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De Facto Precedent at the Court of Justice of the European Union

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Abstract
This paper seeks to demonstrate that although there is no official doctrine of precedent in judgments of the Court of Justice of the European Union (CJEU), the research affirms that there is a *de facto* system of precedent. This means that whilst, *de jure*, there is no official precedent status of the case law of the CJEU, the Court does give precedential value to its own case law through interpretive practices to ensure the uniform application of law and legal certainty throughout the Member States of the European Union (EU). When one looks at the elements of precedent it is apparent that this goes beyond its legal value (i.e. authority or bindingness) or conscious jurisprudential choice – language also plays a role. This article will examine discussions and models of precedent in common law and civil law legal systems in both theory and practice, before going on to examine the theories and practices of precedent at the CJEU.

Keywords
precedent, common law, civil law, CJEU, interpretation

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1. Introduction

This paper seeks to demonstrate that although there is no official doctrine of precedent in judgments of the Court of Justice of the European Union (CJEU), the research affirms that there is a *de facto* system of precedent. This means that whilst, *de jure*, there is no official precedent of the case law of the CJEU, the Court does give precedential value to its own case law through interpretive practices to ensure the uniform application of law and legal certainty throughout the Member States of the European Union (EU) (Derlén, 2015: 68). When one looks at the elements of precedent it is apparent that this goes beyond its legal value (i. e. authority or bindingness) or conscious jurisprudential choice – language also plays a role. This is especially salient when a legal system contains 24 official languages, and its Court officially operates only in one of them (Domingues, 2017). As will be shown, language choices of the CJEU have had an impact on its practices which in turn influence the operation of precedent in EU law. This shapes the theory (or status) of precedent for the CJEU insofar that an unofficial one exists. Beyond theory, there are also practices that support the operation of precedent in any given legal system, such as conscious jurisprudential choice; text production and drafting; language choices; and practices of dialogical or collegiate/single judgments that reflect the style of reasoning of a court. This paper examines the research on the development of the theory and practice of precedent at the CJEU and attempts to understand how it operates.

2. Theories of Precedent: Common and Civil Law

It is arguable that all legal systems, if they are to function fairly, will use some form of precedent in order to demonstrate that similar cases are treated in similar ways (equality and certainty before the law). How such a system operates, however, is a matter for legal tradition and culture (Camarena González, 2016). Whilst 'precedent' is a core operational concept in common law countries through the system of *stare decisis*, countries within the civil law system also operate a system of precedent: *jurisprudence constante*. Although the world is not exclusively drawn across the lines of common law and civil law traditions (cf. Algero, 2004: 780), the theories of precedent in each provide the foundation for various influences on any given legal system and its use of precedent. That civil law traditions do not follow precedent in the same way as common law follows the principle of *stare decisis* is a result of historical development of the legal order and of the separation of powers in the French legal tradition. Namely, where the legislator is seen as the supreme law maker, rather than the courts. However, this does not mean that there is no precedent whatsoever in the civil law tradition (Camarena González, 2016: 273).

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2.1. Common Law Precedent

Stare decisis essentially means 'to abide by precedents' and, as such, not upset settled principles of law (McKean, 1928: 481). The influence of this principle in common law varies from one country to another, but essentially means that where the facts of one case to the next are similar, they should be decided based on the factually similar cases that have gone before them. These cases are arguably invested "with normative authority" by other courts and non-judicial authorities (Gerhardt, 2008: 3). The extent of that "authority" invested by others will vary, depending on different circumstances (see also Edlin, 2007: 74).

Eisenhower III (1988: 871) provides a succinct synopsis of the main theories behind precedent based on Kelsen, Hart, Dworkin and Raz, such as explanations as to why precedent is a source of law in common law jurisdictions. Firstly, Kelsen, as a positivist, establishes that precedent is part of a legal system that sets out legal boundaries of human behaviour, and that this framework is based on a "hierarchy of norms". One norm then gains its legitimacy from another, for example court decisions are usually (though not always) based on legislation or a written constitution. As such, under Kelsen's view, the courts need a legal basis upon which to decide cases that will give their decisions legitimacy and bindingness (ibid.: 872). In "easy" cases, judges can find the legal basis upon which a criminal charge is made, or a lawsuit is brought. A gap in the law makes this more challenging, however a judge refusing to hear a case may render the law "unsatisfactory, unjust or inequitable" (ibid.: 873). It is in this space that precedent becomes judge-made law and starts to usurp the position of the legislator. Kelsen calls this the "fiction of gaps". This fiction sets a boundary for the courts: that they will only fill in the gap where legislation is silent, and of these, only in extreme cases which would lead to injustice (ibid.: 873–874). Eisenhower is critical of this as being "overly formalistic", and also because, according to Kelsen, a case will only bind "if it creates a new substantive law and is not merely the application of an existing one" (ibid.: 874). This is problematic because the interpretation of statute should also be consistent within any given jurisdiction – it would be vastly unfair for one court to interpret rights broadly and another to interpret them narrowly.

Hart argues that "the law is the interaction of legislative and court-made rules" (Eisenhower III, 1988: 874). Legislators cannot account for all situations under one statute, and therefore "must necessarily be general and refer to classes of persons" (ibid.). By being open ended in this way, the courts have space to interpret and apply statutes to cases that come before them, where they believe that the law applies. This is different from Kelsen's position, in that Hart makes no claim as to legislating, though "courts perform an essentially rule *producing* function" [sic] (ibid.: 875). Eisenhower is critical of Hart in that whilst Hart acknowledges rule production, especially where judges must distinguish between cases, he does not provide a legal basis for them to do so that would hold them accountable for the exercise of such discretionary power. Whilst the legislator has

regular elections, judges are (usually) appointed for life. Eisenhower's critique of Kelsen is based on the separation of powers, whereas his critique of Hart concerns accountability.

Eisenhower then goes on to discuss Dworkin, who has a "rights based" theory of precedent (ibid.: 875). According to Dworkin, "the court may not act as a legislator and create a precedent. Instead, it must apply the existing right based upon precedent" (ibid.: 875). He makes a distinction between what legislators do (policy) and what judges do (principle). Whereas the latter deals with collective goals, the former deals with individual or minority rights (ibid.: 875–876). Dworkin argues that courts should not decide cases based on policy considerations. Furthermore, by creating the rules, the legislator does not punish a party (directly), whereas when a court develops a rule through precedent, one of the parties will be adversely affected (ibid.: 876). However, whilst the court should not base its decisions on policy, it should draw from "general principles of the society" (ibid.: 876). Eisenhower's critique of this is similar to that of his critique of Hart's – there is no limitation then on the discretion as to how precedent and rules based on them should develop.

Finally, Eisenhower discusses Raz. Similar to Kelsen and Hart, Raz recognises a space where the law does not govern a situation (what he terms "unregulated") and cases where the law is clear ("regulated"). For Raz, courts clearly do make law through precedent, and through different mechanisms of interpretation of precedent. For instance, distinguishing cases on their facts so that the same rules do not apply, or overruling precedents where the rule, if applied, would no longer lead to a just outcome (ibid.: 876). The difference between Raz, Hart and Dworkin is that the courts are limited by the law, including their own precedents (ibid.: 877). For Eisenhower, the weak point in Raz's work is "whether the courts *should* be the proper place to resolve policy disputes" (ibid.: 877). It is after all, one thing to make law, and another to make or direct policy. This critique then goes to the question of a proper forum for certain types of disputes.

These theories appear to be about the separation of powers – who makes the rules? Does creating rules usurp the role of the legislator? Is there a significant difference between policy and law, especially if the application of a policy by the executive breaches minority rights? Are the courts sufficiently accountable if they are making law? It is these types of questions which have informed subsequent discussions about models of precedent.

2.2. Models of Precedent

According to Gerhardt, there are three basic models of precedent that support the idea that the normative authority of case law can vary: weak, strong, and mixed.

Citing Blackstone, Gerhardt describes weak precedent as a "declaratory theory of law" which focuses on judges saying what the law is, not necessarily on precedent (Gerhardt, 2008: 47). This perception of precedent came to the fore during the New Deal Era in the

United States of America (USA), which urgently required the overruling of precedent in order to implement policies.

Under the strong view of precedent the courts must adhere to decisions – even if they are considered to be "wrongly decided" – establishing a "commitment to doctrine grounded primarily on judicial precedent" (Gerhardt, 2008: 64; cf. Barzun, 2013: 1655–1657). This is more prevalent in areas of constitutional law and research done on the opinions of various judges. Gerhardt's research reveals that "precedent is the most cited source [of law] in constitutional adjudication" (Gerhardt, 2008: 6). However, this does not necessarily mean entrenchment of precedent, or that each case has the same weight in every future case. There is a certain amount of flexibility to decide how much deference to pay to any given case as well as the precedent that it sets within this strong model (ibid.: 67).

Finally, there is the mixed perspective – what Gerhardt terms the "Golden Rule" (ibid.: 79). This approach takes a moderate view between the weak and strong perspectives of precedent. While it would normally be somewhat harder for this model to predict which decisions would weaken or overrule, the current composition of the Supreme Court of the United States (SCOTUS), may mean this presumption is no longer accurate (ibid.: 80; see also Rowe & Katz, 2020: 23). The argument here is that the operation of precedent is not always straightforward (Gerhardt, 2008: 87–91) – it is not always something that will apply from case to case. The influence of precedent varies with the type of case from which it was derived as well as its strength over time. There is not always a clear line of sight and the message may become diluted, reducing the significance of the original statement maker. From this mixed perspective, judges will rarely revisit settled areas of law, thereby maintaining legitimate expectations and legal certainty. However, legal certainty and consistency is not necessarily the same as predictability, especially where a new context requires revisiting settled law. In these circumstances, there is no compulsion to follow precedent, and there is the possibility to distinguish or overrule (ibid.: 93; Barzun, 2013: 1661–1663). Furthermore, there may not be a compelling reason to follow a precedent if the outcome is unjust.

A theory of common law precedent therefore looks at both the strength accorded to precedent by any given court, as well as the way in which this is done. It is also important to note that judges have a choice. Case law is certainly an important source of law for judges to use in deciding cases, but there is always the possibility to argue and decide differently.

2.3. Civil Law

Whilst case law is an important primary source of law in the common law tradition, that of the civil law considers it secondary to codes and legislation, reflecting the supremacy of the legislator over the judiciary (Fon & Parisi, 2006: 522). This does not mean, however, that civil law judiciaries have not developed a system of precedent (ibid.: 522). The

goal in both common and civil law systems is to achieve legal certainty and equality in the application of the law. However, instead of calling it stare decisis, the latter prefers the term *jurisprudence constante* ('settled/persisting jurisprudence') (ibid.: 523). This is "the doctrine under which a court is required to take past decisions into account only if there is sufficient uniformity in previous case law" (ibid.: 522). As such, cases do not automatically hold precedential value (unlike common law) and will only become important enough to be taken into account as a source of law where a specific case has evolved to form the foundation of a uniform body of law on any given issue (Algero, 2004: 799–781). Whilst the starting point and process of developing precedent is different than common law's *stare decisis*, it does allow cases that do not add anything to the jurisprudence and practice of the courts to be excluded from the outset, thereby avoiding unsettling the law or causing ripples in legal practice.

Fon and Parisi argue that the approach taken to *jurisprudence constante* can be either negative or positive. Negative precedents narrowly interpret statutes to limit the scope of protection afforded, whereas positive precedents will expand that scope of interpretation to offer better protection. Either way, if the approach of future similar cases follows one path or the other, and to a certain degree consolidates that approach to the statutes, it becomes authoritative. Following the lines of Gerhardt above on weak, strong and mixed approaches to common law, one could also argue that precedent in civil law can go in similar directions. Where a decision has been predominantly accepted by the courts, it can lead to a "dominant 'positive' jurisprudence". Conversely, a decision that has been largely contradicted by the lower courts would lead to a "dominant 'negative' jurisprudence". If there is no consensus either way, the "jurisprudence is 'split' and precedents do not influence future courts' decisions" (Fon & Parisi, 2006: 525).

As such, precedent starts with the interpretation of legislation. Legal reasoning differs between civil law and common law jurisdictions. For example, the French justice system, both ordinary and administrative, takes a syllogistic approach to judgments: courts identify a rule (either from legislation or from codes as primary sources of law) to apply to the facts and issue(s) that arise from the case (Jeuland, 2018: 103–104). Proceeding in this manner means that the reasoning behind the judgment is much shorter and terser than one would normally find in common law judgments . Similar to common law jurisdictions, not all judgments require in-depth reasoning, especially those of the lower courts. Nevertheless, jurisprudence constante will be created through the accumulation over time of citations of the same highest court cases.

Fon and Parisi further describe the incidences of "minority cases", which are cases that go against the jurisprudence constante (as they do not have dissenting judgments), and can serve as a signal upwards that the judiciary seeks a change in approach due to changing social, political and legal contexts (Fon & Parisi, 2006: 526). The impact of this mechanism, it is argued, can either consolidate or corrode a precedent. Whilst stability is an important factor in jurisprudence, flexibility is needed for judges to respond to societal change and create new consensus on the approach to the law (ibid.: 532–533). Thus,

while the civil law system is characterised by a different type of balance with respect to forward and backward-looking approaches than in the common law system, jurisprudential choices do exist in the former (i.e. the existence of a civil law theory of precedent, albeit developed differently than in the common law context). Furthermore, jurisdictions using either of these systems have been moving towards each other in terms of legislation and the corresponding use of precedent has become more mixed (Algero, 2004: 781). Ultimately, precedent is about the authority and weight given to cases as a source of law for courts to use in future similar cases, and this is reflected in how the courts use these precedents in their reasoning. All legal systems must have a system of precedent in order to maintain some semblance of legal certainty and equality in the application of law. At the same time, they need the flexibility to respond to important social, political, and other environmental changes in society. The balancing act between the elements of conscious jurisprudential choice regarding the creation of 'law' (separation of powers), reasoning from previous decisions, and following or departing from previous decisions exists in the legal families across the EU. Even though the reasoning process to choose what jurisprudence to follow is not nearly as complex in as the common law system, civil law judges are still faced with conscious jurisprudential choices, especially at the highest courts. At the same time, the judiciary at the first instance is tasked with making decisions on the basis of law, including both binding and persuasive material. This requires them to make interpretative choices which are ultimately reflected in the final decision. The elements of dialogue and flexibility are equally as important in this context as at the CJEU. If we turn to look at CJEU judgments and consider them in light of specific elements of precedent, we can see that it does follow its own 'precedent'. Thus, the question is not whether there is a system of precedent at the CJEU, but how the theory of precedent at the CJEU could be conceptualized.

3. Precedent in CJEU

Derlén and Lindholm seek to move beyond the comparison of civil and common law approaches to precedent and how that might apply to the CJEU (2017: 653). For them, the test is the extent to which the CJEU takes its own case law seriously. They hypothesise that

> [t]he CJEU is a constitutional court and it has a particular assignment in the legal system. It is reasonable that these courts will build upon their own previous cases, but the format is constitutional self-precedent. (ibid.: 655)

Self-precedent means that where a judge has issued a judgment, they would be required to give reasons for any departure from their own rulings (ibid.: 654). Using network analysis, they claim that the CJEU does not take a random approach to citing their own cases

in support of their arguments, demonstrating that there are only a small number of cases that are not connected to other cases (ibid.: 656–661).

The CJEU appears to consider its own body of cases as a source of law, which is expressed when it uses the term *settled case law* to resolve a dispute (Lasser, 2004: 108). However, such settled case law must be identified through citation and consolidation, in the same way as within the civil law system of precedent. As such, precedent, including self-precedent, is an important part of the CJEU's reasoning process (Jacob, 2014: 1) and recognised as a source of law for interpreting the Treaties (Lasser, 2004: 107; Derlén & Lindholm, 2017: 664; Vajda, 2018: 5). As with any other young court, "a minimum core of judgments is needed before a court can develop a systematic citation practice" (Derlén & Lindholm, 2017: 664). Derlén and Lindholm found a corelation between the rate of citation, the body of case law and the increasing number of cases the CJEU needs to hear each year (ibid.: 667). Citation of precedent appears to be the CJEU's effort at self-legitimisation through the creation of a system of precedent as a source of law. This reflects a mixed approach between that of the French civil law and that of the common law, with the aim of establishing stability and consistency through path dependency and logical reasoning (see Lasser, 2004: 203–238). However, if we are to more fully understand the CJEU's precedent-creating practices, a conceptual framework needs to be developed which can take account of the different cultural influences from judges of different Member States and legal cultures (Jacob, 2014: 1).

3.1. Methodology of CJEU Precedent

Derlén and Lindholm (2017) distil the 'methodology' of the CJEU in its application of precedent into four components:

1) stages of development, which examines how citations "are distributed over time by looking at average yearly inward citation" (ibid.: 673). Their study notes a similar pattern to the civil law development of jurisprudence constante. Namely, that cases do not start off with binding status, and that precedent is consolidated over time.
2) issue shifting, in which the focus of the CJEU shifts towards different issues at different times, e. g., different areas of free movement such as goods, people, services and capital (ibid.: 679).
3) half-life of important cases – component 2) notwithstanding, "the CJEU is quick to cite new cases and they become settled after a short time" (ibid.: 680). This means that the Court will use recent cases to support their decisions in near-future cases, and whilst some cases continue to be cited, some fizzle out. Again, much like the civil law theory of precedent, characterised by taking time to build

up, yet allowing itself the flexibility to move away from precedent simply by not citing them anymore.

4) overruling and avoiding precedent. In what is called "positive treatment of precedent" (ibid.: 684), the CJEU sometimes fails to be clear about cases it wishes to overrule (ibid.: 682). In practice, this means that it will cite cases to support its decisions rather than explicitly overrule cases in which the rule or principle no longer applies. This does not mean, however, that the CJEU never explicitly overrules (Vajda, 2018: 4).

These four components demonstrate a conscious approach to precedent on the part of the Court. Moreover, using these tools, the CJEU acts as a supreme court to set out interpretations of EU law for Member States' courts and EU institutions. The question remains whether these practices are sufficient to develop a theory of precedent for the CJEU.

3.2. Balancing Constraint and Discretion: A Theory of Precedent for the CJEU?

The EU judiciary has certain factors which are "conducive to positive precedent" (Jacob, 2014: 17). Firstly, there is the "brevity and fecundity" of Treaty language. The Treaties themselves are skeletal, so judicial precedent adds substance. Another reason contributing to the creation of precedent as a source of law is the multilingual nature of the Treaties: "In-built multilingualism […] has always been a powerful reason for not adopting a narrow literal approach to the understanding of supranational legal provisions" (ibid.: 17). The second factor is the "absence of widespread codification" (ibid.: 17). The EU has a different approach to sources of law, instead of affixing legislative powers to the European Parliament (ibid.: 17). Third is the "recognition and effective enforcement" of CJEU judgments (ibid.: 18). Lastly, there is the "multiplicity of influences and polycentricity of actors" (ibid.: 18). The political context of the Court is important, given its multicultural environment and the different actors by which it is approached to resolve disputes on EU law (ibid.: 19).

The CJEU has also taken advantage of Art 267 TFEU preliminary ruling procedure to, for example, create citizenship and free movement of EU citizens (ibid.: 20). The positive impact it has had in protecting citizens' rights has come directly as a result of the Court treating its own judgments as precedent. Whilst the CJEU must refer to the Treaties and other legislation, in using its own case law to interpret these, the CJEU has arguably set itself as equal to the other law-making institutions.

There are two schools of thought on precedent at the CJEU: one denies that the CJEU has a law-making function (constrained/weak approach – please see Section 2.2 Models of Precedent), and the other recognises it (discretionary/strong approach – please see Section 2.2 Models of Precedent). The former, also known as the French model, asserts

that there is a distinction between creating law and its application. Within this framework, cases provide for "legal development in the course of adjudication" (ibid.: 21). This is represented in a binary model, where state parties and legislatures, not adjudicators, make the law (ibid.: 21). Doctrinally, the binary model is a public international law model, and the EU, though starting out as a public international law entity, no longer fits within this doctrine. There are no specific rules to constrain the CJEU in the Treaty of the European Union itself, its cases are cited in secondary legislation and litigation. As such, this first part of the binary model does not apply. Its second element is epistemological: where "the law exists as an objectively ascertainable totality of relevant rules" (ibid.: 27). This basically means that the law can only mean one thing and is not subject to interpretation – a dry and literal understanding of the law. It's arguable that the binary model accounts for neither the "significance of adjudication in modern legal practice" (Jacob, 2014: 28) nor the "… precarious power of the ultimate interpreter" (ibid.: 29).

The balance between constraint and discretion is where "[the] law changes through adjudication while remaining the same" (ibid.: 34). This model follows the French methods, where codification is an important source of law, but which requires adjudicatory development. However, the CJEU has the discretion to be creative, as illustrated by *Francovich*, which developed state liability (ibid.: 35; Case C-6/90). In that case, the Court made a "shift from wording to spirit and purpose" of the Treaty at issue (ibid.: 36). This 'in-between' model is further supported by the idea of "entrenched negation" (ibid.:224), where the Treaty of the European Union itself has ruled out "strict" stare decisis through article 19(1) by not explicitly mentioning it. The difficulty for this model is that it has not caught on. Whilst it acknowledges judicial activity, it seeks to describe constraints of rules and principles which do not actually exist (Jacob, 2014: 39).

The discretionary approach recognises the law-making powers of the CJEU. This is a pragmatic approach which appreciates the function of judging in the application of law in dispute resolution. It also acknowledges the political science definitions of judging, such as 'policy making', 'social control', 'regime legitimation', 'norm advancement', and maintaining a 'coherent legal system' (ibid.: 41). Within this model, precedent has the effect of making law. Unlike the French model, this "is not impersonal" (ibid.: 42), but dependent on the arguments of judges and lawyers (ibid.: 42). However, even within the discretionary approach, it is arguable that the CJEU's own previous case law is an important source of law in interpreting the Treaties. This approach can take a weak, strong or mixed approach to precedent, that requires reasoning and justification for decisions.

Different theories of precedent reflect the varying constitutional positions of particular courts. Both common and civil law systems have found a way of setting clear and binding precedents, whilst allowing them the flexibility to adjudicate in a progressive way. To this end, an alternative 'in-between' model has been introduced to at once allow the constraint of the CJEU, while recognising the role of judges in both applying and making EU law (ibid.: 46). In contrast to the French civil entrenched negation law approach, the function of the judge in the EU is not predicated on a strict separation of

powers (ibid.: 46). Nevertheless, the CJEU has not put itself above legislation and Treaties as a source of law. This takes us to the possibility of a new and unique theory.

3.3. A Unique Theory of Precedent at the CJEU?

Rigid theories of the common and civil law systems are not appropriate to apply to the CJEU. The Court started off as an international treaty organisation, and even though its composition is made up Member State judges, it is not a hybrid of the common and civil law traditions. Despite being a unique institution, its judiciary is constrained by the same jurisprudential choices as any other court in Europe – how to approach cases in a way that respects legal certainty and equality in the application of law, while retaining the flexibility to deal with change.

It has been observed that at the CJEU precedent is a source of legal information (ibid.: 49). Such a conceptualisation actually goes beyond the idea of precedent as a source of law alone, but rather positions it as one of the sources of information. This is a feature of the French approach to producing judgments, which takes on board both legal and non-legal information. It has further been observed that precedent is cited across different types of cases that are not necessarily related and without reasoning (ibid.: 49–50). There is also a lack of explanation as to why the CJEU has developed this practice (ibid.: 52). One explanation is that in order to resolve the dispute, it only needs to give a sufficient answer, with limited citation to previous cases (ibid.: 55).

There is no claim that the CJEU is the ultimate law maker when one looks at the broader context of other institutional actors in the EU and the law-making processes (ibid.: 59). However,

> [legal] arguments can be utilised to mediate between law-making through the Court and distrust thereof, rather than to pretend the former did not exist or simply accept it as preordained. (ibid.: 60)

A theory of "positive precedent" has been proposed for the CJEU. There are certain conditions that constrain the Court under this theory: the CJEU cannot act on own motion (ibid.: 61); it is limited to the scope of the individual case and specific outcomes that impact parties only; the Court does not aim to resolve issues deeper than the dispute; all courts must be considerate of existing doctrine whilst manipulating "legal information"; "law-making by adjudication privileges private and particular contexts of law-creation" (ibid.: 62) which is a different space than legislature; and finally "saying judges make law is perfectly compatible with saying they do not legislate" (ibid.: 63). Rather, they work to fill in gaps as they did with state liability and the recognition of fundamental rights. In this way, the CJEU is able to respond to environmental pressures and changes through adjudication, retaining this flexibility through the broad drafting of the Treaties. This is arguably an attractive theory as it allows for the development of the law over time, and the more abstract the principles, the broader the scope of their application (ibid.: 68–69).

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Even so, the CJEU suffers from the paradox of having no rules for precedent yet following them nonetheless. From the point of view of academia, even though *de jure* the Court "is not bound by its own previous decisions" (Jacob, 2014: 243), in reality it is "bound" as any other court is, owing to the need for legal certainty and equality in application of the law. Having established that a theory of precedent at the CJEU suffers from the same tug of war between those who argue for constraint and those who argue for discretion, it is appropriate to consider how the CJEU sees itself outside of this debate, in relation to the conscious jurisprudential choices that the Court makes, and the actual role precedent has in its decision making.

3.4. Conscious Jurisprudential Choice at the CJEU

Moving away from theory towards practice, the position of the CJEU sits somewhere between "silence" and "denial as to the normativity of its decisions" (ibid.: 245). For example, whilst the Court looked at possible grounds of departure from a line of cases in *Da Costa* (joined cases C-28/62, C-29/62 and C-30/62) it made no decision about departing from it. Internally, the Court sees itself as settling disputes, not "expounding theories in abstracto" (Jacob, 2014: 245). Its reluctance to engage in this type of work appears founded on the concern that it will be haunted by the return of such theories (ibid.: 245). Advocates General have also been shown to be denialists, using concepts such as 'res judicata', and 'erga omnes' obligations (ibid.: 246). Whilst their official line is to deny, in practice their decisions are based on "expectations" and "reasons" (ibid.: 246). The Court "values stability and coherence" which would not be fulfilled in strict adherence to precedent but rather require balanced argumentation (ibid.: 253).

From practice and theory, Jacob seeks to reconstruct a methodology and framework applicable to the CJEU by conceptualising precedent used in both a positivistic (putting legislation and treaties first) and conceptual manner (ibid.: 253–254). Within this reconstructed model, the constraints are founded in legality and limited mandate, whereby principled concerns are 'constitutionally based', such as 'rule of law', and 'due process' (ibid.: 255). Furthermore, the rules of procedure of the CJEU support the role of precedent in the Court. For example, when rejecting a preliminary reference where the legal issue has been dealt with in established case law, it may refer back to such previous cases (ibid.: 259).

The CJEU is not a court of appeal, and whilst, in theory it has the final say on interpretation of EU law, in practice it is more of a dialogue (ibid.: 261). Furthermore, the primacy of EU law is often challenged, especially by Germany's Bundesverfassungsgericht (BfVerg). In a 2020 case, following a preliminary ruling from the CJEU that the European Central Bank's Public Sector Purchase Programme (PSPP) was not a violation of EU law (BvR 859/15, paras. 1–237; see also Hilpold, 2021), the BfVerg found that

PSPP was partially unconstitutional. However, that there is no strict system of precedent has not stopped the CJEU from giving normative or precedential effect to cases (Jacob, 2014: 259). This situation requires, then, an acknowledged theory of precedent for the CJEU.

Preliminary proceedings are another tool to help ensure the uniform application of EU law. The CJEU itself does not settle the dispute during preliminary proceedings, rather it provides canons of interpretation (arrêts de principes) which provide relevant legal information in order for the domestic court to settle the case (ibid.: 263). This is a conceptual and abstract method of deciding a case, as the CJEU itself does not apply the law, but rather leaves it to the domestic court to apply its interpretation to the facts of the case. However, the reality is that an interpretation, if clear enough, will provide a clear answer to how the case should be resolved (ibid.: 270).

CILFIT provided exceptions for domestic courts to make preliminary references to the CJEU where an "acte clair" or "acte éclairé" existed (ibid.: 264; Case 283/81). An "acte clair" refers to cases where there has not been a previous question to the court, but there will be no real question as to "proper interpretation of EU law" (Broberg & Fenger, 2021: 207). Whereas with respect to an "acte éclairé", the CJEU will have "made a decision on the question at hand in previous cases" (ibid.: 2021: 207). Preliminary references therefore ascribe authority of interpretation to the CJEU. This raises the possibility, similar to the workings of the French civil law system, where Member State courts may wish to request a preliminary ruling to signal that it is a time for a change of approach to the law, especially if they phrase their issues in a way that invites a different approach.

In practice (which impacts the theory), there is an official role for precedent in CJEU judgments. Nevertheless, the discussion so far reveals that it is not a particularly unique one. Jacob's theory was set out to enable the Court to be reasonably constrained by its own concern for the rule of law by following its own precedent. This is neither fully common law- nor civil law-based, but rather is derived from the traditions discussed in this article. These include of course the traditions and working habits of the CJEU itself, especially its preliminary reference procedure. The act of interpretation and of being interpreters is authorized by principles of constitutionalism and the rule of law. Ultimately, all this affects the conscious jurisprudential choices of the CJEU. However, what of the authority of the interpreter? In a constitutionally pluralist system, domestic judges become EU law judges whenever they settle a dispute on EU law (ibid.: 269). They are encouraged, however, to follow the precedent of the CJEU (ibid.: 271). There is concern about the diverse possibilities of EU law being non-uniformly applied across the Member States (Van Harten, 2009; Tai & Teuben, 2008: 835). Again, we do know from the theory of precedent of civil law that the way precedent is handled at the lowest courts can have an impact on its development at the highest courts.

3.5. Actual Role of Precedent in CJEU Decisions

3.5.1. Balancing Act

Precedent can be conceptualised through a variety of theories and models, the heart of which is a balancing act for judges on several levels. The first is that of consistency and coherence: balancing the past, present and future. The second is that of legal certainty and the discretion required to apply the law to the specific context of a case, in a manner that is compliant with other principles of law such as equality and non-discrimination. Third is the issue of separation of powers and checks and balances: which is the correct institution to resolve the particular social issue underlying the dispute before the court?

Another balancing act is as between creativity or activism on one hand and conservativism on the other. EU law has been shown to be adaptable in a variety of contexts, such as the development of tortious harm against a citizen (Vajda, 2018: paras. 42:45, 10–11). However, not all cases will have such impact, and in the same way the CJEU has developed legality to limit the powers of other institutions, it has also limited its own jurisdiction (ibid.: para. 74). Ultimately, the operation of precedent in any legal system depends very much on the power of the judiciary to adopt a strong, weak or mixed approach to precedent, and the impact that has on the operation of the law, as well as the structure of the courts.

3.5.2. CJEU's Approaches to Precedent

Precedent is an important source of law in both common law and civil law contexts – the only difference is a matter of degree and the manner of expression. This is not particularly different for the CJEU's application of precedent. The CJEU itself has resisted considering its past rulings to be an autonomous legal source, leading to a lack of citation methodology. Despite this, the Court eventually recognised its case law as a source of EU law, ultimately even being regarded as the foremost source of law (Derlén, 2015: 68).

The CJEU uses treaties, legislation, and precedent as its sources of law, and has very specific techniques related to each. Three approaches are available to the CJEU in its interpretation of treaties and. It may "focus on underlying aims of provisions rather than their wording" (Manchester & Salter, 2006) which represents a "teleological or purposive" approach (ibid.: 104; Lasser, 2004). The CJEU may also follow the "general scheme within which the legislation is found", in accordance with the "schematic or contextual approach". This permits the application of other sources such as legislation, precedents of the CJEU, general principles or the underlying objectives of the EU (Manchester & Salter, 2006). Lastly, they may take a "textual approach", which entails looking only at the "ordinary meaning" of the words. This perspective faces the greatest challenge given the "multilingual character of the EU". The "broad and general language" makes it difficult to be certain as to meaning, and interpretation may ultimately conflict with the EU's

general aims and objectives (ibid.: 104–105; cf. Paunio & Lindroos-Hovinheimo, 2010). It is important for the uniform application of EU law that the CJEU's interpretations are clear and predictable. Since textual arguments can lead to linguistic uncertainty, this sort of interpretation ought to be avoided.

In applying previous case law, the CJEU takes a flexible approach given the fact that there is no easy political corrective mechanism if the Court gets it wrong. For example, all Member State courts may make a preliminary reference to the CJEU, even on issues considered relatively settled. Also, whilst there is no approach to finding the (equivalent of) *ratio* or *obiter* of a CJEU case, it does apply *res judicata* (the decision in a case is binding on its parties) (Manchester & Salter, 2006: 107). The CJEU appears to recognise two forms of precedent: 'interpretative' and 'self-standing'. Interpretative precedents are those that give meaning and definitions to teams and concepts within the Treaties and legislation (Beck, 2012: 240). Whereas self-standing precedents are where the CJEU has created a body of law where none existed previously, such as on general principles of law (e.g. non-discrimination, or direct effect and supremacy) (ibid.: 241–242).

As the CJEU does not follow the common law system with a distinction between *ratio* and *obiter*, there is potential relevance in all previous statements of law expressed in precedent (ibid.: 242). There is no detailed examination of facts or of distinguishing case law: "it is often the lack of factual elaboration and the abstract formulaic discussion of the legal principles which is the fount of judicial discretion in EU law" (ibid.: 245). Finally, because cases of the CJEU are formulaic, they cite from the same paragraphs of (and cut-and-paste from) the same cases over and over, thereby avoiding the need to highlight legal norms to be applied to specific facts (McAuliffe, 2013: 488). This is very much a civil law practice (Beck, 2012: 245). Such paragraphs form building blocks of arguments that can be used. This is efficient, as they originate in previous cases and therefore act as settled law (jurisprudence constante). They can also form the foundation for further developments, linking past to future through a clear path.

3.5.3. Consequences of These Approaches

There are consequences to this. Firstly, the formulaic approach of the Court to all cases, resulting from terse language coupled with the recycling of paragraphs from previous decisions means that any adaptation of those building blocks can be subtle (ibid.: 248). These subtle variations, where confirmed, show or "hide incremental developments in judicial approach and rule instability from one case to the next" (ibid.: 249). Secondly, the CJEU doesn't need to cite the original case which produced the first principle; "that change will gradually become less evident as the original authorities are no longer cited" (ibid.: 249; 263). This is unlike *stare decisis* where the court must clearly overrule, distinguish or confirm a principle. It also differs from jurisprudence constante, where a court must be explicit in diverging from precedent.

Nonetheless, the CJEU does attempt a consistent approach in order to respect legal certainty. It rarely departs from its previous rulings, and "[b]y generally following previous decisions, the European Court of Justice [now CJEU] can develop a body of law on a particular area, known sometimes as jurisprudence constante" (Manchester & Salter, 2006: 107). For the CJEU, this means that precedent 'supplements codified law' as a "source of guidance"; it provides 'substance to general propositions of law'; and it "contributes to the formulation and development of principles of general application" (ibid.: 107). Whilst precedent does influence the form of judgment, these have become more elaborate over time, with reasoning further explicitly developed (ibid.: 108). Finally, the CJEU also uses general principles as both "propositions of law" and as an "aid to interpretation" (ibid.: 109). These can be sourced from the CJEU's own precedent as well as the law of the Member State courts or even international law (ibid.: 109), enabling the Court to engage in a deeper analysis.

However, the building block method reflects not only the evolution of the approach over time, but also the practicality of working in a multilingual environment with the aim of producing a uniform body of law. One way of doing this is to recycle the building blocks – not just as a matter of ease – but also in order to stay within settled law by way of repeating the language of previous cases. This has the effect of giving "the impression of continuity in case law" (Beck, 2012: 248–249). These practices arguably reflect the role of precedent in balancing coherence, justice and checks and balances.

3.5.4. Precedent in a Multilingual Environment

On another level, these building blocks mask the fact that the CJEU does work in a multilingual environment. Although judgments are drafted in French, they are translated back into the language of the country from which the case originated. Not only this, but the legislation and Treaties of the EU are equally authentic in all official languages of the EU (CJEU, Language Arrangements). That different meanings can be attributed to any part of the law thus gives rise to legal uncertainty.

This is not only a linguistic issue but a cultural one as well: how to interpret law, how to use case law as a source of law alongside legislation and treaties. Any given case may be lost in translation – potentially exacerbated by the fact that the language of law differs between various legal systems of the EU member states. It has been argued that this prompted the "teleological method of interpretation of EU legislation" (McAuliffe, 2011: 113).

Irrespective of any linguistic issues that may arise, the EU legal order is still functioning, and this is arguably so because this teleological method of interpretation "actually help[s] to ensure the uniform application of that law" (ibid.: 114). From the perspective of the Member States, the multilingual aspect of the CJEU's output is not lost – national courts tend to try to follow the CJEU as closely as possible (Derlén, 2015: 63). More recently, it has been argued that the Court's laconic style closes off dialogue with other

actors in the EU suggesting that, where possible, other courts and institutions follow the single meaning of the text (Pierdominici, 2020: 318). This method could create transparency and legitimacy for the CJEU, help to cement its authority and ensure acceptance by other institutions and Member State courts. The fact that the Court has no inherent power to enforce its decisions makes this particularly important (ibid.: 319). Nevertheless, if a Member State does fail to comply with a CJEU decision, the European Commission can initiate infringement proceedings through its established doctrine of state liability, although this is a political choice (joined cases C-6/90 and C-9/90).

Part and parcel of that legitimacy is the principle of equal authenticity of EU law (discussed elsewhere in this Special Issue), which essentially means that all language versions of legislation or treaties produced for a case will be considered authentic and have equal value as a source of law (Derlén, 2015: 63). Derlén has written about this in light of the idea of attributing a "single meaning" to the differently translated texts. Given the multilingual nature of the Court, it is debatable though that the principle of equal authenticity is an illusion, given the issues of translation and accuracy. Domingues uses the word *approximation* to characterize the application of EU law (Domingues, 2017: 137). The concept of multiple language versions of legislation or treaties all observed as textually equivalent has also been called a "legal fiction", meaning it is accepted as true so that the legal system can function (Leung, 2019: 190–191). This connects back to the earlier conclusion that the EU still functions in spite of linguistic issues.

Aside from these theoretical aspects, there is the practical impact of the Court's language rules on the theory of precedent. To recap, a theory of precedent looks at how a court justifies its application of previous case law. A multilingual system adds a layer of complexity, as different understandings of texts and training around the use of cases will influence a court's use of its own jurisprudence.

> In a system where the CJEU judgments are arguably used more like case law in a common law system, the fundamental ideas underpinning the language regime […] could be regarded as relevant. (Derlén, 2015: 68)

Whilst all judgments are published in the 24 official languages, the version in the language of the case is the only one that is considered to be authentic. The working language of the Court is French, which does leave non-native speakers at a disadvantage (Domingues, 2017: 128). This linguistic burden is reflected on how decisions are drafted by both référendaires and the army of lawyer-linguists that work for the Court as legal translators (ibid.: 132–133). These lawyers are trained to ensure terminological consistency, and to replicate the formalistic style and linguistic precedent of producing judgments (ibid.: 134–137). Moreover, whilst they work in French, they tend to translate rather than think in French (McAuliffe, 2017). This is one constraint, which may explain the re-use of building blocks from previous cases, rather than drafting with independent reasoning and citation of case law. Another constraint is that of the "collegial nature" (McAuliffe, 2012: 213) and "rigid formulistic drafting style" (ibid.: 216).

Given this complex environment and the need to translate all cases into 24 languages, it has been argued that the use of precedent should be done

> in a transparent manner if the law was to be applied uniformly and if it was to avoid being inundated by unnecessary [preliminary] references seeking guidance on apparently inconsistent decisions. (Arnull, 2006: 637–638)

There are possibly three main practical impacts of the linguistic environment on the application of precedent at the Court. The first is that of terminological consistency. Whilst one can argue that equal authenticity is illusory, the CJEU does understand the link between "linguistic uniformity" and the development of precedent (Domingues, 2017: 134). The need for linguistic uniformity highlights the importance of consistency of language, which is the foundation to legal uniformity in any legal system (ibid.: 135).

Secondly, the language environment has been essential to the development of the CJEU's formalistic style and linguistic precedent. The building blocks that are recycled and re-used also represent the use of expressions that have already been approved by the CJEU: this is what is meant by linguistic precedent. An arguable effect of this practice

> is the strengthening of the normative value of the jurisprudence of the CJEU. The recurrent use of the same terms and formulas led to the development of fundamental legal concepts of EU law and a consistent body of case-law […]. (ibid.: 135)

As such, linguistic precedent is an important part of the theory of precedent for the CJEU in as much as it impacts the jurisprudential choices made by the Court and the underlying reasoning.

Thirdly, this linguistic environment has cemented French as the CJEU's working language and judgement style. Nevertheless, EU growth and 27 Member State courts also influence the CJEU's functioning and understanding of its precedent (ibid.: 135).

3.5.5. Culture of Precedent

Beyond language is the practice of precedent and the role of lawyers in the common law system tradition, with respect to upholding the principles of stare decisis. One part of this is the "duty to disclose adverse precedents" (Pin & Genova, 2019: 240). The consistency of such practice is an important part of legal reasoning in the common law tradition and how the parties and courts frame their issues and decisions (ibid.: 240). Whilst there is a marked difference in how precedent may work across the Commonwealth, the majority of countries see an "ethical duty to respect previous judicial decisions" (ibid.: 243). Most EU Member States do not place such obligations on their lawyers, and courts do not build up their decisions based on principles of stare decisis. The structures and requirements are there to support precedent in common law countries through the trial process, caseload and the adversarial system (ibid.: 247–249).

Recent pressures on the CJEU have meant a change in approach to precedent and caseloads. It "will only consider cases that raise new legal issues or reveal that existing case law should be reconsidered" (ibid.: 249) and has set out a simpler procedure for standard cases which already have an acquis developed (ibid.: 250). This means that their jurisprudence has been given the status of precedent as a source of law, not only for uniform application of law, but also normatively speaking.

Legal reasoning also has a different intellectual framework in the CJEU than in common law countries. Common law practitioners are forced to analyse cases to support as well as contradict their arguments. This analysis is presented to the (common law) court, which decides which of the precedents before it are applicable and thereby form the basis of its judgment (ibid.: 262). Due to the multilingual nature of the CJEU, lawyers employ a specific approach unconnected to precedent through which they state the relevant facts and legal issues. They are further limited to the amount they can present in oral proceedings or in written submissions (ibid.: 264–266). The CJEU, as with other inquisitorial systems, is supported by the role of the Advocate General, who provides assistance to the Court with "legal reflections pursuant to the European Union's interest in the outcome" (ibid.: 266). There isn't a specific requirement for the CJEU to follow precedents; it is not (culturally) constrained in the same way as in common law countries and may depart from previous case law. However, the above discussion on multilingualism suggests that as a practice, the CJEU will not depart suddenly from its case law since to do so would go against principles such as legal certainty and uniformity.

4. Conclusions

As with any legal system based on the rule of law, the CJEU follows its own form of precedent. Whilst that Court has not always been open and consistent about the way it uses precedent – either following, distinguishing or departing from it – the literature shows that its habits have changed since its inception and have become more explicit over time. The CJEU does not work in the same way as the common law system with its decisions, reasoning, and analogies, but nor is it as constricted as the civil law system to the extent that it cites previous cases with more alacrity to build up precedent.

The judges of the CJEU have revealed themselves to be reluctant to depart from case law, in order to maintain legal certainty and legitimate expectations. The CJEU is aware of its position – there is no easy political corrective mechanism as one would find in the domestic Member States. As a forward-looking court, a theory of precedent has developed not only through the Advocates' General opinions but also through the CJEU's syllogistic methodology.

Text production and judicial drafting reflect this attitude – citing cases but not reasoning with them, and applying them in a similar way as a civil law judge would. The

formulaic method of text production and the multilingual context of the Court also have a huge impact on its workings, not least because of jurisprudential choices of the judges and the référendaires and how they are to follow linguistic precedent. Any reasoning to depart from previous cases is therefore done with subtlety and may not be obvious until the final paragraphs which contain the judgment.

Whether the CJEU can create legally binding statements that apply uniformly across all EU Member States, regardless of language and cultural differences is, I believe, somewhat beside the point. Law is always arguable from at least two perspectives (if not more) – language simply gives a different dimension of understanding. Appreciating and developing precedent is a process that does not usually only involve a lexical comprehension, but rather dialogue and discussion. Uniformity is not the goal of legal discussion but rather achieving justice; uniformity is therefore but one part of that discussion.

Ultimately, applying precedent – whether under common law, civil law, or EU law – is about balancing stability and flexibility in the law. That is, the ability of law makers, administrators, and courts to adapt to changing needs and demands of the citizens. This must be done with certain rule of law principles in mind, such as legal certainty, due process, and legitimacy. While the role of the CJEU judge is more complex owing to the multilingual context, it is not the only multilingual court in Europe, or even the world. The CJEU has learned, in dialogue with Member State courts, to adapt to the situation and work to ensure the uniform application of EU law. At its core, the discussions around the role of precedent are also about the separation of powers. This is complicated by the fact that the European Union is made up of many different languages and cultures.

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