

Introduction

A Mapping the prolific juggernaut

This is a study of precedents in the European Court of Justice ('ECJ', 'the Court'). In a legal context, the term 'precedent' is normally associated with an earlier decision of a court and tribunal that is later referred to by adjudicatory bodies, involved parties or commentators, usually, but not exclusively, in the context of dispute resolution. Precedents are a fundamentally important tool of the ECJ in making and justifying its decisions. They inform influential rulings and profoundly shape legal landscapes, sometimes at break-neck speed, at other times over the undulating course of time.

That matter is unfinished business in more than one sense. First, the content and structure of precedents is dynamic. Secondly, the Court has struggled to come up with a consistent and satisfactory practice that is independent from the supposed cunning of history and not afraid of discourse, dissent and political re-imagination. Thirdly, existing scholarly approaches, even progressive ones, often have a difficult time fitting this practice into adequate conceptual arrangements. The underlying premise of this work is that legal scholarship can make a relevant contribution that nudges the larger debate beyond seductive yet unrealistic images that tend to cast the ECJ either in the role of the Machiavellian manipulator or the Solomonic saviour. Taking a cue from doctrinal, theoretical and interdisciplinary approaches, the present work is prompted by two observations and a curiosity.

An initial observation is that the ECJ's output matters immensely. The general rise to prominence of courts and tribunals, in particular those that do not operate in a purely domestic setting, is well-documented.¹ At

¹ See e.g. H. Lauterpacht, *The Function of Law in the International Community* (Clarendon Press, Oxford, 1933), pp. 26–42 (surveying various arbitration conventions); P. Sands, 'Turtles and Torturers: The Transformation of International Law', *New York University Journal of International Law & Politics*, 33 (2001), 527, 553 ('powerful new international

Cambridge University Press

978-1-107-04549-1 - Precedents and Case-Based Reasoning in the European Court of Justice:
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least since the second half of the twentieth century, judges and litigants in many parts of the world slowly but surely rival legislators, reformers and professors as pivotal agencies in law.² Granted, not all spheres of law have experienced judicialisation to the same extent. Some remain decidedly more transactional and less pervaded by dispute settlement. But it holds true for the supranational European sphere, where the idea of a transformation not only of law but also of entire polities through adjudication is a household theme.³ The ECJ is a prolific juggernaut. It rules without possibility of appeal on a plethora of matters ranging from the institutional architecture of the European Union ('EU') via basic principles of market freedoms to sundry matters such as consumer protection concerning package tours. Its pronouncements are watched keenly, not least by national (constitutional) courts. With this ascendancy of the judiciary, authoritative impromptu pronouncements on legal norms and nimble case-by-case balancing profoundly set the tone for discourse about law a decade into the twenty-first century. Simultaneously, comprehensive codification attempts and claims about absolute legal 'truths' are widely discredited as fanciful and rule scepticism is nurtured. Even neo-formalist responses to post-modern legal thought, let alone interdisciplinary approaches, stress the *who* and *why* over the *what*; in other words, actors and processes rather than the abstract divination of meaning are the central battlegrounds.⁴ While this has seriously dented dubious textualism, it has also stifled re-imagination.

The second observation ties in with this. Precedents matter. In the process of justifying decisions, adjudicators, including those at the ECJ,

judiciary'); Y. Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary', *European Journal of International Law*, 20 (2009), 73, 75–6, 90 (highlighting remaining deficits and limitations); A. von Bogdandy and I. Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers', *German Law Journal*, 12 (2011), 979 (noting a quantitative and qualitative shift).

² See D. Kennedy, 'Two Globalizations of Law & Legal Thought: 1850–1968', *Suffolk University Law Review*, 36 (2003), 631, 632–3; R. Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide', *Fordham Law Review*, 75 (2006–2007), 721, 722 (observing an expansion in terms of geography and scope). Cf. J. Waldron, *Law and Disagreement* (Clarendon Press, Oxford, 1999), pp. 9, 213 (sensing democratic participation on the decline).

³ See e.g. J. H. H. Weiler, 'The Transformation of Europe', *Yale Law Journal*, 100 (1990–1991), 2403; A. Arnulf, 'Me and My Shadow: The European Court of Justice and the Disintegration of European Union Law', *Fordham International Law Journal*, 31 (2008), 1174, 1175–7.

⁴ On the recent mainstream fixation with conditionalities rather than 'abstract theory' see G. Shaffer and T. Ginsburg, 'The Empirical Turn in International Legal Scholarship', *American Journal of International Law*, 106 (2012), 1.

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978-1-107-04549-1 - Precedents and Case-Based Reasoning in the European Court of Justice:
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often draw heavily on prior cases. The practice gives courts and tribunals a degree of self-sufficiency, and hence power. This triggers a host of big questions, many of them ageless classics of law, politics and philosophy, and it is here that the question of judicial precedent becomes acutely important beyond individual legal situations.

The curiosity is that the use of precedents by the ECJ is far-reaching but rarely, if ever, explicated in detail as an intricate legal technique in its own right.⁵ At a time when EU law regularly and deeply affects hundreds of millions of people, a comforting yet numbing consensus coagulates, according to which ‘there is no binding doctrine of precedent akin to the Anglo-American *stare decisis* doctrine’ (or similar). But that can only be the beginning of a thorough inquiry. The present work addresses that gap.

This book is not just about adjudicators and their attitudes, behaviour and strategies. Political scientists have done important work on the broader topic, not least by introducing and applying concepts such as precedent density, network centrality, inward or outward citations and authority and hub scores. Still, legal scholarship adds a significant dimension. For all the advances in measuring and empirically quantifying precedent usage or placing it in broader political contexts, any statistical framework has to be vested with meaning, and legal discourse remains a distinct field of inquiry. To truly understand precedent, one also needs to dig into the legal method of the Court. The present work examines different concepts and archetypes on offer to get a theoretical and methodological grip on precedent from a lawyer’s perspective and supplements this with an analysis of the ECJ’s technique. At the same time, an important approach incorporated here is that adjudicatory bodies like the ECJ should indeed be seen and researched as complex institutions affected by a diverse range of contextual incentives and constraints.⁶

The Court is a prime candidate for a study of precedent. A necessary but not sufficient consideration is that this dispute resolution body

⁵ Cf. Y. Lupu and E. Voeten, ‘Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights’, *British Journal of Political Science*, 42 (2012), 413, 414 (on the dearth of research on the use of precedents by international judges).

⁶ The work hence combines the study of autonomous legal ideas with their transformation and management in practice. Cf. D. Kennedy, ‘The Move to Institutions’, *Cardozo Law Review*, 8 (1987), 841, 843; B. Kingsbury, ‘International Courts: Uneven Judicialisation in Global Order’ in J. Crawford and M. Koskeniemi (eds.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012).

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has produced ample legal material to work with.⁷ Moreover, the stakes are high. The EU represents the most successful innovation in political and legal authority of the last century.⁸ It has now emerged as a full-blown global actor, for instance as a part of the so called Quartet on the Middle East. Its legal system has challenged the predominant paradigm of world order that emerged sixty years ago.⁹ At home, there can be no doubt that its institutions profoundly shape the everyday lives of the inhabitants of its Member States. But this is not a book about European integration in general. Rows of library shelves have been filled with that topic.¹⁰ Instead, this book takes a closer look at a crucial part of the inner workings of one of its central actors, the ECJ, which sits at the helm of the triadic Court of Justice of the European Union ('CJEU').¹¹ The European project may have begun as a treaty-based project of legislation, but it is famously considered to have unfolded as a half-century of bold judicial innovation and constitutionalisation. Even a cursory treatment of the EU would seem incomplete without mentioning how the ECJ spearheaded the development of many of the central features of this unique hybrid intergovernmental and supranational organisation and legal order, promoting integration while simultaneously often

⁷ By contrast, as of April 2013, the International Tribunal for the Law of the Sea in Hamburg has had twenty-one cases since its inauguration in 1996.

⁸ See K. R. McNamara, 'Constructing Authority in the European Union' in D. D. Avant, M. Finnemore and S. K. Sell (eds.), *Who Governs the Globe?* (Cambridge University Press, 2010), p. 153.

⁹ Cf. D. Halberstam and E. Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', *Common Market Law Review*, 46 (2009), 13.

¹⁰ See e.g. A. Grimm and C. Jakobeit (eds.), *Politische Theorien der Europäischen Integration* (VS Verlag, Wiesbaden, 2009). Perspicacious portrayals avoid the simple and tautological *sui generis* label. See e.g. J. Neyer and D. Wolf, 'The Analysis of Compliance with International Rules: Definitions, Variables, and Methodology' in M. Zürn and C. Joerges (eds.), *Law and Governance in Postnational Europe: Compliance Beyond the Nation-State* (Cambridge University Press, 2005); R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009), pp. 59–60, 71.

¹¹ This new title was introduced by the Treaty of Lisbon. See Consolidated Version of the Treaty on European Union ('TEU') [2012] OJ C326/13 Art. 19(1); Consolidated Version of the Treaty on the Function of the European Union ('TFEU') [2012] OJ C326/47 Arts. 251–81; Consolidated Version of Protocol (No. 3) on the Statute of the Court of Justice of the European Union ('CJEU Statute'), annexed to the Treaties, as amended by Regulation (EU, Euratom) No. 741/2012 of the European Parliament and of the Council of 11.8.2012 [2012] OJ L228/1. This work focuses on the ECJ's use of precedent. The General Court ('GC') and Civil Service Tribunal are largely outside its scope.

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enhancing its own position.¹² Consistent enlargement of the Union has further enhanced the position of the Court vis-à-vis the Member States, given that an increased likelihood of political differences generally tends to favour adjudicatory solutions. Nor is this slipping of (often very sensitive) issues to Luxembourg always unwelcome.¹³ Over time, the ECJ has risen like Cinderella from the soot and obscurity of its working-class background in the former European Coal and Steel Community to slide on the glittering slipper of human rights and citizenship.¹⁴ The whole episode has rightly been called Europe's 'most powerful and diffused' meta-narrative.¹⁵ Not infrequently, this attracts outspoken disapproval.¹⁶

¹² See e.g. the classic expositions by P. Pescatore, *The Law of Integration* (Sijthoff, Leiden, 1974), pp. 89–90; R. Lecourt, *L'Europe des juges* (reprint edn, Bruylant, Brussels, 2008 (1976)), pp. 216–19, 236–42; E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', *American Journal of International Law*, 75 (1981), 1, 24–7; Weiler (n. 3 above), pp. 2413, 2426. More recent contributions include D. Edward, 'Richterrecht in Community Law' in R. Schulze and U. Seif (eds.), *Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft* (Mohr Siebeck, Tübingen, 2003), pp. 75–80; A. Stone Sweet, 'Conclusion' in A. Stone Sweet (ed.), *The Judicial Construction of Europe* (Oxford University Press, 2004), pp. 235–41; U. Haltern, *Europarecht und das Politische* (Mohr Siebeck, Tübingen 2005), pp. 280–93; J. Schwarze, 'Grenzen des Richterrechts in der Europäischen Rechtsordnung' in G. Müller, E. Osterloh and T. Stein (eds.), *Festschrift für Günter Hirsch zum 65. Geburtstag* (C. H. Beck, Munich, 2008), pp. 169–70; J. Komarek, 'Precedent and Judicial Lawmaking in Supreme Courts: The Court of Justice Compared to the US Supreme Court and the French Cour de Cassation', *The Cambridge Yearbook of European Legal Studies*, 11 (2009), 399, 400.

¹³ See K. J. Alter, 'Agents or Trustees? International Courts in their Political Context', *European Journal of International Relations*, 14 (2008), 33, 53–4.

¹⁴ See e.g. Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* (Grand Chamber) [2008] ECR I-6351; Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* (Grand Chamber) [2011] ECR I-1177.

¹⁵ A. Vauchez, 'The Transnational Politics of Judicialization: *Van Gend en Loos* and the Making of EU Polity', *European Law Journal*, 16 (2010), 1, 2.

¹⁶ See e.g. H. Rasmussen, *On Law and Policy in the European Court of Justice* (Nijhoff, Dordrecht, 1986), pp. 12–14, 31–3, 61–5; H. Rasmussen, 'Between Self-Restraint and Activism: A Judicial Policy for the European Court', *European Law Review*, 13 (1988), 28, 37 ('teleological, pro-Community crusade', 'few cancer-cells are . . . able to ruin completely the healthiest body'); P. Neill, 'The European Court of Justice: A Case Study in Judicial Activism' (European Policy Forum, 1995); J. Coppel and A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?', *Legal Studies*, 12 (2006), 227, 237, 244–5; R. Herzog and L. Gerken, 'Stoppt den Europäischen Gerichtshof', *Frankfurter Allgemeine Zeitung* (Frankfurt, 8 September 2008) (castigating the ECJ for 'interfering massively' with Member States' legal orders and its 'arrogant' reasoning in Case C-144/04 *Werner Mangold v. Rüdiger Helm* (Grand Chamber) [2005] ECR I-9981); P. Hilpold, 'Unionsbürgerschaft und Bildungsrechte oder: Der EuGH-Richter als "Künstler"' in G. H. Roth and P. Hilpold (eds.), *Der EuGH und die Souveränität der Mitgliedstaaten* (Stämpfli, Bern, 2008),

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Tensions flare at different levels of abstraction, ranging from broad questions on the proper allocation of powers amongst the Union's institutions or the reach of EU directives to concrete issues of social policy and labour law. Throughout all of this, the question of the Union's democratic accountability and finality looms large.¹⁷

Faced with these antagonistic assertions of authority – pluralistic *forces* – it might seem quaint to care about what could be considered *legal method*. But there is little that is fusty about looking over the shoulder of the European judicial elite as it shapes social reality by deciding cases with the help of its routine toolkit.¹⁸ Problems of legal theory are real legal problems.¹⁹ At the very least, this helps to develop a vocabulary for a critique of what has become a semi-autonomous process. The alternative, pragmatism with a sprinkling of psychology or sociology, is hardly satisfying. Even if it were possible to discover 'law-like regularities in judicial decision-making', thinking about law and its practice should not be reduced to theory-starved recounting of social phenomena. The abrogation of critical thinking in favour of practical compatibility, a charge not only levelled against common lawyers,²⁰ and a legal scholarship that is simply the handmaiden of a particular project, are of little use.²¹

B Four theses

This book sets out to map the ECJ's case law technique in detail. This is done with a view to contributing to a deeper understanding of

pp. 12, 52–3; Q. L. Hong, 'Constitutional Review in the Mega-Leviathan: A Democratic Foundation for the European Court of Justice', *European Law Journal*, 16 (2010), 695, 708 ('blatantly political decisions').

¹⁷ Cf. U. Haltern, 'On Finality' in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (2nd edn, Hart and C. H. Beck, Oxford and Munich, 2010), p. 234 (on constitutional dialogue with the Court).

¹⁸ It is possible to distinguish between (re)solving cases and legal method, but the position taken here is that the latter is in any event essential to the former. Cf. F. Müller and R. Christensen, *Juristische Methodik: Grundlagen* (9th edn, Duncker & Humblot, Berlin, 2004), p. 29.

¹⁹ See A. Somek, *Rechtliches Wissen* (Suhrkamp, Frankfurt am Main, 2006), pp. 14, 108. The obvious caveat of course being that these are real rather than imagined problems.

²⁰ For a German perspective see B. Schlink, 'Die Entthronung der Staatsrechtswissenschaft durch die Verfassungsgerichtsbarkeit', *Der Staat*, 28 (1989), 161.

²¹ Cf. R. A. Posner, 'The Deprofessionalization of Legal Teaching and Scholarship', *Michigan Law Review*, 91 (1993), 1921, 1928: 'But where is it written that all legal scholarship shall be in the service of the legal profession? Perhaps the ultimate criterion of scholarship is utility, but it need not be utility to a particular audience.'

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case-based reasoning and jurisprudence, both at the Court and elsewhere. Four specific theses are pursued.

First, the incessant and often acrimonious debate over whether the ECJ ‘makes law’ by way of usurping other institutions or the Member States is too crude to be useful. Conceptually, the situation is far messier than this particular variant of the ‘epic rivalry’ can convey, with a myriad of points made in a multitude of form-independent instances read in a certain way making law. In order to get past this intellectual stagnation it is necessary to go back to epistemological basics and rethink adjudication in terms of contestable claims based on the available legal information. Normatively, the underlying concerns can nonetheless be taken seriously, since this realisation enhances, rather than diminishes, critical potential. Law and legal practice also remain viable.

Secondly, the ECJ primarily uses precedents to bolster its legitimacy and acceptance and to fend off outside challenges. While there are also other potential reasons for case citations, including envisaged efficiency gains, the Court above all refers to past decisions to resolve cases, demonstrate the coherence of EU law and thus enhance its credibility vis-à-vis other actors in the European legal space, notably the Member States (and in particular their courts) and other EU institutions. This explains the Court’s precedent practice better than traditional approaches that focus on bindingness or the absence thereof. It is also preferable to an overly schematic juxtaposition between arguments from authority and arguments from reason. Finally, it gets past one-dimensional arguments that the judges either care solely about practical compliance or solely about legal doctrine.

Thirdly and closely connected, the ECJ’s precedent technique is complex and situational. It is not hostage to abstract (and, to boot, often imprecise) legal traditions or families that continue to float around through legal textbooks, law school classrooms and even the odd judicial opinion, but instead owed to the real-world circumstances the Court is faced with and its very own operational modalities. Comparisons with other forms of non-national dispute settlement, in particular investor–state arbitration under international law, further bring this out. This reinforces the view that neat categorical separations – an ‘age of innocence’, as one observer called it – are rapidly coming to an end.²² The broader insight is that precedent usage is receptive and contextual.

²² G. A. Bermann, ‘Reconciling European Union Law Demands with the Demands of International Arbitration’, *Fordham International Law Journal*, 34 (2011), 1193, 1194.

Fourthly, the ECJ has not yet fully developed the techniques and features that one would expect from a mature and satisfactory system of adjudication that takes case law seriously. Even when viewed as a semi-autonomous system that should by all means bolster its own legitimacy and acceptance, it falls short in important respects and endangers legitimacy rather than fostering it. The main problem is a lack of contestability. The Court's precedent practice is prone to offload responsibility, stifle heterogeneity of solutions and promote a self-satisfied institutional platform. More concretely, the ECJ relies too heavily on repetition for legitimacy, which gives rise to the familiar 'authority not reason' accusations. But the argument developed here is not driven by tired nationalistic Euroscepticism. There is in fact little reason to assume that the ECJ is not sincere, pragmatic or technically competent. On the contrary, the problem is that it is at times too well-intended and pragmatic and overly afraid of fragmenting the European legal order, thus obstructing progressive re-imagination. It fails to realise the true promise of a post-nationalistic Europe. Nor is this critique speculative or mired in despair: it has practical implications and leads to concrete recommendations and alternatives.

C The course of the book

The dual dimension of precedent informs the structure of this study. Precedent can both licence and require coercion.²³ On one hand, it plays a vital role in forming EU law. The decisions resulting from ECJ adjudication are important building blocks of the European legal order. On the other hand and at the same time, precedents can impact and channel subsequent reasoning.

Hence the book proceeds as follows. After this initial sketch of the study's ambit and theses (Chapter 1), the next chapter deals with setting precedents (Chapter 2). It tackles the notion of judge-made law, which may be termed *positive precedent*, and develops a conceptual approach. The argument is that the ECJ makes law, and that it is important to appreciate this. In considering the creative or generative side of adjudication, the chapter unfolds and assesses different models on offer that deal with the phenomenon.

²³ Cf. B. A. Garner (ed.), *Black's Law Dictionary* (8th edn, Thomson West, St Paul, MN, 2004), p. 1214 (reflecting the dual sense of precedents making law and furnishing a basis for decisions).

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The largest part of this work is dedicated to the ECJ's use of precedents outside the same set of proceedings. It deals with the channelling or constraining facet of prior decisions that may be termed *negative precedent*. Following an examination of what is relevant in a prior case (Chapter 3), the book unfolds the general citation practice or precedent-application by the Court (Chapter 4). Subsequently, an account of the Court's avoidance techniques, including distinguishing prior cases (Chapter 5) and departing from precedents (Chapter 6), is presented. Contextual explanations for this practice are later synthesised (Chapter 7). The book then addresses the debate on the binding force and normativity of ECJ precedents (Chapter 8). The final chapter summarises the various findings and offers suggestions for the ECJ's practice to evolve (Chapter 9).

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Setting precedents

Law made in Luxembourg

A The different meanings of precedent

‘Precedent’ is a complex concept.¹ Used as a noun and stripped down to its basics, three points can be discerned. First, something happened before. In that respect, it looks to the past. Secondly, it can provide a reason for doing something. In this respect, precedent looks to the future. Its heart is an appeal to or against repetition. Past events should or should not happen again. Hence it is not only a thing, but also an argument. Thirdly, the bond between the past and present decision is that they are in some respect similar. This is often implicit.

In its raw form precedent is not exclusive to law, let alone legal dispute settlement in the EU. Examples can be homely or grand, such as children demanding treatment akin to elder siblings² or the Allied powers deciding not to treat the question of German reparations after World War II as they had previously done in the Treaty of Versailles following World War I. In a legal context, precedent often acquires certain peculiarities. For example, the past events tend to be decided cases.³ They might be afforded special normative quality, in which case the existence of a precedent can provide a reason for deciding in a particular way, regardless of individual beliefs or contrary reasons. This can serve to differentiate precedent from experience, namely observational knowledge about the world,⁴ which is instead revised when it turns out to be wrong.

¹ Little however turns on the difference between ‘precedent’ and ‘precedents’.

² An illustration used by F. Schauer, ‘Precedent’, *Stanford Law Review*, 39 (1986–1987), 571, 572.

³ This emerges very clearly from the term common in German legal scholarship: *Präjudiz*. Indeed, a precedent might be considered to *prejudge* a matter.

⁴ See N. Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008), pp. 2–3.