

The Unbearable Lightness of Precedent

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1 Legal Sources

Legal sources constitute the normative material that lawyers and others use in order to understand the legal system and especially to determine current law. Legal sources are not the law but the foundation of the law. The volume and the variance of legal sources have been increasingly expanded in modern time and to establish an exhaustive list of sources is in reality impossible. The list is dynamic just as the legal system. It is well known that in the modern complex legal system it is often a strenuous task to find the relevant legal sources and then to determine their legal meaning. Relevance depends on the actual legal problem facing the lawyer or judge. The information embedded in a legal source has a normative character and legal method is applied in order to determine the content of the specific normativity. Legal sources can be national, regional (e.g. the EU) and international. They can be written or unwritten. The decisive point is that the sources have to be recognized as legitimate and institutions such as the courts that decide legal issues have to be persuaded by the arguments that are implied in the sources. Being an acceptable argument in legal discourse is consequently the practical function of legal sources. Recognition of the specific source is accordingly based upon both a descriptive and a normative approach.

Although legal sources do not have equal standing, any legal source may constitute the decisive argument in a given case. There is no fixed hierarchy with respect to legal sources as arguments. In principle, statute is just one of several sources although it is in most jurisdictions, including the common law countries of today, normally the most important. The applied sources change over time in the sense that new types are developed while others disappear or become less prominent as e.g. custom in national law. Some types as statute and precedent are quite permanent features of the legal system but also their meaning and importance may vary over time.

2 Legal Culture

There is a close connection between legal culture and the legal sources that are actually being applied in a specific legal system. It is legal culture with its links to legal tradition that determines which sources are recognized and furthermore in which way they in reality are being applied within the legal system. Legal culture is not a precise category in the sense that it cannot be described in certain and accurate terms.¹ It is not written and cannot be studied in books as it mainly represents an underlying attitude with respect to how legality functions at a specific time in a specific society. However regardless of its volatility, legal culture explains the development and the current status of legal sources and in this way is essential although its importance is not always taken into account in jurisprudence.

This article is not directly concerned with legal culture but with a specific legal source, precedent. However, the observations in the following should be

¹ In this respect *see* Blume, Peter, *Retskultur*, Retfærd no. 83, 1998 p. 31-48.

perceived as an example of the influence of a given but not necessarily in all respects national legal culture.² The actual application of each individual legal source represents a fragment of legal culture and in many ways this is especially evident with respect to precedent.

In civil law countries there is no developed theory on precedents. They are recognized as a legal source but without many subtleties although advice is provided with respect to how court decisions are analyzed. In contrast, there is a refined theory in many common law countries with discussions on the division between *ratio decidendi* and *obiter dictum*, and distinctions between rules, principles and arguments. These issues are not addressed in this paper that is based on Danish law although certain observations from other legal systems are taken into account.

2.1 *Publicity*

As a start it is expedient to address the question of whether legal sources have to be widely known in order to be applied. With respect to the recognition and usage of precedents this is an essential question. Its answer is related to legal culture and it may differ from one society to another.

In general it is not a condition of validity that a legal source is made public. An unpublished source can still have normative force. The legal system is not based upon a general principle of *publicatio legis*. An obligation to publish may depend on general rules at a constitutional level. In Danish law only statutes due to section 22 of the Constitution have to be promulgated in order to be valid. If a statute is not published, it is not in force and this means that it cannot be applied as a normative argument. A legal source has to be valid, i.e. exist. With respect to all other normative sources there is no requirement of publication.

However, it is often assumed that some sort of publication is necessary in order to enable court decisions to become precedents.³ It is obvious that a normative effect is dependent on knowledge but such knowledge may be acquired in other ways than through publication. The decision may be more authoritative when published⁴ but especially within the deciding court it can function as a precedent without this being the case. It is well known that unpublished court decisions are used as arguments in cases and that such decisions function as precedents.⁵

As indicated, it may be assumed that it is more likely that the published source will be applied than the unpublished but this is mainly a factual

² The importance of legal culture implies that even in general jurisprudence one should be cautious of extending observations to jurisdictions that are not well known to the particular author.

³ This seems to be the opinion of Jes Bjarup, in Bjarup, Jes, Dalberg-Larsen, Jørgen, *Retsbegreb, retsanvendelse og retsvidenskab*, Bogformidlingens Forlag, Århus 1993 p. 129-133.

⁴ See Dias, R. W. M. *Jurisprudence*, Butterworths, London 1995 p. 126 and 132 ff.

⁵ Within arbitration, decisions are not published but through informal channels they nevertheless may function in the same way as precedents.

observation. Furthermore, it may be argued that the application of unpublished sources is not democratic or is illegitimate as it makes the legal system elitist. These are well known arguments against the application of hidden sources. However, the point which in particular will be made in the following is that application of unpublished sources makes the determination of current law uncertain and in this way the legal system may become less coherent and efficient.

3 Precedents

It is within this framework that it may be determined whether some kind of normative information is perceived as a legal source and against this background can be analyzed. It is well known and need not to be documented anyway in Western legal systems that court decisions can be legal sources and that they to a larger or lesser degree play a role in the determination of current law. This factual observation is decisive as it, as noted by Alf Ross,⁶ is not legal doctrine but the actual usage of normative material that must be taken into account. Against this background, it is in the following taken for granted that precedent is a recognized and applied legal source.

Before discussing specific questions it is expedient to determine what a precedent is and how such court decisions actually are recognized.⁷ The starting point is that not all but only a very limited number of the multitude of court decisions become a precedent. These are the decisions which in their reasoning communicate a general rule that with some degree of certainty will be applied in future decisions concerning the same legal question; see more on this aspect in 5. Precedents represent judge made law in contrast to the law made by a parliament. It is presupposed that the law has been changed when a precedent is made. Such decisions accordingly have a normative intention. Against this background, precedents represent something else than the mere application of current law.

In some legal systems there are institutional rules which facilitate the determination of the decisions that are likely to be precedents. It may follow from procedural law that the supreme court only makes decisions in cases where a precedent may be made. Although there still will be uncertainty, such a regulation may imply that decisions from other courts cannot be precedents⁸ but it does not guarantee that all decisions from the supreme court actually are precedents. There are no courts to my knowledge that explicitly state that a specific decision is a precedent and such a statement would probably also, as elaborated below, be meaningless. In all legal systems precedents have to be

⁶ In *On Law and Justice*, University of California Press, Berkeley 1959, Ross states p. 85 that of interest for the theory of legal sources is “solely the motivating part which precedent actually plays”.

⁷ A plurality of decisions may make it easier to determine the contents of a court made rule but this is not a necessity. A single decision may be a precedent in its own right.

⁸ This may be sustained by a general principle stating that only decisions from certain courts are binding precedents.

determined through an analysis of the individual decision and a helpful guide is that the more prominent position of the court the more likely it is that its decisions become precedents.

The analysis is centered on the reasoning of the court (*ratio decidendi*) and not on the outcome of the specific case. It is taken into account that there are not two cases that are exactly identical. A decision may be a precedent if the reasoning contains a general rule or principle that is not closely linked to the specific practical circumstances of the actual case. The rule must not be dependent on the specific facts. This is, very briefly, the common – and not original – method to determine a precedent. It depends on the traditions of the actual national or international court whether it is easy to make this analysis. It is helpful when the reasoning is drafted elaborately and clearly. Some courts apply extensive reasoning, some courts communicate the reasoning of each participating judge, and some courts like the Danish only communicate the essence of the reasoning that the judges have agreed upon although opposing reasoning is also made known. The determination of precedents is from the outset most difficult in courts like the Danish but it is not certain that this is always the case as extensive reasoning may to a higher degree make diverging interpretations possible. A large text is not always as easy to understand as a small. For the time being it may be concluded that as long as some kind of reasoning is made known it is possible to determine the decisions that may become a precedent.

4 The Idea Sustaining Precedents

Basically, precedents are sustained by the conservative notion, “that questions ought to be decided today in the same way as they were decided yesterday simply because they were decided that way yesterday”.⁹ However, more basic principles also favor use of precedents. The leading idea is equality. Even though no case is exactly the same many cases concern the same legal issue and should be decided in the same way within a certain period of time. The legal opinion has to be the identical as justice should not depend on which court or judge by chance decide the actual case. The idea of formal justice, in contrast to substantive justice, is the rationale of precedents.¹⁰ At the time when a precedent is made it may however be in contrast to formal justice due to its retroactive effect. The actual case is decided in another way than the previous similar case. In contrast to statutes, precedents do not contain interim rules that can prevent such injustice in specific situations. In principle there are no substantial requirements to the contents of a court made rule. It does not have to have links to previous law and it may constitute a total departure from this law.¹¹ However,

⁹ Paton, George, *A text-book of Jurisprudence*, The Clarendon Press, Oxford 1972 p. 211.

¹⁰ See critically Dias p. 164 “An unjust precedent is “law” here and now, but this is sometimes too high a price for certainty in law”.

¹¹ The old notion that courts merely discover what is already the law has most likely always been an illusion.

precedents that merely develop but do not revolutionize the law probably have a greater impact but that is basically another story.¹²

Precedents contribute to certainty in the application of law at the same time as they represent a method that can develop the law.¹³ As already indicated these two purposes are not fully in harmony but it is important to emphasize that precedents have both a static and a dynamic aspect.

Furthermore, precedents are necessary also for pragmatic reasons which are linked to the courts forming a diversified system that is difficult to control. Against this background, precedents represent a method to ensure the uniformity of the courts within a certain jurisdiction. They have a disciplinary function. While the legislative body is a unity the courts are not and precedents are applied to ensure a certain uniformity without directly infringing on the independence of the individual judge.

Evidently, it is basic and fundamental principles embedded in the legal system that favor usage of precedents. These principles constitute a strong argument but they also make it paramount that precedents are actually employed in a way that ensures that these principles are met. The desired equality and unity should actually be achieved. This is the aspiration even though precedents in most countries are not unconditionally binding as it is merely presupposed that they normally and most likely are respected as long as they are in harmony with current factual circumstances and the general beliefs of the law. When this is the case, court made rules are binding in practice and it must accordingly be possible to determine whether such a rule exists and what its contents are.

5 To Whom are Precedents Directed

It is interesting to consider the target group of precedents. The issue is to whom court made rules are directed and who respects them. In the answer to this question lies a further explanation of how it is determined whether a court decision actually is a precedent. In general, precedents are primarily directed towards other courts, and to a somewhat lesser degree other judges within the deciding court. In legal practice, a court made rule has not the same universality as a legislative rule that has a fixed linguistic form in contrast to the wording of precedents. Taking into account the polycentric or pluralistic nature of legal sources it is assumed that it is mainly other courts which are obliged to respect a precedent. It is well known that administrative bodies in many cases adjust their practice in accordance with new precedents, which in Danish law is in accordance with the principle stated in section 63 of the constitution, but these bodies do not welcome precedents that intervene in their sphere of the legal system and often try to limit the consequences of such decisions. Precedents are

¹² Summers, Robert S. *Essays in Legal Theory*, Kluwer Academic Publishers, Dordrecht 2000, assumes that to have an impact a precedent “at least (has to) pass a minimum threshold test both of substantive acceptability and of reasonable coherence with the pre-established legal context” (p. 215) – However, either a decision is a precedent or it is not.

¹³ See Pound, Roscoe, *The Spirit of the Common Law* (reprint), Transaction Publishers, New Brunswick 1999 p. 182.

taken seriously in legal discourse and are often discussed extensively, but they mainly represent a method by which courts talk to themselves.

This is furthermore important in respect to the determination of a precedent. When a new decision is made it is not possible with certainty to know whether it is actually a precedent. This may be the intention but it is not certain whether this intention will become a reality. The deciding court is not fully in control. The existence of the precedent will first be evident in future decisions in which the court made rule is applied. This secondly depends on cases being presented in which it is relevant to use the rule and this thirdly depends on the interpretation of the deciding judges.¹⁴ All in all, it is later court decisions that verify the existence of precedents. Before such decisions exist, assumptions to that extent has the nature of speculation. In some situations this may seem very likely but it is only the future that verifies the existence of a precedent. As stated by Theodore Benditt the situation is that “after all, judicial precedents are only words, written in the past by some judge, and it is only as currently interpreted that they have impact on the community”.¹⁵ In this way precedents differ from statutory rules that are legal sources from the time of enactment regardless of how or whether they are applied in practice. Precedents on the other hand depend on factors outside themselves.

6 Reasoning and Deliberation

A basic issue is still how the contents of a court made rule may be determined with certainty. In this connection, a fundamental question is whether the published reasoning of a decision provides an honest description of the actual reasoning of the court and its judges. Considerations with respect to this question depend to some degree as mentioned above on how the courts within different jurisdictions present their reasoning. This may be more or less easy to understand. The following remarks concern Danish law but they are probably applicable in any case to a certain extent also to jurisdictions where the reasoning is more elaborate with the modifications that follow from such differences. The following mainly concerns civil law as lay judges participate in the important criminal cases leading to particularities which are not necessary to include in the discussion.

With respect to this issue there are two kinds of courts in Danish law. The city courts are presided over by one judge that on his own decides the cases, while the high courts and the Supreme Court consist of several judges who together decide the cases. The distinction between these two types of courts has some importance with respect to the question of whether there is a division between the deliberations of the court and its published reasoning. It is evident that in a one judge court there is no formal division and this makes it more likely that the reasoning reflects the deliberation. Whether this is actually the case is to some degree impossible to verify as the thoughts going through the mind of an

¹⁴ See Zahle, Henrik, *Retten kilder*, Christian Ejlers Forlag, Copenhagen 1999 p. 49, where it is stated that it is due to interpretation that a decision becomes a precedent.

¹⁵ Benditt, Theodore M., *Law as Rule and Principle*, The Harvester Press, Sussex 1978 p. 7.

individual judge fall outside comprehension. This is also interesting in connection with theories on current law that refer to judge ideology.¹⁶ However, in this context this issue will not be considered. These courts are not interesting here and are not included in the following as they very rarely make precedents although they decide the majority of the judicial cases.

The courts in which a plurality of judges participate attract main interest. In these courts there is a clear division between the deliberation and the drafting of the reasoning. It is primarily in such courts it can be questioned whether there is always sufficient coherence between the deliberation and the reasoning. The question is whether they have the same contents, i.e. represent the same rule or principle. In the high courts the deliberation is not recorded while this is the case in the Supreme Court. The special problems related to a recorded deliberation are discussed in the following section. The reasoning of a decision is made known to other courts and lawyers while the (unrecorded) deliberation is only known by the participating judges. It is a natural starting point to assume that the reasoning reflects the opinions presented during the deliberation. The rule stated in the reasoning is actually the rule that the court has developed. It could be argued that this is necessary in order for the precedent to function in accordance with its purpose. If the reasoning does not truly reflect the opinion of the court it cannot be used to predict the outcome of future cases.¹⁷ Whether this line of thought is well founded is discussed below but first it ought to be considered whether there may actually be discrepancies between reasoning and deliberation.

It is impossible fully to answer this question as the contents of the deliberation are unknown to the legal public except for old recorded deliberations that are rarely relevant with respect to the determination of current law. No comprehensive research with respect to this issue has been carried out in Danish law. A starting point could be whether the deciding court actually follows the (probably) made court rule in future decisions. If this is the case then it indicates that the published rule is the actual rule but if the rule is not adhered to there may, however, be two explanations. Either the rule does not represent the real opinion or the court has decided that the decision after all should not function as a precedent. It will depend on legal tradition whether the situation may be clarified as this will be most likely with respect to courts that in their reasoning cite and discuss previous case law.¹⁸

It is only the deciding court that can determine whether the rule indicated in the reasoning is correct in the sense that it represents the opinion of the court but this is not necessary in order for the decision to function as a precedent. Other courts will take their starting point in the published reasoning as they have no other choice. For them the stated rule is the precedent constituting judge made

¹⁶ An example being the theory on current law outlined by Alf Ross in *On Law and Justice*.

¹⁷ The famous theory, developed by Alf Ross in *On Law and Justice*, making the determination of current law in part dependent on the prediction of court behavior as indicated in the reasoning of decisions will be challenged if such a harmony does not exist. According to Ross p. 42, "the statement regarding law at the present time always has reference to the future".

¹⁸ A Danish court that rejects or overrules a precedent does not have to state this explicitly and seldom does.

law. A “wrong” of “incomplete” rule can therefore become a precedent. Such a rule can influence legal developments and be the deciding factor in legal disputes. It could be argued that this is only possible until the next case is presented to the original deciding court as it will then rectify the situation. In practice this will depend on how often such cases are presented at this level and it will furthermore depend on whether the court actually decides to rectify the situation by applying the original “correct” rule. This is not at all certain. The factual situation might have developed in such a way that the decisions made on the basis of the “wrong” rule are viewed as satisfactory and when this is the case it will never be common knowledge that a legal practice started by something which can be perceived as a mistake. An intriguing but not unlikely situation.

Although it seems likely that the reasoning is trustworthy in the majority of cases and it is an exemption that it communicates a “wrong” rule this can only be an assumption. There may have been precedents that from the outset have been founded on another legal opinion than the deciding courts and accordingly legal developments may have been started by a mistake; deliberate or not. These observations cannot be verified as the deliberations are not known and are not always recorded for posterity. The described situation is however not unlikely and ought to be taken into account in legal theory.

7 Recorded Deliberations

In the Danish Supreme Court deliberations are recorded and for this reason the court attracts major attention. It is a long tradition in this court that the deliberation is recorded in protocols that are kept at the court.¹⁹ These protocols can first be accessed 20 years after the decision has been made or in a situation where all the participating judges are dead. These protocols are very interesting seen from the perspective of precedents. This is in particular the case as the Supreme Court is the main producer of such decisions. The protocols constitute the memory of the court as they make it possible for judges to clarify why a previous decision was made. In contrast to other courts the deliberation is accessible to other judges than those who actually participated in the decision. On the one hand this means that the judges will be aware of discrepancies but on the other hand it is more likely that a contradiction between the reasoning and the deliberation can have real impact with respect to the outcome of future decisions.

As only the judges know how the protocols are used the following account and analysis are based on descriptions given by judges.²⁰ It is as a beginning interesting and somewhat disturbing that the protocols themselves are not fully trustworthy. It is normal when an account of a meeting is made that the participating persons read this account and if there are misunderstandings or any misleading incompleteness such mistakes are corrected before the account is

¹⁹ It is likely that the protocols originally have served as the memory of the court at the time when decisions were not published or published without any reasoning.

²⁰ The newest in Denmark is provided by Zahle, Henrik, *Omsorg for retfærdighed*, Gyldendal, Copenhagen 2003.

official. This does not seem to be the case in the Supreme Court. The minutes are taken by the assisting personnel at the court and later transferred to the protocol. The participating judges do not read or control whether the account is correct.²¹ This is probably normally the case but correctness is not certain as the deliberations often take long time and can be very complex. It is not likely that the account always is absolutely correct. Mistakes may occur and if so they are not detected and remain for posterity.

The protocols are not merely kept for posterity but are actively used in the deliberations in new cases. The judges study the protocols carefully. Today, this seems to happen in most cases. Furthermore, it seems to be the reasoning outlined in the protocol rather than the edited and published reasoning of the decision that is seen as the actual precedent. In situations where there is a discrepancy this means that an essential legal source, the protocol, is hidden and not known by the general legal public. As mentioned previously it is not necessary for a legal source to be published but such sources are in general more legitimate. In this case it is especially interesting that participating lawyers do not know the contents of the protocols. This affects the quality of legal arguments as lawyers in presenting a case before the court may follow a path they wrongly think will lead to success. Furthermore, the soundness of advice to clients as to whether high court decisions ought to be appealed will be affected.

Taking into account that the protocols are not fully reliable and that this for other reasons also may be the case with respect to the actual reasoning there is serious doubts as to the feasibility of applying precedents. In any case, they are not always what they appear to be. Reading theories of jurisprudence these deficiencies are not always evident and such theories are without this being their intention often somewhat deceptive or naïve. However, as mentioned above, regardless of whether there are doubts as to what the real judge made rules are and regardless of whether judges sometimes base their decisions on rules unknown to others there is no doubt that what we call precedents actually play an important role in the legal system. Precedents may not always be honest but they still may determine current law.

8 Life Span of Precedents

Another issue concerns the duration of precedents being employed. In comparison with statutory rules no formal procedure is applied in order to make a precedent obsolete. When the circumstances or the law changes the precedent ceases (*cessante razione cessat ipsa lex*) but when these events occur is due to an interpretative decision. There is no exact life span and just as statutes, a precedent can have both a long and short life. As far as the judge made rule is applied in legal decisions the precedent is living. The original precedent may sometimes only be influential in an indirect way as it may be later decisions that are cited. The rule may also die in the sense that it is incorporated in a statute implying that it is the statutory rule that is applied in future decisions. The life of

²¹ See Zahle p. 133. Judges may do so according to Højesteretsinstruks 7 December 1771 § 16.

some precedents may be easy to reconstruct while this is difficult or even impossible with respect to others.

During certain periods it may in general be observed that precedents function for a long or a short time. Such observations may influence the amount of precedents being made. Today, precedents in e.g. Danish law probably have a shorter life span than previously. This is in accordance with common tendencies implying that the legal system in general is more innovative than beforehand. Society changes more quickly today and this is reflected in more rapid legal change. This observation is normally made with respect to statutory law but it seems likely that it also applies to judge made law.²²

Against this background it may be assumed that the inclination to make precedents increases. The consequences of creating justice for the future are easier to predict as the life span is shorter. This, of course, still depends on the behavior of future courts which creates some uncertainty but even though this is the case, it still seems likely that courts today are more inclined to be future oriented. In this way precedent is a living legal source.

9 Do we Need Precedents?

In the discussion above it has not only been assumed that precedents exist but regardless of their uncertain and sometimes maybe even dishonest nature also that they constitute a valuable legal source. They have been perceived as a necessary element of the legal system. These assumptions are not indisputable as precedents easily can be seen as a steering gear of either conservative or dynamic character and furthermore as a means used by courts in order to acquire power at the expense of parliament. From this perspective precedents are not in accordance with modern democracy in the same way as the King in old days was cautious with respect to this practice.²³

In principle, this line of thought is persuasive as law making should be linked to the legitimate political power. Courts should apply and not make law – non *exemplis sed legibus iudicandum est*. It is well known that this is not a realistic approach as statute law cannot cover or foresee all factual circumstances that will occur. However, it still holds some truth although the general values normally are shared by courts and parliament implying that these two institutions travel down the same path. However, if there is a realistic choice then it seems reasonable to prefer statute instead of precedent.

It seems to be a consequence of the modern complex and broad legal regulation that such a choice is not available in all situations. There are limits as to what a parliament in practice can regulate if it maintains its general political role and in some cases there also seems to be limits as to what it will regulate. It is a well-known phenomenon that many legal issues are not settled in statute but

²² See Zahle, 2003 p. 77.

²³ From 1683 to 1771 Danish courts were not allowed to cite precedents. As mentioned in 2 such a prohibition does not preclude precedents from being a legal source but limits their effect.

referred to the courts or other conflict solving bodies. To some degree the courts are given the role as legislator.

Usage of the courts as a surrogate legislator may be due to many different reasons. Some may be sound in the sense that legal regulation from a societal perspective is necessary but it is not at the legislative level possible to draft rules that are sufficiently accurate but merely rules that indicate in which direction a certain issue should be regulated. In such situations, it depends on the specific factual circumstances that cannot be predicted by the legislator how the legal rule precisely should be constructed. In these cases the courts are used for a societal reason and precedents perform a necessary function.²⁴ However, in other situations it is entirely political reasons that empower the courts. It is not possible for parliament to agree upon the details of a certain regulation as this may lead to political difficulties for the majority and for this reason the issue is left to the courts. Politics is turned into law. It may be argued that the courts are misused in such situations but these cases also demonstrate that precedent is a useful method of regulation in the legal system of today and sustains the dynamic features of the law.

However, when judges make law they are not as free as legislators. The procedural situation creates certain restraints and judges have to be more aware of the general principles of the actual legal system in which their “new” rule should function.²⁵ Their range of choice is more limited than the legislators although a precedent in theory can state any kind of rule or principle. Judges are aware of such limitations and it seems likely that precedents are only made when this is seen as a necessary development of the current legal system. In the complex modern society rules cannot only be judge made but such rules do form a part of the comprehensive legal system.

10 Unbearable Lightness

It may be concluded that even in a legal system increasingly dominated by statutory regulation precedents are still needed and there are no signs indicating that this old legal source will disappear. There is also little doubt that precedents are useful both as substantive regulation and as a method of promoting formal justice ensuring discipline within the court system. Against this background it is disturbing that there are many uncertainties related to precedents and that it seems likely that they are not always completely trustworthy. The secretive way in which precedents are produced at least in a legal system as the Danish creates suspicion as to the content of the rules they communicate. Such suspicion may not always be well founded implying that the main characteristic is uncertainty. Precedent that should serve to clarify current law may sometimes leads to the opposite result.

²⁴ In this respect see Hart, H.L.A., *The Concept of Law*, Clarendon Press, 2nd ed. London 1994 p. 135 indicating that the open texture of law creates a need for precedents.

²⁵ See Dworkin, Ronald, *Law's Empire*, Fontana Press, London 1986 p. 244 stating that judges have to make their decisions “on grounds of principle, not policy”.

This does not mean that there should not be precedents as it is impossible to envisage an alternative. Precedents are useful and they are here to stay but within a realistic approach to legal sources it must be recognized that there is something unbearable light about precedents.