# PRECEDENT IN EU LAW: THE LINGUISTIC ASPECT

5th of December 2015, Dun Library, No. 6 Kildare St, Dublin

# Abstracts

### *No Bluebells on Kirchberg: The influences of language on judgment writing:*

John Cooke, former judge at the General Court of the EU

### *Multilingualism and the Idea of Uniformity in EU Law:*

Dr Elina Paunio, référendaire at the Court of Justice of the EU

EU legislation takes shape in a complex pendulum-like procedure, which combines drafting and translation. The 'end-product' is a multilingual legislative instrument without an official source text. This is because EU legislation is equally authentic in all official language versions. Once all versions are finalised, any distinction between source and target text disappears to respect equal authenticity. Bearing that in mind, it is not surprising that the task of harmonizing meaning, or perhaps more accurately, pinning down the meaning of EU law resides with the courts. In the search for uniformity in a multilingual and multicultural legal system, the role of the Court of Justice of the European Union (CJEU) is highlighted. Especially in the preliminary ruling procedure, the CJEU can provide authoritative guidance on how multilingual EU legislation should be interpreted and applied throughout the European Union. In that sense, the importance of CJEU case-law reaches far beyond the individual cases to which the interpretative questions dealt with specifically attach. This is so despite the absence of any official doctrine of precedent in EU law.

The role of the CJEU in making explicit the meaning of multilingual law has attracted some attention in legal scholarship. So has the role of the national courts as the courts that, in the final analysis, are responsible for applying the statements on the correct interpretation of EU law made by the CJEU to disputes pending on the national level. However, a point that is often overlooked is that the statements made by the CJEU as to the correct interpretation of EU law are also embedded in language and translation. Those statements are expressed in judgments drafted in French by both native and non-native speakers. The judgments are therefore not only detached from a particular speech community. The procedure leading to the final judgment is also characterized by a peculiar melange of drafting and translation. More specifically, CJEU judgments are based on translated and retranslated documents. Given that CJEU judgments are only authentic in the language of the case, the officially authentic versions of those judgments are, barring French-language cases, translations too.

How do those linguistic aspects of judicial decision-making at the CJEU impact on the notion of uniform EU law? Or more specifically, taking account of those factors that inform CJEU case-law, can we really speak about uniform EU law in 28 Member States? The paper aims to reflect upon those questions. In particular, it seeks to explain why — despite the inevitable transformation of CJEU judgments in translation — the notion of uniform EU law is not necessarily a fiction devoid of meaning. In that respect, the supranational discourse community that shapes EU law independently from national legal systems seems crucial for overcoming the challenges posed by multilingualism.

## *CJEU Precedent as Legislation – A Multilingual Perspective:*

Dr Mattias Derlén, Umea University

It is often overlooked that the case law of the Court of Justice of the European Union is multilingual, just as the treaties and the legislation of the Union. This lack of discussion is remarkable given the importance of case law as a source of EU law and the unique challenges of multilingualism in this area. According to Article 41 of the Rules of Procedure the issue is straightforward: A judgment is authentic only in the language of the case. However, it is well known that the working language of the CJEU is French and that the judgment is deliberated and drafted in French. The existence of a de jure and a de facto original creates uncertainty in situations of interpretation of case law, made worse by the absence of clear guidance from the CJEU.

In this situation a tendency of falling back on the familiar language regime of the treaties and secondary legislation can be observed, both within the Court itself and in national courts.1 Languages other than the language of the case and/or French are consulted, despite the absence of any formal or practical position at the Court. Sometimes their use is limited to confirming the interpretation indicated by the language of the case,2 but other languages can also be used to support an interpretation not immediately favoured by the language of the case.3

The tendency to consult language versions other than the language of the case and/or French indicates that other languages are seen as added data in the interpretative process. However, it also ties in with the discussion of textualization of precedent and the legislative model of reasoning with previous decisions.4 The inclination of major actors to adopt the same approach regarding multilingual interpretation for case law and legislation, despite the formal differences in language regime, is yet another sign that judgments are treated and interpreted in a manner akin to legislation.

## *Performative Linguistic Precedent:*

Dr Aleksandar Trklja, University of Exeter

In this talk, I will demonstrate that the notion of precedent and the relation between language and law represent a more complex phenomenon than it is usually assumed in the legal literature. The paper discusses the main properties of precedent as a case-based type of reasoning and shows that these properties are part of the mechanism that underlies language use. The main argument of this paper is that precedent is a feature of language use and that, therefore, the production of legal precedent is governed by language use. In addition, it will also be argued that it is through the language use that expressions acquire their performative or binding force. The paper combines a theoretical discussion with an empirical study of CJEU judgments.

In order to provide a solid theoretical basis for my arguments I will rely on insights from linguistics, legal theory, philosophy, literary studies and ethnography. I will first describe the features that allow us to regard precedent as a case-based type of reasoning. After that, I will explore the role of formulaicity and repetition in the construction of precedents and then by moving on to the issues of citationality and binding I will describe the performative force of linguistic precedents.

In the second part, I will illustrate how precedents are constituted through language use. I will report the results of an empirical analysis of repetition in CJEU judgments in different languages. It will be demonstrated that formulaic expressions lie at the core of legal precedents.

***Precedent in the US and the EU: A comparative view:***Professor Lawrence Solan, Center for Law, Language and Cognition, Brooklyn Law School

This paper compares the use of precedent by the Supreme Court of the United States and the Court of Justice of the European Union in cases of statutory interpretation. U.S. courts rely heavily on precedent in common law and constitutional law cases in ways outside the judicial culture of the CJEU. When it comes to statutory cases, one might expect more restraint by the U.S. Court when it comes to precedent, since U.S. courts like those of civil law countries, profess to subordinate the judges' values to those of the legislature. However, even in this domain, this paper will show, U.S. courts rely on precedent for all kinds of propositions beyond any use of precedent that one would find in decisions of the CJEU. These include coherence with court opinions about related statutes, the meanings of everyday words, the use of grammatical canons of construction, and of substantive principles of interpretation. The CJEU, in contrast, quotes its own earlier decisions to establish uniform procedures to interpret laws, including direct quotes of itself. The paper discusses different ways in which the courts refer to themselves to establish a sense of uniformity in interpretation, and the extent to which this sense overstates the uniformity of decision making.

***The Force of EU Case Law: An empirical study of precedential Constraint:***
Dr Urska Sadl, iCourts Centre of Excellence, University of Copenhagen Law School

The power of courts to change the law via case law is among the most persistent and contested themes in the study of courts. In this article we investigate whether previous case law of the Court of Justice of the European Union constrains the Court, and whether it can have a legitimatizing effect on its decision-making empirically. While previous literature on citation networks takes into account entire documents in constructing citation networks, we develop a method to build a network of individual references to individual paragraphs of judgments, together with their adjacent texts. We then analyze the paragraph texts with the aid of a keyword extraction algorithm as well as by applying topic modelling. Our findings help in explaining the citation and the legal relevance of cited precedents, as well as its normative force.

***Big Data, Complex Cases – Classifying CJEU Case Law:***
Dr Johan Lindholm and Dr Mattias Derlén, Umea University

How we classify CJEU decisions has vast implications, both for how we understand and use them in research and how we explain them when teaching EU law, but existing methods for classifying case law have serious flaws. Manual classification is only possible for small samples of data and even then it is problematic. How legal scholars classify a particular case depends on a subjective and time-dependent understanding of what constitutes an important category. Considering law's complex and developing nature, this will always be imperfect.
The obvious answer to the dilemma would be to rely on the subject matter classifications provided by the CJEU for each case. However, these classifications are at the same time too blunt and too detailed, making them less helpful.1 Finally, it is difficult to accommodate the fact that many decisions can not easily be placed exclusively or even primarily in a single category as they have many dimensions, e.g. procedural, substantive, and constitutional, and may involve several issues within each such dimension.2 A qualitative analysis of *van Gend en Loos*3 will reveal that its key contribution concerns the constitutional foundations of the European Union, but without manual control it might as well be classified as a case concerning the customs union.
We present and discuss advantages and disadvantages of two alternative, empirically-based means for classifying case law. First, one can use network analysis to produce an open classification without any preconceived notions based exclusively on how other decisions cite them.4 Alternatively, one can use full-text analysis (corpus linguistics) to understand all or specific parts of a judgment.

***The Court of Justice's Cumulative Approach, Value Pluralism and Rule Instability:***
Dr Gunnar Beck, SOAS

***Who Will Unlock the ECJ's Linguistic Handcuffs?***
Professor Anthony Arnull, Birmingham Law School

The EEC Treaty was heavily influenced by French law and the reasons why the ECJ adopted French as its working language are self-evident. In the early days, the ECJ was unencumbered by diverse legal traditions, previous case law or properly functioning institutions. As a result, the style of its judgments was relatively unproblematic. The accretion of Member States, case law and legislation coincided with and perhaps caused a deterioration in the quality of the ECJ's judgments. It encountered particular difficulty in dealing in its judgments with its own previous case law. In the *HAG II* case decided in 1990, the ECJ for the first time expressly overruled one of its own previous decisions. This might have presaged a new era but the ECJ soon lapsed back into bad habits, which it has still not discarded. Might matters improve if it reconsidered the use of French as its working language? Are there other steps the ECJ might take to improve the transparency of its reasoning?