

Elements of Precedent

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1. Legal Method and the Significance of Precedent

The goal of this chapter is to lay down a framework within which many issues about legal precedent can be analysed and understood in general, that is for all legal systems. To focus on a more concrete topic and demonstrate the usefulness of the framework, the chapter will address the following question: what legal significance or effects can precedent have?

Familiar distinctions have been made to highlight the legal effects of precedent and explain the differences between them, for example in some common law and civil law jurisdictions. It is said that some precedents are binding (or authoritative) but others are persuasive.¹ Some precedents are binding *de jure* but others are binding *de facto*.² Even in those jurisdictions where precedents are not binding, there may be a presumption that they are to be followed or taken into account in practice. It is also said that precedents are sources of law in some jurisdictions but sources of knowledge or evidence about the law in others.³ These distinctions (and others) capture something important: precedents can have different roles. The distinctions are helpful to an extent; but they are too crude or binary to explain the versatile and even nuanced legal effects of precedent in different jurisdictions and circumstances.

The legal significance or effects of precedent will here be viewed from the perspective of legal method. What is that? Legal method is an array of techniques for determining (identifying) the applicable law and applying it in a particular legal system. Legal methods vary between legal systems. The legal method in a jurisdiction is used to answer a legal question, that is a question about what the law is on some subject matter.⁴ Even though a legal method is a way to work out what the law is in a particular legal system, its main elements can be analysed in general, that is for all legal systems.⁵ In light of this, legal significance or effects will refer to the possible roles of precedents in determining and applying a legal norm according to the legal method in the jurisdiction.

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¹ See, e.g., JW Salmond, *Jurisprudence* (6th edn, Sweet & Maxwell 1920) 163–64.

² See, e.g., A Peczenik, ‘The Binding Force of Precedent’ in DN MacCormick and RS Summers (eds), *Interpreting Precedent* (Routledge 1997) 461–63.

³ For these and other distinctions, see, e.g., F Schauer, *Thinking Like a Lawyer. A New Introduction to Legal Reasoning* (Harvard UP 2009) 62 and 67–70.

⁴ See, e.g., S Vogenauer, ‘Sources of Law and Legal Method in Comparative Law’ in M Reimann and R Zimmerman (eds), *The Oxford Handbook of Comparative Law* (OUP 2008) 870, 885. For Icelandic law, see, e.g., HD Kristjánsson, *Að iðka lögfræði. Inngangur að hinni lagalegu aðferð* (BC 2015).

⁵ The discussion about legal method and its norms is based on my DPhil thesis, HD Kristjánsson, *Philosophical Foundations of Norms of Legal Method* (University of Oxford 2022).

Legal methods have at least three elements. The first of these is legal materials, practices, or factors on which the law is based. They are the raw ingredients of the law, so to speak. Statutes, judgments, and *travaux préparatoires* are illustrations of legal materials. Some are sources of law but others are interpretive factors. The second element is norms of legal method. They regulate the determination and application of the applicable law. They regulate, among other things, the role and relevance of legal materials, practices, and other factors for the law. To give examples, some norms identify sources of law, others identify interpretive factors and specify their use, yet others regulate conflicts of law. The third element is legal reasons. Applying norms of legal method to legal materials, practices, and factors in order to determine the applicable law involves reasoning.

Precedents can be analysed in light of these elements. First, we can ask: what sort of legal material is a (written) precedent? Secondly, we can ask how norms of legal method can apply to a precedent. Thirdly, we can ask how to reason with precedent. Due to space constraints, the last question will be left untouched here. By answering these questions, we learn about elements of precedents and their potential legal significance or effects.

2. What Sort of Legal Material?

A. The Concept of Legal Precedent

The term ‘precedent’ has many meanings, even in legal practice. Very broadly speaking, it refers to a past decision or an example, which is, may, or should be followed (in some way) when a new decision is made or an action is taken.⁶ So understood, the term captures binding and persuasive precedents, for instance. The term ‘legal precedent’ will be used here for past decisions that matter for what the law is in a legal system and how it should be applied. A legal precedent in a narrow sense is a source of law. In a wide sense, it refers to all past decisions that are relevant for determining the law and even applying it according to the legal method in the jurisdiction. Past decisions that are, for example, only persuasive, sources of knowledge, or actually followed in practice (*de facto* binding) can be considered precedents in some sense but they are not *legal* precedents because they do not determine the law or the legal position in this sense.⁷ References to ‘precedent’ in what follows are (usually) to ‘legal precedent’.

A precedent is a decision made by an institution or a person in a case. Decisions of different kinds of institutions can possibly be precedents. They include decisions of courts or tribunals, administrative organs, parliamentary ombudsmen, and other organs of the legislative branch. Conceivably, they can also include decisions of private persons. Commonly, the focus is on the decisions of courts and tribunals and the same applies here. Nevertheless,

⁶ For examples of definitions, see, e.g., AL Goodhart, *Precedent in English and Continental Law* (Stevens & Sons 1934) 8; A Ross, *On Law and Justice* (2nd edn, OUP 2019) 100.

⁷ Heuristics, rules of thumb, practical guidelines, or ‘how-to’ rules for ascertaining or applying the law may refer to past decisions but they are not norms of legal method. They do not constitute the law or make the decisions, e.g. sources of law. For heuristics and rules of thumb in law, see, e.g., F Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (OUP 1991) 5, 104–09; M Greenberg, ‘The Moral Impact Theory of Law’ (2014) 123 Yale L Rev 1288, 1335–36; M Greenberg, ‘Natural Law Colloquium. Legal Interpretation and Natural Law’ (2020) 89 Fordham L Rev 109, e.g., 116. Additionally, there may be various social norms, expectations, etc among judges and others that are not a part of the legal method in a jurisdiction. They matter for understanding and analysing *de facto* precedents.

it is fruitful to keep in mind, when thinking about the concept of legal precedent, that there can, for example, be precedents of administrative organs.

Another thing to be mindful of is that judicial precedents are not all the same. Courts have dissimilar powers and roles, and they operate in different ways.⁸ Some courts decide on disputes, others can only hear appeals on points of law, yet others answer questions about the compatibility of law with the constitution and have the power to strike down unconstitutional statutes, and others still answer legal questions referred to them without applying the law to the facts of the case.

B. Precedent as a Source of Law

The term 'source of law' has multiple meanings as well.⁹ Here it will refer to an aspect of legal material or practice (or some factor) that is a basis or a reason for the existence of a legal norm. Statutes, judgments, and practices are examples of sources in this sense. They are bases or reasons for the existence of statutory law, case law, and customary law.¹⁰ A norm cannot be a law of a legal system without having a sufficient basis in one or more sources of that legal system. A source is like a frame within which a legal norm must fit to be a law of the legal system.¹¹ Even though the legal norm is distinct from the source, there is an inseparable connection between them since the former must have a sufficient basis in the latter to exist as the law of the legal system.¹²

Some precedents are sources of law in this sense. The reason why a particular legal norm exists is because the precedent exists and has the content it does.¹³ If, say, the judgment did not exist, then the legal norm, too, would not exist unless it has a basis in a different source in the legal system. As a source of law, a precedent is the kind of thing that could be a reason for the existence of a legal norm. Law can have a basis in the precedent. Of course, it could fail as a source, for example because it is too unclear.

In at least some situations, a legal norm is determined by interpreting a source of law. An interpretation is here understood in a wide sense. The source is the object of interpretation and the legal norm is the outcome. For example, a statutory provision is interpreted in its context and the outcome is a statutory law. The same applies to precedent. The precedent is the object of interpretation and the legal norm, which has its basis in the precedent, is the outcome.¹⁴ However, this does not mean that an interpretation is the only sort of legal reasoning that can be relevant in relation to a precedent. Overruling is not (only) an interpretation, for example.¹⁵

⁸ See, e.g., J Raz, *The Authority of Law. Essays on Law and Morality* (2nd edn, OUP 2009) 180.

⁹ See, e.g., R Cross and JW Harris, *Precedent in English Law* (4th edn, OUP 1991) 166–67.

¹⁰ For 'sources of law,' see, e.g., Ross (n 6) 89–93; Schauer (n 3) 66–67. My use of the term is (slightly) different than its use in HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) and Raz (n 8) 45–52, 62.

¹¹ The metaphor is inspired by H Kelsen, 'On the Theory of Interpretation' (1990) 10 *Legal Studies* 127, 128–31, 133; H Kelsen, *Pure Theory of Law* (Max Knight tr, The Lawbook Exchange 2005) 245.

¹² To clarify, this is not the same view as that of JC Gray and R Gray, *The Nature and Sources of the Law* (2nd edn, The MacMillan Company 1948) 124–25. See also in this context, J Gardner, *Law as a Leap of Faith* (OUP 2012) 58.

¹³ Salmond (n 1) 163; N MacCormick, *Rhetoric and the Rule of Law* (OUP 2005) 144. For a discussion of different models of precedent, see G Lamond, 'Do Precedents Create Rules?' (2005) 11 *Legal Theory* 1–26; N MacCormick, 'The Significance of Precedent' (1998) *Acta Juridica* 174, 178–83.

¹⁴ See, in this context, e.g., Raz (n 8) 184; Gardner (n 12) 57–58.

¹⁵ See, in this context, CK Allen, *Law in the Making* (7th edn, OUP 1964) 260, 415. See also, in part, Raz (n 8) 184. See though AWB Simpson, 'The *Ratio Decidendi* of a Case and the Doctrine of Binding Precedent' in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) 158.

The relationship between a precedent as a source of law, interpretation, and legal norm can cast a light on some issues about precedent. Among them is the question of what counts as the *ratio decidendi*, the holding, or the proposition of law; is it the law stated by the precedent court or the law interpreted by the instant court?¹⁶ In line with what has been said, the instant court needs to interpret the precedent in order to determine the law based on it. That does not mean that what the precedent court wrote in the judgment concerning the law does not matter, since the legal norm is an interpretation *of the judgment*. Even if a specific rule is formulated in a judgment, the judgment still needs to be interpreted and the rule-formulation is only a part of the object of interpretation. However, where there is only a single precedent, a rule-formulation is likely to be an important part of the interpretation.

C. The Law Used as a Source of Law

In what way is a precedent a source of law? Or what is characteristic about a precedent as a source? A precedent is a past decision where a case was decided on the basis of some law. Often the law was applied to the facts of the case to decide a dispute. It is an example of the use of law in some instance. To follow a precedent is to decide a case or to use the law in the same or a similar way as it was used in the past. As was said earlier, judicial precedents are not all the same. In the focal case, a judgment or a legal decision consists of (proven) material facts, law, the application of the law to the facts, which determines the legal position of some person or persons (usually the parties to the case), and an outcome, often called a ruling or an order. The reasoning of a judgment is typically focused on these elements and the arguments and claims of the parties.¹⁷

So, which part of a judgment or a decision is the basis for the law? A ruling or an order tends to be an individual or a particular norm, such as: 'Peter shall pay Sandra one million in damages.' The individual norm is usually binding between the parties and it has certain legal effects commonly referred to under the label of *res judicata*.¹⁸ The individual norm is not the (more general) legal norm based on the judgment as a precedent. The same goes for the legal position but that is the conclusion of applying the law to the facts. Often, it is the rights or duties of the parties in light of the factual circumstance. In our example, the legal position could be that Peter is liable for Sandra's loss and should pay her damages that cover that loss. The ruling is based on the legal position, the power of the court to decide the case in a certain way, and the relevant procedures. A court orders Peters to pay Sandra damages because of its conclusion about their respective legal positions, its power to do so, and procedural matters, such as the fact that Sandra made a claim for damages. But the legal position as such is not the law for which the precedent stands.

The core part of the judgment is the use of law to decide the case. The law used in the judgment to decide the case becomes a source of law, that is a part of a legal material (the judgment) which is a reason for the existence of a legal norm (henceforth). The judgment is not mere evidence for what was decided but the content and form of the decision. Therefore, it would not matter if it came to light that a court had 'actually' based its decision on some other

¹⁶ G Marshall, 'What is Binding in a Precedent?' in McCormick and Summers (n 2) 511–12.

¹⁷ For the structure of a typical judgment, see, e.g., Cross and Harris (n 9) 39–42. See also in this context, Kelsen, *Pure Theory of Law* (n 11) 237ff.

¹⁸ See Gardner (n 12) 76. See also H Kelsen, *General Theory of Law and State* (A Wedberg tr, The Lawbook Exchange 2007) 134, 144–46; T Endicott, 'How Judges Make Law' in Elizabeth Fisher and others (eds), *The Foundations and Future of Public Law. Essays in Honour of Paul Craig* (OUP 2020) 129–31.

law than that reflected in the judgment. Conceptually speaking, the use of law in a judgment could be broad. An example is when a court restates the law on some subject matter in a general fashion before deciding the case with reference to a specific (part of the) law. However, a norm (or norms) could exist in a legal system that narrows what is relevant. For instance, there could be norms about necessary premises and what counts as necessary. The norms are, though, not conceptually necessary.

Sometimes a court explicitly identifies or determines the law for the purpose of the case. For example, a court interprets a statutory provision, perhaps in light of the facts of the case, in order to determine a legal norm. Then it applies the legal norm to the facts of the case to determine the legal position and to support its ruling, which is the individual norm. In so doing, the court may concretize, clarify, or dispel doubts and settle what the law is. The decision on what the law is in the case becomes the basis for what the legal norm is henceforth.¹⁹

In some instances, the use of a (specific) legal norm is implicit. It is not clearly identified or stated in the judgment. Also in this situation, the law that is understood to have been used to decide the case is the (core part of the) source. This applies as well to situations where a court has *created* the law used to decide the case. The law used to decide the case is a more general norm than the individual norm of the ruling. Even when courts only decide on points of law, answer reference questions, or decide on the constitutionality of the law, it is the use of law, that is the decision on what the law is in the case, which becomes the source for what the legal norm is henceforth.

Other parts of a judgment are not irrelevant. The argument of a judgment is interpreted with an eye to identifying the law used.²⁰ This means that the material facts, legal position, outcome of the case or ruling, reasoning of the judgment, and the parties' arguments and claims can matter for interpreting the precedent. The same goes for other factors, such as the relevant procedural laws and competences of the court. For example, the reasoning about the law (*ratio*) and the material facts can matter for deciding the level of generality of the legal norm for which the precedent stands. Depending on the legal system, *obiter dicta* and dissenting and separate opinions may also matter for interpreting the argument of a judgment.

3. How Do Norms of Legal Method Apply?

A. Norms of Recognition

Precedents are not necessarily sources of law just because there is an institution like a court with a jurisdiction to determine conclusively and finally whether the law has been violated.²¹ Whether or not a precedent is a source in a legal system is a contingent matter. It depends on whether there is a norm of recognition that identifies a precedent as a source, such as 'Judgments of the Supreme Court are sources of law.' Norms of recognition regulate the existence conditions of a legal norm in a legal system by identifying sources.²²

¹⁹ Gardner (n 12) 75–79; MacCormick, *Rhetoric and the Rule of Law* (n 13) 154. For precedent as an example, see Hart, *The Concept of Law* (n 10) 124–25.

²⁰ Gardner (n 12) 79. See also Lamond (n 13) 24.

²¹ See Hart's remarks in Hart, *The Concept of Law* (n 10) 97, in this context.

²² The norms are based on and closely related to Hart's rules of recognition, see, e.g., Hart, *The Concept of Law* (n 10) 94–95, 99–110, but there are some differences, which will not be elaborated due to space constraints.

A norm of recognition can identify a precedent as a source by pointing to it or providing criteria for the identification of any precedent, for example by describing its general characteristics or identifying marks.²³ While identification by ostension (or reception of a single judgment) is rare, such as ‘This judgment of the Supreme Court is a source’, it is possible. Norms of recognition can provide criteria in different ways. A norm can, for example, refer to norms about a particular court, that is norms of adjudication, as a part of its criteria. It is a part of the criteria because the law is not whatever is created according to norms of adjudication. That is typically the individual norm of the ruling. The relationship between norms of recognition and adjudication is therefore looser than the relationship between norms of recognition and change, which will be discussed later.

A norm can also lay down other identifying marks, conditions, or considerations, such as ‘The *ratio decidendi* of a judgment of the highest court of the land, which is supported by the opinion of the majority of the judges and so on, is a source (or the law).’ The conditions or considerations can be more or less vague or open-ended. This is part of the reason why it can be hard to formulate fixed rules for identifying the *ratio*. Another part is that the interpretation required to determine the legal norm is context-dependent.²⁴

While there may be a single norm identifying a precedent in a legal system, there may also be many, in which case they need to be applied together to identify the source. Norms of recognition can also be of the same or different kinds. Some may be legal norms just like any others, that is have a basis in a source identified by a norm of recognition, but other norms may be so-called ultimate norms.²⁵

Norms of recognition can also be positive or negative.²⁶ Positive norms identify sources and negative norms state what does not count as a source. An example of the latter is ‘Judgments are not sources of law.’ Therefore, it would be a mistake to think that there cannot be norms of recognition about judicial precedents in those legal systems where they are not considered to be sources. Precedent as sources can, furthermore, be mandatory (must be used) or permissive (may be used).²⁷

Two complications are worthy of being mentioned. First, while a single precedent can be a source, many precedents can be relevant for determining a legal norm.²⁸ Why does it matter? A single precedent may be interpreted in a certain way. The legal norm with a basis in the precedent may be relatively concrete (stick closely to the factual circumstances of the case) and even rule-like. Remarks in the judgment may be interpreted as supporting the legal norm having a certain content. When faced with multiple precedents, all relevant as sources of law in the context, they may be interpreted together instead of being treated as supporting distinct legal norms, which may conflict. A legal norm can have bases in multiple sources. Whereas the object of interpretation was a single precedent before, now it is multiple precedents, which may address (slightly) different factual circumstances and have (slightly) different arguments. Since the object of interpretation has changed and become more complex, so too can the legal norm. As precedents are added, the ‘original’ legal norm may expand or contract. Its scope may become wider and/or qualifications or exceptions to it may be

²³ See *ibid* 94–95.

²⁴ See, in this context, e.g., Raz (n 8) 184; Hart, *The Concept of Law* (n 10) 55.

²⁵ See, in this context, Hart’s ultimate rule of recognition, Hart, *The Concept of Law* (n 10) 106–07.

²⁶ See, in this context, JW Salmond, *The First Principles of Jurisprudence* (Steven & Haynes 1893) 220; Schauer (n 3) 77.

²⁷ For permissive sources, see, e.g., Hart, *The Concept of Law* (n 10) 294; L Green, ‘Positivism, Realism and Sources of Law’ in T Spaak and P Mindus (eds), *The Cambridge Companion to Legal Positivism* (CUP 2021) 51–56.

²⁸ Lamond (n 13) 20–21.

recognized. Whereas a single precedent supported a particular conclusion about the legal norm, other precedents may 'pull' in a different direction. While a rule-formulation in a single judgment may be a weighty factor in its interpretation, it may have less weight when a line of precedents is interpreted. Eventually, many precedents may support a legal principle, that is a (very) general norm. This may partly explain the sense that the common law is fluid, the legal rules are modified as they are applied and a principle may 'grow' or be 'built' from concrete decisions.²⁹ A precedent, which usually involves identifying and applying the law, becomes a source of law relevant for the future determination of the law.

Secondly, the law used to decide a case often depends on other sources of law and is determined by using the legal method in the jurisdiction. For example, a decision is based on the constitution, a statute, a precedent, or a custom. These sources, which will be called 'underlying sources,' were already in existence when the case was decided. In this situation, the precedent involves a decision on what the law is according to those other sources. This raises the following question: what is the relationship between the precedent and the underlying source?

Sometimes a precedent 'replaces' the underlying source. A precedent may overrule another precedent, which may have similar effects to repeal. It may also distinguish or narrow its scope and simultaneously replace a part of it with a different legal norm. Moreover, a precedent may have a higher rank in the legal system than the underlying source. For instance, a precedent may be ranked higher than the legal custom on which the decision was based. Whereas the legal norm was based on practice alone before, now it has a new source of law with a higher rank. Depending on the legal system in question that may entail that, after the judgment is rendered, a judge or a lawyer relies on the precedent as the higher ranking source and does not 'fall back on' the legal custom except where the precedent runs out.³⁰

A precedent can also add to the underlying source in various ways. As was said earlier, the precedent becomes a new source, which is relevant for the determination of the law henceforth. A norm of recognition can identify a precedent as a source (relatively) independently of its treatment of the underlying source. A precedent as an 'independent' source becomes a new source of law whether or not it is based on, for example, a convincing interpretation of the underlying source, stays within its boundaries, or identifies the law correctly. Crudely put, it becomes a source even if it is (clearly) wrong (unless there is a *per incuriam* doctrine).³¹

In contrast, a precedent can be identified by a norm of recognition in a way that depends on its treatment of the underlying source. A precedent as a 'dependent' source only becomes a source if the law used to decide the case has a basis in the underlying source and is identified in accordance with the legal method in the jurisdiction. The law used in the precedent must be within the (fuzzy) boundaries of, for example, the statutory provision on which it was based. The legal norm must, at the very least, be a possible interpretation of the statutory provision according to norms of legal method. If it is not, then the precedent does not become a source independently of the underlying source. It is an error to be overlooked when the law is determined henceforth. In that situation, it is not identified by a norm of recognition as a source.

²⁹ See, e.g., E H Levi, *An Introduction to Legal Reasoning* (University of Chicago Press 1949) 3–4; Schauer (n 3) 105–13; J Holland and J Webb, *Learning Legal Rules* (9th edn, OUP 2016) 155, 194–200, 228, 232. See also Raz (n 8) 195.

³⁰ Goodhart (n 6) 15.

³¹ For *per incuriam*, see, e.g., Cross and Harris (n 9) 148–49; I McLeod, *Legal Method* (9th edn, Macmillan 2013) 151.

Even though a precedent can depend on the underlying source, it does not mean that it does not add to the law. A precedent can, for instance, concretize, clarify, or settle the law.³² After the judgment has been rendered, a judge or a lawyer needs to look at both sources, that is the statutory provision and the precedent in the earlier example, to determine the law despite the need of the latter to be in accordance with the former.³³ As precedents for the interpretation of the statutory provision pile up, so do the sources that need to be taken into account when the law is determined. Sometimes this situation gives the sense of there being a 'layer' of precedents on 'top' of the statutory provision. Even when a precedent does not add any content to the law based on the underlying source, it is still a source. The sources can overlap.³⁴

The distinction between precedents as independent and dependent sources is a matter of degree and sources can be (in)dependent in different ways. It mainly turns on the way in which a precedent is identified by a norm of recognition in the situation or the legal system in question. The distinction may be among the explanatory factors of different treatments of precedents in different situations and jurisdictions. A precedent may be a source even though it does not have all the same characteristics as the prime examples of precedents, which we observe, for example, in English common law. This may be the case in those legal systems where there is a legal norm or a view that judges cannot create the law; they should only identify and apply it; or where a precedent interacts with a higher ranking source, such as the constitution or a statute. Possibly, precedents of the UK Supreme Court about the common law are relatively independent sources. But precedents of the Supreme Court of Iceland are relatively dependent sources. Where precedents are dependent sources, it may cause some to state that a precedent gets its force from the underlying source or to be hesitant about claiming that precedents are 'really' sources.

B. Norms of Change

Norms of change confer a power on someone to create, change, or cancel laws.³⁵ They are those power-conferring norms that norms of recognition refer to as (a part of) the criteria for identifying sources or that stand in certain relations to such norms.³⁶ Norms of change and recognition interlock in this way.³⁷ Examples of norms of change are amendment clauses in constitutions and articles conferring a legislative power on Parliament or Congress. A norm of recognition identifies what is created according to the power-conferring norms as sources.

Precedents can be sources without judges having a law-making power in a certain sense. A norm of recognition can identify a source without referring to or relying on a norm of change (a norm that confers a power to create the general norm for which the precedent stands). A court can have a jurisdiction or a legal power to decide a case according to norms of adjudication without having a specific power to make a new (general) legal norm

³² For precedent having force when it is considered to be wrong, see, e.g., F Schauer, 'Precedent' in A Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2015) 123, 131. A precedent can have force even though it is not considered to be wrong, strictly speaking. It may concretize, clarify, and settle. A precedent may also be more or less convincing given the underlying source and the legal method in the jurisdiction.

³³ See, in this context, Gardner (n 12) 58–59.

³⁴ Salmond (n 1) 161.

³⁵ They are based on Hart's rules of change, see Hart, *The Concept of Law* (n 10) 95–96, but there may be some differences depending on the proper understanding of the relationship between rules of recognition and change.

³⁶ For power-conferring rules, see *ibid.*, e.g., 27–38.

³⁷ See, in this context, *ibid.* 96.

according to some norm of change. It suffices that a norm of recognition identifies the precedent as a source of law. In that way, judges can make law, without being specifically empowered to do so, by deciding a case that becomes a source of law. That is one of the ways they can be in a different position from the legislature.³⁸

However, there could be a norm of change conferring a power on a court to create, change, or cancel laws. For example, there might be a norm conferring an incremental or piecemeal law-making power on a particular court, that is to create new law (of general application) insofar as it is necessary to decide the case. Or there might be a norm empowering a court to overrule a precedent, where the legal effect is to cancel (or 'repeal') the previous law. Moreover, there might be a norm conferring a power to distinguish cases, where the legal effect is to change and narrow the law but is not merely a conclusion that the facts of the instant case do not fall within the ambit or scope of the legal norm of the precedent.³⁹ And there might be a single norm of change covering these situations. Nevertheless, there need not be a specific norm conferring a power to overrule or distinguish precedents. All of this is contingent; it depends on the power-conferring norms and norms of recognition in the legal system.

Sometimes a constitutional court is specifically empowered to strike down unconstitutional statutes. In that case, the constitutional court acts according to a norm of change to cancel laws, that is to repeal or derogate the law. It acts as a 'negative' legislature.⁴⁰ In this situation, it can be difficult to distinguish between norms of change and adjudication. Whether or not the judgment becomes a source of law still depends on there being a norm of recognition with that effect. The individual norm that (expressly) repeals the statute is not a precedent just because it has legal effects or is binding for people other than the parties to the case any more than a statute which repeals another statute.⁴¹

Finally, past decisions can matter because of analogy. Despite the great importance of analogy for understanding precedents, the nature of analogy and the norms governing it will not be discussed here aside from stating that not all legal systems allow the use of analogy from precedents.⁴²

C. Norms of Institutional Decision-Making

Norms of institutional decision-making concern the role of a *particular* institution, or the way in which such an institution can and should decide a case, including how 'far' it goes.⁴³ For example, sometimes there are norms of deference that demand that a court defer to or grant another institution, such as another court or other branches of government, discretion or a margin of appreciation. Norms of institutional decision-making include institutional considerations and duties imposed, for example, on courts to adjudicate. They also include the law-applying powers to decide a case. However, they do not include other types

³⁸ See, e.g., Gardner (n 12) 74, 79. See also, in this context, Lamond (n 13) 24–26.

³⁹ Raz (n 8) 185–92, 196, 200; Gardner (n 12) 74, 80. For interstitial legislation by judges, see, e.g., BN Cardozo, *The Nature of The Judicial Process* (Quid Pro Law Books 2010), e.g., 41; Justice Holmes in *Southern Pacific Co v Jensen* 244 US 205, 221.

⁴⁰ See Kelsen, *General Theory of Law and State* (n 18) 267–69.

⁴¹ See *ibid* 268.

⁴² For analogical reasoning, see, e.g., Raz (n 8) 201–06.

⁴³ They are based on and inspired by Hart's rules of adjudication, see Hart, *The Concept of Law* (n 10) 96–98 and in part 29 and 285, but as a category they are both wider and narrower: for example, they include certain duty-imposing norms.

of norms of legal method. Whereas norms of recognition identify sources, norms of institutional decision-making concern the duties and powers of a *particular* institution in deciding a case. Norms of institutional decision-making can be further categorized, depending on the type of law-applying power or type of institution, into norms of adjudication (courts), norms of executive action (administrative organs),⁴⁴ and other law-applying powers and duties, including those of parliamentary ombudsmen and legislative organs.⁴⁵

The nature of *stare decisis et non quia movere* (or, alternatively, *stare rationibus decidendi* or the doctrine of binding precedent) is interesting in this respect. Here it is taken to be a norm (or a bundle of norms) the content of which is that lower courts are bound by decisions of higher courts (vertical) and some courts are bound by their own decisions (horizontal), either absolutely (strong/strict) or with exceptions or limitations (weak). Therefore, there is a need to look at which court is bound by which court and to what extent. Accordingly, *stare decisis* is a norm that imposes a duty on a court to follow a past decision of a higher court or its own past decision.⁴⁶

A lot depends on how *stare decisis* is characterized (in different legal systems). Understood as a duty on a court to follow a past decision of a higher court or its own past decision, it is a norm of institutional decision-making, more specifically a norm of adjudication. It imposes a duty on a court to decide a case in a particular way.⁴⁷ It does not as such identify precedents as source of law in the sense used here. If it did, then it would be a norm of recognition.⁴⁸ And it does not impose a duty on other officials to recognize precedents as sources. Instead, it imposes a duty on particular institutions to decide cases in a certain way and these duties may differ between courts. How courts, especially higher courts, decide cases matters of course for other officials and the people in the jurisdiction. But that alone does not make it a norm of recognition.

There is an intimate connection between *stare decisis* and norms of recognition that identify precedents as sources. A norm of recognition may identify that part of the judgment that concerns the law used to decide the case as the source and then what is binding according to *stare decisis* is the *ratio* (i.e. the law for which the precedent stands).⁴⁹ The two can be virtually indistinguishable in many situations. However, precedents can be sources in legal systems where there is no *stare decisis*. In this situation, it is sometimes said that a court is not strictly bound to follow its own precedents. There are no institutional norms with that effect. And a past decision is not a source of law just because there is an institutional duty to follow it. Sometimes an administrative organ is bound by past decisions of a higher administrative

⁴⁴ T Endicott, 'The Generality of Law' in L Duarte d'Almeida and others (eds), *Reading HLA Hart's The Concept of Law* (OUP 2013) 20, points out that Hart is missing executive rules.

⁴⁵ Norms of discretion are closely related to law-applying powers. An institution may have a power to decide a case even though it is a (partly) unregulated dispute. Norms of discretion direct or guide the use of the discretion. They are not simply norms of change since they do not empower institutions to create laws as such. See, in this context, Raz (n 8) 96–97.

⁴⁶ See, e.g., Cross and Harris (n 9) 6, chs 3 and 4; McLeod (n 31) 125–26, 156, 164; Holland and Webb (n 29) 155, 157–58; Schauer (n 32) 124; S Hershovitz, 'Integrity and *Stare Decisis*' in S Hershovitz (ed), *Exploring Law's Empire. The Jurisprudence of Ronald Dworkin* (OUP 2006) 103–04.

⁴⁷ According to Hart's scheme, it would not be a rule of adjudication but a supporting duty, see Hart, *The Concept of Law* (n 10) 97. Gardner (n 12) 84, says that the doctrine of *stare decisis* 'regulates the extent to which and the way in which later courts may overrule earlier courts'. It protects against overruling. Simpson (n 15) 173, says that a court's law-making power is limited by the duty to follow or distinguish.

⁴⁸ See, in this context, an interesting discussion about the House of Lords Practice Statement of 1966 in Cross and Harris (n 9) 104–08; R Cross, 'The House of Lords and Rules of Precedent' in PMS Hacker and J Raz (eds), *Law, Morality, and Society* (OUP 1977) ch 8. See also Raz (n 8) 184.

⁴⁹ See, e.g., Cross and Harris (n 9) 6, 97.

organ, such as a ministry or an appeal committee. The duty to follow, or the bindingness of those past decisions, is not enough to make them sources.⁵⁰ The past decisions need to be identified as such by a norm of recognition of the legal system even though they are binding. Given the existence of institutional duties that are not duties to identify sources of law, it is clearer to keep them distinct from norms of recognition even though the two may be entangled in practice and literature.

Norms of recognition are also qualifying norms at their core, that is norms about what counts as something for some purpose. They come in the following form: 'Precedents of the Supreme Court are/count as sources of law in this legal system.'⁵¹ *Stare decisis* is not a qualifying norm but a duty-imposing norm.⁵² Even if norms of recognition are duty-imposing norms that does not make *stare decisis* into one. Not every duty imposed on institutions (namely, courts) in deciding a case is a norm of recognition. In order to be a norm of recognition, at the very least, there must be a duty to treat certain characteristics as identifying marks of legal standards (or primary rules of obligation).⁵³ *Stare decisis* does not do that even though it is closely connected to a norm of recognition that does. If *stare decisis* is a norm of recognition, then it is submitted that its content should be described differently than usual: that is, the norm identifies precedents as sources of law and courts are bound by case law in the same way as they are bound by other laws of the legal system. Vertical and horizontal *stare decisis* would, then, be described by saying, for example, that a court has or lacks a power to overrule its own or other courts' past decisions, and *stare decisis* would not be considered a special duty limiting that power where it exists.

Now, it might be wondered whether *stare decisis* adds something to a norm of recognition that identifies precedents as sources. An institutional duty to follow past decisions can reinforce and entrench precedents as sources by forbidding or limiting departure from them. Also, it may make precedents more rigid than they would otherwise be, especially for lower courts. It regulates the relationship between courts.⁵⁴ To illustrate, the situation could arise in a legal system, especially where precedents are dependent sources, where a lower court departs from a precedent of a higher court because it considers the precedent to be wrongly decided. Or the lower court might depart from the precedent because it considers multiple sources to be relevant and the underlying source, such as a statute, which is of higher rank, leads to a different outcome than the precedent. An institutional duty to follow a past decision might change the situation by demanding that the lower court follow the precedent even if it considers it to be wrongly decided, or if it considers that the statute, in the example, should be interpreted differently. The court would be under a duty to decide the case in a certain way, that is according to the precedent, irrespective of, for example, whether the court considers the law to be otherwise. It is under a duty to treat the precedent as correctly decided.

⁵⁰ See Gardner (n 12) 84. He says that a precedent can be binding without the doctrine of *stare decisis*. That is true, but there still needs to be a norm of recognition identifying it as a source in order for it to be a basis for a legal norm.

⁵¹ They are related to constitutive rules but (slightly) different. For constitutive rules, see, e.g., JW Searle, *The Construction of Social Reality* (The Free Press 1995), e.g., 27–29; 43–44. For constitutive conventions, see A Marmor, *Social Conventions: From Language to Law* (Princeton UP 2009), e.g., 32–34.

⁵² For duty-imposing rules, see Hart, *The Concept of Law* (n 10), e.g., 27–38.

⁵³ See, in this context, HLA Hart, 'The New Challenge to Legal Positivism' (2016) 36 OJLS 459, 464; Gardner (n 12) 69.

⁵⁴ For a discussion of the possible difference that *stare decisis* makes, see, e.g., Herskovitz (n 46) 106, 108–09.

Assuming that *stare decisis* is a norm of institutional decision-making, four situations can arise. First, there may be a duty on some institutions to follow a past decision without it being a source of law. This can be the case for some administrative organs. Secondly, a precedent might be a source without there also being an institutional duty to follow it. This may be the case in some civil law jurisdictions like Iceland. Thirdly, a precedent might be a source and, in addition, there might be an institutional duty to follow it. This might be the case in some common law jurisdictions today. Fourthly, a past decision may not be a source, and there might be no institutional duty to follow it. This is the situation in some civil law jurisdictions, such as possibly in France.⁵⁵

In those situations where there is no institutional duty to follow a past decision, there might, nonetheless, exist institutional considerations or norms, such as a presumption that a past decision is to be followed, or that it should be taken into account where possible. There might be institutional considerations based on stability, predictability, and clarity that recommend that the institution follow past decisions even though it is not under a duty to do so. There might also be various other institutional considerations, such as reasons to respect decisions of other courts because of convenience, coordination, comity, or professional courtesy.

D. Norms of Interpretation

Norms of interpretation regulate legal interpretation or the interpretation of a source. They regulate the (more exact) content of a legal norm.⁵⁶ They identify interpretive factors and specify their uses, statuses, and interrelationships. An interpretive factor is an aspect of legal material, practice, or other factor that can partly determine the content of a legal norm. Examples of interpretive factors in the case of statutes are other statutes *in pari materiae*, *travaux préparatoires*, purpose, and history. Interpretive factors form the context of a statutory provision within which it is interpreted. While a source furnishes the main content of a legal norm and is its existence condition, interpretive factors shape which norm actually exists within the source's frame. Even though both matter for the existence and content of the law in a sense, they stand in different relations to it. A legal norm cannot exist if it only has a basis in an interpretive factor. For example, a norm that only has a basis in *travaux préparatoires*, where it only counts as an interpretive factor but not a statutory provision, does not exist as law in the legal system.

A precedent can be an interpretive factor for another precedent.⁵⁷ In this case, two precedents are not treated as sources for one legal norm, but one precedent is interpreted in the context of another (or, more precisely, the law based on it). This can happen, for instance, when a precedent relates to a connected legal norm. This includes the situation where *obiter dicta* in one precedent are used to interpret another precedent.

A precedent can also be an interpretive factor for other types of sources when it is identified by norms of interpretation that apply to them. To give an example, a norm concerning statutory interpretation can identify a precedent as an interpretive factor. When this happens, a precedent is 'taken into account' and, possibly, weighed against other interpretive

⁵⁵ For precedent in France, see M Troper and C Grzegorzczuk, 'Precedent in France' in MacCormick and Summers (n 2) 103–37. The complication of precedent as an interpretive factor is left untouched here.

⁵⁶ See, in this context, Salmond (n 26) 226–27.

⁵⁷ See, in this context, '*res interpretata*', for example in Troper and Grzegorzczuk (n 55) 126.

factors that point in a different direction. A precedent can also be an interpretive factor for one statutory provision, which is considered to be *in pari materiae*, when another statutory provision is interpreted. The distinction between a dependent source and an interpretive factor can sometimes be difficult to discern in practice, but it depends on the precedent's role in determining the law.

A 'foreign' precedent can also be (indirectly) relevant because of a norm of interpretation. For example, a statute incorporating the European Convention on Human Rights could be interpreted in concordance with the Convention according to a domestic norm of interpretation with that effect. Precedents of the European Court of Human Rights can be relevant insofar as they matter for what the Convention law is according to a (foreign) norm of recognition or a norm of interpretation of the Convention. In this situation, the precedents are indirectly relevant for the interpretation of the statute because they matter for what the law of the Convention is.

E. Norms of Subsumption

Norms of subsumption can regulate the application of a legal norm to the facts. This is sometimes the case for evaluative legal standards and legal principles. An example of such a standard is 'the best interests of the child'. For example, there can be norms as to how to identify and weigh considerations that are relevant for applying an evaluative legal standard.⁵⁸ The views expressed in past decisions can be identified as or be relevant for considerations that are evaluated to determine the standard's application to the facts. It might even be the case in some legal systems that the tort law standard *bonus pater familias* makes past decisions relevant in some instances, such as when officials undertake administrative acts.

Past decisions can also matter for the application of legal norms without being identified by norms of subsumption. A prime example is the principle of equality. An institution, such as a court or an administrative organ, may be bound to treat similar cases in the same way. That means they must follow their past decision in order to not discriminate. In that way, the principle operates in a similar way to *stare decisis*. The past decision does not determine the content of the principle of equality as such but is relevant for its application to the facts and, thereby, the legal position of some person(s). Nonetheless, the decision is not a source of law unless it is identified by a norm of recognition as such. Another example is professional duties, such as those that require lawyers to advise their clients with reference to precedents.

F. Norms of Applicability

Norms of applicability regulate the status of a legal norm, its relationship with other norms, as well as other conditions for its applicability, such as promulgation.⁵⁹ Very briefly put, some norms govern the status of a legal norm and its relationship with other legal norms of the system whereas other norms govern the status of a legal norm and its relationship with norms of other systems, such as foreign or international law. The latter can regulate the applicability of a foreign precedent within a legal system. The legal effects of judgments of the European Court of Justice in an EU Member State's legal system can depend on such norms.

⁵⁸ More on this in, e.g., Kristjánsson (n 4) 176–79.

⁵⁹ See, in this context, Salmond (n 26) 223–26.

4. The Various Legal Effects of Precedent

As should be clear from the foregoing, the familiar distinctions that have been made to elucidate the different roles of precedents can be too crude or binary. To give an example, it is not sufficient, at least not in many circumstances, to contrast binding (or authoritative) and persuasive precedents. As we have learned, precedents can be binding in different ways. There could be an institutional duty to follow a precedent. Even where there is no such institutional duty, there might be various institutional considerations that support taking the precedent into account where possible. An institution or a person might also be required to follow a past decision because of, for example, the principle of equality, *bonus pater familias*, or professional duties or because it matters in other ways for considerations relevant for applying an evaluative legal standard or a legal principle. Moreover, the precedent could be binding in the sense that it is a source of law or an interpretive factor.

Another example is the distinction between sources of law and sources of knowledge. Even where a precedent is a source of law, it should be kept in mind that not all sources of law are the same. Some are independent but others are dependent. And some are mandatory but others are permissive. The multitude of possible roles can also make it hard in some instances to draw a distinction between *de jure* and *de facto* precedents, for example where institutional considerations, presumptions, and permissions are relevant.

In light of all this, we should be wary about making simplistic claims, such as that precedents are sources of law or binding (*de jure*) in common law but not in (some) civil law jurisdictions.