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Constitutive rules of precedent

A non-prescriptivist account of *stare decisis*

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Abstract

The purpose of this paper is to reject the thesis that a system of precedent is established with a prescriptive norm. This claim is supported by two lines of reasoning. First, it is claimed that systems of precedent necessarily require constitutive norms and not prescriptive norms. Second, any system of precedent comprises at least two, if not three, constitutive rules of precedent. While one confers the power to set a precedent, another conditions the validity of a judicial decision to the fact that it follows the precedent. Finally, there may also be a third rule that confers the power to ensure that precedent is followed and to annul divergent decisions.

Index terms

Keywords: rule of precedent, prescriptive norm, constitutive norm, competence, applicability

Full text

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1 Introduction

1 Literature on the theory and dogmatics of judicial precedent is undergoing a renaissance, as the publication of numerous articles, compilations, and volumes on the subject proves. There is, however, still work to be done in this field, at least in terms of the analytical theory of law. It is important to note that certain common statements in

the framework of theories on judicial precedents have not yet been sufficiently filtered through the analytical theory of law. Indeed, while existing contributions have undoubtedly been valuable, many are based on questionable assumptions.

2 I address one such assumption in this paper, namely, that when a system of precedent is in place, following precedent is either mandatory, although to varying degrees, or at the least, permitted.[1] In particular, I argue against the common assumption that the use of precedents in any system of precedent is governed by a prescriptive norm of obligation or – when there is no such obligation – by a prescriptive norm of permission.[2] To this end, I proceed as follows: First, I start by rejecting the thesis that the rules establishing the alleged "obligation" or the alleged "permission" to follow precedents are prescriptive (or regulative) norms.[3] Second, I argue that systems of precedent are necessarily established by constitutive norms, and I demonstrate that the practice of precedent is normally based on three constitutive rules of precedent: one that necessarily confers the power to set a precedent; another that necessarily conditions the validity of judicial decisions to their following of the precedent; and in some systems, one that that confers the power to ensure that precedents are followed and to annul divergent decisions.

3 Three clarifications are, however, important before we turn to the heart of the argument.

2 Three preliminary clarifications

4 The first clarification concerns the difference between prescriptive norms and constitutive norms (2.1). The second traces a distinction between the concept of precedent and the rule of precedent (2.2). The third regards the positive nature of the rule of precedent (2.3).

5 (2.1) Two distinctions that show the contrast between constitutive norms and prescriptive norms are important for the argument in this paper.[4] First, constitutive norms do not provide deontic characterisations of behaviours or states of affairs as mandatory, prohibited, or permitted under certain circumstances of application (as prescriptive norms do). Instead, constitutive norms correlate certain circumstances of application with the attribution of an institutional property. Second, unlike prescriptive norms, constitutive norms are not associated with sanctions for the addressees who are responsible for deviating from the norm. Instead, the legal consequence of non-compliance with a constitutive norm is that the institutional property correlated with the circumstances of application of the norm does not occur.

6 To be able to adequately describe how precedents operate in a legal system, the distinction between prescriptive norms and constitutive norms must be maintained consistently. Indeed, it enables us to flag an improper use of the language when the possibility of choosing to apply a precedent or not is explained by saying that there is a prescriptive norm of permission that allows the judge to choose between both options. As I will show, the norm "allowing" the judge to choose between both options does not have the form of a permission but of a constitutive norm that considers either decision valid. The same can be said about the "obligation" to apply a precedent: It is not that the judge has an obligation established by a prescriptive norm of obligation. Rather, the judge's decision is invalid if the judge does not apply said precedent. For reasons of clarity, it is therefore important to avoid using the terms 'mandatory' and 'permitted' in these contexts.

7 (2.2) The second clarification concerns the distinction between the rule of precedent and precedents themselves. Of course, the concept of precedent cannot be taken for granted; numerous concepts of precedent are available (Chiassoni 2012; Horty 2011; Iturralde 2014). For the purposes of this work, however, "precedent" means a court decision that contains a (general) rule relevant to the justification of other court decisions.[5] It is clear, however, that not every court decision constitutes precedent

(except in the sense of a contingent auto-precedent) for the court issuing the ruling. What differentiates any old jurisdictional decision from a ruling setting precedent is a norm identifying it as such. Such a norm must be in place (is necessary) for precedent to be established. In this regard, a distinction must be drawn between court decisions containing a rule relevant to future judgements and a norm establishing that certain decisions count as precedents. Put simply, while precedents are a set of judicial decisions, the rule of precedent, or the rule of *stare decisis*, is the rule determining that certain court decisions count as precedent.[6] However, and as this paper shall demonstrate, the rule of precedent is not a single rule. It is instead a set of rules on (at least) the competence to set precedents and on their relevance.

8 (2.3) The third clarification concerns the (potentially) positive nature of the rule of precedent. Clarification is needed because a conceptual link has too often been established, either expressly or supposedly, between the positivization from the legislator (or the courts) and the mandatory nature of precedents. Indeed, while a distinction between legally binding and *de facto* binding precedents is highly recommended, this distinction has often been associated with that made between binding precedents and merely persuasive precedents. Beyond the fact that the opposition between binding and persuasive precedents deserves a separate discussion,[7] it is frankly disorienting to argue that precedents are more or less binding depending on whether the legislator (or the court) has positively enforced them. This is disorienting for two reasons.

9 First, nothing prevents the legislator from positivizing the "obligation" to only consider previous decisions, or to only mention them.[8] This means that there is a positive rule but that it establishes a different framework to the mandatory nature of following precedents (for instance, merely considering them may be enough). However, it is also possible that the judges deem following precedent "mandatory" even when there is no legislative provision to support this.[9] This becomes apparent, for instance, when without making a general statement, judges annul court decisions merely because they do not follow previous rulings.

10 Second, however, the legislator's positivization of a normative statement is neither a necessary nor a sufficient condition for adding a rule to the system. Beyond the very real issue of the separation of powers, the fact is that every experienced lawyer is aware of the presence of legislative statements that are systematically ignored by the courts of justice. But the opposite is also true, namely, that every experienced lawyer knows that some norms considered "mandatory", or even of valid, cannot in any way be traced back to legislative or constitutional texts.

11 The three clarifications offered above are relevant precisely because the practice of following precedents is governed, particularly in civil law, through implicit rather than explicit rules. As detailed below, this poses a certain difficulty for determining the nature and the content of the rule of precedent. This is because if we cannot count on legislative positivization to determine the presence and content of the rules governing the practice of precedent, we must empirically analyse which rules govern the use of precedent and the legal consequence of not following them. This is not easy, however, at least if we admit the possibility that some legal rules are associated with no legal consequence. It is possible that in an specific legal system, only the following of precedent is associated with legal consequences or that, on the contrary, only not following precedent has such consequences.[10] The latter seems to be the case with following at least some precedents: decisions where following precedent determines the validity of the subsequent ruling, but not following precedent is not a condition for invaliding the judicial decision.[11] From this standpoint, thinking that because the rule holding precedent to be mandatory has not been positivized, or because there is no legal consequence for not following precedent, these decisions become irrelevant, seems to be a somewhat hasty conclusion. It could certainly be the case that following precedent is not regulated in any way, thus making the following of precedent legally irrelevant. However, the opposite seems to be the case: although there may be no clear consequences for not following precedents, courts often use them to justify their

decisions and trial lawyers constantly cite them. In some legal frameworks, identifying the legal consequences of failing to follow precedent is impossible, but this does not render the precedents themselves irrelevant. Consequently, it is logically possible, and is in fact the case in many legal systems (e.g., in Chile, Spain, and Italy) that failure to follow precedent does not entail any legal consequences but following precedent does. Now, on most occasions, not following precedent does entail legal consequences in terms of the annulment of the judgement or the possibility of appealing it, but these are not the only ways precedent can be relevant.

12 Further, this is not the only evidence to suggest that precedents are legally relevant even when there are no expected implications for not following them. We invest heavily in bibliographic databases, while the judiciaries in several countries are launching free, large-scale digital publications of their rulings; we dedicate whole sections of legal journals to the analysis of judgements; we teach entire university courses on jurisprudential analysis. Therefore, we must analyse how precedents are relevant (if this is the case), even while not following them carries no legal consequences at all.

13 This paper does not seek to describe how precedent works in any specific legal system of common law or civil law. What it aims at is recreating the way both types of systems work. Despite the possibility that specific legal systems include prescriptive norms regulating the following (or non-following) of precedent, these have a contingent character. What is fundamental in precedent systems is that they are based on constitutive norms.

3 Problems of prescriptivist analyses

14 Generally speaking, the reconstruction of the practice of precedent in the common and civil law systems is often introduced as constituting a major division. While in the former, precedent is said to be mandatory, in the latter, it is said to be merely persuasive, with no associated legal consequences.[12] While it is true that in some Latin American civil law systems, there have been legislative and judicial positivization processes for the practice of precedent, many contain no express consequence for not following precedents, meaning they are not, therefore, mandatory.

15 I believe that theories like the above are based on a conceptual error: thinking that the *stare decisis* norm (or rule of precedent) is prescriptive. This section will analyse the theory that following precedent is a prescriptive rule of obligation or a prescriptive rule of permission. As legal systems do not generally prohibit the practice of using past court decisions to justify future court decisions, I shall not focus on this logical possibility.[13]

3.1 Mandatory rule of precedent

16 To analyse the theory that the rule of precedent is a prescriptive norm that renders following precedent mandatory, strictly speaking, based on the *ratio decidendi* or the holding contained in the precedent, I shall assume the maximum degree of bindingness. Consequently, following precedent in this regulatory scenario would be an imperative duty. This section will show that even in such cases, the rule of precedent cannot be configured as a prescriptive norm that qualifies following precedent as mandatory.

17 Despite the fact that in regular juristic parlance, following precedent is often presented as mandatory, it is extremely unwise to reconstruct the rule of precedent as a prescriptive rule of obligation. Indeed, if it were mandatory to apply the same *ratio decidendi* to similar cases as those already decided in a previous decision, then the consequence for a judge not following this mandate would typically be a sanction.

To be clear, I am not arguing that there are no prescriptive norms without sanctions. I am only putting forward the idea that if not following a prescriptive norm has any

consequences, these must logically be a sanction. Since Hart's critique of Kelsen, it has become widely accepted that there can be prescriptive norms without sanctions associated to their violation. Nonetheless, also according to Hart, it is agreed that the normal consequence of a violation of a prescriptive norm is a sanction, whereas the consequence of a constitutive norm is its non-validity. As I aim to show in what follows, the idea that the rule of precedent is a prescriptive norm is not only in contrast with the practice of our legal systems (3.1.1), but that the implications of considering it as such would also be rather strange (3.1.2).

19 (3.1.1) First, it is extremely rare for judges to be sanctioned for not following precedent. Indeed, very few legal systems set forth sanctions for judges if they do not apply the *ratio decidendi* from the previous case.[14] One exception is the Colombian legal system where its Supreme Court considers the failure to follow precedents as a type of prevarication.[15]

20 Two points must be made in this respect. The first concerns the type of prevarication, which always requires at least an inexcusable error if not wilful intent (this is more common). In other words, for prevarication to take place one must not only make the decision in question, but also wilfully (or due to a serious lack of knowledge of the law) infringe the law with it. However, it is also important to stress that when considering failure to follow precedents as prevarication, precedents are comparable to any other legal rule. It is not a question of not following precedent, but of not following any legal rule.

21 The second point concerns the possible indirect sanctions that judges may receive. Indeed, several advocates for judicial independence (Bordalí 2003; Andrés Ibáñez 2019; Taruffo 2014; Núñez Vaquero 2020) have sounded the alarm because following precedent is being associated, albeit not directly with sanctions, with withholding awards, incentives, or some other form of pressure that decreases judicial independence from their (supposed) hierarchical superiors. To assess the thesis that the rule of precedent is not a prescriptive norm of obligation, we shall therefore adopt a broad concept of 'sanction' that covers any negative consequence for the incumbent(s) of the judicial body failing to follow precedent. Consequently, we can argue that the rule of precedent is a prescriptive norm because the failure to follow precedent entails some such sanction in the broad sense.

22 However, despite the expansive nature of such a concept of sanction, which includes not only direct punishments but also indirect sanctions such as losing awards, it is still extremely uncommon for incumbent judges to be sanctioned. Judges are not normally sanctioned for not following a specific precedent but for systematically disregarding them. Still, this remains exceptionally rare.[16]

23 Note that the above definition of sanction excludes the legal consequences that the decisions such courts hand down may be subject to instead of their authors, i.e., the nullity or revocability of the decision. This point is important because if there is one consequence most provided for in the case of not following precedents (strictly speaking: their *rationes decidendi*), it is the nullity or at least the revocability of the decision in question.

24 (3.1.2) Second, it seems somewhat strange that judges would be sanctioned while their judgements would remain valid or at least non annullable. I am not only saying that the sanctioning of judges for not following a precedent in a system where precedents are binding is far from the most frequent consequence of the violation of the rule of precedent. I am saying that the nullity of the decision in question is more consistent with what constitutes a system of precedents.

25 A legal system aiming at having future decisions determined by past rulings could deploy a set of sanctions to make the courts decide in the same fashion as in the past. However, a system of sanctions does not guarantee institutional results, but leads to their achievement only indirectly through the suppression of deviant behaviour. Indeed, it would be possible for judges to accept sanctions and yet systematically ignore precedent. Consequently, it can hardly be argued that a legal framework that punishes

judges who do not follow precedent, but does not annul their decisions, is really a system of precedent.

26 This perspective highlights that the most common consequence linked to a system of precedent is not sanctioning incumbent judges but annulling the judicial decisions that go against past rulings. While it is true that sanctions may function as a negative incentive for judges to not deviate from past decisions, a system of precedent based exclusively on sanctions for judges deviating from past decisions is strange in this sense.[17] To understand this point, simply imagine a system of precedent where failure to follow the precedent results only in sanctioning the incumbent judge, and another system where the anticipated consequence is only the nullity (or the revocability) of the ruling. In the first case, it would be perfectly possible for a judge to decide to deviate from the precedent, accepting the sanction as a reasonable price to pay. However, this appears to frustrate the goals sought through the establishment of a system of precedent. In the second case, on the contrary, if the consequence of not following precedent is the nullity of the decision, whether the incumbent judges are willing to accept the sanction becomes irrelevant because the institutional consequence remains the same.

27 Therefore, while a system of precedent based exclusively on prescriptive norms associated with sanctions for incumbent judges is inconsistent with such goals, it is possible and most common to have a system of precedent that sets forth the nullity (or the revocability) of the decision deviating from precedent as the sole consequence of not following it. As will be developed below (sec. 4), this is an initial argument for considering that the rule of precedent, although possibly accompanied by prescriptive norms regarding the following of precedents, is above all a jurisdiction rule.

28 In short, it is possible for a legal framework to include a prescriptive norm of obligation to follow the precedent. However, the system of precedent must be based on constitutive rules since a system of precedent based exclusively on prescriptive rules isn't possible.

3.2 Permissive rule of precedent

29 It could be claimed that in the majority of civil law systems, the rule of precedent is a prescriptive norm of permission. However, the idea that the rule of precedent can be reconstructed as permission, wherein following precedent is not mandatory, must also be rejected. In a nutshell, the main reason is that if precedent is something that affects the validity of a judicial decision, and validity depends on constitutive norms, then the rule of precedent cannot be a permissive rule because permissive rules are prescriptive norms.[18]

30 To explain why the analysis of the rule of precedent in terms of a permissive norm should be rejected, it is useful to recall that "permission" constitutes the only deontic operator that qualifies either the commission or the omission of a certain behaviour, but not both.[19] Therefore, if following precedent is merely permitted (as opposed to optional, mandatory, or prohibited), then not following a precedent may be prohibited, mandatory, or permitted. But this seems implausible for the following reasons:

31 (i) First, if not following a precedent were prohibited, this would mean that following a precedent would be not only permitted (as by hypothesis of this subsection 3.2), but also mandatory per definition (in deontic logic, "prohibited to " is defined as synonymous with "mandatory not to " and "not permitted to "). In other words, following a precedent would be qualified as both permitted and mandatory. The problem, however, is that this specifically brings us back to what was said in section 3.1 about the rule of precedent as a norm that makes following precedent mandatory.

32 (ii) Second, if not following a precedent were mandatory, this would mean, again per definition, that following a precedent would be prohibited. We would thus have an antinomy: two incompatible regulatory qualifications for the same action. Indeed, following precedent would be both permitted (as by hypothesis of this subsection) and

prohibited. Besides the fact that this brings us back to the problem of qualifying the (non-)following of precedent as mandatory, it does not seem sensible to think that the rule of precedent is a set of antinomic rules.

33 (iii) Third, it is possible that both following and not following a precedent are permitted. Therefore, the rule of precedent would be a norm that would qualify following precedent as permitted, but not following it would also be permitted. It would thus be optional. However, this makes the following of a precedent somewhat irrelevant (but in any case, see Bulygin 2020 and Poggi 2004). To understand the reason, we must examine the functions performed by the permissions, and therefore the optional behaviours, in the legal systems.

34 Permissions are typically assigned three functions: (a) the first is to clarify the regulatory status of a conduct; (b) the second is to protect conduct from future amendments in lower ranking provisions; and (c) the third is to repeal prohibitive rules.[20] Of these three functions, only the third advocates for the rule of precedent.[21] Therefore, we can reject the notion that the function this rule performs in the legal system is to clarify the status of the behaviour of "following the precedent", or to derogate prohibitive rules.

35 The relevant point is the function of permissions to shield certain behaviour so that lower ranking provisions[22] cannot amend the deontic characterisation of the behaviour in question. There would be two rules that could not be issued precisely because the rule of precedent is a norm that qualifies following precedent as optional: (*i*) the rule sanctioning the incumbent judge for not following a precedent; (*ii*) the decision annulling a judicial decision for not following a precedent.

36 (*i*) The first option, where the judge is not sanctioned, must be ruled out for the reasons detailed above. Namely, it is extremely uncommon and strange for judges to be sanctioned for not following a precedent, and when they are, this occurs under the broader term of prevarication, which requires a subjective element (i.e., the will to break the law by making the decision in question or to break the law due to a serious lack of knowledge of the law).

37 (*ii*) The second option is that a rule of precedent making following precedents optional, prohibits a higher body (or the individual rule this body issued) from annulling a decision for (not) using a precedent in its reasoning. From this standpoint, if the rule of precedent qualified the use of precedent as optional, it would be preventing a higher court from annulling the decision for (not) following a precedent, by issuing an individual rule, merely because the decision uses (or does not use) a past court ruling in its reasoning (whether other reasons are used or not).

38 This second option must also be ruled out for two reasons. First, because, as seen above, the consequence that may arise from failure to comply with a prescriptive norm, such as a permissive rule, is a sanction for a certain individual. Although there are sanctions affecting the legal acts an individual may perform through the penalty of disqualification, this applies to future actions on a personal basis. A judicial decision being annulled because precedent was not followed does not seem to comply with these characteristics. In other words, if the rule of precedent prevents a legal decision from being annulled because it has followed precedent or not, then it affects the validity of such a decision. Prescriptive norms do not affect the validity of legal actions (constitutive norms do). Therefore, when we speak about the rule of precedent, we are not speaking about a permissive norm (or at least not only a permissive norm).

39 Second, this configuration of the rule of precedent as optional does not reveal a key aspect of how precedents function in our legal systems: it does not allow a distinction to be made between institutionally relevant and irrelevant behaviour. For example, imagine a system with a rule qualifying signing decisions with a green pencil as permitted. Signing (or not) a legal decision with a green pencil does not add or remove anything for the validity of judicial decisions. It is therefore irrelevant for the purposes of justifying the judgement, although it protects such behaviour from any other norms issued.

40 I do not think we can say the same about the use of legal precedent in the justification of judicial decisions. Instead, even in legal systems with consensus that a failure to follow the *stare decisis* rule does not constitute grounds to annul the decision, this does not mean it is irrelevant for justifying the judicial decision. In such systems, the use of precedent constitutes at least a contributing condition for the validity of the judicial decision. This means that if we classify following precedent as merely permitted in these legal systems, we do not account for how following precedent conditions the validity of the judgement because permissive norms do not condition (and cannot condition) the validity of legal decisions. To use an extreme example, citing a precedent where not mandatory is not like looking into a crystal ball. Setting the rule of precedent as a permissive rule does not allow this key aspect to be accounted for.

41 Of course, nothing would prevent that apart from there being a rule that makes the use of past legal decisions relevant, it is permitted (or optional) to cite precedents. Furthermore, if such a permission is found in a higher-ranking provision, this would prevent a lower ranking provision from being able to qualify such behaviour as prohibited. Nevertheless, it still does not account for the role that the rule of precedent plays in our legal systems.

4 A non-prescriptivist account

42 After ruling out the rule of precedent as a prescriptive norm, we must establish what kind of rule it would be. In this section I argue, first, that not being a prescriptive norm, the rule of precedent must be reconstructed as a constitutive norm (4.1). I then introduce three constitutive norms typical of systems of precedent (4.2):[23] a norm for setting precedents, another on the applicability of the individual rules contained in the ruling *decisum*, and a third (contingent) rule on the competence to control the following of precedent.

4.1 *Stare decisis* as a constitutive rule

43 In this section, I argue that if the rule of precedent is not a prescriptive norm, the only option is to reconstruct it as a constitutive norm. Two reasons justify such a necessity.

44 (i) First, as mentioned above, it is generally accepted that the consequence associated with constitutive norms, from Hart onwards (1998: chs II and III), is not a sanction, but the validity (or invalidity) of the act. In fact, Hart's criticism of Kelsen's reconstruction of primary and secondary norms, which states that primary norms (the only existing rules) are instructions for judges, while secondary norms merely reflect primary norms, hits the mark here: there are norms that are difficult to reconstruct as prescriptive norms. As is also well known, Hart distinguished between three types of secondary rules: change, adjudication (or judgement), and recognition.

45 As detailed below *(infra* 4.2), the rule of precedent is not a single rule, but a set of rules that to a certain extent contains rules of all three types. The important point here is that according to Hart (1998: 35), secondary rules are characterized by the consequence associated with the failure to follow them:[24] the act being invalidated. If, as argued above, the most frequent and normal consequence associated with the failure to follow the rule of precedent is the nullity of the decision,[25] there appears to be good reason to define it as a constitutive rule, not a prescription.

46 (ii) The second reason is that it is possible to reconstruct, based on von Wright, the distinction between prescriptive and constitutive norms as an exhaustive and exclusive division. As is well known, in *Norm and Action*, von Wright distinguishes between six types of norms, differentiating these into two groups: primary and secondary.[26] The first group features prescriptive norms, the defining rules (herein referred to as

constitutive norms), and the technical norms. The second group contains moral, ideal, and customary laws.

47 The second group of norms can be directly ruled out as part of an exhaustive and exclusive distinction of types of rules because such rules are characterized either by their origin (customary) or their content (ideals and morals), whereas the first group is characterized by their structure. Therefore, it would not be difficult to imagine, for example, prescriptive norms that are simultaneously prescriptive, moral, and customary. Consequently, the second group should be ruled out, as I say, as an exhaustive and exclusive division in relation to the first group.

48 The first group includes the prescriptive, constitutive, and technical norms. According to von Wright's definition, technical norms do not exactly guide behaviour in the same way as prescriptive and constitutive norms, as they are instructions intended for those seeking to achieve a certain predetermined goal.[27] A simple example serves to demonstrate this: to cook a paella, a recipe must be followed, otherwise the goal will not be achieved, but such norm (the recipe) does not mean that paella must be cooked.

49 In this sense, technical norms presuppose anankastic statements – statements describing causal relationships between events in the empirical world. However, it could be argued that instead of a statement defining the world as it is, a technical norm presupposes a statement of what ought-to-be: an anankastic-constitutive statement (Azzoni 1986). Again, a couple of simple examples help demonstrate this: if you want to comply with traffic rules, do not break the speed limit; or, have witnesses if you want your marriage to be valid.

50 This possibility could imply that the distinction between constitutive and prescriptive norms is not exhaustive, although it may be exclusive. However, the problem is that this type of technical norm of the world of what ought-to-be presupposes precisely the norms of the other two types. Whereas the first technical norm presupposes the existence of a prescriptive rule (e.g., it is forbidden to drive over 120 km/h), the second assumes the constitutive rule under which for a marriage to be valid, there must be (a necessary condition of a sufficient condition) (Alarcón Cabrera 1991: 284) witnesses when the marriage takes place. It would therefore seem that technical norms that do not presuppose anankastic statements, but norms cannot themselves be considered norms in the same sense as prescriptive or constitutive norms, given that these underpin technical norms.[28]

51 Based on the above, it can be concluded that prescriptive and constitutive norms, being the only types that do not presuppose other sets of norms,[29] form an exhaustive and exclusive set of the types of norms. It can therefore be concluded that if the rule of precedent really is or

52 presupposes a norm (or a set thereof), and if this norm or a set of norms is not prescriptive, then it/they must be constitutive.

53 Although a criterion has already been put forward to distinguish between the two types of norms (the legal consequences associated with not following precedent), this may be insufficient for determining which type the rule of precedent corresponds to if there are no legal consequences laid down in the law,[30] making it impossible to differentiate between them in an extensional sense. Therefore, it might not be clear that, in the absence of legal consequences, the rule of precedent is a constitutive norm.

54 There is, however, another criterion – structural in nature – to distinguish between the two types of norms. Whereas prescriptive rules correlate to a factual situation (regulated behaviour) with a deontic operator (prohibited, permitted, mandatory, or optional), constitutive rules correlate a factual situation (regulated behaviour) with another factual situation (Moreso and Vilajosana 2004: 74). For instance, whereas the prescriptive norm correlates a prohibition with exceeding 120 km/h, constitutive norms correlate the validity of marriage with the presence of witnesses, even if only as a necessary condition (or as a necessary condition for a sufficient condition).

55 The structural difference seems to shape the difference between prescriptive and constitutive norms as a major distinction. Therefore, if following precedent is associated with the validity (applicability, regularity, or any other property that is not a

deontic operator) of the decision – even if, as will be shown below, the condition is not always necessary or sufficient – it can be concluded that the rule of precedent is a rule of a constitutive nature.

4.2 A set of constitutive rules of precedent

56 After establishing that the rule of precedent is a constitutive norm, the next step is to define the type of constitutive norm it would be. There are a wide variety of constitutive norms: competence norms, applicability norms, interpretative norms, validity norms, renvoi norms, etc. (Guastini 2017: 58). I will not explore the specific content of constitutive norms here because they depend on the content of each legal system and are therefore contingent. However, I shall demonstrate the typical content of the rule of precedent, showing how a precedent system can (or cannot) function without them.[31]

57 Having clarified the above, the rule of precedent (or *stare decisis* rule) can be reconstructed as a set of at least three norms. The first is the norm establishing which decisions are precedents (4.2.1). The second is a rule that makes the validity of legal decisions conditional on following precedent, thus limiting their competence (4.2.2). The third gives certain bodies the power to overturn decisions from other judges where precedent has not been followed (4.2.3).

4.2.1 A rule of competence (to set precedent)

58 The first norm involved in the rule of precedent (or *stare decisis* rule) grants competence to the courts (or at least some of them) to set precedent. For example, Article VII of the Peruvian Code of Constitutional Procedure recognises the competence of the Constitutional Court of the Andean nation to set precedent.[32]

59 However, although it is increasingly more frequent for a body to be expressly granted competence to set precedent, this trend is not yet very widespread. It is far more common for the rule to be implicit. Still, stating that the courts have competence to issue general rules, valid or applicable for resolving future cases, while intuitive, is not entirely correct (Magaloni Kerpel 2001: 31 and 38). This is because courts sometimes have no pretence that their *rationes decidendi* be valid, applicable, or binding for subsequent cases. This may occur in two different ways. The first is because the court setting the precedent intended the rule (or linguistic fragment) considered *ratio decidendi* to be different from the norm subsequently considered as such. The second is because the court's decision did not seek to set precedent. Indeed, it is perfectly possible for a court to issue a judicial decision without claiming it contains a norm (*ratio decidendi*) with binding effect for subsequent cases, even if legal practice considers it as such.

60 This possibility is more relevant than it might seem. While we can clearly talk about exercising a competence when the court intends to exercise it, things change when no such intention exists.[33] Of course, it makes perfect sense to state that certain bodies have the competence to set precedent. However, saying that the rule of precedent always constitutes a norm granting judges competence to set precedent may be limiting, as courts could issue a judicial decision with no intention of setting a precedent and yet have the decision considered as such. In other words, for a judgement to count as precedent, it is not always necessary for the issuing body to intentionally set a precedent.[34]

61 In light of the foregoing, rather than asserting that this initial aspect of the rule of precedent grants judges' the competence to set precedent (source act), it would be more accurate to state that, while in some legal systems there is a specific rule conferring jurisdiction, in many others, certain jurisdictional decisions are simply recognized as precedent (source fact), and in others, both occur. To paraphrase Hart: instead of a rule of change, which enables norms to be added to the legal system, in some jurisdictions,

the rule of precedent would resemble the rule of recognition but be limited to the scope of judicial decisions. Therefore, the rule of precedent, which may be an (express or implied) norm that grants certain bodies the competence to issue rules within the framework of a legal procedure, may also simply recognise certain decisions as precedent irrespective of whether the issuing body intended the judicial decision to set a precedent or not.

62 If this is the case, this first rule (whether it provides for jurisdiction or only recognises past decisions as precedents) implied in the rule of precedent, is a minimum or necessary rule in any precedent system. Without a rule identifying which court decisions count as precedent (either by identifying such decisions or by giving jurisdiction to bodies to issue them), a system of precedents is impossible. However, this does not mean there are no gaps in the criteria enabling identification of which past decisions count as precedent (Kelsen 2017; Núñez Vaquero y Arriagada Cáceres 2020). That said, a system silent on which decisions count as precedent would be a system without precedent. The rule identifying certain rulings as precedent setting constitutes the practice of precedent to the extent of identifying the applicable precedents.

4.2.2 A rule of validity (to limit the competence)

63 As seen above when we rejected the notion that the rule of precedent is a prescriptive rule that classifies the following of precedent as mandatory or permitted, the most common and normal consequence of not following precedent is the nullity or revocability of the legal decision. In this sense, it seems plausible to state that the rule of precedent limits the competence of judges to issue valid judicial decisions, while it also conditions the validity of such decision to the fact that precedent has been followed.

64 It is worth clarifying what we mean by the validity of the court decision being conditional on following precedent. First, because the term "validity" is sufficiently ambiguous to require clarification about its intended meaning. Second, because the fact that the rule of precedent conditions the judicial decision's validity does not mean it must condition it.

65 (i) Initially, the term "validity" may refer to multiple properties advocated for different objects. On the one hand, validity is included both in normative texts – legislative and, of interest here, judicial – and in the norms set forth therein. On the other hand, validity may at least mean regularity (issued pursuant to the rules) and applicability, belonging, existence, and mandatory.

66 Analysing the combinations of the different objects with the different meanings of validity would be too lengthy a discussion, so I will specifically explore the concept of validity in only two of its different meanings, each concerning a different purpose.

67 First, it could be said that the rule of precedent conditions the validity, understood as regularity, i.e., production under the norms, of the legal decision following precedent or not. Second, the rule of precedent conditions the validity of the individual norm constituting the *decisum* of the judicial decision applying precedent (or not). In this case, validity is understood not merely as regularity but also as applicability. In the latter sense, the rule of precedent would establish conditions whereby the individual rule contained in the operative part of the judicial decision following precedent (or not) is applicable in subsequent proceedings.[35] This means the individual rule that the judge issues may be used in a subsequent proceeding or applied coercively by the competent bodies.

68 Second, stating that following precedent conditions the validity of subsequent judicial decisions – as described above as applicability of the individual rule – does not mean that it is a necessary condition for the subsequent decision to be valid. There are logically at least five types of conditions: a necessary condition, a sufficient condition, a necessary and sufficient condition, a necessary condition of a sufficient condition, and a sufficient condition of a necessary condition.

69 The way that following precedent may condition the validity of subsequent judicial decisions is relevant, as it demonstrates the different manners the rule of precedent may operate in, and how failure to follow precedent might not entail any consequences. Indeed, it is logically possible that following precedent is a necessary condition for the judicial decision to be valid. However, few legal systems provide for such a requirement, only providing for downstream vertical precedents.

70 Far more frequently, following precedent is a contributing condition, i.e., a necessary condition of a sufficient condition, or a sufficient condition to the subsequent decision's validity. In other words, it is either a necessary element for one way for the condition (sufficient condition) to be considered valid, or merely citing a precedent is itself a condition sufficient to consider the decision justified.

71 However, if the rule of precedent can establish that following precedents is a sufficient condition[36] (or a necessary condition of a sufficient condition) for judicial decisions to be valid, then failure to follow precedents alone would not entail any legal consequences, or at least not in this type of precedent system. This means that whether following precedent (or not) is a necessary condition is just one possibility from several (and not the most common). Therefore, systems of relevant precedent are required, where failure to follow precedent entails no consequences, but following precedent renders a judicial decision valid.

72 Again, this is a necessary rule irrespective of its specific content (necessary, sufficient condition, etc.) for a system of precedents. This is because a system of precedent without any relevance is impossible, precisely because of how precedent has been defined above – as a past decision containing a general rule relevant to similar subsequent cases. If using a past decision for a similar case to justify the subsequent court's decision does not in any way condition the validity thereof, it could be said that there is no system of precedent in such a legal system.

4.2.3 A rule of competence (to control the following of precedent)

73 The third norm often added to the set of rules of precedent, confers competence to certain bodies to overturn a decision precisely because it does not follow precedent. However, before attempting to clarify the status of this third rule of precedent, it is important to highlight, as detailed above, that a rule of precedent can establish the following of past *rationes decidendi* not only as a necessary condition, but also as a sufficient (or contributing) condition for the validity of the subsequent decision. The norm conferring certain courts the power to annul judicial decisions on the basis that they do not follow precedent is therefore contingent.

74 This is obviously relevant if we are to establish whether a system of precedent requires that a body has the competence to verify the following of precedent. While there may well be a body responsible for controlling the validity of judicial decisions in general, in a system in which the following of precedent constitutes a sufficient condition of validity of a judicial decision (or a necessary condition of a sufficient condition) there is no specific control of the following of precedent, but only of the justification of the judicial decision.[37]

75 This leads to the conclusion that there is room for a system of relevant precedents without any specific body having the jurisdiction to annul decisions on the grounds that they do not follow precedents. This, in turn, enables the self-precedent of courts of final appeal at each legal level to be shown in a different light. Indeed, nothing prevents a legal system from laying down, for instance, that following its own decisions is a sufficient condition to render decisions passed down by its own constitutional court valid. For example, this would be the case for the norm enabling, particularly courts of final appeal, to reject certain appeals on the grounds they have already ruled on the matter, exclusively basing their decision on past judicial decisions.

76 A system of precedents therefore seems possible without requiring a body to control their being followed. This is because the rule on following precedent and the jurisdiction to control such following are not mutually involved. In particular, although the norm conferring a body competence to control the following of precedent does require (to ensure the legal system does not contain a technical loophole) a rule determining that the following of precedent is a condition for the validity of the subsequent legal sentence, the norm establishing such a condition does not necessarily confer controlling powers to a body.

77 However, neither does the fact that this is a court of final appeal mean that a precedent following control system cannot be established. First, there is nothing to stop such body from controlling the validity of its own decisions.[38] Second, however, there is nothing to prevent another body from being granted limited competence to determine the validity of the court of final appeal's judicial decision based exclusively on following its own precedents.

5 Conclusions

78 It can be concluded that establishing the rule of precedent as a prescriptive norm is not a plausible way of reconstructing the rule of precedent. Indeed, it is rare for following precedent to be qualified in a deontic sense, and for the consequence (if any) of not following precedent to be a sanction. Moreover, a prescriptive reconstruction of the rule of precedent either turns out to be inconsistent with the goals pursued by a precedent system (that is, if the rule is taken to make the following of precedent mandatory) or makes following precedent irrelevant (if the rule is taken to be one of permission). As we have seen, there may be a prescriptive norm of mandatory compliance stating that precedent must be followed, but such a norm does not explain a system of precedent.

79 It has also been demonstrated that, if the rule of precedent cannot be defined as a prescriptive norm, the only option is to establish it as a constitutive norm. However, it would be somewhat reductive to think of the rule of precedent as a single constitutive norm. Instead, I have argued, any system of precedent is established by a set of rules of precedent, which necessarily includes (a) one constitutive rule identifying a set of jurisdictional decisions as precedents and/or grants certain bodies the power to set precedent, and (b) another constitutive rule conditioning the validity of the subsequent decision applying (or not) the past *ratio*.

80 Finally, a set of rules of precedent can establish different types of conditions for the validity of the subsequent decision: from necessary to merely contributory. This, in turn, means, as I have tried to show, that the rule conferring powers to a body to control the following of precedent is contingent rather than necessary for the existence of a system of precedents.

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Notes

1 See Horty's excellent work on precedent-setting as obligations with exceptions (Horty 2011). See also Pulido Ortiz (2018).

2 Given this limited aim, I will neither provide a comprehensive review of the literature nor refer to it exhaustively. A more comprehensive analysis should undoubtedly include many other important contributions, among which those by non-Anglo-American authors are too often neglected in English language works. See at least Aarnio (1996), Barberis (2015), Chiassoni (2012), Gascón (1993), Bustamante (2016), Peczenik (1997), Taruffo (2014), Garay (2013), Gómora (2018), Guastini (2014 and 2018), Siltala (2000), Wróblewski (2008), Magaloni Kerpel (2001), Ferreres (2010), Zanetti Jr. (2015) and Pulido Ortiz (2018).

3 I will use these two expressions interchangeably.

4 See, e.g., Moreso and Vilajosana (2004: 73) or von Wright (1970: 26) for distinctions between prescriptive and constitutive norms.

5 In this sense, my work develops the theory of precedent in terms of norms rather than reasons for action. Of course, a development of precedent theory based on reasons for action is as perfectly possible and plausible as Lamond (2005) and Horty (2011) have shown. But my work is conceptually prior to theirs's insofar as they presuppose that the rules model - as reconstructed by Alexander and Sherwin (2004) - is a prescriptive rules model. In this sense, when Horty and Lamond attack the rules model, they do so on the grounds that the rules would be prescriptive norms.

6 Pulido Ortiz 2018: 24 ss.

7 The term 'persuasiveness' does not properly express the degree of bindingness of court decisions for two reasons. First, in deontic logic, the term 'mandatory' does not admit degrees. Second, persuasiveness refers why, based on its content and not just its origin, a norm enters reasoning – but it tells us nothing about its bindingness.

8 It is true that in some jurisdictions the legislature (or some legislatures) cannot establish what the force of precedent should be. However, my statement does not refer to any specific statutory law, but to the logical possibility of it being so regulated.

9 In fact, without expressly mentioning it, courts have frequently first considered the 'mandatory' nature of following case law. Later, the courts themselves expressly declare it, particularly courts of final appeal. Only in a final stage, if at all, does the legislator positivize this. This appears to have been the case in Colombia. See Bernal Pulido 2008.

10 From this standpoint, it is possible that not following precedents has no associated consequence for any subject, but following them is a condition to consider the decision valid. This is possible only if we think that it establishes conditions other than those necessary. In such a case, if following precedent were a necessary condition, it would be impossible for the rule of precedent to regulate following precedent, but not regulate the not following of precedent.

11 The work of Richard Re (2020) is particularly valuable. He tries to reconstruct a part of the rule of precedent as a permission. He believes that if we consider the rule of precedent as a rule of permission, it is possible to account for the role that precedents play when they are not binding. The only problem with this thesis is that whether permissive rules can fulfil this function is highly debatable. Indeed, a permissive rule shows a certain action as possible, but as seen below, it is not possible to account for what a behaviour that is merely permitted contributes to justifying the decision. If the rule of precedent is something that affects the validity of legal decisions, then it is not possible to reconstruct it as a permissive rule because these do not affect the validity of any legal act.

12 This is not the only fundamental difference. See, Núñez Vaquero 2021; Bustamante 2016: ch. 1; Gascón Abellán and Núñez Vaquero 2020; Zanetti 2015: ch. 1.

13 Furthermore, due to the interdefinability between "prohibited" and "mandatory", analysing the second option helps us respond to the theory that using precedent is prohibited.

14 The possible sanction associated with international liability that a state may incur for not following the jurisprudence of an international tribunal deserves separate mention. For example, no one doubts that the Inter-American Court of Human Rights lacks the jurisdiction to overturn decisions, but that failure to follow the Court's precedents could result in international liability.

15 Colombian Supreme Court ruling C-539/11.

16 While I do not have empirical data demonstrating how many times judges depart from precedent, I do have some data regarding how many times judges are sanctioned for departing from precedent. Between 2015 and 2019, only two judges have been sanctioned in Spain, for example. See Consejo General del Poder Judicial (2016-2020). However, it is also a commonly shared assertion in several civil law jurisdictions that judges often fail to follow precedent without justification, and that there is no legal consequence for such behaviour.

17 According to Pulido Ortiz, prescriptive norms would have the capacity to guide the behaviour of judges indirectly by generating pressure on practical decision making (Pulido Ortiz 2018: 330 and 335). However, while what such pressure from prescriptive norms consists of in relation to judicial decisions is unclear, above all, it cannot explain the role it would have concerning the validity of the decisions. Of course, it would be absurd not to recognise that prescriptive norms can play some role related to following precedent. While a system of precedent is possible without sanctions, it is not possible without a system of annulments.

18 A reviewer suggested that there might be permissive constitutive rules, which do not affect the validity of any legal act. I do not know if such rules exist, but I cannot identify any examples, let alone identify the rule of precedent with such a rule.

19 In this sense, permission is called the minimal regulatory solution (Alchourrón and Bulygin 2012: 63). In contrast with permissions, obligations and prohibitions constitute deontic operators that qualify both the commission and the omission of the regulated behaviour. In short, if a certain behaviour is mandatory, its omission is prohibited and vice versa; and if a certain behaviour is prohibited, then its omission is mandatory and vice versa.

20 Guastini 2017: 67-68; Poggi 2004: 22.

21 However, the last function, to repeal past prohibitions, could be relevant when use of precedent was previously prohibited. However, as demonstrated below, this reconstructs the following of precedent as a legally irrelevant action, which is strange, as we will see.

22 When speaking of lower ranking provisions, I understand hierarchy materially. For the different meanings of hierarchy, see Guastini 2017: 207.

23 These are not the only standards. On the contrary, it is possible that there are other constitutive rules that are not rules of competence, such as those that establish - as a reviewer rightly mentions - the difference between *ratio decidendi* and *obiter dicta*.

24 Hart's distinction is by no means unambiguous, as he sets forth three different criteria to differentiate between them. First, the distinction is comparable to the difference between norms and meta-norms; second, according to the addressee, the former would be addressed to citizens whereas the latter would target bodies creating and applying the law; third, based on the consequences associated with not following them. See Guastini 2014: 103-104.

25 However, invalidity is only one of the possible consequences associated with a failure to follow precedent. Not following precedent may only mean, for instance, authorisation for the parties to the process where precedent was not followed to file an appeal, or simply annul the decision. That said, the above are consequences associated with the constitutive rules, not prescriptive norms.

26 Von Wright 1970: 26 ff. Truth be told, it is unclear whether von Wright put forward these types of norms as a classification, and not simply as a set of examples of norm meanings. This is a significant difference because in this sense, distinguishing between the norms would be impossible. Therefore, my argument seeks to go even further.

27 This is because certain purposes are assumed, which would be normative in the traditional sense of the term. See von Wright 1970: 34 ff.

28 The discussion about the ontological independence between the different types of constitutive norms is complex and superfluous to the purposes of this paper. For further insight, see Roversi 2011.

29 There would, of course, be a discussion about the autonomy of prescriptive norms from constitutive ones, and vice versa. I argue here, however, that at least from a structural perspective, these are independent.

30 It is often believed that a failure to follow constitutive norms, if 'follow' is the correct term for complying with such rules, means the act is invalid. However, this implies that all constitutive rules are necessary conditions for the validity of the act. Nevertheless, it is possible and common

for constitutive norms to be sufficient or contributing conditions (see Alarcón Cabrera 1991; Azzoni 1986; Roversi 2011). Whether such norms are in fact fragments of rules, is another matter I shall not delve into here.

31 As one of the reviewers rightly points out, it is possible that the rule of precedent contemplates as regulated behaviour something different from following the *ratio decidendi*. Indeed, this is possible as in the case where, for example, past decisions are simply cited. However, this is not the most common scenario.

32 Article VII of the Code of Constitutional Procedure: "Decisions of the Constitutional Court that acquire the authority of res judicata constitute binding precedents when the ruling so states, specifying the scope of their regulatory effect."

33 I am assuming here, following Raz or MacCormick, that the notion of competence is linked to the idea of intention. The thesis is debatable in theoretical terms, as we can reconstruct the notion of competence irrespective of any type of intention. I must thank María Beatriz Arriagada for her comments on this point. However, it seems clear to me that jurisdiction rules emerge, in historical terms, to give institutional relevance to intentional acts. See the work of Arriagada Cáceres 2021 and Mañalich 2021a and 2021b. In any case, settling this matter would require further analysis beyond the scope of this paper.

34 Furthermore, the case may arise whereby, when the judicial decision is issued, there is no rule on precedent and subsequently such a rule is created, and the judicial decision becomes a precedent. These would be the unintended consequences (creation of precedent) of intentional acts (sentencing) (Barberis 2015: 71).

35 Applicability is often understood as the obligation or permission for judges to use a norm to justify a decision. As can be easily observed, such a definition is structured based on prescriptive norms. See Moreso and Navarro 1996. However, applicability should be redefined in constitutive terms, as it is not a case of whether judges can or should use such norms, but instead that the use of such rules is a condition for the regularity of their decisions. Another issue concerns which consequences (if any) this has on the regularity or irregularity of the decision.

36 According to Azzoni (1986: 173-174), these would be metathetic constitutive rules, i.e., adding a sufficient condition of validity.

37 The same can be said regarding a specific system of procedural resources for not following precedent: a system of precedents without specific procedural remedies for failing to follow precedent is perfectly possible. See, in this regard, Gonçalves 2020.

38 For example, see the work compiled in Castillo Cordova 2015 on the reviewability of the Constitutional Court of Peru's rulings.

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