

ARE RULES GOVERNING THE USE OF PRECEDENT NECESSARY?*

¿ES NECESARIA LA REGLA DE PRECEDENTE?

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Abstract:

This paper addresses the issue of the necessary or contingent nature of the rules governing the use of precedent. The author argues that the rules governing the use of precedent in *lato sensu* (the rules that define the legal operation of judicial precedent) is a necessary rule of legal systems. However, legal systems have three different (exclusive and exhaustive) kinds of rules governing the use of precedent: a) binding rules governing the use of precedent, b) rules admitting the use of precedent and c) rules rejecting the use of precedent. The main conclusion is that whether for conceptual reasons of conferring power or for the centrality of the rule of law in current legal systems, when a legal system does not define the legal operation of judicial precedents, it can be said that there are (implicit) rules rejecting the use of precedent.

Keywords:

Judicial Precedent, Rules Governing the Use of Precedent, Constitutive Rules, Power-conferring Rules, Mandatory Rules.

Resumen:

Este trabajo se ocupa de la pregunta por el carácter contingente o necesario de la regla de precedente en los ordenamientos jurídicos. Se argumenta que la regla de precedente en sentido amplio (aquella que configura el funcionamiento de los precedentes judiciales) es una norma necesaria de los sistemas jurídicos. En el trabajo se identifican tres formas (exhaustivas y excluyentes) que puede adoptar la regla de precedente: a) una regla de precedente vinculante, b) una regla de precedente como admisión y c) una regla de precedente como rechazo. Se concluye que la forma que adopte la regla de precedente es contingente en cada ordenamiento jurídico. No obstante, bien sea por las razones conceptuales asociadas a la noción de normas de competencia o por la centralidad del principio de legalidad, lo cierto es que, en aquellos ordenamientos jurídicos que

no contemplen las condiciones para crear, modificar y aplicar precedentes judiciales, se debe entender que existe implícitamente una regla de precedente como rechazo.

Palabras Clave:

Precedente judicial, regla de precedente, normas constitutivas, normas de competencia, normas prescriptivas.

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I. INTRODUCTION

There is a basic distinction between rules governing the use of precedent and judicial precedents themselves (Fabio Pulido-Ortiz, 2018). Rules governing the use of precedent refer to the provisions in the legal system that define the regulatory process to make use of judicial precedents. Judicial precedents, on the other hand, are general directives arising from a judicial ruling deemed important for future judicial decisions.¹ To give an example, imagine that (in its *ratio decidendi*) a constitutional court establishes that “it is unconstitutional to impose disciplinary sanctions against lawyers for conducts that do not transcend or affect their professional duties”. The legal system has also established that the *ratio decidendi* of such rulings are binding for judges in subsequent cases. This clearly shows the difference between a judicial precedent emerging from the *ratio decidendi* of a ruling (i.e., that disciplinary sanctions are invalid for conducts that do not transcend or affect a lawyer’s professional duties) and the rule governing the use of precedent, which defines the binding nature of such precedents.

With this in mind, this article examines what it means to have rules governing the use of precedent and whether such rules are necessary or contingent in legal systems. It first argues that in analyzing it in a broad sense, the rules governing the use of precedent (i.e., the rules that shape how judicial precedent works) are necessary in legal systems. Secondly, it identifies three (exhaustive and exclusive) forms that rules governing the use of precedent, in a strict sense, can take: a) binding rules governing the use of precedent, b) rules admitting the use of precedent and c) rules rejecting the use of precedent. It stresses that the form given to the rules governing the use of precedent in a strict sense depends on each particular legal system. It concludes that either for the conceptual reasons associated with this idea of rule of competence or for the import of the principle of legality, it must be understood that in legal systems without the conditions to create, modify and apply judicial precedents, there is an implicit rule rejecting the use of precedent.

II. TYPES OF RULES

Legal systems are comprised of two types of rules: prescriptive rules (e.g., the rule requiring the use of face masks) and constitutive rules (e.g., the legal rule establishing the conditions for writing a will). Prescriptive rules are in charge of governing action, requiring or allowing the performance (or non-performance) of certain types of actions. Thus, the prohibition to consume alcoholic beverages in public spaces, the obligation to serve in the military or the right to travel on public roads are examples of these rules. Constitutive rules, on the other hand, define certain aspects, among which those establishing conditions to identify, create and apply other rules are fundamental. Examples of constitutive rules include civil rules setting out the conditions for writing wills or constitutional rules establishing the conditions for making laws or constitutional amendments.²

In explaining prescriptive rules, it is essential to differentiate them from sanctioning rules. It is one thing for the law to require a conduct (i.e., the obligation to wear a face mask) and quite another for the law to contemplate sanctions as a strategy to encourage individuals to act as required (i.e., a fine, an arrest, or even positive sanctions or rewards). Prescriptive rules are conceptually distinct from sanctioning rules, whereby a prescribed action is possible without a sanction (Joseph Raz, 1990). By contrast, rules that establish sanctions have a conceptual and justifying dependence on prescriptive rules. For there to be a sanction for engaging in conduct Φ , there is already a prescription not to engage in Φ . Therefore, it makes no sense to claim that there is a legal sanction for doing Φ if there is no prescriptive rule that calls for not doing Φ (Fabio Pulido, 2019).

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By way of example, let us imagine the following situation: a decree issued within the context of Covid-19 emergency states that “it is mandatory to wear a face mask in all public places” and that “whoever fails to comply with this prohibition shall be fined up to 60 days of the current legal minimum wage”. Here, it is easy to distinguish between (1) the duty created by the law, namely the obligation to wear a face mask and (2) the sanction, in this case the fine. There is therefore a conceptual separation between (1) and (2). Now let us imagine that the government has decided that whoever fails to comply with this obligation shall be imprisoned for 4 to 5 years (abolishing the fine and mandating imprisonment instead). Modifying (2), i.e., repealing fines and replacing them with prison sentences, does not modify (1). In other words, even though the sanction has changed, the duty remains the same: to

wear a face mask. Let us now suppose that the constitutional court has declared this sanction (i.e., imprisonment) unconstitutional and, deeming it disproportionate, had the power to strike it from the legal system.

As seen, repealing the rule establishing the sanction is neither a necessary nor sufficient reason to argue that there is no legal obligation to wear a face mask. Even though the sanction may have been repealed, it does not mean that it is now permitted not to wear a face mask. Furthermore, police authorities may continue to require people to wear face masks or may establish restrictions for those not wearing face masks to access certain places. These decisions would not be valid if the obligation to wear a face mask did not exist. When explaining prescriptive rules, it is necessary to differentiate between the grounds for the requirement to adhere to certain conducts and the possible sanctions the legal system may prescribe to encourage compliance with these requirements. The explanation of sanctions cannot be reduced to the explanation of duties, nor can duties be reduced to sanctions.

There are, admittedly, important links between prescriptive and sanctioning rules. However, legal sanctions cannot be regarded as a necessary component of legal prescriptions. The rules establishing sanctions actually depend on the existence of prescriptive rules. There is, nonetheless, a justifying relationship: the existence of a legal duty that must form part of the justification for the existence of a legal sanction. Even if a duty may not be sufficient reason for a sanction to exist because its very existence implies a duty justifying said sanction.

On the other hand, constitutive rules define certain aspects or allow certain things, among which those establishing conditions to identify, create and apply rules are fundamental (Eugenio Bulygin, 1992). Constitutive rules do not prescribe actions (i.e., they neither oblige nor prohibit actions) but are responsible for defining certain aspects (e.g., providing the definition of legal age or parliamentary majorities) or to allow certain acts to be carried out (e.g., a constitutional reform or the bylaws of a trading company). Constitutive rules have different functions, though. First, all legal systems contain a rule (or, if you will, a series of rules) defining the basic conditions of validity. In other words. legal systems have their own grounds of validity (which Hart calls the rule of recognition). To simplify matters, we could say the rule of recognition in Colombia establishes that any law is a valid law: Law N is a Colombian law if and only if a) it is provided for by the constitution or b) it meets the conditions of validity defined by the constitution.

The second type of constitutive rules are rules of competence (or rules conferring powers), i.e., the rules laying down the conditions for judicial acts to be validly carried out. In these terms, the rules of competence make it possible to generate valid acts. At this point, attention must be drawn to the use of certain terms. 'Action' is used to refer to behaviors governed by primary rules (smoking, wearing a seat belt, killing a person, driving animal-drawn vehicles, etc.). The term 'Act', on the other hand, refers to behaviors (and their outcomes) made possible by the rules of competence. Unlike prescriptive rules that require actions (e.g., if a rule

prohibits smoking, then there is a reason not to smoke), rules of competence are reasons that make it possible to perform certain acts, i.e., behaviors aimed at creating, changing or applying rules, e.g., laws, contracts, decrees, constitutional amendments or judicial decisions (Jordi Ferrer-Beltrán, 2000).

Rules of competence, therefore, establish the conditions for the validity of acts of normative production. Hence, such acts (e.g. drafting a law, drawing up a contract or delivering a judgment) are valid as long as they meet the conditions defined in the rule of competence. Thus, if a judicial operator fails to comply with the conditions defined in the rules of competence, their acts are not valid. For instance, supposing that the Constitution grants the Constitutional Court the power to declare laws unconstitutional and strike them from the legal system through a decision passed by an absolute majority of its members. If the Court does not comply with this requirement, its act is invalid. Consequently, it is easy to understand that legal systems not only require or impose *actions* (i.e., with prescriptive rules), but also make the validity of certain *acts of normative production* dependent on complying with the conditions defined in the rules of competence. Legal systems need rules of competence, *inter alia*, because compliance is needed for their authorities to validly exercise their powers. In short, these rules define and enable the valid exercise of those powers (Jordi Ferrer-Beltrán, 2000).

Legal systems have two main types of rules of competence: rules of change and rules of adjudication (Herbert Hart, 1994). Rules of change are rules that make it possible for certain individuals to carry out acts to introduce new rules, modify them or repeal them by establishing the conditions to do so. To give an example, Article 150 of the Colombian Constitution states that “[i]t is the responsibility of the Congress to enact laws” and through them, they can “draw up codes in all areas of legislation and [...] amend their provisions”. Rules of adjudication, on the other hand, are rules of competence that establish the conditions of validity of juridical acts in order to apply the rules with an authoritative status. One paradigmatic case of these rules is those that define the judicial function. For example, the rule that defines the power to decide on claims of unconstitutionality against acts reforming the Colombian Constitution is a rule of adjudication. According to Article 241 of the Colombian Constitution, the Constitutional Court is the one to “decide on the petitions of unconstitutionality brought by citizens against measures amending the Constitution [...] exclusively for errors of procedure in their drafting.”

There is another type of constitutive rules that merely define judicial concepts by establishing relations between different aspects, assumptions or cases (Carlos Alchourrón & Eugenio Bulygin, 1974). This type of rules can be called conceptual rules. The Colombian Civil Code contains several examples of these. Article 34 of the Colombian Civil Code defines a child as “anyone who has not reached seven years of age”; a prepubescent is “anyone who has not reached fourteen years of age”; an adult is “anyone who has reached 18 years of age; and a minor is “anyone who has not reached 18 years of age.” This rule does not prescribe actions, nor does it define powers or establish (at least directly) conditions of validity but defines

correlations between certain legal terms (e.g., prepubescent) and certain conditions (a human being under the age of 14 and over the age of 7). These rules serve to give conceptual precision to the terms used in the legal system. For instance, a conceptual rule that defines who is of legal age means that we know which human beings can perform certain legal acts. We can also find examples of conceptual rules in the characterization of the rules governing the use of precedent, such as the one that defines what is understood by vertical precedent.

III. RULES GOVERNING THE USE OF PRECEDENT

Judicial precedents are general rules originating from a judicial decision relevant to judicial decision-making. Rules governing the use of precedent, on the other hand, are rules in legal systems that define the conditions to identify, dictate and follow judicial precedents. These rules are, in fact, a set of rules based on a series of constitutive rules on the powers for the creation and application of legal precedents. Álvaro Núñez Vaquero (2021) has best stressed the constitutive nature of rules governing the use of precedent, namely that it does not imply the prescription of actions, but the definition of conditions of validity for the creation, monitoring and application of judicial precedents.

Are rules governing the use of precedent necessary or contingent to legal systems? Can rules governing the use of precedent include prescriptions? To answer these questions, I will draw a distinction between *rules governing the use of precedent in a broad sense* and *rules governing the use of precedent in a strict sense*. In a broad sense, rules governing the use of precedent refers to the rules in a legal system that shape the way precedents operate. Meanwhile, rules governing the use of precedent in a strict sense refers to the different (exhaustive and exclusive) forms these rules may assume in different legal systems. In a strict sense, there are three basic kinds of rules governing the use of precedent: a) binding rules governing the use of precedent, b) rules admitting the use of precedent and c) rules rejecting the use of precedent. These kinds of rules are exhaustive in that they exhaust the possibilities of regulating the importance of judicial precedents in the legal system. They are also exclusive because if one of these rules were true, it would be contradictory for one of the other kinds of rules governing the use of precedent to exist for the same type of judicial precedent at the same time.

a) *Binding rules governing the use of precedent*. These rules are binding because they stipulate that judicial precedents establish conditions for the validity of the acts of judicial operators. To elaborate on this idea, it is vital to differentiate between I) the binding nature and II) the mandatory nature of judicial precedents. In the words of María Beatriz Arriagada, judicial precedents are binding whenever they represent a necessary condition for the validity of an act (paradigmatically, a judicial decision). Therefore, not following judicial precedent is sufficient reason to invalidate the related acts (M. Beatriz Arriagada, 2021).

Asserting the existence of binding rules is not sufficient reason to conclude there are mandatory rules governing the use of precedent (i.e., upholding the binding nature of

precedent does not imply that the precedent is mandatory). Constitutive rules define the conditions for the validity of acts (e.g., judicial decisions). The consequence of failing to comply with these conditions is the invalidity of the act. Therefore, the rules governing the use of precedent are binding insofar as it conditions the validity of certain acts (Álvaro Núñez, 2021). Affirming that the rules governing the use of precedent are mandatory means something else: the prescription for obligated subjects to undertake an action. While the binding nature of the rules governing the use of precedent point to the conditions for the validity of the acts (e.g., a judicial decision), a mandatory nature points to the action of an individual (e.g., a judge) who should perform that act.

One of the reasons for confusing binding and mandatory is connected with the Hartian concept of secondary rules, which refers to the constitutive rules of legal systems, i.e., the rule of recognition, rules of competence and conceptual rules. The term secondary rules comes from the idea that the object of these rules (like rules of competence) does not consist of actions, but other rules (i.e., rules about rules). However, one ambiguity regarding the concept of secondary rules is best avoided. Constitutive rules are *secondary rules*—rules about rules—since they define the conditions to identify, create, modify, repeal or apply other rules validly. These rules do not prescribe actions but set out the conditions of validity to perform certain acts or define the features of certain judicial concepts. By contrast, the concept of *secondary rules* can also be used to describe a different phenomenon, namely those rules intended to *prescribe the production of certain acts* to create or apply rules.

To give an example, the judicial function is defined by a series of secondary rules that stipulate the conditions for valid judicial decisions. These rules regulate competent judges, procedures and other means of producing valid judicial acts. But legal systems often round out the regulation of the judicial function with rules that make it mandatory to decide cases and, therefore, render judicial decisions (e.g., through the principle of inexcusability).³ There are other rules that prohibit judges from issuing judicial acts contrary to law, even providing for criminal and disciplinary sanctions in cases which violate this prohibition.⁴

In order to avoid any confusion, it helps to differentiate between constitutive rules (secondary rules that define the conditions to identify, create or apply rules validly) and *second-order prescriptive rules* (i.e., rules that require the creation or application of certain rules). The first bind judicial authorities because the validity of their acts depends on complying with the conditions defined in secondary rules. The latter bind judicial authorities in the sense that they require carrying out actions that prioritize certain acts (e.g., the obligation to issue judicial decisions under the terms set out by law). In making this distinction, binding rules governing the use of precedent suggest that the validity of certain acts is conditioned by judicial precedents, but it is also possible (although contingent on the very idea of binding rules governing the use of precedent) that these same rules contain second-order prescriptive rules that require certain conducts and may even be reinforced by sanctions.

Therefore, the existence of second-order prescriptive rules in the rules governing the use of precedent is not a consequence of its binding nature. It is not true that binding rules also obligate (or prescribe). What happens is that, as a rule, judicial operators are not only bound by the law in force, but also have the obligation to apply it. Because of this, legal scholars have noted that legal systems often provide second-order prescriptive rules on how to use these powers to complement the rules of competence (like those in the binding rules governing the use of precedent) (Álvaro Núñez, 2021). But the fact remains that legal systems may have second-order prescriptive rules that require judicial operators to use the rules governing the use of precedent in the exercise of their powers (Fabio Pulido-Ortiz, 2018).

b) *Rules admitting the use of precedent.* The second type of rules governing the use of precedent is one that allows judicial operators to use judicial precedents to justify their acts, but without stipulating that precedents condition the validity of those same acts. In this context, rules governing the use of precedent accept the use of judicial precedents, but without binding effects. A well-known example of this type of rules governing the use of precedent is the eventual regulation of the use of top-down vertical precedents, as in the case of a legal system that allows the Supreme Court to use precedents of a lower judge or court in justifying its decisions without this becoming a condition for the validity of the decision.

Álvaro Núñez holds that rules admitting the use of precedent implies that “rules governing the use of precedents renders the use of precedents optional,” which prevents “the decision that follows (or does not follow) a precedent” from being annulled. For him, this type of rules should be excluded because “it does not allow to differentiate between relevant and irrelevant conduct from an institutional point of view.” He argues that even in legal systems which recognize that failure to adhere to judicial precedent “does not constitute a reason to overturn a judgment, it does not imply that it is irrelevant in justifying the decision.” He concludes that in such legal systems “the use of precedent is, at least, one reason in favor of the grounds of the judgment” ((Álvaro Nuñez, 2021, pp. 345-346)).

Núñez’s explanation contains two inaccuracies. First of all, rules admitting the use of precedent imply that the use of precedents do not affect the validity of the acts of judicial operators, but do not imply that the action of using precedents is optional. Typically, when it does not affect the validity of the decision, the use of judicial precedents is usually allowed. However, the conditions for the validity of the act and the permissibility of the action are two different issues. It is possible to imagine a legal system in which a legal code of judicial conduct prohibits judges from using, for example, foreign precedents. If judges fail to comply with this prohibition (i.e., by using foreign precedents), it has a negative impact on the evaluation procedure within the judicial branch. But, regardless, it is possible that the use of such precedents does not affect the validity of judicial decisions.

Rules admitting the use of precedent, therefore, are not the same as affirming it is permitted to use precedent insofar as it is neither mandatory nor prohibited. As explained above, rules governing the use of precedent is a constitutive rule as it establishes or defines

the regulatory function of judicial precedents. In this sense, rules governing the use of precedent are not intended to regulate the actions of judges and other judicial operators (allowing or forbidding certain actions) but to determine the valid exercise of their acts. It is worth noting that it is even theoretically possible for an act to be valid, but for the action of carrying it out to be prohibited. In many legal systems, the sale of another person's thing is a valid act (generally to protect the interests of third parties in good faith), but it can also be prohibited and sanctioned by criminal or police regulations.

Secondly, it is not true that the rules admitting the use of precedent do not make it possible to differentiate between institutionally relevant and irrelevant conducts. It has already been made clear that this type of rules governing the use of precedent does not necessarily point to the action of using precedents but to the validity of acts using precedents in their justification, which depends on the rules of competence that constitute them (for example, the validity of a judicial decision depends on the rules of competence giving judges the power to make this decision). The legal system also controls the type of sources to be used as reasons that affect the validity of institutional normative acts. What happens in the case of rules authorizing the use of precedents is that, as Núñez himself claims, the use of precedents does not constitute "a reason to annul a judgment." Lastly, I do not find the assertion that "the use of precedent constitutes, at least, a reason in favor of justifying the judgment" to be true. The law may consider this use irrelevant to legally justify a decision, but may authorize it for other reasons (e.g., to uphold judicial independence and autonomy).

c) *Rules rejecting the use of precedent.* The third type of rules governing the use of precedent establishes that the use of judicial precedents affects the validity of acts. Therefore, if a judicial precedent is used to justify an act, there is a reason to invalidate it. Cross and Harris illustrate this type of rules governing the use of precedent with an example from Article 5 of the French Civil Code, which states that judges are not allowed to create generally applicable rules in their decisions. In keeping with this rule, it is assumed that the decisions based on such rules are invalid (Rupert Cross y J.W. Harris, 2012, p. 36).

Like the other types, rules rejecting the use of precedent is a constitutive rule, but in this case it establishes that the use of precedent adversely affects the validity of the acts. This type of rules governing the use of precedent does not imply that the use of precedent is prohibited. It may be that *second-order prescriptive rules* are enacted, prohibiting acts using judicial precedents in their justification. In any case, the fundamental aspect in shaping the rules governing the use of precedent is its nature as a constitutive rule. Hence, rules rejecting the use of precedent implies that the use of precedent affects the validity of the acts.

In summary, rules governing the use of precedent in a broad sense are constitutive rules that specifies how judicial precedents are used in a legal system. In a strict sense, rules governing the use of precedent can be binding, admit its use or reject its use; and they can be enhanced by second-order prescriptive rules that require or prohibit the use (tracking or

application) of judicial precedents. However, none of these types of rules governing the use of precedent in a strict sense implies the existence of any type of second-order prescriptive rules.

IV. ARE THE RULES GOVERNING THE USE OF PRECEDENT NECESSARY?

Rules governing the use of precedent in a broad sense are the rules in a legal system that shape the way judicial precedents operate. Rules governing the use of precedent in a strict sense refers to ways these rules may be implemented in different legal systems. Thus, there are three types of such rules in a strict sense: a) binding rules governing the use of precedent, b) rules admitting the use of precedent and c) rules rejecting the use of precedent. The first type states that precedents are a necessary condition for the validity of the acts of judicial operators. With the second type, rules governing the use of precedents allow the use of judicial precedents, but these are not binding; that is, they do not condition the validity of the acts. The third type is when rules governing the use of precedent reject the use of judicial precedents in that their use affects the validity of judicial acts.

In any of its forms, rules governing the use of precedent include rules of competence, as well as –to use Hart’s terms– rules of change and rules of adjudication. The first establish the conditions to validly issue judicial precedents (or to disallow that power in the case of rules rejecting the use of precedent). The latter define the conditions to control adherence to precedents (in the case of binding rules governing the use of precedent) or to ensure that precedents are not used (in the case of rules rejecting the use of precedent).⁵ Regarding this last point, María Beatriz Arriagada Cáceres (2021, pp. 387-389) holds that it is misleading to claim that rules governing the use of precedent include rules of adjudication. She argues that courts applying precedents are bound by rules governing the use of precedent but since the flipside of competence is subjection, it cannot be said that courts have the competence to apply precedents but rather subjection.

She is right in stating that the rules governing the use of precedent necessarily involve the regulation of the competence to dictate precedent (a rule of change). But she is wrong in claiming that the use of this power implies binding authorities (e.g., judges or courts) to said precedent. In the case of rules admitting the use of precedent, judges would not be bound to judicial precedent. Here, judges have the option to use the precedents created under the rules governing the use of precedent, but they are not bound to do so since the refusal to use them does not affect the validity of the corresponding act. It could be supposed that Arriagada Cáceres’s thesis is limited to cases of binding rules governing the use of precedent and that in this context there is no competence to apply judicial precedents, but a subjection/subordination to do so. However, and as indicated since the beginning of this paper, it is necessary to differentiate between the rules governing the use of precedent and judicial precedents.

So, when Court X issues precedent P, Court Y is bound to apply P (under the rules governing the use of precedents). But Court Y also has the power to peremptorily apply P in

Case C. This power is conferred by the rule of adjudication comprising the rules governing the use of precedent and not by precedent P. This shows that even when Court Y is bound to Court X regarding Precedent P, it also has the power to peremptorily apply P to Case C under the rules governing the use of precedent. In the context of binding rules governing the use of precedents, exercising the power to issue precedents actually does imply certain judicial operators' subjection to precedent: When Court X issues Precedent P, it binds Court Y. But Court Y also has the power to peremptorily apply Precedent P to Case C. Court Y's decision on Case C also binds the corresponding parties. Rules governing the use of precedent, therefore, not only defines the conditions of Court Y's subordination/subjection to precedent P, but it also defines the conditions under which Court Y can validly apply P in C to bind the parties to the case. In other words, rules governing the use of precedent as a rule of adjudication not only confers the power to apply precedents to a case, but also establishes the conditions to validly carry out an authoritative act of application of these precedents).

Rules governing the use of precedent, accordingly, involve rules of competence to create and apply judicial precedents validly. Let us return to the question are rules governing the use of precedent necessary or contingent on legal systems? The answer is that in a broad sense (the rules in the legal system that establishes how judicial precedents operate) are necessary rules in legal systems. In contrast, the forms and contents of rules governing the use of precedent in a strict sense are contingent and depend on how they are implemented in each legal system. Rules governing the use of precedent strictly adhering to a legal system takes different forms and can even implement several of them within the same legal system.

Rules governing the use of precedent as constitutive rules define the validity or invalidity of the use of judicial precedents. There are only two possibilities in this case: on the one hand, legal systems can allow the use of judicial precedents through their rules governing the use of precedent, which can be binding or admitted (without their being binding). On the other hand, rules governing the use of precedent can reject the use of judicial precedents by determining that this constitutes a reason to invalidate the acts. As stated above, rules governing the use of precedent in a strict sense refer to the specific nature of each of the types of rules governing precedent in each legal system and is contingent to each of them. All legal systems provide some type of rules governing the use of precedent in a broad sense and there are, naturally, various ways of implementing rules governing the use of precedent in a strict sense. Thus, some legal systems have binding rules governing the use of precedent, others can allow its use (without being binding) and yet others may reject its use.

These types of rules governing the use of precedent are exhaustive in that they exhaust all possibilities of regulating the importance of judicial precedents in the system: the use of precedent is either admitted or rejected. They are also exclusive because if one of these rules were true, it would be contradictory for one of the other types of rules governing the use of precedent to exist at the same time for the same type of judicial precedent. For example, if the *ratio decidendi* of Supreme Court decisions is binding for the decisions of judges and courts, it follows that it a contradiction to state that the use of such precedents do not affect the validity

of or invalidates decisions. Another issue is that different forms or types of rules governing the use of precedent are implemented within the same legal system (e.g., binding rules governing the use of precedent for judicial precedents coming from certain judicial authorities but rules admitting the use of precedent for rules of precedent coming from others).

According to the above, rules governing the use of precedent in a broad sense exist, at least implicitly, in all legal systems. Does this mean there are no legal loopholes in establishing precedent? To answer this question, it should be recalled that rules governing the use of precedent are constitutive rules that specify the way precedents operate. One characteristic of contemporary legal systems is that the powers of authorities are defined (or constituted) in judicial rules (rules of competence) that define and make the valid exercise of these powers possible.

As explained above, rules governing the use of precedent are constitutive rules establishing, specifically, the conditions to identify, create and apply judicial precedents validly. Rules governing the use of precedent are actually made up of a series of constitutive rules (including rules of competence and conceptual rules) on the valid use of judicial precedents. Rules governing the use of precedent, therefore, is made up of a series of rules that define the valid ways to create, identify and apply judicial precedents.⁶

The idea of the rule of competence is fundamental in explaining rules governing the use of precedent. The concept of judicial precedent assumes there are judicially created rules that are important to solve resolving certain issues. In most legal systems with binding rules governing the use of precedent, there is a fundamental empowerment given to judges to create general rules in their judicial decisions (Komarek, 2013). In these contexts, rules governing the use of precedent contain a rule outlining the competence to issue precedents, which is the definition of the valid exercise of the power to create rules that constitute precedents (Sandra Gómora-Juárez, 2019) and the rules conditioning the validity of other acts in adhering to judicial precedents (Álvaro Núñez, 2021). Rules admitting the use of precedent, on the other hand, implies that there is a rule of competence that recognizes the valid exercise of the power to create precedents and a rule of competence (a rule of adjudication) that allows judicial operators to use judicial precedents. Meanwhile, under rules rejecting the use of precedent as a rule of competence, the power to dictate precedents and use them is denied.

Bearing in mind the relationship between rules governing the use of precedent and rules of competence, it must be stressed that for public authorities to validly exercise their normative powers (including the creation and application of judicial precedents), there must be a rule to make it possible. This means that if there is no rule of competence to create judicial precedents, then it must be assumed that judges do not have the power to create or apply precedents and, consequently, the legal system does not allow judges to issue precedents or use them to justify their decisions. If there is no rule defining the conditions in which judicial precedents are binding or their use is accepted (i.e., at least admitting the

applicability of judicial precedents) then it must be supposed that the legal system does not recognize the valid use (or the applicability) of judicial precedents.

It could be argued that these conditions for authorities to exercise these powers are accidental and rules governing the use of precedent in a broad sense are therefore contingent on the assumption that it may so be that there are no rules admitting or rejecting the use of judicial precedents (i.e., loopholes in rules governing the use of precedent). But to uphold this idea, it would be necessary to deny the fact that one necessary element to explain judicial powers (including judges' normative powers) is the existence of rules of competence. These rules are intended to enable the exercise of judicial powers (such as creating or applying judicial precedents with institutional authority). In other words, legal power cannot be exercised (much less by public authorities like judges) without a rule of competence constituting it. Since the creation and use of precedents in institutional decisions are the exercise of judicial powers, if there is no rule of competence to make the use of precedents possible, it is assumed that their use is rejected.

Moreover, the principle of legality is central to explaining the exercise of public powers in contemporary legal systems, i.e., the principle according to which acts of public authority carried out according to the rules of competence are valid; and, consequently, acts of public authority carried out outside or contrary to these rules are invalid (Riccardo Guastini, 2001, p. 123). Given the centrality of the principle in judicial practice, the explanation of the conditions of validity in the exercise of public powers—at least in the context of rule of law—depends on the rules that make these powers possible. The principle of legality of public authority seeks to ensure that acts of the authorities are justified according to criteria previously and publicly defined in legal rules, and not on the basis of officials' beliefs (Jeremy Waldron, 2020).

Furthermore, the principle of legality of public authorities is essential to the rule of law, which accordingly implies a series of conditions for the exercise of public and institutional authority. Specifically, this principle requires that rules be clear, public and stable judicial; that authorities require behaviors that can be complied with; that the actions of public authorities be defined and guided by public and pre-established legal judicial rules; and that legal processes (especially judicial ones) be carried out by competent, independent and impartial authorities (Luvios Fuller, 1964). One fundamental aspect of the rule of law is the existence of rules that define competences and limit public power. These rules define procedures, the forms and content of the (valid) exercise of normative powers (Brian Z. Tamanaha, 2012). Thus, the rule of law depends on strengthening the institutional framework in which public authorities operate and, by extension, the rules of competence that limit the specific exercise of the actions of authorities. This is why constitutions acknowledge principles like the division of powers, legality or public administration because their common denominator is to enable and, at the same time, limit public authorities. In other words, these principles flesh out the tenets of the rule of law in political and legal ordinances (P. L. Strauss, 2018).

The relation between the principle of legality and rules of competence is clear. The principle of legality requires that the powers of public authorities be defined and limited in the rules of competence.⁷ In this sense, not only do rules of competence make it possible for authorities to perform the acts authorized by said rules (legislating, issuing administrative acts, pronouncing judgments, etc.), but they also define the authorities themselves and the conditions for the validity of their acts. Authorities can only perform valid acts if they do so in the exercise of the powers granted to them in the rules of competence. Note that the presence of these rules of competence do not represent ideals for public bodies (like judges). In other words, rules of competence are not values to rate legal institutions as good or bad, better or worse, but define or constitute the bodies that form part of legal systems. Rules of competence make institutions what they are, i.e., judicial institutions are what the rules of competence make them: a constitutional court, for instance, is whatever its rules of competence say it is.

The principle of legality specifically requires that legal authorities (judges, legislators, administrators, etc.) are subjected to legal rules, which implies two things. On the one hand, their powers must be previously defined and regulated in legal rules (rules of competence) and, on the other hand, when legal situations or problems are to be resolved, they must do so according to the rules in force. The defining relation between public authorities and their rules of competence therefore imply that if the latter do not provide for a power, it must be concluded that the authority does not have it. Therefore, the principle of legality (and its close relationship with the concept of rules of competence) establishes a rule of closure for defining public powers, so that only the exercise of those powers contemplated in the rules of competence is valid.

In summary, the need for rules governing the use of precedent is the result of the principle of legality and the inescapable existence of rules of competence in the rules governing the use of precedent. The need for these rules of competence act as a rule of closure of the normative powers of judicial authorities in general and of the rules governing the use of precedent in particular. It should be clarified that affirming the necessity for rules governing the use of precedent is different from arguing that there can be no uncertainty surrounding these rules. There may indeed be gray areas in the precise meaning of these rules, for instance, when it is unclear whether or not certain sets of judicial decisions are designated by rules governing the use of precedent.

V. CONCLUSION

There is a basic difference between rules governing the use of precedent and judicial precedent. The first refer to the rules in a legal system that define the way in which judicial precedents operate, while the latter are general rules originating in a judicial decision that prove to be significant for making legal decisions. Rules governing the use of precedent are a set of complex rules based on a series of constitutive rules on the competences for creating and applying judicial precedents. These rules can be enhanced with second-order prescriptive

rules that require or prohibit the application or adherence to judicial precedent. But no type of rules governing the use of precedent imply the existence of a second-order prescriptive rule.

Rules governing precedent in a broad sense refer to rules in a legal system that shape the way judicial precedents operate. Rules governing the use of precedent in a strict sense refer to the way in which they can be implemented in each legal system. Thus, in a strict sense, these rules can be classified into three types: a) binding rules of precedent, b) rules admitting the use of precedent and c) rules rejecting the rules of precedent. It is concluded that for either conceptual reasons associated with the idea of rules of competence or the centrality of the principle of legality, it is true that in legal systems that do not provide for the conditions to create, modify and apply judicial precedents, it is understood that there is an implicit rule rejecting the use of precedent.

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Notes

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1 In the words of Núñez Vaquero, judicial precedents are jurisdictional decisions that express a general rule that is important for the justification of other jurisdictional decisions (2021, p. 335). A more restricted form of judicial precedents has been defined as “the rule of decision contained in the judgment, its *ratio decidendi*, which is the interpretation or specification of the law that is applied in resolving the case and that serves as a guide for resolving future cases that are essentially the same” (Gascón, 2020, p. 167).

2 This distinction has been made, with some differences in details that are not relevant to this work, in Herbert Hart (1994) and Von Wright & Georg Henrik (1963).

3 Article 42 of the Colombian General Code of Procedure establishes that it is the obligation of judges to decide on disputes and issue rulings within the terms of the law.

4 For the crime of malfeasance in office, for instance, the law establishes that “The public servant who issues a ruling, opinion or statement that is clearly contrary to the law shall be subject to a prison term of forty-eight (48) to one hundred forty-four (144) months, a fine of sixty-six point sixty-six (66.66) to three hundred (300) months of legal minimum wages in force, and suspension from exercising public rights and duties for eighty (80) to one hundred forty-four (144) months” (Article 413 of the Colombian Criminal Code).

5 This is what Álvaro Núñez Vaquero calls rules of competence to control adherence to precedents (2021).

6 Even though rules governing the use of precedent have secondary rules, not all of these constitutive rules are rules of competence because some are purely conceptual (e.g., the definition of vertical precedent).

7 In fact, some authors defend the conceptual connection between law and the rule of law. Peña Freire claims that “the concept of law and the rule of law are inseparable since law is nothing more than the set of rules governing the behavior of the individuals [living] under the rule of law... From this perspective, it can be clearly observed that the law as a legal system and the rule of law are, actually, the same thing because the rule of law is no different from the situation achieved when the system of rules that form the law governs the behavior of individuals” (Peña Freire, 2020, pp. 22-23).
