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Diverging Legal Culture but Similar Jurisprudence of Overruling: The Case of the House of Lords and the Belgian *Cour de cassation*

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Abstract: According to the conventional view, the attitude towards precedent is one of the most important differences between common law and civil law systems. This paper argues that the phenomenon of overruling as practised both by the Belgian *Cour de cassation* and the Appellate Committee of the House of Lords casts doubt on the cogency of such a perception. As a matter of fact, the Belgian and English systems exhibit a very similar jurisprudence with respect to departure from existing case law as practised at the highest level in the judiciary. This approach challenges the appearance that formal definitions provide for the difference in attitude towards precedent between the two countries and more broadly between common law and civil law systems, without denying the existence of a distinctive legal culture.

Résumé: Traditionnellement, l'approche relative aux précédents juriprudentiels est une des différences majeures entre les systèmes de *common law* et ceux de *civil law*. Cet article allègue que le phénomène de cassation comme pratiqué à la fois par la Cour de cassation belge et par le *Appellate Committee of the House of Lords* jette un doute sur cette appréciation. En fait, les systèmes belge et anglais montrent une jurisprudence très similaire en ce qui concerne l'abandon de la jurisprudence existante telle qu'elle est pratiquée au niveau le plus élevé du système judiciaire. Cette approche met en question l'apparence créée par des définitions formelles de la différence d'approche relative aux précédents jurisprudentiels des deux pays et, plus généralement, entre les systèmes de *common law* et ceux de *civil law*, sans nier l'existence d'une culture juridique distincte.

Zusammenfassung: Nach der herkömmlichen Auffassung ist die Einstellung zum Präzedenzfall eine der wichtigsten Unterschiede zwischen dem *common law* und den kontinentalen Rechtssystemen. Dieser Beitrag zeigt, daß das Phänomen von *overruling*, so wie es vom belgischen *Cour de cassation* und vom *Appellate Committee of the House of Lords* gehandhabt wird, Zweifel an der Gültigkeit obiger Auffassung aufkommen läßt. So weisen das belgische und englische System auf der obersten Stufe der Gerichte eine sehr ähnliche Linie bezüglich des Abweichens von bestehende Rechtsprechung auf. Diese Betrachungsweise bestreitet den Anschein, daß formale Definitionen in einer unterschiedlichen Auffassung des Präzedenzfalls zwischen diesen zwei Ländern, allgemeiner noch: zwischen dem common law und den kontinentalen Rechtssystemen, münden, ohne dabei jedoch die Existenz einer eigenständigen, als solche unterscheidbare Rechtskultur zu verneinen

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1 Introduction

The contrast between the attitudes of civil and common law systems has often been portrayed 'as one between logical and empirical methods, between deductive and inductive thinking, between the rule of reason and the rule of experience'.[1] This contrast has had a profound influence throughout comparative law leading to an essential place being given to the nature and the scope of the judicial function. In civil law countries, the task of the judge would solely consist in an application of general statutory rules to the special facts of the case. On the contrary, the common law judge would proceed from case to case giving particular weight to the rulings of his predecessors.

According to the conventional view, the attitude towards precedent is one of the most important differences between common law and civil law systems.[2] And even if several academic writers have suggested that the gap between the two systems might be more apparent than real,[3] the rule of precedent is still one of the major criteria on which the division between common law and civil law families rests.[4]

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1 W. FRIEDMANN, '*Stare Decisis* at Common Law and Under the Civil Code of Quebec', in *Canadian Law Review* 31 (1953), p 724. See also MACMILLAN, 'Deux manières de penser', in *Recueil d'Etudes en l'honneur d'Edouard Lambert. Introduction à l'étude du droit comparé*, L.G.D.J., Paris, 1938, p 4; R. DEKKERS, *Le droit privé des peuples*, Editions de la librairie encyclopédique, Bruxelles, 1953, No. 259, p 230; C.K. ALLEN, *Law in the Making*, Clarendon Press, Oxford, 1964, 7th ed., p 161-162; L.-J. CONSTANTINESCO, *Traité de droit comparé*, Economica, Paris, 1983, t. III, p 383-384; C. JAUFFRET-SPINOSI, 'Comment juge le juge anglais ?', in *Droits (Revue Française de Théorie Juridique)* (1989), p 57-58; G.A. ZAPHIRIOU, 'Introduction to Civil Law Systems', in R.A. DANNER and M.-L.H. BERNAL (eds), *Introduction to Foreign Legal Systems*, Oceana Publications Inc., New York, London, Rome, 1994, p 51-52; G. SAMUEL, 'Entre les mots et les choses: les raisonnements et les méthodes en tant que sources du droit', in *Revue internationale de droit comparé* (1995), p 512; D. POIRIER, 'Sources de la Common Law', in *La Common Law en poche*, Bruylant, Bruxelles, 1996, vol. 2, p 103-107; P. LEGRAND, 'Are Civilians Educable ?', in *Legal Studies* 18 (1998), p 219-221 & 227.

2 See, for instance, R.L. HENRY, 'Jurisprudence Constante and *Stare Decisis*', in *American Bar Association Journal* 15 (1929), p 11; A.L. GOODHART, 'Precedent in English and Continental Law', in *Law Quaterly Review* 34 (1934), p 40; M. ANCEL, 'Case Law in France', 16/3rd series, in *Journal of Comparative Legislation and International Law* (1934), p 16-17.

3 F. DEAK, 'The Place of the "Case" in the Common and the Civil Law', in *Tulane Law Review* (1934), p 341; J. BLONDEEL, 'La common law et le droit civil', in *Revue internationale de droit comparé* (1951), p 597; R. CROSS and J.W. HARRIS, *Precedent in English Law*, Clarendon Press, Oxford, 1991, 4th ed., p 14; Z. BANKOWSKI, D.N. MACCORMICK, L. MORAWSKI & A.R. MIGUEL, 'Rationales for Precedent', in D.N. MACCORMICK and R.S. SUMMERS (eds), *Interpreting Precedents: a Comparative Study*, Dartmouth Publishing Co Ltd, Ashgate Publishing Ltd, Aldershot, 1997, p 482.

4 C. PÉRIPHANAKIS, *Les sources du droit en science comparative et notions de droit civil comparé*, A.E., Athènes, 1964, p 35; R. DAVID and C. JAUFFRET-SPINOSI, *Les grands systèmes de droit contemporain*, Dalloz, Paris, 1988, 9th ed., No. 99, p 143; 'Sources de la Common Law', *op. cit.*, p 101; K. ZWEIGERT and H. KÖTZ, *Introduction to Comparative Law*, Clarendon Press, Oxford, 3rd ed., 1998 (translated from the 1995 German ed.), p 67.

In my view, the phenomenon of overruling as practised both by the Belgian *Cour de cassation* and the Appellate Committee of the House of Lords casts doubt on the cogency of such a perception. As a matter of fact, the Belgian and English systems exhibit a very similar jurisprudence with respect to departure from existing case law as practised at the highest level in the judiciary. By jurisprudence of overruling, I mean *the revealed motivations behind the phenomenon of departure from existing case law*, in other words, the overtly discussed principles underlying the rules of change in case law.[5] In order to understand how such departures are legitimated in the practice of the House of Lords and the *Cour de cassation*, the binding nature – if any – of judicial decisions in England and Belgium has to be reviewed.

2 Status of precedents

2.1 Precedents in Belgium

The function conferred on judges in the classical civil law model is strictly limited. Stemming from the 1789 French Revolution, this model is chiefly characterized by the primacy of the legislature, a hierarchical organization of legal norms and a rigid conception of the principle of separation of powers. In this picture, the moment of the legislative creation of the rule is clearly distinct from that of its judicial application. In brief, this implies that the judge is confined to an application of statutory law bound by the letter of the text or the will – supposed unique and unequivocal – of the legislature.[6] Apart from where enactments are exceptionally 'silent, obscure or insufficient',[7] the judge must reason according to the syllogistic model. Amongst others,[8]

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5 This implies that only the published decisions of the House of Lords and the *Cour de cassation* were taken into account. Note that the publication policy in the *Cour de cassation* is still largely unknown and that numerous decisions have never been published. On this subject, see L. CORNIL, 'La Cour de cassation. Considérations sur sa mission', in *Journal des tribunaux* (1950), p 497, col. 2-3; E. KRINGS, 'Considérations critiques pour un anniversaire', in *Journal des tribunaux* (1987), p 554, No. 33. Nowadays, the decisions of the *Cour de cassation* are available at www.cass.be. With respect to the House of Lords, most (but not all) its decisions have been published. See C.K. ALLEN, *Law in the Making*, *op. cit.*, p 373; L.J. BLOM-COOPER and G.R. DREWRY, *Final Appeal. A Study of the House of Lords in its Judicial Capacity*, Clarendon Press, Oxford, 1972, p 248-251.

6 J.-L. HALPÉRIN, 'Le juge et le jugement en France à l'époque révolutionnaire', in *Le juge et le jugement dans les traditions juridiques européennes*, L.G.D.J., Paris, 1996, p 238-239.

7 *Code civil*, Art. 4, currently embodied in *Code judiciaire*, Art. 5. For a useful commentary on the scope of this provision, see A. BAYART, 'L'article 4 du Code civil et la mission de la Cour de cassation', in *Journal des tribunaux* (1956), p 353-355; CH. PERELMAN (ed.), *Le problème des lacunes en droit*, Bruylant, Bruxelles, 1968.

8 On 7 May 1806, Bonaparte asserted before the French *Conseil d'Etat* that judges should only be 'physical machines through whom statutes are enforced as time is marked by the hand of a watch'. He qualified his opinion in subsequent statements. See W.J. GANSHOF VAN DER MEERSCH, 'Réflexions sur la révision de la Constitution', in *Journal des tribunaux* (1972), p 478, col. 2.

Robespierre's declaration that 'there is no case law'[9] constitutes a particularly radical statement of this view.

Even though this picture quickly came to be seen as too restrictive,[10] the rejection of it has hardened for the last fifty years. Numerous studies have insisted on the normative power of case law. Some have applied to the legal field the hermeneutic insight that interpretation is potential creation. They have shown that formal logic, and in particular syllogism, cannot account for judicial reasoning because the application of any legal text presupposes its prior construction.[11] Other studies have described the tremendous creative function in practice fulfilled by case law.[12] The divergent solutions given by French and Belgian decisions where applying the same enactments confirm this observation. An outstanding example is provided by the well-known decision of the Belgian *Cour de cassation* of 9 October 1980.[13] Reversing its previous position, the court held that, when applying foreign law, judges must adhere to the interpretation received in the case law of the relevant country. Consequently, when applying Article 1645 of the French *Code civil* - which is still identically worded in the Belgian *Code civil* - the lower court had to observe the construction implemented by the French *Cour de cassation* and not that given by the

9 Quotation from P. RAYNAUD, 'La loi et la jurisprudence des Lumières à la Révolution française', in *Archives de philosophie du droit* (1985), p 61-62.

10 F. GÉNY, *Méthode d'interprétation et sources en droit privé positif*, L.G.D.J., Paris, 1899, 1st ed.

11 See the numerous publications of Chaïm PERELMAN, esp. 'L'interprétation juridique', in *Archives de philosophie du droit* (1972), p 29-39; *Logique juridique. Nouvelle rhétorique*, Dalloz, Paris, 1979, 2nd ed. Consult also M. VAN QUICKENBORNE, 'La logique juridique et l'activité judiciaire. La portée logique de l'obligation de motiver', in *Rapports belges au XIème Congrès de l'Académie internationale de droit comparé*, Bruylant, Bruxelles, 1982, p 158 & 192; F. OST and M. VAN DE KERCHOVE, *Le droit ou les paradoxes du jeu*, P.U.F., Paris, 1992. In favour of elaborating a dialectic between construction and argumentation, see P. RICOEUR, *Le Juste*, Seuil, Paris, 1995, p 163-183.

12 M. WALINE, 'Le pouvoir normatif de la jurisprudence', in *Etudes en l'honneur de Georges Scelle. La technique et les principes de droit public,* L.G.D.J., Paris, 1950, t. II, p 613-632; J. BOULANGER, 'Notations sur le pouvoir créateur de la jurisprudence civile', in *Revue trimestrielle de droit civil* (1961), p 417-441; W.J. GANSHOF VAN DER MEERSCH, 'Propos sur le texte de la loi et les principes généraux du droit', in *Journal des tribunaux* (1970), p 558; J. DEPREZ, 'A propos du rapport annuel de la Cour de cassation. "Sois juge et tais-toi"', in *Revue trimestrielle de droit civil* (1978), p 509; X. DIEUX, 'Vers un droit "post-moderne"? - Quelques impressions sceptiques', in *Mélanges offerts à Jacques Velu. Présence du droit public et des droits de l'homme*, Bruylant, Bruxelles, 1992, t. I, p 42-43; P. JESTAZ, 'Source délicieuse ... (Remarques en cascade sur les sources du droit)', in *Revue trimestrielle de droit civil* (1993), p 81-82 and the reply of J. VANDERLINDEN, 'Contribution en forme de mascaret à une théorie des sources du droit au départ d'une source délicieuse', in *Revue trimestrielle de droit civil* (1995), p 80.

13 *Pasicrisie*, 1981, I, p 159.

Belgian equivalent court.[14] This expressly recognizes that the same words may have legal meanings which are dependent upon the local case law.

These various studies asserting that the law cannot be reduced to enacted law have shaken the traditional representation of the sources of law according to which statute law is unequivocal and supreme. While some French academic writers still discuss the equation 'case law equals source of law',[15] this debate is outmoded in Belgium. Currently, jurisprudential scholars attempt to replace the orthodox academic model with other representations better able to account for the concept of legal rule and the assumptions which have led to it. They put into question the very notion of source of law, speaking instead of 'strange loops' and 'entangled hierarchies' *(boucles étranges et hiérarchies enchevêtrées)*,[16] 'archipelagos of the legal norm' *(archipels de la norme)*[17] and even 'clouds' *(nuages)*.[18]

The present difficulty in comprehending the true status of case law also stems from the paradoxical discourses that have surrounded the organization of the

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14 The different scopes sometimes prescribed by the *Cour de cassation*, the *Conseil d'Etat* or the *Cour d'arbitrage* (Belgian constitutional court) to identical statutory provisions proceed from a similar reflection. On this topic, see, for instance, F. DUMON, *La mission des cours et tribunaux. Quelques réflexions*, Bruylant, Bruxelles, 1975, p 42, footnote 138; J. VELU, 'Contrôle de constitutionnalité et contrôle de compatibilité avec les traités', in *Journal des tribunaux* (1992), p 730, No. 7.

15 As recent studies discussing the status of case law in France, see, among others, P. HÉBRAUD, 'Le juge et la jurisprudence', in *Mélanges offerts à Paul Couzinet* (1974), p 329-371; C. ATIAS, 'L'ambiguïté des arrêts dits de principe en droit privé', in *Semaine juridique* (1984), I, 3145, No. 1; P. RAYNAUD, 'La loi et la jurisprudence des Lumières à la Révolution française', *op. cit.*, p 61-72; J.-D. BREDIN, 'La loi du juge', in *Etudes offertes à Berthold Goldman. Le droit des relations économiques internationales*, Litec, Paris, 1987, p 19, No. 10; J. HILAIRE and C. BLOCH, 'Connaissance des décisions de justice et origine de la jurisprudence', in J.H. BAKER (ed.), *Judicial Records, Law Reports and the Growth of Case Law*, Duncker & Humblot, Berlin 1989, band 5, p 48; F. ZÉNATI, *La jurisprudence*, Dalloz, Paris, 1991 p 116-130; Exchange of views on the theme 'La jurisprudence aujourd'hui. Libres propos sur une institution controversée', in *Revue trimestrielle de droit civil* (1992), p 338-361, esp. J. CARBONNIER, p 342, G. CORNU, p 344, M. GOBERT, p 345, F. TERRÉ, p 355, F. ZÉNATI, p 359; 'D'autres propos sur la jurisprudence', in *Revue trimestrielle de droit civil* (1993), p 87-96, esp. M.-C. RONDEAU-RIVIER, p 90; J. HÉRON, 'L'infériorité technique de la norme jurisprudentielle', in *Revue de la recherche juridique - Droit prospectif* (1993), p 1083; P. JESTAZ, 'Source délicieuse ... (Remarques en cascade sur les sources du droit)', *op. cit.*, p 81-82 et la réponse de J. VANDERLINDEN, *op. cit.*, esp. 80; J. GHESTIN and G. GOUBEAUX, *Traité de droit civil. Introduction générale*, L.G.D.J., Paris, 1994, 4th ed., p 432 *et seq.*, No. 465 *et seq.*; J. HILAIRE, 'Jugement et jurisprudence', in *Archives de philosophie du droit* (1994), p 181-182; H. LE BERRE, 'La jurisprudence et le temps', in *Droits (Revue Française de Théorie Juridique)* (2000), p 71; P. MORVAN, 'En droit, la jurisprudence est source de droit', in *Revue de la recherche juridique - Droit prospectif* (2001), p 94.

16 F. OST and M. VAN DE KERCHOVE, *Jalons pour une théorie critique du droit*, F.U.S.L., Bruxelles, 1987, p 205.

17 G. TIMSIT, *Archipel de la norme*, P.U.F., Paris, 1997.

18 M. DELMAS-MARTY, *Pour un droit commun*, Seuil, Paris, 1994, p 283-284.

judiciary. In the days following the French Revolution, the legislature reconciled, although not without ambiguity, the pervading distrust towards judges with the creation of a *Tribunal de cassation*. It combined a strict principle of separation of powers with the establishment of the *Tribunal de cassation* 'by the side of the legislative power'[19] to which it has to refer in certain circumstances. The *Discours Préliminaire du Code civil* deemed case law to be a genuine source of law,[20] whereas the code itself established a framework designed to prevent judicial rulings from ever becoming legal rules. Article 5[21] forbidding judges to lay down general rules of conduct was further strengthened by Article 1351 which, in the context of the law of obligations, laid down the *res judicata* principle[22] *(autorité relative de la chose jugée)*. By contrast the effect of Article 4[23] is to underline the persuasive value of case law. In providing that a judge may be prosecuted for denial of justice if he fails to reach a decision on the grounds of silence, lack of clarity or insufficiency of the written law, this provision virtually impels the judiciary to seek guidance and inspiration from precedents in such situations.[24] In order to show its confidence in the judiciary, the Belgian Constituent Assembly of 1830-1831 *(Congrès National)* raised it to the status of a separate power.[25] Nevertheless, the procedure of legislative reference *(référé législatif)* was not abolished before 1865.[26] Comparable ambivalence

19 *Décret-loi des 27 novembre-1er décembre 1790 organisant le Tribunal de cassation*, Art. 1.

20 PORTALIS, *Discours préliminaire du Code civil*, Locré, éd. belge, 1836, t. I, p 157-158, No. 12-13.

21 Currently embodied in *Code judiciaire*, Art. 6. The change of attitude towards judges in civil law countries is well-illustrated by comparing section 5 of the 1804 French *Code civil* with section 1 of the 1910 Swiss *Code civil*. The latter directs the judge facing an absence of statutory provisions or customary law to decide in accordance with rules which he would lay down 'if he had himself to act as legislator'. In doing so, he must search for assistance in 'approved legal doctrine and case law'. See TERLINDEN, 'Une actualité juridique. Le nouveau Code civil suisse', in *Pasicrisie* (1912), I, p 10.

22 Currently embodied in *Code judiciaire*, Art. 23. This provision prescribes that 'the authority of *res judicata* extends only to the subject matter of the judgment. The claim must be for the same thing, it must be based on the same cause of action, it must be between the same parties, and brought by and against them in the same qualities'.

23 Currently embodied in *Code judiciaire*, Art. 5.

24 A. WEST, Y. DESDEVISES, A. FENET, D. GAURIER and M.-C. HEUSSAFF, *The French Legal System. An Introduction*, Fourmat Publishing, London, 1992, p 58.

25 *Constitution*, Art. 40; B. JOTTRAND, *Les juges d'un peuple libre*, Bruylant, Bruxelles, 1932, p 4; J.-P. NANDRIN, 'Le judiciaire et le politique. Approche historicienne de la fondation du pouvoir judiciaire de la Belgique contemporaine (1831-1848)', in *Revue interdisciplinaire d'études juridiques* (1995), p 187-188.

26 'Loi du 7 juillet 1865 qui abroge les Art. 23, 24 et 25 de la loi du 4 août 1832, sur l'organisation judiciaire, et les remplace par des dispositions nouvelles', in *Moniteur belge*, 11 July 1865.

may be found in the fact that whereas its first *Procureurs généraux*[27] portrayed the *Cour de cassation* as the guardian of uniformity in case law,[28] as late as 1925, Paul Leclercq still described it as the 'legislature's agent'.[29]

As a matter of statutory provision, a Belgian court is never bound to follow a precedent, apart from the very specific and limited exception of a second reference back on the same grounds *(deuxième cassation pour mêmes motifs)*.[30] Yet, owing to its essentially normative nature, case law is fundamental to ascertain what the law is. It represents the law in action. In this respect, the decisions of the *Cour de cassation* are of tremendous significance.

The idea that a single decision of the *Cour de cassation* has no binding force whatsoever may strictly speaking be true. Undeniably a petition for review based on the violation of the case law of the *Cour de cassation* is inadmissible.[31] Consistent with this view, no Belgian court may give as the sole reason for reaching its decision the fact that it followed an earlier authority.[32] The *Cour de cassation* itself, however, pays great heed to its precedents. When a decision of a lower court is quashed for violation of enacted law *(violation de la loi)*, this violation most often lies in not construing the statute as the *Cour de cassation* has done. The assertion that the case law of the *Cour de cassation* forms 'a whole' with enacted law or is 'a supplement to the written law' speaks for itself.[33] The annotation of the codes[34] with rulings of the

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27 The *Procureur général près la Cour de cassation* is the head of the *Parquet général près la Cour de cassation*. The main function of each member of the *Parquet général* is to give advice *(conclusions)* on the legality of the judgment attacked through a petition for review before the *Cour de cassation*. As such, he acts as an *amicus curiae* of the *Cour de cassation*.

28 See, for instance, M. LECLERCQ, 'Examen des arrêts rendus chambres réunies en matière civile, depuis l'installation de la Cour', in *Pasicrisie* (1870), I, p I-II.

29 P. LECLERCQ, 'De la Cour de cassation (1925)', in *La pensée juridique du procureur général Paul Leclercq*, Bruylant, Bruxelles, 1953, p 67; *contra* L. CORNIL, 'La Cour de cassation', in *Journal des tribunaux* (1948), p 454, col. 3.

30 When the remanding court *(cour de renvoi)* decides in the same way as the court whose decision was quashed, and its judgment, in turn, being the object of a further hearing is annulled on the same grounds by the *plenum* of the *Cour de cassation (chambres réunies)*, this latter holding binds the third lower court to whom the case is subsequently referred for implementation (*Code judiciaire*, Art. 1119-1120).

31 Cass., 25 November 1975, in *Pasicrisie* (1976), I, p 385; Cass., 4 April 1989, in *Pasicrisie* (1989), I, p 778.

32 Cass., 13 February 1984, in *Pasicrisie* (1984), I, p 660; see also the examples given by W.J. GANSHOF VAN DER MEERSCH, 'Propos sur le texte de la loi et les principes généraux du droit', *op. cit.*, p 559, footnotes 40 & 41; P. FORIERS, 'Les relations des sources écrites et non écrites du Droit (1970)', in *La pensée juridique de Paul Foriers*, Bruylant, Bruxelles, 1982, vol. II, p 685-687.

33 P. LECLERCQ, 'De la Cour de cassation (1925)', *op. cit.*, p 74; L. CORNIL, 'La Cour de cassation. Considérations sur sa mission', in *Journal des tribuanux* (1950), p 492, col. 3; W.J. GANSHOF VAN DER MEERSCH, 'Propos sur le texte de la loi et les principes généraux du droit', *op. cit.*, p 559; J. VELU, 'Représentation et pouvoir judiciaire', in *Journal des tribunaux* (1996), p 633-634, No. 13-14.

34 Here, *codes* means the private publications of enacted law. See, for instance, *Les Codes Larcier* or *Bruylant*.

Cour de cassation offers further evidence of how far this approach is entrenched in daily practice. The fact that a decision of the *Cour de cassation* is an 'addition to enacted law' has even been ratified by the legislature when it provided that, just like a statute, every published judgment of the court must be translated into both national languages.[35] As a result, the lower courts are urged to consider decisions of the *Cour de cassation* to avoid a reversal of their judgments. This practice is well-illustrated by the decision of the *Cour d'appel de Liège* on 23 April 1987,[36] when construing the term *maison de débauche ou de prostitution* contained in the *Code pénal*.[37] The *Cour d'appel de Liège* explicitly referred to a precedent of the *Cour de cassation*[38] as providing the true meaning of the provision, despite the fact that an analysis of the *travaux préparatoires* undoubtedly would have led to a different interpretation as pleaded by the appellant.[39]

2.2 Precedents in England

A central concept in England is not that of case law, but that of precedent, i.e. any prior decision of any court that bears a legally significant analogy to a subsequent case.[40] This is due to the fact that the English doctrine of precedent 'has assumed a special form, known as *stare decisis*, the effect of which is that judicial decisions have binding force and enjoy law-quality per sé'.[41]

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35 'Loi du 15 juin 1935 concernant l'emploi des langues en matière judiciaire', in *Moniteur belge*, 22 June 1935, 'Art. 28 and the *Exposé des motifs*', in *Pasinomie*, 1935, p 409, esp. 410. There are also cases where the legislature expressly refers to established case law to fill lacunae in enacted law or in bills enforcing enacted law. See, for instance, 'Arrêté royal No. 78 du 10 novembre 1967 relatif à l'art de guérir, à l'exercice des professions qui s'y rattachent et aux commissions médicales, Art. 50', in *Moniteur belge*, 14 November 1967.

36 *Journal des tribunaux* (1987), p 575.

37 Art. 380*bis* 2°.

38 Cass., 30 April 1985, in *Journal des tribunaux* (1986), p 89.

39 An analysis of the *travaux préparatoires* of Art. 380*bis* 2° of the *Code pénal* reveals that the terms *maison de débauche ou de prostitution* were treated as equivalent by the Commission of Justice *(Commission de la Justice)*, whereas the *Cour de cassation* ruled that the former was broader than the latter (*Proposition de loi supprimant la réglementation officielle de la prostitution*, *Documents parlementaires – Chambre des Représentants*, 1946-1947, No. 421). See M. VINCINEAU, *La débauche en droit et le droit à la débauche*, Université Libre de Bruxelles, Bruxelles, 1985, p 150-155 and p 228-231.

40 Z. BANKOWSKI, D.N. MACCORMICK and G. MARSHALL, 'Precedent in the United Kingdom', in D.N. MACCORMICK and R.S SUMMERS (eds), *Interpreting Precedents: a Comparative Study*, Dartmouth Publishing Co Ltd, Ashgate Publishing Ltd, Aldershot, 1997, p 323. For the different uses of the term *precedent*, see in the same volume, G. MARSHALL, 'What is Binding in a Precedent', p 503-504.

41 R.W.M. DIAS, *Jurisprudence*, Butterworths, London, 1985, 5th ed., p 126.

Although a doctrine of precedent already existed in the eighteenth century,[42] it is truly in the last quarter of the nineteenth century that it acquired its full extent, evolving from a general principle of adhering to past decisions to a real set of rules of precedent.[43] This evolution is due both to institutional and intellectual factors. Institutionally, the establishment of the Incorporated Council of Law Reporting in 1865, a semi-official organization[44] in charge of publishing the Law Reports, provided a more reliable dissemination of precedents. In addition, the Judicature Acts of 1873-1875 completed the reorganization of the English judicial system and endowed it with a well-regulated hierarchy of courts.[45] During the same period, the House of Lords passed through two phases of professionalization. In the *O'Connel case* of 1844,[46] an appeal to the Lords (in the procedural language of the time, on a writ of error) led for the first time to the agreement of the Lay Lords to withdraw and not to vote on judicial proceedings leaving it entirely to the Law Lords. Secondly, the Appellate Jurisdiction Act of 1876 established a judicial life peerage (Lords of Appeal in Ordinary)[47] which placed the House of Lords in the hands of the most eminent lawyers of the country.[48] With regard to the intellectual aspects which affected an evolution of the doctrine of precedent, a theoretical basis for enacted rules as paramount was pervaded by Bentham and Austin's legal positivism.[49] The need for such rules on the Continent could be seen to have been met firstly by Roman law and codified custom and later by the Napoleonic *Codes.*[50] In line with legal positivism, something else was required in England where no code was implemented in the sense of an exclusive exposition of fundamental principles, and a strict doctrine of binding precedent could be seen to meet the need.

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42 W.S. HOLDSWORTH, 'Case Law', in *Law Quaterly Review* 50 (1934), p 180, footnote 4; C.K. ALLEN, *Law in the Making*, Clarendon Press, Oxford, 1964, 7th ed., p 232.

43 C.K. ALLEN, 'Case Law: an Unwarrantable Intervention', in *Law Quaterly Review* 51 (1935), p 333; J. EVANS, 'Change in the Doctrine of Precedent during the Nineteenth Century', in L. GOLDSTEIN (ed.), *Precedent in Law*, Clarendon Press, Oxford, 1991, p 45, 57, 64. *Contra* W.S. HOLDSWORTH, 'Case Law', in *Law Quaterly Review* 51 (1934), p 180.

44 The *Incorporated Council of Law Reporting* is said to be semi-official because, although its members are representatives of the *Inns of Courts* and of the *Law Society*, it is a private organization.

45 G.R. RUDD, *The English Legal System*, Butterworths, London 1962, p 23 & 51.

46 *O'Connell* v. *The Queen* (1844) 11 Cl. & Fin. (155), at 421-426; 8 ER (1061), at 1161-1163.

47 Appellate Jurisdiction Act 1876, section 6.

48 See T. BEVEN, 'The Appellate Jurisdiction of the House of Lords', in *Law Quaterly Review* 17 (1901), p 369; H. DU PARCQ, 'The Final Court of Appeal', in *Current Legal Problems* 2 (1949), p 4; P. CARMICHAEL and B. DICKSON (eds), *The House of Lords. Its Parliamentary and Judicial Roles*, Hart Publishing, Oxford, 1999.

49 P.S. ATIYAH and R.S. SUMMERS, *Form and Substance in Anglo-American Law. A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions*, Clarendon Press, Oxford, 1987, p 240-245; J. EVANS, 'Change in the Doctrine of Precedent during the Nineteenth Century', *op. cit.*, p 65-72.

50 A.L. GOODHART, 'Precedent in English and Continental Law', *op. cit.*, p 61-62.

The use of precedents is not governed by statute. Precedent rules are usually depicted as 'an aspect of common law which has developed itself purely by common law methodology'.[51] These rules enjoy a constitutional nature in that the main concern is to delimit 'the law-declaring or law-creating powers of judges'.[52] Although they have varied from time to time, three features remain constant:[53] a decision of any superior court has to be considered by the courts which are higher (persuasive precedent);[54] judges in the lower courts are bound by the precedents of superior courts (vertical dimension of binding precedent) and some courts bind themselves in future (horizontal dimension of binding precedent).

The House of Lords used to bind itself in this way. In the 1898 *London Tramways* case, Lord Halsbury L.C. stated that 'a decision of this House once given upon a point of law is conclusive upon this House afterwards, and that it is impossible to raise that question again as if it was *res integra* and could be reargued'. He then added that this is 'a principle which has been [...], without any real decision to the contrary, established now for some centuries'.[55] Lord Halsbury's assertion, that a principle of *stare decisis* in the House of Lords had been entrenched long before the end of the nineteenth century, does not stand up to analysis.[56] But the *London Tramways* case did subject this court to a strict doctrine of *stare decisis*. From this time, the House of Lords was undeniably bound by its precedents, apart from those held *per incuriam* (i.e., the decisions in which the House of Lords 'has omitted to notice an Act of Parliament, or has acted upon an Act of Parliament which was afterwards found to have been repealed').[57]

Distinguishing precedents became the favoured method through which the House of Lords participated in the evolution of the law. The words of G.R. Rudd attest the extent to which this technique has been used: 'the House of Lords has been known to distinguish a new case from an old in circumstances which go very near to

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51 Z. BANKOWSKI, D.N. MACCORMICK and G. MARSHALL, 'Precedent in the United Kingdom', *op. cit.*, p 327.

52 J.W. HARRIS, *Legal Philosophies*, Butterworths, London, 1997, 2nd ed., p 179.

53 J.A. JOLOWICZ, 'La jurisprudence en droit anglais: aperçu sur la règle du précédent', in *Archives de philosophie du droit* (1985), p 107; R. CROSS and J.W. HARRIS, *Precedent in English Law*, *op. cit.*, p 25.

54 A theory of persuasive precedent is especially addressed by R. BRONAUGH, 'Persuasive Precedent', in L. GOLDSTEIN (ed.), *Precedent in Law*, Clarendon Press, Oxford, 1991, p 217-247.

55 *London Tramways* v. *London County Council* [1898] AC (375), at 379. It should be noted that the name of the appellant is wrongly given as *London Street Tramways* in the title of the case. See R. CROSS and J.W. HARRIS, *Precedent in English Law*, *op. cit.*, p 102, footnote 22.

56 I have shown elsewhere that numerous *dicta* of the Law Lords given in the course of the nineteenth century offer evidence that the House of Lords was not strictly bound by its precedents at that time (I. RORIVE, 'La *House of Lords* et le principe du *stare decisis*', in *Mélanges offerts à Michel Hanotiau*, Bruylant, Bruxelles, 2000, p 285-330).

57 *London Tramways* v. *London County Council* [1898] AC (375), at 380.

a reversal of the previous decision, and enable a fresh direction to be given to judicial thought and precedent'.[58] However, this instrument of development of the law was shown to be limited. Distinguishing two legal situations not only consists in finding their factual variants, but also requires that these differences are such as to justify the rejection of a precedent which is *a priori* binding. Accordingly, the process of distinguishing cannot always set aside an unfair or absurd precedent[59] and, where abusively used, it denatures and complicates the content of legal rules.[60]

A growing reprobation led their Lordships to unanimously adopt the famous Practice Statement in 1966.[61] Made outside the course of a judicial appeal,[62] this declaration formally freed the House of Lords from its strict position on *stare decisis*. It was worded as follows:

> 'Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decision of this House as normally binding, to depart from a previous decision when it appears right to do so. In this connection, they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than in this House'.[63]

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58 G.R. RUDD, *The English Legal System*, *op. cit.*, p 52.

59 See, for instance, the 'judicial regrets' expressed by Lord Wright in *Radcliffe* v. *Ribble Motor Services Ltd* [1939] AC (215), at 245, and by Lord Reid in *Nash* v. *Tamplin & Sons Brewery Brighton Ltd* [1952] AC (231), at 250.

60 *R.* v. *National Insurance Commissioner, Ex p. Hudson* [1972] 1 AC 966 *per* Lord Reid; *Knuller (Publishing, Printing and Promotions) Ltd* v. *DPP* [1973] AC 469 *per* Lord Diplock.

61 *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234; [1966] 3 All ER 77. It is noteworthy that, since 1971, counsel who intend to invite the House to depart from one of its decisions must give the House clear warning in the printed Case (*Procedure Direction* 2 [1971] All ER 159). Even if counsel do not, the House of Lords may raise the issue of doing so. In this respect, *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council* was the first positive overruling case in which their Lordships themselves asked to hear argument as to whether a precedent had been correctly decided ([1996] AC 669).

62 It was described as a 'constitutional convention having the force of law' by Lord Simon of Glaisdale in *Miliangos* v. *George Frank (Textiles) Ltd* [1976] AC 472.

63 *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

Subsequent to the Practice Statement, the House of Lords has been subjected to 'a qualified doctrine of horizontal bindingness', in the sense that its precedents are still formally binding, but can be the object of an overruling.[64] They thus have an 'outweighable force' since they 'should be applied unless countervailing reasons apply'.[65] Theoretically, it is incontestable that the Practice Statement implies recognition of the judge-made-law phenomenon and of the crucial role of the House of Lords in the development of the law. This announcement is a cornerstone of the process which abandoned the theory that regards judges not as makers of law but merely as its discoverers and expounders.[66]

3 Jurisprudence of overruling

3.1 A jurisprudence of overruling in the House of Lords: The Practice Statement aftermath

Since the 1966 Practice Statement, several authors have discussed the existence of a jurisprudence of overruling in the decisions of the House of Lords.[67] In professor Harris' view, 'a settled jurisprudence would require two things: first, that it be possible to articulate principles which would support the exercise of the power in those cases in which it has been used and also the refusal to exercise it in other cases; and secondly, evidence that such putative principles had the support of the bulk of judicial *dicta* on the subject'.[68] He considers that the first requirement is fulfilled, namely principles bearing out the exercise of the Practice Statement, whereas the second requirement, that be an explicit articulation of these principles, is largely lacking.

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64 Z. BANKOWSKI, D.N. MACCORMICK & G. MARSHALL, 'Precedent in the United Kingdom', *op. cit.*, p 329, also p 326.

65 A. PECZENIK, 'The Binding Force of Precedent', in D.N. MACCORMICK & R.S. SUMMERS (eds), *Interpreting Precedents: a Comparative Study*, Dartmouth Publishing Co Ltd, Ashgate Publishing Ltd, Aldershot, 1997, p 475.

66 *R.* v. *National Insurance Commissioner, Ex p. Hudson* [1972] 1 AC (944), at 1026 *per* Lord Simon of Glaisdale.

67 R. BRAZIER, 'Overruling House of Lords Criminal Cases', in *Criminal Law Review* (1973), p 98-104; L.V. PROTT, 'When Will a Superior Court Overrule Its Own Decision?', in *Australian Law Journal* 52 (1978), p 304-315; G. MAHER, 'Statutory Interpretation and Overruling in the House of Lords', in *Statute Law Review* (1981), p 85-93; A. PATERSON, *The Law Lords*, MacMillan Press, London, 1982, p 156-169; J. STONE, 'The Lords at the Crossroads - When to 'Depart' and How!', in *Australian Law Journal* 46 (1972), p 483-489; *Idem*, 'On the Liberation of Appellate Judges. How Not to Do it!', in *Modern Law Review* 35 (1972), p 469-473; *Idem*, *Precedent and Law: Dynamics of Common Law Growth*, Butterworths, Sydney, 1985, p 172-185; I. MCLEOD, *Legal Method*, MacMillan Press, London, 1993, p 140-153; and the studies of J.W. Harris mentioned in the following footnote.

68 J.W. HARRIS, 'Towards Principles of Overruling - When Should a Final Court of Appeal Second Guess?', in *Oxford Journal of Legal Studies* 10 (1990), p 135-199, esp. 136; see also J.W. HARRIS, 'Murphy Makes it Eight - Overruling Comes to Negligence', in *Oxford Journal of Legal Studies* 11 (1991), p 417.

What seems certain is that the declarations of the Law Lords on the appropriate criteria to look at when considering the issue of overruling have developed to a certain extent 'the status of case law in the sense of being cited in argument by counsel and developed in later cases'.[69] These overruling standards exceed the Practice Statement's guidelines. They are difficult to articulate for several reasons. First, their Lordships are reluctant to classify the instances where a departure is required or is undesirable. In this vein, Lord Reid stated: 'I would not seek to categorize cases in which [the Practice Statement] should or cases in which it should not be used. As time passes experience will supply some guide'.[70] Secondly, the overruling principles themselves are evolving. Lord Wilberforce emphasized this feature when pleading for overruling *Congreve*[71] on a point of statutory interpretation. He said: 'the discretion conferred by the Practice Statement [...] is a general one. We should exercise it sparingly and try to keep it governed by stated principles. But the fact that the circumstances of one particular case cannot be brought precisely within the formulae used in others, of a different character, should not be fatal to its exercise – or the discretion would become ossified'.[72]

As a matter of fact, there are principles which not merely explain, but also actually justify the exercise of (or the refusal to exercise) the Practice Statement power. Such a jurisprudence of overruling emerges from the cases where the House of Lords explicitly departed from one of its precedents or refused to do so by virtue of the Practice Statement power.[73] Before departing from an earlier decision, the House of Lords must be satisfied that the present law will be altogether improved. Furthermore, this *prima-facie* requirement is subject to constraining principles.[74]

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69 G. MAHER, 'Statutory Interpretation and Overruling in the House of Lords', *op. cit.*, p 87.

70 *R* v. *National Insurance Commissioner, Ex p. Hudson* [1972] 1 AC 966.

71 *Congreve* v. *Inland Revenue Commissioners* [1948] 1 All ER 948.

72 *Vestey* v. *Inland Revenue Commissioners* [1980] AC 1178.

73 Since the 1966 Practice Statement, the House of Lords expressly departed from a precedent in at least nine cases: *EL Oldendorff and Co GmbH* v. *Tradax Export SA, The Johanna Oldendorff* [1974] AC 479; *Miliangos* v. *George Frank (Textiles) Ltd* [1976] AC 443; *Dick* v. *Burgh of Falkirk* [1976] SLTR 21; *Vestey* v. *Inland Revenue Commissioners* [1980] AC 1148; *R.* v. *Secretary of State for the Home Department, Ex p. Khawaja* [1984] AC 74; *R.* v. *Shivpuri* [1987] AC 1; *R.* v. *Howe* [1987] AC 417; *Murphy* v. *Brentwood District Council* [1990] 2 All ER 908; *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council* [1996] AC 669.

74 This presentation is primarily based on professor Harris' research which I further developed in *Le revirement de jurisprudence. Etude de droit anglais et de droit belge*, Bruylant, Bruxelles, 2003. Among the studies currently available, Harris' analysis provides the finest synthesis of these overruling principles. By contrast with other academic writers, he does not only itemise the criteria taken into account in particular instances, but he outlines a model able to articulate them. In addition, he focuses on what the House of Lords is actually saying and doing, rather than what it could or should be doing.

As to the *improvement of the law requirement*, the fact that a precedent of the House of Lords is obviously wrong does not constitute sufficient grounds for overruling it. Lord Reid's much quoted statement in *Knuller* offers a striking piece of evidence that wrongness is not a sufficient ground to justify overruling a precedent of the House of Lords. Although he dissented in *Shaw,*[75] the case under review, and stressed in *Knuller* that he was still of the opinion that *Shaw* was wrong, he said: 'our change of practice in no longer regarding previous decisions of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act'.[76] In addition, as to justify an overruling, there is no need to assert that the House of Lords was mistaken when it decided the impugned precedent. Emphasis may be put on the fact that the circumstances had tremendously evolved from those prevailing in the earlier case.[77]

In order to determine whether an overruling will improve the law in general, the House of Lords takes into account considerations such as justice, certainty and coherence.[78] Their Lordships define the requirement of *justice* not in the light of the unjust results in the particular instance, but in view of the consequences that a universalized application of the impugned ruling produced to an assignable class of persons.[79] The *certainty* consideration provides that the law may need to be changed because the current rule leads to unpredictable results or does not meet the 'bright' lines requirement.[80] The certainty that the content of legal rules demands is often linked with *consistency* considerations such as avoiding over-subtle distinctions that a precedent

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75 *Shaw* v. *DPP* [1962] AC 220.

76 [1973] AC 455. In the same line, see *R.* v. *National Insurance Commissioner, Ex p. Hudson* [1972] 1 AC 966 *per* Lord Reid, at 973 *per* Lord Morris, at 996 *per* Lord Pearson, at 1023 *per* Lord Simon of Glaisdale.

77 In *Miliangos*, the majority of the Law Lords did not conclude that the *Havana* decision was erroneous at the time it was pronounced ([1976] AC 460 *per* Lord Wilberforce, at 497 *per* Lord Cross of Chelsea, at 501 *per* Lord Edmund-Davies). The departure was justified both in the light of commercial transformations which had occurred since *Havana* had been decided and in view of the fact that 'a new and more satisfactory rule [was] capable of being stated' without 'undue practical difficulties' (*ibid*, p 467 *per* Lord Wilberforce). See also *Knuller (Publishing, Printing and Promotions) Ltd* v. *DPP* [1973] AC 484 *per* Lord Simon of Glaisdale.

78 J.W. HARRIS, 'Towards Principles of Overruling - When Should a Final Court of Appeal Second Guess?', *op. cit.*, p 152-156.

79 *Vestey* v. *Inland Revenue Commissioners* [1980] AC 1197 *per* Lord Edmund-Davies.

80 *EL Oldendorff and Co GmbH* v. *Tradax Export SA, The Johanna Oldendorff* [1974] AC 533 *per* Lord Reid, at 555 & 561 *per* Lord Diplock; *Knuller (Publishing, Printing and Promotions) Ltd* v. *DPP* [1973] AC 480 *per* Lord Diplock; *Murphy* v. *Brentwood District Council* [1990] 2 All ER 911 *per* Lord Mackay, at 918 *per* Lord Keith, at 929 *per* Lord Bridge, at 935 *per* Lord Oliver, at 942 *per* Lord Jauncey.

may induce in later cases.[81] Considerations of coherence can be more broadly referred to the need for the law to be consistent in the area under consideration.[82]

Beside the improvement of the law requirement, there are four constraining principles which underlie the terms of the Practice Statement and the overruling cases. They import considerations of finality, reliance, comity with the legislature and mootness.

1. The *no-new reason principle* prevents an overruling 'where the contentions for or against the question of law in issue fail to introduce new reasons - that is, reasons not taken into account in the earlier case'.[83] The concept of new reasons is broad. For instance, the arguments in the precedent may have overlooked some important principles,[84] or evidence of legislative intention,[85] or failed to advert to undesirable consequences which subsequent experience has brought to light.[86] There may have been some material change in circumstances, such as to require a new legal outcome to the issue in question.[87] And the law may have developed in a direction away from the doctrine of the precedent under review.[88] The justification for this constraining principle is to preclude the possibility for the House of Lords of third-guessing.[89]
2. Considerations of *reliance* restrain the use of the Practice Statement 'if it can be shown that citizens who have relied upon the old ruling would thereby be prejudiced'.[90] As a matter of fact, an overruling has a retrospective effect and that the House of Lords has not yet acknowledged the technique of prospec-

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81 *EL Oldendorff and Co GmbH* v. *Tradax Export SA, The Johanna Oldendorff* [1974] AC 535 *per* Lord Reid; *R.* v. *Howe* [1987] AC 437 *per* Lord Bridge, at 438 *per* Lord Brandon.

82 *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council* [1996] AC 710 & 713-714 *per* Lord Browne-Wilkinson.

83 J.W. HARRIS, 'Towards Principles of Overruling - When Should a Final Court of Appeal Second Guess?', *op. cit.*, p 196 & 157-169.

84 See, for instance, *R.* v. *Secretary of State for the Home Department, Ex p. Khawaja* [1984] AC 109 *per* Lord Scarman, at 125 *per* Lord Bridge.

85 See, for instance, *R.* v. *Shivpuri* [1987] AC 21 *per* Lord Bridge.

86 See, for instance, *Vestey* v. *Inland Revenue Commissioners* [1980] AC 1176 *per* Lord Wilberforce, at 1187 *per* Viscount Dilhorne, at 1196 *per* Lord Edmund-Davies.

87 See, for instance, *Miliangos* v. *George Frank (Textiles) Ltd* [1976] AC 462 *per* Lord Wilberforce, at 497 *per* Lord Cross of Chelsea, p 501 *per* Lord Edmund-Davies.

88 See, for instance, *Dick* v. *Burgh of Falkirk* [1976] SLTR 29 *per* Lord Kilbrandon.

89 See, for instance, *R.* v. *National Insurance Commissioner, Ex p. Hudson* [1972] 1 AC 996-997 *per* Lord Pearson.

90 J.W. HARRIS, 'Towards Principles of Overruling - When Should a Final Court of Appeal Second Guess?', *op. cit.*, p 197 & 169-177. See, for instance, *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council* [1996] AC 714 *per* Lord Browne-Wilkinson.

tive overruling.[91] However, the justified reliance principle is not an absolute one. First, the argument of reliance has little weight in cases where the ruling at issue has led to over-subtle distinctions in subsequent instances.[92] Secondly, upsetting individuals' legitimate expectations does not make any sense in some class of cases where such prejudicial reliance is not plausible.[93]

3. The *comity with the legislature* principle implies that 'the House of Lords ought not to overrule a prior decision of its own where, subsequent to the decision, Parliament has acted on the assumption that the ruling in the earlier case represents the law'.[94] Nevertheless, such a principle must be accepted with considerable circumspection. Inferring any legislative intention from the fact that Parliament has enacted legislation in the general area of the impugned decision would always be problematic. In this connection, Lord Reid said: 'I am not greatly impressed by the argument that Parliament must be held to have approved that decision because in recent years there have been several occasions when Parliament could appropriately have dealt with it if it had disapproved of the decision'.[95]

4. The *mootness doctrine* implies that 'courts should not undertake review and development of the law where to do so would have no bearing on any litigated dispute'.[96] In civil litigation, where the public interest in certainty is not as paramount as it is in criminal cases, their Lordships seem to be of the opinion that an overruling is not justified if, on the facts, it makes no difference to the outcome of the appeal. This concern is reflected in their insistence in many positive overruling cases on showing that distinguishing the contested prece-

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91 In favour of prospective overruling in the House of Lords, see Lord Simon of Glaisdale in *R.* v. *National Insurance Commissioner, Ex p. Hudson* [1972] 1 AC 1026 (Lord Diplock concurring on that point at p 1015) and in *Miliangos* v. *George Frank (Textiles) Ltd* [1976] AC 490; Lord Hope in *Arthur JS Hall & Co* v. *Simons* [2000] 3 All ER 673. See J.W. HARRIS, 'Retrospective Overruling and the Declaratory Theory in the United Kingdom - Three Recent Decisions', in *Revue de droit de l'U.L.B.* (2002), p 153-181.

92 See, for instance, Lord Reid's considerations in *EL Oldendorff and Co GmbH* v. *Tradax Export SA, The Johanna Oldendorff* [1974] AC 535.

93 *Dick* v. *Burgh of Falkirk* [1976] SLTR 28-29 *per* Lord Kilbrandon; *R.* v. *Shivpuri* [1987] AC 11 *per* Lord Hailsham, at 23 *per* Lord Bridge; *Murphy* v. *Brentwood District Council* [1990] 2 All ER 923 *per* Lord Keith.

94 J.W. HARRIS, 'Towards Principles of Overruling - When Should a Final Court of Appeal Second Guess?', *op. cit.*, p 177. See, for instance, *Knuller (Publishing, Printing and Promotions) Ltd* v. *DPP* [1973] AC 466 *per* Lord Morris, at 489 *per* Lord Simon of Glaisdale, at 496 *per* Lord Kilbrandon. See also *R.* v. *National Insurance Commissioner, Ex p. Hudson* [1972] 1 AC 1025 *per* Lord Simon of Glaisdale.

95 [1973] AC 455.

96 J.W. HARRIS, 'Towards Principles of Overruling - When Should a Final Court of Appeal Second Guess?', *op. cit.*, p 180.

dent is not sound and that exercising the Practice Statement power is the only appropriate path. However, the mootness principle is far from being conclusive[97] and this doctrine does not always provide a satisfactory explanation why, in any particular case, the House of Lords resorts to its overruling power rather than employing the distinguishing technique.[98]

The Practice Statement of 1966 marks a turning point in the way the House of Lords conceives its role as a superior court. Although its primary function remains the resolution of disputed claims, it acknowledges fulfilling a second function which is, in substance, quasi-legislative. In view of Parliament's supremacy, this secondary function cannot overtake the first one and, therefore, the overruling power is exercised with due restraint and is controlled by constraining principles. One has however to keep in mind that overruling is only one of the techniques used by the House of Lords to induce a significant change in its previous decisions. It sometimes outflanks a precedent without recourse to the Practice Statement. And it may neutralize decisions it dislikes by confining them to their own facts. There have been comparatively few attempts in the speeches of their Lordships to explain why, in any particular case, the House resorts to the Practice Statement power rather than employing the traditional techniques of development of the law. This is due to the fact that the reasoning in the overruling cases is primarily directed towards the substantive question of law under review.

3.2 *A jurisprudence of overruling in the Cour de cassation: A surprisingly well-entrenched practice*

Although the House of Lords eventually empowered itself to overrule its previous decisions 'when it appears right to do so',[99] such a declaration is unthinkable in Belgium where the concept of rules of precedent is implicitly forbidden by Article 6 of the *Code judiciaire*.[100] One could think at first sight that genuine overruling cases do not exist in Belgium given the role formally assigned to the *Cour de cassation*: as the guardian of the true authority of statutory law, the *Cour de cassation* will only depart from one of its precedents when the latter is incorrect in this sense. Furthermore, one can argue that the formally non-binding character of Belgian case

97 See, for instance, Lords Keith and Oliver's attitude in *Murphy* v. *Brentwood District Council* [1990] 2 All ER 924 & 938.

98 Compare, for instance, the House of Lords' position towards *Anns* (*Anns* v. *Merton London Borough Council* [1978] AC 728) in *D & F Estates* (*D & F Estates Ltd* v. *Church Commissioners for England* [1989] 1 AC 177) and in *Murphy* (*Murphy* v. *Brentwood District Council* [1990] 2 All ER 908).

99 *Practice Statement* [1966] 1 WLR 1234.

100 Originally, *Code civil*, Art. 5.

law makes the concept of overruling unnecessary, given that 'the court may simply ignore a single decision of its own whose ruling is now disapproved'.[101]

However, such an intuitive assessment is unconvincing in the light of the practice of the *Cour de cassation*. The *Cour de cassation*'s great concern to ensure uniformity in case law and especially continuity within its own decisions[102] shows that departures are not self-evident. This makes sense if one takes into account the role fulfilled in practice by the *Cour de cassation*. Since the 19th century, the *Cour de cassation* considers that besides being the guardian of statutory law, it also has to maintain uniformity within Belgian case law as a whole. And, in order to achieve such a task, it sometimes has to act as a regulating court and to adapt the law to the need of a society in constant evolution. The function so understood of the *Cour de cassation* leads to the emergence of a jurisprudence of overruling which allows a dialectic between stability and change, both of which being encompassed in the *Cour de cassation*'s role.

Furthermore, if the concept of overruling has no place in the Belgian system, we might ask why the *Parquet général près la Cour de cassation*[103] is so concerned to discuss the reasons justifying a reversal in the *Cour de cassation*'s case law. Originally, such a discussion essentially took place extra-judicially, in the yearly *mercuriale* of the *Procureur général*, i.e. the formal speech on 'a subject suitable for the occasion' that the head of the *Parquet général* has to give at the time of the return of the judiciary after the annual holiday.[104]

Procureur général Faider had already emphasized in the 1880s the 'progressive' nature of case law. Some variations among the precedents of the *Cour de cassation* were still explained by virtue of continuous modifications of enacted law, judges' personalities or misconstructions of statutes, while others were already depicted as the result of the changing nature of society.[105]

A real articulation of the reasons which legitimate a departure by the *Cour de cassation* from one of its previous decisions was firstly developed in 1928 by *Procureur général* Paul Leclercq.[106] As a matter of principle, he stressed that the *Cour de cassation* is bound by its precedents because of its role to maintain uniform construction of enacted law to guarantee 'social peace' and ensure 'legal certainty'.

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101 J.W. HARRIS, *Legal Philosophies*, *op. cit.*, p 170.

102 This concern has been manifest since the creation of the *Cour de cassation*. See, for instance, I. PLAISANT, 'Discours du 19 décembre 1833', in *Pasicrisie* (1834), I, p 8; H. LENAERTS, 'Dire le droit en cassation aujourd'hui', in *Journal des tribunaux* (1991), p 534, No. 10.

103 See footnote 27.

104 Such annual speeches have been compulsory since 1869. See the 'Loi du 18 juin 1869 sur l'organisation judiciaire, Art. 222', in *Moniteur belge*, 26 June 1869, currently embodied in *Code judiciaire*, Art. 351.

105 C. FAIDER, 'La première année de la Cour de cassation', in *Belgique judiciaire* (1884), col. 73-74; *Idem*, 'Discours du 15 octobre 1886', in *Pasicrisie* (1887), I, p V.

106 *Conclusions* before Cass., 26 January 1928, in *Pasicrisie* (1928), I, p 63-67.

This mission implies that 'a wrong but permanent interpretation is preferable to successive and contradictory ones'. He emphasized that the *Cour de cassation* is not 'a learned society where the best solution to a legal problem is indefinitely discussed'.[107] From this perspective, the erroneous character of a decision of the *Cour de cassation* is irrelevant provided that the lower courts do not 'rebel' against it.[108] For Leclercq, the crucial justification for reversal in case law is a 'breakdown in *paix judiciaire*'[109] said to be a 'new fact' arisen after the precedent at issue was handed down.[110] He listed three situations in which this might occur.[111] First, there is the rare circumstance where a decision of the *Cour de cassation*, instead of ending the controversies, has multiplied them either because of its equivocal character, or because it has not been understood by the legal profession. Secondly, the solution advocated by the *Cour de cassation* may be the object of an immediate adverse reaction from the lower courts. Thirdly, due to social, intellectual or technical changes, it may be opportune either to reconsider solutions which seem too severe in the light of changed opinion, or to lay down the scope of particular rules regarding situations which did not exist at the time they were originally laid down. When he referred to the second cause of breakdown in *paix judiciaire* (immediate resistance from lower courts), Leclercq urged the *Cour de cassation* to ensure that the rejected precedent had not been too hastily formulated and that important aspects had not been overlooked by either counsel or the member of the *Parquet général* concerned in the case.

In 1950, *Procureur général* Cornil endorsed the doctrine of his predecessor, but he made two principal developments.[112] Firstly, he enlarged the concept of *paix judiciaire*: the *Cour de cassation* should consider the reactions to the previous decision not only of the lower courts, but also of academic writers, public opinion and speeches in the legislative Chambers. Secondly, he considered that, even when such *paix judiciaire* (in the extended sense) exists, a departure in the case law of the *Cour de cassation* is legitimate in the two following situations: the precedent at issue is manifestly erroneous or it is outdated because the will of the Nation has significantly evolved. In these two situations, as Cornil acknowledged, it would generally be the

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107 P. LECLERCQ, 'De la Cour de cassation (1925)', *op. cit.*, p 74-75; *Idem*, *conclusions* before Cass., 26 January 1928, in *Pasicrisie* (1928), I, p 64.

108 *Pasicrisie* (1928) I, p 67, footnote 1.

109 I shall call *paix judiciaire* the situation where lower courts are following the position advocated by the *Cour de cassation* on the legal issue under consideration. This phrase may be translated as 'judicial accord'. However, I shall keep the French expression given that no conceptual equivalent exists in English law where lower courts are forbidden to disobey House of Lords' rulings.

110 P. LECLERCQ, *conclusions* before Cass., 26 January 1928, in *Pasicrisie* (1928), I, p 64, footnote 2; comment under Cass., 23 March 1933, in *Pasicrisie* (1933), I, p 177.

111 *Conclusions* before Cass., 26 January 1928, in *Pasicrisie* (1928), I, p 64-65; comment under Cass., 31 January 1935, in *Pasicrisie* (1935), I, p 135-136.

112 L. CORNIL, 'La Cour de cassation. Considérations sur sa mission', *op. cit.*, p 493.

case that the *paix judiciaire* even taken in a narrow sense would have been disturbed. Indeed, when a precedent is clearly mistaken or provides an interpretation of a statute which is outmoded by virtue of intellectual, social or technical changes, it will usually be disregarded by lower courts before the *Cour de cassation* has had a chance to intervene. In substance, the theories of Leclercq and Cornil are closely akin to each other: the *Cour de cassation* has to follow its precedents except when they are widely disputed. In such situations, this court has failed its mission of ensuring uniformity in case law. It has therefore to propound new solutions to bring back certainty in the law.

In the 1960s, *Procureur général* Hayoit de Termicourt stressed that the need for stability and certainty in the case law of the *Cour de cassation* stems from its mission of ensuring that lower courts comply with enacted law. He distinguished stability from stagnation, the latter producing 'ossification of the law'. In contrast, he defined stability in case law as to be 'interpreting statutes with constancy in a given social state'. In his view, reversals in the case law of the *Cour de cassation* are 'justified and even compelled' when an old statute is out of line with 'moral evolution, social or technical progress' providing that 'the terms of the statute do not forbid judges to soften, restrict or enlarge its scope'.[113]

Procureur général Ganshof van der Meersch continued in this line. While underlying the essential creative nature of the process of adjudication, he emphasized the importance of 'searching for an adequate balance between stability and evolution'.[114] Accordingly, he asserted that a reversal in the *Cour de cassation*'s case law must remain exceptional to comply with 'legitimate expectations' of individuals. Yet, he considered that a reversal is warranted in situations where there is no such reliance. This arises when the precedent is systematically disregarded by a significant fraction of lower courts (no *paix judiciaire*) or when 'the legal rule becomes unacceptable owing to exceptional changes in social structured relationships'.[115] In particular, he made the point that, because of the passivity of the legislature, an intervention of the *Cour de cassation* is often necessary.[116]

By contrast, the next *Procureur général*, Frederic Dumon, was much more conventional. He seemed to favour stability and certainty to conscious judicial evolution of the law and defined restrictively the situations where a modification in the

113 R. HAYOIT DE TERMICOURT, 'Les audiences plénières à la Cour de cassation', in *Journal des tribunaux* (1967), p 477, col. 1.

114 W.J. GANSHOF VAN DER MEERSCH, *Réflexions sur l'art de juger et l'exercice de la fonction judiciaire*, Bruylant, Bruxelles, 1973, p 5 & 7.

115 W.J. GANSHOF VAN DER MEERSCH, 'Propos sur le texte de la loi et les principes généraux du droit', *op. cit.*, p 558 and footnote 35.

116 W.J. GANSHOF VAN DER MEERSCH, 'Réflexions sur le droit international et la révision de la Constitution', in *Journal des tribunaux* (1968), p 496, col. 3.

case law of the *Cour de cassation* is acceptable.[117] Reacting against his predecessors, he made three observations. He first denied the need for the courts to develop the law because vague concepts evolve naturally without judicial intervention. Secondly, he stressed that changes might be brought about because of legislation in related areas. Thirdly, while acknowledging that the *Cour de cassation* is entitled to reverse a precedent when the *paix judiciaire* is impaired, he emphasized that such a departure is only conceivable if the court truly believes that it was mistaken. If not, an insurrection from lower courts could not lead the *Cour de cassation* to interpret a norm in a way that it disapproves. In such a situation, the *Procureur général* must suggest to the competent public authorities a modification in the legislation or an interpretative statute.

At the end of the 1980s, the *Procureur général* Krings continued to some extent with the cautious attitude displayed by Dumon. He reiterated that the Belgian Constitution did entrust the *Cour de cassation* with the task of sustaining 'stability in case law' and that this aim could only be achieved providing that this court ensures 'stability in its own case law'.[118] He nevertheless noted the important evolutions which had occurred in the decisions of the *Cour de cassation* since 1950 and, therefore, its contribution to 'the edification of the law'. Yet, he underlined the different roles fulfilled by the legislature and the *Cour de cassation*. Primarily, he asserted that although this court has always tried to preserve a fair balance between the interests at stake, it is not entitled to make choices which, in the end, could have a political impact. Such choices belong to the legislature.[119] More generally, he stated that any judge is forbidden 'to decide *contra legem*' even if he is of the opinion that the statute under consideration is out of date. Secondly, he stressed that, as a matter of principle, the legislature provides for the future whereas the *Cour de cassation* settles past situations. Because the *Cour de cassation* decides on existing rights, it has to manifest 'a total independence and an objectivity without any flaws'.[120] However, with regard to the procedural rules which govern an appeal against a decision where a litigant failed to appear, Krings criticized the too formalistic attitude of the *Cour de cassation*. He recommended a reversal in case law on this point rather than a legislative modification in order to have 'immediate effects'.[121]

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117 F. DUMON, *La mission des cours et tribunaux. Quelques réflexions*, Bruylant, Bruxelles, 1975, p 9-10; *Idem*, 'De l'Etat de droit', in *Journal des tribunaux* (1979) p 478, footnotes 28-29.

118 E. KRINGS, *Aspects de la contribution de la Cour de cassation à l'édification du droit*, Bruylant, Bruxelles, 1990, p 7, No. 4 & p 81, No. 78.

119 E. KRINGS, *Considérations sur l'Etat de droit, la séparation des pouvoirs et le pouvoir judiciaire*, Bruylant, Bruxelles, 1989, No. 19, p 26; *Idem*, *Aspects de la contribution de la Cour de cassation à l'édification du droit*, Bruylant, Bruxelles, 1990, p 80, No. 78.

120 *Ibid.*, 1990, p 80, No. 78.

121 E. KRINGS, 'Considérations critiques pour un anniversaire', in *Journal des tribunaux* (1987), p 551, No. 23.

In 1994, *Avocat général* Piret asserted that the *Cour de cassation* has always been astute in respecting the legislature's will without substituting its own views. He emphasized that such an attitude 'prevents it neither from filling legal lacunae nor from modernizing rules of law'.[122] When examining for the reasons behind the reversal of the European Court of Human Rights in the *Borgers* case,[123] he referred to professor Silvio Marcus Helmons' study and his observations on the phenomenon of departure in case law.[124] This study suggests that any final court has to be allowed to change its precedents. Yet, if a reversal is so fundamental that the new solution diametrically contradicts the previous one, it has to be justified by 'detailed and convincing reasons'.[125]

In sum, one can say that most *Procureurs généraux*[126] share the view that the *Cour de cassation* is generally bound by its precedents. However, to varying degrees, they all give as reasons for reversals the fact that the *paix judiciaire* is impaired and the character of a precedent has become outmoded by changes in society. Of course, these two situations are largely indeterminate and the *Procureurs généraux* define them with reference to their own perceptions of the respective roles of the *Cour de cassation* and Parliament. With regard to the legal force of the decisions of the *Cour de cassation*, it is striking to note that the mission of this court shifted quickly from ensuring respect for enacted law by lower courts to sustaining uniformity in case law 'of which modernization of law and legal certainty are the corollaries'.[127]

The annual *mercuriale* is not the only occasion where the *Parquet général* discussed in which circumstances the *Cour de cassation* is entitled to depart from an earlier position. Such considerations are also developed in the advice *(conclusions)* on the legality of the judgment attacked the member of the *Parquet général* gives to the *Cour de cassation*. According to the Belgian Supreme Court itself, its decisions have to be understood in the light of its Parquet général's opinions.[128] This is especially true with respect to the decisions held in an enlarged bench of nine judges

122 J.-M. PIRET, 'Le parquet de cassation', in *Journal des tribunaux* (1994), p 623, No. 7.

123 ECHR, 30 October 1991, *Borgers* v. *Belgium*, Ser. A, vol. 214.

124 J.-M. PIRET, 'Le parquet de cassation', *op. cit.*, p 628, No. 23.

125 S. MARCUS HELMONS, 'La présence du ministère public aux délibérations de la Cour de cassation ou l'affaire Borgers', in *Mélanges offerts à Jacques Velu. Présence du droit public et des droits de l'homme*, Bruylant, Bruxelles, 1992, t. III, p 1380.

126 In this line, see also the recent *mercuriale* of *Procureur général* DU JARDIN, 'Audience plénière et unité d'interprétation du droit', in *Journal des tribunaux* (2001), p 642-643.

127 H. LENAERTS, 'Dire le droit en cassation aujourd'hui', in *Journal des tribunaux* (1991), p 534, No. 10.

128 *Rapport annuel de la Cour de cassation de Belgique (1997-1998)*, Presses du Moniteur belge, 1998, p 80. This annual report states that 'the *conclusions* of the *Parquet général* do clarify the short reasoning of the Court'.

(audience plénière). The system of *audiences plénières* was established in 1954,[129] especially to avoid conflicting decisions between the French and Dutch sections of a *Cour de cassation*'s chamber. But such a procedure is also considered suitable when the precedent at stake requires a new examination on the part of the *Cour de cassation* 'either given social or legislative evolutions, resistance from lower courts, academic controversies, or seeing its lack of internal consistency'.[130]

In reality, from the combination of more than a century of *mercuriales* and nearly fifty years of *conclusions* given in cases decided by an enlarged bench *(audience plénière)*[131] springs up a genuine jurisprudence of overruling in the *Cour de cassation.*[132] The latter can be summarized as follows:

1. As a matter of principle, the *Cour de cassation* strictly follows its previous decisions.
2. The erroneous character of a decision of the *Cour de cassation* is neither a sufficient ground to depart from it nor a necessary prerequisite.

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129 'Loi du 25 février 1954 relative à l'organisation de la Cour de cassation, Art. 134', in *Moniteur belge*, 5 March 1954; currently embodied in *Code judiciaire*, Art. 131.

130 R. HAYOIT DE TERMICOURT, 'Les audiences plénières à la Cour de cassation', *op. cit.*, p 477, col.1. See also DU JARDIN, 'Audience plénière et unité d'interprétation du droit', *op. cit.*, p 643 *et seq.*

131 See, for instance, Cass., 17 November 1956, in *Pasicrisie* (1957), I, p 277 and the *conclusions* of *Avocat général* Delange; Cass., 6 April 1960, in *Pasicrisie* (1960), I, p 915 and the *conclusions* of *Avocat général* Mahaux; Cass., 12 May 1961, in *Pasicrisie* (1961), I, p 968 and the *conclusions* of *Avocat général* Dumon; Cass., 19 December 1962, in *Pasicrisie* (1963), I, p 491 and the *conclusions* of *Avocat général* Dumon in *Revue de droit pénal et de criminologie* (1962-1963), p 568; Cass., 7 March 1963, in *Pasicrisie* (1963), I, p 711 and the *conclusions* of *Avocat général* Ganshof van der Meersch; Cass., 8 December 1966, in *Pasicrisie* (1966), I, p 434 and the *conclusions* of *Procureur général* Hayoit de Termicourt; Cass., 26 May 1967, in *Pasicrisie* (1967), I, p 1138 and the *conclusions* of *Premier Avocat général* Ganshof van der Meersch; Cass., 21 May 1970, in *Pasicrisie* (1970), I, p 827 and the *conclusions* of *Procureur général* Ganshof van der Meersch; Cass., 21 January 1982, in *Pasicrisie* (1982), I, p 623 and the *conclusions* of *Procureur général* Dumon; Cass., 14 April 1983, in *Pasicrisie* (1983), I, p 866 and the *conclusions* of *Avocat général* Velu; Cass., 29 May 1985, in *Pasicrisie* (1985), I, p 1220 and the *conclusions* of *Avocat général* Piret; Cass., 29 January 1986, in *Pasicrisie* (1986), I, p 631 and the *conclusions* of *Avocat général* Liekendael; Cass., 13 avril 1988, in *Pasicrisie* (1988), I, p 943 and the *conclusions* of *Avocat général* Janssens de Bisthoven; Cass., 1 February 1989, in *Pasicrisie* (1989), I, p 582 and the *conclusions* of *Avocat général* Declercq; Cass., 7 December 1990, in *Pasicrisie* (1991), I, p 343 and the *conclusions* of *Avocat général* du Jardin in *Rechtskundig weekblad* (1990-1991), col. 1332; Cass., 19 June 1992, in *Pasicrisie* (1992), I, p 931 and the *conclusions* of *Avocat général* De Swaef in *Arresten van het Hof van cassatie* (1991-1992), p 1000; Cass., 18 December 1992, in *Pasicrisie* (1992), I, p 1391 and the *conclusions* of *Avocat général* Goeminne in *Rechtskundig weekblad* (1992-1993), col. 1059.

132 For further developments, consult I. RORIVE, *Le revirement de jurisprudence. Etude de droit anglais et de droit belge*, Bruylant, Bruxelles, 2003.

3. A departure in the case law of the *Cour de cassation* requires *prima-facie* a 'new fact' which can either be a lack of *paix judiciaire* understood in a broad sense (adverse reactions towards the previous decision from lower courts, academic writers or parliamentarians) or some material change in circumstances or in values.
4. Such a lack of *paix judiciaire* is however an insufficient ground to justify a departure in case law. There must be additional 'good reasons' for legitimizing the change, such as compelling considerations of consistency, justice and certainty or a misreading of the legislature's intention.
5. Even where there are good reasons, a change through case law may be rejected either because the legitimate expectations of individuals are at stake or the reform in question will be better dealt with in parliament.

4 Conclusion

In this study, I have taken a comparative approach not simply to the formal status of the Belgian and English case law, but to the revealed motivations behind the phenomenon of departure as practised by the *Cour de cassation* and the House of Lords since the 1966 Practice Statement. This approach challenges the appearance that formal definitions provide for the difference in attitude towards precedents between the two countries and more broadly between common law and civil law systems, without denying the existence of a distinctive legal culture.

An analysis of how reversals proceed in the case law of the *Cour de cassation* reveals that a single decision of this court may be the sole source for a legal rule. Similar to the House of Lords, when a reversal occurs in the case law of the *Cour de cassation*, it operates retrospectively and has an immediate impact in future on members of the community who were not parties to the litigation. The view that Belgian cases are only interpretative of enacted law rather than a formal source of law also does not stand up to analysis when confronted with the grounds justifying a reversal in the *Cour de cassation*'s case law. The *Procureurs généraux* emphasize that the primary mission of the court is to sustain uniformity in its decisions so as to provide a reliable guidance for lower courts. From this perspective, they usually contend that a wrong but permanent interpretation of statute is preferable to successive and contradictory ones. This implies that a misconstruction of enacted law by the *Cour de cassation* becomes authoritative through its acceptance by the judiciary.

It is striking to note how similar the responses that the Belgian and English systems give to the phenomenon of departure in case law as practised at the highest level in the judiciary are. While the *Cour de cassation* and the House of Lords (since the 1966 Practice Statement) consider themselves as generally bound by their precedents, they acknowledge that a departure from a previous position may be needed. In both countries, this phenomenon emphasizes the inherent law making power of judges which clashes with the notions of parliamentary sovereignty and democratic accountability. Their Lordships and the *Procureurs généraux* have been concerned to

work out standards regulating overrulings in the House of Lords and the *Cour de cassation*. They seem anxious to show that departures from precedents are not exercised in an arbitrary way.

There is however a different way 'to do things' in the two courts, which accounts for a distinctive legal culture. Whereas the overruling principles are overtly discussed in the Law Lords' opinions, the decisions of the *Cour de cassation* are generally silent on this point. Although Belgian decisions of the *Cour de cassation* are more dialectic than their French counterparts, they still have the appearance of a decree rather than an opinion. This succinct style is consistent with the original task of this court to ensure that enacted law is properly construed by lower courts. Accordingly, it formulates clear-cut rulings in the form of a single majority decision. This feature accounts for the fact that the 'contours' of the decisions of the *Cour de cassation* are broader than the decisions themselves, as recently acknowledged by the *Cour de cassation* itself.[133]

When searching for the circumstances which entitle the *Cour de cassation* to depart from one of its precedents and for those which constrain it from doing so, the opinions of the members of its *Parquet général* are the primary material to look at. The only expressive source for putative principles are indeed the *mercuriales* and the *conclusions* of the members of the *Parquet général près la Cour de cassation*. Only on one occasion has the court itself expressed its opinion on the matter.[134] In this case, the State conceded that it was liable to relatives for the death of a soldier, but it disputed the way damages were calculated by the Brussels *Cour d'appel*. The *Cour de cassation* rejected the claim and referred to an earlier decision made in 1937. It stressed that 'this was the case law of the court' to be upheld unless a party puts forward 'a new reason' which 'would oblige' it to review its prior position.

When Paul Leclercq was *Procureur général*, several abstracts in the *Pasicrisie* highlighting the doctrine of the *Cour de cassation* seem to suggest that this court had developed a theory articulating the circumstances which entitle it to modify its precedents.[135] In reality, a close analysis of these opinions shows that the *Cour de cassation* did not actually tackle this issue. The abstracts were written by the *Parquet général* under the supervision of Leclercq. They actually embody the ideas developed

133 See *Rapport annuel de la Cour de cassation de Belgique (1997-1998)*, Presses du Moniteur belge, 1998, p 80.

134 Cass., 3 February 1938, in *Pasicrisie* (1938), I, p 33, esp. 34.

135 Cass., 26 January 1928, in *Pasicrisie* (1928), I, p 63, 5° with the mention '*examiné par le ministère public*'; Cass., 21 June 1928, in *Pasicrisie* (1928), I, p 200, 2° with the mention '*solution implicite*'; Cass. 27 September 1928, in *Pasicrisie* (1928), I, p 235, 3° with the mention '*solution implicite*'; Cass., 23 March 1933, in *Pasicrisie* (1933), I, p 176, 4° with the mention '*solution implicite*'; Cass., 31 January 1935, in *Pasicrisie* (1935), I, p 133, 8° with the mention '*solution implicite*'; Cass., 28 May 1936, in *Pasicrisie* (1936), I, p 273, 6° with no special mention but with reference to Cass., 23 March 1933.

by Leclercq in his *conclusions* and in the footnotes he personally enclosed in the *Pasicrisie*, rather than expressing the conception of the *Cour de cassation.*[136]

Such a methodological difference of practice between the House of Lords and the *Cour de cassation* does not undermine the fact that both courts justify reversals in their case law so as to participate in the modernization of the law. In their own formal way, they both take responsibility for shaping, restating and ordering the doctrine that they themselves produce.

136 This has been misconstrued by some academics as instances where the *Cour de cassation* formulated rules about the binding force of its precedents. See, for instance, R. WALORMONT, 'L'autorité du précédent judiciaire dans la jurisprudence de la Cour de cassation en Belgique et en France', in *Annales de droit et de sciences politiques* (1951), p 77.