International Journal of
Language & Law

McAuliffe & Trklja, JLL 13 (2024): 1–7
www.languageandlaw.eu

Introduction

— Precedent in EU Law: The Linguistic Aspect

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Abstract
This paper introduces the special issue of JLL on Precedent in EU Law: The Linguistic Aspect. This introduction first sets out the context for the discussion of how language, multilingualism and translation may impact the development of a *de facto* precedent in the case law of the Court of Justice of the European Union (CJEU), and introduces the notion of linguistic precedent. Second, it provides an overview of the papers included in this special issue. This special issue is a follow-up on a number of workshops and discussions held in the context of the FP7-funded project *Law and Language at the European Court of Justice* between 2015–2020. The contributions to the special issue, from scholars and practitioners, address various aspects of the linguistic element in the development of a *de facto* precedent in CJEU judgments. These reflections on linguistic precedent and how it relates to the formulation and application of 'precedents' in EU jurisprudence highlight an aspect of the interpretation and application of EU case law that has, to date, largely been ignored by scholars and practitioners. Drawing attention to this linguistic element in precedents and decisional practices allows for a more rounded understanding of how EU case law develops and functions.

Keywords
precedent, linguistic precedent, multilingualism, legal translation, court of justice of the European Union (CJEU)

Published online: 15 July 2024

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1. Introduction

The papers included in this special issue were developed in the context of the 'Law and Language at the European Court of Justice' (LLECJ) project: an EU Seventh Framework Programme (FP7) project that explored the production of multilingual jurisprudence by the Court of Justice of the European Union. A number of the papers in this issue were presented at a workshop convened by the present authors in Dublin, Ireland, in December 2015, with a follow-up workshop held in Birmingham, UK, in February 2018, and many subsequent discussions and collaborations. The aim of those workshops was to bring together scholars from the fields of language studies, linguistics, and law, as well as practitioners, to consider to what extent language may affect a *de facto* precedent in CJEU judgments. The relationship between language and the development of a *de facto* precedent in CJEU judgments, and the concept of linguistic precedent, was first explicitly discussed in McAuliffe's 2013 paper *Precedent at the Court of Justice of the European Union: The Linguistic Aspect* (McAuliffe, 2013), which developed the themes for the 2015 Dublin workshop. Although the development of *de facto* precedent in CJEU judgments has been the subject of significant legal commentary and academic debate, the linguistic element in the development of such 'precedent' had been wholly ignored prior to the LLECJ project, and the initiation of the discussions that have finally led to this special issue. In this issue we showcase selected reflections on the concept of linguistic precedent and how it relates to the formulation and application of 'precedents' in EU jurisprudence.

In this brief introduction, we first set out the context of 'linguistic precedent' in EU law. Subsequently we introduce the five papers in the special issue. We do not pretend that the papers presented here provide an exhaustive overview of the concept of linguistic precedent, or how it may be developed and applied in the context of EU law. Rather we present some interesting examples of research that attempts to think through the relationship between language and 'precedent', with the aim of inspiring readers to develop further work on this topic.

It is hugely important to us to take the time here to express some heartfelt thanks. Readers will note the significant time lapse between the 2015/2018 workshops and the present special issue. All too often in academia the challenges of living a human life alongside one's work are overlooked. In the time since this project was conceived we have, between us, celebrated the birth of three children, completed three international moves, dealt with significant and ongoing health issues which included prolonged treatment and multiple operations, and mourned the passing of very important friends and family members. And of course, there was that global pandemic in the middle! The contributors to this special issue have been understanding and supportive of us throughout the process, and we thank them for that support, and for sticking with the project. Thanks also goes to the eight peer reviewers we asked for support in the preparation of this special issue, whose thoughtful and constructive feedback was extremely helpful.

We would also like to thank the editors of the *International Journal of Language and Law*. Go raibh míle maith agaibh go léir.

2. Context

Over the past 20 years, the development of a *de facto* precedent in European Union (EU) law has been the subject of significant academic debate, centring around questions of what it means for a supreme court to 'make law' and when it is possible to say that its decisions are 'precedents' (Komarek, 2008). While there is no official doctrine of precedent in EU law, the CJEU does on occasion appear to regard its previous decisions as establishing a law that should be applied in later disputes: 'tying down' national courts without establishing a formal hierarchy in the strict sense (Komarek, 2005). The development of 'precedent' in EU law is inextricably linked to the procedure for references for a preliminary ruling under Article 267 TFEU. The CJEU has based much of its reasoning in relation to both the development of the principle that its decisions have binding force on *all* member state courts (and other authorities), and justifying its jurisdiction and decisions under Article 267 TFEU, on the need to ensure the 'uniform application of EU law'. The question raised by commentators researching 'precedent' in EU law is thus: what exactly is meant by uniformity? It is generally agreed that 'absolute sameness' is unachievable in any legal system (Dougan 2004; Komarek 2007); and Chalmers (2004) notes that more 'precedents' do not necessarily mean more uniformity. According to Dyrberg (2001), however, "uniform application is […] a sort of existential problem to which the [Union] legal order has to relate", i.e. that a *presumption* of uniformity is necessary for the CJEU to claim authoritative status within the EU legal order, which, as pointed out by Komarek (2007) aims at supremacy of EU law rather than uniformity itself.

There is, however, one important aspect of the development of a *de facto* precedent in CJEU judgments which has been thus far overlooked in the literature: the linguistic aspect. The notion of 'precedent' in any court is the product not only of a conscious jurisprudential strategy, but is also produced by the mechanics of jurisprudential drafting. While those two elements exist in any court, the multilingual nature of the judgments of the CJEU introduces another variable. The judgments of the CJEU are collegiate documents, drafted in French (the working language of that Court) by jurists whose mother tongue is generally not that language. The pleadings, observations and other documents which inform those judgments undergo many permutations of translation into and out of up to 23 different languages, and the 'authentic' versions of those judgments, as presented to the outside world, are for the most part translations. Questions considering the approximation inherent in translation, how consistently formulaic techniques in the drafting language (which go to the development of precedent) can be carried over to

translated versions, and how to ensure the uniform reception of CJEU judgments across 27 member states are all relevant to any consideration of a *de facto* precedent in EU law.

Recent empirical work, in particular that carried out in the context of the LLECJ project, has demonstrated that language, translation, and multilingual language policies play a far more significant role in the development of EU jurisprudence than is conventionally assumed in literature on EU law, or on the CJEU itself (e.g. Mattioli and McAuliffe, 2021; Trklja and McAuliffe, 2019; McAuliffe and Trklja, 2018; Trklja, 2017). In parallel, research on citation networks has demonstrated that individual cases can be measured in terms of their language similarities (Derlén and Lindholm, 2017; Šadl, 2015; Panagis and Šadl, 2015). This special issue explores the relationship between language and the development of the law, in the context of linguistic precedent, focusing on some of the issues highlighted and questions raised in that empirical work.

3. The Articles

This special issue contains five original research papers that address the notion of linguistic precedent from different perspectives.

Based on more than 40 years' experience of legal practice, Paul Lasok's paper *Precedent in EU law: A Practitioner's View* sets out a view of both the nature of decisional practice generally, and precedent(s) in CJEU case law, from the perspective of a practitioner of EU law. Lasok first makes some general observations about the nature of legal precedents, before turning to the specific case of precedents in the context of CJEU case law. He offers an interesting insight into how lawyers and judges may approach precedents in the reality of decisional practice in lawyering. He goes on to discuss the essential condition for the operation of a precedent in the context of both common and civil law jurisdictions, and offers some fascinating examples of methods of handling and circumventing judicial precedents. The paper focuses in particular on 'problematic precedents' relating to the direct effect of directives in EU law, and comments on how EU precedents have been handled by the CJEU and, before Brexit, by English courts. Lasok's practitioner's view is an important one since the perception by practitioners at national and supranational level of the *de facto* precedent in CJEU judgments has an effect on the relationship between the CJEU and national courts, in particular in the context of the Article 267 TFEU preliminary ruling procedure. Such perceptions of precedent necessarily involve consideration of whether the approximation in translation of the CJEU's jurisprudence allows for unproblematic 'mediation' at the national, member state, level (McAuliffe, 2013).

The paper *De Facto Precedent at the Court of Justice of the European Union* by Gar Yein Ng explores a *de facto* system of precedent in the case law of the CJEU. In spite of the lack of explicit rules of precedent in the EU legal order, Ng highlights the paradoxical reality whereby the CJEU follows precedent(s) for the sake of legal certainty and equality in the

application of the law. The paper describes the multifaceted aspects of legal precedent in this context by examining the impact of language choices, text production, and drafting, on the theory and status of precedent within EU law. Ng discusses how interpretative precedents provide definitions and meaning to terms within the Treaties and EU legislation, establishing a framework for future cases. One of the peculiarities of this system is that the reuse of consistent language and terminology in CJEU judgments creates a linguistic precedent, reinforcing the normative value of CJEU jurisprudence. For instance, instead of offering elaborate explanations and extensive reasoning in applying precedent(s), the CJEU uses what Ng calls the formulaic approach, tending to reuse paragraphs from previous judgments as building blocks. This practice enhances the overall coherence and stability of EU case law. This formulaic approach becomes especially significant when observed in relation to the fact that the CJEU operates in a multilingual environment. Given the diverse language versions of CJEU judgments, establishing a common meaning might pose a challenge, potentially resulting in varied interpretations that, in turn, may conflict with the broader aims and objectives of the EU project.

In his paper *CJEU Case Law as Source of Law in National Courts – Language and Multilingualism*, Mattias Derlén explores the evolving role of CJEU judgments as a source of law in member state courts, with a specific focus on the impact of multilingualism. The paper examines what he calls the consumer perspective, i.e. the use of CJEU case law by member state courts. The paper highlights the sometimes very detailed level of engagement by national courts with CJEU case law, including the examination of wording and comparison of different language versions of judgments in order to ascertain the correct application of those rulings. The paper emphasises the importance of multilingualism and its consequences for the use of CJEU case law as a source of law by member state courts. Among the examples discussed by Derlén is the *Kittel* judgment, the wording of which was subject to intense scrutiny in English courts, specifically in relation to whether the English language version of that judgment (the authentic language version of that case) correctly represented the view of the CJEU when compared with the French language version (the language version in which the judgment was drafted). Derlén's paper highlights the CJEU's special language regime, including the existence of multiple 'original' documents and the complexities of the translation process at the Court. The paper focuses on the blurring of the lines between legislation and case law, and the role of multilingualism in the interpretation and application of CJEU case law. Derlén underlines the significance of national courts as crucial partners in transforming EU law into reality through their engagement with CJEU case law, and the formal and informal language regime of that Court.

Amalie Frese's and Enys Mones' paper, *Path Dependency in the Jurisprudence of the CJEU: An Empirical Study of Anti-Discrimination Law*, approaches the notion of precedent in terms of the concept of path dependency. The authors draw on economic history and technology theory, placing them in the context of the CJEU's jurisprudence concerning anti-discrimination law. Using empirical citation network analysis, they investigate

whether the jurisprudence of the CJEU exhibits path dependency. Frese and Mones emphasise the role of path dependency in formalised institutions, including courts, and argue that the term is often used in a general sense in legal scholarship, where it is equated with consistent case law rather than adhering to its specific definition involving a lock-in mechanism. They point out that inconsistency in the application of path dependency theory has led to criticism regarding its use in attempting to account for legal change, and propose their own, more precise, conceptualisation. To test this, the authors built a case law citation network focusing on seven anti-discrimination cases and examining paragraph-to-paragraph connections to identify flows of information in the paths through which the relevant precedents travel. The study aims to determine if there is a high degree of linguistic similarity between cited and citing cases, which is considered to be indicative of path dependency. The results challenge the notion of path dependency in the CJEU's anti-discrimination jurisprudence, suggesting a lack of consistent language that characterises path-dependent processes. In conclusion, the authors propose that adjustments should be made to path dependency theory in order for it to be applied to legal development, acknowledging the existence of a system of precedent in CJEU adjudication while emphasising the need for a more nuanced understanding of the term.

In his paper *Linguistic Precedent as a Form of Linguistic Replication*, Aleksandar Trklja focuses more generally on the notion of linguistic precedent and its relation to law. He proposes that linguistic repetition, particularly in the form of formulaic language, serves as a mechanism through which linguistic precedent is established and subsequently influences legal reasoning. Trklja bases his argument for this claim in a theories from linguistics, social anthropology research, and cognitive studies. He claims that when linguistic items are reused and applied to different situations, they are interpreted in the same or in a similar way, leading to the creation of semantic equivalence. The representation of different situations as being the same or similar is due to linguistic precedent, which plays a crucial role in shaping the semantic aspects of legal reasoning. Finally, using examples from CJEU case law, Trklja applies his notion of linguistic precedent and semantic equivalence to explore how the reuse of linguistic expressions establishes textual connections between cases: Linguistic Precedent Chain (LPC) models a lineage that traces the origin and use of linguistic expressions across different generations of cases; and Patchwork Relations (PR) represents the relationship between a particular case law text and source expressions that populate the target text and have their origin in other case law texts.

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