

CASE LAW IN ROMAN,  
ANGLOSAXON AND  
CONTINENTAL LAW

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MARÍA JOSÉ FALCÓN Y TELLA

# Case Law in Roman, Anglosaxon and Continental Law

by

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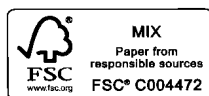
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## Preface

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If, from the viewpoint of continental legal systems, one can define case law as a common interpretation of legal regulations, with those regulations leading to a convergent series of judicial decisions, then to a large extent the phenomenon of case law may be seen as a paradox.

On the one hand, case law can effectively seem to be entirely integrated into the legal regulations whose meanings it interprets. From this point of view, case law apparently fulfills a purely declarative role, thereby running the risk of being viewed as merely an accessory to the legal regulations it describes.

Nonetheless, one cannot ignore the fact that identifying and properly understanding legal norms requires a careful study of case law. In this respect, and from a more realistic standpoint, it can be accepted that case law – partially, at least – helps to establish the scope of the norms that may be in play.

Bearing in mind the uncertainties outlined above, it is understandable that the role and rules of case law itself have taken their place among the problems which the science of law seeks to research and analyse, whether in relation to the inherent principles of a specific legal system or to the properties of law in general. The questions of whether case law has a creative or merely declarative function, in addition to whether – and under what conditions – case law can be considered to be a source of law, represent key problems upon which to reflect.

These issues have indeed been the object of debate since at least the nineteenth century, as much in terms of General Theory of Law as in the doctrinal study of the various national legal systems. In this sense, the understanding of the role performed by the judge, insofar as it derived from certain interpretations of the principle of separation of powers and taking into account the prestige that the judiciary enjoyed in the majority of European legal systems, has driven numerous jurists to consider in depth the question of the proper role and scope of case law.

In any case, it is worth highlighting that, at the present time, the outlined issue has an even greater importance. In effect, certain aspects of the contemporary evolution of European legal systems are contribut-

ing towards making questions concerning role and scope of case law ever more difficult to resolve. These aspects include the increase in written law, in addition to the strengthening of the judicial role in general – a strengthening shown clearly, among other things, by the extension of jurisdictional control of constitutionality of laws in various States, or the growing influence of supranational jurisdictions in areas such as European Union law, or applicable rules in the field of human rights. These are among the factors which have taken the case law phenomenon to a new level of significance. In this regard, and beyond their traditional theoretical and legal dimensions, problems relating to the role and rules of case law demand an in-depth reflection, taking into account the context of the modern day.

The preceding observations alone would justify our interest in this new work by María José Falcón y Tella dedicated to case law. This study, in fact, offers readers an outstanding study of the case law phenomenon.

The reflections offered by the author are concerned with the specific scope of case law in Continental legal systems. This definition derives from a methodological comparison concerning both the meaning of the term *iurisprudentia* in Roman law, and the practice of case law that characterises common law systems (English law particularly being considered with regard to the latter).

Following this first stage, María José Falcón y Tella analyzes, in the light of the Spanish model, the role performed by the various jurisprudential institutions in the formation of case law, and similarly the conditions on which its existence depends. Later, having identified the various functions of case law, the author reviews in detail the arguments advanced in favour of and against the role of case law as a source of law. This is specifically considered with relation to the case law emanating from the Spanish Supreme Court (*Tribunal Supremo*).

The immense interest that the author's work holds is particularly evident in its digressions on Theory of Law, which supplement the arguments made in the work and allow the reader to recognize their scope. These analyses deal not only with the notion of a source of law, but also with the varying understandings of the role played by the judge which have been outlined by the contemporary mainstream of Theory of Law.

The reader will be able to benefit from clarifying analyses provided by the author regarding changes in case law, in addition to considerations of the role it performs in different national legal systems.

The historical focus of the issues, the use of methodology from the perspective of comparative law and of doctrinal studies of positive law, as with the use of resources offered by general Theory of Law, together con-

stitute some of the elements which enrich this work by María José Falcón y Tella and confer real scientific value on the work. Hence, as with previous works of real value written by the author in the field of Theory of Law,<sup>1</sup> this essential study of case law carried out by María José Falcón y Tella will occupy, without a shadow of a doubt, a key position among the more significant reference works dedicated to this form of manifestation of law.

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- 1 See, among others, M.J. FALCÓN Y TELLA, *El argumento analógico en el Derecho*, Preface by J. ITURMENDI MORALES, Madrid, Civitas, 1991. *Id*, *Concepto y fundamento de la validez del Derecho*, Preface by F. OST, Madrid, Civitas, 1994. *Id*, *La desobediencia civil*, Preface by F. GARRIDO FALLA, Madrid, Marcial Pons, 2000. *Id*, *Equidad, Derecho y Justicia*, Preface by J. IGARTUA SALAVERRÍA, Madrid, Editorial Universitaria Ramón Areces, 2005. *Id* – F. FALCÓN Y TELLA, *Fundamento y finalidad de la sanción: ¿un derecho a castigar?*, Preface by A. GARCÍA PABLOS, Madrid, Marcial Pons, 2005.

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# Chapter 1

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## Introduction

Case law is a widely studied field.<sup>2</sup> It creates various questions, the first of which being how it should be defined, as case law cannot be given a single meaning. There is no universal sense of the term “case law”, but rather a plurality of meanings depending on the historical era (temporal variant), and the place or legal system in question (geographical variant). In this sense, the old Roman law concept of *iurisprudentia*, referring to a concept comparable to Science of law, does not carry the same meaning as the current idea of case law.<sup>3</sup> While in Anglosaxon legal systems the idea of case law is one in which judicial precedents form the principal source of law, jurists in Continental systems continue to debate whether case law may be considered at most a source of definition of subjective rights, or also a source for creation of objective law.<sup>4</sup>

- 2 F. M. CALVO VIDAL, *La jurisprudencia ¿Fuente del Derecho?*, Valladolid, Lex Nova, 1992, pp. 23-26. F. C. DE DIEGO, *La jurisprudencia como fuente del Derecho*, Madrid, 1925, pp. 105-106.
- 3 J. H. VON KIRCHMANN, *La jurisprudencia no es ciencia*, translation into Spanish and Introduction by A. TRUYOL SERRA, Madrid, 1949.
- 4 See, on jurisprudence, H. J. ABRAHAM, *The Judicial Process*, New York-Oxford, Oxford University Press, 1986. J. ADAME GODDARD, “Jurisprudencia”, in *Diccionario Jurídico Mexicano*, V, México, Instituto de Investigaciones Jurídicas, UNAM, 1984, p. 289. M. ALBALADEJO GARCÍA, “La jurisprudencia”, in *Revista de Derecho Privado*, 54, 1970. *Id*, *Curso de Derecho Civil español, I, Introducción y Parte General*, 3rd. ed., Barcelona, Bosch, 1983. *Id*, *Derecho civil, I, Introducción y Parte General*, vol. I, *Introducción y Derecho de la Persona*, 12nd. ed., Zaragoza, 1991. N. ALCALÁ ZAMORA Y CASTILLO, *Jueces. Jurisdicción, Jurisprudencia. (Estudios de Derecho procesal)*, Madrid, 1934, pp. 303-326. N. ALCALÁ ZAMORA Y TORRES, *La jurisprudencia y la vida del Derecho*. Discurso leído en el acto de recepción. Contestación de Rafael de Ureña y Smenjaud el día 22 de febrero de 1920, Madrid, Real Academia de Ciencias Morales y Políticas, 1920. L. ALEXANDER, “Precedent”, in D. PATTERSON, *A Companion to Philosophy of Law and Legal Theory*, Oxford, Blackwell, 1996. A. ANZON, *Il valore del precedente nel giudizio sulle leggi*, Milano, Giuffrè, 1995. ARCHIVES DE PHI-

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