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**Defacto Precedent at the CJEU**

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## Introduction

This paper seeks to demonstrate that although there is no official doctrine of precedent in CJEU judgments, the research affirms that there is a *de facto* system of precedent. This means that whilst, *de jure*, there is no legal status of the case law of the Court of Justice of the European Union (CJEU), the CJEU 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 EU.[[2]](#footnote-2) When one looks at the elements of precedent you can see that there is more to it than the legal value of precedent (i.e. authority or bindingness) or conscious jurisprudential choice – language also plays a role. The question for this paper is. This paper will examine the research on the development of the theory and practice of precedent at the CJEU and attempt to understand how it operates.

Whilst it is a core operational concept in common law countries through the system of *stare decisis*, it does not mean that it is the only system of precedent that operates in the world. Civil law systems operate a system of precedent also: *jurisprudence constante*. These theories will be used to support the argument that whilst there is no official system of precedent for the case law and jurisprudence of the CJEU, that fact has not stopped one from evolving.

Beyond theory, there are also the 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. I will later use these to discuss how precedent operates within the CJEU.

It is especially salient when a legal system contains 24 official languages, and its court officially operates only in one of them.[[3]](#footnote-3) As will be shown, language choices of the CJEU have had an impact on its practices, that further impact the operation of precedent in EU law. This shapes the theory (or status) of precedent for the CJEU in so far that it has an unofficial one.

Following the methodology, this paper will examine the theories of precedent in common and civil law systems before going on to look at the different elements of precedent, and then give a brief analysis of how precedent operates at the CJEU, before finally examining the role that multilingualism has in shaping its practices in precedent.

## Methodology

This paper was originally written as part of a systematic literature review, for an ERC funded project under Prof. Karen McAuliffe.[[4]](#footnote-4) This method involves systematically searching and sifting through the literature using online databases and libraries to find all relevant research material that fit specific criteria and then entering information about each paper or book into that personal database in order to quantify the literature. The feature of this method is that it is arguably reliably, quantifiable and reproducible.

For this particular project, I was set a number of databases and library catalogues to use.[[5]](#footnote-5) Within that search, I was given particular search criteria (which I could expand on during the search), which were developed from research question.[[6]](#footnote-6)

I had to deal with each question separately, carry out the search using the databases, whilst keeping a record of search term used and databases searched. From each piece, I either deemed it relevant or irrelevant (with reasons why) in relation to whether the material was useful to answer the above research questions, made summaries of relevant pieces and created review *pro formas* in Endnote, and using the material that was relevant, wrote up the final review. This paper is an updated version of that initial systematic literature review.

Before looking at how precedent operates at the CJEU, I will give a brief overview of theories of precedent in common and civil law legal systems.

## Theories of Precedent: Common and Civil law

It is arguable that all legal systems, if they are to operate fairly, will operate some form of precedent in order to say that they treat similar cases in similar ways (equality and certainty before the law). How it operates however is a matter for legal tradition and culture. [[7]](#footnote-7) This article will briefly explore theories of precedent in both common law and civil law traditions.[[8]](#footnote-8) These theories provide the foundation to the 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 and the separation of powers in the French legal tradition that sees the legislator as the supreme law maker, rather than the courts. However, it does not mean that civil law tradition does not follow precedent at all.[[9]](#footnote-9)

1. Common law Precedent
2. Theories of Common Law Precedent

*Stare decisis* essentially means “to abide by precedents” and as such, not upset settled principles of law.[[10]](#footnote-10)The influence of this principle in common law varies from one country to another, but essentially means that where the facts from one case to the next are similar, that they should be decided based on similar factual cases that have gone before them. These cases are arguably invested “with normative authority” by other courts and non-judicial authorities.[[11]](#footnote-11) The extent of that “authority” invested in others will vary, depending on different circumstances.[[12]](#footnote-12)

Before examining the strength of precedent regarding relationships between different levels of courts, it is important to discuss briefly some of the theories behind precedent- which may also explain why the case of the CJEU are not legally recognised as such in the Treaties.

Eisenhower II provides a succinct synopsis of the main theories behind precedent based on Kelson, Hart, Dworkin and Raz (explanations as to why precedent is a source of law in common law jurisdictions).[[13]](#footnote-13) Firstly, Kelsen, as a positivist, sets out 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,” where one norm gains its legitimacy from another, for example court decisions are normally (though not always) based on legislation or a written constitution. As such, under Kelsen’s view, the courts need a legal basis in which to decide cases that will give their decisions legitimacy and bindingness.[[14]](#footnote-14) In “easy” cases, judges can find the legal basis upon which a criminal charge is made, or a lawsuit is brought. It becomes harder though, when there is a gap in the law, but if the judge refuses to hear a case, could lead to the law being “unsatisfactory, unjust or inequitable.”[[15]](#footnote-15) It is in this space that precedent becomes judge made law and starts to usurp the position of the legislator. Kelsen calls this “fiction of gaps”. By having this fiction, it sets a boundary for the courts that they will only fill in the gap where the legislation is silent, and only in those extreme cases.[[16]](#footnote-16) Eisenhower is critical of this as being “overly formalistic,” but also because, under Kelsen, a case will only bind “if it creates a new substantive law and is not merely the application of an existing one.”[[17]](#footnote-17) This is problematic also because of 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.”[[18]](#footnote-18) Legislators cannot account for all situations under one statute, and therefore “must necessarily be general and refer to classes of persons.”[[19]](#footnote-19) 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 in that he makes no claim as to legislating, though “courts perform an essentially rule *producing* function.” [sic][[20]](#footnote-20) 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. Whilst Eisenhower II’s critique of Kelsen falls to separation of powers issues, his critique of Hart falls to accountability issues.

Eisehower II then goes on to discuss Dworkin, who has a “rights based” theory of precedent. 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.”[[21]](#footnote-21) He makes a distinction between what legislators (policy) do and what judges do (principle). Whereas the latter deals with collective goals, the former deals with individual or minority rights. [[22]](#footnote-22) 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.[[23]](#footnote-23) However, whilst the court should not base its decisions on policy, they should draw from “general principles of the society.”[[24]](#footnote-24) Eisenhower II’s critique of this is similar to that of Hart’s- there is no limitation then on the discretion as to how precedent and rules based on them develop.

Finally, Eisenhower II 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, such as distinguishing cases on their facts so that the same rules don’t apply, or overruling precedents where the rule, if applied, would not lead to a just outcome anymore.[[25]](#footnote-25) The difference between Raz and Hart and Dworkin is that the courts are limited by the law (including their own precedents).[[26]](#footnote-26) For Eisenhower II, the weak point in Raz’ work is “whether the courts *should* be the proper place to resolve policy disputes.”[[27]](#footnote-27) It is after all, one thing to make law, and another to make or direct policy. This critique then goes to the question of proper forum for certain types of dispute.

The 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 big different 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 future discussions about models of precedent. Moreover, it is possibly these types of questions, which at the time of the founding Treaties, meant that precedent of the CJEU was not legally or formally recognised as a source of law.

1. 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.[[28]](#footnote-28)

Citing Blackstone, Gerhardt describes weak precedent as a “declaratory theory of law” which focuses on judges saying what the law is, and not necessarily on precedent.[[29]](#footnote-29) This is a weaker view of the use of precedent, which came to the fore during the New Deal Era in the United States of America (USA), and there was an urgent need to overrule precedent in order for the policies to operate. However, this was done during politically tense times, where the priority of the court were to follow the principles of stability and certainty, but at the time needed the public to have confidence in the judiciary to support democratic decisions.[[30]](#footnote-30) At the time he wrote this, Gerhardt argued that precedents were not easily abandoned.[[31]](#footnote-31) Since the decision in *Dobbs v Jackson* however, [[32]](#footnote-32) it can be questioned whether a new era of weak precedent has been ushered in.[[33]](#footnote-33) Whether one agrees or not with the way the *Jackson* decision, it does show the common law to be a living creature, capable of change and adaptation, whether it abandons precedents as a matter of changing political context, changing societal context or to simply to assail previous decisions due to personal biases.

The strong view of precedent is where the courts must adhere to decisions, even if they are considered to be “wrongly decided,” which shows a “… commitment to doctrine grounded primarily on judicial precedent.”[[34]](#footnote-34) This is more prevalent in areas of constitutional law, and research done on opinions of various justices. Gerhardt identifies in his research that “… precedent is the most cited source [of law] in constitutional adjudication.”[[35]](#footnote-35) 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 and the precedent that it sets within a strong concept of precedent.[[36]](#footnote-36)

Finally, there is the “mixed” perspective- what Gerhardt terms the “Golden Rule.”[[37]](#footnote-37) This approach takes a moderate view between the weak and strong perspectives of precedent. It is somewhat harder to predict decisions that will weaken or overrule (although with the current composition of the SCOPUS, this may no longer be the case).[[38]](#footnote-38) The argument here is that the operation of precedent is not always straight forward[[39]](#footnote-39) - it is not always something that will apply from case to case- the influence of precedent varies with the type of case it came from, and its strength over time- as with Chinese whispers, there is not always a clear line of sight and the message may dilute over time, reducing the significance of the original statement maker. From this mixed perspective, where an area of law is settled, judges will rarely revisit it, thereby maintaining legitimate expectations and legal certainty. However, legal certainty and consistency is not necessarily the same as predictability, especially where a new circumstance requires revisiting settled law. In these circumstances, there is no compulsion to follow precedent, with the possibility to distinguish or overrule.[[40]](#footnote-40) Furthermore, there may not be a compelling reason to follow a precedent if the outcome is unjust.

The operation of precedent in all countries will also very much depend on that court’s composition. This can create shifts in attitudes towards certain types of precedent and create pressures on heads of courts to “forge majorities”, create “cordial relations in court,” “facilitate greater stability of the courts” and “promote respect for the court”, as these activities draw attention to how the court is perceived by the public.[[41]](#footnote-41) If a court appears to be in constant conflict with itself, this can be exploited towards certain political goals, and create a perception that the court cannot be trusted with important matters of law.

There are also a number of characteristics that are shared across all common law systems: “…a clear-cut judicial hierarchy, the concept of ratio decidendi, and the diffusion of law reports.”[[42]](#footnote-42) In England, the ratio is something you need to dig for, but it only holds precedential value if the case has similar facts to the current case, whereas in the USA, they are somewhat more explicit about the ratio.[[43]](#footnote-43) There is also the obiter dicta (“things said in passing”) which may confuse the reader.[[44]](#footnote-44)

A theory of common law therefore looks at the strength of precedent that any given court gives it, and how it does that. Furthermore, it is important to note that they have this choice. This choice is an important point to make, in that yes, case law is an important source of law for judges to use in deciding cases, but there is always the possibility to argue and decide differently.

This takes me to a brief discussion on judicial opinions. We shall see later on that the way the CJEU builds its judgments is directly impacted by language and a multilingual setting, which also impacts its authority amongst member states’ courts. Common law courts (mostly) do not have the issue of working for an audience of multiple languages, let alone working in several languages. However, a judicial opinion must contain certain elements to hold legitimacy and maintain public confidence in the courts.[[45]](#footnote-45) This is also for the courts to be able to legitimately create a precedent, or even overturn, depart or distinguish from it.[[46]](#footnote-46) The facts being especially important to understanding which precedent applies and why. The opinion itself gives the building blocks of the judgment (through reasoning) as to what precedents apply (or not) and why. The reasoning will usually be a response to arguments raised by counsel. Here the opinion reflects whether a judge takes a weak, strong or mixed approach to precedent. The reasoning also provides the justification and therefore also the legitimacy behind the judgment. These building blocks show that the way that a judgment is formed is an important part of the precedent itself. Furthermore, unlike civil law countries, the highest courts have majority as well as dissenting judgments, which gives a broader view of how the courts could have decided- but the same building blocks apply to majority as well as dissenting opinions.

I will now move on to the theory of precedent in civil law.

1. Civil Law

Whilst common law is an important primary source of law, civil law considers case law to be a secondary source, whereas codes and legislation are considered to be primary sources, reflecting the supremacy of the legislator over the judiciary.[[47]](#footnote-47) This does not mean though that judiciaries in civil law countries have no developed a system of precedent,[[48]](#footnote-48) In the same way as with common law, the goal is to achieve legal certainty and equality in the application of the law. However instead of calling it *stare decisis*, they have named in “*jurisprudence constante,*” (“settled/persisting jurisprudence”)[[49]](#footnote-49) which means “the doctrine under which a court is required to take past decisions into account only if there is sufficient uniformity in previous case law.”[[50]](#footnote-50) As such, cases do not automatically hold precedential value (unlike common law) and will only become important enough to take 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.[[51]](#footnote-51) Whilst the starting point and process of developing precedent is different than common law’s *stare decisis*, it is arguably a way to filter out cases from the outset that do not add anything to the jurisprudence and practice of the courts, that does not unsettle the law or cause ripples in legal practice.

However, Fon *et al* 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, it has 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”. However, where a decision has been mostly contradicted by the lower courts, it would lead to a “dominant ‘negative’ jurisprudence”. Whereas, if there is no consenss either way, the “jurisprudence is ‘splt’ and precedents do not influence future courts’ decisions.”[[52]](#footnote-52)

As such, precedent starts with the interpretation of legislation. Legal reasoning is not the same in civil law countries like France, as it is in England or other common law countries. The French justice system, both ordinary and administrative, have a syllogistic approach to judgments: they 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.[[53]](#footnote-53) Given it’s syllogistic manner, it means that “reasoning” is much shorter and terser than one would normally find in common law cases. Similar to the common law, not all courts will need in-depth reasoning, especially those of the lower courts. However, a build up of citations of the same highest court cases over time will create *jurisprudence constante*.

Fon *et al* 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 signal upwards that the judiciary seeks a change in the approach to cases due to changing social, political and legal contexts.[[54]](#footnote-54) The impact of this approach, it is argued, can either consolidate or corrode a precedent, but 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.[[55]](#footnote-55)

Fon *et al* have found that due to the fact that cases do not automatically have authority at the outset means that there is less consistency whilst the jurisprudence finds that level of uniformity. Bearing in mind that the codes and legislation exist as the primary source of law, and that case law, when it hits that level of consolidation, can only ever be a secondary source of law that helps to interpret primary sources of law. This gives civil law systems a different type of balance of forward and backward-looking approaches than common law, but they do have jurisprudential choices there. Even though the approach is very different to that of the common law, there is a theory of precedent in civil law, as much as there is in common law. And as pointed out by Algero, the countries using either of these systems have been moving towards each other in terms of legislating and the corresponding use of precedent, becoming more mixed.[[56]](#footnote-56)

An important point going forward is to remember that 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. As I stated earlier, 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, but at the same time, needing the flexibility to respond to important social, political and other environmental changes in society. This will not be different for the Court of Justice of the European Union (CJEU). This means that the question isn’t whether there is a system of precedent at the CJEU, but what the theory of precedent at the CJEU (arguably) is.

What follows is a distillation of the elements of precedent, and how they function in the mixed system that has evolved at CJEU.

## Elements of Precedent

If we look at the elements of precedent, we can see that (whether we are talking about common or civil law systems) they include: Elements of precedential theory specific to particular legal orders regarding such things as authority and weight of any given judgment on future courts, i.e. whether a particular case binds a future court. This is usually a matter of degree and options available to the judges, and other values that bind them, such as legal certainty and consistency.

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 European Union (EU). Following on from the theory of precedent discussion above on the authoritativeness of judgments (weak, strong and mixed), common law judges have four conscious jurisprudential choices: the first is to follow precedent (in a way that can either strengthen or weaken precedent); the second is to overrule; the third is to depart; and the last is to distinguish. Where a precedent is weakened, overruled, distinguished or departed from, it is called “avoidance technique”.[[57]](#footnote-57) Overruling by a court can only be done by the court that made the initial decision. Initially, this was to be expressly done, but since the 1940s, implied overruling is also allowed.[[58]](#footnote-58) “The usual effect of overruling a case is to make the law in some sense the contrary of the proposition for which the *ratio decidendi* was formerly authoritative.”[[59]](#footnote-59) However, it has only been since 1966 when the House of Lords issued a practice statement that allowed it to overrule its own cases.

As civil law countries do not have the doctrine of *stare decisis* these choices are not available to them in the same way that common law judges have. It is however an illusion that judges in civil courts do not have conscious jurisprudential choices. Civil law Codes must also “modernize/adapt the law to reflect changing social conditions and needs, and relatedly … the simple yet compelling grounds of equity and substantive justice.”[[60]](#footnote-60) Whilst these choices do not, on the surface, reflect those that are available to common law judges, during the collegiate deliberations of a case in France, Advocates General, in their advice to judges, will “typically frame their legal analyses in terms of that jurisprudence, and focus on whether to apply, modify, or overturn it.”[[61]](#footnote-61) As discussed above, judges and the lower courts also have a choice to voice their disquiet about the *jurisprudence constante* in “minority cases.”

It has been shown that where judges in civil law countries deliberately ignore *jurisprudence constante*, their judgments will be overturned on appeal.[[62]](#footnote-62) Fon *et al*, in their model, show that there are a minority of cases going against the *jurisprudence constante*, which “allow for these cases to play a signalling role, informally influencing future decisions.”[[63]](#footnote-63) From the above discussion on the theory of precedent in civil law, we know that it can take time for precedent to develop, giving a certain amount of flexibility of choice until that precedent consolidates. Once it has though, this practice of “minority cases” allows a path away from the precedent once it has been established, allowing the courts to respond to societal changes.

Even though the reasoning process to choose what jurisprudence to follow is not nearly as complex as the common law system, civil law judges are still faced with conscious jurisprudential choices, especially at the highest courts. All the same, at the first instance courts, judges are tasked with making decisions on the basis of law, including both binding and persuasive material. This requires them to make interpretative choices. These choices are reflected in the final (reasoned) decision.

From the examination of civil and common law elements of conscious jurisprudential choice above, it appears that there is a dialogue here, and that as a source of law, primary or secondary, there must be a flexibility for precedent to develop and respond to changes in the legal, political, and social environments that they operate in. If we turn to look at CJEU judgments and consider them in light of these elements of precedent, we can see that it does follow its own ‘precedent’ – and in its own way (it does not work in the common law way, but nor does it work in the civil law way as it can cite previous cases). The next section discusses the available research that goes to the elements of ‘precedent’ that we have discussed (authoritative bindingness of case law and conscious jurisprudential choice). However, this broad discussion that is available in any legal system ignores the elements related to text production and judicial drafting, including judicial reasoning (how ‘precedent’ is actually written), reasoning by analogy and discourse, which we will discuss after the section examining authority and bindingness of precedent at the CJEU.

### Precedent in CJEU judgments

Derlen *et al* seek to move beyond this discussion comparing civil and common law approaches to precedent and how that might apply to the CJEU.[[64]](#footnote-64) For them the test is how far 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.”[[65]](#footnote-65) Self-precedent means where a judge or court has issued a judgment, they would be required to give reasons for any departure from their own rulings.[[66]](#footnote-66) This hypothesis was tested through network analysis, looking at the connections between cases through citations. The research shows that the CJEU does not take a random approach to citing their own cases in support of their arguments and that there are only a small number of cases that are not connected to other cases.[[67]](#footnote-67)

Following from the discussion on theory above, the CJEU case law has some path dependency in order to allow for legal certainty, consistency and equality, which are rule of law principles followed by both types of legal system. However, the results of the research show a more civil law-oriented approach in that a case of the CJEU will not automatically have authoritative status of binding precedent.

The CJEU can be argued to consider its own body of cases as a source of law, which is expressed when they use the term “settled case law” to resolve a dispute,[[68]](#footnote-68) but it has to identify it as settled case law, in the same way as the civil law system of precedent- through citation and consolidation. As such, precedent is an important part of justification for the CJEU,[[69]](#footnote-69) thereby recognising it as a source of law interpreting the Treaties.[[70]](#footnote-70) However, when the CJEU does decide it wishes to create precedent,

“Their brevity, collegial form, and logical structure all contribute to their characteristic magisterial authority. As a result, the Court establishes and refers to its own case law with a remarkably easy self-assurance.”[[71]](#footnote-71)

The CJEU now considers its own case law to be an important source of law.[[72]](#footnote-72) As with any other young court, “a minimum core of judgments is needed before a court can develop a systematic citation practice.”[[73]](#footnote-73) Derlen *et al* found a corelation between the rate of citation, body of case law and the increasing number of cases the CJEU needs to hear each year.[[74]](#footnote-74) Importantly, judicial activism (constitutional cases) does not exclude reliance upon past cases, e.g., *Francovich* was connected to previous judgments. Citation of precedent looks to be the CJEU’s effort to give itself legitimacy in creating a system of precedent as a source of law. This reflects a mixed approach between the French civilian approach to precedent and a common law approach seeking out stability and consistency through path dependency and logical reasoning.[[75]](#footnote-75)

However, it has been argued that a conceptual framework needs to be developed to better understand the CJEU’s precedent creating practices, given the different cultural influences from judges of different member states and legal cultures.[[76]](#footnote-76) This is a fair assessment given that civil law comes from Roman times and common law from medieval English times, and both have had time for practices to settle and conceptual frameworks to develop.

The CJEU’s case law represents global judicialisation, and it is the highest court on EU law matters, whether procedural, institutional or constitutional.[[77]](#footnote-77) Precedents matter because in using them, they are expressing a “degree of self-sufficiency, and hence power.”[[78]](#footnote-78) It is useful to develop a legal theory of precedent in EU law to develop the vocabulary to enable judges to make conscious jurisprudential choices, reflected in their final decisions. As with theories of common and civil law precedent, it is about the degree of bindingness of cases, and how judges make those choices about what cases should have precedent.

## Methodology of CJEU Precedent

The methodology of the court can be distilled in to four components: 1) stages of development; 2) issue shifting; 3) half-life of important cases; and 4) overruling and avoiding precedent.

In terms of the first component, stages of development, this looks at how citations “are distributed over time by looking at average yearly inward citation.”[[79]](#footnote-79) The data reflected an increase over time, in correlation with increased judgments, and citation of recent cases. Developments have been noted over certain times, such as the 1970s, where the CJEU gave the decision in *Dassonville*.[[80]](#footnote-80) This is a similar pattern to the civil law development of *jurisprudence constante*, in that cases do not start off with binding status, and precedent is consolidated over time.

The second component represents a focus shift towards different issues at different times, e.g., different areas of free movement (goods, people, services and capital).[[81]](#footnote-81) Having said that however, (leading into the third component), “… the CJEU is quick to cite new case and they become settled after a short time.”[[82]](#footnote-82) This means they will use recent cases to support their decisions in near-future cases, and whilst some cases to continue to be cited, some fizzle out- again, much like the civil law theory of precedent, taking time to build up, but allowing itself the flexibility to move away from precedent simply by not citing them anymore.

These lead to the final component, that of overruling or avoiding precedent. The CJEU sometimes fails to be clear about cases it wishes to overrule.[[83]](#footnote-83) This is called “positive treatment of precedent…”[[84]](#footnote-84) in that they will cite cases to support their decisions rather than explicitly overrule cases in which the rule or principle no longer applies. This does not mean they never do it.[[85]](#footnote-85)

As such, these components show that there is a conscious approach to precedent. Furthermore, using these tools, the CJEU acts as a supreme court to set out interpretations of EU law for member states’ courts and EU institutions.

Whilst the CJEU does not have the common law practices of dissents, they do receive advice on how the law could be interpreted using precedent. These are provided through the Advocates’ General Opinions. However, CJEU judgments only come in one decision by a panel of judges (unanimous decisions). This means the court presents a united front.[[86]](#footnote-86)

Having looked at the methodology behind the CJEU’s decision making process, it is now time to look to whether these practices are sufficient to develop a theory of precedent for the CJEU.

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

The EU, unlike France, has certain factors which are “conducive to positive precedent.”[[87]](#footnote-87) Firstly, there is the “brevity and fecundity” of Treaty language. The Treaty itself is skeletal, and that precedent adds substance. Another reason creating precedent as a source of law has been easy to do is the multilingual nature of the Treaty itself: “In-built multilingualism … has always been a powerful reason for not adopting a narrow literal approach to the understanding of supranational legal provisions.”[[88]](#footnote-88) The second factor is the “absence of widespread codification”. The EU has a different approach to the sources of law, rather than fixing legislative powers to the European Parliament.[[89]](#footnote-89) The third factor is the “recognition and effective enforcement” of CJEU judgments.[[90]](#footnote-90) Lastly, there is the “multiplicity of influences and polycentricity of actors.”[[91]](#footnote-91) The political context of the court is important, given its multicultural environment and the different actors approaching them to resolve disputes on EU law.[[92]](#footnote-92)

The CJEU has also taken advantage of preliminary ruling procedures to, for example, create citizenship and free movement of EU citizens.[[93]](#footnote-93) The positive impact it has had in protecting citizen 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), and the other recognises it (discretionary/strong approach). The former say that there is a distinction between creating and applying law. Cases provide for “legal development in the course of adjudication.”[[94]](#footnote-94) This is represented in a binary model, where there are institutions that make (state parties or legislatures) or don’t make (adjudicators) the law.[[95]](#footnote-95) 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 itself; and their cases are cited in secondary legislation and litigation. As such, this first part of the binary model does not apply.

The second element of this binary model Is the epistemological: where “"the law exists as an objectively ascertainable totality of relevant rules.”[[96]](#footnote-96) This basically means that the law can only mean one thing and is not subject to interpretation- it’s 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”[[97]](#footnote-97) nor the “… precarious power of the ultimate interpreter.”[[98]](#footnote-98)

The balance between constraint and discretion is where “[the] law changes through adjudication while remaining the same.”[[99]](#footnote-99) This model follows the French methods, where codification is an important source of law, but which needs adjudicatory development. However, the CJEU has the discretion to be creative, as illustrated by its *Francovich* judgment, which developed state liability.[[100]](#footnote-100) In this case, the court made a “shift from wording to spirit and purpose” of the Treaty.[[101]](#footnote-101) This model is further supported by the idea of “entrenched negation” where the Treaty itself has ruled out “strict” *stare decisis* through article 19(1)[[102]](#footnote-102) by not explicitly mentioning it. The difficulty for this model is that it hasn’t caught on. Whilst it acknowledges judicial activity, it seeks describe constraints of rules and principles which are not actually there.[[103]](#footnote-103)

The school that recognises the law-making powers of the CJEU is the pragmatic one which acknowledges the function of judging in the application of law in dispute resolution. It also acknowledges political science definitions of judging, such as ‘policy making’, ‘social control’, ‘regime legitimation’, ‘norm advancement’, and maintaining a ‘coherent legal system’.[[104]](#footnote-104) Within this model precedent has the effect making law, and unlike the French model, “is not impersonal”,[[105]](#footnote-105) but dependent on the arguments of judges and lawyers.[[106]](#footnote-106) However, it is arguable that the CJEU is constrained by its own previous case law to interpret the Treaties, with weak, strong or mixed approaches to precedent, that require reasoning and justification for decisions.

Different theories of precedent reflect the constitutional position of 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 model has been introduced to allow the constraint of the CJEU, that recognises the role of judges in both applying and making EU law.[[107]](#footnote-107) The function of the judge in the EU is not predicated on a strict separation of powers.[[108]](#footnote-108) This makes it different from the French civilian approach to a strict separation of powers, but 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.

### A Unique theory of Precedent at the CJEU?

Rigid theories of the common and civil law systems cannot apply to the CJEU, as it 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. It is a unique institution, but as a judiciary, is constrained by the same jurisprudential choices as any other court in Europe- how to approach cases in a way that respects legal certain and equality in the application of law, at the same time as having the flexibility to deal with change.

It has been observed that at the CJEU precedent is a source of legal information.[[109]](#footnote-109) This actually goes beyond the idea that it is a source of law alone, but rather one source of information out of others- this is a French approach that takes on board both legal and non-legal information when coming to a judgment. It has further been observed that precedent is cited across different types of cases that are not necessarily related and without reasoning.[[110]](#footnote-110) There is also a lack of explanation as to why the CJEU have developed this practice.[[111]](#footnote-111) One explanation is that in order to resolve the dispute, they need only give a sufficient answer, with limited citation to previous cases.[[112]](#footnote-112)

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.[[113]](#footnote-113) 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.”[[114]](#footnote-114) A theory of “positive precedent” has been proposed for the CJEU. There are certain conditions that constrain the court: CJEU cannot act on own motion;[[115]](#footnote-115) the court is limited to scope of the individual case and specific outcomes impact parties only; the court does not have an aim to resolve deeper issues 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”[[116]](#footnote-116) which is a different space than legislature; and finally “saying judges make law is perfectly compatible with saying they do not legislate.[[117]](#footnote-117) 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, and they are able to have this flexibility due to the nature of the Treaties being drafted in such a broad way. This is arguably an attractive theory as it allows for development of the law over time, and the more abstract the principles, the more situations can fit under it.[[118]](#footnote-118)

Even so, the CJEU still 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”[[119]](#footnote-119) in reality it is “bound” as any other court is, due 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, this article will now examine how the CJEU sees itself outside of this debate regarding the conscious jurisprudential choices it makes and the actual role the precedent has in the CJEU’s decision making.

## Conscious Jurisprudential Choice at the CJEU

Moving away from theory to practice, the position of the CJEU on the other hand sits somewhere between “silence” and “denial as to the normativity of its decisions.”[[120]](#footnote-120) Whilst the court looked at possible grounds of departure from a line of cases in the *Da Costa* case[[121]](#footnote-121) the court gave no answer to the question. Internally, the court sees itself as settling disputes, not “expounding theories *in abstracto.*”[[122]](#footnote-122) They appear reluctant to do so in case they return to haunt the court.[[123]](#footnote-123) Advocates General have also been shown to be denialists, using concepts such as ‘*res judicata*’, and ‘*erga omnes*’ obligations.[[124]](#footnote-124) Whilst their official line is to deny, in practice, their decisions are based on “expectations” and “reasons.”[[125]](#footnote-125) The court “values stability and coherence” which would not be fulfilled in strict adherence to precedent but rather balanced argumentation.[[126]](#footnote-126)

From practice and theory, Jacob seeks to reconstruct a methodology and theory applicable to the CJEU by conceptualising precedent used in both a positivistic (putting legislation and treaties first) and conceptual way.[[127]](#footnote-127) 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’.[[128]](#footnote-128) Furthermore, the rules of procedure of the CJEU supports the role of precedent in the court, for example, the court may refer back to previous cases, when rejecting a Preliminary Reference, where the legal issue has been dealt with in established case law. [[129]](#footnote-129)

The CJEU is not a court of appeal, and whilst it has the final say on interpretation in theory, in practice it is more a dialogue.[[130]](#footnote-130) Furthermore, the EU law’s supremacy is often challenged, especially by Germany’s Bundesverfassungsgericht (BfVerg). In a 2020 case, the BfVerg found that the European Central Benk’s Public Sector Purchase Programme (PSPP) was partially unconstitutional. This is a case in point because it followed a preliminary ruling by the CJEU that PSPP was not a violation of EU law.[[131]](#footnote-131) However, that there is no strict system of precedent has not stopped the CJEU from giving normative or precedential effects to cases.[[132]](#footnote-132) This situation requires, then, for there to be 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” (*arrets de principes*) which provide relevant legal information in order for the domestic court to settle the case.[[133]](#footnote-133) 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.[[134]](#footnote-134)

The *CILFIT* case provided exceptions for domestic courts to make preliminary references to the CJEU where an “*acte clair*” or “*acte éclairé*” existed.[[135]](#footnote-135) 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”. Whereas in ‘acte éclairé’, the CJEU will have “made a decisionon the question at hand” in previous cases.”[[136]](#footnote-136) Preliminary references therefore provide authority of interpretation to the CJEU. Similar to the French civil law system, it may be possible that member state courts would want to apply for a Preliminary Reference to signal that it is a time for change of approach to the law, especially if they phrase their issues in a way that invites a different approach.

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.[[137]](#footnote-137) They are encouraged, however, to follow the precedent of the CJEU.[[138]](#footnote-138)

There is concern about the diverse possibilities of EU law being non-uniformly applied across the member states of the EU.[[139]](#footnote-139) 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.

In practice (which impacts the theory), officially there is a role of precedent in CJEU judgments, though based on the discussion so far, not a particularly unique one. The theory developed by Jacob is one that 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. The theory is neither fully common nor civil law based, but one that is derived from the traditions discussed here, including of course the traditions and working habits of the CJEU itself, especially from the preliminary reference procedure. The act of interpretation and of being interpreters is authorized by principles of constitutionalism and the rule of law. This all affects the conscious jurisprudential choices of the CJEU.

## Actual Role of Precedent in CJEU Decisions

### Balancing Act

Precedent has a variety of theories and models, at the heart of which is a balancing act for judges on several scales. 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; and thirdly, there 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 that between creativity or activism and conservativism. EU law has been shown to be adaptable in a variety of contexts, such as the development of tortious harm against a citizen.[[140]](#footnote-140) 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, the CJEU has has limited its own jurisdiction as well.[[141]](#footnote-141) Ultimately, the operation of precedent in any legal system depends very much on the power of judge and the structure of the courts.

### CJEU’s Approaches to Precedent

Precedent is an important source of law in both common law and civil law- the only difference is a matter of degree and the matter of expression. This is not particularly different for the CJEU’s application of precedent. The CJEU resisted considering it’s past rulings to be an autonomous legal source, leading to a lack of citation methodology. Despite this, the court eventually recognisted it’s jurisprudence as a source of EU law, ultimately even being regarded as the foremost source of law.[[142]](#footnote-142)

The CJEU uses treaties, laws, and precedent as its sources of law. The CJEU has very specific techniques related to all three. In interpreting Treaties and legislation the CJEU may use three approaches: “Focus on underlying aims of provisions rather than their wording”[[143]](#footnote-143) This represents a “teleological or purposive” approach.”[[144]](#footnote-144) The CJEU may also follow the “general scheme within which the legislation is found”, which represents the ‘schematic or contextual approach” whereby other sources maybe applied, such as other legislation, precedents of the CJEU, general principles or the underlying objectives of the EU.[[145]](#footnote-145) Lastly, they may take a textual approach, which entails looking only at the “ordinary meaning” of the words. This approach poses the biggest difficulty given the “multilingual character of the EU”; the “broad and general language” makes it difficult to be certain of its meaning; and the interpretation may in the end conflict with the EU’s general aims and objectives.[[146]](#footnote-146) It is important for the uniform interpretation 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 if the court gets it wrong. For example, all courts may make a preliminary reference to the CJEU, even on issues considered relatively settled. Also, whilst there is no approach to finding the ratio or obiter of a case the CJEU, the CJEU does apply *res judicata* which means that a decision given will be binding on parties to the case.[[147]](#footnote-147)

There are possibly two forms of precedent at the CJEU: ‘interpretative’ and ‘self-standing’. Interpretative precedents are those that give meaning and definitions to teams and concepts within the Treaties and the legislation.[[148]](#footnote-148) 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.[[149]](#footnote-149)

As the CJEU does not follow the common law system with a distinction between *ratio decidendi* and *obiter dicta*, there is potential relevance in all previous statements of law expressed in precedent.[[150]](#footnote-150) 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.” [[151]](#footnote-151) 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.[[152]](#footnote-152) This is very much a civil law practice (especially in Germany).[[153]](#footnote-153) Such paragraphs form building blocks of arguments that can be used. This is an efficient use, as the building blocks will have been found in previous cases and act as settled law (*jurisprudence constante*), and can also be the foundation for further developments, so the reader can see a line from the past, to the future.

### Consequences to these approaches

There are consequences to this: Firstly, because of the terse language used, and the recycling of paragraphs from previous cases, the court takes a formulaic approach to all cases. This means that any adaptation of those building blocks can be subtle.[[154]](#footnote-154) The subtle variations, where confirmed, show or “hide incremental developments in judicial approach and rule instability from one case to the next.” 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.”[[155]](#footnote-155) This is unlike *stare decisis* where the court must clearly overrule, distinguish or confirm a principle. It is also unlike the *jurisprudence constante*, where similarly, if the court were to take a different approach once the precedent was there, they would have to be explicit about it.

Nonetheless, the CJEU does try take a consistent approach in order to respect legal certainty. It rarely departs from its previous rulings, and “[b]y generally following previous decision, the ECJ can develop a body of law on a particular area, known sometimes **as *jurisprudence constante***.”[[156]](#footnote-156) [Emphasis added] For the CJEU, this means that precedent ‘supplements codified law’ as a "source of guidance"; provides ‘substance to general propositions of law’; and “contributes to the formulation and development of principles of general application”.[[157]](#footnote-157) Whilst precedent does influence the form of judgment, judges have become more elaborate over time and provide more reasoning for their decisions.[[158]](#footnote-158) Finally, the CJEU also uses general principles as both “propositions of law” and as an “aid to interpretation.”[[159]](#footnote-159) These can be sourced from both the CJEU’s own precedent as well as the law of the member state courts or even international law.[[160]](#footnote-160) This means that they take a deeper approach to explain and reason their decisions.

However, the method of using the building blocks reflects not only the evolved method over time, but also the practicality of working in a multilingual environment where the aim is to produce 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 to be able to stay with the settled law using the same language of previous cases. This has the effect of giving “the impression of continuity in case law.” [[161]](#footnote-161) These practices arguably reflect the role of precedent in balancing coherence, justice and checks and balances.

This leads then to a discussion on multilingualism and its impact on the theory of precedent at the CJEU.

## Precedent in a multilingual environment

On another level, these building blocks mask the fact that the CJEU does work in a multilingual environment, and though judgments are drafted in French, the decisions themselves are translated back into the language of the country the case came from. Not only this, but the legislation and Treaties of the EU are equally authentic in all official languages of the EU.[[162]](#footnote-162) This is a cause of legal uncertainty, given different meanings that can be attributed to any given part of the law.

This is not only a linguistic issue, but also a cultural one: 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- added to which is the language of law, which is different in any legal system. It has been argued that this has been the reason for the “teleological method of interpretation of EU legislation.”[[163]](#footnote-163)

Irrespective of any linguistic issues that may arise, the EU legal order is still functioning, and this is arguably so because of the teleological method of interpretation to “actually help to ensure the uniform application of that law.”[[164]](#footnote-164) From the perspective of the member states, the multilingualistic aspect of the CJEU’s output is not lost - the national courts have a tendency to try to follow the CJEU as closely as possible.[[165]](#footnote-165) More recently, it been argued that the laconic style of the court closes off dialogue with other actors in the European system suggesting that, where possible, other courts and institutions follow the single meaning of the text. [[166]](#footnote-166) This method could create transparency and legitimacy for the CJEU, and help to create its authority and acceptance by other institutions and member state courts. This is important due to the fact that the court has no inherent power to enforce its decisions.[[167]](#footnote-167) However, while the CJEU cannot enforce by itself, if a Member State does fail to comply with a CJEU decision, the Commission can initiate infringement proceedings through its established doctrine of state liability- this though is a political choice.[[168]](#footnote-168)

Part and parcel of that legitimacy is the principle of equal authenticity, which essentially means that all language versions produced for a case will be considered to be authentic and have equal value as a source of law. [[169]](#footnote-169) Language therefore impacts the decisions to focus on ensuring the “correct interpretation of EU law”, especially given the multilingual nature of the court representing a “… merger between drafting and translation…”.[[170]](#footnote-170) It 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.[[171]](#footnote-171) The concept of having multiple language texts which are observed as textually equivalent has also been called a “legal fiction” (meaning it is accepted as true so that the legal system can function). [[172]](#footnote-172) This connects back to the earlier conclusion that the EU still functions in spite of linguistic issues.

Aside from these theoretical aspects, there is also the practical impact that the language rules of the court have 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 to this, as different understandings of texts and training around the use of cases will make a difference to how the court uses 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.”[[173]](#footnote-173)

Whilst all judgments are published in the 24 official languages, 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.[[174]](#footnote-174) This linguistic burden is reflected on how decisions are drafted by both *referendaires* and the army of lawyer-linguists that work for the court as legal translators.[[175]](#footnote-175) These lawyers are trained to terminological consistency, the formalistic style and linguistic precedent and the French style of producing judgments.[[176]](#footnote-176) Moreover, whilst they work in French, they tend to translate rather than think in French. 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 and the rigid style of judgments” which creates the need for drafting to follow “the style and language of previous judgments.”[[177]](#footnote-177)

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.”[[178]](#footnote-178) [Added]

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” to the development of precedent,[[179]](#footnote-179) This highlights the importance of consistency of language, which is the foundation to legal uniformity in any legal system.[[180]](#footnote-180)

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...”[[181]](#footnote-181) 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 why.

Thirdly, this linguistic environment has cemented French as the CJEU's working language and judgement style. Yet, EU growth and 27 member state courts will have impacted the CJEU's functioning and understanding of its precedent.[[182]](#footnote-182)

Finally, we address culture of precedent.

### Culture of Precedent

Beyond language is also a practice of precedent and the role of lawyers in common law systems to uphold the principles of *stare decisis*. One part of this is the “duty to disclose adverse precedents.”[[183]](#footnote-183) The consistency of such practice is an important part of legal reasoning in the common law and how the parties and courts frame their issues and decisions.[[184]](#footnote-184) 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.”[[185]](#footnote-185) Most EU member states do not have 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 trials process, case-loads and the adversarial system.[[186]](#footnote-186)

Recent pressures on the CJEU have meant a change in approach to precedent and caseloads. The CJEU “will only consider cases that raise new legal issues or reveal that existing case law should be reconsidered”[[187]](#footnote-187) and have set out a simpler procedure for standard cases which already have an *acquis* developed.[[188]](#footnote-188) 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 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 court, which decides which precedents (that have been presented to court) are applicable and form the basis of their judgments.[[189]](#footnote-189) Due to the multilingual nature of the CJEU, lawyers have to have a specific approach that is not connected to precedent, where 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.[[190]](#footnote-190) The CJEU, as with other inquisitorial systems, is supported by the role of the Attorney General, who provides assistance to the court with “legal reflections pursuant to the European Union’s interest in the outcome”[[191]](#footnote-191) thereby on part of the role of common law lawyers in presenting case law and arguments to the court. As such, there isn’t a specific requirement for the CJEU to follow precedents- they are not (culturally) constrained in the same way, and may depart from previous case. However, following from the discussion on multingualism above, it is understood that as a practice, the CJEU will not depart suddenly from its’ case law, as it would go against principles such as legal certainty and uniformity.

## Conclusions

As with any legal system based on the rule of law, the CJEU follows its own precedent. Whilst it has not always been open and consistent about the way it uses precedent, either following, distinguishing or departing, the literature shows that its habits have changed since it started and has become more explicit over time. It does not work in the same way as common law with its holdings, 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 given its importance in the European integration project.

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

Text production and judicial drafting reflects 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 has a huge impact on the working of the court, not least because of jurisprudential choices of the judges and the *referendaires* 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, not the entire point. Law is always arguable from at least two perspectives (as there are always two parties to a case, and any other interests involved)- language simply gives a different dimension of understanding. Understanding and developing precedent is a process that does not usually only involve a lexical understanding, but rather dialogue and discussion. Uniformity is not the end of a legal discussion- achieving justice is, and uniformity is but one part of that discussion.

Applying precedent, in the end, whether common law, civil law, or EU law, is about the line and the balance between stability and flexibility in the law- 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. The job of the CJEU judge is more complex based on the multilingual context, however, it is not the only multilingual court in Europe, or even the world, and 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, it's also about the separation of powers, not just between institutions but also between the different levels of court. This is complicated by the fact that the European Union is made up of many different languages and cultures.

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BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 -, paras. 1-237, [http://www.bverfg.de/e/rs20200505\_2bvr085915en.html accessed 09/03/2023](http://www.bverfg.de/e/rs20200505_2bvr085915en.html%20accessed%2009/03/2023)

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1. My thanks to Dr James Slater for his comments, University of Buckingham, School of Law, and my thanks especially to the blind reviewers and Jack Keating for their feedback. All mistakes remain my own. [↑](#footnote-ref-1)
2. M. Derlen, 'Single Text or a Single Meaning' (2015) Language and culture in EU law : multidisciplinary perspectives 53, 68 [↑](#footnote-ref-2)
3. Joana Sousa Domingues, 'The multilingual jurisprudence of the Court of Justice and the idea of uniformity in European Union Law' (2017) 3 UNIO–EU Law Journal, 125 [↑](#footnote-ref-3)
4. Law And Language At The CJEU Project [↑](#footnote-ref-4)
5. Google Scholar, WorldCat, Copac, eBrary, University of Exeter (including electronic catalogue, and the British library) and others in foreign languages that may have been accessible. [↑](#footnote-ref-5)
6. 1. What is ‘precedent’?

   a. Theory of precedent

   b. Precedent in common law jurisdictions

   c. Precedent in civil law jurisdictions

   2. What are the different elements of precedent? (conscious jurisprudential choice, but also element to do with text production/judicial drafting?)

   3. Officially, what is the role of precedent in CJEU judgments – i.e. officially does it exist?

   4. Given RQ1 above, what is the actual role of precedent in CJEU judgments – i.e. is there a form of precedent in CJEU judgments? What form does it take? [↑](#footnote-ref-6)
7. Rodrigo Camarena González, 'From jurisprudence constante to stare decisis: the migration of the doctrine of precedent to civil law constitutionalism' (2016) 7 Transnational Legal Theory 257 [↑](#footnote-ref-7)
8. The world is not exclusively drawn across these lines, and as Algero points out, given globalisation, courts are forced to interpret laws from other jurisdictions, but also that there are mixed jurisdictions as well. Mary Garvey Algero, 'The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation' (2004) 65 La L Rev 775, 780 [↑](#footnote-ref-8)
9. Camarena González, 'From jurisprudence constante to stare decisis: the migration of the doctrine of precedent to civil law constitutionalism' 273 [↑](#footnote-ref-9)
10. Frederick G. McKean, Jr., 'The Rule of Precedents' (1928) 76 University of Pennsylvania Law Review and American Law Register 481, 481 [↑](#footnote-ref-10)
11. Michael J. Gerhardt, 'The power of precedent' (2008) 3 [↑](#footnote-ref-11)
12. See also Douglas E Edlin, 'Common law theory' (2007) 74 [↑](#footnote-ref-12)
13. James J. III Eisenhower, 'Four Theories of Precedent and Its Role in Judicial Decisions' (1988) 61 Temple L Rev 871 [↑](#footnote-ref-13)
14. Ibid 872 [↑](#footnote-ref-14)
15. Ibid 873 [↑](#footnote-ref-15)
16. Ibid 873-874 [↑](#footnote-ref-16)
17. Ibid 874 [↑](#footnote-ref-17)
18. Ibid 874 [↑](#footnote-ref-18)
19. Ibid 874 [↑](#footnote-ref-19)
20. Ibid 875 [↑](#footnote-ref-20)
21. Ibid 875 [↑](#footnote-ref-21)
22. Ibid 875-876 [↑](#footnote-ref-22)
23. Ibid 876 [↑](#footnote-ref-23)
24. Ibid 876 [↑](#footnote-ref-24)
25. Ibid 876 [↑](#footnote-ref-25)
26. Ibid 877 [↑](#footnote-ref-26)
27. Ibid 877 [↑](#footnote-ref-27)
28. Similarly, Schauer uses the language of “optional and mandatory authorities”, but it still indicates that judges have a choice in how to approach case law precedent: Frederick Schauer, 'Thinking like a lawyer: a new introduction to legal reasoning' (2009) 70 [↑](#footnote-ref-28)
29. Gerhardt, 'The power of precedent' 47 [↑](#footnote-ref-29)
30. Ibid 51-52 [↑](#footnote-ref-30)
31. Ibid 55-58 [↑](#footnote-ref-31)
32. With the exception of recent events regarding the overturning of Roe v Wade in *Dobbs, State Health Officer Of The Mississippi Department Of Health, Et Al. V. Jackson Women’s Health Organization Et Al.* Supreme Court, 2022 [↑](#footnote-ref-32)
33. See also Charles L. Barzun, 'Impeaching Precedent' (2013) 80 The University of Chicago Law Review 1625 [↑](#footnote-ref-33)
34. Gerhardt, 'The power of precedent' p64; see also Edlin, 'Common law theory' 83-84; see also Barzun, 'Impeaching Precedent' 1655-1657 [↑](#footnote-ref-34)
35. Gerhardt, 'The power of precedent' 65 [↑](#footnote-ref-35)
36. Ibid 67 [↑](#footnote-ref-36)
37. Ibid 79 [↑](#footnote-ref-37)
38. Ibid 80; see also Malcolm Rowe and Leanna Katz, 'A Practical Guide to Stare Decisis' (2020) 41 Windsor Rev Legal & Soc Issues 1 23 [↑](#footnote-ref-38)
39. Gerhardt, 'The power of precedent' 87-91 [↑](#footnote-ref-39)
40. Ibid 93; see also Barzun, 'Impeaching Precedent' 1661-1663 [↑](#footnote-ref-40)
41. Gerhardt, 'The power of precedent' 104 [↑](#footnote-ref-41)
42. Camarena González, 'From jurisprudence constante to stare decisis: the migration of the doctrine of precedent to civil law constitutionalism' 260-261 [↑](#footnote-ref-42)
43. Ibid p261; see also Rowe and Katz, 'A Practical Guide to Stare Decisis' 23-24 [↑](#footnote-ref-43)
44. Schauer, 'Thinking like a lawyer: a new introduction to legal reasoning' 56-57 [↑](#footnote-ref-44)
45. Gar Yein Ng, 'Quality of Judicial Reasoning: England and Wales', *How to Measure the Quality of Judicial Reasoning* (Springer 2018) [↑](#footnote-ref-45)
46. Schauer, 'Thinking like a lawyer: a new introduction to legal reasoning' 173 [↑](#footnote-ref-46)
47. Vincy Fon and Francesco Parisi, 'Judicial precedents in civil law systems: A dynamic analysis' (2006) 26 International Review of Law and Economics 519, 522 [↑](#footnote-ref-47)
48. Ibid 522 [↑](#footnote-ref-48)
49. Ibid 523 [↑](#footnote-ref-49)
50. Ibid 522 [↑](#footnote-ref-50)
51. See also Algero, 'The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation' 799-781 [↑](#footnote-ref-51)
52. Fon and Parisi, 'Judicial precedents in civil law systems: A dynamic analysis' 525 [↑](#footnote-ref-52)
53. Emmanuel Jeuland, 'The Quality of Adjudication in France', *How to Measure the Quality of Judicial Reasoning* (Springer 2018) 103-104 [↑](#footnote-ref-53)
54. Fon and Parisi, 'Judicial precedents in civil law systems: A dynamic analysis' 526 [↑](#footnote-ref-54)
55. Ibid 532-533 [↑](#footnote-ref-55)
56. Algero, 'The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation' p.781 [↑](#footnote-ref-56)
57. Rupert Cross and James William Harris, 'Precedent in English law' (1991) 125, 125-29 [↑](#footnote-ref-57)
58. Ibid 127-28 [↑](#footnote-ref-58)
59. Ibid 129 [↑](#footnote-ref-59)
60. Mitchel de S. O. l'E Lasser, 'Judicial deliberations : a comparative analysis of transparency and legitimacy' (2004) 56-60 [↑](#footnote-ref-60)
61. Ibid 53 [↑](#footnote-ref-61)
62. Carl Baudenbacher, 'Some Remarks on the Method of Civil Law' (1999) 34 Tex Int'l LJ 333, 351 [↑](#footnote-ref-62)
63. Fon and Parisi, 'Judicial precedents in civil law systems: A dynamic analysis' 525 [↑](#footnote-ref-63)
64. Mattias Derlén and Johan Lindholm, 'Peek-A-Boo, It's a Case Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective' (2017) 18 German Law Journal 647, 653 [↑](#footnote-ref-64)
65. Ibid 655 [↑](#footnote-ref-65)
66. Ibid 654 [↑](#footnote-ref-66)
67. Ibid 656-661 [↑](#footnote-ref-67)
68. Lasser, 'Judicial deliberations : a comparative analysis of transparency and legitimacy' 108 [↑](#footnote-ref-68)
69. Marc A Jacob, 'Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business' (2014) 1 [↑](#footnote-ref-69)
70. Lasser, 'Judicial deliberations : a comparative analysis of transparency and legitimacy' 107 [↑](#footnote-ref-70)
71. Ibid 112 [↑](#footnote-ref-71)
72. Derlén and Lindholm, 'Peek-A-Boo, It's a Case Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective' 664; see also Christopher Vajda, 'Special Supplement: The Common Law and the CJEU' (2018) 15 Common L Rev 4 para. 8, 5 [↑](#footnote-ref-72)
73. Derlén and Lindholm, 'Peek-A-Boo, It's a Case Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective' 664 [↑](#footnote-ref-73)
74. Ibid 667 [↑](#footnote-ref-74)
75. For a deeper discussion on this issue please see Lasser, 'Judicial deliberations : a comparative analysis of transparency and legitimacy' chapter 7: “The ECJ: The French Bifurcation Reworked” 203-238 [↑](#footnote-ref-75)
76. Jacob, 'Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business' 1 [↑](#footnote-ref-76)
77. Ibid 2 [↑](#footnote-ref-77)
78. Jacob, 'Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business' 3 [↑](#footnote-ref-78)
79. Derlén and Lindholm, 'Peek-A-Boo, It's a Case Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective' 673 [↑](#footnote-ref-79)
80. Ibid 675 [↑](#footnote-ref-80)
81. Ibid 679 [↑](#footnote-ref-81)
82. Ibid 680 [↑](#footnote-ref-82)
83. Derlén and Lindholm, 'Peek-A-Boo, It's a Case Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective' 682 [↑](#footnote-ref-83)
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85. Vajda, 'Special Supplement: The Common Law and the CJEU' 4 [↑](#footnote-ref-85)
86. Mitchel de S. O. L'E Lasser, *Judicial transformations : the rights revolution in the courts of Europe* (Oxford University Press 2009) 107 [↑](#footnote-ref-86)
87. Jacob, 'Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business' p.16 [↑](#footnote-ref-87)
88. Ibid 17 [↑](#footnote-ref-88)
89. Ibid 17 [↑](#footnote-ref-89)
90. Ibid 18 [↑](#footnote-ref-90)
91. Ibid 18 [↑](#footnote-ref-91)
92. Ibid 19 [↑](#footnote-ref-92)
93. Ibid 20 [↑](#footnote-ref-93)
94. Ibid 21 [↑](#footnote-ref-94)
95. Ibid 21 [↑](#footnote-ref-95)
96. Ibid 27 [↑](#footnote-ref-96)
97. Jacob, 'Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business' 28 [↑](#footnote-ref-97)
98. Ibid 29 [↑](#footnote-ref-98)
99. Jacob, 'Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business' 34 [↑](#footnote-ref-99)
100. Ibid 35; see also *Francovich v Italy* (1991) C-6/90 [↑](#footnote-ref-100)
101. Jacob, 'Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business' 36 [↑](#footnote-ref-101)
102. “1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.” [↑](#footnote-ref-102)
103. Jacob, 'Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business' 39 [↑](#footnote-ref-103)
104. Ibid 41 [↑](#footnote-ref-104)
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106. Ibid 42 [↑](#footnote-ref-106)
107. Ibid 46 [↑](#footnote-ref-107)
108. Ibid 46 [↑](#footnote-ref-108)
109. Jacob, 'Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business' p.49 [↑](#footnote-ref-109)
110. Ibid 49-50 [↑](#footnote-ref-110)
111. Ibid 52 [↑](#footnote-ref-111)
112. Ibid 55 [↑](#footnote-ref-112)
113. Ibid 59 [↑](#footnote-ref-113)
114. Ibid 60 [↑](#footnote-ref-114)
115. Ibid 61 (as with any court) [↑](#footnote-ref-115)
116. Ibid 62 [↑](#footnote-ref-116)
117. Ibid 63 [↑](#footnote-ref-117)
118. Ibid 68-9 [↑](#footnote-ref-118)
119. Jacob, 'Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business' 243 [↑](#footnote-ref-119)
120. Ibid 245 [↑](#footnote-ref-120)
121. *Da Costa en Schaake NV and Others/Nederlandse Belastingadministratie*, Joined Cases 28, 29, 30/62 (27 March 1963) [↑](#footnote-ref-121)
122. Jacob, 'Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business' p.245 [↑](#footnote-ref-122)
123. Ibid 245 [↑](#footnote-ref-123)
124. Ibid 246 [↑](#footnote-ref-124)
125. Ibid 246 [↑](#footnote-ref-125)
126. Ibid 253 [↑](#footnote-ref-126)
127. Ibid 253-254 [↑](#footnote-ref-127)
128. Ibid 255 [↑](#footnote-ref-128)
129. Ibid 259 [↑](#footnote-ref-129)
130. Ibid 261 [↑](#footnote-ref-130)
131. BVerfG, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, para. 81. For a deeper discussion of this case, please see Hilpold P, “So Long Solange? The PSPP Judgment of the German Constitutional Court and the Conflict between the German and the European ‘Popular Spirit’” (2021) 23 Cambridge Yearbook of European Legal Studies 159 [↑](#footnote-ref-131)
132. Jacob, 'Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business' 259 [↑](#footnote-ref-132)
133. Ibid 263 [↑](#footnote-ref-133)
134. Ibid 270 [↑](#footnote-ref-134)
135. Ibid 264; see also *CILFIT*, Case 283/81 (6 October 1982) [↑](#footnote-ref-135)
136. Broberg, M., and Niels F., 'When Are National Courts Obliged to Refer Questions?', Broberg and Fenger on Preliminary References to the European Court of Justice, 3rd edn, Oxford, 2021, 207 [↑](#footnote-ref-136)
137. Ibid 269 [↑](#footnote-ref-137)
138. Ibid 271 [↑](#footnote-ref-138)
139. Herman Van Harten, 'National European law precedents' (2009) REALaw Research Forum, Top-Down and Bottom-Up, Groningen ; see also Eric Tjong Tjin Tai and Karlijn Teuben, 'European precedent law' (2008) 16 European Review of Private Law 827, 835 [↑](#footnote-ref-139)
140. Vajda, 'Special Supplement: The Common Law and the CJEU' paras 42-45, 10-11 [↑](#footnote-ref-140)
141. Ibid para 74 [↑](#footnote-ref-141)
142. Derlen, 'Single Text or a Single Meaning' 68 [↑](#footnote-ref-142)
143. Colin Manchester and David Salter, 'Exploring the law: The dynamics of precedent and statutory interpretation' (2006) 89, 104 [↑](#footnote-ref-143)
144. Ibid 104; see also Lasser, 'Judicial deliberations : a comparative analysis of transparency and legitimacy' chapter 7 [↑](#footnote-ref-144)
145. Manchester and Salter, 'Exploring the law: The dynamics of precedent and statutory interpretation' 104 [↑](#footnote-ref-145)
146. Ibid 104-5; for further criticism of this approach, please see Elina Paunio and Susanna Lindroos-Hovinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law' (2010) 16 Eur LJ 395-416 [↑](#footnote-ref-146)
147. Manchester and Salter, 'Exploring the law: The dynamics of precedent and statutory interpretation' 107 [↑](#footnote-ref-147)
148. Gunnar Beck, 'The legal reasoning and the European Court of Justice' (2012) xi, 240 [↑](#footnote-ref-148)
149. Beck, 'The legal reasoning and the European Court of Justice' 241- 242 [↑](#footnote-ref-149)
150. Ibid 242 [↑](#footnote-ref-150)
151. Ibid 245 [↑](#footnote-ref-151)
152. McAuliffe, K. 2013, Precedent at the Court of Justice of the European Union: The Linguistic Aspect. in M Freeman & F Smith (eds), Law and Language: Current Legal Issues Volume 15. vol. 15, Current Legal Issues, Oxford, 483-493, 488 [↑](#footnote-ref-152)
153. Beck, 'The legal reasoning and the European Court of Justice' 245 [↑](#footnote-ref-153)
154. Ibid. 248 [↑](#footnote-ref-154)
155. Ibid 249 and 263 [↑](#footnote-ref-155)
156. Manchester and Salter, 'Exploring the law: The dynamics of precedent and statutory interpretation' 107 [↑](#footnote-ref-156)
157. Ibid 107 [↑](#footnote-ref-157)
158. Ibid 108 [↑](#footnote-ref-158)
159. Ibid 109 [↑](#footnote-ref-159)
160. Ibid 109 [↑](#footnote-ref-160)
161. Beck, 'The legal reasoning and the European Court of Justice' 248-49 [↑](#footnote-ref-161)
162. <https://curia.europa.eu/jcms/jcms/Jo2_10739/en/> accessed 9 March 2023 [↑](#footnote-ref-162)
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164. Ibid 114 [↑](#footnote-ref-164)
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166. Leonardo Pierdominici, 'The Style of Court Decisions', *The Mimetic Evolution of the Court of Justice of the EU* (Springer 2020) 318 [↑](#footnote-ref-166)
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169. Derlen, 'Single Text or a Single Meaning' 63 [↑](#footnote-ref-169)
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175. Ibid 132-133 [↑](#footnote-ref-175)
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177. Ibid 132 [↑](#footnote-ref-177)
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180. Ibid 135 [↑](#footnote-ref-180)
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184. Ibid 240 [↑](#footnote-ref-184)
185. Ibid 243 [↑](#footnote-ref-185)
186. Ibid 247-249 [↑](#footnote-ref-186)
187. Ibid 249 [↑](#footnote-ref-187)
188. Ibid 250 [↑](#footnote-ref-188)
189. Ibid 262 [↑](#footnote-ref-189)
190. Ibid 264-266 [↑](#footnote-ref-190)
191. Ibid 266 [↑](#footnote-ref-191)