ON THE RULE AND THE USE OF PRECEDENTS: BRIEF COMMENTS ON THE WORKS OF FABIO PULIDO ORTIZ AND SILVIA ZORZETTO*

SOBRE LA REGLA Y EL USO DE LOS PRECEDENTES. COMENTARIOS AL MARGEN DE LOS TRABAJOS DE FABIO PULIDO ORTIZ Y SILVIA ZORZETTO

Álvaro Núñez Vaquero**

DOI: 10.22201/iij.24487937e.2022.16.5.17583

Abstract:

It filled me with pleasure to be asked by Problema editor-in-chief Sandra Gómora Juárez to lead a discussion on the theories and doctrine on precedent in our context alongside Prof. Marina Gascón Abellán. Besides the undeniable and recognized prestige of the Problema journal, there was also the possibility of working with Prof. Marina Gascón again and with Sandra Gómora for the first time. It was also an opportunity to discuss issues regarding precedent with old friends like Flavia Carbonell, Fabio Pulido and Silvia Zorzetto, and exchange opinions with new ones like Rodrigo Camarena.

On this occasion, I would like to comment specifically on the works of Prof. Fabio Pulido Ortiz and Prof. Silvia Zorzetto, both of which are of unquestionable quality. The article by Prof. Pulido Ortiz of the Universidad de la Sabana in Colombia is a work of analytical finesse and subtlety that discusses some fundamental problems of legal theory from the standpoint of the theory of precedent. Prof. Silvia Zorzetto from Università Statale di Milano has conducted an analytical and metalinguistic survey of the use of precedents in Italy, particularly at the Italian Sezioni Unite Civili della Corte di Cassazione. This work is priceless not only in terms of its value as a study of (internal) Italian legal culture, but also because the analysis can be generalized, at least in part, to explain how precedents are used in civil law systems.

Keywords:

Rule of Precedent, Theory of Precedent, Doctrine of Precedent, Constitutive Norms, Trivalence of Precedent.

Resumen:

Cuando la profesora y directora de la revista Problema, *Sandra Gómora Juárez, nos propuso a la profesora Marina Gascón Abellán y a mí llevar a cabo una discusión acerca de las teorías y doctrinas del precedente en nuestro contexto, no me pude sentir más contento. Al indudable y reconocido prestigio de la revista Problema se sumó la posibilidad de volver a trabajar con la profesora Marina Gascón y hacerlo por primera vez con Sandra Gómora. Además, surgió la oportunidad de volver a discutir con viejos amigos —como Flavia Carbonell, Fabio Pulido, Silvia Zorzetto— sobre cuestiones relativas al precedente, y poder contrastar opiniones con otros nuevos, como Rodrigo Camarena.*

En esta ocasión, me corresponde comentar, en particular, los trabajos del profesor Fabio Pulido Ortiz y de la profesora Silvia Zorzetto. Ambos trabajos son de una indudable calidad. El del profesor Pulido Ortiz, de la Universidad de La Sabana de Colombia, es un trabajo de finura y sutileza analítica que entra a discutir, al calor de la teoría del precedente, algunos problemas fundamentales de la teoría del derecho. La profesora Silvia Zorzetto, de la Università Statale di Milano, ha llevado a cabo un reconocimiento analítico y metalingüístico de la práctica de los precedentes en Italia, con especial atención a le Sezioni Unite Civili della Corte di Cassazione italiana, de incalculable valor. Ello no sólo por el valor que pueda tener para el estudio de la cultura jurídica (interna) italiana, sino porque su análisis puede ser, al menos en parte, generalizado para dar cuenta de cómo son usados los precedentes en los ordenamientos de civil law.

Palabras clave:

Regla del precedente, teoría del precedente, doctrina del precedente, normas constitutivas, trivalencia del precedente.

I. Constitutive Rules, Authorized Precedent and Necessity of Rules Governing the Use of Precedent, According to Fabio Pulido Ortiz

To better understand Pulido Ortiz's highly sophisticated work, it is worth contextualizing it as, at least to some extent, part of a broader discussion with me and Prof. María Beatriz Arriagada Cáceres, from the Diego Portales University of Chile. This discussion began in October 2019 at an international congress on precedents held in Puerto Montt (Chile). Some differences emerged, especially between Pulido Ortiz, on the one hand, and Prof. Arriagada Cáceres and me, on the other, but these point were first brought to light in a collective book that was subsequently published (Álvaro Núñez et al, 2021).

One of the issues already under discussion on that occasion was the Pulido Ortiz's view of the need for rules governing the use of precedent. In his opinion, every legal system

necessarily contains a legal rule establishing the way the use of precedents is to be regulated. This time Pulido Ortiz presents new arguments whose specific merits need to be discussed.

The second issue Pulido Ortiz particularly touched upon on this occasion is directly at odds with several theories I had defended at Puerto Montt and in the ensuing publication. Specifically, Pulido Ortiz criticizes my portrayal of the review of precedent solely as a rule that establishes conditions of validity and invalidity for subsequent decisions that apply (or not) the precedent. In his opinion, between establishing conditions of validity (by following or not following them) for other decisions and establishing conditions of invalidity (by following or not following them) for these decisions, there is a middle ground: when the use of precedents is merely authorized.

There is a certain connection between the two theories, although not mutually implied. Since Pulido Ortiz defends the view of needing rules governing the use of precedent, he also believes it necessary to uphold the opinion that said rules must be only followed when authorized. Both theories can admittedly be defended separately, but since Pulido Ortiz argues that there are legal systems in which following precedents does not affect the validity of jurisdictional decisions (but regulates it in any case), he has to assert the existence of this *tertium datur* between validity and invalidity to argue that all legal systems must have rules governing the use of precedent. Since this connection is not mutually implied between these two theories, I will discuss each one separately.[1] I will therefore follow the same order Pulido Ortiz himself presents his ideas.

Following Pulido Ortiz's lead, it is first necessary to examine his definition of the constituted rules. At first glance his approach seems perfectly correct, but it nevertheless detracts from his interpretation of precedent systems in general, and of the rule of precedent in particular. It is precisely because he regards constitutive rules as those establishing only the conditions required to validate legal acts (and normative acts), he has problems in accounting for how any rule governing the use of precedent can shape the validity of jurisdictional decisions.

1. Constitutive Rules According to Pulido Ortiz

Pulido Ortiz is extremely clear when it comes to drawing a distinction between constitutive rules and prescriptive rules. According to Pulido Ortiz, "[p]rescriptive rules are in charge of governing action, requiring or allowing the performance (or non-performance) of certain types of actions [...] Constitutive rules [...] define certain aspects, among which those establishing the conditions to identify, create and apply other rules are fundamental", (Fabio Pulido, 2022). The author himself stresses the difference: "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)", (Fabio Pulido, 2022).

Pulido Ortiz goes on to point out three different types of constitutive rules: the Hartian rule of recognition, rules of competence and the purely conceptual rules. We are particularly interested in the second and third types of rules. He defines the rules of jurisdiction as “the rules laying down the conditions for judicial acts to be validly carried out", (Fabio Pulido, 2022). He then provides a stipulation, distinguishing between actions (“behaviors governed by primary rules") and acts [“behaviors (and their outcomes) made possible by the rules of competence"]. Pulido Ortiz logically contends that prescriptive rules may concern both actions and normative acts. Thus, a legal system can “create" a new type of behavior and then consider it binding or even —why not— prohibited.

After differentiating between rules of change and rules of adjudication in the field of rules of competence, Pulido Ortiz discusses the purely conceptual rules, those that “merely define judicial concepts by establishing relations between different aspects, assumptions or cases", (Fabio Pulido, 2022). According to Pulido Ortiz, these rules do not prescribe actions, nor do they define powers or establish (at least directly) conditions of validity, but such a rule, he says, “defines correlations between certain legal terms (e.g., a prepubescent) and certain conditions (a human being under the age of 14 and over the age of 7)", (Fabio Pulido, 2022).

A. Certain Considerations on Interpretation of Constitutive Rules

Pulido Ortiz's description of purely conceptual rules has great merit: it offers a structural definition not only of purely conceptual rules, but also of the entire family of constitutive rules, although I am not sure this was Pulido Ortiz's intention. In defining them from a purely structural point of view by connecting various aspects, events or actions, he has provided a structural definition that makes it possible to differentiate, in general terms, constitutive rules from prescriptive ones: while the first interlink two factual assumptions, the latter second interlinks a factual assumption with a deontic operator. This is not a feature inherent only to defining rules but can be found in the entire family of constitutive rules. In fact, from a structural point of view, all constitutive rules have the same form: a generic case linked to another generic case (José Juan Moreso y Josep Vilajosana, 2005, p. 74).

Returning to his general definition of constitutive rules, the one encompassing the three types of constitutive rules would be: “constitutive rules define certain aspects or allow certain things, among which those establishing conditions to identify, create and apply rules are fundamental", (Fabio Pulido, 2022). In terms of rules of competence, Pulido Ortiz is slightly ambiguous since he defines them both as rules that allow judicial acts, as well as normative acts, to be carried out.

This last ambiguity poses a slight problem. It is not the same thing to say that rules of competence are rules for carrying out legal acts as it is to say that they are rules for carrying out normative acts. If it is only for the purpose of carrying out normative acts, then there are two types of rules that cannot be accounted for.

(I) In the first place, it would not address the rules establishing competences for certain subjects, but such competences do not produce rules. (ii) In the second place, there are the rules that do not establish the conditions to identify, create or apply rules but which create a new legal reality in themselves.

(II) In the first case, there are certain competences conferred on unquestionably judicial bodies to carry out acts which in no way produce rules. One example is the Rules of Procedure of the Spanish Congress of Deputies, which contemplates —i.e., establishes— the possibility of submitting non-legislative proposals, which in no way creates binding or mandatory rules. This is not a Spanish peculiarity as the same is true of United Nations General Assembly recommendations. And it does not seem that this type of rule can fit into the category of purely conceptual rules.

(ii) Secondly, in defining constitutive rules as rules establishing conditions to identify, create and apply other rules, Pulido Ortiz does not take into account a very important type of constitutive rules: those that directly create a legal reality, without establishing any type of condition (Gaetano Carcattera, 2014, pp. 48 ss). A few examples should suffice: Royal Decree 3217/1981, dated November 27, 1981, ratifying October 12th as the National Day of Spain; the rule repealing another rule; the rule establishing a renvoi without stipulating a new competence; etc. And these do not seem to apply to purely defining rules either.

B. The Distinction Between "Acts" and "Actions"

The abovementioned distinction Pulido Ortiz makes between "actions" and "acts" seems dangerous to me, even if it is only a simple caveat. It would seem that Pulido Ortiz is thus ontologizing a purely epistemic distinction. The world does not have "acts" or "actions," but rather, depending on how we want to describe a certain human behavior, it will qualify as an "action" or as an "act." "Actions" would refer to behaviors governed by primary rules, while "acts" refer to behaviors made possible by the rules of competence. What Pulido Ortiz seems to overlook is that every "action" is also an "act." This can be easily illustrated with a couple of examples: shooting someone with a firearm can constitute both the 'action' of killing and the 'act' of executing a death sentence; making a holographic will is both the "action" of writing certain characters on a piece of paper, and the "act" of establishing to whom to bequeath one's belongings. Reality is only one: it all depends on how we want to describe it.

C. Rules of Competence as Rules Establishing the Necessary Conditions for Valid Normative Acts

Lastly, Pulido Ortiz argues that an act is valid as long as the conditions defined in the rule of competence are met. In addition to the fact that such a distinction could be made between a rule that establishes the competence itself and the rules that establish the conditions for it to be applied (Jordi Ferrer, 2000, pp. 129 ss.), he actually seems to take its statement too far: "if a judicial operator fails comply with the conditions defined in the rules of competence, their acts are not valid", (Fabio Pulido, 2022). This apparently innocuous

statement may lead to some confusion if it is not borne in mind that the conditions laid down in the rules governing competence are, in many cases, disjunctive enough as they are. In other words, lawmakers look for different ways to achieve the same institutional result.

For example, Spanish legislators provide up to six different ways to draw up a will, each of which results in a valid will. Thus, we have are different ways to achieve the same institutional result: a will. And the same can be said of many other legal acts. To go one step further, taken individually, rules sometimes only establish contributing conditions for an act to be valid. Another example is found in the Spanish university system, where to obtain the credential of “University Professor", having directed a doctoral dissertation is not considered a necessary or sufficient condition, but a complementary qualification —i.e., a contributing condition— to obtain this credential.

But this is not about such a particular as the ways to write a will or obtain university credentials. There are different ways and/or procedures for creating laws, too. In the Spanish legal system, there are at least three other ways, aside from the ordinary procedure, to create an ordinary law: through urgent processing, by being delegated to committee and by a single reading. These four ways constitute sets of disjunctively sufficient conditions to achieve the same institutional result: the creation of an ordinary law.

This calls into question whether the conditions laid down in the rules of competence are always necessary conditions to carry out legal acts. On the contrary, it seems that in many cases lawmakers establish parallel courses to carry out a legal act;[2] or sometimes, elements are considered normatively important, but not necessary or sufficient.

It should be noted that this problem Pulido Ortiz runs into is not an isolated issue. On the contrary, it is precisely because he sees constitutive rules only as necessary conditions for legal acts to be valid that he is forced to defend the idea that a legal system can classify the use of precedents as merely authorized. As will be seen below, it is perfectly possible that following or not following precedents does not constitute a necessary condition for a decision’s validity or invalidity. However, this does not mean that the validity of decisions is conditioned in other ways: as a sufficient condition or a contributing condition, which is vastly different from claiming that the use of precedents is merely authorized.

2. The Theory of the Three Types of Rules Governing the Use of Precedents

The second issue to be addressed is Pulido Ortiz’s theory of the rules governing the use of precedent —the rules in the legal system that define the normative operation of precedents. He explains that these are rules that can classify the application of judicial precedents (defined as rules, which can also be the subject of another discussion best left for later) as binding, as admitting the use of precedents or as rejecting the rules of precedent. This would mean a comprehensive and exclusive distinction, i.e., following precedent is regulated in one of these three ways, and only in one of these three ways. These are distinctions, according to Pulido Ortiz, based on constitutive rules, not prescriptive rules.[3]

A. The Three Comprehensive and Exclusive Elements of the Rules Governing the Use of Precedent

In this section I will specifically discuss how the rules governing the use of precedent regulate following precedents or not following them, leaving the issue of necessity for such rules for the next section.

In the first place, it is necessary to discuss the argument of comprehensiveness and exclusiveness, i.e., the argument that each of these ways of regulating the use of precedents covers all possible forms of regulating precedents and that it is not possible for a legal system to regulate the use of precedents in more ways than one. Naturally, a single legal system can have different rules governing the use of different types of precedents, but Pulido Ortiz refers to the fact that following the same types of precedents are regulated differently in one same legal system.

To begin with the argument of exclusiveness, (i) according to Pulido Ortiz, a legal system can regulate the use of precedents in one of three ways, but only in one of these three ways. However, it should be noted that Pulido Ortiz justifies this argument of exclusiveness by stating that, if it were regulated in two different ways, there would be a contradiction between rules. However, it does not seem impossible for a legal system to regulate the use of precedents —or any other behavior— in ways that come in conflict with other rules.

But, on the other hand, if the rules governing the use of precedents can be both binding and admitting their use, there is no apparent contradiction in saying that a behavior is merely authorized and that it is binding. If courts are authorized to cite precedents, this does not seem to contradict the fact that they are also bound to do so. This idea is based on the relationships between deontic operators of prescriptive rules, according to which the fact that a behavior is mandatory implies that it is also allowed (although not the other way around). Although Pulido Ortiz is clear on the distinction between prescriptive and constitutive rules, the way he redefines the different ways in which rules can govern the use of precedent seems to draw from the prescriptivist way of understanding such rules. Pulido Ortiz seems to have allowed himself to be dragged from the world of constitutive rules to the world of prescriptive rules. "Authorized" in the constitutive world plays the same role as "permitted" in the prescriptive world.

(ii) But things do not improve much from comprehensive approach. Pulido Ortiz appears not to see the various possibilities afforded with rules governing the use of precedents. Beyond the fact of arguing about behavior required by the rules governing the use of precedents — citing them, applying them hypothetically, using rules that are logical consequences, and so on, Pulido Ortiz does not consider all the possible consequences that could stem from these rules.

To give a few examples, one legal system might consider that, although not binding —in the sense of necessarily conditioning the validity of decisions, the fact that a decision follows

or does not follow a precedent may not be sufficient justification to annul a decision, but it may affect its possibilities for appeal. While following precedents may not be a condition to annul or validate a decision, following it may be considered a (necessary and sufficient) condition for the level of its binding nature.[4] Lastly, not following precedents may result in a precedent that ceases to be considered as such, falling into disuse.

B. Rules Admitting the Use of Precedent

The critical aspect of Pulido Ortiz's interpretation is the idea of rules admitting the use of precedent, i.e., “that allows judicial operators to use judicial precedents to justify their acts, but without stipulating that precedents condition the validity of those same acts", (Fabio Pulido, 2022). In other words, it admits judicial operators’ use of precedents, but without it being binding, without placing conditions on their validity. Although it might seem otherwise, this form of admitting use is not permission in deontic terms, a theory that —according to Pulido Ortiz himself— I would have dismissed in a previous work (Álvaro Núñez, 2021, pp. 33-363). But he claims that my argument has two flaws: the first is that the rules admitting the use of precedent would imply, in his interpretation of my proposition, that rules governing the use of precedents does not affect the validity of legal acts, but this does not imply that it is allowed; the second is that the rules admitting the use of precedent would not make it possible to distinguish between institutionally important and irrelevant behaviors.

I do not believe giving an account of what I said in the work to which Pulido Ortiz refers to be of much interest. I will instead deal with the issue directly. To better understand why I believe rules governing the use of precedent cannot simply admit their use, it is necessary to explain the reasoning behind that theory. The aim of that paper was to reject the idea that rules governing the use of precedent could be redefined as a prescriptive rule. The intention was to rule out the possibility for rules governing the use of precedent to be interpreted as a permit (i.e., a non-mandatory prescriptive rule) where it is not mandatory to follow them.

The argument was that permission can serve various functions but, in this case, —if the rule of precedent were a permission it would protect the normative status of certain actions against the creation of certain rules. For example, freedom of expression is borne out in many legal systems as permission of constitutional standing so that ordinary lawmakers cannot modify its normative status.

To determine whether the rules governing the use of precedent can be interpreted as permission, I asked myself how the act of not following precedent would be deontically qualified, in the event that following the precedent were allowed. For the sake of brevity, our focus will be on the case where both following and not following precedent are allowed, i.e., it the use of precedent is optional. The permission (i.e., option) to follow precedent would come into play if someone uses a precedent (or not) to justify a judicial decision. In this case, one of two things (or both) would happen: either the head of the body is sanctioned for following or not following a precedent, or the decision is annulled because a precedent was followed (or

not). It is precisely when faced with these two possibilities —sanction and annulment— that the rule governing the use of precedent as optional would apply.

Aside from the possibility of sanctions,[5] I contend that if permission protects against issuing a review decision the judicial decision for using (or not) a precedent, this rule cannot be permission. Rules setting forth immunities —in this case, the reviewing body's lack of authority to overturn a decision merely because another body followed (or did not follow) a precedent— are not permission (prescriptive rules), but actually constitutive rules.[6]

But I added one more point to this work: claiming that rules governing the use of precedent endow it with immunity does not yet constitute a comprehensive interpretation of how precedents are normatively important in legal systems. It is not simply a matter of not allowing a reviewing body to overturn a decision on the basis of following precedents. This would be, he said, like saying that a judicial decision cannot be overturned because it was signed in green ink. To plausibly speak of precedents, the act of following or not following precedents must have normative normative relevance. My response was that if a decision is considered a precedent, it should then at least count as a condition that contributes to the justification of the decision and, therefore, its validity.[7]

Pulido Ortiz points at two failings in this regard. The first one he argues that since a subject has the competence to carry out certain acts, it would follow that the subject is also allowed to do so. I do not believe to have claimed that if a subject has the competence to carry out an action, it can be inferred that the behavior is also permitted, or vice versa. Regardless of my exact wording, we cannot infer prescriptive rules from constitutive ones, or vice versa. It would like supposing some words uttered are a promise, and based on the definition of promise, there is an obligation to fulfill what has been promised (Daniel Mendoca, 2011, pp. 39 ss.). Therefore, we agree that rules governing the use of precedent cannot classify "following precedent" as permissible and this does not say anything about competence.

(II) The second objection is that I claim that rules governing the use of precedent that consider, to use Pulido Ortiz's terms, following precedents as merely authoritative, thus rendering them irrelevant, which is exactly what I am saying.

As a reminder, we are not in the realm of prescriptive rules, but in that of constitutive ones. Pulido Ortiz seems to include a *tertium datur* between the fact that following precedents is binding —in the sense that they condition the validity of an act— and precedents are rejected —as a condition to consider the decision as invalid. Pulido Ortiz encounters an obstacle when thinking of constitutive rules in terms of prescriptive ones.

For these cases, Pulido Ortiz says "the use of the petitions does not constitute 'a reason to annul a judgment". "But, regardless, it is possible that the use of such precedents does not affect the validity of judicial decisions". According to Pulido Ortiz, when the rules governing the use of precedent consider following it only as authorized, the use of precedents would not constitute a reason to overturn a decision: "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)", (Fabio Pulido, 2022).

In the work Pulido Ortiz cites, I argued that if this was the way things were, then there would be no difference between citing a precedent and not citing one; or using a Spanish proverb to justify a decision: it would simply not be taken into account. If (the validity or correctness of) a decision cannot be appealed because it follows or does not follow a precedent, we cannot actually draw any conclusion about the validity of that decision; it only tells us that it is not a relevant criterion. I do not know if it makes sense to speak of a "system of precedent" in these cases. No one is going to overturn or uphold a sentence because it cites a passage from Don Quixote in its rationale; it will simply be ignored when assessing its (in)validity. Something similar happens here: the validity of a decision cannot be assessed on whether it followed (or did not follow) a precedent.

However, there seems to be an important gap between the possibility that citing a precedent is irrelevant for justifying a decision (i.e., the validity of the justification for the decision) and that a precedent is binding –in that following a precedent or not is a necessary condition for justifying a decision. I will give one example from among the many positions on this point. It may well be that following precedents is not a necessary condition for the validity of a decision, but it is a sufficient condition to justify the judicial decision (and, therefore, its validity). Thus, for example, following Supreme Court case law would guarantee the material correctness of the judicial decision following the precedent and, in this sense, its validity; however, departing from this case law would not be a necessary or sufficient condition for the decision to be considered invalid (not following it would not be legally defined).

Pulido Ortiz fails to view constitutive rules, like the rules of competence mentioned above, as a necessary condition for the validity of legal acts (*supra*, 1.1.3). From his point of view, if an act does not meet all the conditions of validity, it is therefore null and void. But things are a bit more complex. A rule may very well make the validity of a judicial decision conditional upon following a precedent, but only in a way that is sufficient or contributes, and failure to do so is legally irrelevant.

In short, Pulido Ortiz and I might agree on conceiving the rules governing the use of precedent as binding in all cases, if this means that the rule of precedent is always a necessary condition for the validity of decisions. However, there are many scenarios in which following a precedent is a necessary condition of validity or invalidity; both following or not following a precedent may be a sufficient or contributing condition. I cannot subscribe to a rule that labels following or not following precedents as irrelevant, simply because I believe that in such a case it is pointless to speak of “precedents." If we have a system of precedents, it is because using a precedent mark a practical difference; otherwise, why would such decisions constitute precedents?

3. The Rule of Precedent as a Necessary Rule

The last of Pulido Ortiz's theories I will address is the one whereby the rules governing the use of precedent is a necessary norm, found in all legal systems. Thus, the rules governing the use of precedent would regulate them either as binding, as being admitted, or as being rejected when followed or not followed. It is not, according to Pulido Ortiz, a rule that is present in all legal systems by chance, a theory to which I could subscribe. However, Pulido Ortiz's theory is conceptual, a required, or at least from the perspective that legal systems have incorporated the principle of legality.

Pulido Ortiz structures his argument by first noting that rules governing the use of precedent establish, on the one hand, the competence of certain bodies to dictate precedents and, on the other, regulate the use of precedents in the terms seen in the previous section, namely: binding rules of precedent, rules admitting the use of precedent and rules rejecting the use of precedent.

Pulido Ortiz does not claim that lawmakers in every legal system have enacted express rules explicitly regulating the use of precedents. On the contrary, he underlines how it is characteristic of contemporary legal systems that "the powers of authorities are defined (or constituted) in judicial rules (rules of competence) that define or make the valid exercise of these powers possible", (Fabio Pulido, 2022). The problem arises when lawmakers remain silent, and the principle of legality comes into play.

He then states, on the one hand, that the "concept of judicial precedent assumes there are judicially created rules that are important to resolving certain issues" (Fabio Pulido, 2022) and, on the other hand, that "rules admitting the use of precedent... 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", (Fabio Pulido, 2022). To this he adds, concurring with Tamanaha and Waldron, the principle of legality as a guiding principle of the rule of law, which implies that the exercise of powers must be previously provided for by some type of rule of competence.

Here are two different, but central arguments. (I) The first asserts that if there is a rule conferring competence to certain bodies to establish precedents, then there is also a rule regulating heir use. And vice versa, if there is a rule regulating the use of following precedents, then there is a rule conferring competence on somebody to dictate precedents. (II) The second argument is that the principle of legality sets a rule of closure regarding the rules of competence in legal systems, i.e., the theory that all acts that have no rule of competence authorizing such acts are invalid.

(I') To analyze the first argument, if there is a rule establishing competence to dictate precedents, then there is another rule regulating them. If there is one rule regulating them, then there is another establishing competence. The first theory is easy to dismiss as long as we take into account that lawmakers often forget to establish certain rules. Sometimes, lawmakers enact repeals whose logical consequences are unknown when enacted, and it is

perfectly possible that, despite having the power to dictate them, the rules governing the use of precedents may have been repealed.

This other example is even clearer: it is entirely possible that there is a rule regulating the use of precedents, but no one has the competence to dictate them. The possibility of lawmakers implicitly repealing certain rules should not be excluded, but there are other cases which are not the fault of lawmakers. In this sense, it is possible for a legal system to determine the value to be attributed to precedents, but no one has the competence to dictate new precedents in that system.

(II') Pulido Ortiz's second argument, which is quite simple but by no means insignificant, revolves around the principle of legality. In modern common law States, the use of regulatory powers must be regulated by rules of competence; if a subject uses exercises normative power without a rule of competence authorizing it, it is therefore not a valid act. From this, Pulido Ortiz infers that if establishing precedents is not expressly stipulated, the principle of legality comes into play and those precedents are considered rejected.

I will not address the issue of rules of closure regarding the rules of competence in legal systems because the other author Pulido Ortiz mentions, María Beatriz Arriagada Cáceres, has already dealt with the subject in her work (María Beatriz Arriagada, 2021a, pp. 1-23). It is, however, possible to introduce two different theories.

(a) First, if the principle of legality comes into play, then does not exactly mean that we have a rule rejecting the use of precedent, but one that simply states the applicability of the principle of legality. Thus, we would not have a rule governing the use of precedent, but only the principle of legality. Just as we do not have a rule prohibiting mayors from making formal declarations of war against other States or the central bank from imposing new taxes, we would not have rules establishing the use of precedents.

(b) Secondly, this way of understanding the principle of legality seems to make superfluous rules expressly establishing certain bodies' lack competence to undertake certain normative acts. There are rules that rather than establishing a subject's authority to carry out normative acts, expressly prohibit such bodies from doing so. For example, Article 134.7 of the Spanish Constitution states that "The Budget Law cannot create taxes," i.e., it expressly prohibits the lawmakers with the authority to establish the General State Budget from creating new taxes, rates and duties.

Why would we want such a rule if we have a principle of legality that limits the system of competence in such a way that any act without express authorization is invalid? Such an interpretation of the principle of legality makes the rules of non-competence irrelevant.

I have no doubt that, whenever a legal system grants a body the competence to carry out judicial and/or normative acts, this is sufficient condition for acts under those rules to be valid. I am not so sure as to whether it constitutes a necessary condition. On the contrary, it

seems that our legal systems contain various rules that have been enacted and considered valid, without any legal rule protecting or authorizing them. In such cases, it seems that it is the practice of judges themselves —who identify the set of valid rules through the Hartian rule of recognition— that determines what the valid law is, either by applying a rule of competence or by directly referring to the rule of recognition. Ultimately, in order to understand the principle of legality or any other principle, it seems necessary to refer to what judges actually do in practice.

Pulido Ortiz's work clearly has great merits even if I may not entirely subscribe to every argument. I hope this will not be the last time we have the pleasure to discuss these ideas.

II. Use of and Abiding by Precedents, According to Silvia Zorzetto

It is no easy task to comment on Prof. Zorzetto's work. On reading her first draft, I had some theoretical-conceptual questions regarding the scope of her theory. However, by the final version of her paper, Prof. Zorzetto has made her work literally ironclad from a conceptual standpoint, following the best possible analytical tradition. It is truly an impeccable work.

But the ability to elucidate the scope of the concepts that not the only virtue of Silvia Zorzetto's work. As she herself states, her paper seeks to fill, at least in part, a gap left uncovered in the collective book Prof. Marina Gascón and I co-edited a couple of years ago. Zorzetto patently contributes to this end, making headway in the understanding of the argumentative use of precedents. Building on an analysis of the Italian Court of Cassation Sections United decisions and contextualizing it in the light of relevant legislation, she then draws out two conclusions.

The first one can be described as an analysis of Italian (internal) legal culture, explaining the assumptions and theories emerging from these decisions in terms of the system of sources, the theory of interpretation and a number of highly relevant issues. The second one deals with the different ways precedents can be, and in fact are, used, identifying a set of ways in which case law uses Italian Court of Cassation Sections United decisions.

Both theories are based on a specifically Italian analysis, but —as the author herself says — they may be applicable universally to some extent. While the more or less general nature of internal legal culture issues —by their very nature contingent on each place and time— might be open to discussion, the analysis of the different types of arguments based on the precedent can undoubtedly be generalized, if not in terms of how the judicial operators of a given legal system (other than the Italian one) actually operate, then most certainly in the possible argumentative uses of precedents. However, I have some reservations about whether some of the different uses might overlap others, but in the absence of an exhaustive classification of the ways precedents can be used,[8] I believe that it is better to err on the side of multiple categories than reductivism (there will be room for analytical subtleties in this regard). I think

Zorzetto has thus expanded the scope of research on precedent-based argumentation of which some of us have only scratched the surface.

There is not much left to say, except for a few details. A couple of theories underlying Professor Zorzetto's work are more important than they might seem and cast doubts on —not the plausibility of her work, but— the viability of well-ordered system of precedents. The first refers to the conditions for the existence of precedents; the second could be described as the implicit pessimism regarding human skill to make jurisdictional decisions rather than on whether precedents can definitively regulate cases. To get both theories out of the way, it is necessary to look at details, but without taking Zorzetto's descriptive claim out of context.

1. The Relevance Of Past Decisions

Zorzetto's methodical work contains, as already mentioned, a first premise that catches – or should catch– the reader's attention: "However, when each decision is made, no one can know the rulings will be shared by the other courts. Thus, the issuer may have, at most, a *de facto* hope or desire that their decision will become a precedent for others" (Silvia Zorzetto, 2022). This assertion is of the utmost importance in Zorzetto's work, as well as to understand how precedents work in our legal systems.

Zorzetto simply argues that whether a judicial decision counts as precedent ultimately depends on whether that decision is shared by the other courts and/or by the legal community in general. In other words, one can try to create a precedent, but there is no guarantee that it will succeed, even if it is the highest court in the legal system.

If a minimally empiricist point of view is adopted, this statement seems quite sensible. It is absolutely true that a court decision may be disregarded altogether, even if its originators intended the decision to constitute a precedent and this in fact happens on many occasions. For a judicial decision to become a precedent, it must not be systematically disregarded. But I am not so sure that for a decision to be considered a precedent, it is necessary for it to be accepted.

However, that it is one thing to hold, as Zorzetto does, that the fate of a decision to become a precedent depends on its acceptance by other judicial operators, but it is quite another is to claim that a precedent may cease to be considered as such because it is no longer effective, i.e., because of *desuetude*. Along the same empirical lines I share with Zorzetto, it would seem that the means to know whether a precedent has been accepted or not among the rest of the judicial operators is because it has been used as the basis for a court decision. Without access to judges' states of mind, it is hard to imagine another way to know whether it has been accepted unless it has been used.

But this is where things start to get complicated. Following highly respected voices like Taruffo's (Taruffo, pp. 12 ss.), Zorzetto could counter that precedent is only born when it is later used by a judicial operator. But before explaining this point, it bears asking whether the

same could be said of laws. Would anyone say that a law does not become a law until it has been accepted and therefore applied? I think only a radical skeptical empiricist would be willing to accept such an argument.[9] But if this argument is absurd when referring to the law, we may wonder why it is not also absurd when referring to precedents.

One could argue that the reason is that while we have rules to grant parliament- to make laws, we do not have rules to grant the power to make precedents. It is again helpful to turn to the same healthy empiricism mentioned above: is it certain that judges and other judicial operators are not using some criterion —i.e., a rule— to identify certain decisions as precedents? I suspect that, regardless of the specific rules used by Italian judicial operators, it does not seem that they randomly select judgments to consider precedents, but they rely on some criterion, i.e., rules to identify which decisions qualify as precedents. If there really are criteria to identify which decisions qualify as precedents, we can say there are subjects with the competence to establish precedents.

In this same skeptical tone, we must also look at two other statements Zorzetto makes about precedents. The first is a statement that, for lack of a better name, I will call philosophy of legal history. According to Zorzetto, a well-ordered system of precedents (we will address this point below at 2.2) needs to be born "'from the ground up' so to say, by creating a legal and judicial culture that is as sensitive, sharp, far-sighted and responsible as possible" (Silvia Zorzetto, 2022), in the sense that it would not be possible for it to be otherwise. Of course, if a decision is dependent on the acceptance of others for it to be considered a precedent, then it follows that the only way for a system of precedents to work is because there has been a prior change in the legal culture that makes it possible.

Would it make sense to make the same claim about laws enacted by parliament? I am not convinced that all the major changes that have taken place in our legal cultures have been 'from the ground up.' It did indeed happen 'from the ground up' with processes for constitutionalizing the law. But we also have examples to the contrary, such as with the codification processes created by lawmakers which had an enormous impact on the practice of legal operators (Pio Caroni, 2013, pp. 43 ss.). However, Zorzetto is wary, perhaps unjustifiably so, as will be seen in the next section, of the possibility of creating a well-organized system of precedents.

In keeping with the argument of the need for a judicial decision to be accepted by other judicial operators before being considered a precedent, the second claim is that justifying a subsequent decision based on an *ex-auctoritate* precedent weakens its position (Silvia Zorzetto, 2022). Legal operators' acceptance of a judicial decision as precedent and the *ex-auctoritate* argument are diametrically opposed ways of conceiving law. Zorzetto herself goes as far as to say that it is possible for a legal principle, without being linked to the facts of the case, to stand independently of the very decision in which it was formulated. What counts, so to speak, is the content, not the fact, that a rule has been used (or merely) formulated by a court; not even in the case of the Italian Court of Cassation Sections United.

While I understand and somewhat agree that precedents can be used as arguments from authority, I hesitate to say this is a good way to present the use of precedents. The reason is that the *ex-auctoritate* argument is often presented (Giovanni Tarello, 2013, p. 193; Riccardo Guastini, 2018, p. 193) hand in hand with reliance on foreign law and, especially, on the science of law and/or legal doctrine. Placing both arguments (a precedent and legal doctrine) in the same category is [misleading] because they represent authorities in quite different senses. Whereas the use of doctrine is based on proposed solutions to cases having a certain quality (epistemic or moral), in the case of precedents, it is a solution... coming from a body created (or recognized) by the legal system itself! And a precedent enjoys, at least, authority of this kind, regardless of the quality of its content.

In this sense, it may be possible for there to be a precedent, but for it to be considered a bad one.[10] If we can have decisions held to be precedents because they meet certain criteria of identification despite being held to be bad decisions, it seems that it is because the authoritative nature of precedents does not come from a purported (moral or epistemic) quality or virtue. If this were the case with precedents, Zorzetto could rightly claim that the *ex-auctoritate* argument weakens them. However, when a precedent is invoked in favor of a type of decision, the decision of a body created (or at least recognized) by the legal system is invoked. We are not, therefore, referring to the virtues of a body, but rather to an authentic interpretation, at least in the Kelsenian sense (Hans Kelsen, pp. 351 ss.).

Zorzetto herself makes a point of saying that, while conventionalist skepticism is allowed in matters of interpretation, the Sections United are considered to offer the “most accurate" interpretations (p. 21). If that is so, it seems that the *ex-auctoritate* argument based on precedent is not as weak. It is an interpretative decision that the legal system recognizes as having some normative value, even if only for a specific case. But if we confer generality to such interpretations, it is because we agree that it is good for there to be uniformity in the interpretation of legislative texts.

A decision handed down by the Sections United may well be categorically disregarded by all other judicial operators, but this does not prevent it from being recognized as a precedent, at least at the time it is pronounced. When judicial operators engage in evaluated the acceptability of a judicial decision, they are already applying a series of criteria enabling them to recognize that decision as a precedent. Hence, it is possible to identify a judicial decision as a precedent beyond a future act of acceptance and application by other judicial operators. Otherwise, we would be forced to contend, *inter alia*, that the first judge to use a certain decision to justify their own decision is committing an error of law because he would not actually be using a precedent.

2. Excessive Pessimism About the Future of Systems of Precedent

On this second point I will address the pessimism (or perhaps realism?) underlying some of Prof. Zorzetto's comments on the possibility of having a well-ordered system of precedents.

To begin, for Zorzetto a well-ordered system of precedents: “means assuming that precedents are not simply a chaotic fact, that it is not simply a collection of *de facto* decisions. To speak of a system actually implies the existence of a sorting criteria and connections. This is especially true we consider the idea of a ‘well-ordered’ system a value-laden one" (Silvia Zorzetto, 2022).

I have questions about exactly what Prof. Zorzetto means when referring to “the existence of … criteria," but it seems clear that when she mentions “sorting criteria and connections" she is probably speaking of hierarchical (material) (Ricardo Guastini, 2016, pp. 207 ss) relationships between precedents that define which of the different conflicting precedents (i.e., *rationes decidendi*) should be applied. One might first ask what these sorting connections would be and there are, in fact, several options: from weighting the conflicting precedents applicable to a given case to the use of traditional criteria for resolving conflicts. In the latter case, however, it should be noted that such criteria acquire certain particularities when used in the context of precedents and their *rationes decidendi*.[11]

Secondly, it is necessary to ask whether these sorting connections are abrogating in nature, i.e., whether the fact that two precedents contradict each other implies that one needs to be repealed. The issue is by no means trivial, because –if it has abrogating effects– a single isolated decision could overturn a series of precedents that could not be cited again. Prof. Zorzetto obviously cannot be accused of not having further specified these criteria and their effects, given that the problem lies in the lack of precision in our systems of precedents.

Thirdly, it seems that a well-ordered system of precedents requires something more than just “the existence of sorting criteria and connections." I am referring in particular to rules of change for, and especially overruling, precedents. One of the reasons precedents in Italy, Spain or Chile seem to be a catch-all is because the conditions under which a court can distinguish a special precedent or directly overrule a precedent.

Returning to the Hartian metaphor of primitive legal systems (in general), systems of precedent require both rules to identify what the precedents are (rules of recognition) and rules to know who can create new precedents and overrule those already in force (rules of change), as well as who is obliged to follow the precedents and the ensuing effects.

Prof. Zorzetto is quite skeptical of the possibility of building a well-ordered system of precedents. It is no longer an issue and not only an issue of building systems of precedents “from the ground up" (Silvia Zorzetto, 2022) but that “[e]ven if the binding nature of case law precedents were established in the abstract through a principle or a meta-standard, *sceteris paribus* shall always apply: it would be a flawed or defeasible principle or meta-standard from which one can and should depart whenever there are better reasons to decide otherwise" (Silvia Zorzetto, 2022). Zorzetto's main reason for such a claim is, I believe, that since “each life case is ‘unique,’ judicial decisions are an unavoidable part of any existing law… Justice-equality (generality) demands that similar cases be regulated similarly, and that the differences between cases and their handling be commensurate and proportionate. This

implies that if it is going to be fair or right under the law, no decision can be made in a vacuum, independently of the regulation of other cases... This may lead to arguing more from the perspective of analogy, proportion, equality, etc. (generally valuing similarities) or, on the contrary, more from a distinctive perspective (generally highlighting the differences)" (Silvia Zorzetto, 2022).

We are not simply stating that cases are unique or that decisions should not be made in a regulatory vacuum. I cannot possibly disagree with statements of such a general nature. The point is that Zorzetto assumes not only that Italian judges do take into account the uniqueness of each case, but that it is also impossible for them not to do so. In other words, since the particularities of the case must be borne in mind and the lawmakers who have expressly established a rule of precedent are not flawless angels, it is necessarily a defeasible rule, which leaves –and must leave– open the possibility that the judge of a given case may take other aspects into account as relevant and depart from the precedent (ideally, justifiably).

Given this context, a well-ordered system of precedents is impossible. It will always be open to a judge *a quo* to consider facts and circumstances that had not been taken into account when setting the precedent. It seems that judges, all judges, must be capable of deciding whether or not to follow a precedent based on the circumstances of the case. In terms of precedents of interpretation, each judge (every judge) must be capable of establishing the interpretation that best suits the case and thereby achieves material justice, making distinctions among the different cases are apparently the same.

However, I do not consider this a descriptive or conceptual theory, but an ideological approach (of legal ideology) Prof. Zorzetto assumes. These latter conclusions are what make a well-ordered system of precedents undesirable. Zorzetto's comments are rooted in a particularistic ideology according to which it is up to the judge in the specific case to determine the relevant circumstances of each case. In this way, precedents —and the rule of precedent should serve as principles or guidelines to be followed, but without ever sacrificing justice for the specific case.

This would not, as Zorzetto claims, make it impossible to have a well-ordered system of precedents, but it would make it undesirable. Do we really want each and every judge to reopen issues already settled by the Court of Cassation Sections United? Would it not be more sensible for the highest courts to be the ones to issue general rules to guide the rest of the cases without reopening the issues? Moreover, as it is more than debatable whether proximity to the case puts us in a better (moral or epistemic) position as to what the relevant circumstances are, this implies waiving the values advocated by a system of precedents.

A system of precedent clearly promotes equality in a formal sense, although this does not necessarily mean that material justice is sacrificed. Besides, it is an important constraint to judicial arbitrariness and, in a country like Italy with places with a considerable judicial

backlog, it would also bring much greater efficiency to making and justifying decisions. It does not seem a good idea to underestimate its virtues, even if it implies sacrificing other values.

As Zorzetto claims, there is no such thing as a perfect system. But from this we cannot conclude that a well-ordered system of precedents is not possible. The fact is that this implies taking a position in favor of certain values over others. But there is no logical or axiological impediment in taking a legislative approach that limits judges' powers to interpret legislative texts in the way they consider most appropriate, to fill gaps, etc., in favor of interpretations established in the precedents issued by the Court of Cassation Sections United.

In no way does this imply that a court of last resort's interpretation is either the fairest or the right one. The important question is whether we want each judge in their jurisdiction to have the competence to decide which interpretations are the most convenient, or whether it should be the highest courts to decide in general terms.

This has been an excellent opportunity to discuss some of the theories in Professor Zorzetto's and Pulido Ortiz's work, and I hope it will not be the last time I do so.

III. References

Arriagada Cáceres, María Beatriz(2021). La clausura de los sistemas de normas jurídicas de competencia. Episodio I: Los poderes normativos de las autoridades públicas. In *Revus – Journal for Constitutional Theory and Philosophy of Law*, (43), 1-23.

Arriagada Cáceres, María Beatriz(2021). Las dos caras del precedente vinculantes. In Á. Núñez Vaquero, M. B. Arriagada Cáceres, and I. Hunter Ampuero. *Teoría y práctica del precedente* (pp. 365-400). Tirant lo Blanch. 2021.

Carcattera, Gaetano (2014). *Le norme costitutive*. Giappichelli.

Caroni, Pio (2013). *Lecciones de historia de la codificación*. Dykinson,

Ferrer, Jordi (2000). *Las normas de competencia.* Centro de Estudios Políticos y Constitucionales.

Guastini, Ricardo (2016). *La sintaxis del Derecho*. Marcial Pons.

Guastini, Ricardo (2018). *Ensayos escépticos sobre la interpretación*. Zela+.

Kelsen, Hans. *Teoría Pura del Derecho.* Porrúa.

Mendonca, Daniel (2011). *Las claves del derecho*. Gedisa.

Moreso, José Juan & Vilajosana, Josep M, (2005). *Introducción a la teoría del derecho*. Marcial Pons.

Núñez Vaquero, Álvaro (2021). ¿Son obligatorios los precedentes? La regla del precedente como norma(s) constitutiva(s). In Á. Núñez Vaquero, M. B. Arriagada Cáceres & I. Hunter Ampuero. *Teoría y práctica del precedente* (pp. 333-363). Tirant lo Blanch.

Núñez Vaquero, Álvaro & Arriagada Cáceres, María (2021). ¿Es la aplicación del precedente una condición necesaria de su existencia? Un examen desde la teoría analítica del derecho. *Revista Ius et Praxis*, (1), 75-94.

Pulido, Fabio (2022), Are Rules Governing the Use of Precedent Necessary?, (en cursivas) *Problema. Anuario de Filosofía y Teoría del Derecho*, número especial. https://revistas.juridicas.unam.mx/index.php/filosofia-derecho/issue/view/700

Tarello, Giovanni (2013), *La interpretación de la ley*, Lima, Palestra.

Troper, Michael (2004). Una teoría realista de la interpretación. In *Ensayos de teoría constitucional* (pp. 37-62). Fontamara.

Vío Vargas, José. La práctica de citar sentencias pasadas como modelo de precedentes en Chile. In Á. Núñez Vaquero, M. B. Arriagada Cáceres & Hunter Ampuero, I., *Teoría y práctica del precedente* (pp. 279-302). Tirant lo Blanch.

Zorzetto, Silvia (2011). *La norma speciale.* ETS.

Zorzetto, Silvia (2022),Legal Arguments and Case Law Precedents: An Experiment in Judicial-Sociological Experiment Between Practice and Theory, (en cursivas) *Problema. Anuario de Filosofía y Teoría del Derecho*, número especial. https://revistas.juridicas.unam.mx/index.php/filosofia-derecho/issue/view/700

Notes

* Article submitted on October 30, 2021, and accepted for publication on december 12, 2021.
** Professor of Legal Philosophy at the University of Murcia. Email: a.nunezvaquero@um.es, ORCID: https://orcid.org/0000-0001-8665-2381.

1 However, in order to uphold the theory of necessity, the possibility that following precedents are merely authorized must first be upheld as a preliminary step in understanding this concept.

2 Although this set of disjunctively sufficient conditions can be reconstructed by a single rule containing a necessary condition made up of different disjunctively sufficient conditions, it is true that this is a somewhat complicated way of reconstructing the law.

3 In summary, if we hold that precedents are rules, we cannot say that the same decision contains two *rationes decidendi*, but that it constitutes two different precedents. However, it seems much more plausible to think that a single decision, which constitutes a precedent, may contain more than one rule relevant to deciding other cases, i.e., more than one *ratio decidendi.*

4 Consider the legal systems where for court case law to be binding, it must be reiterated on several occasions. Thus, following a previous decision constitutes the necessary reiteration for it to become binding. However, reiteration should not be necessary to speak of precedent. Among other reasons, (Núñez Vaquero, Á. and Arriagada Cáceres, M.B., "¿Es la aplicación del precedente una condición necesaria de su existencia? Un examen desde la teoría analítica del derecho", *Ius et Praxis Magazine*, Year 27, No. 1, 2021, pp. 86 ff.), because the first court to cite a previous decision might appear to be incurring in a legal error.

5 My position in the aforementioned work is that rules governing the use of precedent cannot be interpreted as prescriptive rules, obligating us to follow precedents, but as a constitutive rule limiting the content of judicial decisions. In addition to the fact that sanctions against judges for disregarding precedents are exceedingly rare and forward-looking in nature, it seems that such sanctions would require subjective input. It should also be pointed out that a system of precedent could operate exclusively on the basis of constitutive rules, but not exclusively on the basis of prescriptive rules because there might be dissenting judges who would be willing to accept sanctions if they can continue deciding contrary to precedent.

6 For a different interpretation of rules governing the use of precedent using a Hohfeldian approach, see M. B Arriagada Cáceres (2021b, pp. 365-400).

7 Here, I am implying that the rule for a decision to be considered a precedent must be justified in some way. This raises problems that would require further explanation –in what sense it must be justified; if it is a partial justification, to what extent it must be justified; the possibility of implicit justification, and so on– but are beyond the scope of this paper. Even so, such a rule has been positivized in many legal systems.

8 A similar work, albeit more focused on the analysis of linguistic forms, was undertaken by John Vío Vargas (pp. 279-302).

9 See, for example, M. Troper (2004, pp. 37-62).

10 In fact, there are many precedents in US legal culture which many courts consider bad precedents, but even so, they continue to be regarded as precedents. Consider, for example, the attacks on *Roe v. Wade* in recent years.

11 Here are a few examples. First, the principle of hierarchy can be inferred from the individual rules resulting from decisions considered precedents or from the legal texts on the basis of which the *rationes decidendi* of precedents are formulated. Thus, there would doubt as to the relationship of precedence between a precedent issued by a lower court interpreting the constitution as opposed to a precedent handed down by a constitutional court issuing a rule that fills a legal gap. Second, the principle of specialty —on which Prof. Zorzetto is an expert (*La norma speciale*, ETS, Pisa, 2011)— can take on a different meaning when dealing with courts with a very specialized material scope of competence, such as the Chilean Environmental Courts or the Spanish Courts of Violence against Women.
