wait for the decision of Høyesterett. – The "either-or"-concept of 'being bound' that is presupposed in the rules presented in the text at the present note and the preceding note, will be discussed and discarded as descriptively inadequate in sections 3.3 and 4.1 below.

61 Cross, pp. 7–8, (6–7), compare chs. III–IV; Allen, *Law in the Making*, pp. 236–53, especially pp. 237–42; Harris, *Legal Philosophies*, pp. 156–57. See also Cross, p. 23 (25), on the history of some of these rules.

62 See Smith, *Studier i garantiretten* [studies in the law of guarantees and bonds], pp. 12–13; *Domstolene og rettsutviklingen*, pp. 311–15; Frihagen, *Villfarelse og ugyldighet i forvaltningsretten* [mistake, misrepresentation and invalidity in administrative law], pp. 191–92; Lødrup, *Luftfart og ansvar* [aviation and responsibility], pp. 70–71; Sandvik, *Entreprenørrisikoen* [the risk of the building contractor], p. 78 compared with pp. 70–79 (on arbitration); Andenæs, *Innføring i rettsstudiet*, p. 89. – Eckhoff, *Rettskildelære*, 3rd ed. pp. 136–37, refrains from taking a position. Fleischer, *Grunnlovens grenser* [the limits of the constitution], pp. 186–91; *Rettskildelære*, pp. 172–74, argues against conferring any precedent-weight at all on decisions from the lower courts.

The *doctrinal differences* now mentioned, concerning bindingness of decisions from lower courts, do probably correspond to *differences between lawyer-practice* (the practice of courts as well as of lawyers in general) in the two systems. – I believe these differences in practice to be *the most important ones* between the two systems, with respect to previous judicial decisions as a source of law. For, in regard to the decisions of the supreme courts (that is, the decisions of the House of Lords and of Høyesterett) I do not think that there are any significant differences between lawyer-practice in the two systems.[63]

(iii) The rules laying down *exceptions* to the coercive authority of an otherwise binding precedent. – It is quite natural that when the main rules are elaborated in more detail, one also finds a corresponding difference concerning exceptions.[64]

3.2.3 Since law reporting is a necessary precondition for a practice of precedent ((1) below), one should pay some attention to how the reporting is done, asking whether, and if so how, the various aspects and ways of reporting influence the doctrine and practice of precedent (sections 3.2.3–3.2.6).

(1) There is an important *factual relationship* between a *practice of precedent and law reporting*: For a doctrine of precedent to be effective, previous judicial decisions must be known, that is to say, some kind of law reporting must be presupposed; if no judicial decisions were reported, judges would have no more than fragmentary knowledge of judicial decisions from other courts, and so there would be next to nothing to follow.[65] – A related argument establishes a *normative relationship* between a practice of precedent and law reporting: Even if previous judicial decisions were known by the judiciary, they should not be used as precedents if they were not also known by the public. – For both the reasons now mentioned, law reporting is important for the functioning of a doctrine of precedent.

(2) One would expect that law reporting would be a task naturally falling upon *the state*; compare the reasons just mentioned, and the interest that the political systems both in England and Norway have in a well-functioning legal system. However, both in the English and the Norwegian systems, law reporting is *a private and commercial affair*.[66]

> There are some differences with respect to the *legal basis* of the private law reporting in the two systems: In Norway there are no public prerogatives or

63 See section 4.1.4 below.

64 See Cross, ch. IV, for a survey and discussion of the exceptions.

65 On aspects of this relationship, see Allen, *Law in the Making*, pp. 219, 221–30, 258–59, 312–13, 315–18, 367–79 (especially 374–79); Dawson, *The Oracles of the Law*, pp. 78–79 (including note 48), 88; Cross, pp. 22 (24), 124 (126); Eckhoff, *Rettskildelære*, 1st ed. pp. 148–49, 154–55 (with further references); 3rd ed. pp. 130–32, 136–37 (with further references); Bing, *Rettslige kommunikasjonsprosesser* [legal communication processes], pp. 218–31, 269–79; Bråthen, *Underinstansavgjørelser som rettskilde* [decisions from other courts than Høyesterett as a source of law], pp. 8, 25–27, 33–34, 36, 53–54, 55.

66 Dawson, *The Oracles of the Law*, pp. 77, 81, 82, 84; Rt. 1986, pp. 34–39 (a reprint from Rt. 1908, pp. 1–5).

private copyrights preventing commercial exploitation of judicial decisions.[67] In England one assumes an exclusive right for the Crown to print and publish judicial decisions. One also recognizes the possibility of private copyrights (for the judge, the reporter, or both). However, neither the Crown's prerogative nor possible private copyrights for the judiciary have ever been enforced.[68] So, the English system operates like the Norwegian, as a market for private enterprise.

(3) In *Norway* the only *general* law report series for the decisions of Høyesterett is Norsk Retstidende (Rt.). It contains all the decisions of Høyesterett, either in full (today, in all civil cases and in about two thirds of the criminal cases) or in the form of a short summary.[69] Norsk Retstidende is published by Den norske advokatforening (The Norwegian Bar Association). The same body also publishes Rettens Gang (RG), which is the only general law report series for decisions from courts other than Høyesterett.

In *England* there are two general series of reports. – The leading series is the Law Reports (supplemented by a series of Weekly Law Reports), which is divided into several parts, containing selections of the decisions of the House of Lords, the Privy Council, the Court of Appeal and of the different divisions of the High Court. This series is published by the Incorporated Council of Law Reporting for England and Wales (the General Council of Law Reporting), a non-profit body established in 1865 with the aim of securing more reliable reporting.[70] – The other general series is the All England Law Reports, published by Butterworths. This series contains selections of the decisions from the same courts as the Law Reports. – The two series tend to report the same cases, since their basic criteria for whether a case should be reported, are the same. – The main difference between the two series is that the Law Reports contain the legal arguments of counsel, in addition to the judgment. In the Norwegian system, this difference could not arise, since the arguments of counsel are incorporated into the judgment, being presented at the beginning of the first opinion.

In addition to the general series now mentioned, both the English and Norwegian systems contain several *specialist* series.[71]

(4) The reporting of decisions from the respective *supreme courts* of the two systems (the House of Lords and Høyesterett) seems in the main to be as exhaustive as the practical needs deem necessary. The reporting of decisions from *other courts* is far more comprehensive in the English system than in the Norwegian. In Norway there does not exist any systematic and reliable

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67 Compare the Copyright Act of May 12th 1961 no. 2, § 9 and § 22.

68 See von Nessen, *Law Reporting: Another Case for Deregulation*, pp. 417–22.

69 Stenberg-Nilsen, *Norsk Retstidende 1836–1986*, p. 6; Selmer, *Norsk Retstidende i data-alderen* [Norsk Retstidende in the age of the computer], p. 15. – The coming into force (on August 1st 1995) of the procedural reform transforming Høyesterett from first to second level appellate court in criminal cases (Act of June 11th 1993 no. 80), will reduce the number of decisions from Høyesterett in criminal cases, especially as regards review of sentencing. This again will most certainly lead to a greater proportion of Høyesterett's decisions in criminal cases being reported in full.

70 Daniel, *The History and Origin of the Law Reports*, especially pp. 243–82, 297–302.

71 See Ellis, *Law Reporting Today*, p. 8; Bing and Høyer, *Publisering av rettsavgjørelser* [publication of judicial decisions], pp. 31–33; Eckhoff, *Rettskildelære*, 3rd ed. p. 131.

procedure for selection and publication of decisions from courts other than Høyesterett. The decisions published in Rettens Gang (see (3) above) are not collected in any systematic way, but selected among decisions received at random from judges or counsel.[72]

This *difference regarding the extent to which decisions are reported* can help to explain the important difference between the two systems mentioned above (section 3.2.2 (ii)) as to which courts bind which: Given the lack of a systematic and reliable procedure for the reporting of decisions from courts other than Høyesterett, many Norwegian lawyers will probably say that a necessary condition is lacking for treating these decisions as (re)presenting arguments that must be followed.[73]

(5) In the English system, courts other than the House of Lords quite often *pass judgments orally and immediately* after the close of the final speeches of counsel ("ex tempore judgment" as contrasted to "reserved judgment"). This in practice never happens in ordinary civil proceedings in the Norwegian system; the judgment with reasons is always given in written form some time after the closing of the case. A purely oral judgment, no matter when given, is assumed to be contrary to the Civil Procedure Act.[74]

One would expect that ex tempore judgments would tend to raise some *problems peculiar* to English law reporting and the practice of precedent:

First, one would expect problems to arise regarding the *possibility of obtaining knowledge of a particular judgment*, since the English system has no general rules concerning the keeping of official records of *the reasons* given for judicial decisions;[75] in the absence of special rules or practice, one is left with what there is of law reports, and in the last resort with private notes, personal memory and the like.[76] However, through special rules or practice combined with modern technology,[77] this risk will probably seem more and more peripheral, at least with respect to decisions from the courts that are of most interest as potential sources of precedent.

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72 In the mid-1970s Rettens Gang received about 180–200 decisions each year from the two court levels below Høyesterett, together. The total number of decisions from these two levels was at the time about 12,000–12,500 each year. In percentages the journal received about 0.5 %–0.6 % and published about 0.3 %–0.4 % of the decisions from the first level (by- and herredsrettene), and it received about 5 %–6 % and published about 3 % of the decisions from the level next to Høyesterett (lagmannsrettene). See Bråthen, *Underinstansavgjørelser som rettskilde*, p. 8. – My impression is that these figures also give a rough indication of the current situation.

73 See Bråthen, *Underinstansavgjørelser som rettskilde*, p. 36, on the results of an empirical investigation of the views of judges. – Bing, *Rettslige kommunikasjonsprosesser*, p. 224, possibly expresses a different opinion; however, it is unclear whether his statements are intended as descriptive or normative. – For the views of legal authors, see the references in note 62 above.

74 See Schei, *Tvistemålsloven* [civil procedure Act], pp. 291 and 305.

75 But there are of course rules on securing notoriety of *the conclusions* of the judge as to the rights and duties of the parties (the "judgment" or "decision" in the narrow sense), see e.g. Langang and Henderson, *Civil Procedure*, pp. 226–230, on the successive stages of giving, certifying, drawing up and entering judgment (in the narrow sense).

76 Allen, *Law in the Making*, pp. 377–79; Bergholz, *Ratio et Auctoritas*, pp. 264–65.

77 See e.g. Bergholz, *Ratio et Auctoritas*, pp. 244–45; Ellis, *Law Reporting Today*, pp. 5–6.

Second, presupposing a law report, one would expect that ex tempore judgment, combined with the lack of official records, would tend to raise a problem concerning *the accuracy of the report*. However, also on this point, the highly pragmatic attitude of the English system seems to have fulfilled the practical needs: The reporters appointed by the General Council of Law Reporting[78] maintain high legal standards, all of them being experienced barristers. Their drafts are traditionally submitted to the judge for criticism. The principles of editing used in the law reports have evolved through practice, and have been adjusted to the needs of the legal system as they arise.[79]

3.2.4 A practice of precedent will not only be influenced by the extent and reliability of law reporting, but also by *the basic structure of what is reported*.

By this latter expression I refer to the following distinctions: – First, between decisions with *individual* opinions (be they mutually concurring or dissenting) and decisions with a *single collective* opinion (of the whole court, or of the plurality in the event of dissent). – Second, between decisions with *named* opinions and decisions with *anonymous* opinions. – Third, between *informing and not informing the public about any dissent*.

With respect to these distinctions the English and the Norwegian systems are rather similar: They both offer individual and named opinions (and thereby by necessity inform about any dissent). – In contrast, the Danish Supreme Court gives a single collective opinion (of the whole court, or of the plurality in case of dissent) and the names of the judges. In addition, dissenting opinions are stated and named. Up to 1936 dissenting opinions were concealed, and up to 1958 opinions were anonymous.[80]

In the Norwegian system, the individual and named opinion is *both the right and the duty* of the judge. – In the English system, it is in general *only the right* of the judge, not his duty, since the English courts do not have any general *obligation to give reasons for their judgments*. Exceptions mostly relate to lower courts, that is, courts other than the House of Lords, the Court of Appeal and the High Court.[81] – This is in contrast to Norwegian Law, where the Civil Procedure Act[82] §§ 144–45 lays down a general obligation for all the courts to give reasons for their judgments. – This difference in legal norms does not seem to correspond to any significant difference in practice; the English courts whose decisions are potential precedents, do regularly give reasons for their judgments.

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78 See (3) above, on this Council.

79 See Ellis, *Law Reporting Today*; Dawson, *The Oracles of the Law*, pp. 83–84; Karlen, *Appellate Courts in the United States and England*, pp. 99–104; Pollock, *English Law Reporting*. – The latter paper dates back to 1903, but it still gives valuable information on several topics, especially on cooperation between the law reporter and the judge (pp. 252, 255–56, compare p. 245 on attitude to independence), and on the growth of principles and traditions of reporting (pp. 251–52) and of editing (pp. 249–51, 253–54).

80 Jensen, *Højesterets arbejdsform* [the working procedures of Højesteret], pp. 124, 126, 129–30. – "Højesteret" is the name of the Danish Supreme Court.

81 Bergholz, *Ratio et Auctoritas*, pp. 248–52.

82 Act of August 13th 1915 no. 6.

A system with individual and named opinions tends to give *more guidance as to questions of law* than a system with collective and anonymous opinions not providing information about dissent. When *formal dissents* are left out, the reader is deprived of information as to whether the case was a clear case or a hard case, and further, of information about what opinions on the law the majority more specifically could not tolerate – information that is often impossible to guess from the opinion of the majority alone. When *individual opinions other than formal dissents* are left out, the reader is deprived of nuances in formulation that often provide valuable clues as to actually or potentially relevant distinctions in law.

3.2.5 Dissenting and other forms of individual opinion are quite *common*, both in decisions from the English and the Norwegian courts. – What *attitudes and considerations* on the part of the judiciary can explain the voting behaviour in the two systems?

Having discussed some of his findings concerning attitudes and considerations in the House of Lords,[83] Paterson concludes:

> "[T]he prevailing ethos on [multiple judgments, dissents and the pursuit of unity] in the House of Lords is that of laissez-faire. By and large, it is *up to the individual Law Lord* whether he writes or not, and whether he dissents or not. Except in a small minority of appeals the support for unity in the court is only tentative, there is little resistance to dissents on the ground that they are detrimental to the authority of the court and attempts to reconcile differences in the court are the exception rather than the rule" (my italics).[84]

I think it a plausible hypothesis that corresponding research on attitudes and considerations in Høyesterett would yield a similar result; that is to say, absence of sustained and collective normative pressure concerning whether, and if so when, to dissent or not.

> For lack of research (including systematic interviews with both judges and counsel) one must fall back on more indirect evidence and intuitive impressions. See for example the finding of Carsten Smith that two chief justices of Høyesterett in the period 1964–73 were among those who most often dissented or otherwise gave individual opinions.[85] Further, compare the finding of Smith with the fact that the chief justice of Høyesterett in the period 1946–52 strongly disliked dissents.[86] Both the fact that the leader of the court is among those who most often dissent, and the fact that successive leaders do not seek a common

83 Paterson, *The Law Lords*, pp. 96–109.

84 Same work, pp. 108–9.

85 C. Smith, *Domstolene og rettsutviklingen*, pp. 309–10. – See also Østlid, *Dommeratferd i dissenssaker* [judicial behaviour in cases of dissent], pp. 18–19; Sandene, *Norges Høyesterett – organisering og arbeidsordning* [the Norwegian supreme court – organization and working procedures], pp. 301–2.

86 Østlid, *Dissensavgjørelser i Norges Høyesterett (1936–55)* [decisions with dissent in the Norwegian supreme court (1936–55)], pp. 36–38.

> dissent policy, I take as symptoms of absence of sustained and collective normative pressure.

Absence of sustained and collective normative pressure does not mean that separate opinions are given at the whim of the individual judge. Voting behaviour is also guided by a continual *weighing and balancing of different values*. To illustrate the point: Taking as starting-points the positive evaluations, typically held among lawyers, of information and certainty as to "the right law", one can separate the following *judicial options in relation to dissent and other forms of individual opinions*:

(i) Good information and the highest degree of certainty with respect to law is achieved if the minority bows to the majority view (with no material dissent) and expressly states that it does so (concurring with a leading opinion; producing then, by definition, no formal dissent, nor however any other sort of individual opinion).

(ii) Little or no information and very little certainty with respect to law is achieved if the minority stands by its view (producing material dissent) without saying so, for example by twisting the facts of the case; or if the minority states its view in a manner too intricate or confused to be readily understood (not producing readily understandable formal dissent).

(iii) Good information and a medium degree of certainty with respect to law is achieved if the minority stands by its view on what the right law is (producing material dissent) and expresses this view in a precise manner (producing readily understandable formal dissent).

Alternative (ii) is unfortunate, but nevertheless well-known in both the English and Norwegian systems, maybe more so in the English system, because of the more discursive opinion style of English judges, which sometimes leads to more acute problems in finding the point of an individual opinion.

Also alternatives (i) and (iii) are well-known in both systems: They are accepted as legitimate by the doctrine as well as practised by the judges. – As regards the practice of the judges, it is not seen as any sign of inconsistency that the same judge chooses alternative (i) in one case and alternative (iii) in another. One accepted reason for such variation is the difference between on the one hand cases where *finality* is more important than the content of the decision (supporting alternative (i)), for example cases on a technical point in tax law, and on the other hand cases where moral, political, religious, or similar considerations make *the content* of the decision a most vital point (supporting alternative (iii)), for example cases on the right of workers to organize or to strike, on free speech, abortion, and the like.

The voting behaviour of the House of Lords seems in the last few years to have moved more in favour of alternative (i),[87] thereby *becoming more similar* to the practice of Høyesterett. The most important cause of this change is probably the rise in the workload of the court. A wish to offer more information and certainty with respect to the right law, along the lines just sketched, may also have contributed to the change of course.

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87 See e.g. Bradney, *The Changing Face of the House of Lords*, pp. 179–81, 187, on the change from 1974 to 1984.

3.2.6 By "*opinion style*" I refer to such dimensions of judicial decisions as giving long or short opinions; in literary or matter of fact language; using arguments with an ethical, political, religious, etc., character, or using arguments with a strictly legal character. – Are there any differences in these dimensions, which are connected with differences in the practice of precedent, between the English and the Norwegian systems?

One can easily trace *some differences* in opinion style: The opinions of English judges are longer; more copiously illustrated by reference to other cases and to factual or legal situations of a hypothetical nature; and more outspoken on matters of substantial law or matters of precedent (section 3.1.2 above). – However, I think that these differences *do not operate as causal factors* behind any differences between the English and Norwegian practice of precedent. I have previously argued this point in relation to the difference in outspokenness (section 3.1.3 above). I believe the conclusion reached there to hold good also for the other dimensions of opinion style mentioned above.

Another matter is that differences in opinion style could lead to differences other than those concerning the practice of precedent. For example, the more discursive style in decisions from the House of Lords as compared to decisions from Høyesterett could make it more difficult to identify the legal point of an opinion and thereby to identify the binding part of the judgment.[88]

3.2.7 In summary: To understand the concrete practice of precedent in one legal system as contrasted to another, one should take a look at the law reporting situation in the two systems.

In the preceding discussion, the differences between the English and the Norwegian systems with regard to the *extent* to which cases are reported, have been used to (partially) explain what I believe to be the most important difference in the practice of precedent between the two systems (section 3.2.3 (4)). In contrast, differences regarding the *content* of the law reports – the basic structure of what is reported, dissenting behaviour and opinion styles – although they could be of interest in other contexts, do not seem to have caused any significant differences in the doctrines and practice of precedent (sections 3.2.4–3.2.6).

3.3 The coercive authority of binding precedents; contrasted with persuasive authority

English doctrine draws a distinction between *an obligation to follow* judicial statements termed "binding precedents", and *an obligation to consider* judicial statements more generally.[89] – The identification of binding precedents is done by combining on the one hand rules governing which courts bind which, and on

88 Compare Cross, *The Ratio Decidendi and a Plurality of Speeches in the House of Lords*, pp. 384–85.

89 Cross, pp. 8 (7), 32 (33), see also p. 40 (41); Harris, *Legal Philosophies*, pp. 156, 160– 63. The distinction is also found in Norwegian doctrine, in parallel and in contrast to the outlook described below; see Eckhoff, *Rettskildelære*, 3rd ed. p. 145.

the other hand rules governing which statements of the courts qualify as rationes decidendi.

Other court decisions, for example from a lower court, or *other aspects of court decisions*, for example a dictum, are not seen as binding on the court in later cases. They are said to have only persuasive authority (effect), as contrasted with the coercive authority (effect) of a binding precedent.[90] – I will use "*persuasive precedents*" as a common term for decisions and statements not said to have coercive authority.[91]

An important point when comparing the two doctrines of precedent is that the statements in the English doctrine concerning *the special case of persuasive precedents* are rather similar to *the general outlook* in some parts of the Norwegian doctrine. This can be illustrated by the passage from Harris quoted below. In modern Norwegian doctrine, this passage could, with much plausibility, be read as a description of the relevance and weight of judicial statements in general:

> "What *weight* the court should give to judicial statements (not being binding rationes decidendi) is said to *depend on many factors*: the position in the judicial hierarchy of the judge whose statement it is; the individual reputation of the judge; the number of judges who concurred with what was said, if the court was an appellate court; whether the point was properly argued; how relevant it was to the issue upon which the case turned – that is, how far it fell short of being ratio; whether it was in line with other judicial statements in other cases. *The circumstances vary* from dicta unanimously approved, after elaborate argument, in the House of Lords (which because of some peculiarity of the litigation were not strictly necessary to the decision), to an off-the-cuff and totally obiter observation of a judge at first instance. It is difficult – and some would say undesirable – to be more precise than this" (my italics).[92]

I will later venture the hypothesis that the picture drawn in this citation – the picture of weight attributed to a previous judgment by way of evaluating and balancing some typically relevant aspects of the judgment – gives a descriptively more adequate view of how both the English and Norwegian courts do in fact reason, than the traditional "either-or"-pictures drawn in the English and Norwegian doctrines (section 4.1 below). That is to say, I do not consider the *doctrinal* either-or distinction outlined in this section, between coercive and persuasive authority, to be of much value in describing how lawyers *in fact proceed* in their reasoning with previous judgments as a source of argument.

3.4 The probability of prospective overruling

The three differences discussed above (sections 3.1–3.3) relate to the situation as it is today. A fourth difference points to the future. It concerns *the probability as*

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90 Cross, p. 5 (4).

91 Persuasive rationes decidendi are said to have greater authority than obiter dicta; see Cross, p. 40 (41). But these differences are irrelevant for the comparison made here.

92 Harris, *Legal Philosophies*, p. 161. See also Allen, *Law in the Making*, pp. 261–62; and further, the citations in section 4.1.5 (ii) below.

to whether the courts will introduce prospective overruling. – By the phrase "*prospective overruling*" is here meant judicial techniques having in common that the court applies the old precedent in the case at hand, but at the same time announces that in the future another rule will be followed.

Such techniques are meant to quell the argument levelled against ordinary overruling, concerning its *retrospective effect*.[93]

Prospective overruling is quite common in the practice of the *American* courts.[94] – The case of *Great Northern Railway Co. v. Sunburst Oil & Refining Co*.[95] has traditionally been cited as an important part of the legal basis of this practice. The Federal Supreme Court, its opinion being delivered by Cardozo J., made some statements of a more general nature, from which I shall cite some parts. I shall do so partly to illustrate the concept of 'prospective overruling', and partly because of the importance of this case for the development of the American practice of prospective overruling – a practice which, from the standpoint of the English and the Norwegian judges, can be seen as an experiment and an experience from which to learn (see below):

> "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. …
>
> On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. ...
>
> The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. ... The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule. If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process" (pp. 364–66).
>
> This opinion says no more than that the federal constitution does not stand in the way of prospective overruling. However, by being cited as a positive basis for the aptness of prospective overruling, the case was in effect made into the

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93 Nicol, *Prospective Overruling: A new Device for English Courts?*, analyses some forms of prospective overruling (pp. 546–48) and discusses some arguments for (pp. 544–46) and against (pp. 548–57).

94 A vigorous defence of this practice is given in Llewellyn, *The Common Law Tradition*, pp. 299–305.

95 287 U.S. 358 (1932).

> formally necessary starting-point of the later practice of prospective overruling in the American (state and federal) courts.

Prospective overruling has been discussed in the English system, but according to Harris it has so far (up to 1991, that is) not been used.[96] In the Norwegian system, such a technique has not been discussed, either by the courts or in legal theory.[97]

The declarative point of view is a factor common to the English and the Norwegian legal systems (see sections 2.4.2 above and 4.2 below). In both systems it probably *tends to discourage* the introduction of prospective overruling:

Ordinary (retrospective) overruling is compatible with the declarative point of view in that the judge of the present case can say that the judge of the previous case did not succeed when he tried to find the right law. – In contrast, the technique of prospective overruling explicitly recognizes law as created by the judge. The rationes of earlier cases can no longer be termed "wrong" (otherwise they could not be applied in the present case), only partially "unsatisfactory", or something similar, taking all the relevant interests into account.

Nevertheless, the probability of the English courts' employing prospective overruling is greater than the probability of the Norwegian courts' doing so. This is because prospective overruling would be in particular disharmony with the traditional reluctance of the Norwegian courts to speak in general terms about their own way of reasoning (section 3.1 above; however, see section 3.1.4 on some possibilities for change).

> Examples of statements with some similarity to prospective overruling are found in *Rt. 1979/572* (especially pp. 585–86) and *Rt. 1980/52* (especially pp. 58–59). In the decision from 1980, Høyesterett stated that it thought it doubtful whether a statutory provision in procedural labour law, which declared Høyesterett incompetent to try certain cases, was in accordance with the Constitution (§ 88). In part as a consequence of this, the provision was later abrogated. The statements of Høyesterett differed from prospective overruling in two respects. First, they left it an open question whether the disputed provision was to be considered in conflict with the Constitution (p. 59). Second, it was not necessary to pass judgment on this point in that particular case, since the plaintiff had not yet reached the level in the hierarchy of courts where he was blocked from appeal to Høyesterett. But apart from these differences, the statements approximated prospective overruling in that they gave a warning as to how Høyesterett would view the law in the future.

96 Cross and Harris, pp. 228–32; Harris, *Legal Philosophies*, pp. 169–70.

97 The problem is sketched in Eckhoff, *Rettskildelære*, 1st ed. p. 196; 3rd ed. p. 180.

4 Some Common Weaknesses

4.1 Either-or terminology; contrasted with varieties of bindingness. The factual effect of judicial decisions as a source of law

4.1.1 A feature in common of the English and Norwegian doctrines of precedent is the tendency to formulate in an *either-or terminology* the *graduated reality* of the reasoning of the courts (and of lawyers in general).

Two examples may illustrate this, both concerning a vital point in the doctrines:

In English law, the doctrine holds that either a proposed rule is a "binding ratio decidendi", and thus it decides the case at hand; or the proposed rule is just a "dictum", or a ratio decidendi with just "persuasive force", and thus it is without authority.[98]

Correspondingly, within the less complex conceptual apparatus of the Norwegian doctrine, many lawyers are inclined to say that either a judgment is a "prejudikat", and thus it decides the case at hand; or a judgment is not a "prejudikat", and thus it is without any authority in the present case.[99]

As I mentioned earlier, this tendency towards either-or terminology seems stronger in the English doctrine than in the Norwegian (section 3.3). It is, however, also a noticeable feature of the Norwegian doctrine. – I suspect that this tendency is *untrue to the facts* in both the English and the Norwegian legal systems, untrue to the ways that judges and other lawyers actually reason when they use previous decisions as a source of law.

A *more adequate description* than the "either-ors" of the traditional doctrines, would be to emphasize (1) the weighing and balancing processes in legal reasoning, and (2) the continuous and graduated aspects of these processes:

(1) Lawyers weigh and balance arguments of certain types, arguments which often pull in different directions in relation to the result in the case at hand.

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98 Cross, ch. II; Harris, *Legal Philosophies*, pp. 156–60. – But see the modifications in Allen, *Law in the Making*, pp. 269–70 ("[T]he rigid distinction between the 'binding' and the 'persuasive' becomes very shadowy and insubstantial"); Harris, *Legal Philosophies*, p. 168 ("Perhaps ... only a difference of degree between what judges, under a system of strict stare decisis, are required to do in relation to decisions above them in the hierarchy, and what the doctrine of precedent requires common law judges to do in relation to all court decisions"). – See also Eckhoff, *Rettsvesen og rettsvitenskap i U.S.A.*, pp. 140–56, about the practice of the American courts, and its relationship to the Anglo-American doctrine of precedent. – See further sections 4.2.2–4.2.3 below, about the American realists.

99 Eckhoff, *Rettskildelære*, 1st ed. chs. 6–7, especially pp. 151 ff.; 2nd and 3rd eds. ch. 7 section III contrasted with section IV; Andenæs, *Innføring i rettsstudiet*, ch. 6 VI contrasted with ch. 9. – Fleischer says that he will use "prejudikat" synonymously with "a previous decision from a court of law", see *Rettskilder*, pp. 160–61. In fact however, his discussions too are based upon a material dichotomy within the class of judicial decisions, see e.g. p. 173: "It must be a certain conclusion that decisions from other courts than Høyesterett cannot be given the status of prejudikat". – I do not rule out the possibility that e.g. Eckhoff and Andenæs could declare themselves to be in agreement with much of what is said here on how lawyers use previous judicial decisions as a source of law; see e.g. Eckhoff, *Rettskildelære*, 3rd ed. pp. 135, 145. However, the possibility of such agreement is not readily inferred from their discussions, since these are structured round the dichotomy "prejudikat"–"not prejudikat".

Previous judgments are just one type of such legally relevant arguments. Others are statutory texts, parliamentary and pre-parliamentary materials of statutes ("forarbeider", "legislative history", "travaux préparatoires"),[100] administrative decisions, customs, legal scholarship, and considerations relating to fair and reasonable results in the present case. – The weighing and balancing of arguments may be more or less discursive or intuitive: At the one extreme one finds the lawyer who painstakingly goes through all the aspects of the particular case that he can possibly conceive of as relevant, assessing their actual relevance and relative weight, before reaching a solution; at the other extreme one finds the trained lawyer who instantly takes in the case and grasps the same solution.

(2) When the aim is to give a true description of judicial decision-making, one cannot avoid emphasizing, first, the *continuity* of the weight that *can* be placed on legal arguments of the types just exemplified, and second, the *varying degrees* of weight that *in fact* are given to arguments of the same type, for example to previous judgments, in the particular judicial decision-making processes.

In the following sections (4.1.2–4.1.6), I shall elaborate on these vital points.

4.1.2 In relation to the outlined process of weighing and balancing arguments, the "either-ors" of traditional jurisprudence have shown themselves to be descriptively inadequate. – This can be *illustrated* in relation to the either-or distinction between "being bound" and "not being bound", which constantly surfaces in discussions of precedent.

It is sometimes said that the "absolute binding quality" of a precedent with coercive force, is a specific feature of the English legal system.[101] – This seems an inadequate characterization of any difference between the English and the Norwegian doctrines and practice (sections 4.1.3– 4.1.4 below). To demonstrate this, I will take a look at two distinctions I find useful in sorting out some of the different matters which are often confused when one simply talks about "being bound" (1–2).

(1) First, one must distinguish between verbal attention paid and factual weight given, to previous judicial decisions.

It is clear that English lawyers pay greater *verbal attention* to judicial decisions than Norwegian lawyers: Judicial decisions are studied, commented upon and cited to a much greater degree in English law than in Norwegian law.

A different question is: How much *weight* do English and Norwegian lawyers in fact give to any *particular judicial decision*, when they shall decide a later case which seems to raise questions of law similar to those of the particular

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100 There are important differences between the Norwegian and the English legal systems concerning the relevance and weight of parliamentary and pre-parliamentary materials of statutes, see Eckhoff, *Rettskildelære*, 1st and 3rd eds. ch. 3; Cross, *Statutory Interpretation*, ch. 6 (especially pp. 154–62); Harris, *Legal Philosophies*, p. 145; Bankowski and MacCormick, *Statutory Interpretation in the United Kingdom*, pp. 380–82. The differences were somewhat diminished, but at the same time consolidated, in *Pepper v. Hart*, [1993] A.C. 593: see especially p. 640, where Lord Browne-Wilkinson, speaking for a majority of 6 to 1, enumerates the conditions for permitting reference to parliamentary materials. However, these differences and developments lie outside the subject discussed here.

101 Goodhart, *Precedent in English and Continental Law*, pp. 9–11.

previous case? The answer to this question with respect to similarity or difference between the two systems is not so simple.

It ought to be stressed that *this question is not one of verbal behaviour*; it is neither a question of what lawyers say about rules for legal reasoning, nor a question of what they say in a particular case about the weight of a particular previous case. – The question refers to the arguments that *in fact motivate* the courts and other lawyers in the two systems; it refers to how judges and other lawyers actually think.

The verbal differences mentioned above give a first impression of judicial decisions' having greater factual effect as a source of law in the English system than in the Norwegian system. However, such differences in the wordings of judgments and legal literature do not necessarily correspond to differences in the reasoning process: *The question here* is whether the English courts *more often* than the Norwegian courts pass judgments that they would *not* have passed, had it not been for a previous judgment.

(2) To answer the question just posed in a satisfactory way, one has to introduce another distinction, between *two senses of "binding" argument*.

First, that an argument is "binding" can mean that one has an obligation *to take the argument into account*, without necessarily reaching the same conclusion as that which the argument supports. This I term "*the weak sense of bindingness*". – In this sense both English and Norwegian judges are bound by previous judicial decisions.

Second, that an argument is "binding" can mean that one has an obligation *to reach the same conclusion* as that which the argument supports. This I term "*the strong sense of bindingness*". – Statements in the English or Norwegian doctrines about the "absolute binding quality" of precedents, their "coercive force", "authority", or the like, often seem to be meant as statements about bindingness in the strong sense. Although both English and Norwegian judges are sometimes bound by previous judicial decisions in this way, I venture to say that statements about bindingness in the strong sense are either uninteresting and misleading (i), or untrue (ii):

(i) When statements about precedent say that a *particular* previous court decision is binding in the strong sense in a *particular* later case, then the statements are uninteresting and misleading. – They are *uninteresting* because they focus on the least important part of the judge's reasoning: the *conclusion* as to whether a previous case outweighs all other legally relevant arguments in the present case. – They are *misleading* because they tend to leave unmentioned the important part of the judge's reasoning: the complex and graduated process of weighing and balancing arguments, that *precedes* a decision to view a particular previous judgment as binding precedent in a particular later case (section 4.1.1 (1)–(2) above).

(ii) When statements about the bindingness of precedent purport, first, to be about bindingness in the strong sense, and second, to say something *general*, that is to say, to identify an open *class* of cases that determine the results in an open *class* of later cases – then the statements are *untrue*: Legal theory and judicial practice have *in vain* tried to frame sets of *general conditions (necessary and/or sufficient)* which constitute a determining relationship between certain previous court decisions and the results of certain later cases. Formulations of such

general conditions cannot give a representative picture of the process of weighing and balancing arguments that precedes a decision to view a particular previous judgment as binding precedent in a particular later case.

Suffice it to recall *some* stages at which weighing and balancing takes place in the preceding reasoning process: first, when formulating and applying criteria for the binding parts of the case, its ratio decidendi (section 2.4 above); second, when formulating and applying criteria for distinguishing the case (section 2.4.3.2 above); and third, when formulating and applying criteria for exceptions to bindingness (section 3.3 above). – Taking the choices at these stages and the connected aspects of doctrine and court practice into account: What *possibility* is left for saying something with *general* validity about which previous judgments have "absolute binding quality", "coercive force", or the like? Just one, I think: to map the *aspects* of previous cases which lawyers *typically* view as relevant, when weighing a previous case against other legally relevant arguments in a later case (see the next section).

Then, however, we are driven back to "bindingness" in the *weak* sense; that is to say, as an obligation to *consider* arguments. – I will submit that when the aim is a general understanding of lawyers' reasoning with previous judgments as a source of argument, it is this weak sense of "bindingness" that is *the adequate sense*. The alternatives have shown themselves either to refer only to the particular case, and thus to be uninteresting and misleading ((i) above); or, when purporting to say something general, to be untrue ((ii) above).

4.1.3 Given the descriptive inadequacy of the "either-ors" in traditional legal theory, including the "either-ors" concerning bindingness in the strong sense, I will outline and suggest what I see as a descriptively more adequate picture.[102]

The starting-point is that *all* previous judicial statements are seen as *potentially relevant* arguments. Their relevance and weight in a later case *depend on* a varied, but relatively well defined set of aspects of the previous decision. These aspects are the arguments typically taken into consideration when lawyers weigh and balance previous judicial decisons against other legally relevant arguments. – Some of these aspects were mentioned above (section 3.3):

> From which *level* in the hierarchy of courts did the statement emanate?[103]
>
> Was the previous judgment *unanimous*, or were there one or more *dissenting opinions*?
>
> Has the previous statement been *followed in later cases*, or does it stand as an *isolated statement*?

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102 Arnholm, *Prejudikaters betydning for rettsutviklingen* [the importance of precedents for the evolution of the law], pp. 168–74, is the clearest expression of a similar perspective which I have found in Norwegian theory. In English theory, a similar perspective is limited to persuasive precedents (see section 3.3 above).

103 As expounded above (section 3.2.2 (ii)), the concrete use of this argument constitutes what I believe to be the most important differences between the English and Norwegian systems, with respect to previous judicial decisions as a source of law.

In addition, I will mention the following aspects of the previous case as typically relevant when assessing the weight of its statements:

> Does the previous statement lead to a *reasonable result in the case at hand*? – This is probably the most important factor when lawyers assess the relevance and weight of previous cases.
>
> What is the *age* of the previous judgment? Have the social, economic or other circumstances which influenced the decision, changed in any relevant aspects?
>
> How *clear* is the previous statement? Does it, for example, distinguish and choose between two precise alternative interpretations of a given statute? Or does it characterize some complex constellation of facts with a valueladen legal term, as for example "negligence"?[104]

4.1.4 Equipped with the outlined alternative description (section 4.1.3) one is in a better position to answer *the question* raised above (section 4.1.2 (1)): Do the English courts *more often* than the Norwegian courts pass judgments that they would *not* have passed, had it not been for a previous judgment?

I venture *the hypothesis* that *if* differences are found in the motivation processes of the judges, relating to the relevance and weight of previous court decisions, these differences will be less dramatic than suggested by the different wordings of judgments and legal literature in the two systems.

For example: It seems to be a common attitude among Norwegian lawyers that a unanimous and precise decision by Høyesterett on a question of law, has so much weight in later cases that courts other than Høyesterett must follow the pronounced rule, if it is not abrogated by a later statute or a later decision of Høyesterett itself.[105] – I do not think that this rule, as applied by the Norwegian courts or by Norwegian lawyers in general, leads to results significantly different from the English rule of precedent concerning the "absolute binding quality" of decisions from the House of Lords, as applied by the English courts or by English lawyers in general.

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104 Norms identifying arguments relevant to a process of weighing and balancing, that is, norms identifying arguments that are binding in the weak sense (section 4.1.2 (2) above), such as the norms just described, are examples of the type of norm which the Norwegian author Nils Kristian Sundby termed "retningslinjer" ("guidelines"); and the norms in traditional theory which purport to say when judicial decisions are binding in the strong sense (section 4.1.2 (2) above), are examples of the complementary type of norm which he termed "regler" ("rules"). See his dissertation *Om normer* [on norms], part 2. – The distinction is presented and further discussed in Eckhoff and Sundby, *Rettssystemer* [legal systems], 1st ed. pp. 128–56; 2nd ed. pp. 108–31; *Rechtssysteme*, pp. 90–109; Eckhoff, *Guiding Standards in Legal Reasoning*; Eng, *Sondringen mellom regler og retningslinjer* [the distinction between rules and guidelines]. Similar distinctions have been discussed by several authors; for further references, see the works just mentioned. For discussions in American, English and German literature, see e.g. Dworkin, *The Model of Rules I*, pp. 22, 24–28; *The Model of Rules II*, pp. 71–74; Hart, *Postscript*, pp. 259–63; Alexy, *Zum Begriff des Rechtsprinzips*; *Theorie der Grundrechte*, pp. 71–99.

105 Compare Eckhoff, *Rettskildelære*, 1st ed. pp. 152–53; 3rd ed. pp. 135, 312.

4.1.5 The weighing and balancing processes in lawyers' reasoning with previous judgments as a source of argument, have also been noted by legal theory and in judicial practice. However, both in legal theory and judicial practice there is a tendency to handle these facts in one of two ways (i–ii), neither of which is descriptively adequate:

(i) In some statements, the weighing and balancing processes are *placed outside the theory*, as some form of aberration.

> In *Hedley Byrne Ltd. v. Heller and Partners Ltd*.,[106] the plaintiffs asked their bank to obtain a credit reference on A. The plaintiffs' bank enquired of the defendant, A's bank, who replied, "without responsibility", that A was "respectably constituted" and considered "good for its normal business engagements". – The House of Lords said *both* that the disclaimer protected the defendant from liability, *and* that in some circumstances there might be liability for negligent misstatement. Consequently, the second set of propositions was not necessary for the result: The House of Lords could have reached the same conclusion by saying that, whatever the rules were about liability for negligent misstatement outside of contract, the court had to pass judgment for the defendant, because the disclaimer was effective.
>
> Does this mean that the second set of propositions are dicta, that is to say, propositions that the lower courts can choose to follow or not, as they like? On this point Cross says: "We have plainly reached a point at which the distinction between ratio decidendi and obiter dictum is *meaningless in practice*" (my italics).[107] – This view has also been stated in later court practice: "When [as in Hedley Byrne] five members of the House of Lords have all said after close examination of the authorities that a certain type of tort exists I think that a judge of first instance should proceed on the basis that it does exist *without pausing to embark on* an investigation whether what was said was necessary to the ultimate decision" (my italics).[108]

(ii) In other statements, an attempt is made to *box the weighing and balancing processes into new either-or categories*.

> "Should it ever come to be settled practice that a court bound by a case with two rationes may choose which of the two it prefers, and reject the other, allowance would have to be made for *a concept midway between* ratio and dictum" (my italics).[109]
>
> "A mere passing remark or a statement or assumption on a matter that has not been argued is one thing, a considered judgment on a point fully argued is another, especially where, had the facts been otherwise, it would have formed part of the ratio. Such judicial dicta, *standing in authority somewhere between* a

106 [1964] A.C. 465.

107 Cross, p. 84 (79–80).

108 Cairns, J. in *W.B. Anderson and Sons Ltd. v. Rhodes*, [1967] 2 All E.R. 850 at p. 857. Cited in Cross, p. 84 (80).

109 Cross, p. 89 (84).

> ratio decidendi and an obiter dictum, seem to me to have a weight nearer to the former than the latter" (my italics).[110]

4.1.6 In summary, as regards the *factual effects* of judicial decisions as a source of law: Decisions from *the supreme courts* (the House of Lords and Høyesterett respectively) do seem to have essentially the same impact in the two systems (see section 4.1.4 above). Decisions from *the lower levels* in the hierarchy of courts have probably more weight in the English system than in the Norwegian. This difference I believe in part can be traced back to the relative deficiency of the Norwegian law reporting system when it comes to covering decisions from courts other than Høyesterett (see sections 3.2.2 (ii) and 3.2.3 (4) above).

4.2 The declarative point of view

4.2.1 I have earlier elaborated two basic and common premises in the English and Norwegian doctrines of precedent: (i) Every judgment is seen as only an instance of a general rule in the sense of a set of general conditions (necessary and/or sufficient) for a legal consequence (section 2.3); and (ii) This general rule is seen as already in existence, and therefore found, not created, by the judge (section 2.4).

The combination of these two premises structures much of the *technical vocabulary of the doctrine of precedent*: This vocabulary gives the overall impression that lawyers are engaged in a search for rules already and objectively existing (somewhere).

On this point the Norwegian *courts* may seem less unrealistic in their verbal behaviour than the English ones. But this, again, is probably just another aspect of the Norwegian courts' saying less, not part of a descriptively more adequate doctrine or self-appreciation.

When it comes to *legal theory* one can find some species of realism both in Anglo-American and Norwegian theory about judicial decision-making (section 4.2.2). However, the impact of such realism on the doctrines of precedent seems to be marginal (section 4.2.3).

4.2.2 A *key concept* for a good understanding of judicial reasoning is the concept of 'decision': The judge in a concrete case *decides*, in a nontrivial way (see immediately below), on a series of questions, among others on what shall count as a binding ratio decidendi. – The emphasis is in this context on law as judge-made. The contrast is law as judge-declared.

The terms "decision" and "made" must not, in the present context, be misunderstood as implying erratic deviations from previous practice: *To follow a practice* is also the result of a decision, and among lawyers, the most common type of decision.

On the other hand, the qualification "*in a non-trivial way*" signifies that we are not interested in everything that is covered by the terms. For example, we can be said to "decide" every time we add 2 and 2 and get 4, because we then

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110 Megarry J. in *Brunner v. Greenslade*, [1971] Ch. 993 at pp. 1002–3. Cited in Cross, p. 86 (81).

decide to follow and confirm the linguistic rules governing the use of the terms "2", "add" and "4". When speaking of the decisions of the judge, we point to *something more* than such confirmation of linguistic rules: We point to the openness and uncertainty in some legal disputes. Further, we point to the systematic *connection* in all legal disputes, between the decisions of the judge and the interests and values that people have or hold – be they economic, religious, ethical, political or of other kinds.

The American realists emphasized the role that decisions, in this more substantial sense, play in judicial reasoning. First, they wanted to show that this is how judicial activity actually proceeds: by way of the judge weighing, balancing and deciding.[111] Second, they used this factual premise as a starting-point in their critique of the traditional doctrines of precedent, and of legal reasoning more generally – especially in a critique of some presuppositions deeply ingrained in the language and practice of lawyers: viz. the presupposition that every judicial decision saying something about the law is an instance of a general rule, in the sense of a set of general conditions (necessary and/or sufficient) for a legal consequence, already existing; and the presupposition that the aim of the judge on points of law is to discover this single, correct set of general conditions.

The *Norwegian* author *Astrup Hoel* puts the concept of 'decision' at the centre of his theory of how law is constituted, see his book Den moderne retsmetode [the modern legal method], published in 1925.[112] It is interesting to notice that despite this fundamental similarity to the American realists, Astrup Hoel seems to have had his intellectual inspiration from German literature only.[113] – The strength of Astrup Hoel's book is *the shift in perspective*: from the objective and declarative view, to a subjective and "law as made" view. Its weakness is that the key concept of 'decision' is not further analyzed.

About fifty years later, with *Sundby*'s book Om normer [on norms], some necessary conceptual tools were provided for a nuanced analysis of judicial decisions and lawyers' reasoning in general, especially through Sundby's distinction between rules ("regler") and guidelines ("retningslinjer"): The guidelines structuring the reasoning of lawyers *mediate* the above-mentioned connection between the decisions of the judge and the interests and values that people have or hold.[114] – In the perspective of this article, one should see Astrup Hoel's Den moderne retsmetode and Sundby's Om normer as complementary; together they represent an important contribution to a better understanding of

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111 See especially Frank, *Law and the Modern Mind*. See further Llewellyn, *The Bramble Bush*, especially pp. 68–69 (on the Janus-faced character of the doctrine of precedent); *The Case Law System in America*, e.g. pp. 50–51 (the same point); Cardozo, *The Nature of the Judicial Process*, pp. 121–22, 109–10, 175 ff (on the role of choice and decision).

112 For Astrup Hoel's general point, see *Den moderne retsmetode*, pp. 58–66 (61–63); and for particular applications, see pp.124–25, 142, 147, 149, 154, 170, 179, 189.

113 As far as I can see, Astrup Hoel, *Den moderne retsmetode*, gives only one reference to an Anglo-American legal author (on p. 90, in note 3, to Holland, *The Elements of Jurisprudence*).

114 For an application of this model to our subject, see sections 4.1.2–4.1.4 including note 104, above.

judicial reasoning, and more generally, to a better understanding of lawyers' decision-making.

4.2.3 The English doctrine today seems quite undisturbed by the insights of the American realists. – See, for example, the section in Cross, Precedent in English Law, entitled "The American realists".[115] There he concludes: "We can safely assume that whatever the position in the United States may be, the distinction between ratio decidendi and obiter dictum is not entirely chimerical so far as the English courts are concerned, and proceed to consider the important suggestions with regard to the distinction [between ratio decidendi and obiter dictum] that have been made ...".[116] – It seems a bit puzzling that one should be satisfied to build so sophisticated a doctrine as the English doctrine of precedent on a distinction of which one could only say that it is "not entirely chimerical". – See further the chapter in Harris, Legal Philosophies, entitled "Precedent", compared with the section entitled "American legal realism".[117] Harris' treatment of the American realists is not, I think, entirely fair: Through his focusing on formulations (of others or of his own making) which express extreme views, the reader misses the aims of the American realists, and the present relevance of their views for an appreciation of the doctrine of precedent.

Astrup Hoel's above-mentioned book and ideas made no visible impression on *Norwegian legal theory*. It was not until the seminal writings of *Torstein Eckhoff* that a kindred attitude found some prominence, and then only very slowly. – Eckhoff made penetrating analyses in a distinctively realistic manner in 1943 (Tvilsrisikoen [bearing the risk of doubt]) and 1953 (Rettsvesen og rettsvitenskap i U.S.A. [legal practice and jurisprudence in the U.S.A.]).

However, it was not until 1971, when the first edition of Eckhoff's Rettskildelære [sources of law] was published, that it became obligatory for Norwegian law students to acquaint themselves with something more than second-hand summaries of systematic realism. But the effects of blending traditional legal dogmatics with some psychological and sociological aspects seem small: Students and lawyers alike seem more or less intuitively to separate "the law stuff" from "the non-law stuff", and to view only the former as relevant.

The preceding impressions from the English and the Norwegian systems are pertinent to the more general problem of the relations between, on the one hand *legal doctrines* (be they about precedent or other legal phenomena), and on the other hand *facts* about lawyers, their actions and their reasoning: It seems that the doctrines are quite *immune* to certain kinds of facts, even when the doctrines purport to describe; for example, it seems that the English and Norwegian doctrines of precedent are quite immune to facts contradicting the declarative point of view, even when the doctrines seem to entertain the declarative point of view as a description.

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115 Cross, pp. 50–53 (49–52).

116 Same work, p. 53 (52).

117 Harris, *Legal Philosophies*, ch. 13 and pp. 93–98, respectively.

I shall mention some factors that are probably important in *explaining* the permanence of the declarative point of view:

First, *the ideology of the separation of political powers*: Visible policy-making is assumed to transgress the limits of the competence (legitimate power) of the judiciary, set by this ideology. – The declarative point of view makes it possible for the courts to change the law without the change being visible, and thereby to change the law without infringing the ideology of the separation of powers.

Second, as the declarative point of view allows for changing the law without the change being visible, it also allows for changing the law while *keeping up a pretension of the infallibility and certainty of law*.

> The function of keeping up a pretension of the infallibility and certainty of law has been defended. The following argument, with its reference to social necessity, I believe to be representative of what many lawyers would say if they were questioned on the subject; that is to say, on why lawyers should keep on using seemingly descriptive language forms, which on reflection are recognized to be false:
>
> "[T]he "declaratory theory" expresses a symbolic concept of the judicial process on which much of courts' prestige and power depend. This is the strongly held and deeply felt belief that judges are bound by a body of fixed, overriding law, that they apply that law impersonally as well as impartially, that they exercise no individual choice and have no program of their own to advance. It is easy enough for the sophisticated to show elements of naivite in this view – and no more difficult to scoff at symbols generally. But the fact remains that *symbols constitute an important element in any societal structure* – and that this symbolic view of courts is a major factor in securing respect for, and obedience to, judicial decisions. If the view be in part myth, it is *a myth by which we live and which can be sacrificed only at substantial cost*; consider, for example, the loss involved if judges could not appeal to the idea that it is "the law" or "the Constitution" – and not they personally – who command a given result" (my italics).[118]

Third, since the declarative point of view makes it possible to conceal the multitude of problematic intermediate choices and evaluations that the judge often makes before reaching his final conclusions (sections 4.1 and 4.2.2 above), this point of view is well suited to *disclaiming any personal responsibility for the consequences of the judgment*.

4.3 The need for, and practice of, adjusting the facts

4.3.1 A *prerequisite* of a good understanding of judicial decision-making is to see, first, the reciprocal relations between the legitimate techniques of distinguishing, overruling and following; and then, to see the relations between these techniques and the strategy of adjusting the facts of the case. – A comprehensive account of this subject would take us beyond the scope of this article. However, the subject is sufficiently important to warrant an outline of it (section 4.3.2) and of some problems (section 4.3.3), and an illustration of some

118 Mishkin, *The Supreme Court – Foreword*, pp. 62–63.

linkages, partly within judicial reasoning and partly between such reasoning and its political, legal and social context (section 4.3.4).

4.3.2 Most judges consider it important to reach decisions that represent *fair and reasonable solutions* in relation to the litigants and other individuals possibly affected by the judgment.

(i) The wish for a fair solution is a strong motive behind the never-ending process (section 2.4.3.2 above) of *distinguishing* previous cases.

When the law, as it is assumed to be, blocks a fair solution, the judge can decide and justify his decision in one of the following ways:

(ii) The judge can pass judgment for the fair result and justify his decision by changing the law, together with the description of the facts of the case that he thinks most probable. This strategy includes the *overruling* of previous cases.

(iii) The judge can pass judgment for the result which he considers unfair, and justify his decision with the law as it is assumed to be, together with the description of the facts of the case that he thinks most probable. Here, the judge is *following* the law.

(iv) The judge can pass judgment for the fair result and justify his decision by the law as it is assumed to be, together with *a description of the facts of the case that he would not have given, were it not for* its leading to the fair result under the law as it is assumed to be. Under this alternative I also include the use of rules concerning the burden of proof.

The last alternative, "*fact-adjusting*", is often passed over or only cursorily discussed in analyses of judicial decision-making. But I venture the hypothesis that this strategy is far more *frequently used* than is customarily assumed.[119] – The regular use of fact-adjusting leads to "*mechanical law*": a practice of interpreting and applying in a mechanical way the rule-formulation assumed to be correct, on the outcome-adjusted version of the facts, that is, on a version of the facts adjusted to the rule-formulation assumed to be correct and the outcome desired.

4.3.3 For two reasons, fact-adjusting *ought to be avoided*. First, the fact-adjusting strategy is unfortunate with regard to *the use of precedents*: When the true motives for the result are not disclosed in the opinion of the decision, it is very hard to say what the courts will do in the future; *uncertainty and unpredictability* are the result.

> An example from Norwegian law is the transitionary period from negligence (culpa) being a prerequisite for a claim in tort, to the acceptance of strict liability as well. During this period the courts stretched and pulled the facts of the cases

119 Fact-adjusting is mentioned or discussed in Frank, *Law and the Modern Mind*, pp. 144–45; *Courts on Trial*, pp. 168–69; Llewellyn, *The Common Law Tradition*, p. 361; Posner, *Cardozo: A study in Reputation*, pp. 38–40, 43; Eckhoff, *Rettsvesen og rettsvitenskap i U.S.A.*, pp. 145–46; *En bok om bevisbyrden* [a book on the burden of proof], pp. 35–37; *Rettskildelære*, 1st ed. pp. 29, 107–8, 173–74; 3rd ed. pp. 29, 159; Aarbakke, *Harmonisering av rettskilder* [harmonizing sources of law], pp. 516–18; Gaarder, *Domstolene og den alminnelige rettsutvikling*, p. 230; Andenæs and Kvamme, *Om grunner til uenighet om rettsspørsmål*, p. 24.

> brought before them, so that the rule of negligence could be applied with at least some credibility. At last one recognized the fictions at work, and openly stated strict liability. With this recognition of new law, it was no longer necessary to adjust the facts to a rule of negligence in order to reach liability. So, lawyers and legal theory could at last start the real work: identifying the criteria for strict liability. – An example of current interest is the practice of the English and Norwegian courts concerning when two potentially contracting parties shall be deemed to have moved from the stage of preparation to that of being legally bound. In both systems the courts talk at great lengths about "intentions to be bound" and "intentions to create legal relations", seemingly treating such intentions as necessary conditions for the formation of contract.[120] A more systematic comparison of opinions and outcomes of cases suggests that the intention of the parties is not a necessary condition, but one relevant argument, besides other arguments of a non-intentional kind, to a process of weighing and balancing.[121] However, in this area of law the courts have not yet openly recognized the fictitious character of their argument. So, lawyers must guess their way.

Second, the fact-adjusting strategy is unfortunate with regard to *the litigants* and to *confidence in the judicial process* as a means of conflict-resolution: The litigants know the facts of the case just as well as, most often better than, the judge. Since they are thus able to assess the (in)adequacy of the fact-description given by the judge, fact-adjusting will tend to evoke well-founded criticism from the losing side, and to reduce confidence in the ability of that particular judge, and in the capability of the judicial system in general, to arrive at the truth.

4.3.4 As regards *relations between the different decision-strategies*, it is important to see two things. First, it is important to see that distinguishing, overruling and fact-adjusting are *functionally equivalent*; they serve as alternative means to the same end, the result desired by the judge. Second, it is important to see that the judge's *choice of alternative is not accidental*. This latter point I shall illustrate in relation to the fact-adjusting strategy.

The same factors that tend to promote the declarative point of view (section 4.2.3), will also tend to promote the fact-adjusting strategy: – The ideology of the separation of powers constitutes a strong motive against *expressly overruling*. This is especially the case when the rule to be overruled is essentially based on statute,[122] since the overruling could then be seen as a sign of lack of respect for the democratically elected legislative body. But the ideology also makes itself felt when the relevant rule is essentially based on case

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120 Concerning the practice of the Norwegian courts, see Eng, *"Hva er en viljeserklæring?" Er det logisk umulig at disposisjonsvilje er begrepsmessig kjennetegn ved privatrettslig disposisjon?* ["what is a declaration of intent?" Is it logically impossible for the will to exercise competence to be part of the concept of 'juristic act' in private law?], pp. 38–39; *U/enighetsanalyse – med særlig sikte på jus og allmenn rettsteori* [analysis of dis/agreement – with particular reference to law and legal theory], section IV 2.2 (6)(b).

121 Eng, *"Hva er en viljeserklæring?" Er det logisk umulig at disposisjonsvilje er begrepsmessig kjennetegn ved privatrettslig disposisjon?*, pp. 40–41; *U/enighetsanalyse – med særlig sikte på jus og allmenn rettsteori*, section IV 2.2 (6)(b).

122 "Statutory precedent", in contrast to "case law"; compare note 38 above.

law, since the change can still be seen as a usurpation of legislative power. – In addition, overruling would break the image of the infallibility and certainty of the law. Further, overruling would tend to make people hold the judge responsible for the consequences of his judgment, not only for his weighing of the evidence and his finding the correct legal rule.

For these reasons the judiciary, both in the English and the Norwegian systems, tends to avoid changing the law by overruling earlier cases, and to prefer the technique of *distinguishing* the relevant rule.[123]

However, when the relevant rule is assumed to be *clear and fixed*, distinguishing will also have the drawbacks mentioned in connection with overruling, although to a lesser degree. In addition, distinguishing tends to produce over-complex rules and, as a consequence, never-ending struggles to establish consistency without too much infringement of common sense.

The clarity and fixity of the relevant rule are more influential causes of fact-adjusting in the lower courts than in the superior ones, since cases where the law is assumed to be clear and fixed, are more numerous in the lower courts: Such cases go more seldom to appeal, and they very seldom go all the way to the House of Lords or Høyesterett.

Another factor behind the fact-adjusting strategy is that this strategy is *simpler* than the most acceptable legal-change alternative: distinguishing. Especially *the rules concerning the burden of proof* offer handy instruments for reaching the needed description of fact: They are mostly based on case law, not on statutes, and are consequently without authorized wordings; they are great in number; often they are vague, ambiguous, pull in different directions when applied to a particular case, or in other ways leave much to the judge as to how they should be interpreted and harmonized. In short: By centring his opinion around phrases such as "what has been proved", "burden of proof", "presumption", etc., the judge can, in a professionally acceptable way, justify most of the fact-descriptions that he needs in order to reach the conclusion aimed for in a particular case.

In comparison with the fact-adjusting strategy, exercising the sophisticated legal technique of distinguishing the relevant rule will often seem a far more demanding task, considering what is here deemed necessary: the professionally acceptable knowledge and handling (interpretation and application) of, at least, all legal materials presented by counsel. In addition, the alternative of distinguishing quite often confronts the judge with the exerting task of collecting, sorting out, reading and absorbing legal materials hitherto unknown to him.

As to this latter task, the judge all too often *does not have the necessary time* at his disposal: The number of cases is so great that the time allotted to each case does not allow for the exercise, in a professionally acceptable way, of the legal technique of distinguishing.

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123 As to the relative importance of overruling and distinguishing, see e.g Benditt, *The Rule of Precedent*, p. 98; Blackshield, *'Practical Reason' and 'Conventional Wisdom': The House of Lords and Precedent*, p. 107; Eckhoff, *Rettskildelære*, 1st ed. pp. 170–75, 189–90; 3rd ed. pp. 155–60, 173–74; Gaarder, *Domstolene og den alminnelige rettsutvikling*, pp. 250–51.

> Concerning reactions to the pressures of work, one should also notice a difference between the two systems: The English courts often pass judgments orally and immediately after the close of the final speeches of counsel (section 3.2.3 (5) above), something that never happens in ordinary civil proceedings in Norway. Norwegian judges confront the pressures of work by closing the case and giving the judgment in written form, most often a week or two later, but not infrequently many weeks pass. (The provision of the Civil Procedure Act laying down that judgment must be passed within a week (§ 152), has not been enforced by Høyesterett and is today considered to be without substantial content.)

The factors now mentioned, tending to foster fact-adjusting, can affect *both* superior courts and lower courts. In addition, there are some factors that are more *specific for the lower levels*:

The *threat of reversal* in a superior court is a constant and probably strong motive for a lower court judge not to try to overrule or distinguish the relevant rule. – Further, the lower courts often do not to the same degree as the superior ones have the legal literature, law reports, parliamentary materials, or other species of *legal information* deemed necessary, at their disposal. – Still further, and regardless of whether there is sufficient time and legal information or not, the task of distinguishing often seems so *professionally demanding* to the lower court judge, that he prefers the simpler way of reaching the conclusion aimed for, constituted by the fact-adjusting strategy.

In the context now outlined, one can see some relations to a *doctrine of precedent*. For example: The more strict a doctrine of precedent is, the more fixed is the law assumed to be, and the more burdensome does the task of distinguishing the relevant rule seem – and therefore, the stronger the tendency to choose the strategy of manipulating the facts of the case.

In summary: By mapping some factors that make probable and help to *explain* a tendency towards fact-adjusting, the preceding discussion illustrates that the choice of legal decision-strategy is not accidental. – Further, by relating the factors to lower courts and superior courts respectively, the preceding discussion helps to explain why this practice is more widespread in the lower courts than in the superior ones: This difference is probably the result of the accumulation of "lower court problems" like the reversal threat, less time at their disposal (greater pressure of work), insufficient or uncertain legal information, and probably more widespread feelings of professional uncertainty.

5 Conclusion

When comparing the doctrine of precedent in English and Norwegian law, a central distinction in this article has been between what the legal doctrine and the courts *say* about the reasoning of the courts, and how the courts *in fact* do reason. This distinction has shown itself to be central because on some points there are good reasons to believe that similarity or difference in the one respect quite often does not correspond to similarity or difference in the other respect. More specifically, I have ventured such *non-correspondence* as a hypothesis in

two instances, in both cases maintaining that a *verbal difference does not correspond to any factual difference*.

The first instance is the verbal *role of the courts in shaping the doctrine* of precedent, as contrasted to the factual influence of the courts on the content of the doctrine (section 3.1). – Here my hypothesis is that the more active verbal role of the English courts in discussion and formulation of the doctrine (section 3.1.2) does not correspond to any greater factual influence on the content of the doctrine (section 3.1.3).

The second instance is the specifically English distinction between the *coercive authority* of some statements of the courts and the *persuasive authority* of other statements (section 3.3). – Here my hypothesis is that this distinction, like most "*either-ors*" of the doctrines, does not give a descriptively adequate picture of how lawyers in general, including judges, actually reason: I believe the reasoning of the judiciary in both systems to have an important feature in common, consisting in a weighing and balancing of certain arguments typically viewed as relevant and which often pull in different directions when applied in the particular case (section 4.1).

A doctrinal (verbal) difference that probably *does* correspond to a difference in court practice, concerns the question of *which courts bind which*. Here my hypothesis is that the more detailed and precise rules in the English doctrine with respect to decisions in the lower levels of the hierarchy of courts, correspond to more widespread feelings of being bound than what is found in the Norwegian system at corresponding levels (section 3.2.2 (ii)). – I believe *this difference to be the most important one between the two systems*.

This article has pointed to the continuing dominance of *a modern version of the declarative point of view*: the often tacit presupposition that there exists a general rule behind every earlier case, and that the aim of the judge is to select among the multitude of existing or imagined rules, the single, correct rule for the case at hand (sections 2.3–2.4). This view has structured much of the vocabulary of lawyers, including the vocabulary of the doctrine of precedent (section 4.2.1). – The declarative view has been criticized also in this latter context (section 4.2.2). Its *continuing survival*, despite all criticism, bears witness to the importance of the *function of concealment* that the doctrine of precedent fulfils (section 4.2.3).

Throughout the discussions I have sought to illustrate that a good understanding of a doctrine of precedent requires not only knowledge of the details of the *doctrine* but also some knowledge of the *concrete legal, political and social settings* within which the doctrine functions: be it for example the minute details of law reporting (section 3.2) or the broad political ideology of the separation of political powers (sections 4.2–4.3).

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