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SOURCES OF LAW

JOHN BELL*

ABSTRACT. *This article aims to clarify what is meant by "a source of law" argument. A source of law argument justifies an action by showing that it has as its legal basis the best interpretation of a rule, principle or value identified in a material source of law. Such an argument is authority-based in that it appeals for its correctness to a collective decision to adopt a particular rule. The identification comes from an analysis of the practices within a specific legal community. The concept of "a rule of recognition" is not helpful since it glosses over the contestability of what is a source of law and its revisability over time. In a second part, the article illustrates the dynamics of change by reference to the status of EEC/EU law in a number of national laws and the 1966 Practice Statement on precedent in the House of Lords.*

KEYWORDS: *source of law, rule of recognition, dynamics of legal change, supremacy of EU law, judicial precedent.*

I. INTRODUCTION

The literature on sources of law is unclear. It is therefore not surprising that the Supreme Court in *Miller*[1] was unclear in handling arguments on whether the triggering of Article 50 TEU would affect sources of law. Basically, the majority accepted the submission that the start of a process which could lead ineluctably to the ending of the UK's membership of the EU would affect the sources of law in the UK and this could only be achieved by an Act of Parliament.

That submission is problematic because sources of law do not work in the way it assumes. When a lawyer bases her statement on the status of EU law as a source of English law, she is relying predominantly on the

* Professor of Law (1973), University of Cambridge. Address for Correspondence: Faculty of Law, Sir David Williams Building, University of Cambridge, 10 West Road, Cambridge, CB3 9DZ, UK. Email: jsb48@cam.ac.uk. Special thanks are due to Trevor Allan, John Allison and Neil Duxbury for comments on this paper, though they have no responsibility for the use made of them.

[1] *R. (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

conventional understanding within the UK legal communities[2] about the significance of EU rules. That status may have been triggered by the European Communities Act 1972, but the significance of the rules depends on the way the UK legal communities currently understand both the requirements of EU law about its status in the domestic legal systems of Member States and the place of EU law within the portfolio of sources of UK domestic laws. The legal community adapts the sources of law over time, in relation to changing constitutional or legal circumstances. This can be seen in many legal systems as the status of judicial precedent, doctrinal legal writing and even EU law has changed over time. There is no list of "sources of law" approved by Parliament, and it does not require Parliament's approval to change them. Parliament may play a role in the conditions leading up to a change in sources of law, but its role is neither determinative nor essential.

The problem is not peculiar to the UK. The French legislator of 1790 provided that "Judges are forbidden to decide the cases submitted to them by laying down general rules" (now Article 5 of the civil code of 1804). But French lawyers have ever since been treating judicial decisions as authoritative statements of the law (albeit revisable). Introductions to law are replete with long explanations of how the way French lawyers justify their legal statements is compatible with what the legislator provided.[3] French judges hide the fact in the form of their judgments, but German judges openly admit the importance of consistent caselaw (*ständige Rechtssprechung*) as an authority despite the apparent subordinate status given to it by Article 20 III of the Basic Law.

This article suggests that we best understand the appeal by lawyers to "sources of law" as a justification for their decisions as an appeal to the best interpretation of what the legal community accepts as the reference points for correct legal argument in that particular area of law. This may seem unacceptably vague. But the evidence that this is right comes from the way in which we teach the subject to those entering the legal community. In all legal systems I know, the list of the sources of law and the explanation of their content and authority are contained in student manuals. These articulate the current understandings of the legal community and help newcomers to be inducted into their use in constructing legal arguments.

This article first develops this definition of sources of law and their place in legal reasoning. It then provides two examples of how sources change

[2] I make no assumption that the understandings within the English and Welsh, the Scots and the Northern Irish legal communities are identical.

[3] D.N. MacCormick and R.S. Summers, *Interpreting Precedents: A Comparative Study* (Aldershot 1997), ch. 4; J. Bell, S. Boyron and S. Whittaker, *Principles of French Law*, 2nd ed. (Oxford 2008), 25–32. For a critique, see especially M. de S.-O.-L'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford 2004). German discussions typically refer to Article 20 III GG before acknowledging the reality that cases are a legitimate authority in legal argumentation: see MacCormick and Summers, *Interpreting Precedents*, ch. 2.

over time, the status of EU law in a number of legal systems and the status of House of Lords decisions in the UK.

II. Sources of Law in Legal Reasoning

A. Definitions

The term "sources of law" owes its origins to Savigny. He distinguished between the origins (*Entstehungsgründe*) of the law and concepts and the legal rules which are derived from them.[4] For him, these two ideas went hand-in-hand in the practice of using Roman law to resolve contemporary legal issues.

I would prefer the following definition: "A source of law argument justifies an action by showing that it has as its legal basis the best interpretation of a rule, principle or value identified in a material source of law."

To unpack this statement, we need first to understand the notion of a "material source of law". The most common use of this term refers to the *Entstehungsgrund*, the genre of text in which a legal rule, principle or value is stated – typically a constitution, a statute or a precedent. But that is an inadequate statement of what the law is and on which the lawyer relies. To take a very simple example, Article 1240 of the French civil code provides "Any human act whatever which causes damage to another obliges him by whose fault it occurred to make reparation". This statement of fault liability in delict requires six pages of annotations in the Dalloz civil code and many more in textbooks.[5] When a French lawyer relies on Article 1240 as a justification for making someone liable in delict, she is referring not just to the 24 French words in that provision, but to the body of understanding in French legal community about what that provision means. So, when we offer a legal justification based on a posited legal rule, we are relying on what we consider to be the best interpretation of that provision. It is in this expanded sense that the notion of a "source of law" should be understood. (In this paper, unless otherwise indicated, "source of law" will be used as a shorthand for a source of law argument, rather than a material source of law.) For a lawyer within a legal system, a text and its interpretation exist together.

When lawyers cite a source of law, they use it to provide the "legal basis" or justification for an argument or a decision. This is clearly seen in decisions of EU officials and courts which cite a legal basis in the Treaties or in EU secondary or tertiary legislation in its recitals.[6] The legal basis

[4] F.C. von Savigny, *System des heutigen Römischen Rechts*, vol. 6 (Berlin 1840–48), 11–13.
[5] Dalloz, *Code Civil annoté 2017* (Paris 2016), 1494–1500.
[6] European Ombudsman, *European Code of Good Administrative Behaviour*, Article 18(1): Every decision of the institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision. <https://www.ombudsman.europa.eu/en/resources/code.faces#/page/15> (accessed 23 January 2018).

establishes both the competence to make a decision and the correctness of the solution reached. In order to make such an argument, the official is identifying a text or corpus of legal principles, but is then also giving an interpretation of them in order to provide an adequate justification.

So the first step in this process of justifying an action in law is to identify texts. The legal literature often talks about as "material sources" or "formal sources" of law. Much of the writing on "legal methodology" trains lawyers to use such sources.[7] Pizzorusso distinguished between situations where these sources are laid down in a deliberate way by a specific legal enactment ("act sources", "*fonti atti*") and where the existence of sources emerges from the observation of practices and customs among lawyers ("fact sources", "*fonti fatti*", such as an emerging general principle of law, a consensus of legal opinion).[8] Given that legal sources arguments are normative, his label "fact source" is unfortunate. We are really dealing with a description of sources that emerge from an analysis of processes of applying the law by lawyers (academics, judges, legislators and practitioners). For that reason, I think a better label for Pizzorusso's second category is "process sources" and perhaps the first are better characterised as "event sources". In some cases, we will be able to locate a clear statement of the source from a particular legal event (statute, constitution or judicial decision). More often, we will have (contestably) to reconstruct the understandings with which lawyers actually work. In fact, the distinction between the interpretation of an event source and the construction and then interpretation of a process source is not that great. They are both products of legal interpretation.

Raz also points out that the sources to which lawyers appeal may not be a text resulting from a single event, but may well be a rational reconstruction of a process of development that involves a number of elements:

> The sources of a law are those facts by virtue of which it is valid and which identify its content. This sense of "source" is wider than "formal sources" which are those establishing the validity of a law (one or more Acts of Parliament together with one or more precedents may be the formal source of one rule of law). "Source" as used here includes also "interpretative sources", namely all the relevant interpretative materials. The sources of a law thus understood are never a single act (of the legislature, etc.) alone, but a whole range of facts of a variety of kinds.[9]

As Raz admits, it may be relevant to interpret the formal sources together with ethical principles or political principles in order to produce the best understanding of the law and how it applies.[10]

[7] See e.g. N.J. McBride, *Letters to a Law Student*, 3rd ed. (London 2014), Part 3.
[8] A. Pizzorusso, *Law in the Making: A Comparative Study* (Berlin 1988), 18.
[9] J. Raz, *The Authority of Law* (Oxford 1979), 47–48.
[10] For this essay, nothing turns on whether one considers this interpretation process as a positivist or any other kind of activity.

So, as Rodolfo Sacco has rightly noted, statements of the law in the texts of material sources or in the accounts of a reconstruction of lawyers' practices are typically incomplete and inadequate to justify the solution to specific problems. At best, the statement of a rule in a statute, or in a precedent, or in a scholarly textbook is a "formant".[11] It is an element that needs to be developed into the full formulation of the rule to be applied in the individual case (what Fikentscher calls the "Fallnorm").[12] So the second stage in legal reasoning involves two elements. Accepted methods of interpretation are used to develop the meaning of the legal text or principle identified at the first stage to make it usable for the case in hand. (The application of the rules of statutory interpretation would be an example.[13]) In addition, the individual text or principle is located within the broader range of legal rules and principles so as to show how an interpretation would fit coherently and consistently within the law as a whole. Texts are understood within the legal community as part of a network of rules and values. As Trevor Allan expressed it in relation to the common law: "Common law rules are only provisional formulations of underlying principles, whose implications can be discerned only by exploration, case by case, of the relevant 'fabric of thought'."[14] In other words, the material sources, specific texts or principles, have to be turned into operational sources that can actually justify a particular act or decision in law.

Thus developed, at a third stage we then formulate a legal norm, the *Fallnorm*, (the normative source) that justifies the legal action at issue. When justifying the decision, the legal basis actually being invoked is this source as a norm. In stating the legal basis of the decision, we identify the material source, the product of the original event or process, but actually the justification we are offering relies on the normative source, the rule derived from that collective decision or process. It is this that constitutes the "legal basis" to which a lawyer or decision-maker appeals.

Sources may be stated at various levels of generality. Whereas rules have a clearly identifiable practical outcome ("the President shall sign *ordonnances* and decrees"[15]), principles are more general statements (e.g. "common taxation … should be shares equally among all citizens"[16]). I use the term "values" to suggest that some statements are overarching values and really points of orientation. A good example is the principle of sincere or loyal cooperation which guides the interpretation of the division and

[11] R. Sacco, "Legal Formants" (1991) 39 Am.J.Comp.L. 1, at 21–23.
[12] W. Fikentscher, *Methoden des Rechts*, vol. IV (Tübingen 1977), 299–301. He distinguished the words of a text, their meaning in ordinary language, and their legal significance. Though one may be able to treat the wording as fixed, the legal significance is a matter of interpretation and the *Fallnorm* (the rule to be applied in the case) is only the product of that reasoning process.
[13] See J. Bell and G. Engle, *Cross on Statutory Interpretation*, 3rd ed. (London 1995), 38–43.
[14] T.R.S. Allan, *The Sovereignty of Law* (Oxford 2013), 49.
[15] French Constitution, Article 13.
[16] Declaration of the Rights of Man and of the Citizen, Article 13.

exercise of competences within the EU, and which is based on the German concept of *Bundestreue* which operates in a similar way in the German Constitution.[17] Ideas such as "solidarity"[18] or "subsidiarity" or "freedom of contract" or "the welfare of the child") with no definable specific outcome.[19]

B. Legal Sources as Authority-Based Arguments

It is usual to classify the appeal to legal sources as an authority-based argument. A source-based argument is an authority argument in the sense that it appeals for its correctness not to the personal beliefs of the lawyer or judge, but to the fact that there has been a collective decision to adopt or endorse a particular rule, principle or value. As Summers explains, formalism is a way of dealing with complexity.[20] There are many questions about what is the right thing to do. This complexity can be reduced by agreeing to abide by the results of certain specific processes of decision-making. The results of these processes have a specially authoritative status in legal reasoning. For example, we want to do what seems fair in the compensation of the victims of road accidents. Rather than leave the issue to be settled on each occasion by a process of debate among lawyers, France has adopted a statute which establishes the circumstances in which the car driver is liable to the pedestrian injured. This includes a rule that pedestrians under 16 or over 70 will not be considered to be responsible for the injuries they suffer unless they deliberately seek that harm.[21] Such brightlines may appear arbitrary – the immature 17-year-old is treated as responsible and the reckless 71 year-old is not. But the rule creates predictability and certainty. The source-based reason derived from an enactment by Parliament reduces complexity.

So how do we know which collective processes have such an authoritative status? Peczenik offers the following definition: "All texts, practices etc. a lawyer must, should or may proffer as authority reasons are sources of law."[22] He divides authority reasons into three categories.[23] "Must-sources" are those which a lawyer is required to use, where they exist, to justify a decision. In the case of Swedish law, these are the Constitution, statutes and regulations. "Should-sources" are not binding,

[17] See A. Dashwood et al. (eds.), *Wyatt and Dashwood's European Union Law*, 6th ed. (Oxford 2011), 322–24.
[18] Preamble to the French Constitution of 1946, para. 12.
[19] It might be objected that "values" could not be directly applied as sources of law. But they are often used directly to qualify or limit the scope of legal rules or to object to decisions that have been made by public bodies: see further J. Bell, "External Dimensions of the French Constitution" (2017–8) 57 Virginia International Law Journal (forthcoming).
[20] R.S. Summers, *Form and Function in a Legal System* (Cambridge 2006), 42–47; also Z. Bankowski, *Living Lawfully* (Dordrecht 2001), ch. 7.
[21] See Article 3(2) of the Law of 5 July 1985.
[22] A. Peczenik, *On Law and Reason* (Dordrecht 1989), 318.
[23] Ibid., at pp. 319–21.

but have weighty authority in guiding legal practice and so ought to be cited in support of a proposition. In Sweden, these would include judicial precedents, preparatory materials for legislation, customs and recommendations (such as codes of practice) issued by public bodies. "May-sources" are arguments of lesser weight, but which provide some legal support for a proposition. These include precedents and legislative materials not directly related to the texts to be interpreted, scholarly writings, professional legal literature and foreign law. Peczenik's suggestion that *anything* a lawyer may legitimately cite is a source of law is too wide. Authoritative weight attaches to the "must" and "should" sources since these have the role of displacing the preferences of the lawyer. But Peczenik's method of discovering sources by looking at the practice of lawyers is sound as a starting point.

What gives an argument the quality of an authoritative legal justification? Ost and Van de Kerchove suggest that there is a conjunction of three elements: legality, effectiveness and legitimacy.[24] Legality requires that an argument belong to a legal system of reference.[25] It is here that they locate source-based arguments. Legalism requires a legal basis for decisions. Effectiveness focuses on the actual ability to change situations in the world. A rule valid in terms of legality may, nevertheless, be totally unenforceable. The enforceability of a rule is key to those rules of which people will treat as worth taking notice.[26] Legitimacy suggests a moral authority that attaches to a requirement. Not merely will it be enforced, but it is right that it is enforced. That is an appeal to values.[27] These values may not be the values to which an individual (an official or a subject of the law) personally adheres, but they are recognised as belonging to the system. In a well-functioning system, the official or citizen will apply the law out of a sense that it is fulfilling a valuable purpose, even if, in specifics, the decision is not one with which she or he agrees. The values that confer legitimacy are institutional values, not just personal values. For Ost and Van de Kerchove, whilst legality can provide valid justifications in individual instances, the long-term sustainability of a legal system requires judges and other lawyers always somehow manage to link the three.[28] This is the dynamic aspect of law.[29] They are effectively pointing out that, however much lawyers seek to stress the autonomy of law from social power or social morality, it is only at best a relative autonomy.

[24] F. Ost and M. Van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (Brussels 2002), 352–55.
[25] Ibid, at p. 326. See also, and very importantly, N. Simmonds, *The Idea of Law* (Oxford 2007), 123ff.
[26] Ibid, at pp. 328–29.
[27] Ibid., at p. 337.
[28] Ibid., at pp. 339–40.
[29] Ibid, at p. 354.

C. How Are Sources Identified?

If it makes sense to reduce complexity in handling legal problems by relying on sources of law as authority, then the problem in any legal system lies in identifying what these rules are and how they are changed. Of course, it is possible for these rules to be specified in the sort of detail Peczenik offers, but this is rarely done. Hart talks about "a constitution specifying the various sources of law".[30] But I know of no instance of this. More commonly, the sources are not specified in any single place. Instead, books on legal methodology teach students about how to find the material sources of law and turn the results of their research into cogent legal arguments.[31]

Italian law is unusual. The civil code of 1942 begins with several articles on the sources of law. In his extensive commentary on that code, covering sources of law, Pizzorusso[32] suggested that sources of law may be identified and legitimated either by rules within the legal system itself or, extra legally, from effectiveness. On the one hand, there is a complex set of rules within the legal system about the sources of law – how they are identified, how they are constituted and what is the relationship between different sources. On the other hand, there is the principle of effectiveness "which can be considered as the fundamental norm of the system of norms on sources".[33] Effectiveness is important because the rules about formal sources, such as on the making of statutes, can remain apparently static, but their reality changes fundamentally with changes in political regimes. He illustrated this by the passage from parliamentary democracy within a monarchy in Italy in 1918, through Mussolini's dictatorship, the five transitional regimes between 1943 and 1948, and then back to a parliamentary regime within a Republic after 1948.[34]

In one sense, what count as the sources of law are practices within a specific legal community. They are what the lawyers in that jurisdiction regularly use to justify their actions in law. Rules expressed by authors or judges can make sense of the practices by rationally reconstructing what lawyers actually do by means of a relatively coherent account. Hart is right to locate such rules of legal method in conventional social practices.[35] Peczenik suggests that they are "a kind of second-order customary law".[36] These analyses suggest that, to find the sources of law, we need to

[30] H.L.A. Hart, *The Concept of Law*, 3rd ed. (Oxford 2012), 293.
[31] E.g. J. Bell, in A. Burrows (ed.), *English Private Law*, 3rd ed. (Oxford 2013), ch. 1.
[32] A. Pizzorusso, *Fonti del diritto: Art. 1–9* (Bologna 1977), ch. 1.
[33] Ibid., at pp. 11–12.
[34] Ibid., at p. 27, note 4.
[35] "Rules are conventional social practices if the general conformity of a group to them is part of the reasons which its individual members have for acceptance; by contrast merely concurrent practices such as the shared morality of a group are constituted not by convention but by the fact that members of the group have and generally act on the same but independent reasons for behaving in certain specific ways" (Hart, *Concept of Law*, p. 256).
[36] Peczenik, *On Law and Reason*, p. 324.

observe what lawyers think they ought to do.[37] But within those social practices we need to find the norms which are considered mandatory and those which are strongly encouraged in the provision of legal justifications. A fuller normative account would take into consideration the values which the legal system is trying to pursue and the way particular contributions (from statute, custom, the Constitution, etc.) achieve these. In this way, the rules would articulate a regulative ideal. When lawyers cite sources as a formal justification, they are appealing to such a regulative ideal.

Pizzorusso's commentary illustrates the use of legal practices to articulate a regulative ideal in relation to the provisions of the civil code. He relied heavily on both judicial practice and scholarly writing to evidence what was currently treated as a legal source and how it was used. His writing is clear that his account is a rational reconstruction of not only explicit practice, but also underlying assumptions. In particular, he took the civil code as one moment in the articulation of a long tradition of legal practice, not as a caesura moment. He therefore located it in relation to practices and rules particularly of the nineteenth century and in relation to the subsequent development of sources in Italy, not least in relation to the Republican Constitution of 1948. Although the components of an account of the sources of law in another legal system would perhaps differ from that of Pizzorusso, the methodology would be similar. That is because an account of sources tries to articulate what its own legal community treats as normative among the justifications for its decisions or actions.

For Pizzorusso, as for most lawyers, the sources of law are best expressed in terms of a hierarchy. At the top of the hierarchy, there are the supreme sources, the fundamental principles of the material Constitution (such as parliamentary sovereignty or the rule of law); then there are constitutional sources, which for him involve not just the constitutional texts but judgments of the Constitutional Court and norms adapting domestic law to general international law. Below the Constitution, there are primary sources (national statutes and decrees, EU law and regional laws), secondary sources (state decrees and regulations adopted by regional governments) and the tertiary sources such as collective agreements having force erga omnes and customs praeter legem (and I would add conventions).[38] Although one might disagree about a number of specifics within this analysis, the value of Pizzorusso's presentation is that it recognises that there is a portfolio of sources of law, and that is why the unitary conception of a rule of recognition is unhelpful. Even in the detail of the first nine articles

[37] More correctly, we probably have to look at what the influential members of the legal community do: see A. Paterson, *The Law Lords* (London 1982) on who influences the Law Lords; A. Paterson, *Final Judgment* (Oxford 2013), ch. 6. A similar analysis is made in France: see H. Le Berre, *Les revirements de jurisprudence en droit administratif de l'an VIII à 1998* (Paris 1999), 475–502.

[38] Pizzorusso, *Fonti del diritto*, pp. 174–75.

of the Italian civil code, neither the supreme sources nor the constitutional sources are identified, yet they are fundamental.

The concept of a "hierarchy" is of limited value. It is applied to the rare situations of conflict between sources. To understand how sources normally work, there is value in using the metaphor of a network.[39] The idea of a hierarchy uses a model of self-contained sources. But sources are interconnected. Statutes are drafted presupposing concepts that exist in case law and in legal writing, and are then applied in the light of how those other sources interpret them. Furthermore, in an interconnected world, national sources can be supplemented not only from within the existing order but from outside. To some extent, the different sources of law exist in tension with each other and problems are not always solved. Classically, this is true of the relationship between EU law and national constitutional laws, though in the past the relationship of law and equity might have been perceived in a similar way. At the very least, this suggests that any account of sources need not be tidy. It may be that my perspective as a comparative lawyer explains why I make a less clear-cut distinction between binding and persuasive sources, and why I find Vogenauer's account persuasive:

> In most legal systems, a closer look will show that the conventions as to the determination of the sources of law are far from settled. In reality "the law" or, indeed, any specific legal rule will be constituted by a blend of various factors. The solution to a fact pattern will emerge from the interplay of statutory texts, judicial glosses, and suggestions in, maybe even contradictory, academic writings . . . . Domestic lawyers learn to discern the strength of the various formants, that is, the difference in weight that is accorded to the various sources, by years of training and experience. To acquire this ability whilst lacking the same background is one of the greatest challenges the comparative lawyer faces when he encounters another system.[40]

It will definitely be true that certain deliberate acts to lay down particular sources (e.g. by constitutional amendment) will carry great weight and will be accorded priority over contrary rules of law. But, as Vogenauer suggests, many complex problems are resolved not by a simple use of hierarchy, but by an subtle interplay of different sources. Even within his hierarchical account, Pizzorusso acknowledged that the scope of application of sources may be limited by geography (e.g. to limited specific regions), in time (e.g. to before Brexit and after), or by specialty (e.g. there are reserved matters on which only the UK Parliament can legislate and the devolved assemblies cannot). There is a basket of sources which apply in appropriate ways in different circumstances.

[39] See Ost and Van de Kerchove, *De la pyramide au réseau*, pp. 65–77.
[40] S. Vogenauer, "Sources of Law and Legal Method" in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford 2006), 885.

D. Sources of Law and the "Rule of Recognition"

On the preceding analysis, different kinds of source carry different weights. It does not really help to conceive of these rules belonging to a single, umbrella meta-rule, the "rule of recognition". In Hart's work,[41] that label was only a place-holder within a much larger jurisprudential theory, and his interests lay elsewhere.

Alexy is right to characterise legal reasoning as a "special case" of practical reasoning:

> The claim to correctness involved in legal discourses is clearly distinguishable from that involved in general practical discourses. There is no claim that the normative statement asserted, proposed, or pronounced in judgments is absolutely rational, but only a claim that it can be rationally justified within the framework of the prevailing legal order .... No claim is made here to the effect that the normative statement to be justified would receive universal assent, but it is claimed that everyone governed by the validly prevailing legal order must agree to the statement in question.[42]

His point is that law is a constrained form of practical reasoning. One of the key constraints is that one must make use of legal sources in most cases,[43] but it is clear that source-based reasons have a prima facie character that can be overridden by sufficiently compelling substantive reasons.[44] It is in this context that Hart developed his notion of a "rule of recognition":

> This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure that it [the law] exerts. The existence of such a rule may take any of a huge variety of forms, simple or complex.[45]

For Hart, the rule of recognition served to clarify ideas of the "sources of law". Essentially, he argued that the rule provided authoritative criteria for identifying primary rules of obligation and, where there are multiple sources, the rule of recognition needed to be complex. It would involve both a list of multiple sources and criteria for the priority between them.[46] Hart himself suggested that there were both mandatory sources and permissive sources. Mandatory sources, such as statutes and the

[41] Hart, *Concept of Law*, pp. 94–110.

[42] R. Alexy, *A Theory of Legal Argumentation* (Oxford 1989), 214, 218. Also Simmonds, *The Idea of Law*, p. 136: "... the judgment must demonstrate or tacitly assume that the application of [legal] rules was itself proper and justifiable from the perspective of values that the litigants ought themselves to accept and endorse."

[43] The most famous exception is article 1 of the Swiss civil code: "If no command can be taken from the statute, then the judge shall pronounce in accordance with the customary law, and failing that, according to the rule which he as a legislator would adopt. He should be guided therein by approved precept and tradition."

[44] Peczenik, *On Law and Reason*, p. 322. Substantive reasons can more easily displace "may" or "should" reasons than "must-source" reasons.

[45] Hart, *Concept of Law*, p. 94.

[46] Ibid, at pp. 100–01.

Constitution, have to be included in a justification. But there are a range of other matters which are "good reasons" for a decision, such as the writings of jurists or foreign law.[47] Depending on the legal system in question, judicial precedents may be classed as "mandatory" or "permissive" sources. It was never Hart's project to provide a developed theory of the sources of law. He helped to provide a pointer to the functions which rules on sources performed.

But even his own brief accounts of what a complex rule of recognition might look like suggest it is not really a "rule" in his sense.[48] First, it is not easy to formulate the rule in a way that provides much certainty. If we try to formulate Hart's rule about sources, we get something like:

> You must justify your legal decision by reference to a requirement of the constitution, a statute, a statutory instrument, a binding judicial decision or applicable custom. In interpreting these and in filling gaps in legal provision, you should refer to statutes, statutory instruments and other judicial decisions on related matters, as well as treaties and legislative history or law reform commission works. You may justify your decision by reference to scholarly writings, non-binding international law and foreign legal solutions.

Then we need to add some words about conflicts between sources. Overall, is it helpful to consider that this is a single legal rule? At best, developed in the ways that Peczenik and Pizzorusso have illustrated, the rule of recognition may provide indications of the material sources which need to be referred to when giving a legal basis for a decision. Is the reality not closer to the idea that the legal decision-maker is constrained to justify decisions by reference to what is currently treated as authoritative within the legal community at the moment (whatever that may be)? Such a formulation recognises the contestability of what count as sources and also their revisability over time.

Second, if we remember Sacco's point that statements of the law are often incomplete and inadequate to resolve specific problems, then much of the reasoning is undertaken at the interpretative second stage identified in Section II(A) of this paper. Properly understood, the sources relied on in legal justification are not tightly expressed texts made on a specific date with specific content. They include the accumulated wisdom developed within the legal tradition (and even outside)[49] as to their meaning. Interpretation involves bringing in values that make sense of the provision in the context of the law as a whole and its purposes. That accumulated wisdom is likely to take the form of incremental and experimental formulations that, over time, build towards a more settled view of the law. That is why, if you look at commentaries on a code or on a statute that were produced soon

[47] Ibid., at p. 294 (an original note on the topic of sources, mainly focused on the work of Salmond and C.K. Allen).
[48] Ibid., at pp. 81–82.
[49] E.g. the importance of contemporaneous exposition in the interpretation of statutes: Bell and Engle, *Cross on Statutory Interpretation*, p. 147.

after it was enacted, they will look very different from commentaries produced 30 or more years later. An extreme example is the Dalloz edition of the civil code, which has 24 words in Article 1240 defining liability for fault followed by six pages of double-column, small-print annotations![50] Sources, in the way lawyers rely on them, are not really facts.

Cornish sums up the picture in his account of sources in the nineteenth century English law:

> The relationship between the simplicity of root perceptions [of justice] and the complexity of the rules they engendered encapsulates an ever-present tension – one which helps to explain what is referred to as the autonomous nature of legal reasoning. The law, as a skilled profession, built up its esoteric knowledge through language pregnant with implications. Judges, practitioners and jurists had to understand a whole network of interrelated ideas each with its own clusters of subordinate concepts.[51]

What Hart's distinction between primary and secondary rules captures is a distinction between law-finding as a community process and a more professionalised and autonomous law-finding. In the second, the criteria for what is law are no longer owned by the community, but by a smaller cadre of those knowledgeable in the law. Hence Hart's account moves quickly from acceptance by citizens to the idea that "there should be a unified or shared official acceptance of the rule of recognition containing the system's criteria of validity".[52] These secondary rules are owned by the officials and the different constituent members of the legal community use their experience to determine what is settled and what is arguable.

The coherence and consistency of the common law owed much to the existence of a tight social group within which consensus could develop on basic ideas and values, as well as upon what views are tenable. Such a consensus of views could be oral as well as written.[53] Simpson captured this:

> . . . it seems to me that the common law system is properly located as a customary system of law in this sense, that it consists of a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients, and in other contexts. The ideas and practices exist only in the sense that they are accepted and acted upon within the legal profession . . . . [T]he relative value of formulated propositions of the common law depends upon the degree to which such propositions are accepted as accurate statements of received ideas or practice, and one must add the degree to which practice is consistent with them.[54]

[50] See note 5 above.
[51] W. Cornish et al, *Oxford History of the Laws of England*, vol. XI: *1820–1914 English Legal System* (Oxford 2010), 70.
[52] Hart, *Concept of Law*, p. 115.
[53] Ibid., at pp. 98–99.
[54] A.W.B. Simpson, "The Common Law and Legal Theory" in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence (Second Series)* (Oxford 1973), 94–95.

This perception of the common law is not, in my experience, merely confined to common law systems. Similar analyses are used in continental European civilian systems when explaining, for example, the criteria for the highest courts to overrule established case law doctrines. In France, Le Berre identifies as significant groups creating pressure on the highest court for legal change the lower courts and their reception of the highest court's precedents, reception by scholarly writers in *la doctrine*, the *commissaires de gouvernement* (as they were then called), and authoritative individuals within the court.[55] These actors within the legal community contribute to a sense that the current law is dysfunctional and are cited as such in justifications for the need to change the law. Similarly in the comparison between England and Belgium, Rorive cites "the absence of legal peace" (*l'absence de paix juridique*) as a major justification offered for revisions of precedents. The evidence usually invoked for this lies in the criticism by lower courts, criticism by legal scholars in *la doctrine*, and parliamentary attempts at law reform, as well as reference to foreign legal systems (especially the Netherlands) to show that the context (social and regulatory) on a topic is changing.[56] Again, in both cases, the criteria for changing rules relates to the reception of the law within the defined legal community. It is clear from these accounts that the criteria for what count as sources of law and correct legal argument lie within the legal community. If we are going to have a better understanding of how sources of law work as legal justifications, then we need to take the hints that Hart gives us and develop a more sophisticated theory than he had developed through his explanation of the "rule of recognition".

E. Dynamics of Change

In describing the dynamics of changes in sources, Pizzorusso distinguishes between systemic and extra ordinem factors. Within the legal system, rules about sources include rules about how they may be changed. Thus it is possible for there to be a constitutional rule which changes the status a body of law. For example, Articles 88–81 and following of the French Constitution, introduced in 1992, gave an autonomous basis to European law give legal status to the law of the European Union as part of French domestic law. Previously, it was considered part of French law by being the result of a ratified treaty under Article 55 of the Constitution. In 1999, the *lois du pays* were created as a new source of law for New Caledonia by an Organic Law of 19 March 1999. These enabled a certain amount of self-government by a territory whose rules previously all came from Paris.

[55] Le Berre, *Les revirements de jurisprudence*, pp. 475–502.
[56] I. Rorive, *Le revirement de jurisprudence: Etude de droit anglais et de droit belge* (Brussels 2003), 489, 506–08.

Both changes came about through the exercise of powers to amend the Constitution within Article 89 of the same Constitution.

On the other hand, changes in the sources of law can be triggered from outside the system (extra ordinem). An obvious illustration was the adoption of a new Constitution by the French people in 1958. The Fourth Republic had procedures for constitutional amendment (Article 90), but the procedure for the adoption of the Fifth Republic Constitution did not conform to that. It did not have to, because it was a *replacement* and not an *amendment* to the Constitution. The act of replacement here was a peaceful change of power. Pizzorusso illustrated other changes of sources by reference to military occupation in Italy or revolutionary changes of government. He suggests that such extra ordinem change can happen quickly – even by a single event.[57] Unlike the development of a custom, there is no need for there to be a widespread *opinion iuris* to support the new source of law.[58] But there must be some form of recognition or acceptance for something to be treated as a source.[59] For Pizzorusso, it suffices that the new system has sufficient military, economic, political and cultural force to prevail in imposing itself and, for that reason, he calls it a "normative fact".[60] All the same, it depends essentially on the willingness of the legal community to recognise an authority because of the need to ensure the continuity of government. In my view, this is a form of legitimacy.[61] So Pizzorusso would have been more coherent if he had set legitimacy as the third criterion for a source of law like Ost and Van de Kerchove. The significance of legitimacy is made all the more important by the place of interpretation in the system of sources. Sources are not simply identified; they have to be interpreted both individually and consistently in relation to each other. Inconsistent features will be minimised in order to ensure the law is legitimate. These processes will be seen in relation to two illustrations of changes in the sources of law, the status of EU law and the status of House of Lords precedents.

III. The Status of European Union Law as a Source of Law

The European Economic Community was created in 1957 and the doctrine of direct effect for the benefit of the subjects of national law was established in 1963.[62] That was after the enactment of many national constitutions. Many countries changed their constitutions at a later point to give an

[57] Pizzorusso, *Fonti*, p. 542.
[58] Ibid.
[59] Ibid., at p. 546.
[60] Ibid., at p. 545.
[61] See R. Kiwanuka, "On Revolution and Legality in Fiji" (1988) 37 I.C.L.Q. 961, at 968–73. J. M. Eekelaar, "Principles of Revolutionary Legality", in Simpson, *Oxford Essays in Jurisprudence*, pp. 22–23.
[62] Case 26/62, *Van Gend en Loos* [1963] E.C.R. 1.

explicit basis to EU law. For example, France and Germany did so in 1992 at the time of the Maastricht Treaty. Before this constitutional change, each country had to face the problem of adapting the recognised sources to a new source of directly effective law.

The Italian position is a case in point. The basic view at the birth of the EEC in 1957 was that Article 11 of the Constitution which gives effect in domestic law to duly ratified treaties formed the basis for EU law as a source of law. Before the 1978 ECJ decision in *Simmenthal*,[63] the Italian Constitutional Court had ruled that any conflict had to be resolved in favour of national constitutional law.[64] The court then changed its mind in 1984[65] and took the view that the Italian judge is bound to disapply any Italian law (including a subsequent one) which conflicts with a European Union rule. The principal argumentation was based on the logic of community law as articulated by the Luxembourg court, even though it was acknowledged that community law became part of Italian law by virtue of Article 11. The court justified its change of position by the way in which community law had evolved and the need for further reflection.[66] Soon afterwards, it affirmed that a European Union rule came into effect in Italian law whenever the requirements of direct effect were met, even without an implementing Italian statute.[67] But it reaffirmed later in 2007 that this was subject to the limit that European Union law could not be valid if it went against fundamental principles of the Italian Constitution or fundamental human rights.[68] In that 2007 decision, it did, however, base the foundation of European Union law on Article 11 of the Constitution.[69] So the issue of the relationship of sources has been debated over a long period. The independent nature of EU law as a source of law is accepted, subject to constitutional limitations which derive from an interpretation of Italian constitutional law and not from EU law. Whereas Pizzorusso in 1977 grounded the status of EEC law in some kind of change in the sources of law, the Corte costituzionale hesitated between that view and grounding

[63] Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal (no.2)* [1978] E.C.R. 629.

[64] Corte cost. 30 October 1975 n. 232, *Frontini*, Foro Italiano 1975.I.2661. Also Italian judges cannot disapply incompatible Italian rules without referring the matter to the Corte costituzionale: Corte. Cost. 28 July 1976 n. 205: see Pizzorusso, *Fonti*, pp. 491–92, note 14.

[65] Corte cost. 8 June 1984 n. 170, *Granital v Ministero delle Finanze*, Foro Italiano 1984.I.2062.

[66] Ibid., columns 2075–2076.

[67] Corte cost. 23 April 1985 n. 130, *BECA S.p.A. e altri v Amministrazione finanziaria dello Stato*.

[68] Corte cost. 13 July 2007 n. 284, <http://www.giurcost.org/decisioni/2007/0284s-07.html> (accessed 21 December 2017). The reporter judge in this case was Tesauro, a former Advocate General at the Luxembourg court.

[69] "Ora, nel sistema dei rapporti tra ordinamento interno e ordinamento comunitario, quale risulta dalla giurisprudenza di questa Corte, consolidatasi, in forza dell'art. 11 della Costituzione, soprattutto a partire dalla sentenza n. 170 del 1984, le norme comunitarie provviste di efficacia diretta precludono al giudice comune l'applicazione di contrastanti disposizioni del diritto interno, quando egli non abbia dubbi – come si è verificato nella specie – in ordine all'esistenza del conflitto. La non applicazione [del diritto interno] deve essere evitata solo quando venga in rilievo il limite, sindacabile unicamente da questa Corte, del rispetto dei principi fondamentali dell'ordinamento costituzionale e dei diritti inalienabili della persona."

the status of EU in the Italian Constitution through Article 11. The limitation that the court declared in 2007 in relation to human rights reflects a sense of the limits of legitimacy. For it, the rule of law and fundamental rights are so significant that they prevail notwithstanding the claims of European Union law in the *Simmenthal* decision.

So, in Italy, there were three narratives. First (and ultimately rejected), expressed by the Corte costituzionale in 1975 was that EEC membership did not change the sources of law at all. EEC law was a primary source of Italian law by virtue of Article 11 of the Constitution, but that did not change the normal rules of interpretation, including that subsequent primary sources (e.g. statutes) repeal conflicting preceding primary sources (e.g. rules of EEC law given status as primary sources). The second narrative of Pizzorusso in 1977 was that EEC law was a fact which changed the sources of law and added to the primary sources of law. The third version adopted by the Corte costituzionale in 2007 was that Article 11 enables a treaty to change the primary sources of law and not just the specific primary rules of law. In Pizzorusso's terms,[70] at the very least the fundamental sources of law, if not all the constitutional sources of law remain intact and prevail, but the new category of primary sources is now in place as a result of the EU treaties. Both the first and the third narrative remain within a systematic account of sources of law – the newer sources are authorised in some way by existing sources within the legal system. Pizzorusso's account is more of an extra ordinem event which has changed the primary sources of law. But the third account at least suggests a revision of initial interpretations of national sources of law.

The 2007 Italian decision mimics the view of the German Constitutional Court in the *Solange* decisions. Here again, it is important to note that the EEC postdates the 1949 German Constitution which determines the limits of both the treaty-making powers of the Executive and also the limits on the surrender of sovereignty which are permissible. The 1974 *Solange I* decision[71] decided that the transfers of sovereignty to international organisations under Article 24 of the Constitution were permissible *as long as* (*solange*) as they did not infringe fundamental rights under the German Constitution. The case did establish the obligation on German courts to apply EU law with the very extreme limitation mentioned. So this obligation was grounded in the effect of a treaty which had given EU law a direct and autonomous status in German law. The decision recognised that there had been a clear change in the sources of German law, even though the authority for the change came through Article 24 and remained subject

[70] Above p. 48.

[71] BVerfGE 37, 271. See Solange II, BVerfGE 73, 339; BVerfGE 89, 155 (Maastricht); BVerfGE 123, 267 (Lisbon Treaty); BVerfGE 132, 195 (European Stability Mechanism); BVerfGE 135, 317 (ESM Treaty). Decision of Second Senate, 21 June 2016, 2 BvR 2728/13 (European Central Bank).

to the Constitution. Subsequent decisions refined this position and were more accommodating to the EU. EEC law became an ongoing stream of norms within German law at some earlier point in time after 1957. The Constitutional Court had already accepted in 1967 that EEC law was an "autonomous source of law" in that it was neither international law nor national law.[72] EEC law and national law were seen as two distinct legal orders that connected to each other.[73] This was a position developed by judges and academic writings. The German narrative is that every development can be accounted for within the existing legal system. The EEC source of law was valid only to the extent that it is authorised by Article 24 of the Constitution, but interpreted in such a way that the normal expectation that later German legislation would prevail over an earlier treaty was not applied in the case of EEC law. The change of the Constitution in 1992 provides in Article 23 that:

> (1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat.

In this way, EU law has its own distinctive status within German law, but always within the constitutionally defined sources of law. EU law is part of a systematic account of sources that is more integrated and is no longer seen as two coordinated legal systems operating on a single territory.

In the case of France, the picture was more complex. Article 28 of the French Fourth Republic Constitution of 1946 provided that treaties duly ratified would prevail over ordinary national statutes. The provision was re-enacted in Article 55 of the 1958 Constitution of the Fifth Republic. This gave a legal basis for the priority of EEC law. But the courts took different views on the validity of subsequent French statutes which conflicted with EEC obligations. The Conseil d'Etat in 1968[74] took the view that it could not challenge the validity of an act of the Parliament, even if it conflicted with EEC law. But in 1975, the Cour de cassation took the view that community law would prevail.[75] Interestingly, Procureur général Touffait preferred to base his argument not on Article 55 of the

[72] See BVerfGE 22, 293, p. 296 (8 October 1967). R. Scholz, *Maunz-Dürig Grundgesetz* (Tübingen 2009), Article 23, §19; D. Currie, *The Constitution of the Federal Republic of Germany* (Chicago 1994), 94–98.

[73] See BVerfGE 31, 145 (173–174) (*Milk Powder*, 9 June 1971).

[74] CE 1 March 1968, Semoules de France, no. 62814, conclusions Questiaux, commented on perceptively by Wade in (1972) 88 L.Q.R. 1. Also CE Ass. 22 décembre 1978, *Ministre de l'Intérieur c/ Cohn-Bendit*, Leb. 524, conclusions Genevois. L.N. Brown and J. Bell, *French Administrative Law*, 5th ed. (Oxford 1998), 283–86.

[75] Cass. Ch. Mixte, *Société des cafés Jacques Vabre* D. 1975, 497 conclusions Touffait.

Constitution but "on the very nature of the legal order instituted by the Treaty of Rome". The court itself, whilst explaining that the treaty had effect under Article 55, then argued that the treaty inaugurated a distinct legal order within the legal order of Member States. The Conseil constitutionnel took a similar view in an electoral case in 1988.[76] The Conseil d'Etat reversed its position in 1989 and also accepted the priority of EU law.[77] Subsequently the distinctive status of EU law was given constitutional grounding in Articles 88–1 to 88–4, adopted in 1992. But in its decision on the Constitution for Europe in 2004, the Conseil constitutionnel argued that, where an EU provision challenged fundamental civil liberties or the exercise of national sovereignty, a constitutional amendment was necessary.[78]

So it is clear that there was no common position in French law in favour of the priority of EU law, certainly before 1975 and possibly not before 1989. What happened was a gradual conversion of different courts, the development of a consensus among lawyers. But it was not the result of a single legal act. It is clear that from 1992, EU law has a distinct status as a primary source of law within the constitutionally defined scheme of sources. It is clear that in 1968, it was accepted that it had a status like any other primary source as a law authorised by Article 55 of the Constitution. But between 1968 and 1992, there was a shift to the view that EEC law was a distinct source of law. The fact of France's commitment to the EEC (certainly after De Gaulle's departure in 1969) was unquestioned and the consequence for the sources of law took shape in the private law courts. The public law courts continued their position in 1978, but with changes of generation came to adopt a different view. The view of Touffait in 1975 was much closer to that of Pizzorusso.[79] His view that "process sources" (*fonti fatti*) evolve over time and are essentially more like principles than specific provisions fits the very ambiguous nature of the French debate from 1975 to 1992, or in Italy from 1975 to 2007 or in Germany from 1967 to 1974.

Thus, in all three countries, whereas the courts relied on the constitutional provision of their system that gives internal effect to treaties as the initial basis of EEC law, the way this was applied relied very heavily on a radical reinterpretation of those provisions. First, it enabled the Treaty of Rome of 1957 to introduce an ongoing and continuous power to change

[76] CC 21 octobre 1988, *Ass. Nat. Val d'Oise 5^e^ circ.* Rec. 183 ; RFDA 1988, 908 note Genevois ; S. Boyron, *The Constitution of France* (Oxford 2013), 219–29.

[77] CE Ass. 20 October 1989, Leb. 190 conclusions Frydman; RFDA 1989, 824 note Genevois.

[78] CC Décision n° 2004–505 DC, 19 November 2004, para. 7; J. Bell, "French Constitutional Council and European Law" (2005) 54 I.C.L.Q. 735.

[79] See the views of F. Terré, *Introduction générale du droit*, 5th ed. (Paris 2000), 218: "Procédant de choix idéologiques favorables à l'internationalisation et à l'européanisation de notre droit … les solutions adoptées par la Cour de cassation et le Conseil d'Etat entraînent l'intégration dans notre ordre juridique … d'une énorme mass sécrétée, au jour le jour par la bureaucratie bruxelloise."

domestic law without further enactment, contrary to the normal expectation that later statutes repeal earlier ones. The original constitutional provision was only envisaged in relation to specific provisions arising out of a treaty. It was widely acknowledged that this was a judicial change that obviated a formal change in the Constitution.[80] Second, it gave that EEC/EU law a priority which was not unlimited. At the very least, fundamental constitutional values were preserved from the impact of direct effect. This was not a direct copy of Luxembourg case law or of national legislative provisions, but reflected a distinct national perspective on the limits of shared sovereignty. In the light of scholarly and other debates within their countries and beyond, the courts developed a view of the distinct place of EU law within their national legal order.

The debate in the *Miller* case in England reflects the same lack of clarity in an account of the changes in sources of law. The basic argument for the claimants was that the UK Government could not trigger Article 50 TEU to begin the process of withdrawing the UK from the EU without the consent of Parliament. One of the reasons proffered for this was that, in some circumstances, Article 50 might lead to the automatic ending of the UK's membership of the EU, and that this would alter the sources of UK law without the consent of Parliament. The majority basically accepted this might be the case and considered that, therefore, the consent of Parliament was necessary to trigger Article 50. The majority expressed their views in different ways at different points in their judgment. In para. 65, Lord Neuberger S.C.P. stated:

> In our view, then, although the 1972 Act gives effect to EU law, it is not itself the originating source of that law. It is, as was said on behalf of the Secretary of State echoing the illuminating analysis of Professor Finnis, the "conduit pipe" by which EU law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute EU law an independent and overriding source of domestic law.

Later, in para. 80, he stated that "the 1972 Act effectively constitutes EU law as an entirely new, independent and overriding source of domestic law, and the Court of Justice as a source of binding judicial decisions about its meaning".

The former statement suggests that the sources of law changed at the time of the 1972 Act, but the 1972 Act itself is not the authorising text.[81] The latter seems to treat the 1972 Act as the authorising text. As Elliott has

[80] See the arguments of Procureur général Ganshof van der Meersch in *Le Ski*, Pas. 1971.I at 898–99: "une évolution jurisprudentielle est meilleure qu'un changement de Constitution."

[81] Professor Finnis cautioned that the "conduit pipe" analogy was inadequate: "*Brexit* and the Balance of our Constitution", Sir Thomas More lecture, 1 December 2016, p. 20.

pointed out, the reasoning here is not clear.[82] On the one hand, the majority reject that the "rule of recognition" was changed by the 1972 Act (paras. 60–61). On the other hand, they rejected the view that EU law was delegated legislation in that s. 2 of the Act had constituted the EU legislative process as a subordinate authority to create primary law in the UK. But they then accept in the above paragraphs that EU law is an autonomous source of law.

I think Pizzorusso's analysis helps to clarify what is being said. One way of understanding the effect of the European Communities Act 1972 is that it is an enabling act within the framework of the existing Constitution, a secondary rule about the sources of law, which gives validity to present and future directly effective rules of EEC/EU law as a primary source of law. That is consistent with the understanding in France, Germany and Italy on 1 January 1973.[83] Lord Reed in para. 224 adopts a version of this view by describing EU law as a source of law dependent on the 1972 act.[84] This was the view adopted by Tony Bradley in 1985[85] when he contrasted the status of EEC law in the UK with the Belgian decision in *Fromageries "Le Ski"*. By contrast, Mitchell[86] argued that there had been a change in the Constitution. It was not a complete change in the basic status of parliamentary sovereignty, but a limited one, creating a specific area in which community law had priority. In that sense, it was a partial limitation of sovereignty (and thus a change in the sources of law). Wade's analysis also suggested that entry into the EEC constituted a change in the sources of law. Wade was unhappy with the view that EEC law was like any other treaty law because that failed to account for the obligation to make prior EEC law prevail over later UK statutes. This was a radical change in parliamentary sovereignty and was not just treating EEC law like the results of any other treaty. In this, he challenged the assumptions of the British Governments of 1967 and 1972 which took the UK into the EEC and Lord Bridge in the *Factortame No.2* decision who stated the then effect of EU law.[87] In his view, the authority to

[82] M. Elliott, "The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle" [2017] C.L.J. 257, at 272. Also D. Feldman, "Pulling a Trigger or Starting a Journey? Brexit in the Supreme Court" [2017] C.L.J. 217.

[83] The view in Belgium had already changed during the course of 1971 in Cass. 27 mai 1971, *S.A. Fromagerie Franco-Suisse "Le Ski" c. Ministère des affaire Économiques*, Pas 1971, 886.

[84] Elliott argues that this view is the only one to make sense after rejecting the view that the rule of recognition has changed: Elliott, "The Supreme Court's Judgment in *Miller*", pp. 272–73.

[85] A.W.B. Bradley, "The Sovereignty of Parliament – in Perpetuity?" in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (Oxford 1985), 39.

[86] J.D.B. Mitchell, "What Happened to the Constitution on 1st January 1973?" (1980) 11 Cambrian L.Rev. 69, at 81–82.

[87] H.W.R. Wade, "What Has Happened to the Sovereignty of Parliament?" (1991) 107 L.Q.R. 1, at 4; and H.W.R. Wade, "Sovereignty – Revolution or Evolution?" (1996) 112 L.Q.R. 568; cf. P.P. Craig, "Sovereignty of the UK Parliament after Factortame" (1991) 11 Y.B.E.L. 221. Wade had already expressed a similar view just before the entry of the UK into the EEC: "In a country which has no overriding constitutional legislation, a change in this *Grundnorm* can be achieved only by a legal revolution and only if the judges elected to abandon their deeply rooted allegiance to the ruling Parliament of the

determine the scope of parliamentary sovereignty lay with the judges and not with Parliament: "The point is simply that the rule of recognition is itself a political fact that the judges themselves are able to change when they are confronted with a new situation which so demands."[88] At the same time, in 1972, he argued for Parliament to state clearly whether EEC law would limit the doctrine of implied repeal,[89] but that did not happen and was only determined by Lord Bridge in *Factortame (No.2)*. Whether Lord Bridge's statement formally constituted a change or not, it did crystallise opinion within the legal community and became a point of reference on the status of EU law.[90] Such a gradual build-up of opinion is typical of the status of rules on the sources of law. In a sense, the majority in *Miller* were forcing Parliament to make a decision about the sources of law in a way it had fudged in 1972.

In light of what has been said about German, French and Italian conceptions of the reconciliation of EU supremacy and national constitutional sovereignty, it is interesting to note the views of the Supreme Court in *HS2*. Lord Reid stated: "If there is a conflict between a constitutional principle, such as that embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom."[91]

As in all the other European countries, this qualification of EU supremacy to meet the needs of constitutional principle is not to be found in constitutional, treaty or legislative provisions, but in judicial pronouncements.

I agree with my colleagues, John Allison and Trevor Allan, that the use of the concepts of the rule of recognition and legal revolution are unnecessary and unhelpful in analysing the acceptance of the supremacy of EU law in the period after 1972. It would have been possible to conceive that a change had occurred in the rules governing the primary sources of law and that would not be as dramatic. Allison rightly suggests that "Talk of a new rule of recognition overstates and oversimplifies whatever change of official practice has in fact occurred".[92] Allison suggests that Wade and Hart were concerned with system in the law and Salmond's conception of "ultimate legal principles", so that, if their approach were taken, a move away from the absolute sovereignty of the Westminster Parliament changed the legal system's rule of recognition which, as such, was a radical,

day": H.W.R. Wade, "Sovereignty and the European Communities" (1972) 88 L.Q.R. 1, at 5. By contrast Allan argues that no significant change or recognition of change in sources took place in Lord Bridge's speech: Allan, *Sovereignty of Law*, pp. 148, 150.

[88] Wade, "Sovereignty – Revolution or Evolution?", p. 574.

[89] Wade, "Sovereignty and the European Communities", pp. 4–5.

[90] See Lords Neuberger and Mance, *HS2* [2014] UKSC 3, at [206].

[91] *R. (on the application of HS2 Action Alliance Limited) v The Secretary of State for Transport and another* [2014] UKSC 3, at [79]; see also Lords Neuberger and Mance at [206]–[208]. I am grateful to Trevor Allan for this point. See also Elliott, "The Supreme Court's Judgment in *Miller*", p. 269.

[92] J. Allison, *The English Historical Constitution* (Cambridge 2007), 115.

revolutionary or fundamental constitutional change. Instead, Allison offers an alternative conception, the "economy of the common law", which focuses on characterising the common law Constitution as a seamless web of evolving custom or an array of precedents.[93] The evolving case law fits the character of the historical Constitution. Allan also saw the changes in the Constitution as part of the evolution of the common law, rather than a "revolution": "There is no real need to resort to the notions of 'revolution' or 'shifts in the *Grundnorm*' to explain the result of the *Factortame* litigation. It is simply the legitimate consequence of the interpretation of sovereignty which best reflects new conceptions of the political community."[94] The foundations of the legal system could evolve over time and that was what was happening in the early 1980s, before this was finally recognised in the *Factortame* decision.[95]

Where I would differ from my colleagues is that more careful attention to the rules on sources of law provides a better way of understanding what is happening when sources of law change. When EU law became a source of English law, there was no great change to the fundamental values of the system. The *Miller* judgments are clear in the majority and in the minority that the Sovereignty of Parliament continued to exist. The same point is made by German, French and Italian decisions that, at root, national sovereignty remains as a value, but it now operates in a context of a legally binding commitment to membership of the EU.[96] EU law certainly became a primary source of law, but most countries doubt whether it comes into national law as a constitutional source of law. The French Constitutional Council decision of 2004, the Italian decision of 2007 and the German *Solange* decisions suggest that EU law lives in tension with national constitutional law. EU law has specific spheres of competence, which are defined by geographical and subject-matter considerations. It therefore is one element of the basket of sources of law applicable in a country. As Allison says, it is a gross exaggeration to see EU law as a fundamental change in the system of norms which govern a country. When viewed in this way, the question in *Miller* becomes a matter of whether changes in the sources of law always require the authorisation of Parliament. From what has gone before, the answer is clearly "no". So the question really before the Supreme Court was whether specific acts of the Executive can be permitted to have such an effect.

[93] Ibid., at pp. 116–19, 125–26.
[94] T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford 1993), 280. This fits with his idea that the UK has a common law constitution: ibid., at p. 4; and T.R.S. Allan, *The Sovereignty of Law* (Oxford 2013), 3. His earlier work on the status of European law reflects this approach and counters the perspective of Wade: see note 95 below.
[95] T.R.S. Allan, "Parliamentary Sovereignty: Lord Denning's Dexterous Revolution" (1983) 3 O.J.L.S. 22.
[96] See J. Schwarze, *Birth of a European Constitutional Order* (Baden-Baden 2001), 511–16.

A. What Does This Say about Sources?

First, it is not helpful to talk about a "rule of recognition" or a "Basic Norm" as a single entity. The British courts are typical in wanting to claim the continued importance of parliamentary sovereignty and the priority to be accorded to EU law whilst the UK is a member. The Germans, French and Italians are not alone in setting out the priority of constitutional principles, including fundamental rights. Mitchell's emphasis on partial change is more useful as is the view of the Corte costituzionale in 1984 that there are distinct spheres in which the EU legal order and the national legal order operate, and that the main problem is coordinating these.[97] Pizzorusso's analysis demonstrates that the system of rules on sources is complex. Some parts are capable of changing without other parts changing, and that is the experience of those in countries which have undergone significant regime change. It is not unusual to see a private law judgment citing decisions of courts on the civil code from the German Empire, the Weimar Republic, the Third Reich and the Federal Republic as if they were all the same.[98]

The second feature supports Hart's view that rules of recognition (and thus on sources) are social practices: "... the rule of recognition, which is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts".[99] It is clear that the interpretation of the sources of law alters over time. The position in Italy and France over Articles 11 and 55 in their respective constitutions shows that the integrity of the developing legal order became a predominant factor in interpretation. The initial reaction was that EU law had made a limited change within the national legal order. But the firmness with which this became established emboldened the courts to interpret the situation differently. These reflections really came from outside the legal order itself. The development may be identified by reference to a specific legal text, but there was really a movement of opinion.

The changes in the rules governing the sources of law have come through a change in the consensus among lawyers which were then consecrated by judicial decision. Even the *Factortame* decision is a judicial decision attributing a view to the European Communities Act that is historically false. It was a rational reconstruction of how to view the place of EU law in the contemporary legal system. If that is honestly what happened, then one could imagine that, on Brexit, the legal community could unbelieve in the authority of EU law. On this analysis, Brexit would be a catalyst not an authority for changes in the sources of law. Uncomfortable as it may be for some

[97] *Granital*, note 65 above, Foro Italiano 1984. I. 2062 at cols.2075–2076.
[98] See e.g. BGHZ 29, 65, *Stromkabel* (9 December 1958).
[99] Hart, *Concept of Law*, p. 256.

lawyers, changes in the sources of law is not necessarily a direct democratic act. As Trevor Allan implies, it is a matter of reflection on the best understanding of the current constitutional order.

IV. Illustration 2: The *Practice Statement*

The decision of the Law Lords to issue a *Practice Statement* on 26 July 1966 may appear to be a classic instance of an event source, a decision that changes the sources of law. But I think it is more complex.

The basic facts are well known and undisputed.[100] The immediate trigger for the statement was the decision of the Scottish Law Commission to include in its first programme of work a Bill which would declare that, in Scottish appeals, the House of Lords was not bound by its own decisions. This would effectively have been declaratory of what one of its academic members, T.B. Smith, considered always to have been the position of judicial precedent in Scots law. The English and Welsh Law Commission then decided to work on similar lines and the Lord Chancellor became involved. He invited the Law Lords (and others holding equivalent status who might sit in the House of Lords) to consider the matter. They met and produced an agreement which was presented to the Lord Chancellor. This was then issued as a "Practice Statement" about the future practice of the House of Lords in its judicial capacity:

> Their lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so. In this connexion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this House.[101]

The first feature of this decision is that it reclassifies the statement of Lord Halsbury in *London Street Tramways* from being a judicial statement (ratio or obiter) into a *practice*. It then becomes easier to change. Furthermore,

[100] See in particular L. Blom-Cooper, "1966 and All That: The Story of the Practice Statement" in L. Blom-Cooper, B. Dickson and G. Drewry (eds.), *The Judicial House of Lords 1876–2009* (Oxford 2009), ch. 9; and Paterson, *The Law Lords*, pp. 146–53.

[101] *Practice Statement (Judicial Precedent)* [1966] 3 All E.R. 77.

unlike in *Beamish v Beamish*[102] and *London Street Tramways*,[103] the change was not made within a suitable judicial decision.

Glanville Williams and Brian Simpson had already identified the distinctive character of statements of precedent. Williams had argued that *London Street Tramways* effectively presumed what it was seeking to prove – that a decision of the House of Lords is binding on itself.[104] Cross also took the view that statements about the rules of precedent fell outside the normal classification of judicial statements as either ratio or obiter.[105] But there was controversy about the characterisation of both the judicial decisions of the House of Lords and the *Practice Statement*. Cross saw this simply as an illustration of "the inherent power of any court to regulate its own practice" but the editor of his book on precedent, Jim Harris, took issue with this. He pointed out that the House of Lords did not allow some courts to regulate their own practice on precedent (e.g. the Court of Appeal (Civil Division)) and that there was an inappropriate analogy between rules on precedent and those on court procedure.[106] He did not think the characterisation of precedent as a mere "practice" was adequate. They were rules having a normative character. The classification of the rules as "rules of practice" does not change their character as legal rules, it simply means that they are rules of procedure, rather than rules of substance.[107] Harris accepted that such rules evolve and that a judicial statement might be taken to express the rules:

> Such a pronouncement, if it subsequently meets with general approval by other judges, may have the effect of crystallizing a particular rule or exception .... [But it] is another thing if judges claim overtly to bring about a change in the rules which have hitherto been settled, as those who participated in the Practice Statement seem to have done.[108]

Thus, Harris distinguished between statements articulating unsettled rules and changing settled rules, and thought that the latter required clear authorisation.

Blackshield[109] likewise rejected the idea that the rules of precedent, including the Practice Statement and the decision in *Beamish v Beamish*, were simply statements of "practice". There is a significant difference between "practice" in the sense of habitual ways of conducting cases and rules of procedural law which are in some way binding. He then went on

[102] (1861) 9 H.L.C. 274.
[103] [1898] A.C. 375.
[104] J.W. Salmond, *Jurisprudence*, 11th ed. (London 1957), 187–88.
[105] R. Cross, "The House of Lords and the Rules of Precedent" in P.M. Hacker and J. Raz (eds.), *Law Morality and Society* (Oxford 1977), 156–57.
[106] J.W. Harris, *Cross and Harris on Precedent*, 4th ed. (Oxford 1991), 104–08, especially 105.
[107] P.J. Evans, "The Status of Rules of Precedent" [1982] C.L.J. 162, at 165–66.
[108] Harris, *Cross and Harris on Precedent*, p. 106.
[109] A. Blackshield, "'Practical Reason' and 'Conventional Wisdom', in the House of Lords and Precedent" in L. Goldstein (ed.), *Precedent in Law* (Oxford 1987), ch. 5, esp. 109–31.

to show how Lord Simon of Glaisdale's view that rules of precedent were "conventions"[110] was equally unhelpful. He applied the traditional criteria that conventions had to have a constitutional purpose, would be the product of long development and depend on the consent of constitutional actors, and found the Practice Statement did not fit these. In particular, these criteria did not seem to fit a claim that members of the Judicial Committee of the House of Lords could by a single act establish a new self-limitation on their lawmaking powers.[111] The key problem was that a constitutional convention could, at best, introduce a moral constraint on the exercise of a legal power (to reverse previous decisions). In the end, he took the view that either precedent is a practice (and not a convention), which judges could easily change, or it is a legal rule which the members of the House of Lords had no constitutional authority to change by mere fiat.[112]

Both Harris and Blackshield concluded, as Simpson had remarked earlier, that what was needed was a rule of competence, a rule establishing which body had the authority to change the sources of law. Simpson suggested that this needed a different procedure from that required to make an ordinary judicial decision.[113] Evans subjected this argument to further analysis.[114] He took Simpson's argument to be that rules of precedent were ordinary rules of law, but could not rest on rules of precedent themselves. Each of these authors suggest the need for secondary rules and that there should be a clearly designated institution. But none of the authors was able to locate such rules within the English legal system or to suggest their formulation.

Duxbury[115] has more recently reviewed the arguments about the foundations for the *Practice Statement*. He notes the way in which Cross, Mann, Stone and others have been troubled by the lack of an apparent constitutional authority to change the rule of stare decisis in the House of Lords. But he argues: "It is a mistake to think that the purposes of law, and the ways in which we value legal rules remain stable. Law evolves: the House of Lords, by explicitly altering its position on precedent-following, was not so much doing something new as acknowledging a change which had been occurring over a long period of time."[116]

Harris, Evans and Blackshield focus their attention on secondary rules as constitutional rules which enable changes in the source of law. But

[110] *Knuller v D.P.P.* [1973] A.C. 435, 485.
[111] Blackshield, "'Practical Reason' and 'Conventional Wisdom'", pp. 131–51. His view on the impossibility of conventions being changed by a single act is contestable: see for example the Sewel Convention.
[112] Ibid, at p. 152.
[113] A.W.B. Simpson, "The Ratio Decidendi of a Case and the Doctrine of Binding Precedent", in A. Guest (ed.), *Oxford Essays in Jurisprudence*, 1st series (Oxford 1961), 154–55.
[114] Evans, "The Status of Rules of Precedent".
[115] N. Duxbury, *The Nature and Authority of Precedent* (Cambridge 2008), 129–39.
[116] Ibid., at p. 135.

Duxbury's final analysis permits us to see that an "evolutionary-jurisprudential analysis",[117] similar to that articulated by Allison and Allan in relation to EU law, provides an alternative account. It is not necessary to look at the matter at a high constitutional level with a formal process for change. It suffices to look at the rules on arguments based on the sources of law as part of the practice of lawyers. It is that evolving practice that helps to avoid being tied in knots about whether the Practice Statement is only valid because it has been accepted and is unchallenged.[118] To develop this line of argument further, I would suggest that, if the sources of law are to be found in the rules recognised by the practice of the legal community, then it may not matter that there is no authority charged formally with enacting such a rule. Changes in the rules on sources emerge as a form of consensus within the different branches of the legal community. It may be that one organ, e.g. the House of Lords or even Parliament,[119] takes the initiative, but the validity of the change depends on a form of *opinio juris*.

The debate among leading common lawyers that I have just summarised demonstrates the weakness of existing concepts. The choice that many authors present seems to be between rules of precedent as a practice (and thus non-legal), a convention (morally but not legally binding), and ordinary rule of law (and in which case how can it be changed by a "practice statement"), or treating precedent as one of the "ultimate principles" of the legal system.[120] None of these is adequate. We want to say that rules of precedent are legally binding and a judge who ignores them makes a legal mistake. Common lawyers would treat the decision as *per incuriam*.[121] It would certainly be a ground for criticism of the judge and possible disciplinary sanction.[122] In Pizzorusso's terms, these are legal rules about sources, rather than primary rules of law. The second feature on which Evans was right is that the *Practice Statement*, like *Beamish* and *London Street Tramways*, assumed that judges themselves have the authority to make rules about precedent as sources of law, albeit not exclusive authority.[123]

In terms of authority to make the rules of precedent, Paterson brings out two very important dimensions. The first is that the event of 26 July 1966 came as part of a climate in which the rigidity of the rules of *stare decisis* was being challenged within the legal community. He and Stevens point to the way in which judges in the late 1950s and early 1960s were becoming

[117] Ibid., at p. 136.
[118] Ibid., at pp. 139–49; Harris, *Cross and Harris on Precedent*, pp. 107–08.
[119] See the current draft of clause 6(4) of the European Union (Withdrawal) Bill.
[120] P.J. Fitzgerald, *Salmond on Jurisprudence*, 12th ed. (London 1966), 160.
[121] See Harris, *Cross and Harris on Precedent*, pp. 99, 148–52.
[122] Ibid., at p. 99; MacCormick and Summers, *Interpreting Precedents*, p. 38.
[123] Evans, "The Status of Rules of Precedent", pp. 173, 178.

more critical of the strict practice of the House of Lords being bound by its own decisions and often sought ways to erode it.[124] The second feature is the place of the wider legal community. So academic criticism, particularly from people like Goodhart helped to create the climate and to support the change when it was made.[125] Although the Law Lords were the main reference group for themselves, the concurrence of others was an important part of establishing a consensus within the legal community. As Harris had noted, the key to the legitimacy and acceptability of the rules of precedent as expressing the legal tradition lies in the guardians of the tradition, the key members of the legal community. The points that Paterson and Harris make are compatible with my suggestion that the rules of precedent emerge as a kind of consensus within the legal community, as a "process source", rather than an "event source".

I think it is unhelpful to muddle the discussion of sources of law with the wider concept of the "Basic Norm" or the "rule of recognition". Evans suggested that one should treat "rules of precedent . . . as part of the grundnorm [*sic*] or rule of recognition of the legal system. The position would then be that the authority of rules of precedent would not depend upon precedents or any other source of authority, but merely upon their acceptance as part of the ultimate source of authority of the legal system".[126] This is muddled because, as Pizzorusso rightly states, the Basic Norm relates to the foundations of the legal system – what gives the legal system validity. The rules on sources of law have much greater specificity and narrower scope. It is perfectly possible to change the rules on precedent in relation to specific courts without affecting much of the rest of the edifice of the valid rules of the legal system. Whereas in the Italian legal system, precedents would be tertiary sources of law, in England they would probably be classed as primary. However, this difference does not necessarily affect the way in which custom, decrees, statutes and other sources of law operate, nor how more fundamental values such as the rule of law and the protection of fundamental rights are treated.

V. Conclusion

In this article, I have argued that rules about legal arguments base on sources of law are legal rules in that they are standards of correctness against which the arguments of lawyers (academics, practitioners and judges) are assessed. These rules on sources of law are secondary rules in that they help identify which are relevant primary rules of law and what weight they carry within a legal argument. I have also argued that

[124] Paterson, *The Law Lords*, pp. 147–48; R. Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800–1976* (London 1979), 432, 464–67, 470–73, 496–502, 528–29.
[125] Paterson, *The Law Lords*, p. 149.
[126] Evans, "The Status of Rules of Precedent", p. 172.

it is not helpful to characterise rules about sources as among the highest level of rules within a legal system, as "ultimate legal principles" (Salmond), "rules of recognition" (Hart) or the "Basic Norm" (Kelsen). Those ideas have great value within the wider jurisprudential theories of their authors, but they do not help us to think clearly about sources of law. Except in the rarest of cases, changes in the sources of law do not affect the fundamental character of the legal system, let alone the political order as a whole. Conversely, rules on legal sources will typically remain unaffected (formally and often substantively) even by radical changes in the political or constitutional regime. Rules on the sources of law typically operate at the lower levels of the legal system than many of the exalted concepts like the rule of recognition.

As legal rules, rules on sources are constituted typically by a tradition among lawyers, rather than by a single legal enactment. That is why it is very rare to find a statement of legal sources in an enactment such as a civil code or a constitution. The statement of sources is taken for granted by the lawyers and articulated in their manuals (often for learners or for foreign lawyers). Yes, we look at the practices of lawyers in the way they argue legal points; but we are analysing what these practices show about what they consider to be obligatory or permissive, what is binding and what is persuasive within legal argument. In that sense, we are seeking in the practices the normative standards which guide them, which is essentially what Hart was arguing. There is much merit in Pizzorusso's distinction between process sources (*fonti fatti*) and (legal) event sources (*fonti atti*), as I have re-labelled them. Legal reasoning involves drawing on the material contained in a variety of legal formants (textbooks, statutes, and cases) in order to construct by interpretation a rule applicable to the issue before us. The sources on which we rely in this process actually fit better the continental description of legal reasoning than the pre-occupation of some common lawyers with binding precedents and the literal interpretation of statutes. Continental lawyers would look at a code as a body of rules glossed by an evolving body of interpretation. That typically reflects how common lawyers would approach the Land Registration Act 2002 or the Law of Property Act 1925, as well as legislation on divorce, children and companies, to name but a few areas of law. Case law is seen not in terms of a single ruling, but in terms of an established body of case law (*ständige Rechtssprechung*, *la jurisprudence constante*). That idea is reflected also in the way the authority of a single common law precedent can flourish or dissolve through practices of interpretation such as distinguishing.[127] Only in relation to very recent decisions do common lawyers look only to the single decision. Generally, like their continental colleagues,

[127] See Raz, *The Authority of Law*, pp. 185–86; Duxbury, *The Nature and Authority of Precedent*, pp. 113–16.

they look to assess the authority of a decision in terms of its conformity to principle and judicial respect. As Sir John Baker commented:

> Law cannot consist simply in random single instances. Indeed authorities – in the form of reported pronouncements in particular instances – have no coherence in themselves. They make little sense except in the context of a pre-existing framework of principle and procedure. Individual pronouncements may either confirm that framework or signal attempts to adjust it; but for the framework itself to change requires both general acceptance of the adjustment and "someone to do the adding" [namely someone to make the authoritative statement].[128]

In relation to non-binding sources, such as scholarly writing (*la doctrine*, *die Rechtslehre*), this is more obviously the case because, although individuals may be cited, it is the ability of an author to express the *herrschende Meinung* which is the mark of authority. For my part, I incline to the view that legal sources are more typically process sources than event sources.

The process of change in sources helps us to see more clearly that the sources of law and their weight typically emerge from the practice of the legal community, rather than from individual events. I have given two illustrations. The first is the emergence of EEC/EU law as an autonomous primary source of law without any formal constitutional change. Having incorporated EEC rules like any other international treaty, it came to be recognised that it had an ongoing ability to create directly applicable primary rules of law and that these rules might even displace later primary sources of law. That process of reception involved on the one hand direction from the court in Luxembourg and an emerging consensus among scholars and judges at the national level. It was a process of hesitant steps and diverging opinions before a settled position emerged. In Belgium and Germany, this was in the 1970s; in Italy in the 1980s. In France and the UK, it was in 1989, just before most countries gave the change formal constitutional expression. So here, the rules on sources seem to have emerged from within the legal community, before the democratic political process caught up with what had happened. The second illustration was the change in the authority of judicial decisions of the House of Lords. Here we had disquiet expressed by scholars and judges leading to an event. That event in July 1966 did not fit easily into established constitutional ideas about the authority to make constitutional rules, yet it was seen quickly as unchallengeable. In both cases, scholars have struggled to reconcile what has happened with democratic principles, and maybe that was a mistake. On matters such as the sources of law, there

[128] J.H. Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History* (Oxford 2001), 78. On the role of scholarship and tradition in providing the coherence and sense to otherwise oblique statutory rules or judicial pronouncements, see J.H. Baker, *The Common Law Tradition: Lawyers, Books and the Law* (London 2000), 25.

seems to be a relative autonomy of the legal community to settle such matters. Of course, the legislator or the constituent power can intervene to change the sources of law. In some systems a single judicial decision can do the same. But it is not necessary. Undemocratic as it might appear, the majority in *Miller* was wrong to think that a change in the status of EU law as a source of the laws of the UK required an Act of Parliament. The majority were right that it did not become a source through an Act of Parliament, and so it did not need an Act of Parliament to change it. The proof is that the European Union (Notification of Withdrawal) Act 2017 says nothing at all about the sources of law!