Comity among authorities: a new approach to precedent

MITCHENSON, Jason

Abstract

Determining the authority of precedent is difficult because it largely depends on the authorities in question and the context in which they operate. The vast difference in types of authorities, combined with the diverse contexts in which they operate, tends to suggest there is no general analytical solution to the problem. There is one principle however that may assist authorities to make this determination – the principle of comity. Comity is a useful, yet relatively misunderstood principle that can assist authorities to determine how they ought to act with respect to the legitimate authority of others – including their prior decisions. The purpose of this thesis is to develop a general principle of comity – one that sheds new light on the nature and authority of precedent. By doing so, this thesis argues that comity may provide authorities with the guidance they need to determine the authority of precedent in any given context.

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COMITY AMONG AUTHORITIES
A NEW APPROACH TO PRECEDENT

THESIS
submitted at the University of Geneva
in fulfilment of the requirements of the
Doctorate of Law degree in Legal Philosophy

by

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Under the direction of

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Geneva
2019
ABSTRACT

Often one decision-making authority may consider the prior decision of another to be precedent for a particular course of action. Determining the authority of precedent is often difficult because it largely depends on the authorities in question and the context in which they operate. The vast difference in types of authorities, combined with the diverse contexts in which they operate, tends to suggest that there is no general analytical solution to the problem. There is one general principle however that may assist authorities to make this determination – the principle of comity. Comity is a useful, yet relatively misunderstood principle that can assist authorities to determine how they ought to act with respect to the legitimate authority of others – including their prior decisions. The purpose of this thesis is to develop a general principle of comity – one that sheds new light on the nature and authority of precedent. By doing so, this thesis argues that the principle of comity may provide authorities with the guidance they need to determine the authority of precedent in any given context and offer a principle-based approach to the development of new and existing doctrines of precedent.
Denn in allem Chaos ist Kosmos und in aller Unordnung geheime Ordnung

In all chaos there is cosmos, in all disorder a secret order

Carl Jung
I owe a debt of gratitude to a great many colleagues, mentors, friends and family. Three, however, deserve special mention. I am grateful to Prof. Makane Moïse Mbengue, the most connected man in the law, for taking a chance on a young Australian from the middle of nowhere. I am indebted to Prof. Thomas Schultz, a true scholar, from whom I have learned so much. Most of all, I am bound to my wife, Natasha. Whilst I volunteered to undertake this thesis she was conscripted.

--- post-script ---

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<tr>
<td>ACHPR</td>
<td>African Commission on Human and People’s Rights</td>
</tr>
<tr>
<td>AUS HC</td>
<td>High Court of Australia</td>
</tr>
<tr>
<td>AUS FC</td>
<td>Federal Court of Australia</td>
</tr>
<tr>
<td>AUS FFC</td>
<td>Full Court of the Federal Court of Australia</td>
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<tr>
<td>BIT</td>
<td>Bilateral Investment Treaty</td>
</tr>
<tr>
<td>CAN SC</td>
<td>Supreme Court of Canada / Cour suprême du Canada</td>
</tr>
<tr>
<td>CAS</td>
<td>Court of Arbitration for Sport / Tribunal arbitral du sport</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union / Cour de justice de l’Union européenne</td>
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<td>CJEU Gr. Ch.</td>
<td>Grand Chamber of the Court of Justice of the European Union</td>
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<td>Col. SC</td>
<td>Colorado Supreme Court</td>
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<td>Ct. CP</td>
<td>Court of Common Pleas</td>
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<td>Court of Exchequer</td>
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<td>Del. SC</td>
<td>Delaware Supreme Court</td>
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<tr>
<td>ECTHR</td>
<td>European Court of Human Rights / Cour européenne des droits de l’homme</td>
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<td>ECTHR Gr. Ch.</td>
<td>Grand Chamber of the European Court of Human Rights</td>
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<tr>
<td>EFTA</td>
<td>European Free Trade Association</td>
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<tr>
<td>ENG CA</td>
<td>Court of Appeal (England and Wales)</td>
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<td>ENG HC</td>
<td>High Court of Justice (England and Wales)</td>
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<td>FR Cour. Cass.</td>
<td>French Court of Cassation / Cour de cassation</td>
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<tr>
<td>Ga. SC</td>
<td>Georgia Supreme Court</td>
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<td>GER FC</td>
<td>German Federal Court of Justice / Bundesgerichtshof</td>
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<td>HK CA</td>
<td>The Court of Appeal of the High Court of Hong Kong</td>
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<td>Abbreviation</td>
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<tr>
<td>IACHR</td>
<td>Inter-American Commission on Human Rights</td>
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<tr>
<td>ICC</td>
<td>The International Chamber of Commerce / <em>Chambre de commerce internationale</em></td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice / <em>Cour internationale de justice</em></td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda / <em>Tribunal pénal international pour le Rwanda</em></td>
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<td>ICTR App. Ch.</td>
<td>Appeals Chamber for the International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia / <em>Tribunal pénal international pour l’ex-Yougoslavie</em></td>
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<td>Appeals Chamber for the International Criminal Tribunal for the former Yugoslavia</td>
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<td>ISR SC</td>
<td>Supreme Court of Israel</td>
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<tr>
<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<td>KB</td>
<td>Court of the King’s Bench</td>
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<td>LCIA</td>
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<td>New Jersey Supreme Court</td>
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<td>N.Y. CA</td>
<td>New York Court of Appeals</td>
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<tr>
<td>N.Y. SC</td>
<td>New York Supreme Court</td>
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<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<tr>
<td>OHCHR</td>
<td>Office of the United Nations High Commissioner for Human Rights</td>
</tr>
<tr>
<td>Ont. HC</td>
<td>Ontario High Court of Justice</td>
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<tr>
<td>OSPAR</td>
<td>Convention for the Protection of the Marine Environment of the North-East Atlantic</td>
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<tr>
<td>PCA</td>
<td>Permanent Court of Arbitration / <em>Cour permanente d’arbitrage</em></td>
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PCIJ
Permanent Court of International Justice / Cour permanente de justice internationale

Rolls Ct.
Rolls Court

Scottish Court of Sessions

SGP CA
Court of Appeal of Singapore

SWISS FC
Federal Supreme Court of Switzerland / Tribunal federal / Bundesgericht / Tribunale federale

TJCA
Court of Justice of the Andean Community / Tribunal de Justicia de la Comunidad Andina

UK HL
House of Lords of the United Kingdom

UK SC
Supreme Court of the United Kingdom

UNCITRAL
United Nations Commission on International Trade Law

UNCLOS

US FCA
United States Court of Appeals for the Federal Circuit

US SC
Supreme Court of the United States of America

WIPO
World Intellectual Property Organisation

WTO
World Trade Organisation

WTO AB
World Trade Organisation Appellate Body
1

A New Approach to Precedent

1.1. Introduction

There are many ways to make a decision. The appropriate method, or combination of methods, will generally be determined by the nature of the decision-maker and the circumstances in which the decision must be made. For example, when determining which school I should send my children to, I might decide on the balance of reasons, weighing all relevant reasons for and against. When determining whether I should let my children watch television, I might decide in accordance with a pre-emptive rule that I have laid down earlier in time – for example, ‘only if they have finished all of their homework’. And, when deciding which one of my children should help me do the dishes I might flip a coin or make them draw straws, leaving the outcome to chance.

This thesis is concerned with one specific decision-making method – deciding according to precedent. A system of decision-making that incorporates precedent is one that requires a decision-maker (which I will call the ‘second authority’) to accord some weight to the prior
decision of another (which I will call the ‘first authority’).\(^1\) The question of how much weight the second authority should accord to the prior decision of the first authority is what legal philosophers refer to as ‘the authority of precedent’.

Determining the authority of precedent – and ultimately, whether or not the second authority ought to follow the prior decision of the first authority – is often difficult because it largely depends on the nature of the authorities in question and the context in which they operate. The vast difference in types of authorities, combined with the diverse contexts in which they operate, tends to suggest that there is no general analytical solution to the problem.\(^2\) However, there is one general principle that may help second authorities make this determination – *the principle of comity*.

Comity is the respect shown by one authority for the legitimate adjudicatory authority of another in circumstances where the former is under no obligation to obey the latter. I suggest that the second authority’s duty to act with comity towards the first is not a duty to trust, admire or approve of the first authority or of its decisions. It requires no reciprocity from the first authority and involves no act of courtesy by the second authority towards the first. Rather, the duty to act with comity stems from the systemic judicial need to minimise conflict between co-existing authorities and to allocate their ‘adjudicatory authority’ in the most just manner possible given the context in which they operate.

Comity is relevant in circumstances where there is a risk of conflict between two (or more) authorities who owe no duty to obey each other or each other’s decisions. The principle presupposes that only one conception of justice can apply to resolve any given case and that where the first authority is better placed to resolve a particular type of dispute, or where the

\(^1\) Of course, in some cases the first and second authority will be the same decision-maker. For example, when an authority accords weight to its own prior decision, the second authority is simply the first later in time. However, it is important to make this distinction.

\(^2\) The problem brings to mind the warning at the door to Dante’s Inferno: ‘Lasciate ogni speranza, voi che entrate’ (‘Abandon all hope, you who enter here.’). See, Dante Alighieri (trans. M. Musa), *Dante Alighieri’s Divine Comedy: Inferno* (Indiana University Press 1996) 9.
second authority is in no better position than the first, the best exercise of adjudicatory power by the second authority will ordinarily be to recognise the legitimate authority of the first. The reason why the second authority acts with comity towards the first authority is therefore found in the service it ought to provide to those subject to its own authority – that is, to resolve the matter before it in the most just manner possible.

Comity is a useful, yet relatively misunderstood principle that can assist authorities to determine how they ought to act with respect to the legitimate authority of others – including their prior decisions. The purpose of this thesis is to develop a general principle of comity – one that takes into consideration the principle’s history, its theoretical foundations and the way in which it is used in practice. Such an understanding of comity should open the door to new ways of thinking about the nature and authority of precedent. In short, I am proposing a new approach to an old problem. Ultimately, I propose that the principle of comity may provide second authorities with the guidance they need to determine the authority of precedent in any given context and offer a principle-based approach to the development of new and existing doctrines of precedent.

A comity-based conception of precedent has significant theoretical and practical implications. On the one hand, it should shed new light on the nature and authority of precedent as a universal jurisprudential concept. Contrary to orthodox conceptions of precedent which have largely developed in the common law, a comity-based conception of precedent may help us better understand the nature and authority of precedent among a wide variety of authorities – from parents to universities, domestic courts to international tribunals.

On the other hand, it may also provide critical guidance to authorities in individual cases and a principle-based approach by which to develop new and existing doctrines of precedent.

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3 According to FA Mann ‘[c]omity is one of the most ambiguous and multifaceted conceptions in the law.’ – Francis Mann, Foreign Affairs in English Courts (Clarendon Press 1986) 134.
This should be of utility to all authorities who reason from precedent. Yet, it should be of particular utility to those who are increasingly asked to follow precedent but are unsure how they ought to act. In the international sphere for example, scholars continue to debate the nature and authority of precedent,\(^4\) whilst international courts and tribunals grasp at abstract principles (or worse yet none at all) in an attempt to determine whether or not they ought to follow the prior decision of another in any given context. As a general principle, comity will rarely provide finite answers to finite problems. Yet, as we will see, the more we know about comity, the more helpful it becomes in practice.

It should be noted from the beginning that the purpose of this thesis is not to offer a comprehensive theory of precedent – if such thing were even possible.\(^5\) Nor do I suggest that the principle of comity can explain all aspects of precedent or be of equal utility in every context. So much depends on the authorities in question and the context in which they operate. Yet there are some things that can be said in general about the nature and authority of precedent and the approach one authority ought to take towards the decisions of another. It may seem paradoxical, but this is the way it is with abstract principles: they apply generally, yet their application depends on particulars.

\(^4\) See, for example, the various chapters concerning the nature and authority of precedent in international law in Société français pour le droit international, Le précédent en droit international (Pedone 2015).

The remaining part of this chapter lays the groundwork for a new approach to precedent. By introducing key concepts, and explaining the background and foundation of the approach it takes, this chapter sets the scene for a comity-based conception of precedent.

1.2. The Concept of Precedent

A precedent is a past event that serves as a guide for present action. In the law, that past event is almost always a decision. Thus, when we speak of precedent, ordinarily we are speaking of a prior decision that originates from a legal authority. Yet, not all prior decisions are precedents – it depends how the prior decision is used. Understanding the concept of precedent therefore requires an understanding of the different ways in which an authority might use a prior decision to make a present one.

When my sister turned 15 she made her case to my parents that she should be able to go to a party with her friends. In doing so, and without even realising it, she reasoned from precedent – she argued, amongst many other things, that she should be allowed to go because my parents gave me, her elder brother, permission when I was her age. However, when my parents refused they reasoned from experience – I had taught them only a few years earlier that 15 year olds are certainly not responsible enough to go to parties alone.

In the end, my sister defied my parents, climbed out her bedroom window and went to the party anyway. Yet, my family feud highlights one of the most important characteristics of precedent – its content-independence. When we reason from precedent, the authority of a prior decision is independent from the merits (or demerits) of its content. Its authority derives not from its soundness or persuasiveness, but rather from its source or status as a decision of the first authority.6

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When we reason from precedent, as opposed to experience, the existence of the prior decision is invoked as an independent reason for the second authority to decide a ‘relevantly similar’ dispute in the same way. This is true even in the absence of a formal doctrine of precedent – my sister’s argument case in point. By relying on my parents’ prior decision, my sister did not argue that the decision was correct or that the reasons for the decision were particularly persuasive. Rather, she simply argued that my parents ought to let her go to the party because they had already decided that way in the past. An argument from precedent urges the second authority to follow the prior decision of the first authority for no other reason than the fact the prior decision is a decision of the first authority.

Conversely, when we reason from experience, we do not value the pedigree of the decision. It does not matter that the prior decision is a decision of the first authority. What matters is what we learn from the decision. While my parents certainly used their prior decision to let me go to a party to make a present one in respect of my sister, the decision was, for all intents and purposes, a ‘warning’ not a ‘precedent’. For them, the fact that they had already decided to let me go to a party at age 15 was not a content-independent reason that favoured letting my sister go to a party at the same age.

This suggests that precedents constrain rather than empower. When a second authority reasons from precedent they feel a certain pressure to follow it, regardless of the merits of the decision. This is also the reason why the authority of precedent is only relevant in

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7 Of course, one of the most fundamental problems associated with precedential reasoning is the determination of whether a prior decision is ‘sufficiently similar’ to the case at hand to be treated as precedent. Questions of similarity and difference lie outside the scope of this thesis. Instead, I ask that you treat the first authority’s prior decision as ‘sufficiently similar’ for this purpose. “… it is tempting to say that the holding of the precedent case applied only to similar cases, but such a conclusion is merely preliminary, for then the inquiry moves to the question of just how we are to determine similarity and difference. Two things may be similar for some purpose but not for others, as when a photographer might treat a black dog and a black pocketbook as similar for the purpose of determining the proper exposure, but not for the purpose of deciding whether or not to bring the pocketbook to the veterinarian if it was in need of repair.” – Fredrick Schauer, ‘Precedent’ in Andrei Marmor (ed), The Routledge Companion to the Philosophy of Law (Routledge 2012) 129.

8 Alexander (n 5) 6–7.

9 ibid.
circumstances where the second authority disagrees with the prior decision. If the second authority agrees with the prior decision or is persuaded by its merits then an argument from precedent is superfluous. It is only when the second authority feels bound to make a decision it ordinarily would not have made does the content-independent authority of precedent become apparent.\(^{10}\) As Richard Wasserstrom notes:

If prior decisions can guide behavior in a legal system if and only if these prior decisions are “correct,” then it at once becomes relevant to ask in what way does it make any sense to speak of following precedent? For, if … precedent has any significant meaning, it would seem to imply that precedents can be followed because they are precedents and not because they are “correct” results.\(^{11}\)

It is important to recognise that whilst the existence of a precedent might provide a content-independent reason to follow it, that reason is by no means conclusive. There is no reason why a content-independent reason in favour of following precedent might not be outweighed or overridden by other legal, moral or prudential reasons that favour departing from the prior decision in the present case. Acknowledging the content-independent nature of precedent is simply to recognise that the authority of precedent – that is, its pull in any direction – derives from its source or status only.\(^{12}\) The weight of that authority – that is, the strength of that pull – is a different question entirely. It is one which must ultimately depend on the nature of the authorities in question and the context in which they operate.

The central challenge of this thesis is to demonstrate how comity, as a general principle of law, may assist authorities to determine the authority of precedent in any given context. But,

\(^{10}\) Postema (n 5) 1160–1163; Schauer (n 5) 575–576; Alexander (n 5) 6–7.

\(^{11}\) Wasserstrom (n 5) 52.

\(^{12}\) Dworkin (n 5) 110–115.
this of course presupposes the answer to another question – that is, that it is the second authority who determines the authority of precedent in the first place. We often speak of precedent as if it binds second authorities – as if the prior decision itself, or the authority from which it derives, can directly fetter the hands of the second authority. In this sense, we tend to think that the second authority has no choice in the matter, it is constrained by forces beyond its control.

Yet, even under the strictest doctrines of precedent – for example, the English doctrine of *stare decisis* – the idea that prior decisions bind second authorities, like legislation might bind the general population, contains a large element of fiction.\(^\text{13}\) True, we often say that an authority is bound by a prior decision – and undoubtedly they are. But, when we do, we employ a shorthand to describe a much more complex phenomenon. In truth, neither the first authority nor its decision imposes fetters upon the second authority. The reality is that the prior decision of the first authority *binds* the second authority only because the second authority chooses to be bound by it. In this sense, we can say that the second authority is bound, but not in the literal sense of word. Rather, it is bound only ‘intellectually’ – it fetters its own hands in light of the first authority and its prior decision. In fact, as CK Allen so eloquently notes, even English courts are free under the doctrine of *stare decisis* to ‘utterly flout precedent, and declare all the great doctors of the law to be so many ignoramuses.’\(^\text{14}\)

This fictitious notion that prior decisions bind in the literal sense largely stems from classical legal positivism. According to classical legal positivism, the binding force of legal norms (which includes prior decisions) comes from the fact that they are backed by sanctions emanating from a habitually-obeyed authoritative source. In developing his *Pure Theory of Law*, Hans Kelsen, continuing in the tradition of nineteenth-century positivist legal theory,

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\(^{13}\) Carleton Allen, ‘Precedent and Logic’ (1925) 41 Law Quarterly Review 329, 334.

\(^{14}\) ibid 333; Carleton Allen, *Law in the Making* (Clarendon Press 1939) 247–248. ‘*Stare decisis* is not … a universal, inexorable command. The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.’ – *Burnet v Coronado Oil & Gas Co.*, 285 US 393 (1932) (US SC) 405-406 (Justice Brandeis).
unequivocally emphasised that the binding virtue of law stems from the sanctions annexed to it.\textsuperscript{15}

The problem of course is that the authority of precedent cannot be explained in classical legal positivist terms because the obligation to follow precedent is not backed by any identifiable sanction. As Cross and Harris note in respect of the English judge:

If a judge persistently and vociferously declined to follow cases by which he was bound according to countless statements of other judges, it is possible that steps would be taken to remove him from his office, but it would be a mistake to think in terms of such drastic sanctions for the judge’s obligation to act according to the rules of precedent. Those rules are rules of practice, and, if it is through to be desirable to speak of a sanction for the obligation to comply with them, it is sufficient to say that non-compliance might excite adverse comments from other judges. Needless to say, there are not many examples of such comments in the law reports because … the practice is followed with a high degree of uniformity.\textsuperscript{16}

It is well known that the law as coercive orders thesis advanced by classical legal positivists was dismantled by H.L.A Hart in \textit{The Concept of Law}.\textsuperscript{17} Yet the notion that prior decisions bind in the literal sense prevails in the minds of many. It is, so to speak, engrained in the legal psyche. In common law jurisdictions, the ‘binding nature of precedent’ has ‘through constant and often unthinking repetition, become a kind of sacramental phrase’ which hides the true


\textsuperscript{16} Cross and Harris (n 5) 99. ‘Precedent is a Jewish mother. You don’t have to do what it tells you, but it makes you feel terrible about not doing it.’ – Stephen Sedley, \textit{On Never Doing Anything for the First Time} (Atkin Lecture 2001) 6.

\textsuperscript{17} Hart (n 5).
source of the obligation to follow precedent. Common law scholars are often so obsessed with consequentialist arguments in favour of following precedent – such as consistency and fairness – that often they do not reflect critically on the true nature of precedent. Practitioners add to this by arguing from precedent with force – a good practitioner will seek to convince the court they are bound, not in a mere intellectual sense but, in the literal sense to follow precedent.

The mistake notion the classical legal positivism can explain the nature and authority of precedent extends well beyond the common law. It is perhaps most pervasive in non-hierarchical contexts such as international arbitration or international dispute resolution more generally. In these contexts we are told that prior decisions can have no authority as precedent because international courts and tribunals exist outside of any adjudicatory hierarchy like that which exists in the common law. By explicitly or implicitly adopting a classical legal positivist lens, scholars and practitioners assume that precedent requires hierarchy – namely, that there must be a superior authority capable of binding a subordinate or inferior authority. As Diego P. Fernández Arroyo writes in respect of international arbitration:

The fact that arbitration embodies justice dispensed by tribunals especially appointed in order to settle a particular case, outside any hierarchically organized court and independent of all other arbitral tribunals, immediately leads us to believe that it is impossible to develop a doctrine of precedent in arbitration – and perhaps that the notion of precedent itself cannot possibly exist in this field.  

Karin Oellers-Frahm makes the same point with respect to international courts and tribunals more generally:

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18 Allen (n 13) 334.
The lack of any organisational relationship between international judicial bodies … makes decisions of other courts and tribunals *res inter alios acta*. As international courts and tribunals exist on the same footing so do their decisions; there is no obligation to take into account their own previous decisions or those of other judicial bodies, even if they do concern the same subject-matter and even if there are bodies more specialised or experienced in a particular subject-matter.\textsuperscript{20}

The orthodox position appears to be that without any form of hierarchy, prior decisions can, at most, constitute a kind of ‘persuasive precedent’. Of course, the content-independent nature of precedent means that this term is somewhat of an oxymoron and a non-starter in the race to understand the true nature and authority of precedent. If the second authority is persuaded by

\textsuperscript{20} Karin Oellers-Frahm, ‘Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions’ (2001) 5 Max Planck Yearbook of United Nations Law 67, 76. This is undoubtedly the orthodox position with respect to precedent in non-hierarchical contexts. ‘In addition to the absence of a formal basis for precedent in international law, the lack of hierarchical structure poses challenges for implementing any form of precedent.’ – Irene Cate, ‘The Costs of Consistency: Precedent in Investment Treaty Arbitration’ (2013) 51 Columbia Journal of Transnational Law 418, 438. ‘Investment treaty arbitration is not well suited to establishing a formal system of precedent… In systems of government using *stare decisis*, there are formal rules or understandings about which decisions are binding and which are merely persuasive… In contrast, there are no such hierarchies for investment treaty arbitration.’ – Andrea Bjorklund, ‘Investment Treaty Arbitral Decisions as Jurisprudence Constante’ [2008] UC Davis Legal Studies Research Paper (No. 158) 270–271. ‘… investment treaty arbitration is a decentralized *ad hoc* legal system of dispute settlement. When compared to other dispute settlement bodies … the concept of binding precedent seems even more unsuitable since it lacks a hierarchical structure… Investment tribunals cannot however be expected to act as national courts in hierarchical vertical legal systems which function with rules of binding precedent or jurisprudence constante. Within international investment arbitration, such a system clearly is lacking… The very fact that states have chosen to establish a horizontal system of *ad hoc* arbitration with no appellate mechanism, by necessary implication results in a system whereby each arbitral tribunal assesses the case without any obligation to consider or apply previous case-law.’ – Eric de Brabandere, ‘Arbitral Decisions as a Source of International Investment Law’ in Tarcisio Gazzini and Eric de Brabandere, *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff Publishers 2012) 254. ‘… compared with standing judicial bodies or centralized dispute settlement mechanisms, investment treaty arbitration does not have centralized standing adjudicatory bodies, and has certain specific features that accentuate the impropriety of considering previous decisions as … having a binding character.’ – Eric De Brabandere, *Investment Treaty Arbitration as Public International Law* (Cambridge University Press 2014) 97. ‘There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals’ – *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/02/6 (2004) (ICSID) 97 (El-Kosheri, Crawford and Crivellaro).
the prior decision of the first authority then it is not truly reasoning from precedent. Rather, it is simply reasoning from experience. The authority of precedent is only relevant where the second authority feels pressure to follow the first authority’s prior decision despite the fact it believes the matter before it ought to be decided differently.

Explicitly or implicitly viewing precedent through a classical legal positivist lens masks the true nature and authority of precedent. In truth, precedential reasoning involves the two separate, but interconnected, ideas of ‘recognition’ and ‘self-restrain’. On the one hand, precedential reasoning requires the second authority to recognise the ‘legitimate adjudicatory authority’ of the first – including its prior decisions. On the other hand, it requires the second authority to ‘restrain’ itself out of respect for that authority. It follows that whilst every authority is free to ‘utterly flout precedent’, when an authority reasons from precedent they simultaneously recognise the ‘legitimate adjudicatory authority’ of another, and fetter their own adjudicatory power out of respect for that authority. In this way, they bind themselves.

Why an authority would do so is the primary focus of Chapters 2, 3 and 4. Yet, it becomes clear from the outset that the practice of reasoning from precedent involves issues for the theory of authority that are much more complicated than the explanation of the binary relation between an authority and a person subject to that authority. Of course, in certain contexts, we may speak of the second authority’s obligation to follow precedent. Indeed, we often do. But that obligation does not derive from any duty to obey the first authority. Rather, the second authority’s decision to ‘recognise’ the first authority’s decision as authoritative, and to ‘restrain’ itself in respect of that authority, must derive from the second authority’s duty to those subject to its own authority.

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21 This, of course, is not to suggest that authorities cannot be persuaded by prior decisions. Evidently, they can be. It is merely to say that if they are then they are reasoning from experience, not precedent. Reasoning from precedent constitutes a very specific unique form of practical reasoning.
A complete thesis dedicated to the nature and authority of precedent may give one the impression that precedential reasoning is perhaps more prevalent than it actually is. Of course, we must always keep in mind that reasoning from precedent is but one of a variety of different techniques authorities use to decide.\textsuperscript{22} But, it is one which a wide range of authorities employ and one that continues to trouble both legal theorists and authorities in practice. It is thus necessary that we understand the true nature and authority of precedent if we are to advance the subject both in theory and practice.

1.3. The Problem: A Case-Study

Imagine you have been appointed as one of three arbitrators in an ICSID dispute. The Claimant, a property developer from Switzerland, has filed a request for arbitration against the Respondent, the Turkish Government, pursuant to the Swiss-Turkey BIT.\textsuperscript{23} The dispute arises out of a contract between the Claimant and a Turkish company owned and operated by the Respondent whereby the Claimant agreed to develop a residential construction project in Istanbul. The contract provides that the Claimant was to complete the project within three years of the contract date and completion was backed by a performance bond issued in favour of the Respondent.

About nine months into construction the project came to an abrupt halt due to zoning-related litigation against the Respondent. The litigation had been pending before the parties entered into the contract however the Respondent did not disclose it to the Claimant during pre-contractual negotiations, nor did the Claimant discover its existence during its due diligence. Eventually, the matter was settled but construction on the project did not recommence for nearly two years.

\textsuperscript{23} Agreement between the Swiss Confederation and the Republic of Turkey on the Reciprocal Promotion and Protection of Investments (1988).
In an effort to complete the project, the Claimant made repeated requests to the Respondent for an extension of time. However, these requests were denied by the Respondent who proceeded to terminate the contract on the basis of the Claimant’s ‘late performance’. The Respondent subsequently called in the performance bond and ultimately re-tendered the project to a Turkish company with which the Claimant alleges the Respondent has close ties. The Respondent has since seized the project site and most of the Claimant’s assets in Turkey.

In its request for arbitration the Claimant asserts that the Respondent’s termination of the contract is unlawful. Yet, its central claim is that the termination is really just a pretext for the Respondent to remove the Claimant from the project, seize its assets and to give the project to a Turkish company with which it is closely aligned. The Claimant submits, *inter alia*, that the Respondent’s actions constitute a breach of Art. 3(2)24 and/or Art. 525 of the Swiss-Turkey BIT – namely, that the Respondent afford the Claimant’s investment fair and equitable treatment and refrain from unlawfully expropriating its investment.

Both provisions are open-textured and general in application. They are, *prima facie*, open to a number of normatively defensible, yet mutually exclusive, interpretations. They are also substantively identical to the fair and equitable treatment and unlawful expropriation provisions contained in numerous other BITs – many of which have been the subject of similar disputes in the past. Recognising that the dispute will largely turn on the interpretation given to Arts. 3(2) and 5, the parties routinely rely on prior investment awards in their submissions. The parties even rely on decisions of the ICJ with respect to the general principles that should be applied to the interpretation of international agreements.

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24 ‘Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party.’ – Swiss-Turkey BIT, Art. 3(2).
25 ‘Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments belonging to investors of the other Contracting Party, unless the measures are taken in the public interest, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. The amount of compensation shall be paid to the investor entitled thereto without delay and made freely transferable.’ – Swiss-Turkey BIT, Art. 5.
The parties’ reliance on these prior decisions raises an immediate and important question for the Tribunal. What is the authority – if any – of these decisions? And, how ought the Tribunal act with respect to each of them? You are aware that the common law doctrine of *stare decisis* does not apply in international law. The Tribunal is certainly not bound to follow any of these prior decisions like the courts of the common law might be. But, the parties have gone to great lengths to cite and rely on them. They have based their arguments around them and, for the most part, treat them as if they should be followed. In this sense, they treat them as if they are ‘authoritative’. As a member of the Tribunal you certainly feel the pull of precedent. Surely you cannot just ignore them? Or can you?

I will refer to this case, throughout this thesis, as ‘our ICSID case’. It is ‘ours’ because we will solve it together. But it is, in reality, simply an instance of a more general situation in which one authority is required to determine the authority of another’s prior decision. In each case, the parties’ reliance on prior decisions raises an immediate and difficult problem for the second authority. How *ought* it act with respect to the prior decisions? Should it follow them, depart from them or simply just ignore them? If you think there is no general analytical solution to this problem then you would be right. So much depends upon the nature of the authorities in question and the context in which they operate. Yet, there is a general approach the second authority ought to take if it is to exercise its adjudicatory power with propriety – namely, it ought to act with comity.

1.4. The Principle of Comity

Comity is the respect shown by one authority for the legitimate adjudicatory authority of another in circumstances where the former is under no obligation to obey the latter. I suggest that the second authority’s duty to act with comity towards the first authority is not a duty to trust, admire or approve of the first authority or of its decisions. It requires no reciprocity from
the first authority and involves no act of courtesy by the second authority towards the first authority. Rather, the duty to act with comity stems from the systemic judicial need to minimise conflict between co-existing authorities and to allocate their adjudicatory authority in the most just manner possible.

The principle is relevant in circumstances where there is a risk of conflict between two (or more) authorities who operate within the same context but who have no obligation to obey one another. Comity presupposes that only one conception of justice can apply to resolve any given case and that where the first authority is better placed to resolve a particular type of dispute, or where the second authority is in no better position than the first authority, the best exercise of adjudicatory power by the second authority will ordinarily be to recognise the authority of the first. The reason why the second authority acts with comity towards the first authority is therefore found in the service it ought to provide to those subject to its own authority – that is, to resolve the matter before it in the most just manner possible.

What comity demands of the second authority – that is how the second authority ought to act – is a question for the second authority itself taking into consideration the nature of the authorities in question and the context in which they operate. Because of the diverse nature of authorities, and the types of interactions that may occur between them, acting with comity may involve a range of different actions on the part of the second authority. Comity may, for example, require the second authority to: recognise the first authority’s decision as valid, follow it or give some form of effect to it; require someone else comply with it; refrain from interfering with it; or generally refrain from undermining the first authority’s ability to exercise its own authority. It may even, as I argue in this thesis, require the second authority to recognise the first authority’s prior decision as precedent for a particular course of action. I use the term ought because it is always for the second authority to determine how it will act with respect to
the authority of the first. As the Supreme Court of the United States held in *Mast, Foos & Co. v Stover Manufacturing Co.*:26

Comity persuades, but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided.27

Chapter 2 demonstrates comity’s origins as one of the founding principles of private international law (or the conflict of laws). In his 2011 Hague Lecture on *The Principle of Comity in Private International Law* Adrian Briggs notes the central role comity has played in the development of rules of private international law, concluding that ‘observance of the principle of comity is the essence, the rule, of the common law of private international law’.28 It is, he says ‘both the ancestor and the handmaiden of private international law’, meaning that comity explains much of the private international law we have and offers a principle-based approach to its future development.29

Comity’s origins as a principle of private international law is unsurprising. The doctrine of sovereignty provides that all States are equal and that, subject only to minor limitations, each State has the right to self-determination and non-interference. Yet, the realities of socio-economic life mean that often, and increasingly today, the authority of one State will have an effect within the territory of another leading to the possibility of conflict. In this context, it is easy to imagine a world in which each State resolved matters within its own territory without regard for the legitimate authority of others. The reality however is very different – States (through their courts) often recognise that, in certain circumstances, the most just exercise of their own adjudicatory power will in fact be to recognise another State’s laws or judicial acts.

27 ibid 485 (Justice Brown).
29 ibid 88.
But States are not the only authorities who observe the principle of comity. A wide range of authorities, outside the context of private international law, commonly ‘recognise’ the authority of others, and ‘restrain’ themselves out of respect for that authority, despite being under no obligation to obey them. Imagine, for example, that I am your teenage child and you are my father. You know my mother has forbidden me to go to a party, yet when you come home you find me on my way out. You might, in your own mind, see no reason why you should not let me go. Yet, when you find me half way out the door you stop me from going anyway. Or, imagine a more formal situation: imagine, for example, that you are a judge hearing a matter on judicial review concerning a local school board’s decision to fire one of its teachers. Whilst the decision is not one you would have made had the matter come before you first, you refuse to overturn it anyway.

In both scenarios you are acting with comity – whether you realise it or not. You are under no obligation to obey the first authority (be that my mother or the local school board), yet you choose to ‘recognise’ its authority anyway. This is despite the fact that you have authority to make your own decision – to determine the question for yourself. But you choose to fetter your own adjudicatory authority out of respect for the legitimate authority of another. Why you, or any authority for that matter, would do so is the focus of Chapters 2 and 3. Yet, it becomes immediately clear that a general understanding of comity may greatly assist authorities to determine how they ought to act with respect to the authority of others in a wide variety of contexts – not just in private international law.

I suggest that one such area is in the context of determining the authority of precedent. In Chapter 4, I propose that the practice of attributing prior decisions weight as precedent is best characterised as an act of comity by the second authority towards the legitimate authority of the first. In circumstances where the second authority is asked to follow the prior decision of the first, the second authority is under no obligation to obey the first authority or its decisions.
In determining how it ought to act with respect to the first authority’s prior decision the second authority is much like a sovereign State – subject to the will of no other. Just as every court is free to ‘utterly flout precedent, and declare all the great doctors of the law to be so many ignoramuses’ no authority is bound by the will of another in circumstances where they are required to determine whether or not they ought to follow precedent.

Yet, so often, authorities do recognise the prior decisions of others as precedent for a particular course of action. The Tribunal in our ICSID case certainly considers the prior decisions before it to have some authority. The question for the Tribunal appears not to be whether the prior decisions have authority, but rather how much authority they have and what it ought to do in respect of that authority. A wide range of authorities, in a variety of different contexts, acknowledge that despite being under no obligation to obey the first authority or its decisions, the best exercise of their own adjudicatory power may be in the circumstances of the case to follow its prior decision. A general understanding of comity can thus help second authorities to properly exercise their adjudicatory power in circumstances where they are asked to follow precedent.

If we consider the act of attributing weight to the prior decisions of another to be an act of comity, it naturally follows that doctrines of precedent (which require the same) are most accurately characterised as expressions of comity. By ‘doctrines of precedent’ I mean any rules, principles or practices – whether they be formal or informal, de jure or de facto – that require the second authority to attribute weight to the prior decision of the first authority. Just like rules of private international law, doctrines of precedent regulate how authorities ought to act with respect to one another’s legitimate authority – in this case, each other’s prior decisions. The same point Adrian Briggs makes about rules of private international law can thus be made about

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30 Allen (n 13) 333; Carleton Allen (n 14) 247–248.
doctrines of precedent – comity may help us understand the doctrines we have and offer a guide to their future development.

I suggest that comity towards the legitimate authority of another can involve a duty on the part of one authority to follow the prior decisions of another. Yet, it certainly does not follow that an authority fails to act with comity if it does not. Whether an authority incurs such a duty ultimately depends on the nature of the authorities in question and the context in which they operate. A general understanding of comity can assist second authorities to exercise their adjudicatory authority with propriety by taking these variables into account in individual cases.

In Chapters 4 and 5, I seek to demonstrate comity’s potential for this purpose by reducing the principle to three general axioms which may be applied in any given context. Doing so should provide authorities with the critical guidance they need to determine the authority of precedent in individual cases and offer a principle-based means by which to develop doctrines of precedent. Yet, in our search for clarity we must remember that comity will always retain a certain degree of flexibility and generality. As is the case with all general principles, what comity demands in any given case largely depends on the nature of the authorities in question and the context in which they operate. It may seem paradoxical, but this is the way it is with abstract principles: they apply generally, yet their application depends on particulars. We must therefore not fall into the trap of going too far – to attempt to define and fix that which cannot, in the nature of things, be defined and fixed. As Justice Porter warned in Saul v His Creditors:31

[When so many jurists] of great talents and learning, are thus found to fail in fixing certain principles, we are forced to conclude that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles.

They have attempted to go too far. To define and fix that which cannot, in the nature of things, be defined and fixed. They seem to have forgotten, that they wrote on a question which touched the comity of nations, and that comity is, and ever must be uncertain. That it must necessarily depend on a variety of circumstances, which cannot be reduced within any certain rule.\[32\]

1.5. Thesis Outline

In various contexts, both inside and outside the law, one authority may consider the prior decision of another to be precedent for a particular course of action. Determining the authority of precedent – and ultimately, whether or not a prior decision ought to be followed – is often difficult because it largely depends on the nature of the authorities in question and the context in which they operate. There is one general principle however that may help authorities make this determination – the principle of comity.

Comity is a useful, yet relatively misunderstood principle that can assist authorities to determine how they ought to act with respect to the legitimate authority of others – including their prior decisions. The purpose of this thesis is to develop a general principle of comity – one that sheds new light on the nature and authority of precedent as a universal jurisprudential concept. By removing the cloud of mystery that so often surrounds the principle I propose that comity may provide authorities with the guidance they need to determine the authority of precedent in any given context and offer a principle-based approach to the development of new and existing doctrines of precedent.

To this end, Chapters 2 and 3 are devoted to developing a general principle of comity – one that takes into consideration comity’s history, its theoretical foundations and the way in which it is used in practice. In Chapter 2, I explore comity’s history through the events and

\[32\] ibid 595-596 (Justice Porter).
ideas of those most influential to its development. As a general principle, comity has received little modern academic attention. Its history, even less so. Yet, by situating comity within its true historical context, I propose that we may shed new light on the principle and reveal a number of important aspects which have, until now, been hidden from view.

In Chapter 3 I build on this historical enquiry by considering comity’s theoretical foundations. I ask, and answer, the key question everybody has about the principle of comity – namely, why would any authority act with comity towards another? Comity’s origins as a principle of private international law suggests that if we are to answer this question the best place to start is by analysing how comity operates between sovereign States. From there I propose that we may abstract from the principle of comity in private international law to a general principle of comity among authorities. This should help us better understand why a wide range of authorities in diverse contexts recognise, or ought to recognise, each other’s adjudicatory authority despite being under no obligation to obey one another.

In Chapter 4 I advance a comity-based conception of precedent by drawing on the general principle of comity developed in Chapters 2 and 3. I propose that precedential reasoning is best understood as an act of comity and that doctrines of precedent that require the same are most accurately characterised as expressions of comity. Compared to orthodox conceptions of precedent that have largely developed in the common law, I propose that a comity-based conception of precedent provides a compelling account of the nature and authority of precedent as a universal jurisprudential concept.

In Chapter 5, I seek to demonstrate how comity may help authorities in individual cases to determine the authority of precedent and how comity may provide a principle-based approach by which to develop new and existing doctrines of precedent. Focusing on some of the more prominent types of authorities, I propose that comity is an invaluable tool to determine the proper exercise of adjudicatory power under existing doctrines of precedent and a unique means
by which to develop entirely new doctrines. Whilst this thesis is primarily an exercise in legal theory, Chapter 5 should be of particular interest to practitioners who are in search of critical guidance as to how they ought to act with respect to the prior decisions of other authorities in particular cases.

Lastly, in Chapter 6, I introduce a sociological element to this thesis by exploring the hidden link between comity, precedent and governance. By drawing on the work of political-legal theorists, I propose that comity – by forming the basis for various doctrines of precedent – can contribute to the emergence and evolution of complex systems of governance. In support of this claim, I advance a ‘theory of authority-based governance’ which holds that if an authority, or group of authorities, follow a suitable doctrine of precedent they can, over time, progressively adapt existing normative systems in order to effectively govern those subject to their authority. The theory has both positivist and normative implications for the study of governance. Not only can it help reveal the hidden governance function various authorities already play, but it may also provide a framework within which to better understand emerging systems of governance.

It is important to recognise that the purpose of this thesis is not to offer a comprehensive theory of precedent. Nor do I suggest that the principle of comity can explain all aspects of precedent or be of equal utility in every context. There is no general analytical solution to the question of how much authority a prior decision ought to have or ultimately how one authority ought to act with respect to the prior decisions of another. So much depends on the authorities in question and the context in which they operate. Yet there are some things that can be said in general about the nature and authority of precedent and the approach one authority ought to take towards the decisions of another. The purpose of this thesis is to say such things.
2

The History of Comity

2.1. Introduction

The purpose of this chapter is to explore the history of comity through the events and ideas of those most influential to its development. By doing so, I propose that we may reveal a number of important aspects about the principle which have, until now, been hidden from view. This, I argue, should provide us with a solid foundation to develop a general principle of comity in Chapter 3, a necessary step if we are to harness the principle to better understand the nature and authority of precedent.

The principle of comity has received little modern academic attention. Its history, even less so.\(^1\) What academic work there is has generally sought to understand the principle by reference to its use in practice – an application of what common law scholars refer to as the *case method*. Of course, the case method is an effective way to distil general principles of law

and it is one which I rely upon quite heavily in the course of this thesis. Yet, by itself, it is limited. It is like looking at a painting through a straw – it prevents us from seeing the whole picture. It follows that a right understanding of comity is only possible after a thorough examination of its history.²

As this chapter demonstrates, comity was created to solve the vexed question of how, and under what circumstances, sovereign States ought to recognise each other’s authority. Although it was originally developed as a means to facilitate international trade and commerce, today comity is a principle of justice. The duty to act with comity stems from each State’s paramount duty to do justice to those subject to their own authority. As we will see, States act with, or ought to act with comity because the recognition of foreign authority will, in many cases, be the most just exercise of their own authority.

The history explored here is of course a simplification. It cannot fully, nor accurately, describe the diversity and complexity of the events and ideas presented. As with any historical enquiry, the search for truth is not an easy task. Often we must negotiate between contending versions of past events and competing interpretations of historical works. For this reason, this chapter should not be read as a claim that these events or ideas were universally accepted or uniformly conceived, but only that they were all – to varying degrees – influential to the development of comity.

2.2. The Events Leading to Comity

The birth of comity is intricately connected to the birth of our modern state system. By all accounts, the events leading to the creation of comity are the same as those leading to the

² ‘… a right understanding and criticism of modern principles and practice is only possible after a thorough examination of the doctrines of the Roman law’ – Friedrich Karl von Savigny (trans. W. Guthrie), A Treatise on the Conflict of Laws (The Lawbook Exchange 1880) 50.
creation of sovereignty – if only told from a different perspective. It is a shared history, one marked by the brutality of the Thirty Years War and the rise of the sovereign State.

2.2.1. A Fragmented World

Following the collapse of the Western Roman Empire in 476, Rome’s centralised government was replaced by a network of smaller semi-autonomous communities. These communities were not ‘States’ as we would think of them today but they did enjoy a level of autonomy previously unimaginable under the centralised regime of the Empire. Later, some of them would develop more organised forms of government, binding together on the basis of their mutual Christian beliefs. This spiritual union, combined with the later military intervention of the Crusades, resulted in profound changes to Europe’s political-legal landscape. It also bought two new powerful actors to the forefront of European politics – the Pope and the Emperor – both of who aspired to the *civitas Christiana* which entailed an authority superior to all.3

When the new Holy Roman Empire was established in 800, Charlemagne acknowledged the universal authority of the Papacy. But only 34 years later the new Emperor, Louis I, would begin to challenge that authority. The Pope defended the Papacy with the *two swords* doctrine under which God was said to have delegated his power over spiritual and temporal matters directly to the Papacy. The Emperor on the other hand asserted that whilst this was certainly true in respect of spiritual matters, God delegated his power over temporal matters to the Emperor. Later, under the influence of Peter Damien, a period of compromise was reached yet the relationship between the Papacy and Emperor was never amicable as each sought to expand its power.4

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As these actors entered the Middle Ages there was a constant struggle for power. In essence, two main power relations characterised this time period. The first was horizontal, between the Papacy and the Holy Roman Emperor; whilst the second was vertical, between the Papacy/Holy Roman Emperor and the multitude of new semi-autonomous communities that had sprung up all over Europe. Of course, even at a local level these communities fought for power and resources.⁵

Despite the Papacy’s continual efforts until the 13th century to impose its plenitudo potestatis, it was never fully recognised by some of the more powerful monarchs in Europe. France and Spain never accepted feudal vassalage and England repudiated Papal overlordship in 1366.⁶ Then, in 1517, Martin Luther nailed his Ninety-Five Theses to the door of the Schloßkirche in Wittenberg, setting in motion the Protestant Reformation. Rejecting many of the traditional teachings of the Late Medieval Church, Luther dealt a deadly blow to the Pope’s hope for universal authority.⁷

As the authority of the Papacy declined, so did the authority of the Emperor. And, when the Great Interregnum occurred (1254-1273) it provided the perfect opportunity for the Princes of the Holy Roman Empire to assert their growing independence. By the 14th century, authority over temporal matters ceased to be considered within the exclusive jurisdiction of the Emperor as more power transferred to local rulers.⁸ Whilst the Emperor’s de jure overlordship remained the work of jurists such as Bartolus (1313-1357) and Baldus (1327-1400) solidified the

authority of the Princes as independent with a certain level of self-determination – *rex in regno suo est imperator regni sui*.⁹

England, France, Spain and certain Italian cities – such as Genoa, Florence, Pisa and Venice – all asserted their own authority in competition with the Emperor. Largely succeeding, they effectively replaced the Emperor’s universal authority over temporal matters with the concept of distinct self-governing communities. Lacking a strong economic or military base, the Emperor had no means by which to fold these communities back into the Empire. The constant struggle for power between the Papacy and successive Emperors had created a power vacuum which allowed these new self-governing communities to thrive. The brooding tension between the Papacy, Holy Roman Emperor and now certain feudal monarchs, Princes and free cities as to the appropriate scope of each party’s competing, and often incompatible, claims of authority became highly explosive.¹⁰

Things only got worse for the Emperor as certain German principalities also began to break away from the Empire. Increasingly large concessions were made in favour of the more powerful German Princes and some even revolted against the Empire by siding with the Protestants in emerging conflicts. These conflicts were ultimately settled by the *Treaty of Augsburg* in 1555 which established the principle of *cujus regio, ejus religio* allowing the Princes to determine the religion of their respective territories – the only two acceptable choice at the time being Catholicism or Lutheranism. The Treaty effectively reaffirmed the

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⁹ ‘principes superiores non recognoscentes’ (Princes recognise no superior) – Bartolus de Saxoferrato (1314-1357). The importance and influence of this statement is evident by the widely accepted adage ‘emo bonus íurista nisi bartolista’ (no one is a good jurist unless he is a Bartolist). Baldus de Ubaldis (1327-1400), the only pupil of Bartolus, later reformulated the principle of his teacher as ‘rex in regno sui est imperator regni sui’ (a king in his own kingdom is emperor of his realm). See, Walter Ullmann, ‘The Development of the Medieval Idea of Sovereignty’ (1949) 64 The English Historical Review 1, 5–7.

independence these Princes already had but it also directly contributed to the creation and formal recognition of distinct self-governing communities within the Empire.\textsuperscript{11}

2.2.2. The Consequence of Overlapping Authority

It was not long before the Treaty of Augsburg fell through. Both the Emperor and Princes interpreted it to their own convenience and the Lutherans never considered it more than a temporary accord. A further problem was the rise of Calvinism throughout Europe which added a third major worldview of the Christian religion but which was afforded no recognition in the Treaty.\textsuperscript{12}

Tensions heightened further when Emperor Rudolf II (1576-1612) decided in 1607 to re-establish Roman Catholicism in Donauwörth and the Imperial Diet decided in 1608 that renewal of the Treaty of Augsburg was to be conditional upon the restoration of all Catholic church lands appropriated since 1552. In response, Protestants formed the Evangelical Union (1608) under the leadership of Fredrick V of the Palatinate. Catholics, responded in kind, forming the Catholic League (1609) under the leadership of Maximillian of Bavaria. Whilst both coalitions formed in Germanic regions, they were soon joined by foreign forces. On the one hand, England and the United Netherlands sided with the Protestants. The Evangelical Union even obtained the support of Henri IV of France (despite the fact he was Catholic) who saw an opportunity to further French interests. On the other hand, the Catholic League obtained the support of the Emperor’s cousin, Philip III, the King of Spain.\textsuperscript{13}

\textsuperscript{11} Cicely Wedgwood, The Thirty Years War (Jonathan Cape 1944) 42; Schultz and Holloway, ‘Les Origines de la Comité’ (n 1) 872–873; John Merriman, A History of Modern Europe: From the Renaissance to the Age of Napoleon (Norton 1996) 110.

\textsuperscript{12} ‘However, all such as do not belong to the two above named religions [Catholicism or Lutheranism] shall not be included in the present peace but be totally excluded from it.’ – Treaty of Augsburg, Article XVII, trans. in Henry Vedder, The Peace of Augsburg (Crozer Theological Seminary 1901) 5.

\textsuperscript{13} David Sturdy, Fractured Europe 1600-1721 (Wiley 2002) 12–18.
The increasingly large number of powerful actors, each with different religious and political interest, combined with the multitude of overlapping claims of authority made the Thirty Years War inevitable.\textsuperscript{14} The spark that started it all was struck in 1618 at the \textit{Defenestration of Prague} when a group of Protestants invaded the Imperial Palace and threw two Catholic members of the Bohemian Council out of the window. The series of wars that followed are cumulatively known as the Thirty Years War – the most devastating and destructive conflict in Europe until World War I. As David Sturdy notes, the Thirty Years War ‘acquired a momentum which for almost three decades resisted … political control.’\textsuperscript{15} The sheer number of actors, the length of time and the brutality of the war can all be understood as the inevitable consequence of an increasingly complex multi-layered mess of political, secular and spiritual authority.

The \textit{Defenestration of Prague} was a reaction against the closing of Protestant chapels by Catholic officials in Bohemia. King Ferdinand of Styria, a devout Catholic, sought to impose religious uniformity in Bohemia by forcing Roman Catholicism on its people. Given the relatively large number of Protestants in the city, Ferdinand’s unpopularity soon caused the Bohemian Revolt. Taking control of the government within a month, the Protestants disposed of Ferdinand as King of Bohemia and revolted against the authority of the Emperor and Catholicism. The Emperor attempted to repress the Protestant Rebels and thus the first two years of the Thirty Years War were known simply as the Bohemian War. But, unfortunately for him, Frederick V, the leader of the Evangelical Union, quickly joined the Rebels and was later crowned King of Bohemia.\textsuperscript{16}

\begin{itemize}
\item \textsuperscript{14} Beaulac (n 3) 160.
\item \textsuperscript{15} Sturdy (n 13) 27.
\item \textsuperscript{16} William Guthrie, \textit{ Battles of the Thirty Years War: From White Mountain to Nordlingen 1618-1635} (Greenwood Press 2001) 52.
\end{itemize}
Following the events of the Bohemian War, Ferdinand remained one of the most staunch supporters of the Catholic League and when he succeeded Matthias as Holy Roman Emperor in 1619 he was determined to reclaim Bohemia. With the support of the Catholic League, the King of Spain and the Polish-Lithuanian Commonwealth, Ferdinand quashed Frederick V and his Bohemian Rebels and ordered the re-conversion of Bohemia to Catholicism.\[^{17}\]

Yet by this time fighting had spilled well beyond Bohemia. Into the conflict poured new combatants – various German Princes, Denmark, France, Sweden, the United Netherlands and Spain.\[^{18}\] All of Europe was now involved in what would ultimately become the Thirty Years War. As the war moved into its second and then third decade it became increasingly wild. Religious affiliations were soon forgotten and events became ‘so confused that people no longer knew why or against whom they were fighting’.\[^{19}\]

In no time at all, the Thirty Years War had turned into a dreadful massacre of hordes of ill-paid soldiers from countries far and wide who rampaged throughout the lands, looting and killing. Although statistics are hard to come by, the Thirty Years War devastated entire regions and bankrupted most of the combatants. In certain regions, population losses reached as high as 75 percent. Moving troops and battle fronts, combined with the displacement of civilian populations, led to further disease and famine. By the end, there was a desperate need to end the bloodshed.\[^{20}\]

2.2.3. The Rise of the Sovereign State

In 1648, in the cities of Münster and Osnabrück, the Thirty Years War finally ended with the signing of the Treaties of Westphalia. The peace negotiations involved a total of 109 delegations representing various European powers, including the Holy Roman Emperor, Philip IV of Spain, the Kingdom of France, the Swedish Empire, the United Netherlands, the German Princes and the free imperial cities. Spain and the Netherlands also signed a separate treaty approximately ten months earlier to end their Eighty Years War which had run parallel to the Thirty Years War.21

It is a founding myth that the Treaties sought to establish a New World Order – one based on mutual agreement that all States would be sovereign.22 In truth, the Treaties reveal no such grand political aspirations. To a large extent they were very technical documents relating primarily to the redistribution of lands within Europe. Yet they did require that all the parties recognise a modified version of the Treaty of Augsburg, which permitted local rulers to determine the religion of their territories – the options now being Catholicism, Lutheranism and Calvinism.23

Thus, it is within the Treaties that we find the seed of modern sovereignty. Yet, it is the events leading to their signing, rather than the Treaties themselves, which appear to have been the primary motivation for adopting the principle of sovereignty as the central pillar of our modern state system. The Treaties sought to end the brutality of the Thirty Years War by removing the catalyst that started it all – namely, by giving each party the right to self-

21 The treaty between Spain and the Netherlands is closely associated with, although not commonly understood to be part of, the Treaties of Westphalia. For the full text of the Treaties, in Latin and English, see Clive Parry, The Consolidated Treaty Series, vol 1 (Oceana Publications 1969).
determination and non-interference with respect to religious matters within their territory. As Thomas Schultz and David Holloway write:

… the Thirty Years War was marked by two things, both of which arguably contributed to the doctrine of absolute territorial sovereignty that crystallized, as a consequence, in the wake of the Treaties of Westphalia: its extreme horror and brutality, and its confusion, that is the complex, involuted, overlapping, imbricated, entangled character of the power politics that had fuelled it all along.24

Indeed, in *De jure belli ac pacis* Hugo Grotius (1583-1645) wrote that it was the brutality of the Thirty Years War which led him to reflect on the idea of sovereignty as the basis for his international community of States. For Grotius, the concept of sovereignty was built on the idea that ‘good fences make good neighbours.’ By compartmentalising State authority and removing the possibility of overlaps, Grotius believed the principle of sovereignty would contribute to a more peaceful Europe.25

But of course, the problem with this compartmentalisation of authority is that it never truly matched the realities of socio-economic life. Whilst the authority of States could be restrained to certain boundaries, people could not. Men and women continued to travel to foreign lands. There they acquired property, entered into contracts, committed crimes and suffered injury. Yet, legal relations that arose in one State were of no effect in another. Sovereignty meant that no State was required to recognise the authority of foreign States – be that their laws or the judgments of their courts – within their territory. As international trade increased and disputes with foreign elements became more frequent, there was a need to create

24 Schultz and Holloway, ‘Les Origines de la Comity’ (n 1) 863 (author's translation).
a principle that could soften the sharp edge of sovereignty – a principle that would regulate the recognition of foreign authority without jeopardising the peace. Quite simply, there was a need for comity.

2.3. The Concept of Comity

The creation of comity coincided with a period of radical international change. New States were emerging within their own territorial boundaries resisting any claims of authority superior to their own. The brutality of the Thirty Years War, combined with the work of jurists such as Jean Bodin and Hugo Grotius, all contributed to the growing absolutism of sovereignty and its place at the centre of this new Westphalian system.

One State which asserted its sovereignty with force was the United Netherlands. After the conclusion of the Thirty Years War – which ran parallel to its Eight Years War with Spain – the United Netherlands was recognised as independent from the Spanish Crown. In the years that followed, the United Netherlands enjoyed a period of unprecedented prosperity as it became one of the world’s foremost trading nations. Yet, it quickly became apparent that its success depended upon its ability to continue trading within this new system of sovereign States. It was thus imperative for the Dutch to develop a means by which they could recognise foreign law and judgments so that legal relations created abroad would be recognised and enforced at home.

Of course, the Dutch were not the first to wrestle with the idea of conflicting legal orders. In fact, the Statutists had developed a principle-based approach to resolve conflicts of authority between free cities and provinces in Italy as early as the 13th century. But their approach was developed well before the doctrine of sovereignty crystallised in Europe and it quickly became apparent that it was insufficient to resolve conflicts of authority between sovereign States.
In response, Dutch jurists, working during or immediately after the Thirty Years War, broke away from the Statutist tradition. Relying, to varying degrees, on the principle of comity they developed a new means by which to resolve conflicts of authority and minimise inconsistent legal treatment. The origins of comity must therefore be understood as a reaction to these changing forces – the rise of the sovereign State, the need to promote international commerce and the inability of the Statutists’ approach to resolve conflicts of authority within this new Westphalian political-legal framework.

For the Dutch School, comity was a means to reconcile two competing paradigms – the political need for sovereignty and the commercial need to promote international commerce. The central idea behind their work was that States can or ought to (depending on the jurist) act with comity to recognise foreign authority within their territory because international commerce contributes to the prosperity of all nations. The idea that States ought to act with comity ‘for reasons of justice’ was not developed until much later when the principle was exported to and developed within the common law tradition.

In the United States, Justice Story saw comity as a particularly attractive principle to develop a new system of conflict rules for the American context. As was the case in the United Netherlands, Story sought to reconcile the political need for sovereignty with the commercial need to promote international commerce. Yet, in adapting it for the American context, Story increasingly focused on comity’s concern with justice – an idea given little attention by Dutch scholars. To Story, States ought to act with comity to recognise foreign authority, not only because it promotes international commerce, but also because it furthers each State’s paramount duty to do justice.

The idea that States ought to act with comity ‘for reasons of justice’ was developed further in England where the legal context was substantially different to the United Netherlands and even that of the United States. When comity was received in England, the country was
already a major trading nation and Englishmen commonly travelled to foreign shores. But, at the time, English courts were precluded from recognising foreign authority meaning that they were required to either withhold relief in all cases with a foreign element or simply apply English law to resolve cases before them.

To remedy this situation, Lord Mansfield adopted the principle of comity to permit English courts to recognise foreign law and judicial acts in circumstances where it would be just to do so. In the process of adapting it for the English common law, Mansfield reconceptualised comity as a principle concerned primarily with interests of justice. For Mansfield, States ought to act with comity to recognise foreign authority, not because it is commercially beneficial for States, but because it will often be more just that a dispute be resolved subject to foreign law than domestic law.

The remainder of this chapter seeks to provide an account for this claim. Starting with the Statutists and the response of the Dutch School, this section traces comity’s development from Europe, to the United States and England through the works of those most influential to its development. This should provide us with a solid foundation to develop a general principle of comity in Chapter 3.

2.3.1. The Statutists

Prior to the creation of free cities in Europe, there was simply no need for comity. The dominant ideology of the Roman Empire was the concept of *imperium sine fine* which demanded the integration and assimilation of other territories into the Empire. Given the Roman conception of justice as absolute and universal, Roman jurists considered it impossible that justice could
be done by recognising foreign law. The Roman idea of ‘international order was simply the universalisation of the Roman order – a homogenisation of law’.26

Yet, by the time of the Italian Renaissance (1330-1550) an expansion in trade between different Italian and European cities had led to an increase in the number of disputes that contained a foreign element. The heritage of these cities meant that they adopted Roman law as their natural ‘common law’. But, as they broke away from the Empire, they developed their own local laws to reflect their unique cultures leading to substantive differences over time. This development created a unique problem that had not previously been addressed by Roman jurists.27

At a practical level, the existence of different legal orders required jurists to develop a method to resolve conflicts of authority and the inconsistent treatment of events and sets of facts. Yet at a theoretical level, it required jurists to confront a more difficult problem – the idea that there may be more than one conception of justice. If each city’s legal systems was an interpretation of Roman law then theoretically each had to be considered as reflecting a valid idea of ‘justice’. Private international law – and later, comity as part thereof – developed to address this problem. It was created to minimise the potential for conflict and inconsistent treatment by determining which set of laws – or more specifically, which conception of justice – ought to apply to resolve which types of disputes.28

The first idea of private international law (or the conflict of laws) was probably the Statutists who considered each statute – or law – to naturally belong to one of two categories: (1) personal; or (2) territorial. Under the Statutists’ approach, if a statute was personal it attached to the person and applied outside the territory of the relevant local authority – be that

28 ibid 31.
a Prince, Monarch or some other ruler. If a statute was territorial it attached to the land and applied to all persons within the territorial boundaries of the relevant local authority. Any court dealing with a dispute was therefore required to apply the ‘applicable law’ by reference to both the personality of the parties and the place of the disputed action or thing.\textsuperscript{29}

The Statutists sought to address the injustice caused by conflicting legal orders by developing a principle-based approach by which to determine which set of laws – or conception of justice – should apply in any given context. The idea was that disputes could be resolved most justly by choosing that set of laws which were most natural. As great as this methodology may have seemed at the time, its limitations quickly became apparent as differences in substantive law became greater and disputes that contained a foreign element became more frequent and complex. Overtime it became increasingly difficult to categorise laws as simply personal or territorial. The division of law into one of two categories was simply insufficient and a third ‘mixed’ category was latter added to classify those statutes that did not ‘naturally’ fall into either.\textsuperscript{30}

However, as time went on people became increasingly attached to the land. As a result, theories in support of the authority of local rulers began to emerge with greater force. In France, Bertrand d’Argentré (1519-1590) argued for a presumption in favour of classifying laws as territorial. To d’Argentré laws were to be classified as personal or mixed only in exceptional cases.\textsuperscript{31} Jean Bodin and Hugo Grotius took this idea even further arguing that sovereignty necessarily implied that all laws were territorial. In \textit{Les six livres de la republique}\textsuperscript{32} Bodin argued that sovereign States enjoyed ‘absolute and perpetual power’ within their territory meaning that no State could be subject to the will of any other. And, in \textit{De jure belli ac pacis},\textsuperscript{33}

\begin{footnotesize}
\begin{enumerate}
\item ibid 33.
\item Jean Bodin, \textit{Les six livres de la république} (Fayard 1576) 111.
\item Hugo Grotius, \textit{De jure belli ac pacis} (G Blaev 1631).
\end{enumerate}
\end{footnotesize}
Grotius argued for a community of formally equal States built upon a similar conception of sovereignty.

Over time the progressive adoption of the Westphalian system of sovereign States begat the more complete conceptualised view that a State’s authority extended no further than its territorial boundaries and that no State was subject to the authority of any other.\(^{34}\) The brutality of the Thirty Years War, combined with the work of d’Argentré, Bodin and Grotius, all contributed to the progressive absolutism of sovereignty and the view that States enjoyed absolute control over all things, persons and transactions within their territory.

Whilst Grotius did not write directly on the subject of private international law, his conception of sovereignty would later be considered the starting point for all thinking on public and private international law. Perhaps most importantly, his theory was promptly accepted in the United Netherlands where Dutch jurists were wrestling with the problem of how to promote international commerce within this new system of sovereign States who incurred no duty to recognise each other’s authority within their territory.

2.3.2. The Dutch School

Dutch jurists, working during and after the Thirty Years War, were all indoctrinated in the civil law tradition and the teachings of their Statutist predecessors. Yet their work represents a break from the Statutist tradition in favour of a new basis for resolving conflicts of authority between sovereign States – namely, the principle of comity.

There are, I propose, a number of reasons why comity originated in the United Netherlands. First, by the time the Dutch School came to consider the question of conflicting legal orders, Dutch jurists had already accepted and elaborated upon the work of Bodin and

Grotius. After the Thirty Years War – which coincided with its Eight Years War with Spain – the United Netherlands was recognised as independent from the Spanish Crown. The concept of sovereignty found particular favour with Dutch jurists during this time because it reinforced the United Netherlands’s claim to independence, self-determination and non-interference against Spain and other foreign powers.35

Second, in the years following its independence, the United Netherlands enjoyed a period of great prosperity as it became one of the world’s foremost trading nations. After the Thirty Years War, few European powers were in a position to capitalise on the peace. However, the United Netherlands was and when it signed the Treaty of Münster in 1648 to end its Eight Years War with Spain, the treaty was concluded on highly favourable terms. The revolution against the Spanish ushered in a golden age and the United Netherlands became the first modern European State. Within a generation, the United Netherlands was the most progressive major power in Europe and with the collapse of the Papacy and the Holy Roman Emperor’s plans for universal authority and internal disorder in France, Germany and England, it established commercial trading hubs in Europe, Africa, Asia and the Americas.36

But it quickly became apparent that the prosperity of the United Netherlands depended upon its ability to continue trading within this new system of sovereign States. And, whilst the doctrine of sovereignty had led to peace in Europe, it was impeding international commerce. The compartmentalisation of State authority meant that legal relations that arose abroad were incapable of being recognised and enforced at home. This problem attracted the attention of jurists who began to contemplate the grounds on which the recognition of foreign law and judicial acts within the United Netherlands might be justified.37

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35 Yntema (n 1) 16–17.
36 Ibid; Friedrich Juenger, Choice of Law and Multistate Justice (Brill 2005) 19.
37 Yntema (n 1) 18–19.
Third, the political-legal climate in the United Netherlands was particularly favourable for thinking on questions of private international law. The United Netherlands was a loose federation which had formed as if they were one province for its defence against Spain. However, Art. I of The Union of Utrecht\textsuperscript{38} stipulated that whilst the Provinces were to unite for this common purpose, the traditional privileges and rights of each were not to be diminished. This decentralised regime, combined with the fierce independence of the Provinces, provided a fertile breeding ground for thinking on private international law. The Dutch needed a means to resolve both inter-national and intra-national conflicts of authority that arose between sovereign States and provinces alike.\textsuperscript{39}

Fourth, by this time, it was increasingly evident that the Statutists’ approach was simply incapable of resolving conflicts between sovereign States. Italian and French jurists had been wrestling with the question of conflicts since the 13th century but they wrote before the doctrine of sovereignty crystallised in Europe. Their approach simply did not account for Europe’s changed political-legal landscape. As the opportunity for contact and business outside of one’s own territory increased, so did the complexity of the questions confronted by the Statutists. Accelerated commerce and movement between States inevitably wore down the hard lines of Statutism and as the doctrine grew more complex, it began drawing distinctions that seemed increasingly arbitrary and ‘unnatural’.\textsuperscript{40}

Comity’s origins must therefore be understood as a reaction to these changing forces – the progressive adoption of sovereignty, the need to promote commerce between sovereign States and independent provinces alike and the inadequacy of the Statutists’ approach to resolve conflicts of authority. Taking their cue from Bodin and Grotius, the Dutch School thus sought

\textsuperscript{38} Unie van Utrecht (1579).
\textsuperscript{39} Yntema (n 1) 17–19; Beale (n 31) 38.
to address the vexed problem of how to reconcile the commercial need to recognise foreign authority with the political need to uphold the doctrine of sovereignty.

2.3.2.1. Paulus and Johannes Voet

Paulus Voet (1619-1667) was the first to suggest that States may recognise foreign authority comiter. Accepting the political need for sovereignty, Voet considered all States to be equal and law to be inherently territorial. Yet, he still had one foot within the Statutist tradition considering there to be nine exceptions to this general rule which he traced back to Roman law.41 The first eight were nothing new, but his ninth was – the idea that States could, if they so choose, recognise foreign authority out of comity.42

To Voet, the principle of sovereignty meant that no State could exercise authority over another. The logical implication then was that any recognition of foreign authority had to be completely within the discretion of each State. In De statutis eorumque concursu liber singularis,43 Voet developed his conception of comity as a discretionary principle States could use to recognise foreign authority. But, he made it clear that the primacy of sovereignty meant that there was no obligation to do so – it may happen, but it need not happen.44

Voet touched on the idea that States recognise foreign authority for reasons of justice – aequitate as he put it.45 Like his Statutist predecessors, he understood that, in any one case, there may be competing conceptions of justice and that often justice might better be done if States recognise foreign law rather than apply their own. Yet, a literal reading of his work suggests that Voet’s primary concerns were governmental in nature. True, the recognition of

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41 Yntema (n 1) 22–23.
43 Pauli Voet, De statutis eorumque concursu liber singularis (1661).
45 ibid Sect. IV, Cap. II, 17.
foreign authority may further interests of justice in certain cases. But States do not recognise foreign authority ‘for reasons of justice’. They do so because it is in their mutual interest – namely, because it promotes international commerce without derogating from each State’s sovereign right to self-determination and non-interference. The idea that States ought to act with comity ‘for reasons of justice’ was not developed until much later.

Paulus Voet’s idea of comity was more eloquently endorsed by his son, Johannes Voet (1647-1713). In *Commentarius ad pandectas* Johannes Voet adds little to his father’s original idea but, through his succinct writing style, he advanced his father’s conception of comity as a discretionary principle. Considering all law to be inherently territorial, and all States to be sovereign, Johannes Voet considered any recognition of foreign authority to be completely within the discretion of each State. It is true, he noted, that the courts of one State may refuse to assume jurisdiction where the same action is already pending abroad, they may recognise foreign law or give effect to foreign judgments within their territory. But, when they do, they do so only out of mutual utility. Like his father, he made it clear that no State is obliged to recognise the proceedings, laws or judgments of another State within their territory.

2.3.2.2. Ulrik Huber

In the interval between the key works of Paulus and Johannes Voet, another basis for resolving conflicts of authority between sovereign States was advanced by Ulrik Huber (1636-1694). Huber, a Professor at the University of Franeker and a member of the Court of Appeal in Friesland, sought to supplement the work of Grotius who did not explore the issue in his work. Huber’s reputation was enormous and extended well beyond Friesland, attracting many students from Holland, Germany and Scotland. He is generally considered the father of comity

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46 Johannis Voet, *Commentarius ad pandectas* (Tomus Quartus 1829).
47 Watson (n 44) 15–16; Yntema (n 1) 13–14.
48 Yntema (n 1) 24; Watson (n 44) 16.
and his conception of the principle would later migrate to the United States and England where it became instrumental in the development of many common law conflict of law rules and doctrines.49

In *De conflictu legum*,50 Huber articulates three ‘axioms’ as the basis of his new theory of private international law which he considered self-evident and not open to question:

1. The laws of each State have force within the boundaries of the State, and bind all subject to it, but not beyond (Digest 2.1.20);
2. All persons within the limits of a State, whether they live there permanently or temporarily, are deemed to be subjects thereof (Digest 48.22.7.10);
3. States will act by way of comity, so that the laws of every State, having been applied within its own boundaries, should retain their effect everywhere so far as they do not cause prejudice to the powers or rights of such States or of its subjects.51

Huber’s first two axioms simply continue the progressive trend towards absolute territorial sovereignty. Yet, in describing sovereign authority, Huber takes the idea further than the Voets, rejecting what remained of the Statutists’ approach by arguing that all laws are inherently territorial. Instead his theory of private international law derived solely from the twin concepts of *sovereignty* and *comity*.52

49 Yntema (n 1) 25; Watson (n 44) 1–3.
51 Lorenzen (n 50) 227.
52 Childress (n 34) 20; Lorenzen (n 50) 137; Juenger (n 36) 20; Winston Nagan and Aitza Haddad, ‘Sovereignty in Theory and Practice’ (2012) 13 San Diego International Law Journal 429, 395.
The pertinent question then is whether Huber’s conception of comity differs from that advanced by the Voets, and if so, how. There are, I suggest, a number of possible interpretations of Huber’s third axiom. On the one hand, a number of scholars consider Huber’s comity to be no different to that advanced by the Voets. This has led them to consider Paulus Voet, rather than Huber, to be the true father of comity.\textsuperscript{53} Indeed some of Huber’s writing suggest that indeed he did intend for his third axiom to be discretionary in much the same way – the most notable being the lack of authority he provides for his third axiom compared to axioms one and two. In laying down his first two axioms Huber based them on Roman law – Digest 2.1.20 and Digest 48.22.7.10 respectively – suggesting that they form part of the \textit{ius gentium}. After the conclusion of the \textit{Treaties of Westphalia}, and acceptance of the principle of sovereignty expounded by Bodin and Grotius, these two axioms reflected State practice and could hardly be argued with. But, in laying down his third axiom Huber neglects any reference to Roman law (and thus the universality of the \textit{ius gentium}). There is an argument then that Huber never intended for his third axiom to form part of the \textit{ius gentium}.\textsuperscript{54} Comity was simply ‘common sense’ because it facilitated international commerce within the political-legal framework laid down by axioms one and two.

On the other hand, some of Huber’s work suggests that he may have conceived of comity as obligatory in nature. For the Voets, sovereignty is supreme, the necessary implication being that no State is obliged to act with comity – it happens because it is commercially desirable, but it need not happen. Huber however appears to conceiving of comity, not as an exception to sovereignty, but rather as a necessarily corollary of it. To Huber, comity flows naturally from sovereignty so that each makes the other work. This suggests that he may have considered States to have an obligation to act with comity – a proposition supported by his use

\textsuperscript{53} Roeland Kollewijn, \textit{Geschiedenis van de Nederlandse wetenschap van het internationaal privaatrecht tot 1880} (NV Noord-Hollandsche Uitgeversmij 1937); Lainé (n 31).
\textsuperscript{54} Watson (n 44) 4.
of the word *will*, rather than *can or should*, in axiom three. Indeed, nowhere in his work does Huber indicate a situation in which a State has a choice not to act with comity and he certainly does not cite the Voets.\(^{55}\)

Yet, if this interpretation is correct, what is the source of a State’s obligation to act with comity? Doesn’t sovereignty imply complete control over all matters within one’s territory, including whether or not a State will act with comity? There are, I suggest, two possible sources for Huber’s obligation to act with comity. First, it is possible that Huber considered all three of his axioms to form part of the *ius gentium*. A number of authors support this conclusion, including several modern Dutch jurists.\(^{56}\) The fact that Huber’s third axiom provides no authority in Roman law does not necessarily mean that it does not derive from Roman law or necessarily form part of the *ius gentium*. As Huber explains:

> It often happens that transactions entered into in one place have force and effect in a different country or are judicially decided upon in another place. It is well known, furthermore, that after the breaking up of the provinces of the Roman Empire and the division of the Christian world into almost innumerable nations, being not subject one to the other, nor sharing the same mode of government, the laws of the different nations disagree in many respects. It is not surprising that there is nothing in the Roman law on the subject inasmuch as the Roman dominion, covering as it did all parts of the globe and ruling the same with a uniform law, could not give rise to a conflict of different laws. The fundamental rules according to which this question should be decided must be found, however, in the Roman law itself. Although the matter belongs rather to the law of nations than to the civil law, it is manifest that what the different nations observe

\(^{55}\) ibid 15.

\(^{56}\) See, most notably, Watson (n 44); Kollewijn (n 53) 133; Theodorous de Boer, ‘Living Apart Together: The Relationship Between Public and Private International Law’ (2010) 57 Netherlands International Law Review 183.
among themselves belongs to the law of nations. For the purpose of solving the subtlety of this most intricate question, we shall lay down three axioms which being conceded as they should be everywhere will smooth our way for the solution of the remaining questions.

It follows, therefore, that the solution of the problem must be derived not exclusively from the civil law, but from convenience and the tacit consent of nations. Although the laws of one nation can have no force directly within another, yet nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law. And that is the reason for the third maxim concerning which hitherto no doubt appears to have been entertained.\(^{57}\)

Huber is not out of line with other civil law jurists in taking this approach. In exactly the same way, Bartolus, who sought to build a system of private international law between free Italian cities, based his position on Roman law despite its lack of authority. Indeed, if the law was to grow and meet new challenges not faced by the Romans, then it was necessary for jurists to use such an approach. Of course, as Huber knew, he was not going to find any authority in Roman law for comity because the Romans did not recognise foreign legal systems or different conceptions of justice.\(^{58}\)

If this interpretation is correct, there is a skilful sleight-of-hand in all this. Huber, starts by admitting that his third axiom did not exist in Roman law. But, he claims that because his third axiom is self-evident and has never been in doubt it forms part of the *ius gentium* – it is

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57 Lorenzen (n 50) 226–227.
accepted everywhere. Huber does not make it easy though, he provides no evidence that his third axiom is accepted everywhere. But he argues that he does not need to because his third axiom is exactly that – an ‘axiom’ – a rule that requires no proof because it is self-evident and not open to question.59

Huber’s first and second axioms are to the effect that the laws of a State are not directly binding beyond its territory. His third axiom would thus be to the effect that, subject to the exception that foreign law would cause prejudice to a State or its citizens, every State is bound to recognise foreign law by way of comity. Under this interpretation, foreign law is therefore recognised, but indirectly, so there is no conflict between axioms one and two, on the one hand, and axiom three, on the other. By recognising the authority of another State by consent rather than compulsion, States facilitate international commerce whilst preserving their sovereignty.60

There is one other possible source for Huber’s obligation to act with comity which I suggest has the most support on a reading of his De conflictu legum and associated works. By including the word will, yet failing to provide authority for his third axiom as part of the ius gentium, Huber may have conceived of his third axiom as giving rise to an imperfect obligation. This interpretation is supported – to a certain extent – by the work of Justice Story (discussed below) who considered the nature of the obligation to act with comity in his Commentaries on the Conflict of Laws.61

The distinction between perfect and imperfect obligations was well known, not only to philosophers of the time, but also to the jurists of the Dutch School.62 Grotius, whose work greatly influenced Huber, wrote of the distinction in De jure belli ac pacis, as did other legal theorists before and during Huber’s time. Indeed, imperfect obligations began their life as

59 In Praelectiones juris romani et hodierni, Huber explain what he means by an ‘axiom’, a term he borrowed from the study of mathematics. Axioms, he declared, are nothing more than self-evident truths. They require no proof and their correctness cannot be faulted. See also, Watson (n 44) 4–7.
60 ibid 7–9; Childress (n 34) 22.
61 Joseph Story, Commentaries on the Conflict of Laws (Hilliard, Gray & Co 1834).
62 Watson (n 44) 21.
imperfect rights in the work of Grotius. Although he wrote after Huber’s death, Vattel succinctly summarised the distinction between perfect and imperfect obligations in *Le droit des gens*. Drawing a parallel between the relations of free men and sovereign States, Vattel wrote of the distinction between perfect and imperfect obligations as follows:

To understand this properly we must note that obligations and the corresponding rights … are distinguished into internal and external. Obligations are internal in so far as they bind the conscience and are deduced from the rules of our duty; they are external when considered relatively to other men as producing some right on their part. Internal obligations are always the same in nature, though they may vary in degree; external obligations, however, are divided into perfect and imperfect, and the rights they give rise to are likewise perfect and imperfect. Perfect rights are those which carry with them the right of compelling the fulfilment of the corresponding obligation; imperfect rights cannot so compel. Perfect obligations are those which give rise to the right of enforcing them; imperfect obligations give but the right to request.

It will now be easily understood why a right is always imperfect when the corresponding obligation depends upon the judgment of him who owes it; for if he could be constrained in such a case he would cease to have the right of deciding what are his obligations according to the law of conscience.

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63 This terminology makes much more sense of the label: a perfect right includes the authorisation to use force and coercion to ensure the right is respected. To have an imperfect right, on the other hand, is to be genuinely owed something, but not to have license to use force to get it. So, an imperfect right is, in a sense, incomplete – it does not come with everything that we might want in a right. For more on imperfect obligations, see Andrew Schroeder, ‘Imperfect Duties, Group Obligations, and Beneficence’ (2014) 11 Journal of Moral Philosophy 557.
65 Vattel (trans. B. Fenwick) (n 64) 137.
Thus, an obligation, and its corresponding right, are external whenever each of them is vested in a different subject – i.e. where Party A has an obligation to perform some act and Party B has the correlative right that Party A fulfil that obligation. Yet, external obligations may be perfect or imperfect depending on who has the authority or capacity to judge the existence and nature of the obligation.

If the person who is obliged also has the authority or capacity to judge the existence and nature of the obligation they are to perform – if he has ‘the right of deciding what are his obligations according to the law of conscience’ – then he is only imperfectly obliged, and his counterpart has only an imperfect right to request that he fulfil that obligation. As long as a person retains the authority to judge himself, the obligation remains imperfect. If, however, the person who claims a right can also judge the existence and nature of the obligation, or if a third party has authority or capacity to do the same, then we have a case of a perfect obligation and a perfect corresponding right.

External obligations and rights arise because we are required to interact with others in order to pursue our own greater advantage. As Vattel explains, since man originally entered the state of nature as free and independent, he remains the judge of his obligations towards others. For the same reason, he has no authority to judge what others owe to him in a manner perfectly binding them. A perfect obligation, and corresponding right, may then only be created if, by free will, a person alienates his authority or capacity to judge his own duties and obligations and transfers it as an additional right to the party which originally had the imperfect right of demanding the fulfilment of the obligation or to a third party. This transfer of the right
of judgment is the essence of contract. Properly speaking then, there are no perfect rights and obligations in the state of nature.\textsuperscript{66}

In the same way, sovereign States exist in a state of nature. Yet, in order to pursue their own greater advantage, they must interact. As Huber was acutely aware, the prosperity of the United Netherlands depended upon its ability to promote international trade and commerce. These interactions of course, create obligations, and corresponding rights, which may be either perfect or imperfect in nature. As perfect obligations may only be created by contract, States can be said to have a perfect obligation to recognise international law – which we are told is based on their tacit consent. Thus, if, one were to accept that Huber considered comity to form part of the \textit{ius gentium} then comity could be said to give rise to a perfect obligation – that is an obligation capable of being enforced, not just in the forum of conscience.

However, I suggest that Huber likely considered comity to give rise to an imperfect obligation. In this sense, every State has an obligation to act with comity which derives from the mutual benefit of international commerce and from the inconvenience that would result from a contrary doctrine. Yet, sovereignty implies that the obligation to act with comity will always be imperfect. It follows that every State has the right to judge for itself the nature and extent of its obligation to act with comity towards the authority of other States according to the laws of its own conscience.

Under this interpretation, Huber’s conception of comity differs to that advanced by the Voets. For the Voets, there is certainly no obligation to act with comity. Comity is simply a means by which a State \textit{can}, if it so chooses, recognise the authority of another. If however, Huber conceived of comity as giving rise to an imperfect obligation, then States have an obligation to act with comity. The obligation is imperfect – that is, incapable of being enforced

\textsuperscript{66} Peter Remec, \textit{The Position of the Individual in International Law According to Grotius and Vattel} (Martinus Nijhoff 1960) 136–140.
by others – but it is an obligation nonetheless. At most, the correlative right of such an imperfect obligation entitles one State to ask another to recognise their authority, but it certainly does not given them a right to demand in a manner consistent with a perfect right.

This means that whilst States have a duty to act with comity, exactly how they discharge that duty is completely within their discretion. Perfect obligations, like the obligation to keep a promise, do not provide us with such discretion. The obligation to repay a loan for example obliges the borrower to repay the precise amount agreed upon, to a specific person, often at a specific time. Conversely, imperfect obligations like beneficence, charity, gratitude, mercy, or comity for that matter, all carry with them a certain discretion. Most people think that while the obligation to be charitable requires us to give something to the needy, it does not require that we give a set amount, and it does not require that we donate to any particular person or organisation. Similarly, while we may be obliged to be merciful, that obligation does not specify the form our mercy must take, nor exactly when or to whom we must exhibit it. In the same vein, if Huber considered comity to give rise to an imperfect obligation he meant for States to be obliged to act with comity. Yet, as with all imperfect obligations, he must have considered it within the discretion of each State to determine, in accordance with its own conscience, how it would exhibit comity towards the authority of other States.

Short of waking Huber from the dead, we may never know with certainty how he conceived of his third axiom. Yet, I suggest he likely conceived of it as giving rise to an imperfect obligation. Thus, whilst he envisaged his first two axioms to give rise to perfect obligations, forming part of the *ius gentium*, he conceived of his third as an imperfect obligation the fulfilment of which was to lay firmly within the discretion of individual States. Such an interpretation is certainly keeping with the positivist progression towards the growing absolutism of sovereignty at the time and the pressing need to form a basis by which to recognise foreign authority.
As we will see below, it was Huber’s conception of comity, rather than the Voets, that would later find favour in other jurisdictions. In the common law, Huber was relied upon more than any other jurist to develop conflict of law rules and doctrines. As Ernest Lorenzen notes:

Of the vast number of treaties on the Conflict of Laws Huber’s “De Conflictu Legum Diversarum Imperiis” is the shortest. It covers only five quarto pages; and yet it has had a greater influence upon the development of the Conflict of Laws in England and the United States than any other work. No other foreign work has been so frequently cited.67

Comity’s place at the centre of US and English private international law is hardly surprising. Huber conceived of comity, not as a standalone principle to resolve conflicts of authority, but rather as a principled basis upon which to build concrete rule and doctrines of law. At the time of its inception in the common law both the United States and England required – to varying degrees – a means to build an array of conflict rules and doctrines. Campbell McLachlan writes that comity was a particularly attractive principle for this purpose:

Huber, Voet and the jurists that followed them in the modern Conflict of Laws used the concept of comity as a springboard from which they proceeded to develop a highly organized and sophisticated set of choice of law rules. In this sense, “comity” did not remain a vague desideratum – an invitation to replace law with its antithesis in mere courtesy and discretion. On the contrary, it supplied the basis for the elaboration of a detailed set of positive rules, grounded in practical reality.68

67 Lorenzen (n 50) 199.
Indeed, those of the Dutch School developed fairly advanced conflict rules and doctrines based on comity. In De conflictu legum, Huber notes that his three axioms were intended to ‘smooth’ the way for the resolution of all conflict of law problems. Using them as a base, he went on to develop concrete rules and doctrines that would later guide not only the courts of Friesland, but courts around the world. Whilst comity is certainly vague in the abstract, Huber demonstrated that it could be used to develop positive rules and doctrines of law aimed at regulating how States ought to act with respect of each other’s authority.

2.3.3. Comity in the Common Law

Comity was most famously introduced to the common law world by the American jurist Justice Story in the early 19th century. Much like Huber, Story sought to rely on comity to develop a new system of private international law capable of reconciling the political need for sovereignty and the commercial need for international (and interstate) commerce in the United States. Yet, in adapting the principle for the American context, Story increasingly focused on the connection between comity and justice. To Story, the obligation to act with comity derived, not only from the commercial need to promote international commerce among sovereign States, but also from each State’s paramount duty to do justice to those subject to their own authority.

This idea that States ought to act with comity ‘for reasons of justice’ was developed further, most notably, by Lord Mansfield and John Westlake in England. When comity was received in England, the country was already a major trading nation. Yet, at the time, English courts were unable to recognise foreign authority or grant relief in cases with a foreign element. To remedy the obvious injustice that would result from always applying English law, or from

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69 Lorenzen (n 50) 226.
 withholding relief all together, Mansfield adopted the principle of comity to permit English courts to recognise foreign authority in circumstances where it would be just to do so.

However, unlike Story, Mansfield and Westlake repositioned the source of the obligation to act with comity solely within each State’s paramount duty to do justice to those subject to their own authority. In effect, they detached comity from any concern it had with the promotion of international commerce or as a principle founded on the mutual benefit of States. To Mansfield and Westlake, private citizens would continue to engage in international commerce regardless of whether English courts recognised foreign authority. The question was therefore one of achieving justice within the Westphalian political-legal framework of sovereign States. For them, States ought to act with comity, not because it is in their mutual commercial interest, but rather because, in certain cases, it will be more just to recognise foreign law or judgments than apply one’s own domestic law or withhold relief entirely.

2.3.3.1. Justice Story

Huber’s conception of comity was adapted for the common law world most famously by Justice Joseph Story (1779–1845). Story, a Professor at Harvard University and a Justice of the Supreme Court of the United States, sought to rely on comity to develop a new system of private international law for the United States.70 In his Commentaries on the Conflict of Laws,71 Story endorsed Huber’s work, writing:

Some attempts have been made, without any success, to undervalue the authority of Huberus… But it will require very little aid of authority to countenance his merits… It

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70 Early judicial decisions in the United States demonstrate that comity was received long before Story turned his attention to the subject. Yet, it was Story’s academic and judicial stature that lent unprecedented credibility to the idea of comity as a means of recognising foreign authority in the United States. See Kurt Nadelmann, ‘Joseph Story’s Contribution to American Conflicts Law: A Comment’ (1961) 5 The American Journal of Legal History 230, 230–231.

71 Story (n 61).
is not, however, a slight recommendation of his works, that hitherto he has possessed an undisputed recommendation preference on this subject over other continental jurists, as well as in England as in America.\textsuperscript{72}

Like Huber, Story saw comity as a means of reconciling sovereignty with the need for international and interstate commerce. And, just as comity had done in the United Netherlands, Story believed it would contribute to the greater prosperity of a newly federated United States.\textsuperscript{73} Adopting Huber’s three axioms, Story set about building a system of private international law capable of resolving both international and internal conflicts of authority.\textsuperscript{74} Elaborating on each axiom Story writes:

\begin{quote}
It is an essential attribute of every sovereign that it has no admitted superior, and that it gives the supreme law within its own dominions on all subjects appertaining to its sovereignty. What it yields, it is its own choice to yield; and it cannot be commanded by another to yield it as a matter of right. And, accordingly, it is laid down by all publicists and jurists, as an incontestable rule of public law, that one may with impunity disregard the law pronounced by a magistrate beyond his own territory…\textsuperscript{75}
\end{quote}

But of the nature, and extent, and utility of this recognition of foreign laws, respecting the state and conditions of persons, every nation must judge for itself, and certainly is

\textsuperscript{72} ibid 32.
\textsuperscript{73} Story was acutely aware that the United States was in an analogous position to the United Netherlands in this regard. ‘To no part of the world is [comity] of more interest and importance than to the United States, since the union of a national government with already that of twenty-six distinct states, and in some respects independent states, necessarily creates very complicated private relations and rights between the citizens of those states…’ – ibid 9.
\textsuperscript{74} Elliott Cheatham, ‘American Theories of Conflict of Laws: Their Role and Utility’ (1945) 58 Harvard Law Review 361, 376; Childress (n 34) 24; Beale (n 31) 24.
\textsuperscript{75} Story (n 61) 8.
not bound to recognise them, when they would be prejudicial to its own interest. The very terms, in which the doctrine [of comity] is commonly enunciated, carry along with them this necessary qualification and limitation of it… It is, therefore, in the strictest sense, a matter of the comity of nations, and not of any absolute paramount obligation, superseding all discretion on the subject.

It has been thought by some jurists that the term, ‘comity’, is not sufficiently expressive of the obligation of nations to give effect to foreign laws, when they are not prejudicial to their own rights and interests... And it has been suggested, that the doctrine rests on a deeper foundation; that it is not so much a matter of comity, or courtesy, as of paramount moral duty. Now, assuming, that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity, and charity. Every nation must be the final judge for itself, not only of the nature and the extent of the duty, but of the occasions, on which its exercise may be justly demanded.

The true foundation, on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice… There is then not only no impropriety in the use of the phrase ‘comity of nations,’ but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another.76

76 ibid 34–37.
Like Huber then, Story acknowledged that each State has the right to self-determination and non-interference. To be sure, no State can command another ‘as a matter of right’ to recognise their authority within their territory. Yet, it is clear that Story considered States to have an obligation to act with comity – an imperfect obligation that derives, not only from the mutual benefit of international commerce, but also from ‘a sort of moral necessity to do justice.’

As with all imperfect obligations, Story argues that it is within the discretion of each State to determine the nature and extent of their obligation to act with comity – to determine exactly how and when they will exhibit comity. Citing Vattel’s discussion on the nature of imperfect obligations (above at 2.3.2.2), Story writes:

… it belongs exclusively to each nation to form its own judgement of what its conscience prescribes to it; of what it can, or cannot do; of what is proper, or improper for it to do. And of course it rests solely with it to examine and determine whether it can perform any office for another nation, without neglecting the duty which is owes to itself.

Elaborating on the nature of the obligation to act with comity, Story continually stresses comity’s concern with justice. To Story, part of a State’s ‘conscience’ must necessarily be preoccupied with its duty to do justice to those subject to its own authority. In this sense, Story considers the principle of comity ‘to stand upon just principles’ and to derive, not only from the mutual benefit and utility of international commerce, but also from each States’ paramount duty to do justice to those subject to their own authority.

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77 ibid 37.
78 ibid 36.
79 ibid 37.
As an imperfect obligation, no State can demand ‘as a matter of right’ the recognition of its laws or the judgments of its courts within the territory of another. But, ‘every nation must judge for itself what is its true duty in the administration of justice in its domestic tribunals.’

In certain circumstances, it will necessarily be more just to recognise foreign law or a foreign judgment than simply apply domestic law to every case with a foreign element. In such cases, States, and their courts, have a duty to recognise foreign authority. In Story’s mind, a failure to do so will necessarily amount to a failure to do justice – the primary duty of every State through its courts. By focusing on justice, Story repositioned the source of the obligation to act with comity – moving it away from the mutual commercial benefit of States to include judicial concerns.

Drawing on the principle of comity, Story developed a complex system of conflict rules and doctrines for the American context. Much like Huber’s De conflictu legum, Story sets out his understanding of comity at the beginning of his Commentaries on the Conflict of Laws before drawing upon the principle time and time again to develop concrete and sophisticated rules and doctrines of law. By harnessing comity’s flexibility in the abstract, Story developed fine-grained rules and doctrines of law aimed at regulating specific types of cases.

Judicial decisions in the United States immediately after the publication of Story’s Commentaries demonstrate that comity was well received by the courts. Only five years after publication, the Supreme Court of the United States adopted Story’s conception of comity in Bank of Augusta v Earle and, together with the lower courts, has applied the principle ever since. Increasingly, the courts paid less attention to the idea that the source of their obligation to act with comity was to be found in the mutual commercial benefit of States. Rather, as will

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80 ibid 34.
81 ‘Before entering upon any examination of the various heads, which a treaties upon the Conflict of Laws will naturally embrace, it seems necessary to advert to a few general maxims or axioms, which constitute the basis, upon which all reasoning on the subject must necessarily rest...’ – ibid 19.
be shown in Chapter 3, they increasingly drew upon comity to recognise foreign authority within their territory ‘for reasons of justice’.

2.3.3.2. Lord Mansfield

Across the Atlantic, England’s unified legal system was not a fertile ground for thinking on questions of private international law. Unlike the United Netherlands or the United States, the English common law was the product of a powerful centralised court system that extended throughout the entire realm. Of course, by this time, England was a major trading nation and Englishmen commonly travelled to foreign shores. There they acquired property, entered into contracts, committed crimes and suffered injury. But the common law, which had developed to meet the needs of a feudal society, was not attune to the legal problems posed by international relations. In English courts, jurors had to be drawn from the locality of the disputed action or thing. And, as the courts were powerless to empanel foreign jurors, they were forced to dismiss cases that required the determination of facts that had materialised beyond the realm. Plaintiffs were thus left to seek redress abroad.83

To remedy this situation English lawyers would often resort to a typical common law ruse. A plaintiff who had been maimed in Hamburg, for example, would plead that that the city was situated in England, and the courts accepted such allegations so that the parties had access to some level of justice.84 Since the matter was held to have ‘occurred’ in England, there was no need to recognise foreign authority because the applicable law would always be English law.

But this fiction was soon revealed for what it was and the courts were aware that the application of English law to every dispute with a foreign element would lead to injustice. There was thus a judicial need to recognise foreign laws and judgments in England. Since,

84 See, for example, Ward’s Case (1625) 82 Eng Rep 245 (KB) 246 (Justice Doderidge).
English courts had not dealt with the issue before, the origins of what would later become English conflict of laws had to be found outside of England. In Potinger v Wightman Sir Samuel Romilly declared that, with respect to such matters, he was compelled to draw upon the work of civil jurists:

Of authority on this subject, in the English law, none exist … but it has been much discussed by foreign jurists, to whose opinions in the absence of domestic authorities our courts are accustomed to resort on questions which (like the present) must be decided rather by general principles of law, than by the peculiar doctrines of any local code.

And, it was to the Dutch School to which they turned. A very noticeable feature of English conflict of law decisions during the 18th and early part of the 19th century is the frequency with which Huber is cited. Indeed, Chancellor James Kent noted that when the question ‘was first introduced in Westminster Hall, the only work which attracted attention was a tract by Huberus entitled De conflictu legum.’

The introduction of Huber’s conception of comity into English law was likely facilitated by the very close relations that existed between Scotland and the United Netherlands at the time and Scotland’s later union with England. Many Scottish intellectuals – denied opportunities at English universities as dissenters during the 17th and 18th century – studied law at Leiden,

86 Potinger v Wightman (1817) 3 Mer 67 (Rolls Ct.).
87 ibid 72.
88 Davies (n 85) 52.
89 See, for example, Robinson v Bland (1760) 2 Burr 1077 (KB); Holman v Johnson (1775) 1 Cowp 341 (KB); Hog v Lashley (1792) 6 Br PC 550 (KB); Potinger v Wightman (1817) 3 Mer 67 (Rolls Ct.); British Linen Co v Drummond (1830) 10 B & C 903 (KB); De La Vega v Vianna (1830) 1 B & Ad 284 (KB); Huber v Steiner (1835) 2 Bing NC 202 (KB); Don v Lippmann (1837) 5 Cl & F 1 (HL); Leroux v Brown (1852) 12 CB 801 (Ct. CP).
90 James Kent, A Practical Treatise on Commercial and Maritime Law (Clark 1837) 371.
Utrecht and Franeker where the Voets and Huber lectured. The frequent practice adopted by Scottish jurists during this time was to complete their legal studies at these universities before returning home. In all likelihood they would have been directly acquainted with the ideas of the Dutch School.91

This proposition is supported by evidence that comity originally received greater attention in Scotland than it did in England.92 And, when the Treaty of the Union was concluded in 1707 between England and Scotland, the ideas of the Dutch School were thus likely imported by Scottish jurists into English law. Huber’s comity was obviously an attractive principle for English jurists who were wrestling with the question of how to recognise foreign authority in England.

It is perhaps no coincidence then that credit for the introduction and early development of comity in England is generally afforded to a Scotsman – William Murray, better known as Lord Mansfield (1707-1793). Through a series of judgments, Mansfield, a Scottish jurist and later Lord Chief Justice of the King’s Bench, rejected the Statutists’ approach for the foundation of English conflict of laws, instead favouring Huber’s principle of comity.93 In Holman v Johnson94 Mansfield held:

I am very glad the old books have been looked into. The doctrine Huberus lays down, is founded in good sense, and upon general principles of justice. I entirely agree with him.95

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91 John Westlake, A Treatise on Private International Law with Principal Reference to Its Practice in England (6th edn, Sweet & Maxwell 1922) 7–8; Davies (n 85) 53.
92 Andrew Gibb, International Private Law in Scotland in the XVIth and XVIIth Centuries (W Green and Son 1928). See also, Balfour v Balfour (1793) 6 Br PC 500 (KB) where the leading Scottish decisions on comity are cited.
93 Cecil Fifoot, Lord Mansfield (Clarendon Press 1936) 35; Davies (n 85) 52; Kent (n 90) 371.
94 Holman v Johnson (1775) 1 Cowp 341 (KB).
95 ibid 344-345 (Lord Mansfield).
Like Story, Mansfield appears to have considered States to have an *imperfect obligation* to act with comity. And, like Story he considered that obligation to derive from each State’s paramount duty to do justice. Yet, Mansfield took comity’s concern with justice further than Story. Whilst Story considered the obligation to act with comity to derive from the mutual benefit of international commerce to States and from each State’s duty to do justice, Mansfield considered the obligation to derive solely from the latter.

Mansfield would develop this conception of comity through a number of important cases – the most notable of which was *Somerset’s case.*\(^{96}\) In that case Mansfield was called upon to decide the fate of a slave who had been born in the United States. At that time slavery was legal in the United States but not in England. Somerset, who had sailed to London with his master, argued that in England he was no longer a slave and his legal counsel argued that, under Huber’s third axiom, an English court need not ‘recognise’ foreign law within its territory if it would be prejudicial to England or the duty it owes to those subject to its own authority. Applying Huber’s third axiom, Mansfield held that although non-recognition would likely cause ‘inconvenience’ to the relations between the United States and England, US slavery laws were ‘so odious’ that comity would not extend to their recognition in England.\(^{97}\)

Just like Story, Mansfield made it clear that whilst every State ought to act with comity, the obligation to do so can only ever be imperfect. This implies that it is wholly within the discretion of each State to determine the nature and extent of its duty to act with comity towards the authority of others. Referring to Huber’s third axiom, Mansfield held that slavery was but one example of a situation where foreign law would not be recognised because it was prejudicial to England and those subject to its own authority – in essence, it would require English courts to subvert their own duty to do justice. This of course included the duty to do justice to

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\(^{96}\) *Somerset v Stewart* (1772) 98 ER 499 (KB).

\(^{97}\) ibid 510 (Lord Mansfield).
Somerset who, as a temporary alien in England, was subject to the authority of the English courts.

In recognising that the decision may result in ‘inconvenience’, Mansfield effectively detached the obligation to act with comity from State interests. To Mansfield, States do not act with comity for reasons of mutual commercial benefit. Rather, they act with comity purely for ‘reasons of justice’. This of course means that the subsequent effect recognition or non-recognition may have on international commerce becomes a subsidiary concern.

The idea that courts ought to act with comity for reasons of justice was quickly adopted by English courts and scholars. For the courts, comity provided them with a new means to recognise foreign law in circumstances where the application of English law would ordinarily lead to injustice. Writing in 1767, Lord Kames, who dedicated his *Principles of Equity* to Mansfield, wrote of the reasons for comity as follows:

… though a statute has no coercive authority as such extra territorium, it becomes necessary, upon many occasions, to lay weight upon foreign statutes, in order to fulfil the rules of justice.98

2.3.3.3. John Westlake

The idea that State ought to act with comity for reasons of justice was advanced further by John Westlake (1828-1893), a barrister and professor at the University of Cambridge. In his *Treaties on Private International Law*,99 Westlake traced the origins of English conflict of laws noting that once English courts abandoned their earlier practice of resorting only to English law to decide cases with a foreign element, they filled the void with the *principle of comity*. In his

99 Westlake (n 91).
words, there was a ‘reception in England of continental maxims on the topic of private international law’—the most influential of which was Huber’s comity.

Although Westlake is generally praised for introducing continental theory into English law, he rejected the international elements of Story’s approach—in particular his comparative methodology and reliance on foreign authority. Unlike Story, Westlake largely confined his study to English judicial decisions because he considered private international law to be a ‘department of English law’. To Westlake conflict rules are an instance of domestic sovereignty and thus any duty to recognise foreign law must be found internally within English law itself. On the obligation to act with comity, Westlake writes:

Now since private international law is administered by national courts, it follows that each court must apply any solution of these questions which its own national law may be found to prescribe. And the national law is very likely to contain an answer to the question under what conditions an action is maintainable in its own courts, while it may probably be silent with regard to the law according to which any particular action is to be decided, or to the validity to be allowed to foreign judgments. What then is to be inferred from the silence of the national law on these topics? The inference that the national law itself must always be applied, and that no validity is to be allowed to foreign judgments, would have led to practical results so shocking to all notions of justice that it has never been drawn it has been regularly assumed that the national law tacitly adopts some maxims according to which foreign laws and foreign judgments are sometimes admitted to be of force.

100 ibid 10.
101 ibid 7–8.
102 ibid 1.
103 ibid 7.
Westlake made it clear that the obligation to act with comity arises because the application of domestic law would, in many cases, lead to results that are ‘shocking to all notions of justice’. Considering the obligation further, he notes that since the time of Mansfield, the English conception of comity has always been different to that advanced by the Voets and Huber:

While English writers and judges freely borrowed the term ‘comity’ from John Voet and Huber, it may be doubted whether they meant it strictly in a sense independent of justice. Although on the continent comity and justice are usually regarded as forming an antithesis, it is probable that in this country the prevailing view has been that while a concession is made in not determining every question by the lex fori, that concession is dictated not only by a convenience amounting to necessity, but also by deference to a science of law embodying justice, which the law of the land was deemed to have adopted as governing its own interpretation and application, and from which it was conceived that the rules of comity were drawn. ¹⁰⁴

Like Mansfield, Westlake thus ties the idea of comity to justice – in his view the rules of comity are drawn from the ‘science of law embodying justice.’ He notes later in his Treaties on Private International Law that ‘if the notion of comity was ever radically different from that of justice, it has now been completely merged in the latter.’¹⁰⁵ Just like Mansfield then, Westlake considered courts to have an obligation to act with comity – the source of that obligation being their primary duty to resolve matters according to the rules of justice. Yet, as private international law – and comity as part thereof – forms a purely domestic branch of law, the

¹⁰⁴ ibid 20.
¹⁰⁵ ibid 415.
nature and extent of the obligation is a question for each State. As an *imperfect obligation* it is up to each State to determine how and under what circumstances it will be just to recognise the authority of another.

### 2.4. Conclusions

Comity was created to reconcile two competing paradigms that emerged after the Thirty Years War – the rise of the sovereign State and the need to promote international commerce. For a newly independent United Netherlands, comity was seen as fundamental to its continued prosperity as one of the world’s foremost trading nations. By drawing on the concept of comity, Dutch jurists sought to resolve the vexed question of how, and under what circumstances, formally equal sovereign States ought to recognise each other’s authority within their territory. Overtime, the principle migrated to the United States and England where jurists were struggling to resolve the same question – albeit for different reasons. By harnessing comity’s flexibility in the abstract, these jurists were able to use comity to develop concrete fine-grained rules and doctrines of law aimed at regulating the recognition of foreign authority.

Since its creation comity has undergone significant change. What started as a discretionary exception to the doctrine of sovereignty deriving from the mutual benefit and convenience of States later became an (imperfect) obligation deriving from each State’s paramount duty to do justice to those subject to their own authority. Indeed, both the history of comity and modern judicial decisions demonstrate that courts act with, or ought to act with comity to recognise each other’s authority solely ‘for reasons of justice’.\(^\text{106}\)

However, on closer inspection, it is not immediately apparent what appeals to ‘justice’ mean in this context. *Why* is it more just in some cases to recognise another’s authority over

\(^{106}\) Notable judicial decisions on comity are discussed in Chapter 3. For an in-depth comparative analysis of judicial decision on comity see also, Schultz, Mitchenson and Ridi (n 1) chs 3–6.
one’s own? Clearly, the idea that the most just exercise of one’s own authority can be to recognise another’s raise as many questions as it resolves. It follows that if we are to truly understand the nature of the obligation to act with comity then we need to unpack the reasons for comity in greater detail.
3
Why Act with Comity?

3.1. Introduction
The purpose of this chapter is to understand why authorities act with, or ought to act with comity towards one another. Comity’s origins as a principle of private international law suggest that if we are to answer this question the best place to start is by analysing how comity operates between sovereign States. From there I propose that we may abstract from the principle of comity in private international law to a general principle of comity among authorities. This should help us understand why a wide range of authorities recognise, or ought to recognise each other’s authority despite being under no obligation to obey one another. This includes, as we will see in Chapters 4 and 5, authorities who reason from precedent.

As we will discover in this chapter, comity is the respect shown by one authority for the ‘legitimate adjudicatory authority’ of another in circumstances where the former is under no obligation to obey the latter. The second authority’s duty to act with comity towards the first authority is not a duty to trust, admire or approve of the first authority or of its decisions. It
requires no reciprocity from the first authority and involves no act of courtesy by the second authority towards the first. Rather, the duty to act with comity stems from the systemic judicial need to minimise conflict between co-existing decision-makers and to allocate their adjudicatory authority in the most just manner possible given the context in which they operate.

Comity presupposes that only one conception of justice can apply to resolve any given type of case and that where the first authority is better placed to resolve the type of dispute in question, or where the second authority is in no better position than the first, the best exercise of adjudicatory power by the second authority will ordinarily be to recognise the authority of the first. The reason why the second authority acts with comity towards the first authority is therefore found in the derivative nature of the duty the second authority owes to those subject to its own authority – that is, to resolve the matter before it in the most just manner possible. It follows that authorities act with, or ought to act with comity because, in certain cases, the most just exercise of their own authority will in fact be to recognise the authority of another.

3.2. ‘For Reasons of (Systemic) Justice’
Chapter 2 demonstrates that every State is sovereign. The necessary implication of that sovereignty is that no State is subject to the will of any other. In this context, it is easy to imagine a world in which States resolved matters within their own territory without regard for the legitimate authority of others. The reality however is very different – States often acknowledge that, in certain circumstances, they ought to recognise each other authority out of comity.

But why do States act with comity? Why do they recognise each other’s authority despite being under no obligation to obey one another. Chapter 2 certainly hints at the answer – States act with comity ‘for reasons of justice’. And, as we will see in this chapter, a review of judicial decisions would tend to suggest the same. However, on closer inspection, it is not
immediately apparent what appeals to ‘justice’ mean in this context. Without more, it is difficult to comprehend how the recognition of another’s authority can be the most just exercise of one’s own.¹

In private international law, the idea of ‘justice’ has historically been associated with the claim that the subject is concerned with the protection of ‘private rights’. Under this approach, conflict of law rules and principles are justified on the basis that they meet ‘the reasonable and legitimate expectations of the parties to a transaction or an occurrence.’² As a principle of private international law, attempts to justify comity have traditionally taken the same path. Courts are said to act with comity to recognise foreign authority because a failure to do so would defeat the reasonable and legitimate expectations of private litigants, ultimately leading to injustice.

More recently however, scholars have argued, rather convincingly, that private international law rules and principles cannot adequately be justified within this traditional private rights-based framework. Rather, they argue that they should, at least primarily, be understood as being concerned with the protection and promotion of systemic judicial interests.³ Viewing rules and principles of private international law from a systemic judicial perspective is not about denying that they have an effect in individual cases or on the rights of private litigants – they certainly do. Rather, it is simply about highlighting the often hidden concern these rules and principle have with minimising the injustice of conflict and the misallocation of authority among co-existing States.

¹ It is perhaps for this reason that comity is often viewed as ‘one of the most ambiguous and multi-faceted conceptions in the law’ – Francis Mann, *Foreign Affairs in English Courts* (Clarendon Press 1986) 134–136.
Viewing conflict rules and principles from a systemic judicial perspective also shifts the focus of private international law from a ‘subject’ to a ‘technique’. It opens the door to viewing private international law, not as a collection of rules and principles that simply deal with conflicts of authority, but rather as a set of techniques courts may use to minimise conflicts before they occur, resolve them when they do and ensure the most just allocation of authority among States. It has been argued that viewing private international law in this way, could provide valuable guidance with respect to a range of other, perhaps analogous problems concerning the conflict and allocation of authority among different types of decision-makers – an idea taken up in this thesis.4

I propose, that like other principles of private international law, comity should be conceived as one of systemic justice. Its primary concern then is not with the protection of private rights in individual cases but rather with minimising conflict between co-existing States and promoting the most just allocation of authority within the context in which they operate. To understand why States act with, or ought to act with comity – and how the recognition of foreign authority can, in certain circumstances, be the most ‘just’ exercise of one’s own authority – it is necessary to understand how comity effects its systemic judicial aim. I suggest that it does this through the application of two separate, but intertwined principles inherent in its purpose. The first, is the principle of justice pluralism; and the second, is the principle of modified subsidiarity. It follows that if we can understand why States act with, or ought to act with comity towards one another, we may better understand why all authorities ought to act with comity.

3.2.1. Justice Pluralism

The idea of justice pluralism⁵ can be understood as a reflection in the law of the concept of value pluralism in philosophy.⁶ Commonly understood, value pluralism is the metaphysical thesis that there are many objective values which may be equally correct and fundamental, yet in conflict with one another. Value pluralists argue that, whilst there are fundamental values common to all, most values are irreducibly plural — in the sense that they cannot be collapsed into one ultimate paramount value — and incommensurable — in the sense that they cannot, in the abstract, be ranked or ordered in terms of importance.⁷

It follows that to value pluralists, there is no rational means by which to choose between competing values in the abstract. Yet, this does not necessarily preclude rational deliberation between them in the real-world. A choice between alternate courses of action can rationally be made in isolated cases, even if these alternatives represent different values deemed to be equally correct and incommensurable in the abstract. This is because in isolated cases we have more to guide us than the abstract deliberation of values. The context in which all decisions must be made facilitates rational decision-making between theoretically equal values.⁸

Let us take, for example, the choice between two values that often conflict — the values of privacy and security. In the abstract, both are equally correct and fundamental — neither can be considered more important than the other and we certainly have no rational means by which to choose between them. Yet, in the real world, a rational choice between competing courses

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⁵ The idea of ‘justice pluralism’ is inspired by Alex Mills’ discussion of the concept in Mills (n 3) 5–6.
⁶ Value pluralism is most commonly associated with the work of Isaiah Berlin. Berlin however, traced the idea back to figures such as Niccolò Machiavelli, Montesquieu and John Stuart Mill. Others have credited the idea to historical figures as far back as Aristotle. More recently, value pluralism has diverged into numerous sub-groups and has undergone further development by theorists such as George Crowder and Joseph Raz. For more on value pluralism see, Isaiah Berlin, Four Essays on Liberty (Oxford University Press 1969); George Crowder, Liberalism and Value Pluralism (Continuum 2002); Joseph Raz, The Practice of Value (Oxford University Press 2005).
⁷ For this reason, monism (the idea that one can be left with a paramount value) and relativism (the idea that there are no objective values) are antithetical to value pluralism. Value pluralists reject the Platonic assertion there is a summum bonum (highest good) or that there are no fundamental values which represent something of value to all. See, Crowder (n 6) 2.
⁸ ‘Reasoned ranking of plural values is impossible in the abstract, but apparently unproblematic in particular cases. What makes the difference is evidently the presence in particular cases of a concrete context for choice.’ — George Crowder, ‘Communications’ (1996) 44 Political Studies 649, 650.
of action, representing these two distinct equal values, can be made by reference to the context in which the decision must be made. For example, after the 9/11 terrorist attacks the choice of some governments to promote security concerns over, or to the detriment of, individual privacy, could be considered rational in certain contexts. If the choice between abstract values is incapable of determination by reason, it does not follow that the choice between alternate courses of action that embody these theoretically equal values will, in isolated cases, always be irrational. Of course, this is not to say the choice will be easy. But the existence of context allows for a rational choice to be made nevertheless.

Building on the idea of value pluralism in the law, the idea of justice pluralism is the metaphysical legal thesis that different legal systems represent different and distinct conceptions of justice which must ultimately be considered equally correct, fundamental and, in the abstract, incommensurable. Thus, each State’s national laws, and the judgments of their courts, represent a particular conception of justice – a different belief as to what the just outcome to any one type of dispute ought to be. The necessarily implication is that there is no universal just outcome to any particular type of dispute, but rather an incommensurable conflict of values embodied in the different national laws of States, and the judgments of their courts.9

Evidently, the just outcome to a dispute in England, subject to English law, will not necessarily be the same as the just outcome to the same dispute in Australia, subject to Australian law. Yet, both sets of law necessarily embody equally correct, fundamental conceptions of justice and neither may be considered more just in a substantive sense – even if they do ultimately lead to very different results. As Justice Cardozo held in Loucks v Standard Oil Co.10

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9 Mills (n 3) 4–6.
If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing the plaintiff what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.\(^{11}\)

As with value pluralism, the incommensurability of different conceptions of justice is not necessarily inimical to the need to rationally choose between different sets of laws in cases where they conflict. It may be that, in the context in which the dispute arises, it would be more just to apply the laws – that is, the conception of justice – of one State rather than the other. In such cases, the question is not whether English or Australian law would necessarily lead to a more just outcome – for both are substantively just. The question is, in the context in which the dispute arises, would it be more just to apply English or Australian law, an English or an Australian conception of justice? The choice between the two must be made by reference to the context in which the dispute arises, not by an assessment of each legal order’s apparent ‘substantive justness’.

When a court acts with comity to recognise foreign jurisdiction, by declining to exercise its own, or recognises foreign law or judicial acts within its territory, it is, through that very act, acknowledging that in the context in which the dispute arises it would be more just that the matter be resolved subject to foreign law, applied by a foreign court, than by domestic law applied by a domestic court. The very act of recognition presupposes an underlying commitment to the idea of justice pluralism. It is an acknowledgement by the court that there are two competing conceptions of justice that could apply to resolve the dispute in question, but, in the context in which the dispute arises, it would be more just that the dispute be resolved subject to a foreign conception of justice rather than its own. As both foreign and domestic law must, in the abstract, be considered to embody equally correct and fundamental conceptions of

\(^{11}\) ibid 110-111.
justice, the conflict between the two can only be resolved by reference to the context in which the dispute arises.

Through the idea of justice pluralism, comity presupposes that, for certain types of disputes, it will be more just to recognise foreign law or judicial acts than to resolve them subject to domestic law applied by a domestic court. It follows that, in certain circumstances, the best exercise of adjudicatory power by the courts of one State, will necessarily be to recognise the authority of another within its own territory – even where recognition would lead to an outcome very different to that which would have resulted had the dispute been resolved subject to domestic law. Of course, this is not to say that the laws of the foreign State, or the judgments of its courts, are more just than the laws of the domestic State or the judgments of its courts. It is simply to acknowledge that in the context in which the dispute arises the conception of justice preferred by the foreign State, embodied in its laws or in the judgments of its courts, would more justly apply to resolve the type of dispute at hand.

Justice pluralism thus helps us understand why comity should be understood as a principle of systemic justice. It presupposes that only one conception of justice can apply to resolve any given type of dispute and that, depending on the context in which the dispute arises, the conception of justice that ought to apply may be that preferred by a foreign State. Justice pluralism highlights comity’s functional role as a principle concerned with minimising conflicts that arise between the co-existing authority of sovereign States. At the same time, it hints at comity’s normative role, as a principle concerned with the just allocation of that authority. For comity, it is not enough to minimise the inconsistent legal treatment of disputes by selecting any conception of justice – it matters which conception is chosen. In this sense, comity is a principle of meta-justice – it is concerned with the justness of the justice chosen.

Properly understood then, comity is about minimising conflicts between States by allocating their authority in the most just manner possible. However, the principle of justice
pluralism does not help courts answer the normative question of which conception of justice ought to govern which types of disputes. It answers the why, but not the how. That question is reserved for the principle of modified subsidiarity.

3.2.2. Modified Subsidiarity

I propose that, where relevant, comity allocates authority in a manner consistent with what I describe as modified subsidiarity. The principle of modified subsidiarity holds that in circumstances where the authority of two decision-makers conflict, the authority to govern or decide upon a particular issue ought to be allocated to that decision-maker best able to do so. The concept is related to, but differs from, the usual way in which the term subsidiarity is understood by political and constitutional scholars concerned with the allocation of authority in Federal States and the European Union.

Subsidiarity is a principle of structure. It dictates how regulatory, executive or adjudicatory authority ought to be allocated among various authorities operating within the same space. In the ordinarily sense of the word, it is used to justify the existence of different levels of government and their respective powers to decide upon or regulate particularly issues. According to the principle, the authority to decide upon or regulate an issue ought to be allocated to that level of government which is closest to the issue. If, and only if, the closest level of government cannot effectively decide upon or regulate the issue then the power to do so ought to be allocated to a higher level which can. The principle is justified on the basis that

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12 The idea that comity embodies a version of, or is related to, the principle of subsidiarity should be attributed to Timothy Endicott who has primarily sought to use comity as a means of explaining the intricacies of administrative law. The idea of modified subsidiarity developed in this section was inspired by Endicott’s original discussion on the subject yet we ultimately conceive of comity differently. See, most notably, Timothy Endicott, Administrative Law (2nd edn, Oxford University Press 2011); Timothy Endicott, ‘Comity Among Authorities’ (2015) 68 Current Legal Problems 1.
those closest to the issue in question are the most likely to do justice to those subject to their authority.¹³

In practice, subsidiarity may justify, for example, the existence of local councils on the basis that they are ordinarily best placed to determine where street lights should be installed, which days the bins should be collected or when public gardens should be trimmed. At the same time, the principle may also justify the existence of federal or even supra-national governments (such as the European Union) on the basis that certain matters – such as defence or taxation for example – simply cannot be regulated or decided upon by lower levels of government.¹⁴

The word ‘subsidiarity’ derives from the Latin word ‘subsidiarium’ meaning to aid or give assistance. The idea has been developed in modern political thought to support the general proposition that each level of government ought to respect the proper allocation of authority by aiding, assisting or, at the very least, not interfering with the exercise of authority by those to which it has been allocated. Injustice is said to occur when a higher authority deprives a lower authority of discretion that it is competent to exercise; or where a lower authority fails to relinquish discretion that has been allocated to a higher authority.¹⁵

Subsidiarity’s origins demonstrate it to be intricately connected to the idea of justice. The principle first appeared prominently in modern European political thought as a result of Catholic teachings in the 1930s.¹⁶ In the papal encyclical Quadragesimo Anno, Pius XI wrote:

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¹⁴ Endicott, ‘Comity’ (n 12) 8–9.


¹⁶ Yet, its origins can be traced ‘as far back as classical Greece… [S]ubsequent echoes of it [can be found] in the thought of political actors and theorists as varied as Montesquieu, Locke, Tocqueville, Lincoln, and Proudhon.’ – Paolo Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’ (2003) 97 American Journal of International Law 38, 41. In Catholic theology the principle appears to have been expressed first by Pope Leo XIII although not by that name: ‘Whenever the general interest or any particular class suffers, or is threatened with harm, which can in no other way be met or prevented, the public authority must step in to deal with it… [But the] State must not absorb the individual or the family: both should be allowed free and untrammelled action so far as is consistent with the common good and the interest of others.’ – Leo XIII, Rerum Novarum: Encyclical Letter on Capital and Labor (Vatican 1891). On the history of subsidiarity as a principle of
As history abundantly proves, it is true that on account of changed conditions many things which were done by small associations in former times cannot be done now save by large associations. Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do.

Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of ‘subsidiary function,’ the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.17

The principle is also described as ‘one of justice’ by political and constitutional scholars concerned with the allocation of political and legal authority.18 With this in mind, the principle has found its most recognisable form in European Law. Art. 5(3) of the Treaty on the European Union19 provides:

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17 Pius XI, Quadragesimo Anno: Encyclical Letter on Reconstruction of Social Order (Vatican 1931). See more recently, the writing of John Paul II: ‘… a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good.’ – John Paul II, Centesimus Annus: Encyclical Letter on the Hundredth Anniversary of Rerum Novarum (Vatican 1991).


Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional or local level, but can rather by reason of the scale or effects of the proposed action, be better achieved at Union level.

Within the European Union, the principle of subsidiarity seeks to regulate the just allocation of authority between the Union and Member States. Powers of governance are allocated to the lowest possible level – in this case, the central, regional or local level of Member States – on the basis that they are closest to the matter in question and therefore most likely to do justice to those subject their authority. However, the principle also justifies the allocation of authority upward – in this case, to the Union – in circumstance where Member States are unable to effectively regulate or decide upon matters because of their nature or position. Subsidiarity requires that each level of government act in a way that promotes and protects the allocation of authority in a manner consistent with the principle.

I propose that the reason States act with comity towards one another can be explained as a version of subsidiarity – a principle which I describe as modified subsidiarity. According to the principle of modified subsidiarity, authority ought to be allocated, not on the basis of ‘closeness’, but rather, to that decision-maker which would best govern or decide upon the matter in question. The principle is related to the principle of subsidiarity because it embodies the same commitment to justice. But it is modified to the extent that it allocates authority on the basis of ‘comparative competency’, not ‘closeness’. The idea is that justice is most likely to be done if the authority to decide upon or regulate matters is allocated to those best place, by virtue of their nature, to do so and if the allocation of that authority is respected by others. This
requires a comparative assessment, not only of each authority’s skill and expertise, but also their respective purposes, scopes, duties and limitations.

In private international law, this translates to the general proposition that each State, and its courts, can be expected to do a better job than other States, and their courts, at resolving issues they are best placed to govern. Thus, the Australian courts can be expected to do a better job at regulating Australian matters subject to Australian law than the courts of any other State can be expected to. It is not because the Australian courts are closer to Australian matters – although ordinarily they will be. It is because Australian courts have certain expertise and skill not possessed by other States that enable them to better determine matters that fall within their jurisdiction.\(^\text{20}\)

It follows that even if other States disagree with a judgment of the Australian courts or a policy of the Australian government, they should at least recognise that they cannot be expected to do a better job than the Australians can with respect to Australian matters and Australian law.\(^\text{21}\) The act of recognition implies acceptance of the underlying idea that in such circumstances, it will ordinarily be more just to recognise Australian authority within one’s own jurisdiction than to make a matter that would be best decided by the Australian courts, subject to Australian law, subject to a foreign conception of justice.

When an Australian court applies Australian law to resolve a dispute in Australia, comity thus supports the proposition that the Australian courts are best placed to resolve the dispute – they are the most likely to do justice by virtue of their expertise and skill. They have been created for the specific purpose of resolving such matters and have been given the appropriate scope and power to do so. If one of the parties later institutes proceedings in England for example, or has assets in England, the English courts are certainly empowered to exercise authority over the same dispute. The English courts may apply English law – and by

\(^{20}\) Endicott, ‘Comity’ (n 12) 9.

\(^{21}\) Ibid 9–10.
extension an English conception of justice – to resolve the dispute. To be sure, they are certainly not bound by the Australian court, or any decision it might ultimately render. However, in the context in which the dispute arises, the principle of comity supports a presumption that the English courts ought ordinarily to recognise Australian authority within their jurisdiction.

The principles of justice pluralism and modified subsidiarity presuppose that only one conception of justice can apply to resolve any given type of dispute and that the conception of justice that ought to apply to resolve a particular case is that which is preferred by the authority best placed to resolve it – in this case the Australian court. Even if the English court disagrees with the way in which the Australian court will resolve the dispute, or the decision of the Australian court after it has done so, it should at least recognise that it is in no better position than the Australian court. Comity requires the English court recognise the comparative competency of both courts – not only their skill and expertise with respect to the dispute, but also their respective purposes, scopes, duties and limitations. The English court must ultimately recognise that it was not created for the purpose of resolving such a dispute and that comparatively it is limited to do justice in the context.

In such a case, comity may support the presumption that the English court ought ordinarily to recognise the Australian court’s authority in a number of ways. For example, the English court may decline to exercise its own jurisdiction in favour of the Australian court by granting a stay of proceedings on grounds of forum non conveniens.22 Under the doctrine of forum non conveniens English courts will generally ‘decline to exercise jurisdiction on the

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22 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (UK HL). The English doctrine of forum non conveniens has been followed in most other common law jurisdictions including the United States of America, Canada, New Zealand, Hong Kong, Singapore and Israel. Although the English doctrine was rejected in Australia (considered below). See, *Gulf Oil Corp. v Gilbert*, 330 US 501 (1947) (US SC); *Amchem Products Incorporated v British Columbia (Workers’ Compensation Board)* [1993] 1 SCR 897 (CAN SC); *McConnell Dowell Constructors Ltd v Lloyd’s Syndicate 396* [1988] 2 NZLR 257 (NZL CA); *The Adhiguna Meranti* [1988] 1 Lloyd’s Rep 384 (HK CA); *Brinkerhoff Maritime Drilling Corp. v PT Airfast Services Indonesia* [1992] 2 SLR 776 (SGP CA); *Abu-Ghichla v The East Jerusalem Electric Co.*, 48(1) PD 556 (1993) (ISR SC).
grounds that a court in another State … would objectively be a more appropriate forum for the trial of the action’ – that is to say, a forum in which ‘the ends of justice’ might more suitably be met.  

23 The doctrine is the most commonly recognised expression of comity requiring that English courts recognise foreign authority and restrain the exercise of their own judicial power in turn.  

24 Comity’s role in the development of the doctrine of forum non conveniens is evident through its commitment to justice pluralism and modified subsidiarity. When an English court grants a stay on grounds of forum non conveniens it is certainly not suggesting that the laws of Australia are substantively more just than the laws of England. And, it is certainly not suggesting that if English law were to apply that it would necessarily lead to injustice. To be sure, if there was no conflict, the English court would surely exercise its jurisdiction and apply English law to resolve the dispute.  

25 Rather, the doctrine simply presupposes that in cases of conflict only one conception of justice can apply to resolve any given case and that, where the Australian court is better placed to resolve a particular type of dispute, the best exercise of adjudicatory power by the English court will ordinarily be to recognise the authority of the Australian court to do so. By forming the basis for the doctrine of forum non conveniens, comity is able to minimise conflict and ensure the most just allocation of authority between the Australian and English courts given the context in which they are operating.  

Incidentally, I suggest that it is for this reason that the Australian doctrine of forum non conveniens is generally criticised as being ‘contrary to comity’.  

23 Sim v Robinow (1892) 19 R 665 (Scot. Ct. Sess.) 668 (Lord Kinnear); Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460 (UK HL) 474-476 (Lord Goff, with whom Lord Keith, Lord Templeman, Lord Griffiths and Lord Mackay agreed).  

24 ‘My Lords, the essential change in the attitude of the English courts to pending or prospective litigation in foreign jurisdictions … is that judicial chauvinism has been replaced by judicial comity.’ – The Abidin Daver [1984] AC 398 (UK HL) 411 (Lord Diplock).  

25 ‘If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay.’ – Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460 (UK HL) 478 (Lord Goff, with whom Lord Keith, Lord Templeman, Lord Griffiths and Lord Mackay agreed).  

26 ‘If comity is such an important factor in forum non conveniens, it is submitted that logic would suggest that the [English] ‘more appropriate forum’ test is more consistent with comity than the [Australian] ‘clearly inappropriate
only decline to exercise jurisdiction in favour of a foreign court if it considers the Australian forum would be a ‘clearly inappropriate forum’ for the resolution of the dispute. The focus is thus on the inappropriateness of the Australian court only, not the comparative competency of the Australian court vis-à-vis the foreign court to do justice. The doctrine clearly fails to give effect to the principle of modified subsidiarity inherent in comity’s purpose.

Of course, comity forms the basis for a range of other doctrines aimed at achieving systemic justice. For example, comity also forms the basis for the well-established cannon of statutory interpretation – known as the assumption against extra-territoriality – that all legislation is to be interpreted, so far as its language permits, as extending no further than the boundaries of the State. In circumstances where the scope of domestic legislation is ostensible unlimited, a literal reading often give one the impression that English courts have the power to exercise jurisdiction over matters and persons anywhere in the world – including, for example, in Australia. The assumption against extra-territoriality forms the basis for a presumption that English courts ought ordinarily recognise the authority of the Australian courts to determine matters that they are comparatively better placed to resolve.

In a similar vein, comity will support the presumption that the English court ought ordinarily not act in a manner that interferes with the jurisdiction of the Australian court. For example, comity would ordinarily restrain the English court from granting an anti-suit

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28 In Regie Nationale Renault v Zhang (2002) 210 CLR 491 (AUS HC) 524-525 Kirby J noted as much holding that the English ‘more appropriate forum’ test was more ‘harmonious’ with the principle of comity.
29 For a comprehensive and comparative analysis of the many doctrines of law comity forms the basis for in various jurisdictions, see most notably, Thomas Schultz, Jason Mitchenson and Niccolò Ridi, The Principle of Comity in Public and Private International Law (Cambridge University Press 2019) chs 3–6.
30 Lawson v Serco Ltd (2006) UKHL 3, 1 All ER 823 (UK HL) 6 (Lord Hoffmann, with whom Lord Woolf, Lord Roger, Lord Walker and Baroness Hale agreed); Masri v Consolidated Contractors International (UK) Ltd (No 4) [2009] UKHL 43, [2010] 1 AC 90 (UK HL) 10 (Lord Mance, with whom Lord Scott, Lord Rodger, Lord Walker and Lord Brown agreed).
injunction\textsuperscript{31} in such circumstances or from entering into a litigation strategy that would interfere with or undermine the Australian court’s authority to determine the case.\textsuperscript{32} Comity may even require the English court to support the Australian court’s authority to determine the case by granting pre-trial discovery orders in England,\textsuperscript{33} by remitting assets in England to Australia\textsuperscript{34} or by granting a world-wide asset freezing order over such assets where the defendant is within the jurisdiction of the English, but not the Australian court.\textsuperscript{35} And, comity will ordinarily support the presumption that any resulting decision of the Australian court ought to be recognised by English courts domestically.\textsuperscript{36}

Of course, comity will not always call for recognition of foreign authority. As we saw in Chapter 2, where recognition would prejudice England or the duty it owes (though it courts) to those subject to its own authority, comity will not form the basis for a presumption of recognition. For example, if the English court considers itself in a better position to resolve the dispute, there would certainly be no presumption in favour of deferring to the Australian court

\textsuperscript{31} Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460 (UK HL); Connelly v RTZ Corporation Plc [1998] AC 854 (UK HL); Seacorsar Far East Ltd v Bank Markazi Jonhouri Islami Iran [1994] 1 AC 438 (UK HL).

\textsuperscript{32} ‘… as a matter of comity … the London judge had an obligation to support the proper conclusions of the French court or, at the least, not to enter into a litigation strategy to undermine the order.’ – Mercredi v Chaffe [2011] EWCA Civ 272, 2 FLR 515 (ENG CA) 63 (Thorpe LJ). ‘… it is quite consistent with the comity of nations that … if the court finds that there is already pending a process of universal distribution of a bankrupt’s effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution’ – Galbraith v Grimshaw [1910] AC 508 (UK HL) 513 (Lord Dunedin).

\textsuperscript{33} ‘… the approach of this court and other courts in this jurisdiction will be to seek to assist a foreign court wherever it is appropriate. For that reason the courts will seek to give effect to a Letter of Request [for pre-trial discovery orders] wherever this is practical. Comity between jurisdictions demands no different an approach.’ – Minnesota v Philip Morris Inc [1998] ILPr 170 (ENG CA) 56 (Gibson J).

\textsuperscript{34} See, for example, Re HIH Casualty and Insurance Ltd [2008] UKHL 21, 1 WLR 852 (UK HL) 30 (Lord Hoffmann) where the House of Lords held that, despite differences between the English and Australian statutory regimes, assets located in England were to be remitted to Australia because the dispute was rightfully within the jurisdiction of the Australian courts. Lord Hoffmann held that both the statutory and common law power to remit assets overseas must be interpreted in accordance with comity.

\textsuperscript{35} Credit Suisse Fides Trust SA v Cuoghi [1998] QB 818 (ENG CA); Refco Inc v Eastern Trading Co [1999] 1 Lloyd’s Rep 159 (ENG CA).

\textsuperscript{36} Today the obligation to recognise foreign judgments in England is primarily contained in European regulations or domestic legislation. We might say that despite this, these rules find their rationale in comity or require courts act with comity to recognise foreign judgments. At common law, early judicial decisions demonstrates that the obligation to recognise foreign judgments was originally founded on comity. See, Williams v Jones [1845] 13 MW 628 (KB) 633 (Parke B) and Rubin v Eurofinance SA [2010] EWCA Civ 895, [2011] Ch 133 (ENG CA) 34-35 (Ward LJ) (judgment reversed on grounds unrelated to the Court of Appeal’s remarks on comity in Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 AC 236 (UK SC)). See also, Adrian Briggs, ‘The Principle of Comity in Private International Law’ (2012) 354 Recueil des cours 65, 149–150; Schultz, Mitchenson and Ridi (n 29) ch 3.
under the doctrine of *forum non conveniens*. The English court may even move to restrain the parties from instituting or continuing proceedings in Australia by granting an anti-suit injunction. In doing so, the English court would be relying on comity to minimise the possibility of conflict between the English and Australian court and to promote the most just allocation of adjudicatory authority between the two given the circumstances in which they are operating.

If the English court were required to recognise Australian authority in such circumstances it would most certainly prejudice the duty it owe to those subject to its own authority. The English court has a duty to those subject to its own authority to resolve disputes before it in the most just manner possible. If, in the context in which the dispute arises, the dispute ought to be resolved subject to an English conception of justice recognition of another State’s laws or a judgment of their courts would ultimately prejudice that duty. Likewise, in circumstances where the exercise of Australian authority is illegal or contrary to English law or public policy, comity will not form the basis for a presumption in favour of recognising such authority in England.

Where the principle of modified subsidiarity is relevant, recognition of foreign authority is easily justified as the best exercise of adjudicatory power because the foreign court is better placed, by virtue of its nature, skill and expertise to resolve the dispute. Yet, evidently, there will be cases where the principle is irrelevant – it may be that the courts of neither State can

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37 ‘If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay.’ – *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (UK HL) 478 (Lord Goff, with whom Lord Keith, Lord Templeman, Lord Griffiths and Lord Mackay agreed).

38 Where there are two or more available forums for trial, comity requires that England be the natural forum before an anti-suit injunction is granted. See, *Airbus Industrie GIE v Patel* [1999] 1 AC 119 (UK HL); *British Airways Board v Laker Airways Ltd* [1985] AC 58 (UK HL); *Deutsche Bank AG v Highland Crusader Partners LP* [2009] EWCA Civ 725, [2010] 1 WLR 1023 (ENG CA).

39 An obvious example is *Somerset v Stewart* (1772) 98 ER 499 (KB) considered in Chapter 2. But see, most notably, *Oppenheimer v Cattermole* [1976] AC 249 (UK HL) where the House of Lords held that it would not recognise decrees of the Nazi Government in England which deprived Jewish immigrants of their German nationality and confiscated their property. See also *Yukos Capital Sarl v OJSC Rosneft Oil Co* (No 2) [2012] EWCA Civ 855, [2014] QB 458 (ENG CA) 151 (Rix LJ) where the Court of Appeal held that ‘considerations of comity… necessitate specific examples of [a breach of public policy] before any decision is made not to recognise the judgments of a foreign state.’
claim to be in a better position to decide upon the type of dispute at hand. In such circumstances, I propose that comity’s functional concern with systemic justice still requires courts to act in a manner that minimise conflict because it constitutes part of the court’s broader duty to resolve the matter before it in the most just manner possible.

The existence of different legal order – each embodying different conceptions of justice – obviously creates the potential for injustice through the inconsistent legal treatment of events or sets of facts. The possibility of conflict poses significant problems both in relation to the regulation of conduct, where parties may, for example, have difficulty complying with inconsistent legal orders or judgments, and in relation to the regulation of status, where a company may, for example, be confronted by the fact that it is legally constituted in one State but not another. For the English court, basic considerations of justice are unlikely to be achieved if those subject to its own authority are put in a position of conflict merely because the English court prefers its own conception of justice to that of a foreign State for no other reason than nationalism or pride. The result is that, in certain circumstances, where recognition would not prejudice the State, or the duty it owes, through its courts, to those subject to its own authority, comity will support the recognition of foreign authority simply on the basis that the foreign court was first-in-time.40

Consider, for example, comity’s role in the interpretation of international treaties. In circumstances where an English court is called upon to interpret a provision of an international treaty, the principle of modified subsidiarity is irrelevant. No court can claim to be in a better position than any other to interpret the provisions of an international treaty. Yet, conflicting interpretations have the potential to lead to serious injustice. For that reason, comity requires

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40 It is for this reason that comity will ordinarily require English courts to recognise foreign entities in England if they are validly constituted in a foreign State. This is the case even if the foreign entity would not be considered valid in England. See, *Lazard Brothers & Co v Midland Bank Ltd* [1933] AC 289 (UK HL); *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] QB 549 (ENG CA); *Bumper Development Corporation Ltd v Commissioner of Police of the Metropolis* [1991] 1 WLR 1362 (ENG CA).
courts to recognise foreign decisions and supports a presumption that they ought ordinarily to adopt the same interpretation so long as it would not prejudice the duty they owe to those subject to their own authority.\(^{41}\)

Of course, in such circumstances, it cannot be said that the interpretation preferred by the foreign court – or more specifically, its conception of justice – is substantively more just than the interpretation preferred by the English court. Rather, recognition is justified on the basis that the English court has, by the same token, no reason to consider itself in a better position to interpret the meaning of certain treaty provisions than the foreign court, and to deny recognition would introduce an unjustified conflict between the two. Minimising the potential for conflict is therefore part of the English court’s broader duty to resolve the matter before it in the most just manner possible.

It is true that in such cases recognition of foreign decisions may mean that a different interpretation is given to the provisions of an international treaty than that ordinarily preferred by the English court. But, there is no reason to believe that the interpretation preferred by the English court would necessarily have been more ‘just’ in the circumstances either. Comity presupposes that courts have a duty to minimise the potential injustice of conflict by seeking a consistent interpretation in circumstances where it would not prejudice their duty to do justice to those subject to their own authority.

Viewing comity as a principle of systemic justice – embodying the principles of justice pluralism and modified subsidiarity – helps us understand why recognition of foreign authority can, in certain cases, be the most just exercise of one’s own authority. Comity is only relevant

\(^{41}\) Morris v KLM Royal Dutch Airlines [2002] UKHL 7, 2 AC 628 (UK HL); Re Deep Vein Thrombosis and Air Travel Group Litigation [2005] UKHL 72, [2006] 1 AC 495 (UK HL); Great China Metal Industries Co Ltd v Malaysian International Shipping Berhad (1998) 196 CLR 161 (AUS HC). See also, Leonie’s Travel Pty Ltd v Qantas Airways Limited [2010] FCAFC 37 (AUS FFC) 58 (Landers and Rares JJ) where the Full Court of the Federal Court of Australia extended the presumption to international private standard form contracts. In that case, the Court held that the primary judge should have recognised a decision of the English Court of Appeal with respect to the same issue of interpretation and that comity formed the basis for a presumption that Australian courts ought ordinarily to adopt the same interpretation as English courts with respect to international private standard form contracts unless they consider the decision ‘irrelevant or plainly wrong’.
in circumstances where there are two (or more) competing conceptions of justice that may apply to the resolution of a particular case. In such circumstances, to avoid the injustice of conflict and the misallocation of authority, comity presupposes that only one conception of justice can apply to resolve any given case and that where the first court is better placed to resolve a particular type of dispute, or where the second court is in no better position than the first, the best exercise of adjudicatory power by the second court will *ordinarily* be to recognise the authority of the first. The reason why the second court acts with comity towards the first is therefore found in the service that it ought to provide to those subject to its own authority – that is, to resolve the matter before it in the most ‘just’ manner possible.

### 3.3. Comity and Practical Reasoning

The idea that the best exercise of one’s own authority can, in certain cases, be to recognise the authority of another can be explored further by drawing on the philosophy of practical reason.\(^{42}\) More specifically, the study of practical reason can help us understand exactly how comity factors into the practical reasoning process – namely, how it guides the exercise of adjudicatory power in specific contexts. As we will see, comity constitutes, or gives rise to, a non-exclusionary second-order reason for action. In essence it forms the basis for a presumption that guides authorities to exercise their adjudicatory power in the most just manner possible given the context in which they operate.

Practical reasoning is the general human capacity to resolve, through deliberation, the question of what one ought to do when faced with two alternate courses of action that have yet to be performed. The philosophy of practical reason is thus concerned with the processes,

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\(^{42}\) In this section I do not seek to explain the complexity or varied arguments concerning the philosophy of practical reason. I merely seek to draw on the study of practical reason to highlight in further detail how comity factors into the practical reasoning process of authorities.
methods and techniques authorities use to answer this question – that is, how they assess and weigh their reasons for action.\textsuperscript{43}

In \textit{Practical Reason and Norms},\textsuperscript{44} Joseph Raz draws a distinction between two modes of reasoning when an authority is faced with a decision between two alternate courses of action.\textsuperscript{45} The first is what Raz describes as the determination of what ought to be done on the \textit{ordinary balance of first-order reasons}. An authority acting in accordance with this conception of practical reason first determines the total weight of all relevant reasons in favour of each course of action, and then acts upon that course of action which has the greatest overall support. The reasons to be taken into account are what Raz calls \textit{first-order reasons} – that is, reasons directly relevant to the determination at hand.\textsuperscript{46}

Acting on the balance of first-order reasons is a commonly employed mode of practical reason – we do it all the time. The easiest way to conceptualise this mode of practical reason is to imagine a set of scales.\textsuperscript{47} To use my example from Chapter 1, when deciding which school to send my children to, I decided on the balance of first-order reasons. I drew up a list of all the arguments for and against each school and ultimately sent my children to that school which had the most pros and the least cons.

We tend to think that all decisions are made on the balance of first-order reasons; that all conflicts for and against a particular course of action are resolved by the relative weight or strength of the conflicting reasons and that which is heaviest or strongest overrides the other.\textsuperscript{48} Yet, acting on the balance of first-order reasons is not the only mode of practical reason. There

\textsuperscript{43} ‘Reasons are the corner-stone of all explanation of human actions, indeed of the very notion of human action itself… Intentional action itself is action performed by an agent who knows what he is doing and does it for a reason.’ – Joseph Raz, ‘Introduction’ in Joseph Raz (ed), \textit{Practical Reasoning} (Oxford University Press 1978) 2–3.
\textsuperscript{44} Joseph Raz, \textit{Practical Reason and Norms} (3rd edn, Oxford University Press 1999).
\textsuperscript{45} ibid 35–48.
\textsuperscript{46} Since this account is a formal one, no distinction need be drawn between substantive types of reasons.
\textsuperscript{47} Joseph Raz ‘Reasons for Actions, Decisions and Norms’ in Raz (ed) (n 43) 128–129.
\textsuperscript{48} ibid 129.
exists another – what Raz describes as the determination of what ought to be done on the basis of a second-order reason.49

A second-order reason is a reason to act on or refrain from acting on one or a category of first-order reasons. For Raz, the most important type of second-order reasons are exclusionary reasons – reasons to refrain from acting on a first-order reason or category of first-order reasons.50 According to Raz, these second-order reasons, known as exclusionary second-order reasons, do not override or outweigh first-order reasons. Rather, they simply exclude them from the authority’s consideration.51 In doing so, an exclusionary second-order reason may tip the balance of first-order reasons in favour of that course of action which ordinarily would have been considered to have less support. To better understand this mode of practical reason I will give an example in a moment.

The idea of multi-level reasoning is one of Raz’s major contributions to the philosophy of practical reason. Yet, some argue that perhaps even Raz himself has underestimated its complexity. Stephen Perry, for example, argues that the notion of a second-order reason is far richer than Raz allows and there exist second-order reasons upon which authorities rely that do not have the exclusionary effect Raz describes.52 To Perry, a second-order reason may be non-exclusionary, meaning that it constitutes, or gives rise to, a reason to treat a first-order reason (or category of first-order reasons) as having less weight than an authority would otherwise ordinarily judge it to have.53

49 Raz (n 44) 39–40.
50 To Raz, exclusionary second-order reasons may vary in scope. They may exclude all or only some of the reasons which apply to certain practical problems. For example, when a judge directs a jury to disregard certain evidence, the jury has an exclusionary second-order reason to exclude that evidence, but not all evidence.
51 Raz (n 44) 41.
53 To Perry then, Raz’s conception of an ‘exclusionary second-order reason’ is simply the special case of a second-order reason that attributes zero weight to those first-order reasons that favour a course of action inconsistent with the second-order reason. The two modes of practical reason which Raz distinguishes can thus be regarded as the two extremes of a single continuum. At one end action is to be assessed on the basis of a balance of reasons in which no reason has been assigned anything other than its ordinary weight. At the other end action is to be assessed by a balance of reasons some of which have been assigned, on the basis of a second-order reason, a non-ordinary weight of zero. Between these two extremes lies an indefinite number of further possibilities, all of which are
Rather than exclude one or a category of first-order reasons from consideration, a *non-exclusionary second-order reason* essentially re-weighs the balance of first-order reasons in a manner that favours that course of action most consistent with the second-order reason. In effect, it creates a *new weighted balance of first-order reasons* by attributing less weight to those first-order reasons that are inconsistent with the second-order reason. Acting in accordance with a non-exclusionary second-order reason does not entail that the first-order reason which has been given a new weight actually *has* that new weight. Rather, it is simply to say that, in the context in which the non-exclusionary second-order reason applies, the authority is being directed to act *as if* the first-order reason in question has a different weight than it actually does.54

The result is a presumption where those first-order reasons that favour a course of action inconsistent with the second-order reason must now attain a higher threshold to prevail than they would have needed if the authority were to decide the matter on the ordinary balance of first-order reasons. By acting in accordance with a non-exclusionary second-order reason, an authority introduces a deliberate and systematic bias into its practical reasoning process that favours that course of action most consistent with the second-order reason.55

As a mode of practical reasoning, acting in accordance with a second-order reason can be difficult to conceptualise because it implies that an authority ought not to act on the ordinary balance of reasons – that is, to act on that course of action which it believes has the strongest support.56 Yet, it is a commonly employed mode of reasoning and can rationally be defended on the basis that, in certain contexts, it represents a good strategy for better decision-making. As we will see, the principle of comity constitutes, or gives rise to, a second-order reason for

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54 *ibid* 222.
55 *ibid*; Perry (n 52) 932–933.
56 Raz (n 44) 41.
action. It follows that it is vital for us to understand second-order reasoning if we are to understand how comity guides the exercise of adjudicatory power.

To better understand second-order reasoning and to demonstrate how it can be justified as a good strategy for better decision-making I will adopt Raz’s example of ‘Ann the investor’. Ann runs a small investment firm and as the sole proprietor she has complete authority to determine how investments are to be made. Late one night, after a particularly long and hard day at work, Ann is presented with an investment opportunity to which she must immediately respond. She is aware that it may be a good investment, but there may also be factors which mean it is not. All she requires is a couple of hours to examine the investment proposal and all the relevant information is available in the mass of documents on her table.

To decide whether or not she ought to invest, Ann may, for example, make a decision on the ordinary balance of first-order reasons. If Ann were to act in accordance with this mode of practical reason she would assess and weigh all the relevant reasons for and against investing – namely, all relevant considerations that go to the potential return versus the potential risk of the investment – and ultimately choose that course of action which has the greatest overall support. Thus, if she were to decide that the reasons for investing outweighed the reasons for not investing it would be rational for Ann to invest.

The problem of course is that Ann is, to an extent, inhibited from making a proper determination on the ordinarily balance of first-order reasons. She is tired and knows that when she is tired she is susceptible to making mistakes. Even if she believes the balance of first-order reasons favours investing, her inhibited state increases the possibility that her decision will be wrong. Of course, the fact that she is tired does not mean that she will make the wrong decision. It simply means there is a higher probability that she will.

\[^{57}\text{ibid 37.}\]
In an effort to make the best decision she can given the context in which she must make it Ann could adopt a different strategy, a different mode of reasoning. For example, Ann could decide, at an earlier point in time, that when she is tired she will never make investment decisions. To Raz, this earlier decision constitutes, or gives rise to, an exclusionary second-order reason – a reason for Ann to exclude from her consideration any first-order reason or category of first-order reasons that favour investing. Notice that Ann does not regard her prior decision as a first-order reason for action. It is not simply another reason to be weighed against other first-order reasons for investing. Rather, she regards it as a reason for disregarding other reasons that favour investing. If Ann acts in accordance with her prior decision then when she is tired she will not invest regardless of how strong she considers the reasons in favour of investing to be.\(^{58}\)

Raz’s example simultaneously exemplifies the advantages and limitations of exclusionary second-order reasoning. On the one hand, if Ann faithfully acts in accordance with her exclusionary second-order reason, she will never make a bad investment decision when she is tired. There will certainly be cases where Ann believes, in her tired state, that she ought to invest despite the fact she should not. In such circumstances her exclusionary second-order reason is a reason for her not to act on the ordinary balance of reasons and acting in accordance with it can be justified because it helps her make the best decision in the context – that is, not to invest. On the other hand, there will be cases where the best decision is actually for Ann to invest, but her exclusionary second-order reason will preclude her from doing so. In such circumstances it will restrain her from making the best decision in the context – that is, to invest.

An alternate strategy would be for Ann to walk a middle-line. For example, she may decide, at an earlier point in time, that ordinarily she will not invest when tired unless the investment opportunity appears to be ‘really good’. To act in this way is what Perry describes

\(^{58}\) ibid 37–38.
as acting in accordance with a non-exclusionary second-order reason.\footnote{Perry (n 53) 223.} When Ann is tired, she will still refuse the majority of investment opportunities that come her way. Yet, her non-exclusionary second-order reason will not pre-empt her decision in any given context by excluding from consideration any first-order reasons she may find relevant to her ultimate determination.

By acting in accordance with her non-exclusionary second-order reason, Ann would effectively be introducing a presumption in favour of not investing. The presumption would only be capable of being displaced where the strength of the first-order reasons in favour of investing are strong enough that the investment could be considered ‘really good’. In effect, she would be attributing less weight to the reasons that favoured investing, so that they were now required to be stronger than what they would have needed to be if she were to decide on the ordinary balance of first-order reasons. Any investment opportunity that fell below the threshold of ‘really good’ would therefore be rejected on the basis that the reasons for investing are not strong enough to displace the presumption in favour of not investing.

Acting in accordance with a non-exclusionary second-order reason is certainly difficult to conceptualise. But this is simply to acknowledge that the way in which authorities reason is not easily explained. What is clear however is that, in this context, Ann is more likely to make the right decision each time she is faced with a new investment opportunity if she acts in accordance with her non-exclusionary second-order reason rather than if she were to act on the ordinarily balance of first-order reasons or in accordance with her exclusionary second-order reason. In this sense, acting in accordance with her non-exclusionary second-order reason represents the most effective strategy for Ann to make the best decision she can when tired.\footnote{Perry (n 52) 935.}

To better understand these three modes of practical reasoning I provide them diagrammatically below. As we will see, it is important to understand each mode of practical
reason well because it will help us understand exactly how comity guides authorities in the exercise of their adjudicatory power. Similarly, in Chapters 4 and 5, where we apply comity to the question of precedent, we will rely quite heavily on the philosophy of practical reasoning.

The first diagram represents Ann acting on the ordinary balance of first-order reasons. In it, we can picture Ann’s practical reasoning process as a balancing act in which she puts considerations that count in favour of investing on one side of the Balance, and considerations that count against investing on the other side of the Balance, to see which side swings down. In this mode of practical reasoning each consideration is assigned its ordinary weight (represented in circle brackets). The diagram shows that Ann ought to invest because that course of action has the greatest support.

The second diagram represents Ann acting in accordance with her exclusionary second-order reason – that is, her prior decision never to invest when tired. Here we picture Ann’s practical reasoning process as the same balancing act. Yet this time, Ann excludes from consideration those first-order reasons that count in favour of investing. By acting in accordance with her exclusionary second-order reason she assigns those first-order reasons that count in favour of investing a theoretical weight of ‘zero’ (represented in square brackets) which effectively removes them from consideration. It follows that the Balance will swing down towards not investing and if Ann acts rationally she ought not to invest.

The third diagram represents Ann acting in accordance with her non-exclusionary second-order reason – that is, her prior decision that, when she is tired, she will only invest if the opportunity appears to be ‘really good’. Again, we picture Ann’s practical reasoning process as the same balancing act. Yet, unlike the prior two modes of practical reasoning, Ann treats those first-order reasons in favour of investing as having theoretically less weight than they actually do (represented again in square brackets). In this way, the Balance incorporates a bias in favour of not investing but Ann’s second-order reason does not restrain her from
considering and weighing first-order reasons in favour of investing. In the diagram, those first-order reasons in favour of investing are still of sufficient weight to tip the Balance down towards investing despite the fact that they are assigned less weight in Ann’s decision-making process.
Mode 1: Deciding on the ordinary balance of first-order reasons

Considerations in favour of investing (+6)
  - Strong possibility of returns (+3)
  - No time limit on investment (+2)
  - Diversification of portfolio (+1)

Considerations against investing (+2)
  - Volatile stock (+1)
  - May miss out on other opportunities (+1)

Mode 2: Deciding in accordance with her exclusionary second-order reason

Considerations in favour of investing (+6) [+6]
  - Strong possibility of returns (+3) [+0]
  - No time limit on investment (+2) [+0]
  - Diversification of portfolio (+1) [+0]

Considerations against investing (+2)
  - Volatile stock (+1)
  - May miss out on other opportunities (+1)

Mode 3: Deciding in accordance with her non-exclusionary second-order reason

Considerations in favour of investing (+6) [+3]
  - Strong possibility of returns (+3) [+1.5]
  - No time limit on investment (+2) [+1]
  - Diversification of portfolio (+1) [+0.5]

Considerations against investing (+2)
  - Volatile stock (+1)
  - May miss out on other opportunities (+1)
Of course, acting in accordance with a non-exclusionary second-order reason will not only represent an effective decision-making strategy for Ann. A wide range of authorities, operating in diverse contexts, might also act in accordance with a non-exclusionary second-order reason in an effort to make better decisions. Consider, a different scenario – for example, my decision to buy a painting. Last week I came across a magnificent Picasso. The asking price – only £10,000. Now, I know a little bit about art. I know that Picasso is a famous artist and I know his work is well sought after. I have also done some research and discovered that Picasso’s artwork is often sold for much more than £10,000. I immediately see a potential investment opportunity.

The question however is whether or not I should buy it – whether or not it would be a good investment. One possible way to make this decision might be to decide on the ordinarily balance of first-order reasons. This would require me, like Ann, to weighing all the relevant first-order reasons for and against buying the painting and act on that course of action which had the greatest overall support. However, perhaps I might employ a better strategy, one that may increase the chance that I will make a good investment. For example, perhaps I could rely on the opinion of a professional valuer.\(^{61}\)

Now I am certainly not inhibited like Ann was. I am not tired, emotional or drunk and I can certainty decide for myself. But, I must recognise that, with respect to the decision to be made, my ability to decide on the balance of reasons – to assess what first-order reasons are relevant and what weight they should be given – is limited in comparison to that of a professional valuer. In other words, the valuer is, by virtue of his superior expertise and skill (that is, his very nature as a professional valuer), in a better position than I am to determine

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\(^{61}\) Raz argues that it can be rational not only to follow an exclusionary second-order reason which one has formulated for oneself at a time before the relevant situation has arisen but also to treat the utterances of another to constitute, or give rise to, an exclusionary second-order reason. Perry makes the same point with respect to non-exclusionary second-order reasons.
what the balance of first-order reasons really requires. Our comparative competency means that, in this case, it would certainly be rational for me to defer to his judgment.

But what are the limits of such deference? Ultimately, that is up to me – I am certainly under no duty to obey the valuer or his judgment. Of course, I could decide that there should be no limits, and that, regardless of the first-order reasons against buying the painting, if the valuer is of the opinion that the painting is a good investment, then I ought to purchase it. If I were to act in this manner, we might say that the respect I have for the valuer’s skill and expertise constitutes, or gives rise to, an exclusionary second-order reason to defer to his judgment.

It is certainly true that the superior skill and expertise of the valuer makes it more likely that his determination as to what the balance of first-order reasons requires will be correct. At the very least, I should recognise that his judgment is likely to be better than my own. But, I would likely consider this kind of deference – deference as a rule – to go too far. Whilst it could certainly be justified as the best decision I could make in most circumstances, there would be cases where I would be required to defer to his opinion even though I am thoroughly convinced he is wrong. In essence, I would be forcing myself to make a decision I was sure could not be right.

Of course, this problem can be avoided, or at the very least minimised, if I were to consider the respect I have for the valuer’s skill and expertise to constitute, or give rise to, a non-exclusionary second-order reason for action. For example, I may decide to defer to the valuer’s judgment, perhaps up until the point where I could say that, in my opinion, the valuer’s judgment ‘certainly could not be right’. In doing so, I would be introducing a presumption or bias into my practical reasoning that I ought ordinarily to follow his judgment unless I am convinced he certainly could not be right. In doing so I would be deferring as a matter of principle, rather than as a rule.
Evidently, there is no reason why the strength of the presumption will be the same in all contexts. The nature of the authorities in question and the context in which they operate will ultimately shape the appropriate presumption that operates between them. For example, where I have drastically less expertise and skill than the valuer, I would certainly have good reason to believe that his superior skill and expertise means that his judgment will better than my own. By the same token, my comparative lack of skill and expertise means that, ordinarily, I am less likely to be in a position where I can say for sure that the valuer’s opinion ‘certainly could not be right’.

On the other hand, imagine I have studied Picasso’s work for a very long time and that, whilst I am no expert, I know quite a lot about Picasso and the market for his works. In circumstances where I have comparative less skill and expertise than the valuer, but not substantially less, I still have good reason to believe that the valuer’s judgment will be better than my own. But my reasons will not be as strong, resulting in a weaker presumption in favour of deferring to the valuer’s judgment. By the same token, despite my comparative lack of skill and expertise, I will also be in a better position (than if I had comparatively far less skill and expertise) to determine if the valuer’s judgment ‘certainly could not be right’. The strength of the presumption will thus differ representing the best strategy I can employ to make the best decision I can given the context in which I must make it.\(^{62}\)

Acting in accordance with a non-exclusionary second-order reason can therefore be justified on the basis that it represents an effective strategy for authorities to determine what they *ought* to do in a given context. In certain circumstances, a simple determination on the ordinary balance of first-order reasons will not always lead to the best result; nor will acting in accordance with an exclusionary second-order reason. A non-exclusionary second-order reason on the other hand introduces a systematic and deliberate bias into an authority’s practical

\(^{62}\) Perry (n 52) 935.
determination in the form of a presumption with the aim of guiding the authority to make a better decision than it would have made on the ordinary balance of first-order reasons or if it were to act in accordance with an exclusionary second-order reason.

It is important to note that a non-exclusionary second-order reason persuades, but it does not command. It creates a presumption in favour of a particular course of action – in the form of a new weighted balance of first-order reasons – but never in the form of a rule. It never pre-empts an authority’s decision but rather guides an authority towards that course of action most likely to be right in any given context.63

I propose that comity constitutes, or gives rise to, a non-exclusionary second-order reason in much the same way. When a court acts with comity, it effectively introduces a systematic and deliberate bias into its practical reasoning process, the aim of which is to guide the exercise of its own adjudicatory power in a manner consistent with the reasons for comity – namely, to minimise the injustice of conflict and the misallocation of authority. As the United States Supreme Court held in Mast, Foos & Co. v Stover Manufacturing Co.64

Comity … is something more than mere courtesy, which implies only deference to the opinion of others… but its obligation is not imperative. Comity persuades; but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided.65

I believe this is supported by the role comity plays in the development and application of private international law more generally. Comity never precludes a court from taking into consideration any first-order reasons that it may consider relevant to its determination in any

63 ibid 944.
65 ibid 488-489 (Justice Brown).
given case. Likewise, it never precludes a court from acting in a manner ultimately inconsistent with comity. But, comity does *reweight* the balance of first-order reasons, by attributing less weight to those first-order reasons that are inconsistent with the reasons for comity. The result is that, when a court acts with comity towards another, it effectively create a presumption – in the form of a new weighted balance of first-order reasons – that may only be displaced when the collective weight of those first-order reasons that favour a course of action inconsistent with comity attain a somewhat higher threshold than they would have needed had the court simply made a determination on the ordinary balance of first-order reasons. Of course, the strength of the presumption will differ depending on the context in which the decision is to be made.

Consider again, for example, comity’s role in the development of the doctrine of *forum non conveniens*. In England, the doctrine of *forum non conveniens* forms the basis for a presumption that where there is a foreign court better placed to resolve the matter in question the English court ought ordinarily to recognise its authority to do so by declining to exercise its own jurisdiction. In circumstances where the English court considerers that there is a foreign court better placed to resolve the matter in question a stay on grounds of *forum non conveniens* may only be refused where there are ‘significant reasons of justice’ against granting such an order.\(^66\) A review of judicial decisions demonstrates that any reasons of justice against granting such an order are not to be assessed and weighted on the ordinary balance of reasons. Rather, the principle of comity effective attributes less weight to these reasons of justice requiring that they be ‘significant’ in nature in order to tip the balance in favour of refusing a stay.

In this sense, comity constitutes, or gives rise to, a non-exclusionary second-order reason – a reason to treat a first-order reason as having less weight than the court would otherwise ordinarily judge it to have. Comity, certainly does not exclude any relevant first-order reasons of justice from the court’s consideration. But, it does reweigh the balance of first-

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\(^{66}\) *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (UK HL) 475-478 (Lord Goff, with whom Lord Keith, Lord Templeman, Lord Griffiths and Lord Mackay agreed).
order reasons in a manner that favours that course of action most consistent with comity – in
this case, the granting of a stay in favour of a more appropriate forum. By acting with comity,
the English court effectively introduces a deliberate and systemic bias into its practical
reasoning process in the form of a presumption justified by the reasons for comity.

Consider likewise comity’s role in the recognition of foreign judgments. Where a
foreign court had competent jurisdiction to hear a dispute – i.e. it did not act contrary to comity
by exercising jurisdiction when it should not have – comity supports a presumption that the
courts of other States ought ordinarily to recognise the judgment within their territory. Of
course, the presumption may be displaced in circumstances where there are reasons that count
against recognition. Yet, again a review of judicial decisions demonstrates that these reasons
are not to be assessed and weighed as if the question of recognition is to be made on the
ordinarily balance of first-order reasons.

In practice, the principle of comity requires that any reasons against recognition not
only exist but that they also be ‘special’ in nature or that recognition would be ‘repugnant’ to
public policy. It is no surprise that courts often speak of this as a ‘high bar’ to meet. This
terminology is certainly suggestive of the weighted balancing act that operates behind the
court’s exercise of power. The practical reasoning process of the court in such cases only makes
sense if we conceive of comity as constituting, or giving rise to, a non-exclusionary second
order reason – a reason to attribute less weight to a first-order reason, or category of first-order
reasons, that favours a course of action inconsistent with comity.

67 See, most notably, Hilton v Guyot., 159 US 113 (1895) (US SC). See also, the position in English and Australian
law, Schultz, Mitchenson and Ridi (n 29) ch 3.
68 Hilton v Guyot., 159 US 113 (1895) (US SC) 202-203 (Justice Gray, with whom Justice Field, Justice Brown,
Justice Shiras and Justice White agreed); Bachchan v India Abroad Publications Inc (1992) 585 NYS 2d 661 (N.Y.
SC).
I suggest that comity plays the same role with respect to all doctrines of private international law that it forms the basis for.\textsuperscript{70} Of course, the varied nature of the contexts in which the need for comity may arise means that the strength of the presumption – or more specifically, the weighted threshold – will differ. However, judicial decisions demonstrate that comity, through the development and application of various doctrines of private international law, guides the court’s exercise of adjudicatory power with respect to the authority of other States. By reweighing the balance of first-order reasons, comity is able to ensure that ordinarily courts exercise their adjudicatory power in a manner consistent with the reasons for comity – that is, reasons of systemic justice.

3.4. A Duty to Act with Comity?

So do State, through their courts, have a duty to act with comity towards one another? The short answer is yes but the long answer involves issues for the theory of authority that are much more complicated than the explanation of the binary relation between an authority and a person subject to that authority. In truth, the duty to act with comity derives not from any duty to foreign States or their courts. Rather, it derives from the duty courts owe to those subject to their own authority to resolve disputes that come before them in the most just manner possible. It is here, in the derivative nature of the duty courts owe to those subject to their own authority that we can truly understand the nature and extent of the duty to act with comity.

The duty to act with comity stems from the systemic judicial need to minimise conflict between co-existing States and to allocate their authority in the most just manner possible. The principle is only relevant in circumstances where there is a risk of conflict. To take our English-Australian example again, comity presupposes that only one conception of justice can apply to resolve any given case and that where the Australian court is better placed to resolve a particular

\textsuperscript{70} For more on this point see generally, Schultz, Mitchenson and Ridi (n 29).
type of dispute, or where the English court is in no better position than the Australian court, the best exercise of adjudicatory power by the English court will ordinarily be for it to recognise the Australian court’s authority. The reason why the English court acts with comity towards the Australian court is therefore found in the service it ought to provide to those subject to its own authority – that is, to resolve the matter before it in the most just manner possible.

We can say that a duty of comity is owed by the English court to the Australian court, but this is really just a shorthand to describe something much more complex. In truth, the duty to act with comity derives not from any duty to the Australian court. Rather, the English court’s duty to recognise the authority of the Australian court derives solely from the duty it owes to those subject to its own authority. It is a duty that arises by derivation of the much broader duty it owes to those subject to its own authority to resolve the matter before it in the most just manner possible. Comity embodies the idea that the best exercise of the English court’s adjudicatory power vis-à-vis those subject to its own authority may in fact be to recognise the authority of the Australian court.

The derivative nature of the duty to act with comity helps explain why comity is so difficult to define. Consider the most commonly cited definition of comity provided by Justice Gray (on behalf of the majority) of the United States Supreme Court in Hilton v Guyot:71

‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.72

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71 Hilton v Guyot., 159 US 113 (1895) (US SC).
72 ibid 163–164 (Justice Gray, with whom Justice Field, Justice Brown, Justice Shiras and Justice White agreed).
Justice Gray’s remarks seem to best encapsulate the uneasiness courts feel in describing the nature and extent of their duty to act with comity. The courts are not quite sure whether they should call it an ‘obligation’ because it is clear that there is no obligation to the foreign State, or to its courts. But, they refuse to call it courtesy or goodwill and deny the question is open to their discretion. So judges appeal to principle and they call it comity, much to the dismay of some.73

But viewing comity as a principle of systemic justice helps us better understand the relationship between comity and duty. We can say unequivocally that comity towards the Australian court can involve a duty on the part of the English court to recognise Australian authority. But it is a duty towards the Australian court only by derivation of what the English court owes to those subject to its own authority. This is why comity is a valuable notion, and usefully distinguished from the duty of a subordinate authority to obey a higher authority.

Viewing comity in this way also helps us understand why comity is not synonymous with concepts such as trust, admiration, approval, courtesy or reciprocity as it is so commonly misunderstood to be.74 Whilst the world might ultimately be a better place if courts around the world were to act with these additional qualities towards one another, the reasons for comity certainly do not depend on them. The reasons for comity derive only from systemic judicial concerns. Comity is part and parcel of each court’s paramount duty to those subject to their own authority – that is, to resolve matters before them in the most just manner possible.

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73 Endicott, ‘Comity’ (n 12) 13.
74 See, for example, Mann (n 1) 134; Joel Paul, ‘The Transformation of International Comity’ (2008) 71 Law and Contemporary Problems 19, 19–20. See also, in particular, the work of Anne-Marie Slaughter who imagines a world of ‘judicial comity’ where judges engage in a transnational dialogue based on trust, admiration, courtesy and reciprocity. Whilst the world might ultimately be a better place if judges acted with these additional qualities they are separate to the duty to act with comity. By tying them to the idea of comity, Slaughter misconstrues and confuses the nature and extent of the duty to act with comity. See, Anne-Marie Slaughter, A New World Order (Princeton University Press 2004); Anne-Marie Slaughter, ‘Court to Court’ (1998) 92 The American Journal of International Law 708; Anne-Marie Slaughter, ‘A Global Community of Courts’ (2003) 44 Harvard International Law Journal 191.
additional qualities then are distinct from the reasons for comity and ultimately have no impact on one’s duty to act with comity towards the legitimate authority of others.

It follows that when the English court acts with comity towards the Australian court it involves no act of act of trust, admiration or approval on the part of the English court towards the Australian Government or its courts. Rather, it is simply recognition that the Australian courts are better placed in the context in which the case arises to resolve the dispute, or at the very least the English court is in no better position. Even if the English court does not trust the Australian Government to enact good policy or the Australian courts to make the ‘right decision’, it does not follow that the English court can consider itself in a better position to decide upon the dispute. The English court is in a comparatively worse position to determine the dispute on the ordinary balance of first-order reasons and therefore has a valid second-order reason to recognise the Australian court’s authority.

Similarly, even if the English court is not particularly fond of the Australian court, or the Australian court would refuse to recognise English authority if the situation were reverse, it does not follow that the Australian court is now somehow less able to do justice with regard to Australian matters, or that the English court can necessarily do a better job. Comity presupposes that the best exercise of adjudicatory power by the English court will still ordinarily be for it to recognise the Australian court’s authority on the basis that it can be expected to do a better job with respect to Australian matters than the English court.

If this is correct, then incidentally, the decision is *Hilton v Guyot* was wrongly decided. In that case, the United States Supreme Court declined to recognise a French judgment in the Unites States holding, by a majority of 5-4, that comity does not require recognition where the French courts would not recognise a judgment of the United States in France. By doing so, the

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75 "Hilton v Guyot." 159 US 113 (1895) (US SC).
Supreme Court tied the principle of comity to the idea of reciprocity, misconstruing the nature and extent of the duty to act with comity. Justice Gray, on behalf of the majority, held:

… where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh.

…

[However] there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgment of the courts of France; and that ground is want of reciprocity, on the part of France, as to the effect to be given to the judgements of this and other foreign courts.\textsuperscript{76}

I suggest that the minority gave a more accurate account of the nature and extent of the duty to act with comity. Chief Justice Fuller, on behalf of the minority, held that as the matter was clearly within the competency of the French court, and there was no ‘special reason’ why recognition should not be given in the United States, the decision ought to have been recognised. To the minority, there could be no requirement of reciprocity because the question of whether or not France would afford reciprocal recognition had no bearing on the French.

\textsuperscript{76} ibid 202–210 (Justice Gray, with whom Justice Field, Justice Brown, Justice Shiras and Justice White agreed).
court’s ability to do justice. By failing to recognise the judgment, the Supreme Court was failing to exercise its own authority in the most just manner possible – i.e. to minimise conflict and recognise the authority of that court most competent to decide the case in question.

To the minority, the majority’s decision constituted an act of retaliation by the Court against France (and the French courts) for its failure to afford recognition to US judgments in France. Yet, the question of retaliation was, in their opinion, a question ‘for the government, and not for its courts’ – that latter being concerned solely with considerations of justice, not international politics.\(^77\) The majority’s decision incorrectly required that the courts of the United States do ‘not as justice and reason require, but as they are done by’.\(^78\)

Whilst the requirement of reciprocity has not been completely abandoned in the United States, it has to a large extent been detached from the duty to act with comity. Most State and Federal courts either refused to enforce the reciprocity doctrine, or no longer enforce it, with respect to foreign judgments.\(^79\) As the Supreme Court of Minnesota held in *Nicol v Tanner*:\(^80\)

*Hilton* has been severely and consistently criticized by commentators and courts… We therefore decline to adopt the doctrine of *Hilton* and hold instead that reciprocity is not a prerequisite to enforcement of a foreign judgment in Minnesota. It is not the business of the courts, whose province is the decision of individual cases, to impose rules designed to coerce other nations into giving effect to our judgments. Reciprocity has

\(^77\) *ibid* 234 (Chief Justice Fuller, with whom Justice Harlan, Justice Brewer and Justice Jackson agreed).

\(^78\) ‘… the supreme court of the United States, by a bare majority, has considered that the effect to be given to a foreign judgment is determined by the treatment given our judgments in the courts of the country whose judgment is under consideration; that courts are required to do, not as justice and reason require, but as they are done by.’ – *MacDonald v Grand Trunk Ry Co.*, 71 NH 448 (1902) (N.H. SC) 456 (Justice Parsons).

\(^79\) The scope of *Hilton* was limited because the issue before the Supreme Court originated from a federal court sitting in diversity. *Hilton* thus established a rule of federal common law that was binding on federal courts but not on state courts. As a result, many state courts, not expressly bound by the Supreme Court’s decision in *Hilton* refused to enforce the reciprocity doctrine. Later, in *Erie Railroad Co. v Tompkins*, 302 US 63 (1938) and *Klaxon Co. v Stentor Elec Mfg Co.*, 313 US 487 (1941) the Supreme Court held that federal courts are constitutionally bound in diversity cases to follow the law of the state in which they sit. Given these developments and the limited reach of *Hilton*, it was assumed by most courts that state law governed the recognition of foreign judgments and that, accordingly, the reciprocity doctrine was no longer binding upon federal courts sitting in diversity.

\(^80\) *Nicol v Tanner*, 256 NW.2d 796 (1976) (Minn. SC).
no basis in the policies or rules that underlie the just and fair disposition of a case involving a foreign judgment; accordingly, it should have no place in our law.  

Detaching comity from the so-called doctrine of reciprocity helps clarify the nature and extent of the duty to act with comity. Even if the English court is aware that the Australian court would show no respect for its judgments if the situation were reverse, this does not mean that the English court can, or should, ignore the dictates of comity. The reasons for comity have to do with the English court’s duty to those subject to its own authority and the value in recognising the superior skill and expertise of the Australian court to resolve the particular type of cases in question. The reasons for comity are not cancelled or defeated by a lack of reciprocity on the part of the Australian court. Rather, if the English court fails to act with comity in such circumstances, one can only say that the English court has failed to fulfil its own duty to do justice to those subject to its authority.

3.5. Comity Among Authorities

The principle of comity certainly helps us understand why States recognise, or ought to recognise, each other’s authority despite being under no obligation to obey one another. Yet, it is clear that the reasons for comity are not limited to the interactions that occur between States in the context of private international law. There exists a wide range of authorities, operating in diverse contexts, who act with, or who ought to act with comity towards one another.

Drawing on the principle of comity in private international law, I propose that we can abstract to a general principle of comity among authorities. A general principle of comity has the potential to assist a wide range of authorities who, despite having no obligation to obey one another, must still determine how they ought to act with respect to each other’s authority.

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81 ibid 800-801 (Justice Kelly).
Whilst the application of a general principle of comity is far-reaching, the purpose of this these is to draw upon it for one specific purpose – namely, to better account for the nature and authority of precedent and to assist authorities to determine how they ought to act with respect to each other’s prior decisions.

Drawing on the principle of comity in private international law there are a few things we can say in general about the duty to act with comity. Comity is the respect shown by one authority for the legitimate adjudicatory authority of another in circumstances where the former is under no obligation to obey the latter. The second authority’s duty to act with comity towards the first is not a duty to trust, admire or approve of the first authority or of its decisions. It requires no reciprocity from the first authority and involves no act of courtesy by the second authority towards the first. Rather, the duty to act with comity stems from the systemic judicial need to minimise conflict between co-existing authorities and to allocate their adjudicatory authority in the most just manner possible.

Comity is relevant in any context where there is a risk of conflict between two (or more) authorities who have no duty to obey each other or each other’s decisions. The principle presupposes that only one conception of justice can apply to resolve any given type of case and that where the first authority is better placed to resolve the dispute, or where the second authority is in no better position than the first, the best exercise of adjudicatory power by the second authority will ordinarily be to recognise the authority of the first. The reason why the second authority acts with comity towards the first is therefore found in the service it ought to provide to those subject to its own authority – that is, to resolve the matter before it in the most just manner possible.

The principle of comity constitutes, or give rise to, a non-exclusionary second-order reason that effectively restrains the second authority from making a de novo assessment in any given case on the ordinary balance of first-order reasons. By acting with comity, the second
authority fetters its own adjudicatory power to determine the matter in question on the balance of first-order reasons and instead chooses to attribute less weight to those reasons that favour a course of action inconsistent with comity. The result is a presumption – or a new weighted balance of first-order reasons – that favours that course of action most consistent with comity.

Acting with comity is an effective strategy for the second authority to make the best decision it can given the context in which it operates. The presumption reflects the likelihood that the best exercise of adjudicatory power by the second authority will ordinary be that course of action favoured by the presumption. The new weighted balance of first-order reasons operate as a systemic and deliberate bias in the second authority’s practical reasoning process requiring that those reasons that favour a course of action inconsistent with comity attain a somewhat higher threshold than they would have needed had the dispute been decided simply upon the ordinary balance of first-order reasons.

There is no reason to think that the presumption will always be active or that it will be the same in all contexts. The varied nature of authorities and the contexts in which they operate suggests that the weighted threshold that ought to apply will differ. The question for any second authority, before it can determine how it ought to act, must necessarily be to determine what presumption (if any) ought to apply in favour of that course of action most consistent with comity. In a sense, this requires the second authority to determine if, and how, comity reweighs the balance of first-order reasons in the specific context and subsequently to determine whether there are any counter-reasons of sufficient weight to displace that presumption.

The diverse nature of authorities and the contexts in which they operate means that acting with comity may involve a variety of actions on the part of the second authority. As we have seen in the context of private international law comity forms the basis for, and guides the application of, a wide range of legal doctrines aimed at regulating how States ought to act with respect to each other’s authority. In other contexts, comity’s role is no different – it forms the
basis for doctrines that guide the exercise of adjudicatory power. Generally speaking, comity may require the second authority to recognise a decision of the first authority as valid, follow it or give effect to it; require that someone else comply with it; generally refrain from interfering with it; or require the second authority to act in a manner that supports the first authority’s capacity to exercise its own authority. It may even, as we will see in Chapters 4 and 5, require the second authority to recognise the first authority’s prior decision as precedent for a particular course of action.

Comity certainly helps us understand why States recognise each other’s authority despite being under no obligation to obey one another. Yet, the reasons for comity are not limited to the interactions that occur between States. In certain contexts, parents will owe each other a duty of comity, as will teachers, administrative agencies, courts and tribunals. It follows that a general principle of comity may have far-reaching application for a wide range of authorities operating in diverse contexts.

Take for example the role of courts in the context of judicial review. Whilst administrative lawyers would not ordinarily think of courts as incurring a duty of comity towards administrative agencies, I argue that they do and suggest that a general principle of comity may guide courts in the exercise of their judicial powers.\textsuperscript{82}

In cases of judicial review, courts incur no duty to obey administrative agencies or their decisions. They are certainly not subordinate to administrative agencies in any sense of the word and are empowered to overturn decisions with which they disagree. Yet, they rarely do. Ordinarily, courts will defer to administrative agencies on questions that fall within their expertise and skill, even in circumstances where they disagree. I propose that this deference is best characterised as an act of comity and that a general principle of comity can help explain its operation and scope.

\textsuperscript{82} Timothy Endicott makes a similar point in Endicott, \textit{Administrative Law} (n 12).
The basic justification for instituting an administrative agency is the opportunity it creates for the agency to draw upon its expertise and skill in a relatively limited field of practice. The idea is that, by drawing on this expertise and skill, administrative agencies are likely to make better decisions than other types of authorities – including the courts. For this reason, comity supports the presumption that courts ought ordinarily to recognise the authority of administrative agencies to determine matters within their scope because they are ultimately better placed than the courts to do so.

To reflect this position in the law, comity forms the basis for, and informs the application of, the doctrine of ‘reasonableness’ found, to varying degrees, in various common law jurisdictions. Under this doctrine courts defer to administrative agencies unless their decision is one which the court considers to be ‘unreasonable’. In *Associated Provincial Picture Houses v Wednesbury*, Lord Greene MR held that:

… the task of the court is not to decide what it thinks is reasonable, but to decide whether what is *prima facie* within the power of the local authority is a condition which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose.

It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming…

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84 *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 (ENG CA).
85 ibid 223-234. ‘… power is exercised in an improper manner if … the decision-maker makes his or her decision in a manner so devoid of plausible justification that no reasonable person could have taken that course.’ – *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (AUS HC) 290 (Chief Justice Mason and Justice Deane).
Justice Moldaver of the Supreme Court of Canada elaborated on the doctrine in *McLean v British Columbia*, adding:

The bottom line here, then, is that the Commission holds the interpretative upper hand: under reasonableness review, we defer to any reasonable interpretation adopted by an administrative decision maker, even if other reasonable interpretations may exist. Because the legislature charged the administrative decision maker rather than the courts with “administer[ing] and apply[ing]” its home statute (Pezim, at p. 596), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear.

Accordingly, the appellant’s burden here is not only to show that her competing interpretation is reasonable, but also that the Commission’s interpretation is unreasonable. And that she has not done. Here, the Commission, with the benefit of its expertise, chose the interpretation it did. And because that interpretation has not been shown to be an unreasonable one, there is no basis for us to interfere on judicial review — even in the face of a competing reasonable interpretation.

*Wednesbury* and *McLean* demonstrate that the doctrine of ‘reasonableness’ is best understood as an expression of comity. In effect, it fetters the court’s ability to approach questions on judicial review on the ordinary balance of first-order reasons. The court’s bar to exercising

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87 ibid 40-41 (Justice Moldaver, with whom LeBel, Fish, Rothstein, Cromwell and Wagner JJ agreed).
88 ‘…responsibility for making the relevant decision rests with another party and not with the court. It is not enough that we might, if the responsibility for making the relevant decision rested with us, make a decision
its power to overturned administrative decisions and replace them with its own is not whether the court disagrees with the decision of the administrative agency, but rather whether there are ‘overwhelming reasons’ that make the decision unreasonable. In forming the basis for the doctrine, and by informing its application, comity guides the court’s exercise of power in a way that allocates adjudicatory authority to that decision-maker best placed to make the decision given the context in which the court operates – in this case, the administrative agency.

Even where the court disagrees, the superior skill and expertise of the administrative agency means that its decision will, ordinarily, be better than the court’s. Comity requires that the courts recognise they are, by virtue of their inferior expertise and skill, in a worse position than administrative tribunals to do justice. The strength of the presumption reflects the comparative competency of administrative agencies vis-à-vis courts in the context of judicial review and represents the best strategy the court can employ to determine how it ought to act in respect of those subject to its own authority.

Of course, there will be circumstances where the court considers there to be reasons so ‘overwhelming’ that it is sure the administrative agency could not be right. Certainly, in such circumstances, the court may displace the presumption, overturn the decision and replace it with its own. Requiring a court to defer to an administrative agency in such circumstances would prejudice the duty the court owe to those subject to their own authority because it would

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89 ‘It may be misfortunate for the applicant that the court … cannot begin to evaluate the comparative worth of research in clinical dentistry; but it is a fact of life.’ – R v Higher Education Funding Council, ex parte Institute of Dental Surgery [1994] 1 WLR 242 (ENG HC) 262 (Sedley J).

90 On judicial review, the comparative competency of the two authorities in question and the context in which they operate calls for a strong presumption in favour of deferring to the opinion of the administrative tribunal. Thus, there needs to be ‘overwhelming’ first-order reasons that make the decision one which no reasonable authority would have made. The decision must be ‘[s]o outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.’ – Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (UK HL) 410 (Lord Diplock).
require that it defer to the decision of another authority despite the fact it is one the court believes ‘no reasonable authority could have made’.\(^91\)

It is certain possible to imagine a system of judicial review without comity. However, it would be one that would ultimately lead to injustice through conflict and the misallocation of authority. Decisions of administrative agencies would be provisional, with an opportunity for a party disappointed by the decision of an administrative agency to ask for a new decision to be made afresh by the courts. If the courts owed no duty of comity, administrative agencies would essentially become redundant and the authority to determine matters originally within their scope of expertise and skill would be allocated to a less competent authority – namely, the courts.

Yet, by acting with comity, the courts are able to promote the just allocation of authority and improve the likelihood that they will exercise their own adjudicatory powers in the most just manner possible. Courts on judicial review incur a duty of comity towards administrative agencies for the simple reason that they are not administrative agencies.\(^{92}\) They are courts and the best exercise of their own power will ordinarily be to recognise the authority of administrative agencies by refusing to overturn their decisions.

A general principle of comity might also help a range of other authorities determine how they ought to act with respect to the adjudicatory authority of others. Consider, for example, how a general principle of comity might assist international courts and tribunals to determine how they ought to act in cases where they share concurrent jurisdiction with another authority. I propose that in such circumstances comity may form the basis for, and guide the

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\(^91\) ‘It is not the constitutional role of the court to regulate the conditions of service in the armed forces of the Crown, nor has it the expertise to do so. But it has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. While the court must properly defer to the expertise of responsible decision-makers, it must not shrink from its fundamental duty to do right to all manner of people…’ – *R v Ministry of Defence, ex parte Smith* [1996] QB 517 (ENG CA) 556 (Bingham MR).

\(^92\) ‘If I were the planning authority, I would stop preserving the Vospor building as a useless object... However, I am not the planning authority, and neither is the judge.’ – *First Secretary of State v Hammersmatch Properties Ltd* [2005] EWCA Civ 1360 (ENG CA) 40 (Staughton LJ).
application of, a range of doctrines aimed at minimising the injustice of conflict and the misallocation of authority.

In recent years, scholars and practitioners have become increasingly concerned with the proliferation of international courts and tribunals. The increased density, volume and complexity of international law, combined with a new willingness on the part of States, investors and individuals to submit to various forms of international adjudication, has led to a significant increase in the number and type of international authorities operating with the same space.93

These authorities co-exist in a manner no so different to nation States. For the main part, they are largely ‘sovereign’ in the sense that they generally incur no duty to obey one another or each other’s decisions. Ordinarily they will have been created independently and little thought will have been given to the question of their compatibility with other international authorities. Likewise, the treaties and agreements that establish their existence and authority will generally lack any norms by which to resolve conflicts of authority. In the absence of a central legislature, the emergence of international courts and tribunals has been sporadic and largely uncoordinated resulting in a complex space dominated by interdependent yet operationally autonomous authorities.94

For this reason, international adjudicatory authorities are susceptible to many of the same problems that face States in the context of private international law.95 For example, the ICJ, which has jurisdiction to adjudicate any legal dispute between States, may have concurrent jurisdiction over inter-State disputes referred to specialised international tribunals (for example,
ITLOS or the WTO) or to regional courts (for example the CJEU or one of the many regional human rights courts). The WTO, which has jurisdiction over inter-State trade disputes, might also have concurrent jurisdiction with certain regional trade authorities (for example, the CJEU, NAFTA, the EFTA Court or the TJCA) and the OHCHR for example, which is a universal human rights authority, may have concurrent jurisdiction with various regional authorities (for example, the ECtHR, IACHR or ACHPR) or other specialised human rights authorities (for example, the UN Committees against Racial Discrimination, Discrimination against Women, or against Torture). Indeed, it is not uncommon for parties to commence proceedings before more than one authority simultaneously.96

In fact, in recent years a growing number of disputes involving different branches of international law have been submitted to more than one international authority. For example, a dispute over the legality of transit restrictions introduced by Chile against European Community fishing vessels was brought concurrently before the WTO and UNCLOS.97 Similarly, a dispute between Ireland and the United Kingdom over the now infamous MOX Plant gave rise to parallel proceedings under ITLOS,98 OSPAR99 and UNCLOS.100 The matter also gave rise to CJEU proceedings as well.101 In the same vein, various aspects of the 1999 NATO operation in Kosovo have been addressed in the ICTY,102 the ECtHR103 and the ICJ.104

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96 Shany (n 93) 8–9.
97 Chile – Measures Affecting the Transit and Importation of Swordfish, Request for Consultation by the European Communities, WT/DS193/1 (2000) (WTO); Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile – European Union), Order 2000/3, UNCLOS Case No. 7 (2000) (UNCLOS)
98 The MOX Plant Case (Ireland v United Kingdom), Provisional Measures, ITLOS Case No. 10 (2001) (ITLOS).
100 MOX Plant Case (Ireland v United Kingdom), Memorial of Ireland, PCA (2002) (PCA-UNCLOS).
101 Commission v Ireland C-459/03 (2006) (CJEU Gr. Ch.).
103 Banković v Belgium [2001] ECHR 890 (ECtHR Gr. Ch.).
104 Legality of Use of Force (Yugoslavia v Belgium) [1999] ICJ Reports 124 (ICJ); Legality of Use of Force (Yugoslavia v Canada) [1999] ICJ Reports 259 (ICJ); Legality of Use of Force (Yugoslavia v France) [1999] ICJ Reports 363 (ICJ); Legality of Use of Force (Yugoslavia v Germany) [1999] ICJ Reports 422 (ICJ); Legality of Use of Force (Yugoslavia v Italy) [1999] ICJ Reports 481 (ICJ); Legality of Use of Force (Yugoslavia v Netherlands) [1999] ICJ Reports 542 (ICJ); Legality of Use of Force (Yugoslavia v Portugal) [1999] ICJ Reports 656 (ICJ); Legality of Use of Force (Yugoslavia v United Kingdom) [1999] ICJ Reports 826 (ICJ).
The decentralised regime in which these authorities operate means that like States they generally incur no duty to obey one another or each other’s decisions. For this reason, they are susceptible to reproducing the injustice associated with the conflict and the misallocation of authority.\(^\text{105}\) Yet, the similarity between States and international adjudicatory authorities also means that solutions developed in respect of the former may be of use to the latter.

As I noted at the beginning of this chapter, viewing comity as a principle of systemic justice opens the door to using it as a ‘technique’ to resolve conflicts of authority among a variety of different decision-makers. Scholars have long argued that many doctrines of private international law may also be used between international courts and tribunals.\(^\text{106}\) As a number of these doctrines are based on comity it follows that a general principle of comity may help relive many of the negative consequence associated with the proliferation of international authorities.

For example, comity could form the basis for an international doctrine of interpretation analogous to the *assumption against extra-territoriality*. Under such a doctrine, international courts and tribunals would be required to exercise their jurisdiction in a restrictive manner having due regard to the fact that there may be other authorities better placed to resolve the type of dispute in question. In effect, it would require them to ‘recognise’ the authority of other international courts and tribunals and ‘restrain’ the exercise of their own adjudicatory power out of respect for that authority.

Similarly, comity could inform the development of an international doctrine of *forum non conveniens* which would empower international courts and tribunals to decline jurisdiction on the grounds that another court or tribunal is better placed to resolve the type of dispute in question. In fact, a number of international authorities have already held that international

\(^{105}\) Guillaume (n 95) 303; Koskenniemi (n 93) 8–9.

\(^{106}\) Mills (n 4) 446; Crawford (n 94) 208; Michaels and Pauwelyn (n 4); Knop, Michaels and Riles (n 4).
courts and tribunals may stay proceedings ‘for reasons of justice’.\textsuperscript{107} Whilst they generally make no reference to comity, granting a stay on such grounds necessarily requires international courts and tribunals to restrain the exercise of their own adjudicatory power out of respect for the legitimate authority of another.\textsuperscript{108} In other words, whether they know it or not, they are acting with comity and a general principle of comity may help them exercise their adjudicatory power with propriety.

I do not intend to explore these questions any further for they fall outside the primary purpose of this thesis. Rather, my point is simple — a general principle of comity has far-reaching application for a wide range of authorities in diverse contexts. In particular, it has the potential to assist authorities who, despite having no obligation to obey one another, must still determine how they ought to act with respect to each other’s authority. As we will see in Chapters 4 and 5, this includes authorities who must determine whether or not they ought to follow the prior decision of another as precedent.

3.6. Conclusions

Authorities incur a duty to act with comity ‘for reasons of (systemic) justice’. Comity, as we have seen, is not concerned with the individual rights of private litigants but rather with minimising the injustice of conflict and the misallocation of authority. Through the principles of justice pluralism and modified subsidiarity, comity presupposes that only one conception of


\textsuperscript{108} Although see, \textit{Société Générale de Surveillance SA v Republic of the Philippines}, Objections to Jurisdiction, ICSID Case No. ARB/02/6 (2004) (ISCID). In that case no reference was made to comity. However, James Crawford, one of the arbitrators, later stated that the Tribunal’s decision to stay proceedings was based on ‘interests of comity’. See, James Crawford, ‘Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture’ (2010) 1 Journal of International Dispute Settlement 3, 20.
justice can apply to resolve any given type of case and that where the first authority is better placed to resolve the type of dispute in question, or where the second authority is in no better position than the first, the best exercise of adjudicatory power by the second authority will *ordinarily* be to recognise the authority of the first. The reason why the second authority acts with comity towards the first authority is therefore found in the derivative nature of the duty the second authority owes to those subject to its own authority – that is, to resolve the matter before it in the most just manner possible. It follows that authorities act with, or ought to act with comity because, in certain cases, the most just exercise of their own authority will in fact be to recognise the authority of another.

It is clear that the reasons for comity are not limited to the interactions that occur between States. There exists a wide range of authorities, operating in diverse contexts, who act with, or ought to act with comity. They too acknowledge, or ought to acknowledge that in certain cases the best exercise of their own adjudicatory power will be to recognise the authority of another. It follows that the general principle of comity developed in this chapter has the potential to assist these authorities to determine how they ought to act with respect to one another’s authority.

There is however one context in which a general principle of comity may be of particular utility – namely, in the context of determining the authority of precedent. In Chapters 4 and 5, I advance a comity-based conception of precedent which suggests that precedential reasoning is best characterised as an act of comity and that doctrines of precedent are but an expression of the principle’s systemic judicial aim. As we will see, the general principle of comity developed in this chapter opens the door to a new approach to precedent – one that accounts for the nature and authority of precedent as a universal jurisprudential concept and one that offer authorities guidance in cases where they may be required to recognise another’s prior decision as precedent for a particular course of action.
4
A Comity-Based Conception of Precedent

4.1. Introduction

The purpose of this chapter is to advance a new approach to precedent – one based on the principle of comity. A comity-based conception of precedent suggests that precedential reasoning is best characterised as an act of comity and that doctrines of precedent are but an expression of comity’s underlying systemic judicial aim. It follows that the general principle of comity developed in Chapters 2 and 3, may provide us with a new means to account for precedent.

A comity-based conception of precedent significantly advances our theoretical understanding of the nature and authority of precedent. In particular, it helps us answer some of the most fundamental questions about the theory of precedent – namely, what are precedents? How do authorities reason from precedent? And, how does the prior decision of one authority bind another? As we will see, a comity-based conception of precedent differs in many respects
to orthodox conceptions of precedent. Yet, I argue that it provides a more compelling account of the nature and authority of precedent as a universal jurisprudential concept.

Taking our cue from Huber, I propose that we may reduce this new approach to precedent to three key axioms:

1. The second authority ought to act with respect for the ‘legitimate adjudicatory authority’ of the first authority – including its prior decisions.

2. Where the first authority is better placed to resolve the type of dispute in question, or where the second authority is in no better position than the first authority, comity will support a presumption that the second authority ought ordinarily to follow the first authority’s prior decision.

3. The strength of the presumption depends on the nature of the authorities in question and the need to minimise conflict given the context in which they operate.

These axioms are not intended to replace a proper understanding of comity or a comity-based conception of precedent. Yet, as we will see in Chapter 5, they may provide a wide range of authorities with critical practical guidance in circumstances where they are unsure how they ought to act with respect to the prior decisions of another and may offer a principle-based approach by which to develop new and existing doctrines of precedent.

**4.2. A New Approach to Precedent**

Precedential reasoning is often thought of as unique to the common law. It is no surprise then that our most advanced attempts to understand the nature and authority of precedent have traditionally focused on the common law doctrine of *stare decisis*.\(^1\) However, the idea that only

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the courts of the common law know precedent is a fallacious conclusion. In reality, a wide range of authorities, in various different contexts, reason from precedent. One need only think of the child who insists he should be allowed to stay up late because his older brother was allowed to when he was the same age; or the professor who denies one of his students an extension on the basis that he has already denied another student an extension for the same reason. In countless instances, both inside and outside the law, the fact that something was done before provides a content-independent reason for doing it that way again.2

Reliance on precedent then is a part of life – parents, teachers, colleagues, governmental and university departments, courts and tribunals all do it. The common law’s lack of an exclusive claim on precedential reasoning suggests that if we are to truly understand the nature and authority of precedent then we need to look beyond orthodox conceptions of precedent that have been developed only by reference to the doctrine of stare decisis. In short, what we need is a new approach – one that can help explain the nature and authority of precedent as a universal jurisprudential concept.

Orthodox conceptions of precedent derive primarily from legal positivism – a theory which claims to provide a full account of the nature of binding legal norms. Yet, legal positivism can perhaps best be thought of as singling out one particular aspect of the law as theoretically fundamental and then somehow trying to accommodate all remaining legal phenomena into the theory that results. As we will see below, legal positivism is really a theory of legislation, not adjudication, and by asking us look at precedent through a positivist lense we distort the true nature and authority of precedent both inside and outside the law.

I would thus like to look at precedent, at least initially, without the baggage of orthodox conceptions of precedent or any given theory of law. By removing these potentially distorting

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constraints, I propose that we may shed new light on the nature and authority of precedent as a universal jurisprudential concept. To start then, I would like you to forget what you think you know about precedent. Instead, think about precedent only in its most rudimentary form and ask yourself the following basic questions: What does an argument from precedent entail? When an authority reasons from precedent what does it do? And, ultimately, how do precedents bind?

A system of decision-making that incorporates precedent is one that requires the second authority to accord some weight to the prior decision of the first authority to resolve a relevantly similar case in the present. This weight – what legal philosophers refer to as the authority of precedent – often exists to varying degrees depending on the nature of the authorities in question and the context in which they operate. In some cases, the authority of precedent will be of sufficient strength to bind the second authority to follow the first authority’s prior decision. It follows that the question of how much weight a prior decision ought to be given is important because it ultimately determines whether the second authority is bound to follow it.

In all cases, the authority of precedent operates only to constrain the second authority, not to empower it. The content-independent nature of precedent means that the authority of a prior decision derives not from its merit but rather only from its status as a decision of the first authority. This of course implies that if the second authority agrees with the prior decision, or is persuaded by it, then an argument from precedent is superfluous. If the second authority truly reasons from precedent it accords weight to the prior decision of the first authority despite the fact it believes the present decision ought to be decided differently on the ordinary balance of first-order reasons.3

3 ‘The bare skeleton of an appeal of precedent is easily stated: The previous treatment of occurrence $X$ in manner $Y$ constitutes, solely because of its historical pedigree, a reason for treating $X$ in manner $Y$ if and when $X$ occurs again. – ibid 571. For more on the content-independent nature of precedent see, Chapter 1.2 (The Concept of Precedent).
If the authority of precedent acts only to constrain the second authority from making the
decision it believes to be correct, this means that when a precedent binds, it binds the second
authority to make a decision with which it disagrees. If the second authority were under an
obligation to obey the first authority or its decisions then justifying this inherent contradiction
at the heart of precedential reasoning would pose little difficulty. Just as a lieutenant has no
right to question the merits of his sergeant’s orders, the second authority would have no right
to question the merits of the first authority’s prior decision. It would be obligated to follow the
prior decision because it incurred a duty to obey the first authority come what may.

Yet, in the context of reasoning from precedent, the second authority incurs no such
duty. Whilst we often say that an authority is bound by precedent, we do not mean it in the
literal sense. In truth, neither the first authority, not its decisions, can directly fetter the
adjudicatory power of the second authority. When we say an authority is bound by a decision
then we are really employing a shorthand to describe a much more complex phenomenon. If
you look closely, precedential reasoning necessarily involves issues for the theory of authority
that are much more complicated than the explanation of the binary relation between an authority
and a person subject to that authority.

In truth, the legally binding part of a decision is limited only to the parties to the original
dispute. This necessarily excludes the second authority who owes no duty, as a subsequent
decision-maker, to obey the first authority or its prior decisions. If the second authority chooses
to flout precedent then it is certainly free to do so. The reality is that it will always be the for
the second authority to determine the authority of precedent – to determine what weight, if any,
the prior decision of the first authority ought to be given. It follows then, that if a prior decision
binds the second authority, it does so only because the second authority chooses to be bound
by it. In other words, the precedent binds the second authority because the second authority
considers itself obligated for some reason to follow it.
If this is true, then any account of precedent must be able to explain why authorities follow precedent at all. If it is up to every authority to determine whether or not it ought to follow precedent, and the authority of precedent only acts to constrain authorities from making the decision they consider best on the ordinary balance of first-order reasons, then why would any authority consider itself to have a duty to follow precedent?

I propose that we can only make sense of the nature and authority of precedent if we conceive of precedential reasoning as an act of comity. This, I suggest, is not hard to do. When the second authority reasons from precedent it simultaneously ‘recognises’ the legitimate authority of another to resolve the type of dispute in question and ‘restrains’ itself from making a determination of the case at hand on the ordinary balance of first-order reasons. A comity-based conception of precedent suggests that the second authority’s obligation to accord the prior decision of the first authority weight – and in some circumstances to follow it – derives from the second authority’s duty to act with comity towards the legitimate authority of the first. If this is true then I propose that we can better understand the nature and authority of precedent by reference to the general principle of comity developed in Chapters 2 and 3.

A comity-based conception of precedent suggests that every decision (whether it has been made in the past or will be made in the future) embodies a particular conception of justice. By this I mean an authority’s opinion or belief as to what the ‘correct’ outcome to any particular type of dispute ought to be. Every precedent then, properly defined, can be understood to embody the first authority’s conception of justice – that is, the first authority’s opinion or belief as to how the type of dispute in question ought to be resolved. Conflicting decisions arise because reasonable authorities prefer different conceptions of justice – that is to say, they differ among themselves as to what the ‘correct’ resolution to any one particular type of dispute ought to be. Drawing on the philosophy of practical reason, we might say that these authorities differ as to what they believe the ‘objective balance of first-order reasons’ is in the particular case at
hand – namely, which reasons are applicable, what their appropriate weight is and what course of action they ultimately support.

Through the idea of *justice pluralism*, a comity-based conception of precedent presupposes that there is no ‘one right answer’ to any particular type of dispute. In essence, it acknowledges the fiction of Ronald Dworkin’s Justice Hercules – the idea that any one authority may possess ‘superhuman skill, learning, patients and acumen’ to discover the ‘one right answer’ to any given dispute.4 Rather, just as parents recognise that there is no one right answer to the question when they should send their children to bed, or how much pocket money – if any – they should receive, legal authorities acknowledge, or ought to acknowledge, that there is no one right answer to any given legal dispute. Every dispute can ultimately be resolved in a number of different ways and each ‘way’ will necessarily embody a different conception of justice.5

Of course, this plurality of justice implies that, in the abstract, there is no rational means by which to choose between competing conceptions of justice when they conflict. Yet, as we discovered in Chapter 3, the incommensurability of values in the abstract does not necessarily preclude a rational choice between them in real life. In certain circumstances, there will be a need to choose between competing conceptions of justice and it may be that, in the context in which the dispute arises, it would be more just to resolve the dispute in question subject to one conception of justice than another. The context in which the dispute arises thus allows us to make a rational choice between theoretically equal competing conceptions of justice where necessary.6

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4 Ronald Dworkin, ‘Hard Cases’ in Dworkin (n 1) 105.
5 ‘In very many cases it cannot be said positively that one construction is right and the other wrong. Construction so often depends on weighing one consideration against another. Much may depend on one’s approach.’ – Jones v Secretary of State for Social Services [1972] AC 944 (UK HL) 966 (Lord Reid).
6 ‘Reasoned ranking of plural values is impossible in the abstract, but apparently unproblematic in particular cases. What makes the difference is evidently the presence in particular cases of a concrete context for choice.’ – George Crowder, ‘Communications’ (1996) 44 Political Studies 649, 650.
This suggests that the practice of precedential reasoning involves an inherent conflict. When the second authority is asked to follow the prior decision of the first, the question for the second authority is really about choosing which conception of justice ought to apply to resolve the type of dispute before it – the conception of justice preferred by the first authority (as embodied in its prior decision) or its own conception of justice (based on its own assessment of the dispute on the ordinary balance of first-order reasons). The second authority cannot apply both conceptions of justice to resolve the dispute before it so its job, and by extension, the job of doctrines of precedent, is to mediate this conflict. Just like conflict doctrines in private international law, doctrines of precedent seek to regulate how authorities ought to act with respect to one another’s decisions – to regulate which conception of justice ought to apply and when.

The duty to act with comity stems from the systemic judicial need to minimise conflict between co-existing authorities and to allocate their individual adjudicatory authority in the most just manner possible. Through the idea of *justice pluralism* and *modified subsidiarity*, the principle presupposes that only one conception of justice can apply to resolve any given type of dispute and that where the first authority is better placed to resolve the type of dispute in question, or where the second authority is in no better position than the first, the best exercise of adjudicatory power by the second authority will ordinarily be to recognise the authority of the first. The reason why the second authority acts with comity towards the first authority is therefore found in the service it ought to provide to those subject to its own authority – that is, to resolve the matter before it in the most just manner possible.

The principle of comity thus helps to explain and justify precedential reasoning, and by extension doctrines of precedent, by reference to its own systemic judicial purpose. The principle presupposes that the best exercise of adjudicatory power by the second authority will not always be for it to act on the ordinary balance of first-order reasons – that is, to apply its
preferred conception of justice to resolve the type of dispute before it. Rather, there will be cases in which the best exercise of adjudicatory power will actually be for the second authority to follow the prior decision of the first authority despite the fact it disagrees. The act of following precedent, and by extension doctrines of precedent that require the same, is therefore justified on the basis that the second authority has good reason to believe that it would be more just to apply the conception of justice embodied in the first authority’s decision to resolve the type of dispute before it than its own preferred conception of justice. By acting with comity then, the second authority is able to fulfil the duty it owes to those subject to its own authority by minimising the potential injustice of conflict and by applying that conception of justice that would best apply to resolve the type of dispute before it.

It is important to recognise that comity is not an ordinary form of justice. Rather, it is more adequately defined as a principle of *meta-justice*. Authorities act with comity for reasons of (systemic) justice – in other words, they act with comity to give effect to the various underlying principles of justice which, by virtue of their nature as decision-makers, they are bound to take into account. Where the second authority’s decision may conflict with the decision of the first authority, the principle of comity helps the second authority exercise its own adjudicatory authority in a manner consistent with its obligation to do justice to those subject to its own authority. This necessarily includes a duty to avoid conflict where it would lead to injustice and to allocate the authority to decide particular disputes to those best able to do so by virtue of their nature.

Evidently, a comity-based conception of precedent shares a lot of similarities with adjudicative theories of law. Adjudicative theories of law are, in essence, natural law theories

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7 I use the term ‘adjudicative theories of law’ to describe the various approaches taken by natural law theorists to the study of legal theory. The adjudicative approach is particularly dominant in the work of Ronald Dworkin but can also be discerned – to a greater or lesser degree and in differing forms – in the work of George Fletcher, Charles Fried, Lon Fuller and Stephen Perry. See, most notably, Dworkin (n 1); Ronald Dworkin, *Law’s Empire* (Fontana 1986); George Fletcher, ‘Two Modes of Legal Thought’ (1981) 90 The Yale Law Journal 970; Lon Fuller, ‘Reason and Fiat in Case Law’ (1946) 59 Harvard Law Review 376.
that are grounded in a certain conception of adjudication and the adjudicative process. In this way they differ from more traditional natural law theories which attempt to establish a systematic connection between valid positive law and moral value. One might say that these theories are not so much concerned with the relationship between positive law and justice as they are with the pursuit of justice within the context of adjudication. In essence, these theories see the function of law and adjudication as the resolution of disputes in accordance with relevant principles of justice.  

We can say, without hesitation, that comity towards the legitimate authority of another can involve a duty on the part of one authority to follow another’s decision. Yet, it is in the derivative nature of the duty the second authority owes to those subject to its own authority that we may truly understand the obligation to follow precedent. In truth, the second authority’s duty to act with comity – and thus, accord weight to the prior decision of the first authority – derives not from any duty it may owe to the first authority. Rather, the second authority’s duty to act with comity to recognise the first authority’s prior decision as precedent derives solely from its duty to do justice to those subject to its own authority.

This is why comity is a valuable notion and particularly apt to account for the nature and authority of precedent. Whilst it is true that authorities may incur a duty to obey one another in certain contexts, in the context of reasoning from precedent the second authority certainly owes no duty to obey the first authority or its decisions. In this regard, it can be thought of as ‘sovereign’ – it has the right to determine for itself how it ought to act and is subject to the will of no other. This is the case even if we speak of authorities who operate in an adjudicatory hierarchy. Even the lowest court in the common law must determine for itself whether or not it ought to follow the prior decision of another. The second authority incurs a duty to follow the prior decision of the first authority for the simple reason that, in certain cases, doing so will

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represent the most just exercise of its own adjudicatory power vis-à-vis those subject to its own authority.

Drawing on the logic of practical reason we can say that comity constitutes, or gives rise to, a non-exclusionary second-order reason to follow precedent. More specifically, by acting with comity, the second authority fetters its own adjudicatory power to determine the dispute before it on the ordinary balance of first-order reasons (the way it thinks best all things considered) and chooses instead to attribute less weight to those first-order reasons that favour a course of action inconsistent with comity. In the context of reasoning from precedent, where the first authority is better placed to resolve the dispute in question, or the second authority is in no better position than the first, the action most inconsistent with comity will ordinarily be the act of departing from the prior decision of the first authority. The result then is a presumption – or, more specifically, a new weighted balance of first-order reasons – that favours following the prior decision of the first authority.

There is of course no reason to think that the presumption in favour of following precedent will always be active or that it will be the same strength in all contexts. The varied nature of authorities and the contexts in which they operate suggests that the weighted threshold that ought to apply will necessarily differ. It follows that the question for any authority asked to follow the prior decision of another is to determine what presumption, if any, ought to apply in favour of following the decision. This requires the authority to determine how comity reweighs the balance of first-order reasons in the specific context and subsequently to determine whether there are any first-order reasons of sufficient strength to displace the presumption. The question of how different authorities might do this is the subject of Chapter 5.

Ultimately, acting with comity is an effective strategy for the second authority to make the best decision it can given the context in which it operates. The strength of the presumption ultimately reflect the likelihood that the best exercise of adjudicatory power by the second
authority will ordinary be for it to follow the prior decision of the first authority. The presumption leaves room for the second authority to depart from the prior decision when it is just to do so, but it will require that there be sufficient first-order reasons to support such a course of action. The presumption operate as a systemic and deliberate bias in the second authority’s practical reasoning process requiring that those reasons that favour departing from the prior decision attain a somewhat higher threshold than they would have needed had the dispute simply been decided on the ordinary balance of reasons. In this way, the principle of comity guides authorities to exercise their adjudicatory power in a manner consistent with their duty to do justice to those subject to their own authority.

It is important to remember that comity is a principle of ‘recognition’ and ‘self-restraint’. It is a principle which authorities may use to determine what weight, if any, they ought to accord to the prior decision of another and ultimately whether or not they ought to follow that decision in any given context. Yet, comity does not, and never will, command how a case shall be decided. As a principle, rather than a rule, comity’s strength is best characterised in terms of degree – as a non-exclusionary second-order reason to follow precedent. In this sense, it can only ever guide authorities in the exercise their adjudicatory power, not compel them. Comity recognises that the primary duty of every authority is to resolve cases before them in the most just manner possible. It demands that no authority shall abdicate its judgment but recognises that in certain contexts the best exercise of adjudicatory power by one authority may ultimately be to follow the prior decision of another.

4.3. New Observations for the Theory of Precedent
A comity-based conception of precedent sheds new light on a number of important aspects about the nature and authority of precedent. In this section, I propose to expand upon some of the more important observations that a comity-based conception of precedent brings to light
and discuss exactly what they mean for the theory of precedent. In particular, I expand upon how a comity-based conception of precedent can help explain what precedents are, how authorities reason from precedent and how the prior decision of one authority can bind another.

4.3.1. What Are Precedents?

According to a comity-based conception of precedent every decision (whether it be made in the past or will be made in the future) embodies a particular conception of justice. By this I mean an authority’s opinion or belief as to what the ‘correct’ resolution to a particular dispute ought to be – namely, what it thinks the objective balance of first-order reasons requires. It follows that every ‘precedent’, properly so-called, embodies the first authority’s opinion or belief as to what the correct resolution to the type of dispute in question ought to be. If this is true, this begs the question – what exactly are precedents?

A comity-based conception of precedent suggests that precedents ought to be understood as ‘authoritative declarations’. In a legal context, every precedent is, by itself, simply a declaration of what the first authority considers the correct interpretation or construction of the law to be and how it applies to the facts of the case. That declaration however is nothing more than a declaration for the parties before the first authority until the second authority is asked to resolve a relevantly similar case in the future. If, by acting with comity, the second authority accords weight to the prior decision of the first authority and subsequently restrains itself from making a de novo assessment of the case before it on the ordinary balance of first-order reasons, then we can say that the prior decision of the first authority has been transformed from a simple ‘declaration’ to an ‘authoritative declaration’. Yet, it is only by virtue of the second authority’s duty to act with comity that the first authority’s declaration becomes ‘authoritative’ as a particular interpretation or construction of law.
Without doubt, the legally binding part of the first authority’s decision extends no further than those subject to the original dispute. This necessarily excludes the second authority who, as a subsequent decision-maker, incurs no duty to obey the first authority or its decisions. Rather, for the second authority, the prior decision is merely a declaration of what the first authority believes the law to be and how it ought to apply to the facts of the case. The first authority’s decision is ultimately accorded weight as an ‘authoritative declaration’ of the law because it was made by a decision-maker who had the requisite authority – and by extension, the requisite skill and expertise – to decide the particular type of dispute in question. Comity presupposes that where the first authority is in a better position than the second to resolve the type of dispute in question, or where the second authority is in no better position than the first, the best exercise of adjudicatory power by the second authority will ordinarily be to recognise the first authority’s declaration as ‘authoritative’ for it has good reason to believe that the first authority’s conception of justice is better than its own or, at the very least, its own conception is no better than the first’s.

It does not matter whether the authorities in question exists inside or outside the law. The prior decision of a parent in respect of their child, a university admissions board in respect of a student, or a government department in respect of a citizen are all best characterised as ‘authoritative declarations’ when accorded weight by a subsequent authority who owes a duty of comity. In each case, the authority in question has made a decision how the applicable rules or principles of their normative system ought to be interpreted and how they ought to apply to the facts of the particular type of case in question. Provided the decision-maker has the requisite authority – and thus, the requisite skill and expertise – to decide the matter in question, comity dictates that it ought to be afforded respect by subsequent authorities. The question of how much respect – that is, what authority the prior decision ought to have – is ultimately a question

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9 Of course, as demonstrated in Chapters 2 and 3, it is an inherent limitation of comity that it will not require recognition of illegal or illegitimate exercises of power.
for the second authority to be answered by reference to its duty to do justice to those subject to its own authority.

It follows then that prior decisions amount to, at most, a subsidiary means to determine the proper interpretation to be given to formal rules and principles. In the law, this means that prior decisions constitute a ‘subsidiary source of law’ – they help authorities determine what the law is but do not amount to rules of law in and of themselves. I propose that characterising precedent in this way is not difficult to comprehend because the idea has already been developed, at least in part, by legal theorists concerned with the operation of precedent before international courts and tribunals in light of Art. 38(1) of the ICJ Statute.\footnote{The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply ... judicial decisions ... as subsidiary means for the determination of rules of law.” – Statute of the International Court of Justice (1945), Art. 38(1)(d).} The difference is that a comity-based conception of precedent conceives of every precedent in this way regardless of context. This obvious includes international courts and tribunals, but also courts of the common law and arbitral tribunals for example.

If prior decisions do not constitute rules of law, a comity-based conception of precedent must, evidently, supports a version of the declaratory theory of law. The declaratory theory of law, in its strictest form, holds that authorities do not make new rules but only declare what those rules have always been.\footnote{Allan Beever, ‘The Declaratory Theory of Law’ (2013) 33 Oxford Journal of Legal Studies 421, 421–424.} In respect of the courts of the common law, William Blackstone famously maintained that the role of the judge is not to ‘pronounce new laws, but to maintain and expound the old one.’\footnote{William Blackstone, Commentaries on the Laws of England, vol 1 (Cavendish 1766) 69.} The judge, he said, is not the legislature and no matter how hard he tries never will be.
In his *Lectures on Jurisprudence* John Austin famously dismissed the strict version of the declaratory theory of law as a ‘childish fiction’ and today there are few who argue that it provides a truly accurate account of what judges do.\(^\text{13}\) Most legal philosophers, judges and practitioners – both inside and outside the common law – acknowledge that legal authorities not only ‘discover the law’, but in some sense, also appear to ‘make it’.\(^\text{14}\) It is not for nothing that when we speak of precedent we often employ language such as ‘the common law’, ‘judge-made law’, ‘arbitral case law’ or ‘the case law of the ICJ’ to name but a few examples.

A comity-based conception of precedent supports a weak version of the declaratory theory of law – one that accounts for the appearance of law-making through the process of interpretation. If we understand the declaratory theory of law in this way it is neither ‘childish’ nor ‘fictional’ as Austin suggests. Rather, the question simply comes down to what we mean by the term ‘make’ in this connexion.

It is clear to all that legal authorities do not, and cannot make law in the same way formal law-makers do. By no extension of their office can domestic courts make new rules of law akin to legislation; nor can international courts and tribunals make new rules of international law like States do through the creation of treaties or by State practice. Nobody would dispute that formal law-makers possess a power which legal authorities simply do not have. The difference between the two lies in the fact that formal law-makers are unlimited in their choice of materials, whereas legal authorities are always limited to materials which exist in the present or the past. Formal law-makers can project into the future rules of law which have never before existed and they can apply these rules not only in respect of one case but all future cases that fall within the criteria for the rule’s application.

\(^{13}\) John Austin, *Lectures on Jurisprudence, or, The Philosophy of Positive Law* (Murray 1895) 321.

Legal authorities on the other hand cannot. An English judge in 1901, for example, may have held the strongest feminist views, but by no possible interpretation of existing law at the time could he have decided that a woman had the right to vote in Parliamentary elections. In the same way, judges of the ICJ might be fundamentally concerned with the protection of the environment but they cannot create laws that restrict deep-sea mining by States unless States choose to create such laws (either through treaty or customary international law, for example). What legal authorities are powerless to do, formal law-makers, in their various capacities, may do with the stroke of a pen.

It follows that legal authorities must work with what they already have, not with what they choose to make for themselves. It is commonly objective to this that if legal authorities only ‘discover’ the law, then the whole law must already exist. There must be, it is said, at any one time a complete and perfect code of English law, American law, international investment law or public international law. But this of course is a mistaken conclusion. Combinations of circumstances are infinite, and can never be completely provided for by any legal system or set of rules. No legal system is complete and perfect, but it does contain all the essential rules and principles we need for the logical consideration of human action.\(^\text{15}\)

Adjudicative theories of law tell us that when positive law runs out, legal authorities may draw upon general principles of justice.\(^\text{16}\) ‘To administer law is, or ought to be, to administer justice; and justice is, was, and ever will be, wider than the law.’\(^\text{17}\) The ‘new’ rules and principles which legal authorities rely upon to supplement the existing law are thus nothing else than the application of existing principles of natural justice, practical expediency, or common sense. The job of all legal authorities then is to give effect and shape to these principles in order to resolve the cases that come before them. Judges are appointed to

\(^{15}\) Carleton Allen, ‘Precedent and Logic’ (1925) 41 Law Quarterly Review 329, 336–337.


\(^{17}\) Allen (n 15) 334–335.
administer justice – ‘justice according to the law, so far as the law extends, but so far as there is no law, then justice according to nature.’

This, of course, eludes to the secondary way in which we use the word ‘make’ in this connexion – namely ‘making’ through the process of interpretation. So often existing rules of law and principles of justice must be applied to new factual scenarios. No legal authority or theorists would pretend that in the process of interpretation authorities do not shape these norms into new forms. Yet, as CK Allen writes in *Precedent and Logic*:

This is not an original act of creation. No human agency can create the clay in the earth, but men may take the clay and shape it into myriad forms. It is the community itself, either through its customs or its constituted Sovereign, which makes the clay of legal rules; it is the judges who handle it and fashion it into appropriate forms. In this sense doubtless they ‘make’ law; but in this sense, too, almost any act is an act of making. If a man chops a log into firewood, he has in a sense ‘made’ the billets of wood. If a man translates a play of Sophocles, he has ‘made’ a translation, but he has certainly not made a drama. The new is necessary created out of the old. But just as we recognize the limits of human creation, because we know that man, with all his resource, is confined to the material vouchsafed to him … so we must recognize the limits of the creative capacity of the Courts. They too can work only with the materials vouchsafed to them. In this sense, which it is important to keep in view, it is true to say that they do not make law, but take it and shape it as they find it.

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18 ibid 335.
19 ibid 338. For a similar view see, *James M. Beam Distilling Co. v Georgia.*, 501 US 529 (1991) (US SC) 549 where Justice Scalia (with whom Justice Marshall and Justice Blackmun agreed) held that the courts only have the power ‘to say what the law is … not the power to change it.’ Yet he also noted that he was ‘not so naive … as to be unaware that judges in a real sense “make” law.’ But, he continued ‘they make it as judges make it’ implying that this process of ‘making law’ is really just the process of interpretation.
In this process of shaping the law precedent is important for the weight comity requires subsequent authorities attribute to prior decisions has, in certain circumstances, the capacity to bind them to particular interpretations or constructions of law. Perhaps it is because case law is often treated and presented as if it were itself a body of legal rules that we think of prior decisions as rules themselves.\(^{20}\) Yet, this is merely an illusion. It is only by virtue of the second authority’s duty to act with comity towards the first – to accord its prior decision weight as precedent – that the second authority considers itself bound to adopt the interpretation of law given by the first authority to resolve the case before it. The first authority has certainly not created a new rule of law by which all future authorities are bound. Rather, it has simply interpreted and applied existing positive law or principles of justice to a new scenario. This, I take to be Lord Esher MR’s point when he endorsed the declaratory theory in *Willis v Baddeley*:\(^ {21}\)

There is in fact no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritative laid down that such law is applicable.\(^ {22}\)

### 4.3.2. Precedential Reasoning as Conflict

Although not ordinarily understood as such, a comity-based conception of precedent suggests that precedential reasoning involves an inherent conflict. Identifying this conflict is important because it opens the door to using comity – a conflict of laws principle – as a means to resolve it. When the second authority is asked to follow precedent it is, in effect, being asked to choose between two competing conceptions of justice that might apply to resolve the particular type of

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\(^{20}\) Duxbury (n 1) 23.

\(^{21}\) *Willis v Baddeley* [1892] 2 QB 324 (ENG CA).

\(^{22}\) Ibid 326.
dispute before it – the conception of justice preferred by the first authority (as embodied in its prior decision) or the conception of justice preferred by the second authority (embodied in its assessment of the case on the ordinary balance of first-order reasons). The job of the second authority, and by extension doctrines of precedent, is to determine which conception ought to apply.

Legal realists have convincingly argued that the indeterminacy of legal norms means that a range of reasonable ‘correct’ solutions exist for almost any legal question.23 The same of course can be said with respect to almost any question an authority might have cause to consider – legal or not. As Karl Llewellyn famously wrote, in truth, there may be as many ‘as two, three, or ten’ correct answers to any given question.24 Consider, for example, a question every parent must answer – when should children go to bed? Of course, every parent has a duty, so to speak, to look after their children. This, I would argue, necessary means that they cannot let their children stay up all night every night. Yet, as all parents would admit, the question has a number of correct available answers. Much depends on the approach of individual parents, in essence, what they think is correct on the ordinary balance of first-order reasons.

In much the same way legal authorities recognise, or ought to recognise, that there is no one correct answer to any given legal question. Consider, for example, the numerous different approaches taken by investment tribunals to the question of whether or not they can expand

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their jurisdiction by reference to an MFN clause.\textsuperscript{25} As Lord Reid held in \textit{Jones v Secretary of State for Social Services}:\textsuperscript{26}

In very many cases it cannot be said positively that one construction [of any particular rule or principle] is right and the other wrong. Construction so often depends on weighing one consideration against another. Much may depend on one’s approach.\textsuperscript{27}

Under a comity-based conception of precedent, each decision (whether it has been made in the past or will be made in the future) is best characterised as embodying a particular conception of justice – that is, an authority’s belief as to what the correct answer is. In reality then, precedential reasoning is simply the choice between two competing conceptions of justice. On the one hand, the second authority may follow precedent, thereby choosing to apply the conception of justice preferred by the first authority to resolve the case before it. On the other hand, the second authority may depart from precedent, thereby choosing to apply its own conception of justice – that is, its belief of what is correct on the ordinary balance of first-order reasons.

Understanding precedential reasoning in this way suggests that the question facing the second authority is actually a ‘conflicts problem’ not dissimilar to that which courts face in the context of private international law. This, I propose, opens the door to using certain conflict principles – namely, the principle of comity – to better understand the nature and authority of precedent. Like various doctrines of private international law, I propose that comity forms the

\textsuperscript{25} ‘It is notorious that this question has proved to be among the most divisive in the jurisprudence… There are, broadly, three schools of thought evidenced in the jurisprudence and no school can claim a clear numerical supremacy of adherents: there is the ‘yes’ school, the ‘no’ school and the ‘question cannot be formulated in general terms’ school.’ – Zachary Douglas, ‘The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails’ (2011) 2 Journal of International Dispute Settlement 97, 98. Also see, Patrick Jacob & Frank Latty, ‘Arbitrage transnational et droit international général’ (2012) 58 Annuaire français de droit international 605, 620.

\textsuperscript{26} \textit{Jones v Secretary of State for Social Services} [1972] AC 944 (UK HL).

\textsuperscript{27} ibid 966.
basis for, and guides the development of, doctrines of precedent. Just like conflict of law doctrines then, doctrines of precedent embody or express comity’s systemic judicial purpose – they seek to minimise the potential injustice that may arise from conflicts of adjudicatory authority and its misallocation among co-existing decision-makers. By guiding the development of doctrines of precedent, comity can help authorities exercise their adjudicatory power in a manner consistent with relevant principles of systemic justice by which they are bound to take into account when resolving cases that come before them.

Where there is a risk of conflicting decisions, the principle of comity presupposes that only one conception of justice can apply to resolve any given case. The second authority cannot apply both conceptions of justice and is thus forced to choose between two theoretically correct answers to the same legal question. The principle of comity helps authorities resolve this conflict – that is, it helps them ‘rationally’ choose between these two competing conceptions of justice – by requiring that the second authority act in accordance with the principle of modified subsidiarity. As we know from our discussion of the principle in Chapter 3, the principle of modified subsidiarity holds that where there is a risk of conflict, the ‘authority to decide’ a particular type of dispute ought to be allocated to that decision-maker best placed to do so by virtue of its nature, skill, and expertise. The idea is that justice is most likely to be done if the authority to decide is allocated to the decision-maker best placed to do so and if the allocation of that authority is respected by others.

In the context of reasoning from precedent, this translates to the general proposition that those best placed by virtue of their nature, skill and expertise to determine the type of dispute in question are most likely to do justice. Comity presupposes that in circumstances where the first authority is better placed to resolve the type of dispute in question, or where the second authority is in no better position than the first, the best exercise of adjudicatory power by the second authority will ordinarily be to recognise the authority of the first. The existence of
context – namely, the difference in the nature, skill and expertise of the authorities in question – allows the second authority to choose between two theoretically equal conceptions of justice. It provides the second authority with a reason to believe that, with respect to the dispute before it, the conception of justice preferred by the first authority will ordinarily be more just than its own. The reason why the second authority acts with comity towards the first authority is therefore found in the service it ought to provide to those subject to its own authority – that is, to resolve the matter before it in the most just manner possible.

Where the first authority is comparatively better placed to resolve the type of dispute in question, the second authority’s choice to defer to the first authority’s conception of justice over its own is easy justified as the best exercise of its own adjudicatory power. This is because the first authority’s decision is likely to be better than the second authority’s. It follows that the second authority has a good reason to believe that acting on the ordinary balance of first-order reasons (that is, how it thinks best all things considered) would actually result in a less just outcome for those subject to its own authority than if it were to simply follow the prior decision of the first authority as precedent.

Yet, evidently, there will be cases where the principle of modified subsidiarity is irrelevant. Between certain types of authorities – such as courts of co-ordinate jurisdiction or arbitral tribunals for example – it may be that neither the first nor the second authority can reasonably claim that they are in a better position than the other to resolve the particular type of dispute in question. It may be that there is no difference in nature between the two authorities – and thus no difference in skill and expertise – that would make one better placed to resolve the dispute than the other. In such circumstances, I propose that comity’s functional concern with systemic justice still requires the second authority to act in a manner that minimises the potential injustice of conflicting decisions because it constitutes part of the second authority’s broader duty to resolve the matter before it according to relevant principles of justice.
In some cases, this will require the second authority to follow the prior decision of the first authority merely because it was first-in-time. Of course, in such circumstances, it cannot be said that the conception of justice preferred by the first authority is better, or more just, than the conception of justice preferred by the second authority. Rather, recognition of the first authority’s prior decision as precedent is justified on the basis that the second authority has, by the same token, no reason to consider itself in a better position to resolve the type of case before it than the first authority and to depart from the prior decision of the first authority would introduce an ‘unjustified conflict’ between the two.

In *Taking Rights Seriously* and *Law’s Empire* Ronald Dworkin argues, rather convincingly, that ‘justice entails fairness’. As part of the duty to do justice to those before them, authorities thus have a duty to act according to principles of fairness. In this context, that authorities ought ordinarily to follow each other’s prior decisions ‘rests on the idea that fairness requires the consistent enforcement of rights’, which means ‘treating like cases alike’. A judge may, for example, consider it wrong to require compensation for an emotional injury. But, if he accepts that justice entails fairness (integrity as Dworkin called it) and he knows that some victims of emotional injury have already been given a right to compensation, he will have a reason for deciding in favour of others who seek compensation for emotional injury before him.

It is important to recognise however that whilst justice entails fairness, fairness does not necessarily have to entail justice. Particular rights could be enforced consistently but insensitively within a particular normative system, so that like cases are resolved in the same

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28 Dworkin (n 1).
29 Dworkin (n 7).
30 Ronald Dworkin, ‘Hard Cases’ in Dworkin (n 1) 116; Dworkin (n 7) 177.
31 Dworkin (n 1) 116; Dworkin (n 7) 177.
32 Dworkin (n 7) 177; Duxbury (n 1) 60–61.
unjust way. As we will see below, the principle of comity does not entail an obligation to follow precedent come what may. Rather, comity simply guides authorities to exercise their adjudicatory power in a manner consistent with their obligation to do justice to those subject to their own authority. In many cases, this will require the second authority to follow precedent, because a failure to do so, will lead to an ‘unjustified conflict’ between the first and second authority. Yet, in other cases, the second authority will be of the opinion that following the conception of justice preferred by the first authority would in fact lead to injustice in the case before it. In such circumstances, comity will not guide the second authority to follow the prior decision of the first on the basis that to do so would prejudice the second authority’s duty to do justice to those subject to its own authority.

It is important to remember that whilst the second authority owes a duty of comity towards the first authority, that duty arises only by derivation of what it owes to those subject to its own authority. A comity-based conception of precedent thus justifies the act of following precedent, and by extension doctrines of precedent, on the basis that, in certain circumstances, the best exercise of adjudicatory power by the second authority *vis-a-vis* those subject to its own authority will be to recognise the first authority’s conception of justice over its own. But, by the same token, it also justifies the second authority’s departure from precedent on the same grounds – namely, that in the context in which the case arises, the best exercise of adjudicatory power *vis-a-vis* those subject to its own authority will actually be to apply its own preferred conception of justice. Regardless of whether the second authority follows or departs from precedent, acting with comity guides the second authority’s exercise of adjudicatory power so that it may fulfil the duty it owes to those subject to its own authority – namely, to resolve their dispute in the most just manner possible.

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4.3.3. The Authority of Precedent

A comity-based conception of precedent suggests that the ‘binding force of precedent’ is best understood not in terms of its validity (that being a binary concept) but rather in terms of its authority (of which there can be degrees). In this way it differs from orthodox conceptions of precedent such as those advanced by legal positivists in respect of the binding nature of precedent under the doctrine of stare decisis.\(^{34}\) It is not for nothing that we speak of the ‘authority of precedent’ — a term which is supposed to reflect the reality that precedents do not bind in an all-or-nothing fashion like rules do. Rather, all precedents possess a certain degree of weight — in other words, a degree of ‘bindingness’ — which ultimately depends upon the authorities in question and the context in which they operate. A comity-based conception of precedent helps us see that the authority of precedent is best characterised as a presumption of differing degrees of strength in favour of following prior decisions.

The idea that the authority of precedent is best characterised as a presumption, rather than an all-or-nothing rule, has been explored by a number of legal theorists concerned with the theory of precedent. Perhaps this idea has been best summarised by John Harrison who notes that in practice:

Rules of precedent are like rules of evidence for questions of law rather than fact. They give special, sometimes dispositive, strength to one particular indicator of what the law requires. Precedent means that prior decisions are taken as correct, or correct unless shown otherwise to some requisite degree, much as an evidentiary presumption means that some fact is taken to be true, or true unless clearly shown not to be.\(^{35}\)

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\(^{34}\) For more on this point, see section 4.4 (Against Orthodox Conceptions of Precedent).

\(^{35}\) John Harrison, ‘The Power of Congress over the Rules of Precedent’ (2000) 50 Duke Law Journal 503, 512. There are other scholars who also characterise the authority of precedent in similar terms. ‘Most authorities are therefore not binding or controlling in the absolute sense, and treating a source as authoritative or even mandatory does not entail following it come what may.’ — Frederick Schauer, Thinking Like a Lawyer: A New Introduction to Legal Reasoning (Harvard University Press 2009) 75–76. ‘... an overridable obligation can be considered an
A comity-based conception of precedent supports an understanding of precedent along very similar lines. Yet, it goes further because it is able to explain both the sources of the presumption and its operation in practice. As we already know, the principle of comity constitutes, or gives rise to, a non-exclusionary second-order reason that effectively restrains the second authority from making a *de novo* assessment in any given case on the ordinary balance of first-order reasons. By acting with comity the second authority effectively fetters its own adjudicatory power to determine the dispute before it how it thinks best and instead chooses to attribute less weight to those first-order reasons that favour a course of action inconsistent with comity. The result is a presumption – or a new weighted balance of first-order reasons – that favours that course of action most consistent with the reasons for comity. In circumstances where the second authority is asked to follow a prior decision, provided the first authority is better placed than the second authority to resolve the dispute in question, or the second authority is in no better position than the first, comity will ultimately support a presumption that the best exercise of adjudicatory power by the second authority will ordinarily be for it to follow the prior decision.

Acting with comity is an effective strategy for the second authority to make the best decision it can given the context in which it operates. The strength of the presumption reflects the likelihood that the best exercise of adjudicatory power by the second authority will ordinary be that course of action favoured by the presumption – necessarily, to follow the prior decision of the first authority. The presumption operate as a systemic and deliberate bias in the second

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*obligation only if the threshold for override is higher than the threshold would have been … absent the obligation …*  
[*If a court under a purported regime of stare decisis is free to disregard any previous decision it believes wrong, then the standard for disregarding is the same when stare decisis applies as when it does not, and the alleged stare decisis norm turns out to be doing no work. If this is so, then stare decisis does not in fact exist as a norm at all. But if, by contrast, it requires a better reason to disregard a mistaken precedent than merely that it is believed to be mistaken, a stare decisis norm can be said to exist even if its overridable.*] – Frederick Schauer, ‘Has Precedent Ever Really Mattered in the Supreme Court’ (2007) 24 Georgia State University Law Review 381, 389–390.
authority’s practical reasoning process requiring that those reasons that favour departing from the prior decision attain a somewhat higher threshold than they would have needed had the dispute been decided on the ordinary balance of first-order reasons.

Of course, there is no reason to think that the presumption will always be active, or that any one presumption will provide the optimal solution in all contexts. The varied nature of authorities and the contexts in which they operate suggests that the appropriate weighted threshold will differ. The principle of comity allocates ‘the authority to decide’ based on the context in which the choice between competing conceptions of justice needs to be made. It follows that between different authorities and in different contexts, the presumption in favour of following the first authority’s prior decision will differ. The question for any authority required to determine the authority of precedent then is to determine what presumption, if any, ought to apply in favour of following the prior decision – more specifically, how it ought to reweigh the balance of first-order reasons. It will then need to determine whether there are any counter-reasons of sufficient weight to displace the presumption.

Where there is a need to minimise conflict between the first and second authority, and where the first authority has comparatively more skill and expertise than the second authority, comity will ordinarily support a strong presumption that the second authority ought to follow the first authority’s prior decision. In such contexts we might say – as authorities often do – that the prior decision is ‘strong authority’ for the proposition that the dispute now before the second authority ought to be resolve in the same way it was resolved by the first authority. This is because the presumption in favour of following the prior decision will only be displaced where the collective weight of those first-order reasons that favour an alternate conception of justice attain a significantly higher threshold than they would have needed had the second authority simply made a determination on the ordinary balance of first-order reasons.
Alternatively, where there is less perceived need to minimise conflict, and/or the first authority is in no better position to govern the dispute in question than the second authority, comity will ordinarily support a weaker presumption that the second authority ought to follow the prior decision of the first authority. In such contexts we may still say that the prior decision is ‘authority’ for the proposition that the dispute now before the second authority ought to be resolved in the same way it was by the first authority. The presumption will still only be displaced where the collective weight of those first-order reasons that favour an alternate conception of justice attain a somewhat higher threshold than they would have needed had the second authority simply made a determination on the ordinary balance of first-order reasons. Yet, evidently it will be easier to displace the presumption where there are first-order reasons that do. The varied nature of authorities and the contexts in which they operate all suggests that the weighted threshold that ought to apply in favour of following a particular decision in any given context may vary from very weak to very strong.

As we saw in Chapter 3, in his discussion on the logic of practical reason, Joseph Raz distinguishes between two modes of reasoning about what one ought to do. The first is what Raz describes as acting on the ordinary balance of first-order reasons. If an authority acts in accordance with this mode of practical reason, it weighs all relevant first-order reasons for and against a particular course of action and choose that course of action which has the greatest overall support. Yet, acting on the balance of first-order reasons is not the only mode of practical reason. There is a second, which Raz describes as acting in accordance with a second-order reason. Raz conceives of second-order reasons as being exclusionary in nature – that is, as reasons to exclude a first-order reason, or category of first-order reasons, that favours a course of action inconsistent with the second-order reason from consideration. But, as we know, the concept of a second-order reason is far richer than Raz allows. In fact, there also exist second-order reasons that are non-exclusionary in nature – that is, reasons to treat a first-
order reason, or category of first-order reasons, as having less weight than they would ordinarily be determined to have. Under this conception of practical reason, an exclusionary reason is thus simply the special case where one or more first-order reasons are treated as having zero weight.

The two modes of practical reason which Raz describes – that being, the act of deciding on the ordinary balance of first-order reasons and the act of deciding in accordance with an exclusionary second-order reason – can thus be regarded as the two extremes of a single continuum. At one end action is to be addresses on the balance of reasons in which no first-order reason has been assigned anything other than its ordinary weight; whilst at the other end action is to be assessed on a balance of reasons some of which have been assigned, on the basis of a second-order reason, the weight of zero. However, between these two extremes lies an indefinitely large number of further possibilities – all of which are variations of the idea of a weighted balance of reasons. Because comity constitutes, or give rises to, a non-exclusionary second-order reason, rather than an exclusionary second-order reason, the authority of precedent, regardless of context, must lie somewhere along this spectrum. The question of where on the spectrum the authority of a particular decision lies depends on the authorities in question and the context in which they operate.

You might object that the idea of a weighted balance of reasons is contrary to the content-independent nature of precedent. As we know, the characteristic feature of precedent is that its authority derives solely from its status as a decision of the first authority, not from the second authority’s determination as to its persuasiveness or soundness. However, a comity-based conception of precedent supports the content-independent nature of precedent because it suggests that the authority of precedent in any given context is determined by the strength of the presumption in favour of following the decision.

36 Perry (n 8) 223.
The presumption to be applied in favour of following the prior decision of the first authority in any given context does not change in accordance with the second authority’s perception of its soundness or persuasiveness. Whilst the presumption always provides second authorities with the flexibility to depart from prior decisions, the threshold at which they may do so is set solely by reference to the nature of the authorities in question and the context in which they operate not the prior decision’s content. The presumption will always be the same between the same authorities in the same context. Yet, whether that presumption may be displaced in individual cases will ultimately depend on the first-order reasons relevant to the case at hand.

It is important to remember that comity is a principle of ‘recognition’ and ‘self-restraint’. It is a principle which second authorities may use to determine what weight – if any – they ought to accord to the first authority’s prior decision and ultimately whether or not they ought to follow that decision in any given context. But, comity does not command how a case shall be decided. Rather it merely guides authorities in the proper exercise of their adjudicatory power. Comity recognises that the primary duty of every authority is to resolve cases before them in the most just manner possible. It demands that no authority shall abdicate its judgment, but recognises that, in certain contexts, the most just exercise of one’s own adjudicatory power may in fact be to follow the prior decision of another.

This, of course, is how principles operate – they guide but they do not command.\footnote{Ronald Dworkin, ‘The Model of Rules I’ in Dworkin (n 1) ch 2.} Understanding precedential reasoning as an act of comity, and doctrines of precedent as an expression of comity, helps us understand why the authority of precedent must be characterised in non-exclusionary terms. As we know, under a comity-based conception of precedent, comity forms the basis for, and guide the application of, doctrines of precedent. This, necessarily includes so-called ‘rules of precedent’. But, it is important to recognise that when we speak of
‘rules of precedent’ we are not speaking of rules of law – the validity of which may be characterised in exclusionary binary terms. Rather, ‘rules of precedent’ are really ‘doctrines of precedent’ – they are practices which, over time, authorities have come to adopt to reflect the proper way in which they ought to exercise their adjudicatory power with respect to one another’s prior decisions in particular contexts. Rules of precedent then are not rules of law, properly so-called, but rather doctrines which authorities impose upon themselves in order to guard against the injustice that would beset the adjudicative process if they were simply to reason every point of law afresh. Not without good reasons do authorities speak of being bound by precedent. But for equally good reason authorities resist being bound by precedent absolutely.

In The Model of Rules,38 Ronald Dworkin draws an important distinction between ‘rules’ and ‘principles’ of law. According to Dworkin, a rule of law, which is said to operate in an all-or-nothing fashion, gives rise to an obligation to perform (or refrain from performing) a specified action whenever the rule’s conditions of application have been met. Although Dworkin did not rely on the logic of practical reasoning, we can say that a ‘rule’, properly so-called constitutes, or gives rise to, an exclusionary second-order reason to act in a particular way. Regardless of the first-order reasons that favour a course of action inconsistent with the rule, if the rule applies, then a rational authority ought to consider itself bound to follow it. Rules essentially direct authorities to exclude from their consideration any first-order reasons that favour a course of action inconsistent with the rule.

A principle, on the other hand, favours one course of action over another but does not, by itself, require that course of action be followed. In Dworkin’s words:

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38 ibid.
Only rules dictate results, come what may. When a contrary result has been reached, the rule has to be abandoned or changed. Principles do not work that way; they incline a decision one way, though not conclusively, and they survive intact when they do not prevail.39

Principles possess a dimension of weight or importance, which is to be factored into an authority’s determination concerning what they ought to do when faced with two alternate courses of action. Unlike rules which apply in an all-or-nothing fashion, principles do not operate according to the same *binary logic*. Instead they operate according to a graded *fuzzy logic* – one that makes room for an indefinite number of mid-values between two binary poles of ‘valid’ or ‘not valid, ‘applicable’ or ‘not applicable’, or the binary values of 1 and 0.40

Drawing on the logic of practical reason, we can say, that a principle constitutes, or give rise to, a non-exclusionary second-order reasons to act in a particular way. Unlike a rule, a principle does not exclude any first-order reasons from consideration. Rather, it simply direct an authority to act as if those first-order reasons inconsistent with the principle have less weight than they actually do. In this way, principles are able to guide authorities to exercise their adjudicatory power in a non-exclusionary way towards that course of action supported by the principle.41

Dworkin argues that in the law, not only are there rules which are legally binding but certain sorts of principles as well. Authorities are thus bound to take into account certain rules – for example, the constitution, legislation, treaties or arbitral rules – and certain principles of justice that arise purely by virtue of their nature as decision-makers. These principles, Dworkin

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39 ibid 35.
40 ‘It seems odd to speak of a principle as being valid at all, perhaps because validity is an all-or-nothing concept, appropriate for rules, but inconsistent with a principle’s dimension of weight.’ – Ronald Dworkin, ‘The Model of Rule II’ in ibid 59.
41 Perry (n 8) 224.
argues, guide authorities in the proper exercise of their adjudicatory power, but do not operate in an all-or-nothing fashion like rules. They are not hard and fast rules since, standing alone, they do not constrain behaviour in an exclusionary sense. Rather, they provide guidelines for how the law is to be interpreted and applied.\(^{42}\)

To Dworkin, who was concerned only with precedent in the common law, the doctrine of \textit{stare decisis} is not a rule of law properly so-called. To him, it is best characterised as an expression of a cluster of underlying principles that reflected the equities of consistency.\(^{43}\) This, of course, suggests that the authority of precedent cannot be characterised in an all-or-nothing fashion because the doctrine of \textit{stare decisis} simply reflects non-exclusionary principles of justice that the courts are bound to give effect to when they exercise their adjudicatory power. Just like the principles of justice that lie behind the doctrine of \textit{stare decisis}, the authority of precedent can thus only ever be characterised in terms of degree.

We can say that comity is a ‘principle of justice’. But to do so is not entirely accurate. In truth, authorities act with, or ought to act with comity ‘for reasons of justice’. Comity then is best described as a principles of \textit{meta-justice} – it is a means by which authorities may give effect to the collection of systemic judicial principles by which they are bound to take into consideration when exercising their adjudicatory power. One way in which comity does this is by forming the basis for, and guiding the application of, doctrines of precedent. This includes the doctrine of \textit{stare decisis} in the common law, but necessarily includes all ‘rules’ and ‘practices’ of precedent (whether they be formal or informal, \textit{de jure} or \textit{de facto}) regardless of context.

The binding force of all doctrines of precedent then are nothing more than the collective normative force of the systemic judicial principles that lie behind them – namely, the need to

\(^{42}\) ‘All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.’ – Ronald Dworkin, ‘The Model of Rules I’ in Dworkin (n 1) 26.

\(^{43}\) ibid 37; Perry (n 8) 223–224.
minimise the injustice of conflict and the misallocation of authority. Because principles do
not operate in an all-or-nothing fashion like rules, it follows that doctrines of precedent cannot
be thought of as constituting, or giving rise to, exclusionary second-order reasons to follow
precedent. Rather, they can only ever have a non-exclusionary effect – at most they can form
the basis for a presumption of varying degrees of strength in favour of follow precedent on the
basis that doing so will be consistent with the underlying consideration of systemic justice by
which every authority is bound to take into account.

This of course implies that doctrines of precedent are really just a kind of aide-mémoire
which exemplify and instantiate the various underlying principles of justice by which
authorities are bound to take into consideration. In other words, they are a shorthand means
to determine the authority of precedent without having to revert back to comity, or the
underlying principles of systemic justice which comity seeks to give effect to. They necessarily
avoid the inconvenience and difficulty that would arise if individual authorities had to interpret
and apply these open-textured and often ambiguous principles in every case in which they are
asked to follow the prior decision of another.

Yet, we cannot lose sight of the fact that all doctrines of precedent, regardless of context,
are based on comity and the underlying principles of justice comity seeks to give effect to. It
follows that under a comity-based conception of precedent authorities do not have a strict
obligation to follow doctrines of precedent at all. Rather, it is more accurate to say that they
have an obligation to give effect to those principles of justice that lie behind them. By acting
with comity to guide the development and application of doctrines of precedent then, I propose
that authorities are able to properly give effect to these principles.

In his 2011 Hague Lectures on *The Principle of Comity in Private International Law*,
Adrian Briggs concludes that comity is ‘both the ancestor and handmaiden of private

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45 Ronald Dworkin, ‘The Model of Rules II’ in ibid 77–78; Perry (n 8) 225.
international law’. By this he means that comity explains much of the private international law we have and also offers a guide to its development. I propose that comity might do the same in respect of doctrines of precedent. Not only can comity help explain the doctrines we have, but it may also provide a principle-based means by which to develop new and existing doctrines.

The importance of a comity-based conception of precedent for this purpose cannot be understated. As we will see in Chapter 5, for authorities already operating under established doctrines of precedent, the principle of comity may help them better exercise their adjudicatory power in times of ambiguity. A comity-based conception of precedent can help authorities justify their actions under such doctrines, both when they follow precedent and when they depart from it. For authorities not operating under established doctrines of precedent, a comity-based conception of precedent may be of even more utility. As we will see, it has the potential to assist a wide range of authorities in diverse contexts to develop new doctrines of precedent aimed at regulating how they ought to act with respect to one another’s decisions.

4.4. Against Orthodox Conceptions of Precedent

A comity-based conception of precedent reconceptualises the very idea of what a precedent is, why authorities reason from precedent and how precedents bind. It should be no surprise then that it departs significantly from orthodox conceptions of precedent that have largely developed in the common law. In this section, I propose that a comity-based conception of precedent provides a more compelling account of the nature and authority of precedent as a universal jurisprudential concept than current orthodox conceptions.

Precedential reasoning is often thought of as being unique to the common law. For this reason our most advanced attempts to understand the nature and authority of precedent have

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traditionally focused on the common law doctrine of *stare decisis*.

In truth however, precedential reasoning is a universal phenomenon. A wide range of authorities – both inside and outside the law – reason from precedent. Parents, teachers, colleagues, governmental and university departments, courts and tribunals all do it. However, by focusing only on the doctrine of *stare decisis*, those concerned with the study of precedent in the common law have unduly narrowed our scope of analysis. In essence, they have failed to see the forest from the tress – they have sought to understand the nature and authority of precedent by reference to only one doctrine. By ignoring the universal nature of precedential reasoning they have fragmented the study of precedent, detaching the practice of common law courts from all other types of authorities.

Orthodox conceptions of precedent derive from the theory of legal positivism – the dominant theory of law in common law jurisdictions. More specifically, they derive from the legal positivist thesis that positivism, as a theory of law, can provide a complete and accurate account of the binding nature of legal norms. Yet, as we will see, legal positivism effectively seeks to force a square peg through a round hole – it starts with a theory of legislation and then seeks to accommodate the practice of adjudication by moulding precedent to fit within it. This of course distorts the true nature and authority of precedent at both a local and universal level. If we acknowledge the universal nature of precedential reasoning, it quickly becomes apparent that legal positivism cannot properly account for the nature and authority of precedent in or beyond the common law.

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47 See, most notably, Hart (n 1); Raz, *The Authority of Law* (n 1); Dworkin (n 1); Duxbury (n 1).
48 Schauer, ‘Precedent’ (n 2) 571–572.
49 Of course, as a theory of law, legal positivism is associated with a number of different theses. Here I am concerned only with the claim that legal positivism can accurately account for the nature of binding legal norms.
50 Stephen Perry, ‘Second-Order Reasons, Uncertainty and Legal Theory’ (1989) 62 Southern California Law Review 913, 957. See also, Ernest Weinrib’s discussion of the general theoretical emphasis which legal positivists place on legislation in Weinrib (n 23) 956.
The common law’s lack of an exclusive claim on precedential reasoning suggests that if we are to truly understand the nature and authority of precedent then we must look beyond orthodox conceptions of precedent. I propose that it is only by reference to comity that we can properly account for precedent as a universal jurisprudential concept. A comity-based conception of precedent does not start with a theory of law and then seek to accommodate the practice of precedential reasoning within it. Rather, it does the exact opposite – it starts with the practice of precedential reasoning then seeks to account for the nature and authority of precedent by reference to general principles that all authorities are bound to take into consideration.

4.4.1. Classical Legal Positivism

The first real attempt to understand the nature and authority of precedent as a jurisprudential concept can be found in the work of classical legal positivists grappling with the idea of binding legal norms in English law. According to classical legal positivism, the binding force of legal norms (which includes precedent) derives from the fact that they are backed by sanctions emanating from a habitually-obeyed authoritative source.\(^51\) In developing his *Pure Theory of Law*, Hans Kelsen noted that his theory of law as coercive orders ‘continued in the tradition of nineteenth-century positivist legal theory’\(^52\) – the theory according to which the ‘binding virtue of law lies in the sanction annexed to it’.\(^53\)

It is well known that H.L.A. Hart systematically dismantled the classical legal positivist thesis of law as coercive orders in *The Concept of Law*. Yet, even before then the shortcomings of classical legal positivism were becoming increasingly evident. In particular, the theory was

\(^{51}\) Duxbury (n 1) 14.


simply unable to account for the obligation of English courts to follow precedent under the doctrine of *stare decisis*. Whilst it could, at least *prima facie*, account for the reason why litigants followed court decisions (i.e., because they feared sanctions for non-compliance), it was not immediately apparent how the decisions of one court could bind another.\(^{54}\)

As a piece of doctrinal description, the statement that precedents bind is unremarkable. We often say, without much hesitation, that the prior decision of one court is binding on another and judicial practice shows that subsequent courts often consider themselves bound to follow prior decisions even with those with which they disagree. Yet, from a classical legal positivist perspective, the idea that prior decisions bind poses a serious difficulty. For if precedents bind then there must be some identifiable sanction applicable to courts who refuse to follow precedent. The problem is that in reality no such sanction exists. If precedents bind, then they do so because courts bind themselves. As CK Allen notes:

> We say that [the judge] is bound by the decisions of higher courts; and so he undoubtedly is. But the superior court does not impose fetters upon him; he places the fetters on his own hands… The humblest judicial officer has to decide for himself whether he is or is not bound.\(^{55}\)

It is of course possible that if a judge were to persistently decline to follow precedent that steps might be taken to remove him or her from office. Yet, as Cross and Harris note, ‘it would be a mistake to think in terms of such drastic sanction for the judge’s obligation to act according to the rules of precedent.’\(^{56}\) Rather, it is quite clear that it is for each judge to determine whether or not he or she incurs a duty to follow precedent in any given case. For the classical legal

\(^{54}\) Duxbury (n 1) 15–16.


positivist however, the very notion that precedents bind is only intelligible if there is an identifiable sanction which will apply to those who fail to follow precedent. Without such a sanction, it is unclear how prior decisions can bind future courts.57

To be fair, modern orthodox conceptions of precedent do not derive from the classical legal positivist thesis of law as coercive orders. As we will see below, modern legal positivists have reconceptualised the nature and authority of precedent in the common law. Yet, there continues to be a tendency among scholars and practitioners both inside and outside the common law to characterised precedent in classical legal positivist terms. The idea that precedents bind in a literal sense has ‘through constant and often unthinking repetition, become a kind of sacramental phrase which contains a large element of fiction.’58 It has, so to speak, become ingrained in the legal psyche.

A comity-based conception of precedent helps highlight the inability of classical legal positivism to account for the duty to follow precedent. Regardless of the context, comity only operates in circumstances where the second authority is under no obligation to obey the first authority or its decisions. When the second authority acts with comity, it attributes weight to the prior decision of the first authority for the sole reason that doing so fulfils its primary duty to do justice to those subject to its own authority. In other words, treating the prior decision of the first authority as binding will, in certain circumstances, constitutes the action most consistent with the second authority’s obligation to act according to relevant principles of justice. It follows that when authorities follow precedent they do so not for fear of sanction, but rather because they consider themselves obligated to do so.

Helping to dispel what is left of the classical legal positivist thesis is important because it hinders the study of precedent not just in the common law but also beyond it. In particular areas of law, such as public international law and international arbitration, it is a common

57 Duxbury (n 1) 16–17.
58 Allen (n 15) 334.
objection that prior decisions cannot bind because there is no adjudicatory hierarchy like that which exists in the common law.59 Those concerned with the study of precedent in non-hierarchical contexts generally argue that prior decisions can guide future authorities, but they can do so only as ‘persuasive precedent’.60 This, as we know, amounts to an argument that precedent, properly so-called, cannot exists in these contexts because the content-independent nature of precedent means that if an authority agrees with, or is persuaded by the prior decision of another then it is not truly reasoning from precedent.

59 ‘The fact that arbitration embodies justice dispensed by tribunals … outside any hierarchically organized court and independent of all other arbitral tribunals, immediately leads us to believe that it is impossible to develop a doctrine of precedent in arbitration and perhaps that the notion of precedent itself cannot possibly exist in this field.’ – Diego Arroyo, ‘Private Adjudication Without Precedent?’ in Horatia Muir Watt and Diego Arroyo (eds), Private International Law and Global Governance (Oxford University Press 2014) 119. ‘The lack of any organisational relationship between international judicial bodies … makes decisions of other courts and tribunals res inter alios acta. As international courts and tribunals exist on the same footing so do their decisions; there is no obligation to take into account their own previous decisions or those of other judicial bodies, even if they do concern the same subject-matter and even if there are bodies more specialised or experienced in a particular subject matter.’ – Karin Oellers-Frahm, ‘Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions’ (2001) 5 Max Planck Yearbook of United Nations Law 67, 76. ‘Investment treaty arbitration is not well suited to establishing a formal system of precedent … In systems of government using stare decisis, there are formal rules or understandings about which decisions are binding and which are merely persuasive… In contrast, there are no such hierarchies for investment treaty arbitration.’ – Andrea Bjorklund, ‘Investment Treaty Arbitral Decisions as Jurisprudence Constante’ [2008] UC Davis Legal Studies Research Paper (No. 158) 270–271. ‘… investment treaty arbitration is a decentralized ad hoc legal system of dispute settlement. When compared to other dispute settlement bodies … the concept of binding precedent seems even more unsuitable since it lacks a hierarchical structure… Investment tribunals cannot however be expected to act as national courts in hierarchical vertical legal systems which function with rules of binding precedent or jurisprudence constante. Within international investment arbitration, such a system clearly is lacking… The very fact that states have chosen to establish a horizontal system of ad hoc arbitration with no appellate mechanism, by necessary implication results in a system whereby each arbitral tribunal assesses the case without any obligation to consider or apply previous case-law.’ – Eric de Brabandere, ‘Arbitral Decisions as a Source of International Investment Law’ in Tarcisio Gazzini and Eric de Brabandere, International Investment Law: The Sources of Rights and Obligations (Martinus Nijhoff Publishers 2012) 254. ‘… compared with standing judicial bodies or centralized dispute settlement mechanisms, investment treaty arbitration does not have centralized standing adjudicatory bodies, and has certain specific features that accentuate the impropriety of considering previous decisions as … having a binding character.’ – Eric De Brabandere, Investment Treaty Arbitration as Public International Law (Cambridge University Press 2014) 97. ‘There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals.’ – SGS Société Générale de Surveillance S.A. v Republic of the Philippines, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/02/6 (2004) (ICSID) 97 (El-Kosheri, Crawford and Crivellaro). 60 ‘The jurisprudence of state courts present characteristics of homogeneity in a hierarchical system that arbitral case law does not and cannot have. Yet, international commercial arbitration produces decisions… These decisions are referred to by other arbitrators, and they may in certain cases persuade a future tribunal to adhere to previous solutions. Arbitral precedent is no more and no less than this capacity of past arbitration awards to convince future tribunals to adhere to the solution they embody.’ – Alexis Mourre, ‘Precedent and Confidentiality in International Commercial Arbitration’ in Emmanuel Gaillard and Yas Banifatemi (eds), Precedent in International Arbitration (Juris Publishing 2008) 41.
The objection that binding precedent can only operate in contexts of hierarchy stems from the fundamental misconception that the binding nature of precedent can be understood in classical legal positivist terms. A comity-based conception of precedent makes it clear that the first authority has no ability to fetter the adjudicatory power of the second authority or impose any sanction upon it for failing to follow its decisions. Rather, precedents bind because authorities choose to be bound by them – because they consider themselves under an obligation to follow them in any given case. This obligation, as we know, stems from the duty to act with comity, a duty that applies not only in contexts of hierarchy. A comity-based conception of precedent maintains that the systemic judicial principles which comity gives effect to are not only relevant in hierarchical contexts but also in non-hierarchical contexts. It follows that in certain circumstances second authorities ought to consider themselves bound to follow precedent even if there is no relationship of hierarchy between the first and second authority.

4.4.2. Modern Legal Positivism

Like classical legal positivists, modern legal positivists see the function of law as the authoritative guidance of conduct. The function of the legislature is to determine how those within a given system ought to act through the proclamation of law and the correlative function of the courts is to apply that law to the facts of individual cases or, where no law exists, to create new law. It is from this starting point that modern legal positivists seek to account for the binding nature of legal norms – including prior decisions.61

Yet modern and classical legal positivists differ in their account of how law binds. According to modern legal positivism, law is best understood, not as a series of commands, but rather as a series of certain types of rules. In The Concept of Law, H.L.A. Hart argues that classical legal positivism provides an insufficient account of the binding nature of law because

61 See generally, Hart (n 1); Raz, The Authority of Law (n 1); Joseph Raz, Practical Reason and Norms (3rd edn, Oxford University Press 1999).
it fails to account for the distinction between being ‘obliged’ and being ‘obligated’ to follow rules of law. As Hart explains, any gunman may order you to give him your money and, consequently, you might feel ‘obliged’ to comply. But we would not ordinarily say in connection with the gunman’s order that you are ‘obligated’ to hand over your money – you certainly incur no ‘duty’ to do so. Using this example, Hart argued that there are rules of law that are backed by sanction and rules of law that are not. Yet, even in respect of the latter we generally consider ourselves obligated to obey them. Modern legal positivists like Hart argue that the coercive aspect of law is actually much more marginal than classical legal positivist assume and that if we follow rules of law then we do so not because we are ‘obliged’ but because we consider ourselves ‘obligated’ to do so.62

The basic elements of Hart’s legal philosophy are well known, and so they can be presented with the minimal detail necessary to show how he accounts for the binding nature of precedent. Elaborating on the nature of rules, Hart argues that there are two kinds of legal rules: primary rules of obligation, and the secondary rules of recognition, change, and adjudication. In *The Concept of Law*, he writes:

> There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.63

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62 Hart (n 1) 6–20, 82–91.
63 ibid 116.
According to Hart, primary rules of obligation either forbid or require certain actions and can generate duties or obligations. When we think of something being against the law, or required by the law, we are generally in the realm of primary rules. A primary rule, for example, might be the law against stealing or the law requiring you to stop at a red light. Yet there are also secondary rules which are, in effect, ‘rules about primary rules’. These include: secondary rules of change, which confer power on certain authorities to enact, alter or derogate the valid rules of obligation; secondary rules of adjudication, which lay down the formal procedure to be observed when primary rules of obligation are applied and enforced in the courts; and the rule, or rules, of recognition with reference to which the rules of obligation are identified as valid law by judges and other law-applying officials. Of these three secondary rules, Hart believed the rule of recognition to be the most important because it tells us how to identify what rules are to count as law within a relevant legal system.\(^6^4\)

Hart’s philosophy is important because it permits modern legal positivists to offer a more compelling account than classical legal positivists of the binding nature of law – including precedent. According to modern legal positivists, people feel an obligation to follow rules of law, not because of any sanction that may be annexed to them, but because they accept the rule of recognition. If one accepts the rule of recognition then they automatically accept to be bound by rules which the rule of recognition points to as valid law.\(^6^5\) For modern legal positivists, the obligation courts incur to follow precedent coincides with the duty to apply whatever source-based positive rules are recognised within the relevant system to be law. The most important rules of law are those that derive from legislative enactments. Yet, prior decisions are also said to constitute rules of law in much the same way. By accepting the doctrine of *stare decisis* as
‘part of the rule of recognition’ – that is, as one of the criteria by which courts identify what is to constitute law – courts recognise judicial decisions as rules of law akin to legislation.\textsuperscript{66}

When a court is asked to resolve a dispute that is not regulated by a pre-existing rule of law – be that legislation, precedent or some other type of law recognised by the rule of recognition – modern legal positivists tell us that the court assumes the secondary role of a ‘delegate legislature.’ We are told that when a court decides a novel dispute it effectively creates a new rule of law to resolve the case before it and for all relevantly similar future cases. It follows that, according to modern legal positivism, subsequent courts who accept the doctrine of \textit{stare decisis} as part of the rule of recognition must therefore treat prior decisions as amounting to rules of law akin to legislation.\textsuperscript{67}

By arguing that precedents form part of the law, modern legal positivists are able to justify why future courts are bound to follow precedent irrespective of whether or not they believe the prior court made the right decision. Just as courts are not free to question the substantive merits of legislation, so too they are not free to question the merits of an earlier court decision.\textsuperscript{68} If the purpose of the law is to guide those within the system, then the delegate rule-making function of courts and their corresponding duty to apply prior decisions as law, fulfils that purpose. The theoretical contours of the duty to follow precedent are thus shaped almost entirely by the belief that the function of law, and the corresponding duty of the courts, is to authoritatively guide the conduct of those within the system.\textsuperscript{69}

To further support their theory, modern legal positivists – in particular H.L.A. Hart and Joseph Raz – rely on the logic of practical reason. To them, the obligation to follow rules of

\textsuperscript{66} Raz, \textit{The Authority of Law} (n 1) 95–96; Duxbury (n 1) 103–104.
\textsuperscript{68} Raz, \textit{The Authority of Law} (n 1) 185–188; Grant Lamond, ‘Do Precedents Create Rules?’ (2005) 11 Legal Theory 1, 1–2; MacCormick (n 67) 213–228; Schauer, \textit{Playing by the Rules} (n 67) 174–187.
\textsuperscript{69} Perry (n 50) 957; Perry (n 8) 231.
law – regardless of whether they derive from legislation or precedent – constitutes, or gives rise to, an exclusionary second-order reason to follow them. As we know, an exclusionary second-order reason is a reason to refrain from acting on the ordinary balance of first-order reasons and to exclude all relevant first-order reasons from consideration that support an action inconsistent with the second-order reason. Modern legal positivists tell us that legal rules are, in effect, a direction to comply with another authority’s judgment of what is right over one’s own. A legislative enactment then is a directive by the legislature to the courts not to decide a particular matter on the ordinary balance of first-order reasons but rather to accept its judgment instead. In the exact same way a precedent is an authoritative directive by the precedent court to all future courts to adopt its judgment.

By accepting the doctrine of *stare decisis* as part of the rule of recognition – that is, as one of the criteria by which courts identify what constitutes law – modern legal positivists argue that subsequent courts treat the doctrine as constituting, or giving rise to, an exclusionary second-order reason to follow precedent. The doctrine of precedent, we might say, is an ‘exclusionary rule’ which requires courts to treat precedents as giving rise to exclusionary rulings. To modern legal positivists, if courts accept the doctrine of *stare decisis*, then they automatically accept that precedents constitute valid rules of law, and their obligation to follow the law excludes any reliance upon their own judgment.

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70 Hart actually conceived of legal rules as constituting ‘peremptory reasons’ for action – that is, ‘a reason for belief without independent investigation or assessment of the truth of what is stated’ – HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press 1982) 253. I adopt Raz’s conception of legal rules as constituting ‘exclusionary second-order reasons’ because Raz has demonstrated it offers a more accurate conception of legal rules. As Raz notes, when an authority follows a rule of law it is not precluded from conducting an independent assessment or investigation of the truth of what it states. However, the nature of a rule means that regardless of the result of its assessment, if the rule applies then it cannot act upon its own judgment. It must necessarily preclude from its consideration any first-order reasons that support a course of action inconsistent with the rule. Of course, neither Hart nor Raz were the first to conceive of rules of law as constituting exclusionary reasons for action. The genesis of the idea can be found in Thomas Hobbes’ *Leviathan*: ‘Command is, where a man saith, do this, or do not this, without expecting any other reason than the will of him that says it.’ – Thomas Hobbes, *Leviathan* (Scolar 1651) II, 25, 2.


72 Duxbury (n 1) 105; Perry (n 8) 231; Perry (n 50) 957.
Modern legal positivism – at least how it has been developed by Hart and Raz – claims to provide a full and accurate account of the binding nature of legal norms including prior decisions. Yet, if we look critically at modern legal positivism it is quite clear that it single out one particular aspect of the legal process as theoretically fundamental and then seeks to somehow accommodate remaining legal phenomenon into the theory that results. Without doubt what lies at the heart of modern legal positivism is the importance of legislation and the idea that the function of law is the authoritative guidance of those within the system. In this sense, it is really a theory of legislation, not adjudication.⁷³

To accommodate precedential reasoning within the broader framework of modern legal positivism, positivists distort the true nature and authority of precedent by casting prior decisions as exclusionary rules of law. This they do in two stages. First, they ask us to conceive of the doctrine of *stare decisis* as forming part of the rule of recognition. This of course allows them to cast prior decisions as ‘rules of law’ akin to legislative enactments. Second, by asking us to view prior decisions as akin to legislation, they ask us to treat the authority of precedent in the same way. Just like legislation then, we are told that precedents create new rules of law which future courts are bound to apply in relevantly similar cases.⁷⁴ Both citizens and judges then ought to treat the doctrine of *stare decisis* as constituting, or giving rise to, a second-order reason to follow precedent – one that excludes all relevant first-order reasons from consideration that may favour departing from precedent in any given case.

A comity-based conception of precedent suggests that it is simply not plausible to account for the nature and authority of precedent as a universal jurisprudential concept in modern legal positivist terms. Contrary to modern legal positivism, a comity-based conception of precedent rejects the positivist assertion that the function of the courts – or any adjudicatory

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⁷³ Perry (n 50) 957; Weinrib (n 23) 956.
⁷⁴ ‘Strictly speaking judge-made law is binding and valid, just as much as enacted law.’ – Raz, *The Authority of Law* (n 1) 197.
authority for that matter – is the authoritative guidance of those within the system.\textsuperscript{75} Rather, the primary duty of all authorities – including the courts of the common law – is to decide disputes that come before them according to relevant principles of justice. In some cases, these principles of justice require authorities to accord weight to the prior decisions of other authorities in order to resolve the cases that come before them. This of course is consistent with an adjudicative approach to legal theory which is concerned with the pursuit of justice within the adjudicative process.

The idea that the doctrine of \textit{stare decisis} forms part of the rule of recognition is evidently self-serving to the positivist cause. The doctrine certainly does not force this interpretation but it is necessary to conceive of it in this way if modern legal positivists are to accommodate the binding nature of precedent within their more general theory of law. If the doctrine of \textit{stare decisis} does not constitute part of the rule of recognition, then prior decisions cannot constitute rules of law and modern legal positivism would be unable to account for the practice of following precedent from a positivist perspective.

A comity-based conception of precedent suggests that by forcing us to conceive of the doctrine of \textit{stare decisis} as part of the rule of recognition, modern legal positivists have in fact distorted the true nature and authority of precedent. The reality is that the doctrine of \textit{stare decisis} – just like any doctrine of precedent – is simply a collection of self-imposed rules and practices aimed at regulating how one type of authority ought to act with respect to the prior decisions of others in one specific context. Yet, it is not a rule of law, properly so-called. Even English courts have noted as much.\textsuperscript{76} Just like all rules and practices of precedent, the doctrine

\textsuperscript{75} This, of course, is not to deny that prior decisions can offer guidance to future litigants – an idea which is explored in Chapter 6 (Comity, Precedent and Authority-Based Governance). However, this is not the primary function of courts, or any authority for that matter. Rather, it is simply a by-product of every authority’s primary adjudicative function to resolve the disputes that come before them according to relevant principles of justice.

\textsuperscript{76} ‘… a rule as to precedent (which any court lays down for itself) is not a rule of law at all. It is simply a practice or usage laid down by the court itself for its own guidance…’ – \textit{Davis v Johnson} [1978] 2 WLR 182 (ENG CA) 281 (Lord Denning).
of *stare decisis* is simply an expression of comity – a meta-judicial principle that gives effect to underlying principles of systemic justice that all authorities are bound to take into consideration by virtue of their nature as decision-makers.

This of course suggests that prior decisions do not constitute rules of law akin to legislation. This proposition does not only flow from a rejection of the doctrine of *stare decisis* as part of the rule of recognition but also from judicial practice.\(^77\) The reality is that courts do not see their job as rule-makers, but rather as interpreters of existing rules and principles. Consider for example a case in which one party has purposefully concealed documents during contractual negotiations. If there was no positive source-based rule of law regulating such conduct, a court would not approach the question by saying: ‘I find there to be no law regulating this case, but now that this case has arisen, I think it best to create some’. No. In practice, the court would likely consider the act of failing to disclose documents during contractual negotiations to be contrary to general principles of justice which it may characterises as principles of fairness, equity or good faith for example. To bring about the just resolution of the dispute before it, the court would thus give shape and effect to these principles in a manner that appears reminiscent of the creation of rules.

Yet, as we know from our discussion of the process of interpretation in section 4.3.1 (What Are Precedents?), any implication that courts create rules of law is illusionary. The analogy to legislation then is misleading because the precedent court is not trying to determine the outcome for any future cases whose facts fall within the scope of the precedent case as a legislative rule would. Rather, it is simply trying to resolve the case before it according to

\(^77\) Those who reject the modern legal positivist model as an accurate account for the binding nature of precedent usually do so on the basis that it simply does not reflect judicial practice. See, for example, Lamond (n 68); Dworkin (n 1); Perry (n 8); Barbara Levenbook, ‘The Meaning of a Precedent’ (2000) 6 Legal Theory 185. See also, Michael Moore, ‘Precedent, Induction, and Ethical Generalization’ in Laurence Goldstein (ed), *Precedent in Law* (Clarendon Press 1987) 183.
relevant principles of justice. If modern legal positivists believe that any decision in which there is uncertainty or a lack of specificity within the law constitutes the creation of new laws, then that amounts to an incredibly large quantity of retroactive law-making. In this sense, modern legal positivism appears to collapse under its own weight for the function of law under the modern legal positivist model is supposed to be the authoritative guidance of future conduct.

The idea that an authority’s decision can constitute a rule of law seems to be even more absurd if we think about it outside the common law and outside the theory of modern legal positivism. The decision of a mother to give her eldest child £10 a week pocket money may well be used as precedent by her youngest child when she demands the same amount. But neither the child nor her mother would consider the mother’s prior decision to create a ‘house rule’ that all her children are entitled to £10 a week pocket money. Nor would either of them consider the mother to be bound by her prior decision as if it gave rise to a rule – i.e. as if it constitutes, or gives rise to, an exclusionary reason to follow it. Rather, in reality, the mother is likely to feel as if she ought to follow her prior decision, but the existence of the prior decision is unlikely to stop her from considering any relevant reasons against giving her youngest child pocket money. This of course is more consistent with the idea that she is actually acting in accordance with a non-exclusionary second-order reason under a comity-based conception of precedent.

This contradiction is even more pronounced in contexts where prior decisions are specifically precluded from constituting rules of law like modern legal positivists tell us they do. Art. 38(1)(d) of the ICJ Statute, for example, makes it clear that the prior decisions of international legal authorities do not create new rules of law. Yet, as we will see in Chapter 5, this certainly does not preclude them from having authority as precedent. In many contexts, international legal authorities reason from precedent despite the fact prior decisions cannot give

rise to rules of law. And when they do, they certainty do not treat prior decisions as
eclusionary rulings. Rather, they treat them as ‘authoritative declarations’ and their duty to
act with comity requires that they follow them in non-exclusionary manner.

As we will see in Chapter 5, a wide range of authorities, in diverse contexts reason from
precedent. If we acknowledge the universal nature of precedential reasoning, it quickly
becomes apparent that modern legal positivism simply cannot account for the nature and
authority of precedent outside the common law. This also tends to suggest that the inverse is
tue – that it cannot properly account for the nature and authority of precedent within the
common law either.

A comity-based conception of precedent suggests that, rather than constituting rules of
law, precedents are best characterised as ‘authoritative declarations’. When the first authority
resolves a dispute, its decision constitutes a declaration of what it believes the correct resolution
to that type of dispute ought to be. In a legal context, every precedent then is, by itself, simply
a declaration of what the first authority considers the correct interpretation of the relevant rules
of law or legal principles to be and how they ought to apply to the facts of the case. If, by acting
with comity, the second authority accords weight to the prior decision of the first authority and
subsequently restrains itself from making an assessment of the case before it on the ordinary
balance of first-order reasons then we can say that the prior decision of the first authority is
transformed from a simple ‘declaration’ to an ‘authoritative declaration’. Yet, it is only by
virtue of comity that the first authority’s declaration becomes ‘authoritative’ as a particular
construction or interpretation of law.

To be sure, the legally binding part of the first authority’s decision does not extend any
further than those subject to the original dispute. This necessarily excludes the second authority
who owes no duty to obey the first authority or its decisions. Rather, for the second authority,
the prior decision is merely a declaration of what the first authority believe the law to be and
how it out to apply to the facts of the case. The decision is ultimately accorded weight as an ‘authoritative declaration’ of law because it was made by a decision-maker who had the requisite authority – and by extension, the requisite skill and expertise – to decide the particular type of dispute in question. Comity presupposes that for this reason the decision is entitled to respect and that where the first authority is in a better position than the second to resolve the type of dispute, or where the second authority is in no better position than the first, the best exercise of adjudicatory power by the second authority will ordinarily be to recognise the first authority’s declaration as ‘authoritative’ for it has good reason to believe that the first authority’s conception of justice is better than its own or, at the very least, its own conception is no better and to depart from the prior decision would introduce an unjustified conflict between the two.

If prior decisions do not constitute rules of law akin to legislation then it follows that they do not ‘bind’ in the same exclusionary way. As we know from our discussion of the nature of rules and principles in section 4.3.3 (The Authority of Precedent), rules, unlike principles, operate in an all-or-nothing fashion. More specifically, the obligation to follow rules constitutes, or gives rise to, an exclusionary second-order reason to act in a particular way whenever the criteria for the rule’s application have been met. This of course is the way in which we conceive of legislation and other formal rules – they apply regardless of the first-order reasons that may support a course of action against them.79

Courts however do not treat the doctrine of *stare decisis* as a rule that constitutes, or gives rise to, an exclusionary second-order reasons to follow precedent. Nor do they treat precedents as giving rise to exclusionary rulings by virtue of the doctrine. Far from being excluded, subsequent courts may, in almost every case, reconsider and modify the underlying balance of reasons with respect to a given type of case. As we will see in Chapter 5, even the

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79 Raz, *The Authority of Law* (n 1) 28–33.
lowest court in the judicial hierarchy has leeway, in certain circumstances, to depart from the prior decisions of those courts above it; and the obligation to follow precedent only becomes weaker as we leave the common law and explore the authority of precedent in other contexts.

Whilst the duty to follow legislation may constitute, or give rise to, an exclusionary second-order reason to follow it, it is clear that the doctrine of *stare decisis* does not constitute, or give rise to, a similar reason to follow precedent. To conceptualise the authority of precedents as exclusionary requires that we accept too tidy a picture of precedents as authoritative directives to later authorities – that we assume precedents to be more rule-like and less amenable to alteration and adaptation than tends to be the case. 80

However, it is quite clear that precedents do constrain. A wide range of authorities, inside and outside the law, feel the pull of precedent. Whilst the nature of that constraint may elude the exclusionary model advanced by modern legal positivists, subsequent authorities who reason from precedent do not consider themselves free to approach relevantly similar cases on the ordinary balance of first-order reasons. Evidently then, a new approach to precedent is needed – one that accounts for the ‘binding force of precedent’ not in terms of its validity (that being a binary concept) but rather in terms of its authority (which is in terms of degrees). The idea of precedent having ‘authority’ is meant to capture the reality that the truth lies somewhere between these two extremes, that precedents do constrain but not as exclusionary rules of law.

A comity-based conception of precedent recognises that authorities may be bound by both rules and principles. Legal authorities are bound to take into account certain legal rules – for example, the constitution, legislation, treaties or arbitral rules – and certain principles of justice that arise purely by virtue of their nature as decision-makers. These principles guide authorities in the proper exercise of their adjudicatory power, but do not operate in an all-or-

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80 Duxbury (n 1) 108–109.
nothing fashion like rules do. Rather, they guide authorities with respect to how the law ought to be interpreted and applied.

A comity-based conception of precedent maintains that the doctrine of *stare decisis* – just like any doctrine of precedent – is best characterised as an expression of comity and the underlying collection of (systemic) judicial principles that comity seeks to give effect to. As a principle of meta-justice – that is, as a higher-level principle which seeks to give effect to these underlying judicial principles – comity forms the basis for, and guides the application of, doctrines of precedent. This includes the doctrine of *stare decisis* in the common law, but necessarily includes all doctrines of precedent regardless of context.

The binding force of doctrines of precedent then are nothing more than the collective normative force of the systemic judicial principles that lie behind them – namely, the need to avoid the injustice that results from conflict and the misallocation of authority. It follows that the authority of precedent can thus only ever be characterised in non-exclusionary terms – in degrees of bindingness. As a non-exclusionary second-order reason, comity may only form the basis for a presumption (of varying degrees of strength) in favour of following precedent. Exactly how authorities ought to determine the authority of precedent in any given context – that is, to determine what presumption ought to apply – is the subject of Chapter 5.

### 4.5. The Three Axioms of Comity

Drawing on the comity-based conception of precedent developed in this chapter, I propose that we may reduce our new approach to precedent to three key axioms. Taking our cue from Huber, these axioms should ‘smooth’ the way for the development of new and existing doctrines of precedent that regulate how all authorities ought to act with respect to one another’s decisions:

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81 Indeed, as we saw in section 2.3.2.2 (The History of Comity – Ulrik Huber) Huber laid down three axioms in his *De conflictu legum* which he intended would ‘smooth’ the way for the resolution of all conflict of law problem. Using them as a base, he developed concrete doctrines of law that would later guide not only the courts of Friesland, but courts around the world. He showed that whilst comity is vague in the abstract, it could be used to
1. The second authority ought to act with respect for the ‘legitimate adjudicatory authority’ of the first authority – including its prior decisions.

2. Where the first authority is better placed to resolve the type of dispute in question, or where the second authority is in no better position than the first authority, comity will support a presumption that the second authority ought *ordinarily* to follow the first authority’s prior decision.

3. The strength of the presumption depends on the nature of the authorities in question and the need to minimise conflict given the context in which they operate.

We can say, without hesitation, that comity towards the legitimate authority of another *can involve* a duty on the part of one authority to follow another’s decision. Yet, whether or not this will be the case depends on the authorities in question and the context in which they operate. Evidently then, the determination as to whether the second authority ought to follow the prior decision of the first authority in any given case is context specific.

In Chapter 5, I propose to demonstrate how these three axioms may assist authorities in practice to determine the authority of precedent and how they may guide the development of new and existing doctrines of precedent in any given context. Backed by a nuanced understanding of a comity-based conception of precedent, I propose that these three axioms may provide authorities with critical practical guidance in times of uncertainty and a principle-based approach to determine how they ought to act with respect to one another’s decisions.

develop positive doctrines of law aimed at regulating how States ought to act with respect to one another’s authority.
4.6. Conclusions

In this chapter I have advanced a new approach to precedent – one based on the principle of comity. I propose that a comity-based conception of precedent provides a more compelling account of the nature and authority of precedent as a universal jurisprudential concept than orthodox conceptions of precedent. More specifically, a comity-based conception of precedent help us understand exactly what precedents are, how authorities reason from precedent and how the decision of one authority can bind another.

A comity-based conception of precedent significantly advances our theoretical understanding of the nature and authority of precedent. Yet, it also has significant practical implications. Drawing on our three axioms, I propose in Chapter 5 that a comity-based conception of precedent may provide a wide range of authorities with critical guidance in practice and offer a principle-based means by which to develop new and existing doctrines of precedent.
5

Comity in Practice

5.1. Introduction

The purpose of this chapter is to demonstrate how comity, as a general principle of law, may operate in practice. Drawing on our three axioms in Chapter 4, I propose that comity may assist authorities in individual cases to determine the authority of precedent and provide a principle-based means by which to develop new and existing doctrines of precedent. As we will see, comity has the potential to assist a wide range of authorities, in diverse contexts, determine how they ought to act with respect to the prior decisions of another – including our ICSID Tribunal from Chapter 1. For this reason, this chapter should be of particular interest to practitioners looking for critical guidance in practice.

To demonstrate how comity may do this I propose to progressively construct a complex system of authorities. This system is of course a theoretical construct. But, if we focus on some of the more prominent types of authorities, it quickly becomes a very real reflection of our modern-world. As we will discover, the diverse nature of authorities, combined with the varied
contexts in which they operate, means that the authority of precedent will differ from context to context. There is of course no general analytical solution to the question of how much authority a prior decision ought to have or how one authority ought to act with respect to the prior decision of another. So much depends on the authorities in question and the context in which they operate. Yet, a comity-based conception of precedent can provide critical guidance to authorities in individual cases and a principle-based means by which to develop new and existing doctrines of precedent.

In this chapter I group authorities into three different categories depending on whether the authority in question is being asked to follow: (1) its own prior decision (‘Single Authorities’);\(^1\) (2) the prior decision of a co-ordinate authority (‘Co-ordinate Authorities’);\(^2\) or (3) the prior decision of a specialist authority of horizontal\(^3\) or vertical jurisdiction\(^4\) (‘Specialist Authorities’). In each category comity supports a presumption that authorities ought to follow precedent unless there are sufficient first-order reasons to justify departing from the prior decision in the case at hand. As we will see, the strength of the presumption in favour of following precedent generally gets stronger as we move from single authorities to specialist authorities reflecting the need to minimise the injustice of conflicting decision and the unique nature, skill and expertise of the authorities in involved.

\(^1\) ‘Single Authorities’ are authorities called upon to determine the authority of their own prior decisions. In section 5.2, I demonstrate how comity can assist domestic courts, the ICJ, the ECHR, the CJEU, the ICTY, the ICTR and the WTO Appellate Body to do so.

\(^2\) ‘Co-ordinate Authorities’ are authorities of the same type who operate within the same or a competing adjudicatory space. In section 5.3, I demonstrate how comity can assist domestic courts of co-ordinate jurisdiction, trial chambers of the ICTY and ICTR, foreign courts, and investment, sports, WIPO and commercial arbitral tribunals to determine how they ought to act with respect to the prior decisions of a co-ordinate authority.

\(^3\) ‘Specialist Authorities of Horizontal Jurisdiction’ are authorities who exist outside of any adjudicatory hierarchy vis-à-vis the second authority but who possess some skill or expertise the second authority cannot reasonably claim to have. In section 5.4.1, I demonstrate how comity can assist investment tribunals, the ICTY and the ICTR to determine the authority of prior decisions of the ICJ and how comity might, in turn, assist the ICJ to do the same with respect to prior decisions of authorities such as the CJEU and ECHR. Here I also demonstrate how comity might assist US federal and state courts to determine the authority of one another’s prior decisions.

\(^4\) ‘Specialist Authorities of Vertical Jurisdiction’ are authorities who sit higher on an adjudicatory hierarchy than the second authority and are charged with hearing appeals. In section 5.4.2, I demonstrate how comity can assist domestic courts to determine the authority of higher court precedent and how the Trial Chambers of the ICTY and WTO Panels might do the same with respect to prior decisions of the ICTY Appeals Chamber and the WTO Appellate Body respectively.
It is important to remember that in all cases comity is a principle of ‘recognition’ and ‘self-restraint’. It will always be for the second authority to determine what weight – if any – ought to be given to the prior decision of another authority and ultimately whether or not that decision ought to be followed in any given case. Comity does not command how a case shall be decide. Rather it provides authorities with a principle-based means by which to determine how a case ought to be decided with propriety. It recognises that the primary duty of every authority is to resolve cases before it in the most just manner possible. And, whilst it demands that no authority shall abdicate its judgment, it recognises that in certain contexts the best exercise of adjudicatory power by one authority may ultimately be to follow the decision of another.

5.2. Single Authorities

Let us start with just one authority; a single authority which has absolute discretion to resolve all disputes referred to it. This authority can be thought of as existing within a system akin to what Joseph Raz describes as a system of absolute discretion. When called upon to resolve a dispute for the first time, the authority has no choice but to make a determination on the ordinary balance of first-order reasons – that is, a decision which it thinks is best on the balance of all reasons relevant to the case at hand.

Now, imagine our single authority is called upon to determine the same dispute yet again. Having absolute discretion, the authority is certainly at liberty to determine the case on the ordinary balance of first-order reasons. However, there is a risk that if it does its first and second decision might conflict. This risk is minimised to some extent because there is a greater

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5 I say akin to Raz’s system of absolute discretion because I conceive of my system of absolute discretion slightly different. In my system the authority has absolute discretion to determine disputes before it however it sees fit based on the applicable law and facts. It cannot act irrationally or arbitrarily but can choose between competing interpretations of the law to resolve the case before it. See, Joseph Raz, Practical Reason and Norms (3rd edn, Oxford University Press 1999) 137–141; Joseph Raz, The Authority of Law: Essays on Law and Morality (Oxford University Press 1979) 111–114, 173–175.
chance than not the authority will continue to consider the way it resolved the prior case to be correct. But, as each determination is made on the ordinary balance of first-order reasons one would expect to see some conflict over time – particularly in hard cases that present no obvious and immediate answer.

This risk of conflict is obviously compounded where the authority’s internal composition is subject to change. For example, where the authority is a single judge or panel of judges, a change to the authority’s composition will result in a greater chance of conflict between the prior decision and the present one. The later authority in time, which may aptly be described as the second authority, must have reasons for its actions. It cannot decide irrationally. But, the determination of which reasons are applicable, their appropriate weight and which course of action they support will often differ. Even in this context, one would expect to see some consistency because similar authorities tend to resolve issues in a similar way. But, because authorities will sometimes change their minds, and because reasonable authorities will differ amongst themselves as to what the balance of first-order reasons requires in certain types of cases, the degree of consistency is unlikely to be high.

As we know, ‘justice entails fairness’ and part of an authority’s duty to do justice to those before them requires that authorities act according to principles of fairness. As Ronald Dworkin notes, ‘fairness requires the consistent enforcement of rights’ which necessarily means ‘treating like cases alike’. If an authority has already decided a particular type of case in a particular manner, then the authority will have a good reason for deciding the same way again in future cases. An authority’s duty to do justice necessarily extends to the duty to minimise conflicting decision – namely, to minimise the injustice causes by the inconsistent enforcement of rights.

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One possible strategy that might occur to the second authority to minimise the potential for conflict would be for it to somehow factor its prior decision into its present determination. This of course could be done in a number of ways. The second authority could, for example, defer completely to the first authority’s judgment as to what the balance of first-order reasons requires in this type of case. As we have seen in Chapters 3 and 4, this would be tantamount to acting in accordance with an exclusionary second-order reason. It would also be tantamount to acting in accordance with a rule-based conception of precedent advocated by orthodox conceptions of precedent. Thus, regardless of the first-order reasons in favour of an alternate conception of justice, the second authority would be required to consider itself bound to follow the prior decision of the first authority (and by consequence to apply the first authority’s preferred conception of justice to resolve the case before it over its own).

Whilst this approach would undoubtedly solve the problem of conflicting decisions, the second authority would likely consider deference as a rule as going too far. The second authority’s duty to those subject to its own authority is paramount and its primary concern. Deferring completely to the first authority’s judgment as to what the balance of first-order reasons requires would sometimes require the second authority resolve disputes in a way that it considers to be quite clearly wrong, since it would, at least in some circumstances, be quite strongly convinced that the first authority had made a mistake or that its prior decision no longer continues to be correct. A strategy based on completely pre-empting the second authority’s decision fails to recognise that the primary duty of every authority is to resolve the case before it in the most just manner possible. Whilst justice entails fairness, fairness does not necessarily have to entail justice. An authority would obviously be subverting its duty to do justice if it were to enforce particular rights consistently but insensitively so that like cases were resolved in the same unjust way.
Between its 1898 decision in *London Street Tramways v London County Council*⁷ and its 1966 Practice Statement⁸ the English House of Lords adopted such a strategy. During this time, the House considered itself absolutely bound to follow its own prior decisions. In a sense, it can be thought of as acting in accordance with an exclusionary second-order reason that precluded it from taking into account any first-order reasons that favoured departing from the prior decision in the present case. Ironically, the House of Lords ultimately came to think of this practice as mistaken because it was forced on a number of occasions to follow its own prior decisions even in cases where it was convinced that its prior decision must be wrong or ceased to be correct.⁹ In certain circumstances it was evident that the practice constrained the House of Lords from fulfilling its primary purpose to administer justice according to the law.

An alternate strategy would of course be for the second authority to walk a middle-line – to use some principle or methodology that promotes deference to the first authority’s prior decision without pre-empting its own authority to depart from it in the present case if relevant considerations of justice require it. One principle the second authority could adopt to meet this need is the *principle of comity*. By acting with comity, the second authority would introduce a systematic and deliberate bias into its practical determination in the present case in favour of following the prior decision of the first authority without completely pre-empting its decision. As we saw in Chapter 3 and 4, this would be tantamount to acting in accordance with a non-exclusionary second-order reason for action.

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⁷ *London Street Tramways Co Ltd v London County Council* [1898] AC 375 (UK HL).
⁸ *Practice Statement (Judicial Precedent)* [1966] 3 All ER 77.
⁹ I say ironically because the House of Lords’ decision was logically and legally circular. ‘Precedent in the House of Lords is a subject which ought to appeal to anyone who likes to tie things up in knots… In 1898, the House of Lords undertook an act almost tantamount to self-enslavement, declaring itself normally bound by its own precedents. The binding force of this declaration seemed questionable because it appeared to be the source of its own authority. In 1966, the House purported to loosen the chains by stating that it could now overrule its precedents whenever it seemed right to do so. This, again, seemed like an exercise in boot-strapping. If the declaration of 1898 was truly self-binding, should it not have been irrevocable apart from by legislative intervention?’ – Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press 2008) 139.
By acting with comity, the second authority would effectively attribute less weight to those first-order reasons that favour departing from the prior decision; the result being a presumption – in the form of a weighted balance of first-order reasons – that favoured following the prior decision of the first authority. The presumption underlies comity’s systemic judicial concern with minimising conflict between the first and second authority without pre-empting the second authority’s determination to depart from the prior decision where there are sufficient first-order reasons to support doing so. In circumstances where there are sufficient first-order reasons, to require the second authority to follow the prior decision would prejudice the purpose for which it exists and the duties it owes to those subject to its own authority – that is, to resolve the dispute before it in the most just manner possible.

Thus, comity supports the presumption that authorities ought ordinarily to follow their own decisions. At the same time, the presumption should provide authorities with enough flexibility to depart from their prior decisions where they consider them to be wrong or no longer correct beyond a certain threshold. The strength of the presumption or where that threshold ought to be set must reflect the authority in question and the context in which it operates.

In this context, there is a need to minimise conflict between the first and second authority because conflict can lead to serious injustice. If justice entails fairness then, in order to act according to relevant principles of justice, the second authority ought ordinarily to treat like cases alike. However, the second authority, which is simply the first authority later in time, has no reason to believe that the conception of justice preferred by the first authority will necessarily provide a more just resolution to the type of dispute before it than its own preferred conception of justice. Evidently, the first authority has no superior skill or expertise that would make it better placed to determine what the balance of first-order reasons requires. Yet, it necessarily follows that by the same token the second authority cannot claim to be in a better
position than the first authority. The second authority also has no reason to believe that its preferred conception of justice would necessarily be more just than that preferred by the first authority.

The result is that the second authority cannot justify departing from the prior decision of the first authority simply on the basis that it prefers an alternate conception of justice to the first authority to resolve the type of dispute before it. The second authority must be acutely aware that by departing from the prior decision, it would effectively be introducing a conflict between the two. Taking into consideration comity’s systemic judicial concern with minimising the injustice of conflict, comity will thus ordinarily support a presumption in favour of following the prior decision. The second authority would only be justified in departing from the prior decision where there were some first-order reasons that made the prior decision wrong beyond a mere difference of opinion. If the second authority was of the opinion that a prior decision was wrong beyond that threshold, to require it to follow the prior decision would subvert the duty to do justice that it owes to those subject to its own authority in the present case.

The exact nature of the presumption that ought apply in favour of following the prior decision is of course a question for the second authority. However, the principle of comity can assist second authorities to make this determination and ultimately determine whether or not they ought to follow their own prior decisions in individual cases. Comity can thus provide second authorities with critical guidance in concrete situations and offer a principle-based approach by which to develop new and existing doctrines of precedent.

In common law jurisdictions, the presumption that courts ought to follow their own prior decisions forms part of the doctrine of *stare decisis*. Whilst common law scholars do not ordinarily consider the doctrine to be based on comity, early English decisions make it clear
that the obligation to follow one’s own decisions necessarily derives from the duty to act with comity. In The Vera Cruz\textsuperscript{10} Brett MR held:

\ldots there is no statute or common law rule by which one court is bound to abide by the decision of another of equal rank, it does so simply from what may be called the comity among judges. In the same way there is no common law or statutory rule to oblige a court to bow to its own decisions, it does so again on grounds of judicial comity.\textsuperscript{11}

I propose that viewing the doctrine of \textit{stare decisis} in this way – as an expression of comity – can help us better understand how courts determine, or ought to determine, the authority of their own prior decisions. Whilst the doctrine differs slightly from jurisdiction to jurisdiction, it is clear that comity has guided its development in all common law jurisdictions that abide by the doctrine of \textit{stare decisis}.

In the United States for example, the Supreme Court has repeatedly held that it will follow its own prior decisions unless there is some ‘special justification’ or ‘special reason’ above and beyond the mere belief that the prior decision was wrong.\textsuperscript{12} In \textit{Dickerson v United States}\textsuperscript{13} Chief Justice Rehnquist held:

\begin{quote}
Whether or not we would agree with Miranda’s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of \textit{stare decisis} weigh heavily
\end{quote}

\textsuperscript{10} \textit{The Vera Cruz (No. 2)} (1844) 9 PD 96 (ENG CA).
\textsuperscript{11} ibid 98.
\textsuperscript{12} ‘… this Court has never departed from precedent absent special justification.’ – \textit{Payne v Tennessee.}, 501 US 808 (1991) (US SC) 849-849 (Rehnquist CJ); ‘… a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.’ – \textit{Planned Parenthood v Casey.}, 505 US 833 (1992) (US SC) 864 (O’Connor, Kennedy and Souter JJ).
\textsuperscript{13} \textit{Dickerson v United States.}, 530 US 428 (2000) (US SC).
against overruling it now… We have always required a departure from precedent to be supported by some ‘special justification’.\textsuperscript{14}

In \textit{The Nature of the Judicial Process} Justice Cardozo spoke of the obligation to follow precedent under the doctrine of \textit{stare decisis} as follows:

\begin{quote}
I think adherence to precedent should be the rule and not the exception… It happens again and again, where the question is a close one, that a case which one week is decided one way might be decided another way the next if it were then heard for the first time. The situation would, however, be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings… But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed…\textsuperscript{15}
\end{quote}

Whilst Justice Cardozo speaks of the ‘rule of adherence to precedent’, it is clear that by arguing for a more relaxed position he is in fact advocating for a principle-based approach. As we know from our discussion of rules and principles in Chapters 3 and 4, rules apply in an exclusionary fashion whereas principles have some degree of latitude.\textsuperscript{16} Whether he acknowledges it or not, he is arguing that the Supreme Court ought to act in accordance with the principle of comity towards its prior decisions.

In the United Kingdom, the UK Supreme Court, and House of Lords before it, has held that it ought to act in a similar manner to its American counterpart – namely, it ought to follow its own prior decisions unless the prior decision is, in the opinion of the present court, ‘clearly

\textsuperscript{14} ibid 443-44 (Rehnquist CJ).
\textsuperscript{15} Benjamin Cardozo, \textit{The Nature of the Judicial Process} (Yale University Press 1978) 149–150.
\textsuperscript{16} For more on the discussion of the logic of rules and principles see section 4.3.3 (The Authority of Precedent) and section 4.4 (Against Orthodox Conceptions of Precedent).
wrong’ or there is ‘a very good reason’ not to follow it.\textsuperscript{17} In *Rees v Darlington Memorial Hospital*,\textsuperscript{18} the House of Lords held:

It is now necessary to consider how an invitation to depart from a decision of the House should be approached. *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, which announced that such a course was possible, was in no sense an open sesame for a differently constituted committee to prefer their views to those of the committee which determined the decision unanimously or by a majority.\textsuperscript{19}

In *Rees*\textsuperscript{20} the House of Lords endorsed the remarks of Lord Reid in *R v Knuller*\textsuperscript{21} where his Lordship consider the point most aptly:

It was decided by this House in *Shaw v Director of Public Prosecutions* [1962] AC 220 that conspiracy to corrupt public morals is a crime known to the law of England... I dissented in Shaw’s case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that 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

\textsuperscript{17} In its *1966 Practice Statement* [1966] 3 All ER 77, the House of Lords gave notice that it would ‘depart from a former decision when it appears right to do so.’ Despite the wording of the Practice Statement, the UK Supreme Court, and the House of Lords before it, have held that it will only depart from its own prior decisions where there is a ‘very good reason’ to do so. Thus, from 1966 onward, the House of Lords, and now the UK Supreme Court, can be thought of as acting in accordance with a non-exclusionary second-order reason to follow precedent. See, most notably, *R v Knuller (Publishing, Printing and Promotions) Ltd* [1973] AC 435 (UK HL); *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 26 (UK SC).

\textsuperscript{18} *Rees v Darlington Memorial Hospital* [2004] UKHL 52, 1 AC 309 (UK HL).

\textsuperscript{19} ibid 31 (Lord Steyn).

\textsuperscript{20} ibid.

certainty in the law we must be sure that there is some very good reason before we so act…

Lord Reid’s decision is particularly enlightening and eloquently summarises the doctrine of stare decisis at common law. His Lordship makes it clear that on the balance of first-order reasons he considers that the case before him should be decided differently to the precedent case. However, the judicial need to minimise conflicting decisions means that the House of Lords ought to apply a presumption in favour of following its own prior decisions. The duty to act with comity requires that there be ‘some very good [first-order] reason’ to displace the presumption in favour of following the prior decision – a reason above and beyond a mere difference of opinion. The fact that such reasons did not exist in this case meant that the best exercise of his Lordship’s authority was to follow the conception of justice embodied in the House of Lord’s prior decision in Shaw.

Comity forms the basis for a similar presumption in Australia and Canada where courts require ‘special circumstances’ or ‘compelling reasons’ to depart from their own prior decisions. In both jurisdictions courts demand something more than a mere belief that the present case ought to be decided differently to displace the presumption in favour of following precedent. The presumption requires that there be first-order reasons of a special or compelling nature.

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22 ibid 45.
23 ibid. ‘If the decision in the Chancery Lane case was wrong, it certainly was not so clearly wrong and productive of injustice as to make it right for the House to depart from it’ – Fitzleet Estates Ltd v Cherry [1977] All ER 996 (UK HL) 719 (Lord Wilberforce).
24 In Australia the High Court has held that ‘in the absence of special circumstances, its longstanding practice is to follow its own decisions.’ – Re Tyler; ex parte Foley (1994) 181 CLR 18 (AUS HC) 38-39 (McHugh J).
25 In Canada the Supreme Court has held that it will ordinary follow its own decision, but will depart from them ‘where there are compelling reasons for doing so.’ – R v Salituro [1991] 3 SCR 654 (CAN SC) 665 (Iacobucci J); ‘It is beyond doubt that this Court has the power to overrule one of its previous decisions if there are compelling reasons for departing from the principle of stare decisis.’ – R v Robinson [1996] 1 SCR 683 (CAN SC) 76 (L’Heureux-Dubé J).
26 It must be remembered that whilst the threshold of ‘special circumstances’ or ‘compelling reasons’ ultimately stays the same, the weight of the first-order reasons authorities may be required to consider might vary. For example, in certain types of cases – such as those concerning the interpretation of the constitution or human rights
If, as I propose, comity forms the basis for the doctrine of *stare decisis* then we may also use the principle to critique and develop the doctrine in circumstances where its application is inconsistent with comity. Take, for example, how the doctrine operates in the Civil Division of the English Court of Appeal. In that context, the doctrine of *stare decisis* demands the Court of Appeal consider itself strictly bound by its own prior decisions. This is evidently inconsistent with comity, because it constraints the Court of Appeal in certain cases from carrying out its primary purpose – that is, to do justice to those subject to its own authority.

As discussed above, between its 1898 decision in *London Street Tramways* and its 1966 Practice Statement, the House of Lords considered itself absolutely bound to follow its own prior decisions. However, it ultimately came to think of this practice as mistaken because it was forced, on a number of occasions, to follow its own prior decisions in circumstances where it was convinced they must be wrong or ceased to be correct. Yet, the Court of Appeal remains, to this day, absolutely bound by its prior decisions subject to the few exceptions outlined in *Young v Bristol*.27

During his tenure as Master of the Rolls, Lord Denning undertook what many described as a ‘one man crusade’ to change the doctrine’s application in the Court of Appeal. Arguing that the Court of Appeal, just like the House of Lords, was free to loosen its own ‘self-imposed fetters’ his Lordship sought to convince his colleagues to adopt a new practice of precedent

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27 *Young v Bristol Aeroplane Co* [1944] KB 718 (ENG CA) 729-730 (Lord Greene MR). In *Young v Bristol* the Court of Appeal held that it may depart from its prior decisions only where: (1) there are conflicting decisions of the Court of Appeal and the subsequent Court must choose to follow one and depart from the other; (2) where a Court of Appeal decision is inconsistent with a decision of the House of Lords or the UK Supreme Court and the Court of Appeal must depart from it in order to follow superior precedent; or (3) where the prior decision of the Court of Appeal was given *per incuriam*. The Court of Appeal is not permitted to depart from its own prior decisions simply on the basis that there are first-order reasons of sufficient strength that make it just to do so.
similar to that which had been laid down by the House of Lords in its 1966 Practice Statement.  

In *Davis v Johnson*, Lord Denning held:

On principle, it seems to me that, whilst this court should regard itself as normally bound by a previous decision of the court, nevertheless it should be at liberty to depart from it if it is convinced that the previous decision was wrong.

In *Davis*, his honour highlighted comity’s role in the early development of the doctrine of *stare decisis*. Endorsing the remarks of Brett MR in *The Vera Cruz*, his Honour held that ‘there is no common law or statutory rule to oblige a court to bow to its own decisions’. Rather, courts bow to their own decisions solely ‘on grounds of judicial comity.’ Lord Denning was of the opinion that, in order for the Court of Appeal to exercise its power in accordance with the dictates of comity, the doctrine required modification. Sir George Baker agreed pointing out that ‘by his judicial oath a judge binds himself to do right to all manner of people according to the laws and usages of this Realm.’ He continued, noting that, if the statute is the law (not the prior decision) then the Court of Appeal has a duty to depart from its own prior decisions in circumstances where it is convinced that the prior decision is wrong or no longer correct.

In *Gallie v Lee* Lord Salmon agreed and spoke in greater detail about how the principle of comity might be used to further develop the doctrine of precedent in the Court of Appeal. In that case his Lordship held:

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28 *Boys v Chaplin* [1968] 1 All ER 283 (ENG CA) 296; *Davis v Johnson* [1978] 2 WLR 182 (ENG CA).
29 *Davis v Johnson* [1978] 2 WLR 182 (ENG CA).
30 ibid 193.
31 *The Vera Cruz (No. 2)* (1844) 9 PD 96 (ENG CA) 98.
32 ibid 195.
33 ibid 195-198.
34 ibid 205.
35 ibid.
36 ibid.
37 *Gallie v Lee* [1969] 2 Ch 17 (ENG CA).
This practice of ours apparently rests solely upon a concept of judicial comity laid down many years ago and automatically followed ever since: see The Vera Cruz (No. 2) (1884) 9 P.D. 96, per [Brett M.R.], at p. 98. Surely today judicial comity would be amply satisfied if we were to adopt the same principle in relation to our decisions as the House of Lords has recently laid down for itself by a pronouncement of the whole House. It may be that one day we shall make a similar pronouncement. I can see no valid reason why we should not do so and many why we should.38

Ultimately Lord Denning’s ‘one man crusade’ failed as he was unable to persuade the majority of his colleagues in the Court of Appeal to support a change in practice.39 Yet, in The Discipline of Law, he remained unrepentant writing:

I am consoled to find that there are many Courts of Appeal in the Commonwealth which adopt the course which I have advocated. So this has made my dissent worthwhile.40

Whilst he may ultimately have failed to change the doctrine of stare decisis’ operation in the English Court of Appeal, his ‘crusade’ does shed light on the ability to use comity as a principle-based means to critique and develop existing doctrines of precedent. Whilst we may never know, perhaps if Lord Denning’s colleagues in the Court of Appeal had a more robust understanding of comity they might have been more easily persuaded.

Of course, comity may also help us understand how authorities in other contexts act, or ought to act, with respect to their own prior decisions. Take for example, the Cour de cassation

38 ibid 49.
40 Alfred Denning, The Discipline of Law (Oxford University Press 1979) 300.
in France. Although civil law jurisdictions do not recognise the doctrine of *stare decisis*, as a matter of practice, their highest courts ordinarily follow their own prior decisions. As René David and Henry De Vries note:

> Despite the absence of a formal doctrine of stare decisis, there is a strong tendency on the part of the French courts, like those of other countries, to follow precedents… The *Cour de cassation* can, of course, always overrule its own prior decisions. But it is equally certain that it will not do so without weighty reasons…

A similar practice is found in most other civil law jurisdictions. Rarely will courts depart from their own prior decisions unless they have reasons, above a mere difference of opinion, to do so. This of course suggests that they do not approach relevantly similar disputes on the ordinary balance of first-order reasons but rather act with comity.

> Of course, the degree of deference to prior decisions and the level of freedom to depart from prior rulings varies from one jurisdiction to another. In civil law countries, the precedential value of cases is generally weaker than in common law countries, though it is nonetheless well established. Indeed, civil law countries have such notions as *arrêt de*

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42 ‘A deviation from the continuity of prior decisions can only be accepted as an exception if clearly outweighing or even absolutely compelling reasons are in favour of it.’ – BGHZ 85, 64 (GER FC) 66. Also see, BGHZ 87, 150 (GER FC) 155; BGHZ 125, 218 (GER FC) 222. ‘The general attitude is that a precedent should be applied, at least when no good reasons can be found not to follow it.’ – Michele Taruffo and Massimo La Torre, ‘Precedent in Italy’ in Neil MacCormick and Robert Summers (eds), *Interpreting Precedents: A Comparative Study* (Routledge 1997) 156. Also see, John Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, Stanford University Press 2007) 46–48; Mauro Cappelletti, John Merryman and Joseph Perillo, *The Italian Legal System: An Introduction* (Stanford University Press 1967) 271.
principe\textsuperscript{43} and jurisprudence constante,\textsuperscript{44} which are similar to stare decisis except that they do not generally require courts follow a single prior decision except where it evidences a prior line of cases decided in the same way. For example, in Switzerland, the Supreme Court will only depart from a prior line of cases if it has objective reasons, such as a better understanding of the intent of the legislators, a change in circumstances, a change in legal conceptions or an evolution of societal morals. In cases of doubt, the practice of the Court is to follow its prior decisions even when a reason for change exists.\textsuperscript{45}

It must be remembered that authorities can use the past in a variety of ways and not every use of a prior decision will constitute precedential reasoning. Often civil law courts, just like common law courts, will cite prior decision because they agree with them, or because they are persuaded by them.\textsuperscript{46} In such circumstances the authority of precedent is irrelevant because the court is not reasoning from precedent at all. Yet, it is equally clear that, in certain contexts, civil law courts do in fact reason from precedent – they accord their own prior decisions weight for no other reason than the fact that they are their own prior decisions. Whilst, the practice is not as formal as it may be in the common law, it still requires the second court to recognise the legitimate authority of the first court and to restrain itself from making a decision in the present case on the ordinary balance of first-order reasons. It follows that when they do reason from

\textsuperscript{43} In Switzerland, the notion of arrêts de principe operates in a manner similar to the doctrine of stare decisis in the common law. See, Pierre Tercier and Christian Roten, La recherche et la rédaction juridiques (Schulthess 2007) 1181; Yves Le Roy and Marie-Bernadette Schoenenberger, Introduction générale au droit suisse (Bruylant 2002) 168. A similar position is evident in France with respect to prior decisions of the Cour de cassation. See, most notably, François Terré, Introduction générale au droit (Dalloz 1998) 241; Philippe Malinvaud, Introduction à l’étude du droit (LexisNexis 2005) 142; Jean Carbonnier, Droit civil: Introduction (Presses universitaires de France 1999) 276.

\textsuperscript{44} One speaks of jurisprudence constante where there is a series of cases that resolve a particular issue in a certain way. In Switzerland, for example, the more constant the precedent is the more reluctant a court will be to depart from it. In this sense, the existence of prior decisions constitutes a content-independent reason to follow them in the form of a rebuttable presumption. See, most notably, ATF 122 I 57 (SWISS FC) 59; ATF 120 II 137 (SWISS FC) 142; ATF 114 II 131 (SWISS FC) 138. See also, Roy and Schoenenberger (n 43) 168; Malinvaud (n 43) 142.

\textsuperscript{45} ATF 126 I 81 (SWISS FC) 93; ATF 127 V 353 (SWISS FC) 356; ATF 122 I 57 (SWISS FC) 59; ATF 121 V 80 (1995) (SWISS FC) 85-86; ATF 114 II 131 (SWISS FC) 138.

\textsuperscript{46} Pascal Deumier, Le raisonnement juridique, recherche sur les travaux préparatoires des arrêts (Dalloz 2013) 36, 70.
precedent the principle of comity may explains how they do and offers a guide to the proper exercise of their adjudicatory power.

Consider likewise, the practice of the ICJ. A reoccurring problem in international law is the question of how the ICJ ought to act with respect to its own decisions. The fact that the ICJ Statute does not lay down any formal doctrine of precedent, has left many scholars and practitioners grasping at abstract principles that do not accurately reflect the practice of the ICJ nor provide it with any real guidance in times of uncertainty.47 I propose that the principle of comity can assist the ICJ to determine the authority of precedent in individual cases and provide it with a principle-based means by which to develop a suitable doctrine of precedent.

Art. 59 of the ICJ Statute provides that a ‘decision of the Court has no binding force except between the parties and in respect of the particular case.’ Some contend that, taken literally, Art. 59 precludes the ICJ from taking into consideration its prior decisions as precedent. However, this is not the case. In fact, Art. 59 goes back to the original PCIJ Statute. In respect of its effect, the Allied Committee on the Future of the PCIJ noted:

The effect of this provision, has, in our opinion, sometimes been misinterpreted. What it means is not that the decisions of the Court have no effect as precedents for the Court or for international law in general, but that they do not possess the binding force of particular decisions in the relations between the countries who are parties to the statute. The provision in question in no way prevents the Court from treating its own judgements as precedents. It is important to maintain the principle that countries are not ‘bound’ in the above sense by decisions in cases to which they were not parties, and we consider accordingly that the provision in question should be retained without alteration.48

The Allied Committee’s remarks suggest that Art. 59 does not preclude the Court from considering its own prior decisions to have authority for particular points of law. There is a distinction between the force of the decision itself and the force of international law as authoritatively declared by the decision. This distinction was alluded to by Judge Zoričič in the Interpretation of Peace Treaties case\(^{49}\) where he held:

… it is quite true that no international court is bound by precedents. But there is something which this Court is bound to take into account, namely the principles of international law. If a precedent is firmly based on such a principle, the Court cannot decide an analogous case in a contrary sense, so long as the principle retains its value.\(^{50}\)

A comity-based conception of precedent helps us understand the nature and extent of the ICJ’s obligation to follow precedent. Under a comity-based conception of precedent, precedents do not lay down new rules of law and are not to be considered sources of law in the formal sense. Rather, as explained in section 4.3.1 (What Are Precedents?), prior decisions are best characterised as ‘authoritative declarations’. The decision of the first authority is a ‘declaration’ of what it believes the law to be and how it ought to apply to the facts of the case before it. When a relevantly similar case arises in the future, that ‘declaration’ may be transformed into an ‘authoritative declaration’ by virtue of the second authority’s duty to act with comity. In this sense, prior decisions of the ICJ are merely authoritative declarations of what the ICJ

\(^{49}\) Interpretation of Peace Treaties, Advisory Opinion [1950] ICJ Reports 65 (ICJ).

\(^{50}\) ibid 104 (Judge Zoričič, dissenting opinion). Also see, Case Concerning the Temple of Preah Vihear (Cambodia v Thailand) [1961] ICJ Reports 17 (ICJ) 27 where the ICJ had cause to discuss the distinction between the binding force of a decision \textit{vis-à-vis} the parties subject to that decision and the ‘precedential force’ of a prior decision as ‘a statement of what the Court regarded as the correct legal position’.
considered, at an earlier point in time, the relevant rule or principle of international law to be for this particular type of dispute.

Those concerned with the study of precedent before the ICJ vehemently deny that the doctrine of *stare decisis* exists in international law.\(^5\) About this, they are undoubtedly correct. The rules, principles and practices which make up the doctrine of *stare decisis* have been developed for the courts of the common law, reflecting their unique nature and the context in which they operate. Yet comity suggests that the ICJ, as a single authority, ought to follow its own prior decisions unless it considers there to be some first-order reasons that make the prior decision wrong or no longer correct beyond a mere different of opinion. By acting with comity and recognising its own decisions as precedent, the ICJ would be doing no more than deferring to its own prior declaration of what it considered the relevant rule of international law to be in that particular type of case.

A review of ICJ decisions suggests that ordinarily the ICJ follows its own prior decisions in a manner consistent with comity. Even advisory opinions, which are not formally binding for any State or even for the international organ having requested the opinion, are generally followed in later advisory opinions and judgments. In this respect, Edward Lindsey notes that:

… enunciation by the Court of the legal rules or principles on which its decision of the issue rests has weight as a precedent even though the principle of *stare decisis* is not regarded as obligatory on the Court.\(^6\)

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\(^6\) Edward Lindsey, *The International Court* (Crowell 1931) 268. Also see, Mohamed Shahabudeen (n 47) 107.
Of course, it is at the heart of comity that it is for the second authority to determine for itself the extent of its duty to follow its own prior decisions. For that reason, the question of what weight ought to be attributed to its prior decisions – or more specifically, the weighted threshold that ought to apply – is a question for the ICJ. However, evidently, comity may assist the ICJ to develop a suitable doctrine of precedent that appropriately reflect the need to minimise conflicting decisions and its unique nature and duties as an adjudicatory authority.

Although, the ICJ has not considered its duty to follow its own prior decisions from a comity-based perspective, it has previously considered the strength of the presumption that ought to apply. Reviewing the ICJ’s jurisprudence, Judge Lauterpacht wrote that ‘the Court is free at any time to reconsider the substance of the law as embodied in a previous decision… [but] it will not do so lightly and without good reason.’53 In The Interhandel case,54 he noted that, just like domestic courts, ‘[t]here must exist weighty reasons for any departure from that principle so clearly formulated’ in the ICJ’s prior decision.55

Judge Lauterpacht has reiterated this approach on a number of occasions,56 as have other judges of the ICJ.57 That the ICJ should not ‘act lightly and without good reason’ suggests that the mere fact that the ICJ in a later case may be disposed to see the law different from the way

54 *The Interhandel Case (Switzerland v United States)* [1959] ICJ Reports 6 (ICJ).
55 ibid 120 (Judge Lauterpacht, dissenting opinion).
56 ‘Undoubtedly, so long as the Court itself has not overruled its former pronouncement or so long as States have not, by a treaty of a general character, adopted a different formulation of the law, the ruling formally given by the Court on any question of international law must be considered as having settled, for the time being, the particular question at issue.’ – Lauterpacht (n 53) 62.
57 ‘[The ICJ] will not depart from settled jurisprudence unless it finds very particular reasons to do so.’ – *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* [2008] ICJ Reports 412 (ICJ) 428. ‘…a change of jurisprudence on a question of jurisdiction must have a very solid basis.’ – *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1964] ICJ Reports 6 (ICJ) 148 (Judge Armand-Ugon, dissenting opinion). ‘Although the force of *res judicata* does not extend to the reasoning of a judgement, it is the practice of the Court, as of arbitral tribunals, to stand by the reasoning set forth in previous decisions.’ – *Barcelona Traction, Light and Power Company, Limited, Second Phase (Belgium v Spain)* [1970] ICJ Reports 3 (ICJ) 267 (Judge Gros, separate opinion). ‘…the same issue is now before the Court: it must be resolved by applying the same principles.’ – *Notaibohm Case (second phase) (Liechtenstein v Guatemala)* [1955] ICJ Reports 4 (ICJ) 22.
in which it saw it in an earlier case may not, without something more, suffice to warrant a
departure from its prior decision.58 This approach is obviously consistent with comity’s
systemic judicial aim of minimising conflict whilst ensuring that authorities have the requisite
flexibility to depart from their prior decisions where there are first-order reasons that convince
them that their prior decision was wrong or no longer correct.

A review of ICJ decisions demonstrates that the presumption that the ICJ ought to
follow its own prior decisions is not as strong as the presumption applied by courts acting in
accordance with the doctrine of stare decisis. Yet, the doctrine of precedent that operate before
the ICJ is not dissimilar and is clearly based on comity. It require the second ICJ Court, so to
speak, to respect the authority of the first ICJ Court. As Judge Read held in the Interpretation
of Peace Treaties case:59

… [whilst the presumption] does not make the decisions of the Permanent Court
binding, in the sense in which decisions may be binding in common law countries, it
does make it necessary to treat them with the utmost respect, and to follow them unless
there are compelling reasons for rejecting their authority.60

Comity of course, never precludes the ICJ from departing from a prior decision where there are
first-order reasons of sufficient strength to displace the presumption. But it does require the
ICJ act with respect for its prior decisions with a view to minimising the potential injustice of
conflict. As Judge Lauterpacht writes again:

58 Juan Quintana, Litigation at the International Court of Justice: Practice and Procedure (Brill Nijhoff 2015)
181; Mohamed Shahabuddeen (n 47) 134.
60 ibid 233.
No legal rule or principle can bind the judge to a precedent which, in all the circumstances, he feels bound to disregard. In that case he will contrive to do what he considers to be justice... But he is not free to disregard judicial precedent altogether. He is bound to adduce reasons for departing from the obligation of consistency and of observance of settled principles.61

Similar to the ICJ, the founding statues of other regional and specialised international courts do not lay down formal doctrines of precedent. Consider for example, the practice of the ECtHR, CJEU, ICTY, ICTR and WTO Appellate Body. Scholars concerned with the role of precedent before these authorities have likewise struggled to explain how they act, or ought to act with respect to their own prior decisions. Often they view these authorities as separate and discrete, failing to recognise the universal nature of precedential reasoning. In reality, these authorities are all simply ‘single authorities’ being asked to follow or depart from their own prior decisions. For the same reason then, comity, as a general principle of law, may guide the development of similar doctrines of precedent common, but unique to all.

Evidently, before each of these authorities there is a need to minimise conflicting decisions. That need supports a presumption that these authorities ought to follow their own prior decisions unless they consider there to be first-order reasons that favour departing from the prior decision above and beyond a mere difference of opinion. A good example of a doctrine of precedent consistent with comity is that which operates before the ECtHR. In Cossey v United Kingdom62 the ECtHR held:

61 Lauterpacht (n 53) 14–15. ‘The same kind of cases must be decided in the same way and possibly by the same reasoning. This limitation is inherent in the judicial activities as distinct from purely academic activities. On the other hand, the requirement of the consistency of jurisprudence is never absolute. It cannot be maintained at the sacrifice of the requirements of justice and reason. The Court should not hesitate to overrule the precedents [when they are wrong].’ – Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) [1964] ICJ Reports 6 (ICJ), 65 (Judge Tanaka, separate opinion); ‘… the Court is not bound to perpetuate faulty reasoning’ – South West Africa, Second Phase (Ethiopia v South Africa, Liberia v South Africa) [1966] ICJ Reports 6 (ICJ) 67 (Judge van Wyk, dissenting opinion).

It is true that … the Court is not bound by its previous judgements. However, it usually follows and applies its own precedent... Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal change and remains in line with present day conditions.63

Comity forms the basis for similar doctrines of precedent before the CJEU,64 ICTY,65 ICTR66 and WTO Appellate Body.67 In each of these context, authorities deny the existence of the doctrine of stare decisis that exists in the common law. However, unsurprisingly, each has

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63 ibid 35.
64 'It is none the less obvious that the Court should, as a matter of practice, follow its previous case-law except where there are strong reasons for not so doing.' – Joined cases C-267/95 and C-268/95 Merck & Co Inc and Ors v Primecrown Ltd and Ors [1996] ECR I-6285 (CJEU) 6343–6347. ‘Clearly no one will expect that, having given a leading judgment, the Court will depart from it in another action without strong reasons, but it should retain the legal right to do so’ – Joined Cases 28, 29 and 30/62 – Da Costa en Schauke N.V., Jacob Meijer N.V. and Hoechst-Holland N.V. v Nederlandse Belastingadministratie [1963] ECR 42 (CJEU). See also, more generally, in respect of the CJEU, Marc Jacob, Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business (Cambridge University Press 2016).
65 ‘The Appeals Chamber recognises that the principles which underpin the general trend in both the common law and civil law systems, whereby the highest courts, whether as a matter of doctrine or of practice, will normally follow their previous decisions and will only depart from them in exceptional circumstances, are the need for consistency, certainty and predictability. This trend is also apparent in international tribunals... The Appeals Chamber, therefore, concludes that ... the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice... It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception.’ – Prosecutor v Zlatko Aleksovski [2000] IT-95-14/1-A (ICTY App. Ch.) 97-109 (Judges May, Mumba, Hunt, Tieya and Robinson).
66 ‘The Appeal Chamber adopts the findings of the ICTY Appeals Chamber in the Aleksovski case and recalls that in the interests of legal certainty and predictability, the Appeals Chamber should follow its prior decisions, but should be free to depart from them for cogent reasons in the interests of justice.’ – Prosecutor v Laurent Semanza [2003] ICTR-97-20-T (ICTR App. Ch.) 92 (Judges Ostrovsky, Williams and Dolenc); ‘Applying the principle enunciated in the Aleksovski Appeal Judgement, this Appeals Chamber is unable to ... find cogent reasons in the interests of justice to depart from the law as identified in the Tadić Appeal Judgement.’ – Prosecutor v Zejin Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo [2001] IT-96-21-A (ICTY App. Ch.) 26 (Judges Hunt, Raid, Nieto-Navia, Bennouna and Pocar).
67 ‘It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the ratio decidendi contained in previous Appellate Body reports... absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.’ – United States – Final Anti-Dumping Measures on Stainless Steel from Mexico., WT/DS344/AB/R (2007) (WTO AB) 158-160 (Ganesan, Bautista and Sacerdoti).
adopted similar doctrines of precedent to those used by the highest courts of common law jurisdictions. This is certainly not because they are in awe of common law courts – far from it. It is because acting with comity helps them exercise their adjudicatory power appropriately and, as single authorities, comity dictates that they ought to apply a presumption in favour of following their own prior decision unless there are ‘strong’, ‘cogent’ or ‘compelling’ first-order reasons not to do so. This implies that in order to act according to the dictates of comity (and thus relevant principles of justice), something more than a mere difference of opinion is needed if an authority wishes to depart from its own prior decision.

5.3. Co-ordinate Authorities

Let us now introduce other authorities into our system of adjudication to demonstrate how comity might operate between them. Consider first, a system where multiple authorities of the same type operate within the same adjudicatory space. These authorities, which we may call co-ordinate authorities, have for the most part, the same purpose, scope, duties and limitations. They also have, for the most part, the same expertise and skill making them formally equal within a larger normative system. As we will see, between these types of authorities, comity supports a presumption that the second co-ordinate authority ought ordinarily to follow the prior decision of the first co-ordinate authority unless there are first-order reasons of sufficient strength to displace the presumption.

A common example of co-ordinate authorities are courts of equal jurisdiction within Federal States. Each court has co-ordinate authority in the sense that they have power to resolve the same types of disputes within their separate jurisdictions but exists outside any relationship of hierarchy. The idea of co-ordinate authorities can be expanded further to encompass a wide range of other authorities. For example, I propose that we may consider the trial chambers of international courts (such as the ICTY or ICTR) as co-ordinate courts just like the highest courts
of different States (such as the UK Supreme Court, High Court of Australia and the United States Supreme Court for example). Similarly, we may think of arbitral tribunals of the same nature (such as investment, commercial, sports or WIPO tribunals) as co-ordinate tribunals.

There is no reason to think that any one presumption will necessarily provide the optimal solution for all contexts between all types of co-ordinate authorities. Ultimately, the strength of the presumption that ought to apply must depend on the authorities in question and the context in which they operate. The varied nature of co-ordinate authorities and the wide range of contexts in which they operate suggests very different presumptions will apply between them.

There is also no reason to think that the nature of authorities and the contexts in which they operate will necessary stay constant over time. This is particularly true for less established authorities. For example, certain types of arbitral tribunals are undergoing systemic change as scholars and practitioners debate their future purpose in light of increased globalisation and transnationalism. A comity-based conception of precedent operates within a continuous feedback loop meaning that as the nature and purpose of authorities change, and the context in which they operate varies, authorities may draw upon comity to further develop doctrines of precedent to reflect such changes.

Let us consider first how comity informs doctrines of precedent between domestic co-ordinate courts. In this context, there is a need for consistency, so much so that co-ordinate court’s often think of themselves as ‘siblings’ of a single legal family.\textsuperscript{68} The need to minimise conflict in this context is not dissimilar to the need to minimise conflict between the decisions

of a single authority at different points in time. For that reason, comity supports a similar presumption.\textsuperscript{69}

It is no surprise then that in most common law jurisdictions, comity supports a presumption that the second co-ordinate court ought to follow the prior decision of the first co-ordinate court unless it considers the prior decision to be ‘clearly or plainly wrong’\textsuperscript{70} or that there are ‘strong reasons’\textsuperscript{71} why it should not. As early as 1844, English courts have held this presumption to be based on comity.\textsuperscript{72} Yet, consider two recent decision from the Australian Federal Court which discuss in detail how comity has informed the doctrine of precedent operating this context. In \textit{Hicks v Minister for Immigration},\textsuperscript{73} Justice French held that with respect to co-ordinate court precedent:

\begin{quote}
It is well established that a judge of this Court should follow an earlier decision of another judge unless of the view that it is plainly wrong.\textsuperscript{74}
\end{quote}

\textsuperscript{69} ‘…judicial comity does not merely advance mutual politeness as between judges of the same or co-ordinate jurisdictions. It tends also to uphold the authority of the courts and confidence in the law by the value it places upon consistency in judicial decision-making and mutual respect between judges.’ – \textit{Hicks v Minister for Immigration and Multicultural and Indigenous Affairs} [2003] FCA 757 (AUS FC) 76 (French J).

\textsuperscript{70} ‘I turn now to the comity aspect … I am not bound to follow Edmonds J in \textit{Virgin Holdings}, it being a decision of co-ordinate authority … [but] I will in fact follow his Honour’s inconsistent decision unless I conclude that it was clearly or plainly wrong…’ – \textit{Undershaft (No 1) Ltd v Commissioner of Taxation} [2009] FCA 41 (AUS FC) 67-74 (French J); ‘It is well established that a judge of this Court should follow an earlier decision of another judge unless of the view that it is plainly wrong.’ – \textit{Hicks v Minister for Immigration and Multicultural and Indigenous Affairs} [2003] FCA 757 (AUS FC) 75 (French J).

\textsuperscript{71} ‘The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary…’ – \textit{Rex ex rel McWilliam v Morris} [1942] OWN 447 (Ont. HC) 448-489 (Hogg J). ‘I think that “strong reason to the contrary” does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was given without consideration of a statute or some authority that ought to have been followed. I do not think “strong reason to the contrary” is to be construed according to the flexibility of the mind of the particular judge.’ – \textit{R v Nor. Elec. Co.} [1955] OR 431 (Ont. HC) 448 (McRuer CJ).

\textsuperscript{72} ‘… there is no statute or common law rule by which one court is bound to abide by the decision of another of equal rank, it does so simply from what may be called the comity among judges.’ – \textit{The Vera Cruz (No. 2)} (1844) 9 PD 96 (ENG CA) 98 (Brett MR).

\textsuperscript{73} \textit{Hicks v Minister for Immigration and Multicultural and Indigenous Affairs} [2003] FCA 757 (AUS FC).

\textsuperscript{74} ibid 76 (French J). See also, \textit{Australian Securities Commission v Marlborough Gold Mines Ltd} (1993) 177 CLR 485 (AUS HC); \textit{Farah Constructions Pty Ltd v Say-Dee Pty Ltd} (2007) 230 CLR 89 (AUS HC).
Later, in *Undershaft v Commissioner of Taxation* 75 Justice French held that the source of this obligation necessarily derives from the duty of the second co-ordinate court to act with comity towards the legitimate authority of the first. After concluding that he would ordinarily have decided the case before him differently to the precedent case, his Honour considered the nature and extent of the obligation to follow co-ordinate court precedent in light of the duty to act with comity:

I turn now to the comity aspect… I am not bound to follow Edmonds J in *Virgin Holdings*, it being a decision of co-ordinate authority… [But] I will in fact follow his Honour’s inconsistent decision unless I conclude that it was clearly or plainly wrong… While the expression ‘clearly wrong’ and ‘plainly wrong’ may be open to criticism, they usefully remind the later judge of the interests of justice in consistency of decision-making in a system of which the individual judge is but a part.76

Similar remarks have been made in other jurisdictions. For example, in England, Chief Justice Lord Goddard held in *Police Authority for Huddersfield v Watson*77 that:

… a judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity.78

English judicial decisions demonstrates that the threshold term ‘wrong’ used by the English courts is similar to, if not the same, as the ‘clearly or plainly wrong’ threshold used by

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75 *Undershaft (No 1) Ltd v Commissioner of Taxation* [2009] FCA 41 (AUS FC).
76 ibid 67-74 (French J).
77 *Police Authority for Huddersfield v Watson* [1947] 1 KB 842 (ENG HC).
78 ibid 848 (Lord Goddard CJ, with whom Atkinson and Lewis LJJ agreed).
Australian courts. In both jurisdictions, comity require that the second co-ordinate court be of the opinion that the prior decision is more than ‘wrong’ in the ordinary sense of the word. The second co-ordinate court must be of the opinion that the prior decision is ‘wrong’ in the unique legal sense of the word – that is, wrong beyond a mere difference of opinion.

Much like in our single authority system, the second co-ordinate court has no reason to believe that the conception of justice preferred by the first co-ordinate court will necessarily be more just than its own preferred conception of justice. Evidently, the first co-ordinate court has no superior expertise or skill that would make it better placed to resolve the dispute than the second co-ordinate court. But this of course presupposes that the second co-ordinate court is in no better position than the first. Comity requires the second co-ordinate court to acknowledge the context in which it operates and recognise that it cannot justify departing from the prior decision of the first authority simply on the basis that it prefers an alternate conception of justice.

Justice French’s remarks in Undershaft make it clear that part of the second co-ordinate court’s duty to do justice to those before it is to minimise conflict – to ensure an acceptable level of consistency within a system in which the court is but a part. Justice entails fairness and comity supports a presumption that minimises the risk of unjustified conflict between co-ordinate authorities. The second co-ordinate court is only justified in introducing a conflict where there are reasons of sufficient strength that suggest the prior decision is ‘clearly or plainly wrong’. To require the second co-ordinate court to follow a prior decision where there are reasons to depart from it beyond this threshold would subvert the duty it owes to those subject to its own authority. The second co-ordinate court’s duty to resolve the dispute before it in the most just manner possible must be its primary and paramount concern.

One may argue by analogy that comity should give rise to a similar presumption between other co-ordinate authorities. Consider, for example, the practice that exists between
the three Trial Chambers of the ICTY. In *Prosecutor v Aleksovski*, the Appeals Chamber held that:

… decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.

This of course tends to suggest that the prior decisions of co-ordinate Trial Chambers are not precedent at all. Rather, they may only be used to persuade other Trial Chambers. It follows that in circumstances where a Trial Chamber disagrees with the decision of another Trial Chamber, the prior decision has no precedential authority and thus no ability to constrain the subsequent Trial Chamber. This practice is clearly inconsistent with comity because it fails to minimise conflict between the Trial Chambers by allowing them to approach relevantly similar disputes on the ordinary balance of reasons. In effect, it permits each Trial Chamber to act as if it is an ad hoc authority and ignores the injustice that may result from conflicting decisions.

A comity-based conception of precedent suggests that that the Trial Chambers of the ICTY ought to develop a doctrine of precedent similar to that which applies between domestic co-ordinate courts. The need to minimise conflict in this context is similar, if not the same, suggesting that comity should form the basis for a presumption that Trial Chambers ought to follow each other’s prior decisions unless they consider the prior decision to be ‘clearly or plainly wrong’. Of course, the exact wording, or strength of the presumption, is to be determined by the Trial Chambers themselves. Yet, the principle of comity may help them develop a suitable doctrine of precedent in this context.

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80 ibid 114 (Judges May, Mumba, Hunt, Tieya and Robinson).
Comity may also be of assistance to authorities who operate in less established normative systems. For example, many scholars argue that other co-ordinate authorities such as foreign courts or arbitral tribunals ought also to follow each other’s prior decisions in certain circumstances. In an era of increased globalisation and international commerce, these authorities are now, more than ever, coming into contact with one another and, as this contact increases, so does the risk of conflicting decisions and systemic injustice.

The principle of comity recognises a correlation between the need to minimise conflict in a particular context and the strength of the presumption that ought to apply in favour of following prior decisions. Put differently, the presumption in favour of following the prior decision of another is exponentially correlative to the risk and seriousness of the injustice that would result from conflicting decisions. It follows that in circumstances where there is a judicial need for consistency the presumption will be strong. An excellent example is the ‘clearly or plainly wrong’ formula used by domestic co-ordinate courts. However, where there is less need to minimise conflict the presumption will ultimately be weaker. This is certainly the case with foreign courts and arbitral tribunals who exist in a much looser normative framework.

Historically, the injustice that may result from a conflict between the decisions of the courts of two different State or the awards of two different arbitral tribunals has been largely down played compared to the injustice that may result from conflicting decisions of domestic courts. However, in more recent years, the advent of globalisation, transnational law and international litigation has forced these authorities to consider themselves as part of larger, albeit looser, systems of adjudication. The result is that, in certain contexts, these co-ordinate

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authorities now perceived there to be a judicial need to minimise unjustified conflict between
them in certain context.

Speaking only of the practice of foreign courts, courts around the world appear to
recognise that, in certain contexts, there is a judicial need for them to follow each other’s prior
decisions. Take for example, the role of comity in the interpretation of international treaties.
In cases where a court is required to interpret the provisions of an international treaty comity
forms the basis for a presumption that the second court ought ordinarily to follow the prior
decision of a foreign court where the prior decision evidences an international consensus as to
the correct interpretation of the provision.

Take for example, comity’s role in guiding English doctrines of precedent in this
context. In *Morris v KLM Royal Dutch Airlines*, the House of Lords held that:

In an ideal world the [Warsaw] Convention should be accorded the same meaning by
all who are party to it… Considerable weight should be given to an interpretation which
has received general acceptance in other jurisdictions...  

In *Morris*, the House of Lords accorded weight to decisions of the highest courts in the United
States, Australia and Israel, ultimately holding that they evidenced an international consensus
as to the proper interpretation of the *Warsaw Convention*. Lord Mackay, in particular, held
that were it not for the House of Lords’ duty to act with comity, he would have given more
weight to the argument for a contrary interpretation.

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82 *Morris v KLM Royal Dutch Airlines* [2002] UKHL 7, 2 AC 628 (UK HL).
83 ibid 81 (Lord Hope).
84 ibid 107-120 (Lord Hope).
85 ibid 7 (Lord Mackay).
Australian courts have held comity to form the basis for a similar doctrine of precedent. In *Great China Metal v Malaysian International Shipping*, the High Court of Australia held that it was in the ‘interest of justice … to strive for the uniform construction of international conventions’. In *Siemens v Schenker International*, the High Court elaborated on the presumption that ought to be applied in favour of following foreign decisions in this context:

In the interests of international comity … it is appropriate to take any contrary opinions into account so as to promote a generally consistent approach to common transborder problems.

The approach of comity is the settled attitude of this Court in such instances; and so of other Australian courts. The primary judge was correct to tackle the two issues before him in this way. The Court of Appeal did likewise. It represents a sensible adaptation of the common law in the construction of disputed language appearing in international treaties and domestic legislation giving them effect and in instruments drafted for related purposes. The approach adopted is similar to that applying to legal divergences within a federation.

In *Siemens*, the High Court held that comity supports a doctrine of precedent in this context similar to that which operates between domestic courts of co-ordinate jurisdiction within a federation – the ‘clearly or plainly wrong’ formula eluded to above. However, a review of judicial decisions demonstrates that it differs to the extent that the authority of a foreign court’s

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87 ibid 38 (Gaudron, Gummow and Hayne JJ).
89 ibid 153-154 (Kirby J).
prior decision only become relevant where the prior decision evidences an international consensus. In this sense, the doctrine of precedent that exist between the courts of foreign States is much closer to the concept of *jurisprudence constante* found in civil law jurisdictions. Whilst one foreign decision is afforded little weight, a foreign decision that evidences a consensus is likely to be considered strong authority for the proposition that the present case ought to be decided in the same manner.

This practice reflects in the law the idea that justice necessarily entails fairness. As part of the duty to do justice to those before them, authorities have a duty to act according to principles of fairness. In this context, that authorities ought to follow each other’s prior decisions ‘rests on the idea that fairness requires the consistent enforcement of rights’, which means ‘treating like cases alike’. The English courts may for example, consider it wrong to require compensation for an emotion injury under the *Warsaw Convention*. Yet, if they accept that justice entails fairness, and they know that some victims of emotional injury have already been given a right to compensation in other jurisdictions, they will have a reason for deciding in favour of others who seek compensation for emotional injury before them.⁹⁰

This of course, is not to suggest that the courts of other jurisdictions are necessarily right or that the English courts are necessarily wrong. Rather, it is simply to acknowledge that the English courts are, with respect to the interpretation of international treaties, in no better position than the courts of other jurisdictions and that for the English courts to depart from prior decisions on the subject for no other reason than nationalism or pride would introduce an unjustified conflict as to the proper interpretation given to the instrument in question. Comity requires that English courts recognise foreign decisions for this reason and restrain themselves from deciding the issue on the ordinary balance of first-order reasons.

⁹⁰ Dworkin, *Law’s Empire* (n 6) 177.
In *Leonie’s Travel v Qantas Airways*, the Full Court of the Federal Court of Australia extended this approach by using comity to fashion a new doctrine of precedent in circumstances where foreign courts have already decided upon the interpretation to be given to a widely used international commercial agreement. In that case, the Court held that comity supports a presumption similar to that which exists between domestic co-ordinate courts within a federation. In the context of the case, the Court held that the primary judge in Australia should have followed a prior decision of the English Court of Appeal regarding the construction of a private standard form contract with wide international use unless he considered the decision ‘irrelevant or plainly wrong’.

In light of the injustice that would result from conflicting interpretations of certain international documents, the Court held that there was a judicial imperative that courts around the world seek to minimise conflicting interpretations where possible. The Court’s comments with respect to comity are particularly enlightening:

… there is an obvious commercial imperative for the courts of other nations to follow the decision of a court of the standing of the [English] Court of Appeal in proceedings such as these. This should occur unless the Court is persuaded that the former decision is plainly wrong or clearly distinguishable…

An invidious commercial result would come about if other courts ignored such decisions, and construed these documents differently. Airlines and Agents in one country would then have different rights and liabilities to those of their counterparts in, say, the United Kingdom, in respect of exactly the same contractual relationship.

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91 *Leonie’s Travel Pty Ltd v Qantas Airways Limited* [2010] FCAFC 37 (AUS FFC).
A decision of a court of the stature of the [English] Court of Appeal given on an agreement which has international application should be followed by an intermediate Court of Appeal in this country, unless the Court is of the opinion that the reasons of the [English] Court of Appeal have no application to the issues under consideration or the Court is of the opinion that the decision is plainly wrong. A decision of the [English] Court of Appeal is entitled to be given considerable respect… International comity demands that this Court follow the decision unless, for the reasons given, it is unable so to do.  

Thus, the Court held there to be ‘an obligation on domestic courts … to approach their decisions in comity with decisions of other [foreign] commercial courts.’ Some would argue that treating the prior decisions of foreign co-ordinate courts in this manner adequately reflects the nature and purpose of these authorities and the need to minimise conflict between them. Yet, I suggest that the doctrine of precedent developed by the Court in this case goes too far. It would, I argue, be more consistent with comity if co-ordinate courts in this context were to adopt a similar presumption to that adopted by the House of Lords in Morris or the High Court of Australia in Siemens. Rather than apply a presumption in favour of following a single prior decision of a foreign court, comity would thus support a presumption that decisions ought to be followed only if they evidence an international consensus and only if they are not considered ‘plainly wrong’.

But as always it at the heart of comity that it is for every authority to determine, for itself, how it ought to act with respect for the legitimate authority of others – including their prior decisions. And, as the world becomes increasingly connected and the law becomes more transnational in nature, these authorities may find there to be an increased judicial need to act

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92 ibid 55-58 (Landers and Rares JJ).
93 ibid 48 (Landers and Rares JJ).
like domestic co-ordinate courts, adopting stronger and stronger presumptions in favour of following each other’s prior decisions. The principle of comity operates within a constant feedback loop; it enables authorities to take into consideration the particulars of the context in which they operate at any time and continuously develop doctrines of precedent to reflect changing environmental conditions.

Comity support a similar presumption between other co-ordinate authorities on the basis that injustice may result from conflict. For example, in the context of investment arbitration, sports arbitration, and domain name arbitration there are emerging doctrines of precedent being developed that resembles something falling between than which exists between domestic co-ordinate courts of jurisdiction and foreign courts. Generally speaking, whilst the strength of the presumption will differ between different types of authorities it will not ordinarily be displaced merely because the second co-ordinate authority prefers an alternate conception of justice to the first. This is because there is a need to minimise conflict between these types of authorities and because the second tribunal has no reason to believe that its preferred conception of justice will necessarily be better than that preferred by the first authority.

A review of arbitral awards demonstrate that comity has played a key role – albeit an undervalued one – in the development of these emerging doctrines of precedent. Responding to the now common practice for parties to rely on prior awards in investment arbitration, the Tribunal in *Saipem v Bangladesh*\(^{94}\) held:

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international

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tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases.95

The Tribunal in *AWG v Argentina*96 noted similarly that basic considerations of justice required that investment tribunals ordinary follow each other’s decisions unless there are sufficient first-order reasons why they should not:

Although this tribunal is not bound by such prior decisions, they do constitute ‘a subsidiary means for the determination of the rules of law’. Moreover, considerations of basic justice would lead tribunals to be guided by the basic judicial principle that ‘like cases should be decided alike’, unless a strong reason exists to distinguish the current case from previous ones.97

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95 ibid 67 (Kaufmann-Kohler, Schreuer and Otton). ‘ICSID arbitral tribunals are established ad hoc, from case to case, in the framework of the Washington Convention, and the present Tribunal knows of no provision, either in that Convention or in the BIT, establishing an obligation of *stare decisis*. It is nonetheless a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals. The present tribunal will follow the same line, especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent.’ – *El Paso Energy International Co v The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/03/15 (2006) (ICSID) 39 (Cailisch, Stern and Bernardini). ‘While individual arbitral awards by themselves do not as yet constitute ... binding precedent, a consistent line of reasoning developing a principle and a particular interpretation of specific treaty obligations should be respected... A deviation from well and firmly established jurisprudence requires an extensively reasoned justification.’ – *International Thunderbird Gaming Corporation v The United Mexican States*, Separate Opinion of Thomas Wälde, UNCITRAL (2005) (ICSID-UNCITRAL) 16 (Wälde). ‘Avant de procéder à l’examen de ces conditions, le Tribunal tient à préciser qu’il n’est pas lié par les décisions et les sentences CIRD rendues antérieurement. Le présent Tribunal estime toutefois qu’il se doit de prendre en considération les décisions des tribunaux internationaux et de s’inspirer, en l’absence de justification impérieuse en sens contraire, des solutions résultant d’une jurisprudence arbitrale établie.’ – *Víctor Pey Casado and President Allende Foundation v Republic of Chile*, Award, ICSID Case No. ARB/98/2 (2008) (ICSID) 119 (Lalive, Chemloul and Gaillard). See also, *M.C.I. Power Group L.C. and New Turbine Inc. v Republic Of Ecuador*, Decision on Annulment, ICSID Case No. ARB/03/6 (2009) (ICSID) 25 (Hascher, Danelius and Tomka); *Burlington Resources Inc v Republic of Ecuador*, Decision on Jurisdiction, ICSID Case No. ARB/08/5 (2010) (ICSID) 100 (Kaufmann-Kohler, Stern and Viciuña).


97 ibid 189 (Salacuse, Kaufmann-Kohler and Nikken). See also, *Camuzzi International S.A. v The Argentine Republic*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/03/2 (2005) (ICSID) 135 (Viciuña, Lalonde and Rico); *Sempra Energy International v The Argentine Republic*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/02/16 (2005) (ICSID) 147 (Viciuña, Lalonde and Rico).
In *IAAF v USA Track & Field & Y*\(^98\) a sports tribunal noted relevantly that the obligation to follow prior decisions in this context may derive from the second tribunal’s duty to act with comity:

In CAS jurisprudence there is no principle of binding precedent, or *stare decisis*. However, a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel. Whether that is considered a matter of comity, or an attempt to build a coherent corpus of law, matters not.\(^99\)

Contrary to the Tribunal’s opinion, I argue that correctly identifying the source of the obligation to follow precedent matters greatly. The primary duty of every authority is to resolve the dispute before it in the most just manner possible. It is therefore arguable whether, in the process of carrying out their adjudicative responsibilities, authorities also have a duty to ‘build a coherent corpus of law’. A comity-based approach to precedent on the other hand suggests that doctrines of precedent are expressions of comity. An authority’s duty to act with comity stems from its primary duty to do justice to those subject to its own authority. By understanding doctrines of precedent in this manner, it becomes clear why, in certain circumstances, authorities incur a legal obligation to follow precedent.

The decisions of WIPO Panels also help highlight how comity has shaped doctrines of precedent between similar co-ordinate tribunals. Take for example *WIPO Case D2004-0338*.\(^100\) In that case the Panel held that despite favouring an alternate course of action ‘the Panel has to bend to the weight of UDPR authority’.\(^101\) The Panel continued:

\(^98\) *International Associations of Athletics Federations (IAAF) v USA Track & Field (USATF) & Y*, Award, CAS 2004/A/628 (2004) (CAS).
\(^99\) ibid 19 (Leaver, Kok and Hunter).
\(^101\) ibid at 6(c) (Argy).
In making its finding, the Panel wishes to clarify that its decision … is based on the need for consistency and comity in domain name dispute “jurisprudence”. Were it not for the persuasive force of the cited decisions, this Panel would have expressed [a different] view.\textsuperscript{102}

The Panel’s use of the term ‘persuasive force’ is unfortunate. A complete reading of the case makes it clear that the Panel was not persuaded by prior decisions. Rather, it ultimately considered itself bound to follow them. For this reason, the phrase ‘persuasive force’ ought to be read as ‘authoritative force’.

In \textit{WIPO Case DWS2002-0001},\textsuperscript{103} the Panel came to a similar conclusion ultimately holding the correct practice to be that it ought to follow prior decisions where they evidence a consensus:

Although Panels are not bound to follow the decisions of prior Panels, it nevertheless is appropriate to determine whether a majority view has developed among other Panels that have considered the same issue. Not only do such decisions frequently have persuasive weight and authority, but also, they reflect a consensus that is worthy of some deference. Divining and following such a consensus helps to ensure consistency among UDRP decisions, a critical component of any system of justice… In light of this principle, this Panel determines that it should follow the consensus view that has emerged regarding this issue.\textsuperscript{104}

\textsuperscript{102} ibid.
Together, these decisions are representative of a much larger practices concerning the approach arbitral tribunals take, or ought to take towards one another’s decisions. These awards demonstrate that comity supports a presumption in favour of following prior decisions where they evidence a consensus unless there are ‘compelling’, ‘strong’ or ‘special’ reasons why the prior decision ought not be followed. The presumption exists to minimise the risk of conflicting decisions without restricting the ability of the second authority to depart from prior decisions where there are sufficient reasons to do so.

Of course, arbitral practice is not consistent and some tribunals reject that they have any obligation to follow prior decisions in such circumstances. Consider, for example, the Tribunal in *SGS v Philippines*\(^\text{105}\) which held:

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\ldots \text{the present Tribunal does not in all respects agree with the conclusions reached by the } \text{*SGS v Pakistan* Tribunal on issues of the interpretation of arguably similar language in the Swiss-Philippines BIT. This raises a question whether, nonetheless, the present Tribunal should defer to the answers given by the *SGS v Pakistan* Tribunal… [T]here is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals.}\(^\text{106}\)
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By arguing that ‘there is no good reason’ to defer to the prior decisions of other investment tribunals, we can only assume that the Tribunal was making a one-sided reference to the idea

\(^{105}\) *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/02/6 (2004) (ICSID).

\(^{106}\) ibid 97 (El-Kosheri, Crawford and Crivellaro).
of justice pluralism. In other words, it was arguing that the *SGS v Pakistan* Tribunal was in no better position than it was to determine the correct interpretation of a similarly worded BIT. This is undoubtedly true. Yet, the *SGS v Philippines* Tribunal failed to recognise that, by the same token, it was in no better position than the *SGS v Pakistan* Tribunal.

If an authority acts with comity they recognise that part of their duty to do justice is to minimise conflict and allocate authority in the most just manner possible. Even where the authorities in question are co-ordinate authorities, the second authority’s duty to minimise conflict will continue to be relevant. Comity helps us see that there are good reasons to follow precedent, even where the authorities in question are co-ordinate authorities that exist outside of any formal hierarchy. If justice entails fairness – namely the equal enforcement of rights – then the Tribunal in this case evidently failed to act in the most just manner possible *vis-à-vis* those subject to its own authority.

By acting with comity, the Tribunal could have exercised its adjudicatory power more appropriately. More specifically, it could have recognised that even though it favoured an alternate conception of justice to the *SGS v Pakistan* Tribunal it has no reason to believe that its conception of justice would necessarily be better. It follows that, unless it had sufficient first-order reasons to rebut the presumption in favour of following the prior decision it ought to have followed it.

The nature of commercial arbitral tribunals, and the context in which they exist, suggests *prima facie* that a similar doctrine of precedent ought also to apply between them. Many scholars concerned with the role of precedent in commercial arbitration consider arbitral precedent to be a ‘necessity for certain types of disputes, if not only for the sake of the rule of law.’

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arbitral tribunals, as decision-makers, must take into consideration. Tribunals have also noted the pressing judicial need to adopt a suitable doctrine of precedent.\[108\]

However, in practice no established doctrine of precedent exist. I suggest this is because historically commercial arbitral tribunals have considered themselves to be more ‘ad hoc’ than other types of co-ordinate authorities. Whilst other types of arbitral tribunals – such as investment arbitral tribunals, sports tribunals and WIPO Panels – ordinarly consider themselves to operate within a larger normative framework, commercial arbitral tribunals have not, until late, consider themselves to be in an analogous position. This distance, I suggest, originates from the nature of commercial arbitral disputes which are largely factual in nature and often confidential. The result is that there is a low reoccurrence of legal issues (or at least a low perceived reoccurrence of legal issues due to confidentiality) and thus a lower perceived risk of conflict.\[109\]

In circumstances where there is a lower need to minimise conflict the presumption in favour of following prior decisions will be weaker. In circumstances where there is no need, a presumption will cease to exist at all. This is supported by the fact that domestic courts rely on the prior decisions of foreign courts in matters that have an international element but not in matters that are purely domestic in nature. For example, whilst an Australian court may accord weight to the prior decision of an English court with regard to the interpretation of an international treaty or a standard form contract with wide international application, it will not ordinarily accord weight to the prior decision of an English court with respect to the interpretation of council by-laws for example. Even if similarly worded by-laws exist in England, a conflict in the interpretation of such by-laws is unlikely to result in injustice for

\[108\] ‘The decisions of [commercial arbitral] tribunals progressively create caselaw which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond.’ – Dow Chemical v Isover Saint-Gobain (1984) ICC Award No. 4131, 9 YB Comm Arb 131 (ICC) 136 (Sanders, Goldman and Vasseur).

\[109\] Kaufmann-Kohler (n 107) 362–363.
those subject to the authority of the Australian court. Whilst it is true that justice entails fairness it is not necessarily unfair to adopt different conceptions of justice in such contexts.

In recent years both academics and practitioners have begun to reconceptualise the purpose, scope, duties and limitations of commercial arbitral tribunals and arbitral institutions have begun to publish awards. In light of these changes there has been a considerable push to consider commercial arbitral tribunals, not just as ad hoc dispute resolvers, but rather as a network of decision-makers that may be considered something akin to a system. As a result, there has been heated debate as to the duty of commercial arbitral tribunals to follow precedent in certain contexts. Matters of jurisdiction and procedure, tribunal powers and appropriate timelines are consistently reoccurring issues in commercial arbitration leading some tribunals unsure of their obligation to follow prior decision with respect to such issues.

The need to minimise conflict in this context has already led to the development of a de facto doctrine of precedent aimed at guiding commercial arbitral tribunals in the exercise of their adjudicatory power to determine how they ought to act with respect to each other’s decisions. These de facto rules and practices evidence a perceived need on behalf of tribunals to minimise conflict and an acknowledgement by them that exercising their power irrespective of prior decisions is likely to lead to injustice. The problem however, is that they are grounded in practical necessity, not in legal principle or theory. As Gabrielle Kaufmann-Kohler notes, arbitral tribunals considered themselves, at most, to be under a sort of vague ‘moral obligation’ to follow prior decisions, but not necessarily a legal one.

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111 Kaufmann-Kohler (n 107).
112 ‘It may be debatable whether arbitrators have a legal obligation to follow precedents – probably not – but it seems well settled that they have a moral obligation to follow precedents so as to foster a normative environment that is predictable.’ – ibid 374.
Absent a legal obligation to follow prior decisions, commercial arbitral tribunals will continue to consider, weight and even ignore prior decisions in accordance with their own moral conception of what they consider they ought to do. It is the central claim of this thesis that comity, as a general principle of law, can assist second authorities, like commercial arbitral tribunals, to determine how they ought to act with respect to one another’s authority – including their prior decisions. A comity-based conception of precedent suggests that the duty to follow prior decisions is in fact a legal one – it derives from the authority’s primary legal duty to resolve the matter before it in the most just manner possible.

If we conceive of arbitral tribunals as similar to domestic co-ordinate courts comity would support a presumption that the second tribunal ought to follow the prior decision of the first authority unless it considers it to be ‘plainly or clearly wrong’. However, the application of such a presumption relies on arbitral tribunals viewing themselves as part of a system akin to domestic co-ordinate courts. Whilst there are certainly scholars and practitioners who advocate for such a view, the reality is that arbitral tribunals do not currently view themselves in this way. Rather, a review of commercial awards and modern commercial arbitration literature tends to suggest that commercial arbitral tribunals view themselves as similar, if not the same, as foreign courts view one another. Whilst not akin to domestic co-ordinate courts they are more than simply ad hoc authorities. A conflict between two or more arbitral tribunals has the potential to cause injustice and arbitral tribunals, through the development of a *de facto* doctrine of precedent recognise this.

I propose that the nature of commercial arbitral tribunals, and the context in which they operate, supports a presumption that they ought ordinarily to follow each other’s decisions where the decision in question represents a consensus amongst tribunals as to the correct means by which to resolve a particular dispute. This is not only consistent with the principle of comity but also consistent with the doctrines of precedent developed among other analogous co-
ordinate authorities. The presumption should only be capable of being displaced where the second arbitral tribunal is of the opinion that the prior decision is ‘plainly or clearly wrong’ or that there are ‘compelling reasons’ why the prior decision ought not be followed.

5.4. Specialist Authorities

So far we have explored how comity operates between authorities of the same type – either the same authority at different points in time or co-ordinate authorities. Let us now introduce specialist authorities into our system of adjudication to demonstrate how comity might operate between them. I use the term ‘specialist authorities’ to describe authorities that, by virtue of their nature, are differ from others. These authorities have been instituted for a specific purpose and usually possess certain skills and expertise to carry out that purpose. As we will see, the principle of comity forms the basis for a much stronger presumption that ordinary authorities ought to follow the prior decisions of more specialist authorities than their own prior decisions or the prior decisions of co-ordinate authorities.

Specialist authorities may exist horizontally or vertically vis-à-vis the second authority. In the domestic sphere we find a multitude of horizontal specialist authorities. For example, we might say that consumer, competition, immigration or defence force administrative tribunals are all specialist authorities. Each has been instituted for a specific purpose – namely, to resolve disputes that fall within their jurisdiction. Of course, these tribunals might divide their jurisdiction even further. There may, for example, be a defence force discipline tribunal, a defence force remunerations tribunal or a defence force honours and awards tribunal. In this context, each authority can be considered to have some skill and expertise, not possessed by other authorities, with respect to its particular subject matter.

Within this horizontal category, we may also include specialist authorities who operate in the international sphere. We might say, for example, that the ICJ, the ECtHR, and the CJEU
are all specialist authorities. Each has a different set of skills and different expertise and each
has been given the appropriate jurisdiction to carry out its specific purpose.

Vertically we may speak of authorities charged with hearing appeals. The most
common example are superior courts of jurisdiction within a domestic judicial hierarchy. For
example the Supreme Court of the United Kingdom or the United States are both courts of
superior and final jurisdiction charged with hearing appeals from courts below them in their
respective judicial hierarchies. There are of course a variety of different authorities that fall
within this category. Most States have a hierarchy of courts that may consist of three or more
levels, the court above being superior to the court below. On the international stage, we may
speak of similar authorities such the Appellate Body of the WTO or the Appeals Chamber of
the ICTY who have jurisdiction to hear appeals from lower authorities within their respective
adjudicatory hierarchies.

In Chapter 3 we discussed the role comity has played in the development of the ‘doctrine
of unreasonableness’ in the context of judicial review. In administrative law, the basic
justification for instituting a specialist authority is the opportunity it creates for the authority to
draw upon its unique skill and expertise in a relatively limited field of practice. The
underlying idea is that the superior skill and expertise of the specialist authority make it more
likely that its determination of what the balance of first-order reasons requires will be better
than the determination of other authorities who do not possess that same skill and expertise. In
administrative law, comity reflects this position in the law by forming the basis for a strong
presumption that courts on judicial review ought not to overturn administrative decisions and
replace them with their own conception of justice. Ordinarily, courts will restrain themselves
from exercising their judicial power to overturn administrative decision unless there are first-

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113 See specifically, section 3.5 (Comity Among Authorities).
order reasons that make the administrative decision one which the court considers no ‘reasonable’ authority could have made.

However, the underlying justification for this presumption is not limited to the field of administrative law. In fact, I propose that it may logically be extended to all specialist authorities who have some skill and expertise over a particular subject matter that others simply do not possess. For example, the ICJ, with its 15 highly qualified international law judges all considered to be experts in their field, undoubtedly possesses a certain level of skill and expertise that other authorities simply cannot claim to have with regard to the interpretation of general international law. Similarly, appeals courts in a domestic legal system are generally considered to have greater expertise and skill with regard to the interpretation of law than the courts below them. In all jurisdictions, higher courts are ordinarily composed of a greater number of judges who possess more experience and skill than those below them. This makes them ordinarily better placed to identify and balance the first-order reasons relevant to cases that fall within their jurisdiction.

In circumstances where the first authority has greater skill and expertise than the second authority with regard to the dispute in question, the second authority will, in most circumstances, be justified in deferring to the judgment of the first authority. However, if the second authority acts with comity towards the first, the second authority is not only justified in doing so, it will also incur a legal obligation to do so. The superior expertise and skill of the first authority make it more likely that the first authority’s preferred conception of justice is better than the conception of justice preferred by the second authority to resolve the dispute before it. It follows that where the dispute falls within the expertise of the first authority, comity will support a strong presumption that the best exercise of adjudicatory power by the second authority will ordinarily be for it to follow the first authority’s prior decision.
This presumption embodies comity’s commitment to systemic justice – it seeks to minimise conflict between co-existing decision-makers and allocate their individual adjudicatory authority in the most just manner possible by allocating the ‘authority to decide’ how the issue ought to be resolved to that decision-maker best place to resolve the type of dispute in question. Whilst the strength of the presumption is a question for the second authority, the authorities in question and the context in which they operate suggest that the presumption ought to be much stronger than that which ordinarily applies between co-ordinate authorities. This is because the first authority’s preferred conception of justice is likely to be more just than that preferred by the second authority. It follows that, in nearly every case, the best exercise of the second authority’s adjudicatory power will in fact be for it to follow the prior decision of the first authority.

Even if the second authority strongly disagrees with the prior decision of the first authority, this will not ordinarily be enough to displace the presumption. The very notion of comity embodies the idea that the second authority ought to follow the prior decision of the first authority for the simple reason that it is not the first authority – the second authority does not have the same nature, skill or expertise. It therefore lacks the requisite tools or ability to make the same decision as the first authority in the case at hand for the simple reason that it is comparatively less competent. This is not to say the second authority will necessarily be wrong, but there is certainly a higher likelihood that it will be or that its decision will be ‘less correct’. The principle of comity helps the second authority recognise that, even when it disagrees with the first authority, the first authority’s inconsistent decision is still more likely to be better than its own.

A comity-based conception of precedent suggests that the prior decisions of specialist authorities ought to be treated by others similar to the way in which courts approach administrative decisions on judicial review. The relationship between courts and administrative
tribunals is analogous to that which exists between specialist and non-specialist authorities in the context of determining the authority of precedent. Thus, just as comity has done in the context of administrative law, I propose that it may guide the development of doctrines of precedent between specialist and non-specialist authorities in a variety of different contexts.

Accordingly, comity supports a presumption that the second authority ought ordinarily to follow the prior decision of the first authority unless it is of the opinion that there are first-order reasons that make the prior decision so wrong that it is one which no ‘reasonable’ decision-maker in the shoes of the first authority could have made. Of course, what is ‘unreasonable’ is a question for the second authority for it is at the heart of the principle of comity that it is for the second authority to determine the extent of its duty to recognise the authority of the first – including its prior decisions.

The strength of the presumption – that is, the question of what is ‘unreasonable’ – will necessarily differ depending on the nature of the authorities in question and context in which the second authority must make its decision. As in the context of administrative law, where the second authority has significantly less skill and expertise than the first authority, the first authority becomes significantly better placed to resolve that type of dispute than the second authority. Further, from a practical reasoning perspective, the comparative lack of expertise and skill of the second authority means that it is also less likely to be in a position where it can be convinced that the first authority’s prior decision was ‘unreasonable’.

Alternatively, where the second authority has less expertise and skill than the first authority, but the difference is not significant, the first authority will be only slightly better placed to resolve that type of dispute than the second authority. By the same token, the second authority is also more likely to be in a position where it can be convinced that the first
authority’s prior decision was ‘unreasonable’. In *R v Ministry of Defence*, Lord Bingham held that, in respect of the judicial review of administrative decisions:

… the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense.

Lord Bingham’s remarks are equally applicable in the context of determining the authority of specialist authority precedent. The more remote the subject matter of a decision from the skill and expertise of the second authority, the more hesitant the second authority ought to be in holding the decision to be unreasonable. The presumption reflects the unique nature of the authorities in question and the context in which they operate. Acting with comity is therefore a good strategy for the second authority to ensure the best exercise of its own adjudicatory power. In short the principle of comity is good law, and like most good law, common sense.

5.4.1. *Specialist Authorities: Horizontal Jurisdiction*

Let us now consider how comity may assist second authorities who have cause to consider the prior decisions of horizontal specialist authorities. As noted above, specialist authorities of horizontal jurisdiction exist in a wide range of contexts. In most domestic jurisdictions there will be specialist tribunals who have jurisdiction over various subjects and issues such as employment, licensing, veteran affairs, immigration, care standards, mental health, social security and pensions, consumer protection and telecommunications. Often, the subject matter jurisdiction of these tribunals will be separate, meaning there will be little overlap between them. However, increasingly, subject matters or legal issues will overlap and these types of

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115 *R v Ministry of Defence, ex parte Smith* [1996] 1 All ER 257 (ENG CA).
116 ibid 264.
authorities may be required to determine whether or not they ought to follow each other’s prior
decisions.

I do not propose to review every context in which an authority might have cause to
determine the authority of precedent deriving from a specialist authority of horizontal
jurisdiction. Rather, I propose to focus on two areas of law where comity may be of significant aide. The first is in the context of international law where I propose comity may guide the exercise of adjudicatory power by international courts and tribunals who are increasingly unsure as to how they ought to act with respect to each other’s prior decisions. As a general principle of law, comity may guide the development of new doctrines of precedent between these various authorities and remove some of the ambiguity that so often surrounds the authority of precedent in international law. The second is in the context of the United States judiciary where I propose that comity may guide the exercise of adjudicatory power by state and federal courts who are called upon to determine the authority of each other’s prior decisions. Again, as a general principle of law, comity may provide these courts with a unique means to critique existing doctrines of precedent and develop them in a manner consistent with comity’s systemic judicial aim.

The risk of conflict between international courts and tribunals is one of contemporary international law’s greatest problems because it results in what experts call the ‘fragmentation of international law’. Much like the common law of a single State, many consider international law to a unified system. The risk of conflicting decisions undermines the unity of

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international law creating the possibility for large scale injustice. In the *Ahmadou Sadio Diallo* case\textsuperscript{118} Judge Greenwood held:

> International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.\textsuperscript{119}

Perhaps without recognising it, some have already called for a comity-based conception of precedent in international law. Consider, for example, the remarks of President Rosalyn Higgins of the ICJ (as she was then) which are reminiscent of a comity-based conception of precedent:

> … we judges are going to have to learn how to live in this new, complex world, and to regard it as an opportunity rather than a problem: we must read each other’s judgment; we must have respect for each other’s judicial work; we must try to preserve unity among us unless context really prevents this.\textsuperscript{120}

I propose that a comity-based conception of precedent can help fill out this general framework outlined by President Higgins. The principle of comity suggests, like President Higgins, that

\textsuperscript{118} *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), Compensation* [2012] ICJ Rep 324 (ICJ).

\textsuperscript{119} ibid 394 (Judge Greenwood, declaration). Gilbert Guillaume, former judge of the ICJ, echoed similar concerns cautioning against allowing the disunity of international law to intensify any further. See, Gilbert Guillaume, ‘The Future of International Judicial Institutions’ (1995) 44 The International and Comparative Law Quarterly 848, 861–862.

international authorities ought to have respect for one another’s authority – including each other’s prior decisions. However, it necessarily goes further, providing a more detailed account of the nature and extent of the obligation to follow precedent in international law. I propose that comity can provide international authorities with a principle-based approach by which to determine when they ought to follow prior decisions and when the context really does prevent them from doing so.

Consider an investment tribunal called upon to determine the authority of a prior decision of the ICJ concerning a question of general international law – for example, the question of what general principles apply to the interpretation of international treaties. In this context, comity supports a presumption that the investment tribunal ought to follow the prior decision of the ICJ unless it is convinced that there are first-order reasons that make the prior decision ‘unreasonable’. In practice, investment tribunals often do follow the prior decisions of the ICJ on issues that fall within their expertise and skill and in some cases justify their actions on grounds of comity. Most notably, in *Tulip Real Estate v Republic of Turkey* the Tribunal held:

Each Party refers the Tribunal to previous ICSID and investment treaty awards, and statements made in ICJ judgments. Although not bound by such citations, the Tribunal accepts that, as a matter of comity, it should have regard to earlier decisions of courts

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(particularly the ICJ) and of other international dispute tribunals engaged in the interpretation of the terms of a BIT.\textsuperscript{123}

In \textit{Tulip Real Estate} the Tribunal held that whilst it was not bound to follow prior decisions, it would, as a matter of comity, pay due regard to prior decisions of the ICJ and other investment tribunals. However, the Tribunal did not go any further than this and provides little insight into how comity might be used to determine the authority of each type of precedent.

I propose that a comity-based conception of precedent can provide investment tribunals, like the Tribunal in \textit{Tulip Real Estate}, with real guidance in such cases. As we have already discussed above, as a co-ordinate authority, comity supports a presumption that investment tribunals ought to follow each other’s prior decisions where the prior decision in question evidences a consensus \textit{unless} it is of the opinion that the prior decision is ‘plainly or clearly wrong’ or there are ‘compelling reasons’ why it should not be followed. The presumption reflects the need to minimise conflict between investment tribunals and the reality that neither the first nor the second authority is better placed to resolve the dispute in question.

However, comity supports a stronger presumption in respect of the ICJ’s prior decisions where they concern general principles of international law. The ICJ’s prior decisions ought to be afforded more weight because the ICJ can be considered to have better skill and expertise with respect to the identification and interpretation of general principles of international law than investment tribunals. The result is that comity supports a presumption that investment tribunals ought to follow prior decisions of the ICJ \textit{unless} there are first-order reasons that demonstrate the decision to be ‘unreasonable’.

As in the context of judicial review, comity supports a presumption that the investment tribunal ought to follow a prior decision of the ICJ even where it disagrees with its conclusion.

\textsuperscript{123} ibid 47 (Griffith, Jaffe and Knieper).
I propose that the threshold is one of ‘unreasonableness’ requiring that there be ‘overwhelming’ first-order reasons against following the prior decision. The presumption reflects the need to minimise conflict and the comparative competency of both authorities to determine the dispute in question – in this context, the existence and application of general principles of international law. The comparative skill and expertise of the ICJ means that even when the investment tribunal disagrees, it is more likely that the ICJ’s decision is better than the investment tribunal’s with respect to the subject matter at hand.

Of course, investment tribunals are not devoid of expertise and skill with respect to the interpretation of general principles of international law. As in the context of administrative law, where the second authority has less expertise and skill than the first authority, but the difference is not significant, the first authority is only slightly better placed to resolve that type of dispute than the second authority. By the same token, the second authority is also more likely to be in a position where it can be convinced that the first authority’s prior decision was ‘unreasonable’. As the subject matter of the ICJ’s decision is not so remote from the expertise and skill of the investment tribunal, it follows that investment tribunals will ordinarily be well placed to determine whether the prior decision of the ICJ is ‘unreasonable’ in the circumstances of any given case.

Consider likewise how other authorities, such as the ICTY for example, ought to act with respect to ICJ precedent. In Prosecutor v Delalic\textsuperscript{124} the Appellants argued that the Trial Chamber erred because it rejected, what it described as, the ‘correct legal test’ set out in the ICJ’s decision in the Nicaragua case\textsuperscript{125}. The Appellants submitted that the ICTY Trial Chamber was bound to follow the ICJ’s prior decision because the ICJ is ‘essentially the

\textsuperscript{124} Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo [2001] IT-96-21-A (ICTY App. Ch.).

\textsuperscript{125} Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits [1986] ICJ Reports 14 (ICJ).
Supreme Court of the United Nations'.

In that case the Appeals Chamber was not persuaded by the Appellants’ argument holding that:

… this Tribunal is an autonomous international judicial body, and although the ICJ is the “principal judicial organ” within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion.

Respectfully, I suggest that the Appeals Chamber, like many concerned with the study of precedent, mistakenly identified the source of the duty to follow precedent. The Appeals Chamber’s decision tends to suggest that a prior decision can only have authority if the first and second authority exist in a relationship characterised by hierarchy. As there is no hierarchical relationship between the ICJ and ICTY, there can therefore be no duty on ICTY Tribunals to follow ICJ precedent. However, a comity-based conception of precedent demonstrates this position to be mistaken.

A comity-based conception of precedent demonstrates that the authority of precedent does not derive from the existence of hierarchy between authorities. Prior decisions bind only because second authorities choose to be bound by them. A comity-based conception of precedent suggest that authorities have a duty to follow precedent in certain contexts because doing so will represent the best exercise of their own adjudicatory power vis-à-vis those subject to their own authority. Comity requires authorities respect the legitimate authority of others for

127 ibid 24 (Judges Hunt, Raid, Nieto-Navia, Bennouna and Pocar).
this reason alone and requires them to recognise that, in certain circumstances, the best exercise of one’s own adjudicatory power may necessarily be to recognise the authority of another – even where they disagree.

Comity suggests that the Appeals Chamber ought to apply a presumption in favour of following the ICJ’s prior decisions on the basis of their comparative nature, skill and expertise – not because of any relationship of hierarchy. The Appeals Chamber rightly noted that part of its duty is to minimise the injustice of conflicting decisions. But it failed to recognise that the ICJ is better placed than the ICTY Appeals Tribunal, by virtue of its nature, skill and expertise, to determine questions concerning the existence and interpretation of general principles of international law. The principle of comity suggests that the Appeals Tribunal, whilst free to make its own decision, should respect the most just allocation of authority in the context and recognise decisions of the ICJ as precedent. Of course, it does not follow that the ICTY Tribunal cannot depart from prior decisions of the ICJ – it is not bound to follow ICJ precedent come what may. However, the need to minimise conflict, combined with the comparative competencies of the authorities in question, suggests that it ought not to do so unless it considers the ICJ’s prior decisions to be ‘unreasonable’.

It follows that comity might be of equal assistance to the ICJ with respect to prior decisions emanating from other specialist authorities – for example, the CJEU or the ECtHR. Both the CJEU and ECtHR are specialist international courts – the former with respect to European law and the latter with respect to human rights under the European Convention of Human Rights. In this context, comity supports the presumption that the ICJ ought to follow the prior decisions of each with respect to its particular area of expertise unless it considers them to be ‘unreasonable’ in the legal sense of the word.

Of course, the exact strength of the presumption is a question for the ICJ guided by the dictates of comity. Comity requires the ICJ recognise the purpose, scopes, duties and
limitations of both authorities, including their respective skills and expertise. It might be said that with respect to questions concerning human rights under the European Convention of Human Rights, the ICJ, for example, will have the requisite skill and expertise to resolve such matters. However, comity requires the ICJ recognise that the ECtHR was instituted for this specific purpose and thus has certain expertise and skill which may make it better placed to resolve such issues. As a general principle of law then, comity would allocate authority to the ECtHR in times of conflict on the basis of their comparative competencies. Yet, the ICJ’s own skill and expertise means that it will always be in a good position to determine whether a prior decision of the ECtHR is unreasonable.

As noted above, I propose that comity may also assist state and lower federal courts in the United States to critique and develop doctrines of precedent that have long existed between the two. Often it is the case in the United States that state courts are called upon to resolve issues of federal law while federal courts are called upon to resolve issues of state law. Whilst both sets of courts consider themselves inferior to the Supreme Court of the United States on questions of federal law, they are, with respect to one another, specialist authorities of horizontal jurisdiction.

As specialist authorities of horizontal jurisdiction one might expect both sets of courts to adopt doctrines of precedent consistent with comity. In this context, comity would support a presumption that lower federal courts ought ordinarily to follow state courts on questions of state law whilst state courts ought to follow federal courts on questions of federal law. This, of course would reflect the comparative nature, skill and expertise of each type of court and the need to minimise conflict within the context in which they operate – that is within the United States of America.
In *Erie v Tompkins* the Supreme Court considered the doctrine of precedent that ought to operate between state and lower federal courts with respect to questions of state law. In that case the Supreme Court held that in cases where state law provides the appropriate rule or principle of law federal courts have a constitutional obligation to ascertain and apply ‘the law of the state’. The Supreme Court held that ‘whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern’, implying that federal courts must look to the prior decisions of a state’s highest court to ascertain state law.

The result is that federal courts consider themselves bound to follow the prior decisions of state courts on questions of state law, even in circumstances where they disagree. The duty to do so is founded in the court’s duty to uphold the constitution. Yet, it is also ‘largely’ consistent with comity – it requires federal courts to defer to the conception of justice preferred by state courts on issues of state law. Comity dictates that in circumstances where the first authority (in this case the state court) is more competent, by virtue of its nature, skill and expertise than the second authority (in this case the federal court) the second authority ought to apply a strong presumption in favour of following its prior decisions.

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129 Ibid 78 (Brandeis J).
130 Ibid. ‘… the duty rests upon federal courts to apply state law under the Rules of Decision Statute in accordance with the controlling decision of the highest state court.’ – *Vandenbark v Owens-Illinois Glass Co.*, 311 US 538 (1941) (US SC) 543 (Reed J).
The presumption is only capable of being displaced in circumstances where the federal court is convinced that the state court would not follow its own prior decision in the case at hand.\textsuperscript{131} In \textit{Swix v Daisy}\textsuperscript{132} the Court of Appeals for the Sixth Circuit held:

Where a state’s highest court has spoken to an issue, we are bound by that decision unless we are convinced that the high court would overrule it if confronted with facts similar to those before us.\textsuperscript{133}

I say the duty is ‘largely’ consistent with comity because it requires federal courts to defer to the judgment of state courts on issues of state law. Yet, the presumption is not wholly consistent with comity and we may use comity to critique its application in this context. I propose that the principle of comity ought to form the basis for a presumption that federal courts should follow the prior decisions of state courts on questions of state law unless the decision is one which the federal court considers no reasonable state court could have made. This of course is a very restrictive approach but it is one that adequately reflects the authorities in question and the context in which they operate. It is also consistent with authorities who operate in analogous contexts (as discussed above).

Respectfully, the principle of comity helps us see why a doctrine of precedent that requires federal courts to guess how a state court would resolve a particular type of dispute is simply illogical. At the very heart of comity is the notion that in contexts such as this, the

\textsuperscript{131} ‘… the rulings of the Supreme Court of Florida … must be taken as controlling … unless it can be said with some assurance that the Florida Supreme Court will not follow them in the future.’ – \textit{Meredith v City of Winter Haven.}, 320 US 228 (1943) (US SC) 234 (Stone CJ, judgment of the Court). ‘We are not required to apply all decisions of the Arkansas Supreme Court, even if they have not been expressly overruled, if we are convinced that that court would not follow them…’ – \textit{IG Centennial Ins. Co. v Fraley-Landers.}, 450 F.3d 761 (8th Cir. 2006) (US FCA) 767 (Wollmann CJ, with whom Fagg and Arnold JJ agreed). ‘… there will be occasional, though rare, instances in which the best prediction of what the state’s highest court will do is that it will not follow its previous decision.’ – \textit{MindGames, Inc. v Western Publishing Company, Inc.}, 218 F.3d 652 (7th Cir. 2000) (US FCA) 656 (Posner CJ, with whom Fairchild and Wood JJ agreed).

\textsuperscript{132} \textit{Swix v Daisy Manufacturing Co Inc.}, 373 F.3d 678 (6th Cir. 2004) (US FCA).

\textsuperscript{133} ibid 681 (Cudahy J, with whom Martin and Clay JJ agreed).
second authority ought to follow the prior decision of the first authority for the simple reason that it is not the first authority – the second authority does not have the same nature, skill or expertise as the first authority. It follows that it lacks the requisite tools or ability to make the same decision as the first authority in the case at hand for the simple reason that it is comparatively less competent. This is not to say that the second authority will necessarily be wrong, but there is certainly a higher likelihood that it will be or that its decision will be less correct. Comity guides the second authority in the proper exercise of its adjudicatory power by helping it recognise that by virtue of its nature its decision – no matter how good it thinks it is – will, in times of conflict, ordinarily be less just.

In *Erie* the Supreme of the United States only addressed the question of how federal courts ought to act with respect to state courts concerning questions of state law. It did not however address the question of how state courts ought to act with respect to the prior decisions of federal courts on questions of federal law. One might think the answer is obvious – shouldn’t state courts defer to federal court precedent on questions of federal law? Perhaps unsurprisingly this is not the case.

There is no constitutional, statutory or common law obligation on state courts to follow lower federal court precedent.\(^{134}\) And, whilst some state courts fetter their own authority and consider themselves bound to follow the prior decisions of lower federal courts on federal law

\(^{134}\) ‘…the Supremacy Clause [in the United States Constitution] demands that state law yields to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court’s interpretation of federal law give way to a (lower) federal court’s interpretation.’ – *Lockhart v Fretwell*, 506 US 364 (8th Cir. 1993) (US FCA) 376 (Thomas J).
issues, the majority view is that state courts incur no obligation to do so. The Michigan Court of Appeal’s decision in *Abela v General Motors* reflects the majority position:

Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts.

The fact that state courts are given authority to hear cases involving issues of federal law suggests that they competent to hear such issues. However, it does not follow that state and federal courts are equally competent to do so or that state courts necessarily incur no obligation to follow the prior decisions of federal courts with respect to federal law. The nature of federal courts, combined with their comparatively higher skill and expertise to determine federal issues, suggest that they are likely to resolve disputes concerning federal law better than state courts.

As the Court of Appeals for the Ninth Circuit put it in *Yniguez v Arizona*:

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135 ‘… in exercising our jurisdiction with respect to what is essentially a federal question, we are guided and bound by federal statutes and decisions of the federal courts interpreting those statutes.’ – *Desmarais v Joy Manufacturing Co.*, 538 A.2d 1218 (1988) (N.H SC) 1200. ‘This court cannot indulge in the luxury of its own ideas where a federal statute is concerned, but is bound by the decisions of the federal courts…’ – *Martin v Cullum*, 299 P.2d 29 (1956) (Cal App. Dep’t Super. Ct.) 30. ‘… the Court's task in the present case is greatly simplified by the fact that there is a Fifth Circuit Court of Appeals decision on point, which this Court considers to be controlling with regard to the present issue of federal law.’ – *King v Grand Casinos of Mississippi Inc.*, 697 So.2d 439 (1997) (Miss. SC) 440 (Prather PJ, with whom Roberts and Mills JJ agreed). ‘… questions relating to due process of law under the Federal Constitution should be resolved in accordance with the decisions of the Supreme Court of the United States and other federal courts, rather than with the decisions of state courts.’ – *Atlas Mut. Benefit Ass'n v Porthcoller*, 46 A.2d 643 (1945) (Del. SC) 646-650.

136 ‘Although the Supremacy Clause demands that state law yield to federal law, neither federal supremacy nor any other principle of federal law requires that a state court’s interpretation of federal law give way to a federal court’s interpretation other than that of the United States Supreme Court. Thus, we are not bound by … decisions of the lower federal courts.’ – *Community Hospital v Fail*, 969 P.2d 667 (1998) (Colo. SC) 672 (Mullarkey CJ). ‘… the decisions of lower federal courts are not binding on state courts, even on issues of federal law.’ – *Dan Wiebold Ford Inc. v Universal Computer Consulting Holding Inc.*, 127 P.3d 138 (2005) (Ida. SC) 143 (Eisman J, with whom Schroeder CJ, Trout and Burdick JJ agreed). ‘… the decisions of the federal courts of appeal are not binding on this court…’ – *Macon-Bibb County Hospital Authority v National Treasury Employees Union*, 458 S.E.2d 95 (1995) (Ga. SC) 96 (Benham PJ, with whom Hunt CJ, Fletcher, Hunstein, Carly, Thompson and Kreeger JJ agreed).


138 ibid 327 (Corrigan J, Weaver, Taylor, Young and Markman JJ).

139 *Yniguez v Arizona* 939 F.2d 727 (9th Cir. 1991) (US FCA).
Having chosen to create the lower federal courts, Congress may have intended that just as state courts have the final word on questions of state law, the federal courts ought to have the final word on questions of federal law.¹⁴⁰

The majority view that state courts incur no legal duty to follow lower federal court precedent is contrary to comity and thus contrary to the duty of state courts to resolve the cases that come before them in the most just manner possible. There is good reason for state courts to defer to the conception of justice preferred by federal courts concerning issue of federal law because they are, by virtue of their nature, skill and expertise, better placed to determine such issues. This is the case even if one concedes that state courts have jurisdiction to hear matters of federal law. Doing so necessarily minimises the risk of conflict between state and federal courts concerning the interpretation of federal law and allocates the authority to decide federal issues to that decision-maker best placed to do so. In *Dewey v RJ Reynolds*,¹⁴¹ the Supreme Court of New Jersey noted this to be the case when it held:

… the operative principle that informs the discussion is the principle of ‘judicial comity.’ Stated simply, lower federal court decisions in this area should be accorded due respect…¹⁴²

In *Dewey* the Supreme Court of New Jersey spoke in depth of its duty to act with comity towards the legitimate authority of federal courts. Yet, in its decision, it appears to do nothing more than pay lip service to the idea. Rather than apply a presumption in favour of following lower

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¹⁴⁰ ibid 736 (Reinhardt J, with whom Tang and Fletcher JJ agreed).
¹⁴² ibid 80 (Clifford J).
federal court decisions, the Court chose simply to decide a question of federal law on the ordinary balance of first-order reasons. The practice of analogous authorities demonstrates that in this context the principle of comity ought to form the basis for a presumption that state courts should follow federal lower court precedent unless, in the opinion of the state court, the prior decision is ‘unreasonable’ in the legal sense of the word. Such a presumption would minimise the risk of injustice of conflicting decisions on the interpretation of federal law and would allocate the authority to decide such issues to that decision-maker best placed to do so.

It follows that in nearly all cases the best exercise of adjudicatory power by the state courts will in fact be to follow lower federal court precedent.

The idea that the authority of precedent may differ depending on the comparative nature of authorities can also help us understand why some co-ordinate authorities attribute greater weight to the prior decisions of certain co-ordinate authorities over others. Often it is the case that even amongst formally equal authorities, one may be known to have a particular speciality, skill or experience with regard to a particular subject matter. In such circumstances, comity certainly justifies attributing more weight to those decisions on the basis that they are, like specialist authorities, better placed to resolve the type of dispute in question.

For example, courts around the world would be justified in according English maritime decisions greater weight than the maritime decisions of other courts. English courts are known to have significant experience and a particular expertise which the courts of other States simply cannot claim to have with respect to such matters. In a similar manner, state and federal courts in America would be justified, and often do attribute more weight to decisions of the Seventh

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143 See, most notably, the dissenting opinion of Justice Antell who criticised the majority for doing just that. ‘I also concur that the applicability of lower federal court decisions on the question of preemption must be made on principles of judicial comity… The majority correctly states that in the interpretation of federal statutes principles of comity dictate that lower federal court decisions be accorded due respect… From this posture the Court then undertakes its ‘independent analysis of the federal scheme,’ an inquiry in which it rejects the well-reasoned, unanimous determinations of the five federal Circuit Courts of Appeal and the Supreme Court of Minnesota which all conclude that Congress has preempted the question of adequate warnings concerning the use of cigarettes. So much for comity.’ – ibid 101 (Antell J).
Circuit Court of Appeals on questions of anti-trust or competition law, just as international arbitral tribunals might place greater weight on the awards of prominent arbitrators such as Jan Paulsson, Gabrielle Kaufmann-Kohler or Gary Born. In each of these scenarios, the best exercise of adjudicatory power by the second authority vis-à-vis those subject to their own authority will ordinarily be to recognise the first authority’s prior decision as precedent.

5.4.2. Specialist Authorities: Vertical Jurisdiction

Let us now consider how comity may be of assistance to second authorities who have cause to consider the prior decisions of specialist authorities of vertical jurisdiction – that is, those who may hear appeals from the second authority. Much like specialist authorities of horizontal jurisdiction, specialist authorities of vertical jurisdiction possess comparatively more expertise and skill than lower authorities. But they also possess a very different nature and purpose – they are instituted to definitively settle questions of law arising from authorities below them on an adjudicatory hierarchy. This suggests that the presumption in favour of following their precedent ought to be even stronger than that which applies between specialist authorities of horizontal jurisdiction.

Consider the most common example of a domestic judicial hierarchy. Whilst comity never acts as an exclusionary second-order reason to follow precedent, the need to minimise conflict between levels of a single judiciary, combined with the comparative difference in nature, skill and expertise of the courts in question, supports a strong presumption that lower courts ought ordinarily to follow the prior decisions of higher courts.144 The presumption must

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144 In Agostini v Felton., 521 US 203 (1997) (US SC) 235 and Payne v Tennessee 501 US 808 (1991) (US SC) 828 the United States Supreme Court held that whilst ‘stare decisis is not an inexorable command’ courts are certainly not free to abandon the strong presumption in favour of following superior court precedent. Of course, considerations of comity may be overridden in certain contexts to the extent that lower courts may be required, by statute, to follow superior court precedent. See, for example, s 31 Bundesverfassungsgerichtsgesetz (1951) (German Federal Constitutional Court Act) which provides that in Germany, all Federal Constitutional Court cases are to be followed by lower courts as if they have the same status as statute.
be strong because it is quite clear that the authority to definitively decide questions of law ought to be allocated to the higher court, not the lower court. In circumstances where the lower court is asked to follow a prior decision of the higher court, comity requires the lower court to minimise conflict and respect the most just allocation of authority between the two.

I propose that in this context we may continue to use the presumption of ‘unreasonableness’ developed above. But, the difference in the nature of the authorities in question and the context in which they operate suggests a very restrictive approach to what is considered ‘unreasonable’. The need for consistency between the levels of a single judiciary is certainly greater than the need for consistency between specialist and non-specialist authorities of horizontal jurisdiction. Likewise, the purpose of the higher court is different to the extent that it has been charged with hearing appeals and definitively settling questions of law arising from the lower court. For these reasons, comity supports the presumption that lower courts ought ordinarily to follow the prior decisions of higher courts unless there are first-order reasons of such strength that the lower court has no choice but to consider the prior decision in question one which no reasonable higher court could have made. Importantly, the threshold test of ‘unreasonableness’ must be considered in the strictest of terms.

In common law jurisdiction, lower courts generally consider themselves strictly bound to follow higher court precedent. The presumption in favour of following higher court precedent is so strong that we tend to think of it more like a rule. Yet, there are circumstances where a lower court may displace the presumption on the basis of unreasonableness – namely, a finding of per incuriam. The nature of the authorities in question and the context in which they operate demonstrates that the prior decision certainly needs to be more than ‘unreasonable’ in the ordinary sense of the word. In Morelle v Wakeling145 Lord Evershed MR held:

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145 Morelle Ltd v Wakeling [1955] 2 QB 389 (ENG CA).
As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some feature of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam, must in our judgement, consistently with the stare decisis rule which is an essential part of our law, be of the rarest occurrence.\textsuperscript{146}

In England, as is the case in other common law jurisdictions, the doctrine of stare decisis only permits finds of per incuriam in case where the lower court is satisfied that the omission of the higher court produced an essential flaw in the reasoning of the earlier case so as to make it ‘unreasonable’. This is clearly a high burden to meet, requiring that the prior decision be unreasonable because it was produced by faulty reasoning.\textsuperscript{147}

As we have already discussed the doctrine of stare decisis does not exist in civil law jurisdictions. However, as a matter of practice, civil law courts tend to abide by similar doctrines of precedent. As Konrad Zweigert and Heinz Kötz note:

\ldots it is hardly an exaggeration to say that the doctrine of stare decisis in the Common Law and the practice of Continental courts generally lead to the same results\ldots In fact, when a judge can find in one or more decisions of a supreme court a rule which seems

\footnotesize{\textsuperscript{146} ibid 406.  
\textsuperscript{147} ibid; Broome v Cassell Co Ltd [1972] AC 1027 (UK HL); Young v Bristol Aeroplane Co Ltd [1944] KB 718 (ENG CA).}
to him relevant for the decision in the case before him, he will follow those decisions and the rules they contain as much in Germany as in England or France.\textsuperscript{148}

Whilst the obligation to follow precedent may not be as strong in civil law countries as it is in the common law, rarely will a lower court depart from a higher court’s precedent unless the lower court considers the decision wrong beyond a high degree of doubt. The need to minimise the injustice of conflicting decision between levels of a single judiciary and the misallocation of authority suggests that lower courts, regardless of context, ought to follow the prior decisions of higher courts except in the rarest of cases.

Comity may also inform the doctrines of precedent that exist, or ought to exist, between other authorities of vertical jurisdiction. Take for example, the doctrine of precedent that exist between the ICTY Appeals Chamber and the Trial Chambers. In \textit{Prosecutor v Aleksovski}\textsuperscript{149} the Appeals Chamber held that the Trial Chambers ought to consider its prior decisions as binding in nearly all cases. This, it held, was necessary considering the need to minimise conflict between the Appeals Chamber and the Trial Chambers and because the ICTY Statute had established the Appeals Chamber for the specific purpose of ‘settling definitively certain questions of law and fact arising from decisions of the Trial Chambers’.\textsuperscript{150}

The Appeals Chamber in \textit{Aleksovski} highlighted the need for a doctrine of precedent that minimises conflict between the Appeals Chamber and Trial Chambers and which allocates the authority to definitively settled issues of law to the Appeals Chamber – that being the authority best place, by virtue of its nature, skill and expertise to do so. Whilst the Appeals Chamber did not elaborate on the strength of the presumption to be applied, a review of its

\textsuperscript{148} Konrad Zweigert and Hein Kötz, \textit{An Introduction to Comparative Law} (Clarendon Press 1998) 263. In Sweden, for example, lower courts are generally considered to have a duty to follow higher court precedent ‘except where it is created \textit{per incuriam}.’ – Gunnar Begholtz and Aleksander Peczenik, ‘Precedent in Sweden’ in MacCormick and Summers (n 42) 300.

\textsuperscript{149} \textit{Prosecutor v Zlatko Aleksovski} [2000] IT-95-14/1-A (ICTY App. Ch.)

\textsuperscript{150} ibid 112-113 (Judges May, Mumba, Hunt, Tieya and Robinson).
decisions tends to suggest that it considers that the Trial Chambers ought to apply a presumption similar to that which exists between higher and lower courts in the common law. Of course, it is at the heart of comity that it is for the Trial Chambers, not the Appeals Chamber, to determine how they ought to act with respect to the legitimate authority of others, but this position is consistent with comity.

Comity may also form the basis for a similar doctrine of precedent in the context of the WTO where WTO Panels are often asked to follow the prior decisions of the Appellate Body. The introduction of an appeal mechanism in 1995 as an integral feature of the dispute settlement system has raised the issue of the vertical effect of appellate decisions on WTO Panels. In *US – Stainless Steel (Mexico)*\(^{151}\) the Appellate Body held:

> It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports… Ensuring ‘security and predictability’ in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.\(^{152}\)

The decision in *US – Stainless Steel (Mexico)* is representative of the general practice WTO Panels take towards the prior decisions of the Appellate Body. However, I propose that the ‘cogent reasons’ formula is not consistent with comity. The presumption is not strict enough

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\(^{152}\) ibid 158-162 (Ganesan, Bautista and Sacerdoti).
and does not adequately reflect the nature of the authorities in question and the context in which they operate.

In *US – Stainless Steel (Mexico)* the Appellate Body adopted the term ‘cogent reasons’ from the ICTY Appeals Chamber’s decision in *Aleksovski* and the investment arbitral award in *Saipem v Bangladesh* (both discussed above). Yet in both of these cases the authorities in question considered the ‘cogent reasons’ formula appropriate to determine the authority of different kinds of precedent. In *Aleksovski* the Appeals Chamber considered the ‘cogent reasons’ formula to be appropriate to determine the authority of its own prior decisions – that is, a single authority at different points in time – whilst the Tribunal in *Saipem v Bangladesh* considered the similarly worded ‘compelling grounds’ formula to be appropriate to determine the authority of prior investment awards – that is, co-ordinate authority precedent. The Appeals Chamber in *Aleksovski*, which also considered the approach Trial Chambers ought to take to their precedent, considered that ordinarily Trial Chambers ought to consider themselves bound to follow prior decisions of the Appeals Chamber in the same manner that lower courts consider themselves bound by higher court precedent in common law jurisdictions.

In practice, WTO case law tends to suggest that more than ‘cogent reasons’ are needed to depart from a prior Appellate Body decision. Respectfully, a comity-based conception of precedent suggests that in the context of determining whether a WTO Panel ought to depart from the prior decision of the Appellate Body, cogent reasons will simply not be sufficient. The nature of WTO Panels and the Appellate Body and the context in which they operate suggests much more is needed. In *US – Stainless Steel (Mexico)* the Appellate Body continued:

In the hierarchical structure contemplated in the DSU, panels and the Appellate Body have distinct roles to play. In order to strengthen dispute settlement in the multilateral trading system, the Uruguay Round established the Appellate Body as a standing body.
Pursuant to Article 17.6 of the DSU, the Appellate Body is vested with the authority to review ‘issues of law covered in the panel report and legal interpretations developed by the panel’. Accordingly, Article 17.13 provides that the Appellate Body may ‘uphold, modify or reverse’ the legal findings and conclusions of panels. The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements.153

The Appellate Body in *US – Stainless Steel (Mexico)* certainty has a nuanced understanding of the nature of the Appellate Body *vis-à-vis* WTO Panels and the need to minimise conflict between the two. Yet, it appears nonetheless to have advocated for a presumption not suited to context in which it operates. Had the Appellate Body understood the nature and authority of precedent from a comity-based perspective, it would likely have advocated for a presumption similar to that which exists between other authorities who operate in analogous contexts – namely, a presumption based on ‘unreasonableness’.

All of this of course is not to suggest that higher authorities owe no duty of comity towards lower authorities. Higher authorities ought to act with comity towards lower authorities for the exact same reason that lower authorities ought to act with comity towards higher authorities. Where there is a risk of injustice through conflict, the principle of comity presupposes that the power to definitely decide a certain type of dispute ought to be allocated to that authority best placed to do so.

I propose that it is for this reason that in many jurisdictions higher courts refrain from reviewing findings of fact made by lower courts on appeal. When a decision of a lower court is heard on appeal, the higher court will generally only concern itself with questions of law. As

153 ibid 161 (Ganesan, Bautista and Sacerdoti).
we know, comity supports the higher court’s exercise of power to depart from and overturn the lower court’s decision on questions of law because it is, by virtue of its nature, skill and expertise, better placed to determine such issues. However, in many jurisdictions findings of fact will not be reviewed by higher courts and ordinarily will not constitute a grounds for appeal (unless a finding of fact is wrong beyond a relevant legal standard). This is because the lower court had the opportunity to hear direct evidence and was thus better placed than the higher court to determine relevant questions of fact.

It follows then that the higher court has a duty to ordinarily accept the lower court’s findings of fact. This duty derives from the higher court’s duty to act with comity – a shorthand way to describe its duty to do justice to those before it on appeal. Comity requires the higher court recognise that by virtue of its nature the lower court (as the authority who heard direct evidence) is better placed to determine questions of fact. In such a context, the best exercise of its own adjudicatory power will ordinarily be to recognise the legitimate authority of the lower court for this purpose and accept its findings of fact on appeal. Each court thus owes the other a duty of comity, but comity will require very different actions in different contexts. As we have seen in this section, in the context of determining the authority of precedent, lower courts (like all lower authorities) will incur a strict duty to follow higher precedent because higher courts (like all higher authorities) are comparatively better placed to determine issues of law.

5.5. Our ICSID Case: A Comity-Based Solution?

In Chapter 1 I asked to you to imagine you had been appointed as one of three arbitrators in an ICSID dispute. The Claimant, a property developer from Switzerland, has filed a request for arbitration against the Respondent, the Turkish Government, pursuant to the Swiss-Turkey BIT. The dispute arises out of a contract between the Claimant and a Turkish company.

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154 Agreement between the Swiss Confederation and the Republic of Turkey on the Reciprocal Promotion and Protection of Investments (1988).
owned and operated by the Respondent whereby the Claimant agreed to develop a residential construction project in Istanbul. The contract provides that the Claimant was to complete the project within three years of the contract date and completion was backed by a performance bond issued in favour of the Respondent.

About nine months into construction the project came to an abrupt halt due to zoning-related litigation against the Respondent. The litigation had been pending before the parties entered into the contract however the Respondent did not disclose it to the Claimant during pre-contractual negotiations, nor did the Claimant discover its existence during its due diligence. Eventually, the matter was settled but construction on the project did not recommence for nearly two years.

In an effort to complete the project, the Claimant made repeated requests to the Respondent for an extension of time. However, these requests were denied by the Respondent who proceeded to terminate the contract on the basis of the Claimant’s ‘late performance’. The Respondent subsequently called in the performance bond and ultimately re-tendered the project to a Turkish company with which the Claimant alleges the Respondent has close ties. The Respondent has since seized the project site and most of the Claimant’s assets in Turkey.

In its request for arbitration the Claimant asserts that the Respondent’s termination of the contract is unlawful. Yet, its central claim is that the termination is really just a pretext for the Respondent to remove the Claimant from the project, seize its assets and to give the project to a Turkish company with which it is closely aligned. The Claimant submits, *inter alia*, that the Respondent’s actions constitute a breach of Art. 3(2)\textsuperscript{155} and/or Art. 5\textsuperscript{156} of the Swiss-Turkey

\textsuperscript{155} ‘Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party.’ – Swiss-Turkey BIT, Art. 3(2).

\textsuperscript{156} ‘Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments belonging to investors of the other Contracting Party, unless the measures are taken in the public interest, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. The amount of compensation shall be paid to the investor entitled thereto without delay and made freely transferable.’ Swiss-Turkey BIT, Art. 5.
BIT – namely, that the Respondent afford the Claimant’s investment fair and equitable treatment and refrain from unlawfully expropriating its investment.

Both provisions are open-textured and general in application. They are, *prima facie*, open to a number of normatively defensible, yet mutually exclusive, interpretations. They are also substantively identical to the fair and equitable treatment and unlawful expropriation provisions contained in numerous other BITs – many of which have been the subject of similar disputes in the past. Recognising that the dispute will largely turn on the interpretation given to Arts. 3(2) and 5, the parties routinely rely on prior investment awards in their submissions. The parties even rely on decisions of the ICJ with respect to the general principles that should be applied to the interpretation of international agreements.

The parties reliance on these prior decisions raises an immediate and important question for the Tribunal. What is the authority – if any – of these decisions? And ultimately, how ought the Tribunal act with respect to each? As a member of the Tribunal do you have a duty to recognise them as precedent? And does this mean that you have to follow them even if you disagree? Or can you simply just ignore them and decide the case before you how you see fit?

Whilst our ICSID case is hypothetical, the problem facing our Tribunal is not. Increasingly, investment tribunals are been asked to follow the prior decisions of other authorities – be that prior investment awards or the decisions of other types of authorities such as the ICJ. Yet, academic discussion surrounding the nature and authority of precedent in this context is superficial at best. By equating precedent with hierarchy, scholars tend to argue that prior decisions simply cannot have authority as precedent. We are told that, at most, prior decisions constitute ‘persuasive precedent’ – a term we know to be inherently contradictory. All this of course is of little help to investment tribunals who certainly feel the pull of precedent yet are increasing confused as to how they ought to act with respect to prior decisions.
A comity-based conception of precedent suggest that the obligation to accord weight to the prior decision of another, and in certain circumstances to follow that decision, derives from the duty to act with comity. Comity’s concern with systemic justice presupposes that only one conception of justice can apply to any given dispute and that where the first authority is better placed to resolve the type of dispute in question, or where the second authority is in no better position than the first, the best exercise of adjudicatory power by the second authority will *ordinarily* be to recognise the authority of the first – including its prior decisions. The reason why the second authority acts with, or ought to act with comity towards the first authority is found in the derivative nature of the duty the second authority owes to those subject to its own authority – that is, to resolve the matter before it in the most just manner possible.

We can say, without hesitation, that comity towards the legitimate authority of another can involve a duty on the part of one authority to follow another’s decisions. Yet, whether or not this will be the best exercise of adjudicatory power by the second authority in a particular case depends on the authorities in question and the context in which they operate. Evidently then, the determination as to whether an authority ought to follow the prior decision of another in any given case is context specific.

In this case, our Tribunal has been asked to follow two different types of precedent. The first, those that originate from prior investment tribunals, constitute what I describe as *co-ordinate authority precedent*; whilst the second, those that originate from the ICJ, constitute what I describe as *(horizontal) specialist authority precedent*. Of course, these two types of precedent will ultimately be accorded different weight because the nature of the authorities in question and the context in which they operate is different.

As we saw in section 5.3 (Co-ordinate Authorities), comity supports a presumption that the Tribunal ought to follow the prior decisions of other investment tribunals where they evidence a consensus as to the ‘correct’ resolution of the type of dispute in question. The
Tribunal should only consider itself at liberty to depart from the prior decision of another investment tribunal in such circumstances where it considers the prior decision to be ‘plainly or clearly wrong’ or that there are ‘compelling reasons’ why the prior decision should not be followed in the case at hand. The presumption reflects the need to minimise conflict between investment tribunals and the reality that no investment tribunal can consider itself better placed to resolve any particular type of dispute, or question of law, than any other. Acting with comity allows the Tribunal to minimise the potential injustice of conflict without prejudicing its primary duty to resolve the case before it in the most just manner possible.

As we saw in section 5.4.1 (Specialist Authorities: Horizontal Jurisdiction), comity supports a strong presumption that the Tribunal ought to follow prior decisions of the ICJ concerning the existence and application of general principles of international law. More specifically, the Tribunal ought to follow prior decisions of the ICJ in such circumstances unless the Tribunal considers the prior decision in question to be ‘unreasonable’ in the legal sense of the word. The presumption reflects the need to minimise conflicting decisions between investment tribunals and the ICJ with respect to questions concerning the existence and interpretation of general principles of international law and the comparative competency of both types of authorities to determine such questions.

The comparative skill and expertise of the ICJ means that, even where our Tribunal disagrees with a prior decision of the ICJ, it is more likely that the ICJ’s decisions will be better than the Tribunal’s with respect to the subject matter at hand. Comity, by forming the basis for the presumption, requires the Tribunal recognise the comparative competency of each authority and recognise that the ICJ is better placed to resolve the type of dispute in question. The strength of the presumption reflects the likelihood that the best exercise of adjudicatory power by the Tribunal will ordinarily be for it to recognise the authority of the ICJ and follow its prior decisions as precedent.
It is important to remember that in all cases comity is a principle of ‘recognition’ and ‘self-restraint’. It will always be for our Tribunal to determine what weight – if any – ought to be given to the prior decision of another authority and ultimately whether or not that decision ought to be followed in any given case. Comity does not command how a case shall be decide. Rather, it provides authorities with a principle-based approach to determine how a case ought to be decided with propriety. It recognises that the primary duty of every authority is to resolve cases before it in the most just manner possible. And, whilst it demands that no authority shall abdicate its judgment, it recognises that in certain cases the best exercise of adjudicatory power by one authority may ultimately be to follow the decision of another.

5.6. Conclusions

Comity is a general principle of law. As with all general principles, it has the potential to shed new light on existing practices and provide critical guidance in time of uncertainty. Yet, its application necessarily depends on the authorities in question and the context in which they operate. It may seem paradoxical, but this is the way it is with abstract principles: they apply generally, but their application depends on particulars.

But it is clear that the more we know about comity in general, the more helpful it becomes in specific contexts. As we have seen in this chapter, by harnessing comity’s flexibility in the abstract we can assist a wide range of decision-makers to determine the authority of precedent in concrete situations and offer a principle-based means by which to develop new and existing doctrines of precedent. Whilst this thesis is primarily an exercise in legal theory, this chapter should provide practitioners in various contexts with the practical guidance they need to determine how they ought to act with respect to the prior decisions of others.
6.1. Introduction

The purpose of this chapter is to introduce a sociological element to the conception of precedent advanced in this thesis by exploring the link between comity, precedent and governance. Drawing on the work of political-legal scholars, I propose that comity – by forming the basis for various doctrines of precedent – can contribute to the emergence and evolution of complex systems of governance. In support of this claim, I advance a ‘theory of authority-based governance’ based on Alec Stone Sweet’s ‘model of judicialization’.\(^1\) The theory holds that if an authority, or group of authorities, follow a suitable doctrine of precedent they can, over time, progressively adapt existing normative systems to effectively govern those subject to their authority.

The theory has both positivist and normative implications for the study of governance. Not only can it help reveal the hidden governance function certain authorities already play, but it may also provide a framework within which to better understand emerging systems of governance. With this in mind, this chapter seeks to apply the theory to two different areas of law – namely, English tort law and international investment law – where I propose English courts and international investment tribunals alike are actively contributing to the development of effective systems of authority-based governance by following doctrines of precedent.

6.2. Political Jurisprudence and the Study of Governance

‘Governance’ is a broad term generally used to refer to any process by which an institution, or group of institutions, govern those subject to their authority. More specifically, it is the process by which institutions adapt a given normative system to the experiences and demands of those who live under them. Given that society is always changing, all social systems require mechanisms of change if they are to reproduce themselves over time and regulate the behaviour of those within the system.²

Whilst the term ‘governance’ resembles, and is often used in conjunction with the term ‘government’ it differs in two important respects. First, the term ‘government’ refers specifically to the institutions of government. The term ‘governance’ on the other hand refers to what governments actually do – that is, the processes of governing. Second, governments are not the only institutions that govern. Corporations govern their employees, markets govern those who engage in the market place and even parents can be said to govern their children.³

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Different academic communities use the term governance in connection with a wide range of issues across diverse fields such as development studies, economics, geography, international relations, planning, public administration, sociology, politics and law. Political theorists for example, tend to use the term to conceptualise and explain the various ways in which political institutions coordinate and organise themselves to govern a particular group of people – normally, citizens of a particular State. One of the most obvious and effective ways in which political institutions govern is through the proclamation and enforcement of law. For this reason, the intersection between political institutions and legal systems has led to the emergence of ‘law and politics’ as a unique and flourishing discipline.

Traditionally, law and politics has focused on the governance function of the legislative and administrative arms of government whilst largely ignoring the judiciary. To address this ‘governance gap’ contemporary scholars have sought to create a new, specialised field within the law and politics discipline – the field of ‘political jurisprudence’. The primary aim of political jurisprudence is to shed light on the multitude of ways in which courts also constitute effective institutions of governance.

Political jurisprudence is an extension of certain elements of sociological jurisprudence and judicial realism combined with the substantive knowledge, tools and methodologies of political science. Its foundational premise is that courts must be understood, not as independent institutions but, as an integral part of the governance structure of social systems. The purpose

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4 See generally, Bevir (n 3).
5 As the early American jurists James Wilson observed ‘law is the greatest sinew of government’. It is the principal instrument by which the government exerts its will on society and thus lies at the heart of the study of politics. See, James Wilson and Bird Wilson, The Works of the Honourable James Wilson (Lorenzo Press 1804) 352.
6 The term ‘political jurisprudence’ is usually attributed to Martin Shapiro who, in the early 1960s, was asked to contribute to a symposium on jurisprudence. Borrowing terminology from older sociological jurisprudence and judicial realists, he titled his contribution ‘political jurisprudence’. The term became a widely used label for most political science-oriented research on courts that occurred over the next several decades. See, most notably, Martin Shapiro, ‘Political Jurisprudence’ (1963) 52 Kentucky Law Journal 294; Martin Shapiro, Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence (New York Free Press 1964).
of political jurisprudence then is to supplement both political and legal science by highlighting the inherent, yet somewhat hidden governance function courts play.\textsuperscript{7}

For the political jurist courts are simply political agencies. They form part of the institutional structure of government by sitting alongside other agencies who also make decisions about how citizens ought to be governed. This, of course, includes the legislative and executive arms of government. But, it also includes bureaucrats, commissions and city councils. For political jurists, judges take their place next to other civil servants who all make the requisite decisions of government. By ignoring the web of mystery surrounding the construction, interpretation and application of law political jurists seek to integrate the courts back into the matrix of government. Just like other political agencies then, the courts are seen as comprising but one part of the normative matrix humans use to govern themselves.\textsuperscript{8}

Political jurisprudence is, in many ways, a natural result of the American experience. In the United States, the judiciary is one of three equal branches of government which also exercises a veto power over the actions of the other two. In this sense, it is impossible to ignore the place the judiciaries holds at the heart of government and the process of governing. Drawing on the tools and methods developed by political scientists to analyse the legislative and executive arms of government, political jurists thus began to apply them to the Supreme Court of the United States.\textsuperscript{9}

\textsuperscript{8} ibid 14, 21–38.
The decisions in cases such as *Marbury v Madison*,¹⁰ *Dred Scott v Sandford*,¹¹ *Roe v Wade*,¹² and more recently *Obergefell v Hodges*¹³ have all bought to light the significant governance function that the Supreme Court plays. As the field of political jurisprudence has grown, political jurists have sharpened their tools of analysis and sought to apply them to the judicial branch of government more generally. In more recently years, political jurists have bought to our attention the significant governance function that lower federal and state courts also play.

But there is no reason why the work of political jurists need stop there. Whilst the United States has always been the centre of gravity for the study of political jurisprudence, the tools and methods developed by political jurists may shed light on the governance function of a wide range of authorities in a variety of other contexts outside the United States.¹⁴ Judges are third party dispute resolvers, who are to be distinguished from other decision-making authorities in relative, not absolute terms. Legal reasoning, amongst other things, constitutes a highly formalised species of analogic reasoning which is basic to how all people, everywhere, manage environmental complexity and resolve problems. Underlying the field of political jurisprudence is the broader assertion that much of what we think is special to the world of law, courts and judging is and should be studied as a subset of a more general phenomenon.¹⁵ It follows that to politics jurists there really is not much difference in principle between how parents govern children and how courts govern citizens.

¹⁰ *Marbury v Madison*, 5 US 137 (1803) (US SC) (where the US Supreme Court held that it had the power to set aside law as unconstitutional).
¹¹ *Dred Scott v Sandford*, 60 US 393 (1857) (US SC) (where the US Supreme Court held that slaves had no right to sue in federal court and that the federal government had no power to regulate/abolish slavery).
¹² *Roe v Wade*, 410 US 113 (1973) (US SC) (where the US Supreme Court held that the Due Process clause of the Fourteenth Amendment of the US Constitution extended to a woman’s right to have an abortion).
¹³ *Obergefell v Hodges*, 567 US __ (2015) (US SC) (where the US Supreme Court held that the right to marry is guaranteed to same-sex couples by the Due Process clause and Equal Protection clause of the Fourteenth Amendment of the US Constitution).
¹⁴ Whittington, Kelemen and Caldeira (eds) (n 9) 3–4.
¹⁵ Shapiro and Stone Sweet (n 7) 14, 122–124.
The fact that political jurisprudence is such a new field of study means that the potential governance function of courts in other jurisdictions has gone relatively unnoticed. Few political jurists have turned their attention to the UK Supreme Court, the High Court of Australia, the French Court de cassation, the Swiss Tribunal fédéral or the German Bundesverfassungsgericht for example. Nor have they ventured far into the unexplored territory of the various courts and tribunals that operate below them. Similarly, the potential governance function of international courts and tribunals has, as of yet, been left largely unstudied.\textsuperscript{16}

Drawing on the tools and methodologies developed in political jurisprudence, and to a larger extent political science more generally, below I offer a ‘theory of authority-based governance’. The theory holds that provided an authority, or group of authorities, follow a suitable doctrine of precedent – so that there is a reasonable expectation on behalf of those subject to their authority that prior decisions will ordinarily be followed – they may contribute to the development and evolution of effective systems of governance.

6.3. A Theory of Authority-Based Governance

The theory, expressed diagrammatically below, consists of four basic components: (1) the Normative System; (2) the Dyad; (3) the Triad; and (4) Triadic Construction of the Normative System.\textsuperscript{17} The theory also allows for the optional input of external rule-makers who I conceive of as those who have the power to interpret the normative system from outside the dispute resolution process. The fundamental premise of the theory is that by progressive moving around the circle, \textit{ad infinitum}, we can, by virtue of a self-sustaining process, move from a

\textsuperscript{16} Although, see the work of Stone Sweet and Grisel (n 1).

\textsuperscript{17} The theory is based primarily upon Alec Stone Sweet’s ‘model of judicialization’ as applied to the international trade regime, the French Fifth Republic and international arbitration. It is also based on Joseph Raz’s discussion of institutions and normative systems. See, most notably, Stone Sweet (n 1); Stone Sweet and Grisel (n 1) 1–34, 171–217; Joseph Raz, \textit{Practical Reason and Norms} (3rd edn, Oxford University Press 1999) ch 4.
single dispute between two parties to an elaborate and effective system of authority-based governance.

The theory is intentionally expressed in the abstract, without reference to time, place or type of authority. In this way, it provides a general theory of authority-based governance which may help us better understand how an authority, or group of authorities, contribute to the development of effective systems of governance. By breaking down authority-based governance systems into their constituent parts, the theory is able to translate the micro-level actions of individuals into macro-level governance outcomes.
6.3.1. Stage 1: From Normative System to Dyadic Relations

The dyad represents the simplest of sociological formations and is constituted by any pattern of direct exchange between two parties. A dyad can be made up of two individuals or two groups of individuals and may define a wide range of basic relationships that might exist between any two parties. For example, it may define the relationship between a married couple, a buyer and a seller, a principal and a contractor or two States. A dyad may come into existence explicitly – for example, when two parties conclude a contract that establishes reciprocal rights and obligations – or implicitly – for example, when one party hits another with their car. Because dyads bind single units together they are, in a sense, the building blocks of society. They bind two parties together to the exclusion of others but they may also be linked in chains or clusters to form larger social institutions.

For a dyad to form, there must be at least a rudimentary normative system. The normative basis for the dyad – stripped to its bones – is the principle of reciprocity or the idea that people should treat others as they would like to be treated. Thus, promises should be kept, debts incurred should be repaid and those who suffer loss should, as far as possible, be

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20 Stone Sweet (n 1) 152.
21 Two thousand years ago, a rabbi known as Hillel the Elder was asked to summarize Jewish law while standing on one foot. Daring to meet the test, Hillel articulated his version of The Golden Rule as follows: ‘What is hateful to you, do not do to others. That is the whole law. The rest is simply commentary.’ – Babylonian Talmud, *Shabbat*, v 31a. Around the same time another rabbi voiced similar moral aspirations: ‘Whatever you want others to do to you, do also to them.’ – *Holy Bible – New International Version* (US Zondervan 1984) Matthew, 7:12. And well before either Hillel or Jesus, Moses employed yet another formulation: ‘Love your neighbour as yourself.’ See, ibid Leviticus 19:18. The importance of reciprocity to the dyad has long been a central feature of social science. See, most notably, Alvin Gouldner, ‘The Norm of Reciprocity: A Preliminary Statement’ (1960) 25 American Sociological Review 161.
restored to their original position. This basic notion of reciprocity encourages the creation of dyads and constitutes the starting point for nearly all social interaction.\textsuperscript{22}

Of course, in reality, normative systems are much more complex. The rules of a household, the rules of chess or the unwritten rules of etiquette are all examples of distinct normative systems. So is the law and the sub-categories of law that make up its constituent parts. Contract law, tort law and international investment law, for example, can all be thought of as distinct normative systems. Each provides a subject-specific background of rules and principles which, to varying degrees, facilitate the creation and maintenance of dyadic relations.

We readily observe that normative systems differ over time and place. If we were, for example, to try and borrow money or form a business, the rules and principles which tell us how we should go about doing such things will differ from country to country.\textsuperscript{23} Thus, a contract of sale between a vendor and purchaser, the legal relationship that arises between a negligent manufacturer and a consumer or a treaty between two State only makes sense when considered within its respective normative system.

The normative system is thus best thought of in the abstract simply as the ‘rules of the game’.\textsuperscript{24} Those rules may be formal or informal, constituted by treaties, legislation, contracts, codes, customs, beliefs or traditions. They may be created – as in the Constitution of the United States or the United Nations Declaration of Human Rights – or they may simply evolve over time like the rules of etiquette or the rules of ceremonies. The difference between informal and formal rules is of course one of degree. But together they permits us to identify what is appropriate or normatively defensible behaviour in any given context. In this sense, the

\textsuperscript{24} My definition of the ‘normative system’ is based upon Joseph Raz’s description of the same. It is also similar to what Alec Stone Sweet calls the ‘normative structure’, what North calls ‘institutions’ and what March and Olsen refer to as ‘rules’. For more on this point see, Raz (n 17) ch 4 and 5; Stone Sweet (n 1) 150; North (n 23) 3–6; James March and Johan Olsen, Rediscovering Institutions (New York Free Press 2010) 22.
normative system provides the necessary framework within which all human interaction can take place. Without it, dyadic relations are incomprehensible and incapable of forming.\(^{25}\)

It follows then that the normative system exists to facilitate and maintain dyadic relations. This it does in two key ways. First, by laying down the ‘rules of the game’ the normative system simplifies the range of choices open to individuals. For example, in most jurisdictions contract and/or consumer law will limit the permissible ways in which two parties may contract just as international law will limit the permissible ways in which States may use force. Second, the normative system provides a level of assurance to each party by providing ready-made rules by which they may orient their own behaviour and their expectations of others and by laying down the standard by which they will be judged if a dispute between them erupts.\(^{26}\) In this way, the normative system seeks to manage the uncertainties of human interaction and reduces the transaction costs of entering into what would otherwise be risky dyadic relations.\(^{27}\)

6.3.2. Stage 2: From Dyad to Triad

In a perfect world, every normative system would provide a complete set of rules and principles capable of regulating every conceivable social situation that might arise between any two parties. In this utopia there would be little need for third party dispute resolution because the answer to every problem would be easily recognisable in any given context. Yet, in the world

\(^{25}\) North (n 23) 46–47.

\(^{26}\) ‘Whether we call them customs, laws, usages, or normative rules seems of little importance. What is important is that … members [are not] free to go their own way and explore every possible avenue of behaviour. They operate with a set of rules or standards which define appropriate action under a variety of circumstances. The rules, by and large, operate to eliminate conflict of interests by defining what it is people can expect from certain of their fellow… Rules, even though they may at times produce conflict, reduce the chance for conflict because they reduce the total amount of ambiguity for those concerned by defining specific rather than universalistic claims and obligations. It becomes possible to order one’s life with a set of priorities regarded as legitimate… Rules do not solve all problem; they only simply life.’ – Elizabeth Colson, *Tradition and Contract: The Problem of Order* (Aldine 1974) 51–53.

\(^{27}\) ‘Indeed, the paradigmatic metaphors of game theory – prisoner’s dilemma, chicken, the assurance games – focus our attentions on the fierce difficulties of establishing and maintaining dyadic cooperation.’ – Stone Sweet (n 1) 149. See also, North (n 23) 6; Stone Sweet and Grisel (n 1) 14–15.
we know, all bodies of rules are incomplete and all principles have varying scopes of applicability. Normative systems, no matter how complex, cannot account for every contingency of human life.

The result is an inevitable gap between norms and party action which ultimately generates disputes. The generic source of the normative systems indeterminacy lies in the essential tension that exists between the abstract nature of rules and principles and the concrete nature of human experience.\(^{28}\) In other words, because norms cannot apply themselves, they will always contain a level of indeterminacy. The precise nature, scope and content of rules and principles – and by consequence duties and obligations – can thus only be known through the process of interpretation or construction. Here lies the basic functions of all authorities – to declare for the dyad exactly what the normative system means and how it applies to their unique social situation. In short, to resolve the dispute between them.

The types of disputes that may arise between any two parties in any particular context need not detain us for long. They are, for all intents and purposes, infinite. When a dyad is formed the parties may attach different meaning to the rules and principles of the normative system or they may find that they disagree as to how they ought to apply to new social situations that arise between them. The inherent ambiguity of norms means that parties will often be provided with more than one normatively defensible means of interpreting and applying their normative system to their unique social situation. Using language that we ought now be familiar with – each party may adopt their own, mutually exclusive, conception of justice.

Alternatively, over time the relative value of the dyad may decline for one or both of the parties and they may, calculating ‘best strategies’, succumb to incentives to renege on their obligations.\(^{29}\) Neo-rationalists tell us that dyads are inherently unstable because each party

\(^{28}\) Stone Sweet (n 1) 153; Shapiro and Stone Sweet (n 7) 260.

\(^{29}\) This of course is the essence of what game theorists call the Prisoner’s Dilemma. The Prisoner’s Dilemma is best illustrated by the following example:
faces powerful incentives to ignore normative obligations, thereby cheating on the other. Game theorists emphasise the importance of the normative system as a crucial factor in modifying dyadic behaviour and minimising the likelihood of cheating. Without the rules of the game – including the consequences for contravening them – dyads would fail to exist. The normative system therefore incentivises the creation and maintenance of dyadic relations.

Evidently, the dyad is capable of accommodating both cooperation and conflict. The former is socially enabling allowing individuals to come together for their mutual benefit. The latter however can be socially debilitating, hindering cooperation. In the large majority of cases, dyads, aided by the rules and principles of the normative system, will resolve disputes on their own. Yet, because dyads are inherently unstable and dispute resolution is often difficult between parties embroiled in conflict, there is a functional demand for third party adjudication. If the parties fail to resolve the matter on their own dyadically, they may choose to appoint a third party or may be subject to the compulsory jurisdiction of a third party charged with resolving the matter.30

In the former situation, the dyad delegates the right to resolve the matter to a third party authority at the time of the dispute. This act of delegation recognises but also confers social authority, or legitimacy, on the third party. For example, siblings often appeal to parents, classmates to one another and villagers to a chief. In the latter situation, the act of delegation

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Two members of a criminal gang are arrested and questioned. Each prisoner is held in a separate room and has no means of communicating with the other. The prosecutor lacks sufficient evidence to convict the pair on the principal charge but hopes to sentence both to a year in prison on a lesser charge. Simultaneously, the prosecutor offer each prisoner a bargain. Each prisoner is given the opportunity to either; betray the other by testifying that the other committed the crime, or to cooperate with the other by remaining silent. The offer is expressed as follows:

- If A and B each betray the other, each of them serves 2 years in prison;
- If A betrays B but B remains silent, A will be set free and B will serve 3 years in prison (and vice versa);
- If A and B both remain silent, both of them will only serve 1 year in prison (on the lesser charge).

Game theorists tell us that because betraying a partner offers a greater reward than cooperating, all purely rational self-interested prisoners would betray the other. For more on game theory and the Prisoner’s Dilemma see, William Poundstone, *Prisoner’s Dilemma* (Knopf Doubleday Publishing Group 2011).

30 Stone Sweet (n 1) 150–154; Stone Sweet and Grisel (n 1) 15.

is replaced by an initial, often constitutional act where delegation is frozen in place for the lifetime of the authority. The triadic dispute resolution process is thus triggered by one party against the will of the other at the time of the dispute. Courts are a classic example of compulsory triadic dispute resolution. Yet, so are arbitrators and adjudicators. Explicit rules govern the dispute resolution process and these rules often facilitate the move from a dyadic dispute to triadic dispute resolution even if one of the parties does not consent.\(^{31}\)

The appointment of the third party (be it voluntary or compulsory) creates a triad – namely, the two parties to the dyad and the third party authority now charged with resolving their dispute. To move from the dyad to the triad is to create a particular form of governance – a localised governance function that generates normative guidance about how each party ought to have behaved in the past or ought to behave in the future.\(^{32}\)

Whilst conflict may be debilitating or even destroy the dyad, the triad is born of conflict. It can only exist where the dyad is incapable or unwilling to resolve the dispute itself. The triadic authority’s purpose is thus to guarantee that the dyad will be subject to the normative system under which it falls. It follows that dyadic conflict and the delegation of that conflict to a third party is the fuel that drives the model. If disputants do not delegate or if they are able to resolve their dispute dyadically, the theory implies there is no need for triadic dispute resolution and ultimately no way authorities can develop effective systems of governance.\(^{33}\)

The triad is a universal phenomenon as old as time itself. We all know the stories of King Solomon or the Twelfth Camel.\(^{34}\) Today, dyads still rely on triadic dispute resolution even if that process has become more specialised and formal over time. Often the dispute resolution process will vary along a continuum that stretches from mediation to arbitration and

\(^{31}\) Stone Sweet (n 1) 150; Stone Sweet and Grisel (n 1) 12.
\(^{32}\) Stone Sweet (n 1) 150.
\(^{33}\) ibid 155.
finally coercive adjudication. As we move from left to right along this continuum, the authority of the decision-maker *vis-à-vis* the parties is entrenched and institutionalised in ever more formal rules and procedures. It follows that, at a theoretically level, a mother settling a dispute at the dinner table between her children performs the same function as a commercial arbitral tribunal settling a dispute between two companies or the ICJ settling a dispute between two States. In each case, the authority completes the triad and fulfils the functional need for dispute resolution.

6.3.3. Stage 3: Triadic Construction of the Normative System

The purpose of the triadic authority is to ‘interpret’ or ‘construe’ the normative system and to apply it to the unique social situation that has given rise to the dispute between the parties to the dyad. In this way the authority is being asked to ‘authoritative declare’ what the normative system is and how it governs the dyad. To move from the dyad to the triad then is to create a particular, localised, form of governance.

All authorities necessarily perform this function. A teacher, for example, charged with resolving a dispute between two of her students will be required to determine what the ‘school rules’ are what they mean for each student. In the exact same way, courts and tribunals are required to determine what the law is and how it applies to the litigants before them. In each case, the authority fulfils the functional need for third party dispute resolution by authoritatively declaring what the normative system is and how it applies to the dyad.

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36 There is an important theoretical distinction between the process of ‘interpretation’ and ‘construction’. However, in this Chapter I use the terms interchangeably to refer to the process by which an authority ‘interprets’ or ‘construes’ the meaning and scope of relevant norms so as to apply them to the facts of individual cases. Of course, the term ‘construction’ itself relates to the process of ‘construing’ not ‘constructing’ the meaning and scope of such norms.

37 Stone Sweet (n 1) 147.
6.3.4. *Stage 4: Redefining the Normative System and Modifying Dyadic Relations*

By resolving the dispute, the triadic authority interprets or construes the normative system in a way that is concrete, particular and retrospective for the parties to the dyad. In this way it resolves the existing dispute between two specific parties about the terms of one unique dyadic relationship. As we know from our discussion in section 4.3.1 (What Are Precedent?), the authority’s decision constitutes an ‘authoritative declaration’ of what the normative system is and what it means for the dyad.

Yet this is not only what it does. By justifying its decision – that is, by telling the parties how it reached its decision – the triadic authority also interprets or construes the normative system in an abstract, general and prospective way; generating a discourse about how people ought to behave more generally.\(^{38}\) Elaborating on the nature and scope of the normative system is not the primary purpose of the triad. Rather it is simply a by-product of the duty all authorities have to give reasons for their decisions.

But the decision will not, by itself, modify future dyadic relations. Whilst the decision is ‘authoritative’ *vis-à-vis* the dyad, its authority stops there. The only way a decision may modify future dyadic relations is if there is a reasonable expectation by those subject to the normative system that subsequent authorities will ordinarily judge their behaviour in the same way the authority has judged the dyad. In other words, if there is an expectation that the decision of the first authority will ordinarily be followed by other authorities called upon to determine relevantly similar disputes in the future then future dyads will have reason to modify their behaviour accordingly.\(^ {39}\)

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\(^{38}\) ibid 157; Stone Sweet and Grisel (n 1) 17.

\(^{39}\) Of course, some authorities are already acutely aware of the sociological implications of precedent. For example, former president of the ICJ Rosalyn Higgins has written that States follow decisions of the ICJ ‘because they know that every judgment is at once an authoritative pronouncement on the law, and also that, should they become involved in a dispute in which the same legal issues arise, the Court, which will always seek to act consistently and build on its own jurisprudence, will reach the same conclusions.’ – Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 202–203.
The theory thus implies that for a system of authority-based governance to emerge and evolve of time, authorities must follow a doctrine of precedent. This thesis has argued that comity may provide authorities with a principle-based approach to develop new and existing doctrines of precedent in any given context. By acting with comity, I propose that authorities may, as a by-product of their duty to resolve individual dyadic disputes, extend their governance function beyond individual dyads to future dyadic relations.

Returning to our governance model (expressed diagrammatically at section 6.3), we can now see how the dyad, triad and normative system all fit together to create a system of authority-based governance. And we can also see how a single dyadic conflict can generate a complex process of systemic change. Moving through Stages 1 to 4 we see: (1) a dispute erupts between the parties to the dyad about how the normative system applies to their unique social situation; (2) the dispute is elevated to the triadic level which requires a third party authority to resolve the dispute; (3) to resolve the dispute the triadic authority interprets or construes the normative system and applies it to the unique social situation in which the dyad finds itself – thus resolving the specific dispute between the parties to the dyad; (4) provided future authorities ordinarily follow the decision, the authority’s decision will have redefined the normative system – thus changing the way future dyads are created and maintained.40

Returning to Stage 1 – that is, how the normative system impacts dyadic behaviour – we come full circle to our initial starting point. But we find ourselves in a rather different world this time. The parties comprising the dyad, whether they be the same parties or different ones, have learnt something about the nature of their relationship and about the normative environment in which they exist. Put simply, through the process of interpretation or construction, the authority (and its decision) has redefined the nature, meaning and scope of the normative system which in turn has modified the nature of future dyadic relations.41

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40 Stone Sweet (n 1) 157–158; Stone Sweet and Grisel (n 1) 18.
41 Stone Sweet (n 1) 158; Alec Stone Sweet and Florian Grisel (n 22) 81.
The key condition that drives the model then is the existence of a doctrine of precedent. If this condition is satisfied, the process of triadic dispute resolution is likely to generate a powerful feedback loop that deepens and expands the normative force of the system. Dyadic exchange will inevitably be placed in the shadow of an ever changing normative system and parties will modify their behaviour accordingly. As we move around the circle again and again that shadow will deepen and expand covering more and more forms of human interaction. The process operates according to the logic of increasing returns and path dependence. As it proceeds, dyadic exchange is forced down narrower and narrower pathways. In other words, parties will continuously adapt their behaviour to increasingly finite rules and principles to avoid negative economic consequences. By structuring their relations according to the new redefined normative system, parties remake themselves and their respective communities. As more and more decisions are followed by subsequent authorities, the normative system steadily deepens and expands, becoming more elaborate and differentiated, which in turn helps organise future dyadic interactions.

Yet all this is only possible if authorities follow a suitable doctrine of precedent. Without a doctrine of precedent, future litigants will have no incentive to change their behaviour because they will have no reasonable expectation that future authorities will judge their actions by the same standard as the first authority. It follows that that theory falters if an authority, or group of authorities, do not subscribe to a doctrine of precedent. Yet, if they do, the theory holds that authorities can develop effective systems of governance that do not require any form of hierarchy or the input of external rule-makers. Provided there is an understanding that prior decisions will ordinarily be followed authorities may become powerful institutions of governance.

42 Stone Sweet (n 1) 158.
43 Shapiro and Stone Sweet (n 7) 113–115, 121.
44 Stone Sweet (n 1) 158.
6.3.5. Stage 5 (Optional): The Input of External Rule-Makers

The theory demonstrates how a full-blown system of governance can emerge and be maintained by authorities alone. It requires only that Stages 1 to 4 are reiterated *ad infinitum*. But triadic dispute resolution is not the only means by which normative systems can be modified. Arguably there are more effective ways to govern a population – namely, by the proclamation of new rules and principles.

To reflect this, the theory also allows for the input of external rule-makers. These rule-makers might be public or private and may having varying capacities to modify the normative system. Obvious examples of public rule-makers include institutions such as domestic Parliaments, Congress or the United Nations Security Council. Obvious examples of private rule-makers include institutions such as the International Chamber of Commerce, the International Football Federation or individual companies who may create their own codes of conduct. The theory also accounts for not so obvious external rule-makers such as scholars, practitioners or judges speaking extra-judicially. Whilst these actors generally lack formal authority to modify their respective normative systems, their actions often do.

Conceived in this way, external rule-makers serve an important social function. By introducing new norms, by adapting existing ones and removing others, external rule-makers seek to modify the behaviour of future dyads. Legislating, or rule-making in any form, will ordinarily be a more efficient means of governing a group of individuals than case-by-case adjudication. But, because norms are binding on broad classes of people and activities they are inherently ambiguous. Partly for this reason, and partly because in some contexts legislating is not an option, authorities will play an important role in governing individuals and activity in place of, or in conjunction with, external rule-makers.\(^45\)

\(^45\) In certain common law jurisdictions for example, complete areas of law may be left by the legislature to be developed by the courts. This commonly occurs when consensus cannot be reached in the legislative arm of government or if the legislature does not have the skill or capacity to suitably regulate a particular area of law.
6.3.6. Stages 1-5: Collective Construction

The theory holds that we can move, by virtue of a self-sustaining process, from a single dispute about the terms of a dyadic relationship to an elaborate and effective form of governance. The model breaks down the process of governance into four compulsory stages, each represented by a chronological shift around the governance model.

The theory suggests that, once constituted, triadic dispute resolution will organise future dyadic arrangements by interpreting, then re-interpreting, the normative system within which those dyads exist. Once dyadic relationships are established, triadic authorities perpetuate a discourse – in the form of their decisions – about what the normative system is and how it applies to concrete social situations. This discourse creates a positive feedback loop requiring dyads to modify their behaviour in accordance with the redefined normative system. The theory suggests that, given certain pre-conditions, triadic authorities will reconstruct, gradually but inevitably, the nature of governance. In doing so, they perform a profound governance function to the extent that dyadic participants are drawn into this discourse and help to perpetuate it.

Of course the theory allows for the input of external rule-makers – namely, those capable of modifying the normative system from outside the dispute resolution process. Rule-making is a far more efficient means of coordinating activity than case-by-case adjudication. But because rule-making is not an option in some contexts and because rules and principles are inherently indeterminate, third party adjudication is necessary. The theory ultimately holds that governance systems can emerge with or without the input of external rule-makers.

It might be argued that the theory oversimplifies the process by which an authority-based governance system can emerge and evolve over time. In some respect this is certainly true. The theory is expressed deductively and in the abstract, with no reference to time, place or particular type of authority. All authorities have difference which may affect their capacity

Similarly, in international law, the inefficiency of the treaty process often means that international authorities will develop areas of international law before, or in place of, States.
to participate in the construction of governance. Similarly, the theory jumps from a micro-level analysis (the dyad and the triad) to a macro level analysis (the emergence of complex normative systems). The result is that one may have the mistaken impression that the move from a single dyadic dispute to a complex system of governance is an easy liner one characterised by consensus among successive authorities.

This, however, could not be further from the truth. In reality, the process is a messy one, characterised by a complex interplay between consensus and conflict among a network of interdependent, yet operationally autonomous authorities. By following and departing from each other’s decisions, authorities engage in a type of ‘adjudicatory dialogue’ as to how they believe the normative system ought to be interpreted or construed. Over time, this dialogue redefines the normative system as the network moves towards greater and greater consensus – a process which I call ‘collective construction’.

When we consider questions of governance, we often think that all forms of governance are ‘top-down’, characterised by hierarchy, power and rules. Top-down modes of governance rely primarily upon the undisputed centrality and power of a single decision-maker which turns everybody else into subjects. Top-down modes of governance permeate society – state governments carry out the decisions of federal governments, soldiers carry out orders from their generals and employees carry out the directions of their managers. We often think that all governance structures must incorporate hierarchy, power and rules to function effectively.

However, this is not the case. Our fascination with Weberian hierarchies tends to blinds us to the multitude of ways in which networks of autonomous actors have replaced, exist in place of, or work in conjunction with hierarchical forms of governance. Whilst top-down modes of governance require hierarchy to function, networks operate according to a very different dynamic. The central idea is that groups of largely autonomous actors can, if they act according to certain generally accepted norms, form powerful governance networks capable of
developing effective normative systems through a process of mutual dialogue.\textsuperscript{46} Networks are particularly effective in highly fragmented contexts where the proliferation of largely autonomous authorities undermines the ability of hierarchical forms of governance.\textsuperscript{47} Networks, for example, are often considered one of the most effective solutions to meet the various problems posed by the proliferation of international courts and tribunals and our fragmented system of sovereign States.\textsuperscript{48}

As we know, in the context of reasoning from precedent, no authority is subject to the will of any other. In other words, it will always be for the second authority to determine whether it ought to follow the prior decision of the first. A comity-based conception of precedent makes it clear then that, in this context, authorities are related horizontally, rather than hierarchically. This, of course, does not mean that they cannot be related hierarchically with respect to other issues\textsuperscript{49} or that they are all equal in terms of authority – in many contexts there will be asymmetrical allocations of authority within the network.\textsuperscript{50} But since authorities are related non-hierarchically, no authority can force any other to act or think in a particular way. Even the lowest court of the common law must determine for itself whether or not it is consistent with its duty to act with comity to follow the prior decision of a higher court.

\textsuperscript{46} Eva Sørensen and Jacob Torfing, ‘Introduction’ in Eva Sørensen and Jacob Torfing (eds), Theories of Democratic Network Governance (Palgrave Macmillan 2008) 3–6, 11–14.


\textsuperscript{49} Of course, authorities might operate within an adjudicatory hierarchy of appeal. Thus, the second authority’s decisions may be subject to review by the first authority. Yet, the question of whether or not the second authority ought to follow the first authority’s prior decision as precedent will always be a question for the second authority. As we know from our discussion of classical legal positivism in section 4.4.1, in the context of reasoning from precedent, the first authority cannot force the second authority to follow its decision.

\textsuperscript{50} As we saw in Chapter 5, the authority of a prior decision may differ depending on the nature of the authorities in question and the context in which they operate.
Of course, networks can also be of varying degrees of integration. They might be dominated by loose and informal contacts or they might be tight and formal. They can be self-grown or initiated from above; open or closed; short-lived or permanent; and have a sector-specific or society-wide scope. Domestic judicial networks, for example, are generally characterised by the tight and formal connections that exist between courts. These networks are often regulated by strict procedural rules, are generally initiated from above (provided for by the constitution or legislation), closed (in the sense the network is limited in number), permanent and have society-wide scope. On the other hand, the network of international arbitral tribunals, for example, is often characterised by the loose and informal contacts that exist between tribunals, the open and short-lived nature of the network (in the sense new tribunals are created every day and old ones become extinct) and its sector-specific scope. The multiplicity of governance networks attests to the broad relevance of the concept for describing contemporary forms of societal governance.

It is important to remember that the duty to act with comity is not necessarily a duty to follow precedent. Rather, the duty stems from the broader duty every authority has to do justice to those subject to their own authority. The principle recognises that, in certain circumstances, the best exercise of adjudicatory power by the second authority will be to recognise the first authority’s decision as precedent and refrain from acting on its preferred conception of justice. By the same token, it also recognises that, in certain circumstances, the first authority’s prior decision ought not to be followed because the second authority is better placed to resolve the type of dispute in question or because there are first order reasons of sufficient strength to rebut the presumption in favour of following it.

In this sense, comity appears to bind largely autonomous authorities together by structuring how they ought to act with respect to one another’s authority. Comity might

51 Eva Sørensen and Jacob Torfing, ‘Introduction’ in Sørensen and Torfing (n 46) 11.
therefore be considered a principle of *meta-governance*. All authorities accept, or ought to accept comity as a necessary corollary of their duty to do justice and, by acting with comity, they effectively bind together in form distinct adjudicatory networks. It follows that the process of reinterpreting or reconstruing the normative system operates according network dynamics. As the power to redefine the normative system does not lie in the hands of one centralised decision-maker, the process must be achieved through adjudicatory dialogue between network participants. In the context of reasoning from precedent, the decisions of authorities ought therefore to be viewed collectively as a mutual dialogue amongst network participants as to the proper interpretation or construction of the normative system.

If, for example, the second authority chooses to follow the decision of the first authority, then we may say that the first and second authority have reached a consensus as to how the normative system ought to be interpreted or construed. This, as our governance model predicts, will redefine the normative system which, over time, will in turn modify the behaviour of future dyads and structure how conflict is identified and resolved. However, if the second authority chooses to depart from the prior decision of the first authority, then a conflict between the two authorities arises as to the ‘proper’ interpretation or construction of the normative system. In sociological terms, the second authority will have signalled to the network that it considers that the normative system ought to be interpreted or construed differently to the first authority.

When a third authority is called upon to decide the issue yet again, it will have three options: (1) it may follow the decision of the first authority; (2) it may follow the decision of the second authority; or (3) it may interpret or construe the normative system in an entirely different way, thus introducing a third conception of justice into the mix. Theoretically, this process could continue indefinitely – a fourth authority called upon to decide the issue may resolve the matter entirely different yet again. Yet, if we suppose that the third authority chooses to follow the decision of the first – thereby explicitly or implicitly departing from the
decision of the second – the third authority will signal to the network that it considers the conceptions of justice embodied in the first decision to be the proper interpretation or construction of the normative system. A consensus will thus build in favour of the first decision and against the second.

In this way, we see how the network accommodates both consensus and conflict. Consensus between authorities is necessary if the normative system is to evolve and replicate itself over time. As our governance model predicts, if dyadic participants have no reasonable expectation that their actions will be judged according to a particular standard (as expressed by the prior decision of the first authority) then they will have no reason to modify their behaviour. Yet, conflict should not necessarily be considered negative or antagonistic to the creation and evolution of an authority-based governance system. It is both natural and necessary for an effective and responsive governance system to emerge over time.

Conflicts result in new problems or solutions, in the rethinking of old problems and solutions and the realisation of reform and innovation. Conflict signals to the network that there may be another, better way to do things, or that societal changes mean that what we once thought was right can no longer be considered so. As Lord Denning held in *Packer v Packer*:52

> If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both.53

### 6.4. Redefining of the Normative System: Two Case Studies

A theory of authority-based governance has obvious implications for the study of governance. The theory is deliberately expressed in the abstract without reference to time, place or type of...

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52 *Packer v Packer* [1953] 2 All ER 127 (ENG CA).
53 ibid 129-130.
authority. One could thus, theoretically, use the model to track systemic change over a wide variety of contexts. In this sense, it may shed light on the relationship between comity, precedent and governance in respect of any of the authorities discussed in Chapter 5.

In this section however, I propose to apply the theory to two case studies. The first case study reflects on the development and evolution of the concept of ‘duty of care’ in English tort law. By drawing on our governance model, I propose that we may better understand how English courts have, with relatively no legislative input, developed a complex and nuanced regulatory system that governs negligent interactions. The case study provides an excellent example of the model in practice and demonstrates how English courts, by following the doctrine of *stare decisis*, have continually adapted English tort law to changing environmental circumstances.

The second case study reflects on the development and evolution of the principle of ‘fair and equitable treatment’ in international investment law. Whilst certainly not as complex as English tort law, I propose that by following a *de facto* doctrine of precedent investment tribunals are actively contributing to the creation of an increasingly sophisticated governance system capable of modifying the dyadic behaviour of States and investors. By shedding light on this emerging system of governance, our theory may help alleviate some of the more serious governance concerns that plague the field.

6.4.1. Case Study 1: ‘Duty of Care’ in English Tort Law

Modern English tort law is the result of an established and well-accepted doctrine of precedent. By following the doctrine of *stare decisis*, English courts have developed a complex normative system capable of regulating dyadic relations between a variety of different actors. A review of judicial decisions demonstrates that English courts have, over time, adapted the normative system to the changing needs of society with very little external input from the legislature. For
this reason, our governance model may provide significant insight into the relationship between precedent and the construction of governance in this context.

Prior to the industrial revolution, English manufacturers could not be held liable for personal injury or damage to property resulting from their products unless there was a contract between the manufacturer of the goods and the ultimate consumer. In legal terms, ‘privity of contract’ was needed between the plaintiff and defendant if the plaintiff was to succeed in an action for damages. This position reflected society at the time – namely, that those who made goods generally sold them and the mass manufacturing of goods had yet to become common place.

However, as time went on, the economics of production lines and the specialisation of manufacturers and transporters became increasingly apparent. As England moved full-steam ahead towards the industrial revolution, manufacturers started making goods on a larger scale. At the same time, they started selling their products in bulk to shop-keepers who in turn would sell their products to individual consumers. These two forces – mass production and specialisation – meant that privity of contract between manufacturers and consumers was quickly becoming a thing of the past.54

This, of course, began to create issues for modern British society. There was a feeling among many that manufacturers should be liable if their goods were manufactured negligently and they resulted in personal injury or damage to property. An interesting evolution in the English common law is that, at the turn of the 19th century, an increasing number of cases came before the courts concerning the idea of general manufactures’ liability.55

55 See for example, Langridge v Levy (1837) 2 M & W 519 (Ct. of Exch.); Heaven v Pender (1883) 11 QBD 503 (ENG CA); Derry v Peek (1889) 14 App Cas 337 (UK HL); Le Lievre v Gould [1893] 1 QB 491 (ENG CA); George v Skivington (1869) LR 5 Ex 1 (Ct. of Exch.); Winterbottom v Wright (1842) 10 M & W 109 (Ct. of Exch.).
In 1842, the Court of Exchequer was asked to consider this very question. In *Winterbottom v Wright*\(^{56}\) the defendant (Wright) contracted with the Postmaster General to supply and maintain a mail coach. The Postmaster General contracted with another party (Atkinson) to operate the coach. Atkinson in turn contracted with the claimant (Winterbottom) to drive the coach. The defendant had not maintained the coach properly, in breach of his contractual obligations with the Postmaster General. As a result an accident occurred in which the claimant was thrown from the coach and suffered personal injury. The claimant bought a claim for damages against the defendant but ultimately failed. Lord Arbinger CJ held:

I am clearly of opinion that the defendant is entitled to our judgment… Here the action is brought simply because the defendant was a contractor with a third person; and it is contended that thereupon he became liable to every body who might use the carriage… There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.\(^{57}\)

The court held that the only reasonable construction of the law was to confine the right to recover damages to those who had privity of contract. This meant that Winterbottom was without recourse against the defendant who was in charge of keeping the coach in good repair.

Successive courts would follow *Winterbottom* thus reinforcing the normative system. With the reasonable expectation that future courts would follow the decision, manufacturers and service providers had no reason to modify their behaviour. Those building coaches for

\(^{56}\) *Winterbottom v Wright* (1842) 10 M & W 109 (Ct. of Exch.).

\(^{57}\) ibid 113-114 (Lord Arbinger CJ, with whom Alderson, Gurney and Rolfe BB agreed).
example, and those charged with keeping them in repair, would thus not be held liable for damage resulting from their acts and omissions except in circumstances where they had privity of contract with the plaintiff. The Court had authoritatively declared that third parties, the ultimate consumers of such goods and services, had no right of recourse and subsequent courts, following the decision in Winterbottom, would slowly solidify that position as the ‘correct’ interpretation of the law.

It was not until 90 years later that the House of Lords would depart from Winterbottom in the case of Donoghue v Stevenson. In Donoghue, the House of Lords held that manufacturers did in fact owe a duty of care to consumers – despite the fact there was no privity of contract – to avoid manufacturing goods they could reasonable foresee would be likely to cause injury or damage. The case is often referred to as the most important decision in the common law because it revolutionised how British society regulates the relationship between manufacturers and consumers and ultimately, all goods and service providers.

In Donoghue, the claimant (Donoghue) was given a bottle of ginger beer, bought by her friend from a café. The defendant (Stevenson) was the manufacturer of that ginger beer. Donoghue alleged that the ginger beer contained the decomposing remains of a snail and by drinking the beer she suffered personal injury in the form of gastroenteritis. As Lord Buckermaster pointed out, the case was analogous in nearly every respect to the Court of Exchequer’s prior decision in Winterbottom.

Citing the long line of cases which had followed and elaborated upon Winterbottom, counsel for the defendant argued:

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58 M’Alister (or Donoghue) v Stevenson [1932] AC 562 (UK HL).
60 M’Alister (or Donoghue) (Pauper) v Stevenson [1932] AC 562 (UK HL) 568.
… it is now firmly established both in English and Scottish law that in the ordinary case (which this is) the supplier or manufacturer of an article is under no duty to anyone with whom he is not in contractual relation… This general principle has been consistently and uniformly applied both in Scotland and in England for very many years, and excludes the view now contended for by the Appellant.61

The House of Lords agreed that on prior cases the claimant would have no recourse against the defendant. However, changes in society – primarily the now distant relationship between manufacturers and consumers – meant that the decision in *Winterbottom* could no longer be considered correct. Departing from a long line of prior decisions, the House of Lords held that the defendant did in fact owe the plaintiff a ‘duty of care’. This duty derived from the general duty everybody has to take reasonable care to avoid foreseeable injuries to others. Elaborating on this point Lord Aitkin held:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.62

The House of Lords thus held for the first time that manufacturers owed a duty of care to consumers by virtue of their proximity – that is, because their negligent acts or omissions were likely to directly affect consumers. It follows that Stevenson was found to have breach his duty

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62 M’Alister (or Donoghue) (Pauper) v Stevenson [1932] AC 562 (UK HL) 580.
of care by failing to take reasonable steps to ensure Donoghue’s safety in the production of his ginger beer.

In Winterbottom, the argument was that liability must end somewhere and so it might as well end where the contract finishes. Lord Aitkin’s decision in Donoghue could not be more different. In his opinion, a duty of care is owed to all those placed at a reasonably foreseeable risk of injury by someone else’s actions. This duty, Lord Aitkin held, was based ‘upon a general public sentiment of moral wrongdoing for which the offender must pay.’ In other words, upon the legal principle of corrective justice that operates between any two parties.

Let us now revert back to our governance model to see whether we can explain this shift sociologically. Prior to 1932, the normative system governing dyadic relations between manufacturers and consumers was characterised by the case of Winterbottom. In that case, the Court authoritatively declared that manufacturers were not liable to consumers for injuries caused by the negligent production of their products if there was no privity of contract between them. This, of course, meant that manufacturers were free to sell their products to third parties without having to take reasonable care to ensure those goods would not result in injury to consumers or damage to their property.

Yet, as a result of the industrial revolution, an increasingly large number of goods were passing through middle-men. Manufacturers would sell their goods to shop-keepers, and shop-keepers would in turn sell those products to consumers. The result was that for a wide variety of products, there was no privity of contract between the manufacturer and the ultimate consumer. This, of course, left a ‘governance-gap’ where those who suffered personal injury or damage to their property had no recourse against negligent manufacturers. After the industrial revolution, there was a need to adapt English law to this new world in which

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63 ibid.
64 Beever (n 59) 120–121.
manufacturers and consumer were no longer, as a matter of course, bound directly by contracts of sale.

In 1932, the House of Lords departed from *Winterbottom*, declaring that English law did in fact recognise that a general duty of care is owed to those placed at a reasonably foreseeable risk of injury by someone else’s actions. Drawing on the principle of corrective justice, the House of Lords held that if a manufacturer sells a product with the intention that it will be used by a consumer with which they have no contract, they owe a duty of care to that consumer to take reasonable care in its production. The decision clearly redefines the normative system – it constitutes an adoption of the legal norms that govern dyadic relations between manufacturers and consumers to accommodate changes in modern British society.

At the dyadic level, *Donoghue* was simply a dispute between two parties as to the rules and principles that governed their relationship. Donoghue argued that Stevenson owed her a duty of care that required Stevenson to take reasonable steps to ensure her safety in the production of his ginger beer. Stevenson on the other hand argued that he did not. Donoghue thus instituted court proceedings against Stevenson elevating the dispute to the triadic level.

The purpose of the triad of course is to resolve the dispute between the parties to the dyad. The triadic dispute resolution authority, in this case the House of Lords, was thus required to determine what the normative system was and what it meant for the parties given their unique social situation. In deciding as it did, the House of Lords construed the normative system in a way that was concrete, particular and retrospective for the parties, ‘authoritatively declaring’ that Mr Stevenson did in fact owe a duty of care to Ms Donoghue. Yet, in justifying its decision – that is, in telling Ms Donoghue and Mr Stevenson how it reached its decision – the House of Lords also construed the normative system in an abstract, general and prospective way. In this sense, it opened up a discourse about how manufacturers ought to behave more generally towards consumers.
Of course, the House of Lords’ decision was incapable of redefining the normative system by itself. Its effect was limited only to the dyad – namely, the dispute between Donoghue and Stevenson. The only way the decision could redefine the normative system is if other authorities were to follow the decision in relevantly similar cases arising in the future. Without a doctrine of precedent, future manufacturers would have no economic incentive to modify their behaviour with respect to the safety of consumers.

This, of course, the English courts do particularly well. English courts follow the doctrine of *stare decisis* – a particularly strong doctrine of precedent. Following the advice of legal counsel that they would no longer be immune from liability, manufacturers quickly implemented new processes and procedures to ensure their products would be less likely to cause injury to consumers or damage to their property. By following the House of Lord’s decision, subsequent courts signalled to manufacturers that their behaviour would be subject to the same standard as Stevenson. This signal revolutionised English tort law and British society more generally because it lead to a change in the normative system governing the relationship between manufacturers and consumers and created a strong economic incentive for manufacturers to institute processes aimed at minimising potential injury and damage to consumers and their property.

Of course, the introduction of a general duty of care was not the only change. By ‘authoritative declaring’ that manufacturers owed a duty of care to consumer, the House created a virtuous circle that would, over the next 70 years, spur the development and evolution of a complex and effective normative system of negligence. Lord Aitkin’s definition of ‘duty of care’ was so wide and open-textured that it would inevitable spark future disputes about the nature and scope of the duty. The central premise that you must take *reasonable care* to avoid *acts or omissions* which one can *reasonable foresee* would be likely to injure your *neighbour* required a significant amount of subsequent interpretation on the part of future courts. What
constitutes reasonable care in any given context? What is an act or omission for this purpose? What test should apply to determine whether an injury was reasonable foreseeable? And who, at law, is your neighbour?

Even today, parties draw upon the courts to answer these questions in increasingly varied contexts. As the courts hear new legal problems and ‘authoritatively declare’ for parties what the normative system is in different contexts, the system becomes more complex and expansive. This process is represented by the self-perpetuating circular shift from Stages 1 to 4 of our governance model. As we move around the circle again and again the normative system’s shadow deepens and expands clarifying the nature of the duty and covering more forms of human interaction.

For example, in the immediate aftermath of Donoghue, English courts held the case to be precedent only for the proposition that manufacturers of goods owed a duty of care to consumer. But, over time, the courts would recognise that a duty of care was also owed to those who ‘consumed’ services. Subsequent courts, for example, would find that financial advisors owe a duty of care to their clients not to give negligent financial advice, doctors owe a duty to their patients to exercise reasonable care and skill in diagnosing, advising and treating patients and solicitors owe a duty to their clients to give prudent legal advice. Of course, in each of these cases, the nature and scope of the duty in the particular context would require further litigation thus redefining the normative system again and again. Yet, it is through this process that English courts slowly deepened and expanded the reach of the law of negligence.

A virtuous circle was thereby created – the courts would clarify the normative system for parties which would force the law down narrower and narrower paths. As new parties came to the courts to clarify new aspects of the normative system, each decision would redefine the

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65 Home Office v Dorset Yacht Co (1970) AC 1004 (UK HL) 2027 (Lord Reid).
67 Sidaway v Bethlem Royal Hospital Governors [1985] AC 871 (UK HL).
system again and again making it more comprehensive in nature. Each time the courts decided an issue concerning the nature or scope of the law of negligence, the normative system steadily expanded, becoming more elaborate and differentiated so as to cover more and more dyadic relations. This in turn would structure future dyadic relations, conflict and dispute resolution. Soon all goods and service providers were aware that, in particular circumstances, they would be held liable for foreseeable injuries to others as a result of their negligent acts or omissions. This of course provided them with a strong economic incentive to avoid negligent acts or omissions in their respective fields.

Today, English tort law is a complex normative system that covers a wide range of dyadic relations. Yet, even now it is still evolving. Our governance model makes it clear that this process is, for all intents and purposes, never-ending. The disparity between the abstract nature of norms and the concrete nature of human experience means there will always be a need for triadic dispute resolution. Of course, it is this need that facilitates change and the evolution of the system. So long as English courts continue to follow the doctrine of stare decisis, their decisions will reconstruct the normative system and modify dyadic behaviour. In this way, the courts will continue to be key players in the construction of an effective system of governance.

6.4.2. Case Study 2: ‘Fair and Equitable Treatment’ in International Investment Law

In much the same way, investment tribunals are actively contributing to the development of an increasingly elaborate system of governance around certain key principles of international law. Whilst there is no formal doctrine of precedent in international law, as we saw in Chapter 5 modern arbitral jurisprudence demonstrates that investment tribunals do in fact follow a de facto doctrine of precedent.69 I propose that by doing so investment tribunals are slowly

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69 For more on this de facto doctrine of precedent see section 5.3 (Comity in Practice – Co-ordinate Authorities).
constructing a complex and effective system of governance aimed at regulating dyadic relations between States and investors.

There are a number of areas of international investment law where this is occurring. Yet, perhaps the most interesting example is the evolution of the fair and equitable treatment standard. By subscribing to a doctrine of precedent – one which permits subsequent tribunals to follow and depart from prior decisions – investment tribunals are engaged in an on-going dialogue as to the appropriate nature and scope of fair and equitable treatment provisions. This dialogue is still, to a very large extent, on-going and for that reason many questions concerning the nature and scope of the fair and equitable treatment standard remain unanswered. But, by following each other’s decisions, investment tribunals have, over time, settled particular aspects of the principle and ultimately redefined it as a key norm of international investment law.

Fair and equitable treatment is perhaps the most important standard in investment disputes. Most treaties dealing with the protection of investments contain this standard and it is invoked in the large majority of cases bought to arbitration. A pro-forma example of the standard (and coincidentally, the one facing our ICSID Tribunal) is contained in Art. 3(2) of the Swiss-Turkey BIT:

Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party.

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71 Agreement between the Swiss Confederation and the Republic of Turkey on the Reciprocal Promotion and Protection of Investments (1988).
Art. 3(2) is substantively similar to the fair and equitable treatment provisions contained in nearly all other investment treaties.\(^{72}\) During the great wave of investment agreements signed in the 1980s and 1990s, States virtually cut and paste the fair and equitable treatment provision contained in their agreements from a basic template.\(^{73}\)

If we revert back to our governance model we can make two early observations. First, by including fair and equitable treatment provisions in their investment agreements, States can be seen as assuming the role of external-rule makers. Of course, States will always be able to influence the way in which norms of international investment law are interpreted by arguing for a particular construction as a party to investment disputes. However, in a much more direct way, States are also able to redefine the normative system of investment law by adding, subtracting or modifying norms *ex ante*. In this context, the fair and equitable treatment provisions contained in most agreements can be seen as an addition to the normative system by States in their position as external-rule makers. States intended that the principle would govern their future dyadic relations with foreign investors.

Second, the fair and equitable treatment standard is a classic example of an open-textured, incomplete norm. Art. 3(2) of the Swiss-Turkey BIT is an perfect example.

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\(^{72}\) According to Alec Stone Sweet and Florian Grisel only 1.8 per cent of BITs do not contain a fair and equitable treatment provision. See, Stone Sweet and Grisel (n 1) 215.

\(^{73}\) ibid 192. See, for example, the following fair and equitable treatment provisions which have only minor linguistic difference:

- *Treaty between the United States of America and the People’s Republic of Bangladesh concerning the Reciprocal Encouragement and Protection of Investments* (1986) (US-Bangladesh BIT), Art. II(3): ‘Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party.’

- *Agreement between the Republic of France and the Republic of Argentina concerning the Reciprocal Encouragement and Protection of Investments* (1991) (France-Argentina BIT), Art. 3: ‘Each Contracting Party shall extend and ensure fair and equitable treatment in accordance with the principles of International Law to investments made by investors of the other Contracting Party in its territory or in its maritime area, and ensure that the exercise of the right thus recognized shall not be hindered by law or in practice.’

- *Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments* (1993) (Australia-Hong Kong BIT), Art. 2(2): ‘Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the area of the other Contracting Party.’
Reasonable arbitrators could – and have – come to very different interpretations of the nature and scope of the principle and how it ought to apply to dyadic relations in any given context. In words that should be familiar by now – it is normatively defensible for different arbitrators to adopt very different conceptions of justice.

Investment agreements provide virtually no guidance as to how these fair and equitable treatment provisions ought to be interpreted. Rather, in a race to finalise these agreements, States left the interpretation process to arbitral tribunals. This, of course, reduces contracting costs for States – the primary participants in the original contracting process. But it also acts as a catalyst for disputes. For dyads – in this case, States and investors – the general obligation of a State to afford investors fair and equitable treatment is simply too open-textured to match the concrete nature of party actions and expectations.

As a general principle, the fair and equitable treatment standard is ripe for dispute. Investors will always seek to expand the nature and scope of the principle to gain more protection against State action whilst States will seek to do the exact opposite in an effort to gain more control within their borders. Whether an act of State is fair and equitable will thus require significant interpretation on the part of investment tribunals. As Peter Muchlinski notes:

The concept of fair and equitable treatment is not precisely defined. It offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its

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74 The significant discretion afforded to tribunals in this context has not gone unnoticed. ‘It thus inevitably falls to the adjudicatior to determine whether particular conduct by a state “crosses the line” that separates valid regulatory activity from expropriation.’ – *Saluka Investments B.V. v The Czech Republic*, Partial Award, UNCITRAL (2006) (PCA-UNCITRAL) 264 (Watts, Fortier and Behrens). ‘A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the case.’ – *Mondev International Ltd v United States of America*, Award, ICSID Case No. ARB(AF)/99/2 (2002) (ISCID) 118 (Stephen, Crawford and Schwebel). ‘… Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.’ – *Waste Management Inc. v United Mexican States (‘Number 2’)*, Award, ICSID Case No. ARB(AF)/00/3 (2004) (ICSID) 99 (Crawford, Civiletti and Gómez).
interests. It is, therefore, a concept that depends on the interpretation of specific facts for its content.\textsuperscript{75}

It is no surprise then that the fair and equitable treatment standard is one of the most litigated issues in investment law. But, as we will see, the functional need for third party dispute resolution to resolve questions concerning the nature and scope of the standard has provided the perfect catalyst for an authority-based governance system to emerge. In short, dyadic conflict has, and continues to, facilitates movement around the governance model. Conflict leads to triadic dispute resolution, triadic dispute resolution leads to construction of the normative system and precedent leads to redefinition. By analysing arbitral jurisprudence we can see how our governance model sheds light on this process over time.

Like other general principles of law, the principle of fair and equitable treatment has been subject to increased specification through interpretation. A number of awards – particularly in the last fifteen years – have made valuable contributions towards settling the nature and scope of the principle. Whilst the principle is still in its infancy, our governance model predicts that a steady stream of future fair and equitable treatment claims will lead tribunals to develop an increasingly dense and articulated jurisprudence on the subject. In other words, an increasingly complex and effective system of authority-based governance.

Arbitral jurisprudence demonstrates that tribunals have developed the fair and equitable treatment standard as a type of ‘master norm’ – an overarching principle that informs a wide variety of actions. The result is that, today, the principle is comprised of a wealth of derivative sub-principles, including: good faith; due process, the reason giving requirement and access to justice; regulatory consistency and transparency; reasonableness, non-arbitrariness and non-

\textsuperscript{75} Peter Muchlinski, \textit{Multinational Enterprises and the Law} (Blackwell 1999) 625.
discrimination; and proportionality. Successive tribunals have gradually assembled these norms under the doctrine of the ‘legitimate expectations of the investor’.\textsuperscript{76}

It was not until 2003 that arbitral tribunals open up a dialogue as to the proper interpretation of the fair and equitable treatment standard. Early awards in particular, made it clear that the principle primarily involved a commitment by States to protect the legitimate expectations of investors. An investor’s legitimate expectations may include, for example, an entitlement to some minimal level of stability in the host State’s regulatory environment, and more if expressly promised by the State to induce the investment. Later, however, tribunals refined earlier jurisprudence on the subject holding that the legitimate expectations of the investor must be balanced against the State’s sovereign ‘right to regulate’ in order to pursue important public interests. Such interests may include, for example, the right to regulate in respect of the health of a host State’s citizens or to take strong regulatory measures to lessen the impact of, or avert, a financial crisis.

Today, the principle of fair and equitable treatment has been redefined as a master norm which requires tribunals to balance the legitimate expectations of investors against the sovereign prerogative of States to regulate in the pursuit of important public interests. By debating the nature and scope of the principle, successive tribunals have clarified the principle and provided normative guidance to States and investors about their rights and obligations. Below I analyse five important awards which helps elucidate this progression over time.

The 2003 award in \textit{Tecmed v United Mexican States}\textsuperscript{77} was the first to announce the legitimate expectations doctrine as a part of the fair and equitable treatment principle. In that case, the Tribunal was required to determine the nature and scope of Art. 4(1) of the Spain-


\textsuperscript{77} \textit{Técnicas Medioambientales Tecmed SA v United Mexican States}, Award, ICSID Case No. ARB (AF)/00/2 (2003).
Mexico BIT which guaranteed ‘fair and equitable treatment’ to foreign investors.\textsuperscript{78} The Tribunal held that, in light of the good faith principle established by international law, Art. 4(1):

\textldots requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations\ldots The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.\textsuperscript{79}

The \textit{Tecmed} award tied the idea of legitimate expectations – or as the Tribunal called them ‘basic expectations’ – to the principle of fair and equitable treatment. In doing so, it set the scene for future tribunals to adopt the same approach to fair and equitable treatment claims. In the years that followed, investment tribunals would follow the decision, thus redefining the fair

\textsuperscript{78} ‘Each Contracting Party will guarantee in its territory fair and equitable treatment, according to International Law, for the investments made by investors of the other Contracting Party.’ – \textit{Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the United Mexican States} (1996), Art. 4(1).

\textsuperscript{79} \textit{Técnicas Medioambientales Tecmed SA v United Mexican States}, Award, ICSID Case No. ARB (AF)/00/2 (2003) (ICSID) 155 (Grigera Naón, Fernández Rozas and Verea).
and equitable treatment principle as one concerned with the protection of the legitimate expectations of investors.  

The decision however attracted strong criticism from the arbitral community, many of whom considered it to endorse an interpretation of the fair and equitable treatment standard that was essentially ‘pro-investor’.  

The decision cast the fair and equitable treatment principle as concerned primarily with the protection of the legitimate expectations of investors without paying equal attention to the sovereign right all States have under international law to regulate in pursuit of important public interests within their territory.

Over time successive tribunals would supplement the Tecmed decision by interpreting the fair and equitable treatment standard as one which required tribunals to balance the legitimate expectations of investors against the need for States to regulate in pursuit of important public interests. Explicit recognition of this ‘right to regulate’ as a necessarily corollary of the fair and equitable treatment standard emerged in Thomas Wälde’s dissent in the 2006 NAFTA case of Thunderbird v United Mexican States. Although Thunderbird is a

80 ‘The relevant question for international law in this discussion is not whether there is an obligation to refund VAT, which is the point on which the parties have argued most intensely, but rather whether the legal and business framework meets the requirements of stability and predictability under international law. It was earlier conclude that there is not a VAT refund obligation under international law … but there is certainly an obligation not to alter the legal and business environment in which the investment has been made. In this case it is the latter question that triggers a treatment that is not fair and equitable.’ – Occidental Exploration and Production Company v The Republic of Ecuador, Final Award, LCIA Case No. UN3467 (2004) (LCIA-UNCITRAL) 191 (Vicuña, Brower and Sweeney). ‘… the different factors which emerge from decisions of investment tribunals as forming part of the [fair and equitable treatment] standard … comprise … the obligation to … refrain from … frustrating the investor’s reasonable expectations with respect to the legal framework affecting the investment.’ – Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan, Award, ICSID Case No. ARB/03/29 (2009) (ICSID) 178 (Kaufmann-Kohler, Berman and Böckstiegel). Also see, MTD Equity v The Republic of Chile, Award, ICSID Case No. ARB/01/7 (2004) (ICSID); LG&E Energy Corp v The Argentine Republic, Award, ICSID Case No. ARB/02/1 (2006) (ICSID); Azurix Corp v The Argentine Republic, Award, ICSID Case No. ARB/01/12 (2006) (ICSID); International Thunderbird Gaming Corporation v The United Mexican States, Award, UNCITRAL (2006) (ICSID-UNCITRAL); Saluka Investments B.V. v The Czech Republic, Partial Award, UNCITRAL (2006) (PCA-UNCITRAL); Total S.A. v The Argentine Republic, Award, ICSID Case No. ARB/04/01 (2010) (ICSID); El Paso Energy International Company v The Argentine Republic, Award, ICSID Case No. ARB/03/15 (2011) (ICSID).

81 ‘The Tecmed “standard” is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all States should aspire but very few (if any) will ever attain.’ – Zachary Douglas, ‘Nothing If Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex’ (2006) 22 Arbitration International 27, 28.

NAFTA case, Wälde focused on the fair and equitable treatment standard as a common principle at the heart of international investment law.

Following *Tecmed*, amongst others, Wälde held that it was now undisputed that the fair and equitable treatment standard was concerned with the protection of the legitimate expectations of investors. In this vein, he held:

These awards – *Metalclad v Mexico, Tecmed v Mexico, Occidental v Ecuador, Waste Management v Mexico II and MTD v Chile* – may not have explained the doctrinal background of the principle, its scope and contours specifically, but these authoritative precedents have contributed towards establishing the “legitimate expectation” as a sub-category of “fair and equitable treatment”…

Wälde’s decision makes it clear that he was acutely aware that arbitral awards have the capacity to redefine norms of international investment law. However, he also made it clear that the proper interpretation of the fair and equitable treatment standard had yet to be settled. In his opinion, the principle necessarily requires arbitrators to engage in a balancing exercise – something that was missing from prior cases. Making reference to decisions of the CJEU, the ECtHR, the WTO Appellate Body and domestic courts, Wälde held that whilst every investor should be protected against unexpected and detrimental changes of policy by the host State:

… [s]uch protection is, however, not un-conditional and ever-lasting. It leads to a balancing process between the needs for flexible public policy and the legitimate reliance on particular investment-backed expectations.

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83 ibid 30.
84 ibid 25-33.
85 ibid 30.
Two months later, the Tribunal in *Saluka v Czech Republic* held that the legitimate expectations doctrine was the ‘dominant element’ of the fair and equitable treatment principle. Citing *Tecmed* in support, the Tribunal held that by virtue of the fair and equitable treatment standard included in Art. 3.1 of the Czech Republic-Netherlands BIT, the Czech Republic assumed an obligation to treat foreign investors in a way that would avoid frustration of their legitimate and reasonable expectations.

However, the Tribunal held that the fair and equitable treatment principle did not only concern the protection of investors’ legitimate expectations. If it did, it ‘would impose upon host States’ obligations which would be inappropriate and unrealistic.’ It continued:

No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, the host State’s legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.

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87 ibid 302 (Watts, Fortier and Behrens).
The determination of a breach of Article 3.1 by the Czech Republic therefore requires a weighing of the Claimant’s legitimate and reasonable expectations on the one hand and the Respondent’s legitimate regulatory interests on the other.\textsuperscript{91}

The Tribunal in Saluka reconfirmed that investors’ legitimate expectations were the dominant protection afforded under the fair and equitable treatment principle. However, the Tribunal also reshaped the principle, narrowing the protection it affords investors by recognising that the legitimate expectations of investors must be balanced against the right of domestic authorities to regulate in pursuit of important public purposes. The Tribunal thus constructed the principle as an overarching ‘balancing norm’ which would ultimately be followed by numerous subsequent tribunals.

In 2010 and 2011, two awards – Total v Argentina\textsuperscript{92} and El Paso v Argentina\textsuperscript{93} – consolidated what is now considered the proper interpretation to be given to the fair and equitable treatment standard. Both Tribunals followed Saluka recognising that the principle of fair and equitable treatment requires tribunals to balance the investors legitimate interests with the sovereign right of all States to regulate matters within their own borders. In Total the Tribunal held:

\begin{quote}
Tribunals have often referred to the principle of the protection of the investor’s legitimate expectations especially with reference to the “stability” of the legal framework of the host country applicable to the investment, as being included within the fair and equitable treatment standard… On the one hand, stability, predictability and consistency of legislation and regulation are important for investors in order to plan...
\end{quote}

\textsuperscript{91} ibid 304-306 (Watts, Fortier and Behrens).
\textsuperscript{92} Total S.A. v The Argentine Republic, Award, ICSID Case No. ARB/04/01 (2010) (ICSID).
their investments, especially if their business plans extend over a number of years… On the other hand, signatories of such treaties do not thereby relinquish their regulatory powers nor limit their responsibility to amend their legislation in order to adapt it to change and the emerging needs and requests of their people in the normal exercise of their prerogatives and duties.\textsuperscript{94}

The \textit{El Paso} Tribunal echoed the same approach. Following a long line of awards, the Tribunal held that there is an ‘overwhelming trend to consider the touchstone of [the fair and equitable treatment standard] to be found in the legitimate and reasonable expectations of the Parties.’\textsuperscript{95} However:

\ldots it is inconceivable that any State would accept that, because it has entered into BITs, it can no longer modify pieces of legislation which might have a negative impact on foreign investors…

Under a [fair and equitable treatment] clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature. Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze…

In other words, fair and equitable treatment is a standard entailing reasonableness and proportionality. It ensures basically that the foreign investor is not unjustly treated, with

\textsuperscript{94} \textit{Total S.A. v The Argentine Republic}, Award, ICSID Case No. ARB/04/01 (2010) (ICSID) 114-115 (Sacerdoti, Alvarez and Marcano).

\textsuperscript{95} \textit{El Paso Energy International Company v The Argentine Republic}, Award, ICSID Case No. ARB/03/15 (2011) (ICSID) 348 (Caflisch, Bernardini and Stern).
due regard to all surrounding circumstances. [The fair and equitable treatment standard] is a means to guarantee justice to foreign investors.96

Both the Total and El Paso Tribunals emphasised the importance of context – the general political and economic circumstances surrounding the investment – to the various ways in which legitimate expectations and the right to regulate reciprocally limit one another. The investor can never expect ‘economic stability’, and the fair and equitable treatment standard is not a general stabilisation clause. Nonetheless, the principle does protect the ‘legitimate expectations’ of investors. Whether or not an investor’s expectations will be legitimate will need to be determine in the context of the case by reference to all the surrounding factors.

Although there remain important disagreements concerning the nature and scope of the fair and equitable treatment standard, the arbitral process has largely determined its basic parameters.97 What started as an open-textured incomplete norm was construed almost 15 years ago as a principle concerned almost solely with the protection of investors’ legitimate expectations. Today, it has been the subject of a number of significant awards which have refined its nature and scope, redefining it as a meta-norm which requires tribunals to engage in a nuanced balancing act that takes into consideration both the legitimate expectations of investors and the sovereign right of all States to regulate matters within their territory.

Reverting back to our governance model we can see why fair and equitable treatment provisions beget disputes. As with all general principles, the disjunct between the abstract nature of norms and the concrete experiences of parties causes conflict. The functional need for a third party to authoritatively interpret the nature and scope of the principle is a strong catalyst for the creation of an authority-based governance system. By following a de facto

96 ibid 367-374 (Caflisch, Bernardini and Stern).
97 Stone Sweet and Grisel (n 1) 203.
doctrine of precedent, tribunals have successfully redefined the normative system within which States and investors operate.

As our theory predicts this has led to, or is likely to lead to, a change in dyadic behaviour. On the one hand, States are now acutely aware of many of the types of action that will constitute a violation of the fair and equitable treatment standard. It is too early to tell, but our governance model predicts that States are less likely to take action in the future which they know, by virtue of prior awards, have been held to be a violation of the fair and equitable treatment standard. States now have a reasonable expectation that they will be judged to the same standard as host States in prior awards and thus have a powerful economic incentive (in the form of an adverse award) not to breach their obligations.

At the same time, investors have been put on notice that BITs, and more specifically fair and equitable treatment standards, are not insurance policies against bad business decisions. Not every act of a host State that is detrimental to a foreign investment will constitute a violation of the fair and equitable treatment standard. If the act is general in nature, rather than specifically against the investor, and is necessary in order to meet some important public interest then States may, depending on the circumstances, escape liability under fair and equitable treatment provisions.\textsuperscript{98} The steady stream of fair and equitable treatment claims over the last 15 years has led tribunals to develop an increasingly dense and articulated jurisprudence on the subject which in turn has redefined the normative system.

Development of the fair and equitable treatment standard is still in its infancy. Compared to the concept of ‘duty of care’ in English tort law for example, significant questions concerning its nature and scope remain unanswered. Yet, as the governance model predicts, the more a particular norm is the subject of triadic dispute resolution the deeper and more expansive its governance shadow will become. In other words, the more fair and equitable

\textsuperscript{98} Total S.A. v The Argentine Republic, Award, ICSID Case No. ARB/04/01 (2010) (ICSID Arb.) 124 (Sacerdoti, Alvarez and Marcano).
treatment provisions are relied upon as the basis for investment claims, the more exacting and finite the principle will become. As tribunals confront new situations to which the principle may apply – and, so long as they follow a doctrine of precedent – they will force the principle down narrower and narrower pathways, clarifying its meaning for future dyads and contributing to the emergence of a complex and effective system of governance.

6.5. Conclusions

The purpose of this chapter has been to introduce a sociological element to the conception of precedent advanced in this thesis by exploring the link between comity, precedent and governance. Drawing on the work of political-legal scholars, I have argued that comity – by forming the basis for doctrines of precedent – can contribute to the emergence and evolution of complex and effective systems of governance. In support of this claim, I have advanced a theory of ‘authority-based governance’ which suggests that if an authority, or group of authorities, follow a doctrine of precedent they can, over time, progressively adapt their respective normative systems to effectively govern those subject to their authority.

The theory is deliberately expressed in the abstract without reference to time, place or type of authority. In this sense, it is a general theory of governance capable of explaining the hidden governance function of a wide variety of authorities. In this chapter, we have focused on the construction of authority-based governance systems in two different contexts by two different types of authorities – namely, English courts in the context of tort law and investment tribunals in the context of international investment law. Yet, there is no reason why the theory cannot be used to shed light on the link between comity, precedent and governance in a wide range of other contexts – including all of those discussed in Chapter 5.

A system of authority-based governance is inherently messy. It is characterised by a ‘babble of voice’ – a network of authorities who are simultaneously interdependent and
operationally autonomous. These authorities are linked by their duty to act with comity towards one another, but it will always be for each authority to determine whether or not they ought to follow precedent. What is clear is that every decision is important and worthy of the respect comity demands because collectively all are capable of redefining the normative system in which authorities act.
This thesis has advanced a new approach to precedent – one based on the principle of comity. It argues that precedential reasoning is best characterised as an act of comity and that doctrines of precedent are an expression of comity’s underlying systemic judicial purpose. A comity-based conception of precedent has both theoretical and practical implications. With respect to the former, it significantly advances our understanding of the nature and authority of precedent as a universal jurisprudential concept. With respect to the latter, it provides authorities with the guidance they need to determine the authority of precedent in practice and offers a principle-based means by which to develop new and existing doctrines of precedent.

Comity is generally considered ‘one of the most ambiguous and multi-faceted conceptions in the law.’ For this reason, a large portion of this thesis – namely, Chapters 2 and 3 – was devoted to removing the cloud of mystery that so often surrounds the concept. By exploring the history of comity, its theoretical foundations and its use in practice, we were able to abstract from the principle of comity in private international law to a general principle of comity among authorities. As we then saw in Chapters 4 and 5, a general principle of comity naturally lends itself to account for the practice of precedential reasoning and the nature and authority of precedent.

Chapter 2 demonstrates comity to be one of the founding principles of private international law (or the conflict of laws). It was created to resolve the vexed question of how, and under what circumstances, newly formed sovereign States ought to recognise each other’s authority within their territory. Whilst comity was invented as a discretionary exception to

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sovereignty founded in the mutual benefit and convenience of States, it was later reconceptualised as an (imperfect) obligation founded in each State’s paramount duty to do justice. Indeed, the history of comity demonstrates that States recognise each other’s authority ‘for reasons of justice’.

However, it is not immediately apparent what appeals to justice mean in this context so, in Chapter 3, we were forced to further unpack the reasons for comity. As we discovered, the idea that the best exercise of one State’s authority will be, in certain cases, to recognise the authority of another only makes sense if we consider comity to be a principle of systemic justice. Comity we saw, is not concerned with the rights of private litigants in individual cases. Rather, it is concerned with minimising the injustice of conflict and the misallocation of authority among decision-makers who owe no duty to obey each other or each other’s decisions.

In private international law, comity forms the basis for a variety of doctrines which all seek to give effect to this systemic judicial aim. Embodying the principles of justice pluralism and modified subsidiarity comity requires States (through their courts) to recognise there are often competing conceptions of justice that may apply to the resolution of any given case. In circumstances where a foreign State or its courts are in a better position to resolve the type of dispute in question, or where the domestic court is in no better position to do so, comity presupposes that the best exercise of adjudicatory power by the domestic court will ordinarily be to recognise the authority of the foreign State or its courts. Comity requires the domestic court recognise that, in certain cases, the most just exercise of its own adjudicatory power vis-à-vis those subject to its own authority will in fact be to recognise foreign authority.

Drawing on the principle of comity in private international law, there were some things we could say in general about the duty to act with comity. Comity, we learnt, is the respect shown by one authority for the legitimate adjudicatory authority of another in circumstances where the former is under no obligation to obey the latter. The second authority’s duty to act
with comity towards the first authority is not a duty to trust, admire or approve of the first authority or of its decisions. It requires no reciprocity from the first authority and involves no act of courtesy by the second authority towards the first. Rather, the duty to act with comity stems from the systemic judicial need to minimise conflict between co-existing authorities and to allocate their adjudicatory authority in the most just manner possible.

Comity is relevant in any context where there is a risk of conflict between two (or more) authorities who have no duty to obey each other or each other’s decisions. The principle presupposes that only one conception of justice can apply to resolve any given type of case and that where the first authority is better placed to resolve the dispute in question, or where the second authority is in no better position than the first authority, the best exercise of adjudicatory power by the second authority will ordinarily be to recognise the first’s authority. The reason why the second authority acts with comity towards the first authority is therefore found in the derivative nature of the duty it owes to those subject to its own authority – that is, to resolve the matter before it in the most just manner possible.

Drawing on the philosophy of practical reason, we were able to explore in greater detail how the recognition of another’s authority can, in certain circumstances, be the most just exercise of one’s own and how comity is able to guide the exercise of adjudicatory power in accordance with relevant principle of systemic justice. As we saw, comity constitutes, or give rise to, a non-exclusionary second-order reason that effectively restrains the second authority from making a de novo assessment in any given case. By acting with comity, the second authority fetters its own adjudicatory power to determine the matter in question on the ordinary balance of first-order reasons and instead chooses to act in accordance with a presumption that favours that course of action most consistent with comity.

The diverse nature of authorities, combined with the varied contexts in which they operate, means that acting with comity may involve a variety of actions on the part of the second
authority. As we saw in the context of private international law comity forms the basis for a number of doctrines aimed at regulating how States ought to act with respect to each other’s authority. In other contexts, comity’s role is no different – it forms the basis for doctrines that guide the exercise of adjudicatory power in circumstances where one authority is required to determine how it ought to act with respect to another’s legitimate authority. Generally speaking, comity may require the second authority to recognise a decision of the first authority as valid, follow it or give effect to it; require that someone else comply with it; generally refrain from interfering with it; or require the second authority to act in a manner that supports the first authority’s capacity to exercise its own authority. It may even, as I argue, require the second authority to recognise the first authority’s decision as precedent for a particular course of action.

In Chapter 4, I advanced a comity-based conception of precedent which suggests that predecental reasoning is best characterised as an act of comity and that doctrines of precedent are but an expression of comity’s underlying systemic judicial purpose. As we saw, compared to orthodox conceptions of precedent which have largely developed in the common law, a comity-based conception of precedent provides a compelling account of the nature and authority of precedent as a universal jurisprudential concept. It follows that a comity-based conception of precedent can help explain the operation of precedent among a wide variety of authorities – from parents to universities, domestic courts to international tribunals.

When the second authority reasons from precedent it simultaneously ‘recognises’ the legitimate authority of another to resolve the type of dispute in question and ‘restrains’ itself from making a determination of the case at hand on the ordinary balance of first-order reasons. It acts in accordance with a presumption – of varying degrees of strength – that the best exercise of its own adjudicatory power will in fact be to follow the prior decision of the first authority as precedent. A comity-based conception of precedent suggests that the second authority’s
obligation to accord the first authority’s prior decision weight – and in some cases follow it – derives from the second authority’s duty to act with comity.

It follows that the principle of comity can help explain precedential reasoning, and by extension doctrines of precedent, by reference to its own systemic judicial purpose. The principle presupposes that the best exercise of adjudicatory power by the second authority will not always be for it to act on the ordinary balance of first-order reasons – that is, to determine the dispute before it how it sees fit. Rather, where the first authority is better placed to resolve the type of dispute in question, or where the second authority is in no better position than the first, comity presupposes that the best exercise of adjudicatory power by the second authority will *ordinarily* be for it to follow the first authority’s prior decision. By acting with comity, the second authority is able to fulfil the duty it owes to those subject to its own authority – namely, to resolve the matter before it in the most just manner possible.

We can say, without hesitation, that comity towards the legitimate authority of another can involve a duty on the part of one authority to follow another’s decision. Yet, it is in the derivative nature of the duty the second authority owes to those subject to its own authority that we may truly understand the obligation to follow precedent. In truth, the second authority’s duty to act with comity – and thus, its duty to accord weight to the first authority’s prior decision – derives not from any duty it may owe to the first authority but rather solely from its duty to do justice to those subject to its own authority.

Drawing on the logic of practical reason we can say that, in the context of reasoning from precedent, comity constitutes, or gives rise to, a non-exclusionary second-order reason to follow precedent. By acting with comity, the second authority fetters its own adjudicatory power to determine the dispute before it on the ordinary balance of first-order reasons and chooses instead to attribute less weight to those first-order reasons that favour a course of action inconsistent with comity. In circumstances where the first authority is better placed to resolve
the dispute in question, or where the second authority is in no better position than the first authority, the action most inconsistent with comity will ordinarily be departing from the first authority’s prior decision. The result then is a presumption that the second authority will follow the prior decision of the first authority unless there are first-order reasons of sufficient strength to displace the presumption.

There is of course no reason to think that the presumption in favour of following precedent will always be active or that it will be the same in all contexts. As we came to appreciate in Chapter 5, the varied nature of authorities, and the contexts in which they operate, suggests that the strength of the presumption that ought to apply will necessarily differ. It follows that the question for any authority being asked to follow the prior decision of another is to determine what presumption, if any, ought to apply in favour of following the decision. This requires the authority to determine how comity reweighs the balance of first-order reasons in the specific context and subsequently to determine whether there are any first-order reasons of sufficient strength to displace the presumption.

It is important to remember that comity is a principle of ‘recognition’ and ‘self-restraint’. It is a principle which authorities may use to determine what weight, if any, they ought to accord to the prior decision of another and ultimately whether or not they ought to follow that decision in any given context. Yet, comity does not, and never will, command how a case shall be decided. As a principle, rather than a rule, comity’s strength is best characterised in terms of degree – as a non-exclusionary second-order reason to follow precedent. In this sense, it can only ever guide authorities in the exercise of their adjudicatory power, not compel them. Comity recognises that the primary duty of every authority is to resolve the case before them in the most just manner possible. It demands that no authority shall abdicate its judgment, but recognises that in certain cases the best exercise of adjudicatory power by one authority may ultimately be to follow the prior decision of another.
Taking our cue from Huber, we were able to reduce our comity-based conception of precedent to three key axioms:

1. The second authority ought to act with respect for the ‘legitimate adjudicatory authority’ of the first authority – including its prior decisions.

2. Where the first authority is better placed to resolve the type of dispute in question, or where the second authority is in no better position than the first authority, comity will support a presumption that the second authority ought to follow the first authority’s prior decision.

3. The strength of the presumption depends on the nature of the authorities in question and the need to minimise conflict given the context in which they operate.

In Chapter 5 we drew on these three axioms to demonstrate how comity can assist authorities in practice to determine the authority of precedent and how it may be used to develop new and existing doctrines of precedent in various different contexts. Although we analysed how comity might operate between a wide variety of authorities, we were able to group authorities into three general categories depending on whether the second authority was being asked to follow: (1) its own prior decision; (2) the prior decision of a co-ordinate authority; or (3) the prior decision of a specialist authority of horizontal or vertical jurisdiction.

As a general proposition comity supports a presumption that authorities within each category ought to follow precedent unless there are sufficient first-order reasons to justify departing from the prior decision in the case at hand. As we discovered, the strength of the presumption in favour of following precedent generally gets strong as we move from authorities in category one to authorities in category three reflecting the need to minimise the injustice of conflicting decision and the misallocation of authority. Whilst this thesis is primarily an
exercise in legal theory, Chapter 5 should provide a wide range of practitioners with the
guidance they need to determine how they ought to act with respect to prior decisions in times
of uncertainty.

Lastly, in Chapter 6, we introduced a sociological element to the conception of
precedent advanced in this thesis by exploring the hidden link between comity, precedent and
governance. Drawing on the work of political-legal scholars, I propose that comity – by
forming the basis for various doctrines of precedent – can contribute to the emergence and
evolution of effective systems of governance. In support of this claim, I advanced a ‘theory of
authority-based governance’ which holds that if an authority, or group of authorities, follow a
doctrine of precedent they can, over time, progressively adapt existing normative systems to
effectively govern those subject to their authority.

The theory has both positivist and normative implications for the study of governance. Not only can it help reveal the hidden governance function certain authorities already play, but it may also provide a framework within which to better understand emerging systems of governance. With this in mind, I applied the theory to two different areas of law – namely, English tort law and international investment law. As we saw, by acting with comity to develop doctrines of precedent, English courts and international investment tribunals alike are actively contributing to the construction of effective systems of authority-based governance.

A complete thesis dedicated to the nature and authority of precedent may give one the
impression that precedential reasoning is perhaps more prevalent than it actually is. Of course,
we must always keep in mind that reasoning from precedent is but one of a variety of techniques
authorities use to decide disputes that come before them. But, it is one which a wide range of
authorities employ and one that continues to trouble both legal theorists and authorities in
practice. It is therefore necessary that we understand the true nature and authority of precedent
if we are to progress the subject both in theory and practice.
The purpose of this thesis has been to advance a new approach to precedent – one based on the principle of comity. I do not claim to have offered a comprehensive theory of precedent – if such a thing were even possible. Nor do I suggest that the principle of comity can explain all aspects of precedent or be of equal utility in every context. There is no general analytical solution to the question of how much authority a prior decision ought to have or ultimately how one authority ought to act with respect to the prior decision of another. So much depends on the nature of the authorities in question and the context in which they operate. Yet there are some things that can be said in general about the nature and authority of precedent and the approach one authority ought to take towards the decisions of another. The purpose of this thesis has been to say such things.
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