REVIEW OF COMPARATIVE LAW
VOLUME XXV
YEAR 2016

PRECEDENTS OF SOLUTION AND COURT OF JUSTICE OF EUROPEAN UNION

*Filip Gołba**

ABSTRACT

Article elaborates on how Court of Justice of European Union treats its precedential rulings. Its principal purpose is to examine the distinction between precedent of solution and precedent of interpretation and assess whether the distinction may serve the purpose of reconciliation of Court of Justice's heavy reliance on precedent with reluctance toward recognising precedent as a formal source of law manifested by civil law lawyers. According to some scholars, Court of Justice's precedents are merely precedents of interpretation, therefore they are not instance of judge-made law. Herein, it is argued, that the distinction is insufficient to prove their conviction is right.

Key words: European Court of Justice, precedent of solution, precedent of interpretation

INTRODUCTION

This paper explores the normativity of Court of Justice of the European Union precedential rulings. It aims at shading some light on the practice of Court of Justice, which is pervasive nowadays, whereby the Court justifies its decisions by making reference to its prior judgments

* PhD Candidate, Faculty of Law and Administration, Jagiellonian University in Krakov, filip.golba@doctoral.uj.edu.pl.

in a fashion to some extent similar, to the way common law courts reach and justify their decisions. In particular, it examines the tenability of some arguments in favour of the view, that despite the aforementioned practice, Court of Justice does not exceed the competences conferred on courts of law in civil law[1] legal systems (which are dominant amongst the jurisdictions within European Union).

At the very beginning it has to be stressed, that the paper is not meant as a thorough defence of the claim, that Court of Justice treats its own precedential rulings in the same way as common law courts treat binding precedents. Neither does it strive to establish, that adoption of common law methodology is acceptable in civil law tradition. These far-reaching contentions, even if correct, would require extensive studies, clearly excessing what may be presented within the limits of a single article. Instead, the paper challenges only one of the arguments casted by those scholars, who motivated by adherence to a doctrine forbidding civil law courts from law-making and the view that common law practice differs significantly in that respect, seek to prove that despite superficial similarities to common law understanding of precedent, precedential practice of Court of Justice remains within the limits set forth by civil law tradition. Thereby, the article goal is arguably modest and narrowly outlined.

All that has been said so far is subject to a caveat, that the distinction between civil law and common law legal traditions is (both historically and currently) to a considerable extent an oversimplification, on one occasions an useful one, but on the others quite misleading. Neither the legal systems traditionally classified to one or the other tradition are indeed homogeneous nor the traditions themselves differ in all interesting aspects. The foregoing reservation is true not only in respect of the rationales for and functioning of precedent, but also other features of the legal traditions in question[2]. Having said that, for the sake of argument, it is henceforth assumed, that civil law legal tradition, predominant within Member States

[1] Henceforth, "civil law" is understood as a term referring to a family of legal systems, as opposed to common law legal systems.

[2] D. Neil MacCormick and Robert S. Summers, *Introduction,* [in:] *Interpreting Precedents: A Comparative Study*, (ed.) D. Neil MacCormick and Robert S. Summers (Aldershot ; Brookfield, Vt: Ashgate, 1997), pp. 3–6, 12.

of European Union, does not formally recognise precedent as a source of law.

This article deals with the distinction between two forms of precedent: precedent of solution and precedent of interpretation. The issue which is going to be elaborated on may be roughly formulated as follows: is this distinction capable of justifying Court of Justice's reliance on its previous rulings and preventing the conclusion, that this reliance constitutes an unwarranted appropriation of law-making competences, deemed unacceptable in civil law legal tradition.

Precedent, understood as an obligation on the part of court or other institution to reach the same decision, as has been made in similar case beforehand, has two aspects, which may be looked upon: vertical and horizontal one. The former concerns obligation of the court or other institution to follow the decision made by the court or institution placed higher in the hierarchy, whereas the latter concerns obligation to follow its own decisions[3]. Herein, the precedent is elaborated on in its horizontal aspect i.e. the question being addressed reads: in what sense Court of Justice of European Union considers itself as bound by its previous rulings?

PRECEDENT AS A METHOD OF JUSTIFICATION OF COURT OF JUSTICE'S RULINGS

Comprehensive comparison of Court of Justice adjudicative practice with the practice of common law courts in United Kingdom or other common law jurisdictions goes far beyond the scope of this paper, because of the scale and complexity of this problem (or rather set of problems). Therefore the paper is limited to discussion of one of the threads in the debate about the Court of Justice methodology.

At the outset of its judicial activity Court of Justice of the European Communities was very reluctant to make reference to its prior rulings as justification of a resolution in the case at hand. However, this attitude to

[3] Frederick Schauer, *Precedent,* [in:] *The Routledge Companion to Philosophy of Law*, (ed.) Andrei Marmor (New York: Routledge, 2012), pp. 123–24.

precedent began to change in eighties, towards the establishment of practice of regular referencing to previous rulings in subsequent decade (which is hardly astonishing, as the initial Court of Justice's reluctance to making recourse to precedential rulings, was simply due to the sparseness of the latter)[4]. This state of affairs remains actual nowadays.

Despite that, Court of Justice in principle does not recognise precedent as a formal source of law. Moreover, not only the Court fails to do so, but arguably, it is also not authorised to do so by the European Treaties. Thus, the convergence between the methodologies of common law courts and Court of Justice, which has become evident for many years, demands an explanation and justification.

It is so because the role of precedent in common law systems, where precedent is recognised as formal source of law blurs the strict separation between law-giving and applying the law. It is accepted among common law scholar`s that, when common law court decides a case in accordance with legal rules it might, at least under some circumstances, lay down a new rule, which is going to bind this and other courts in subsequent cases. While in common law legal systems this widened role of courts is well-established and less controversial, in countries adhering to civil law tradition, courts are expected to confine themselves to mere adjudication, rather than to assume the role of legislator. This limitation applies to Court of Justice as well, as due to its predominant civil law ancestry, it does not formally recognise the doctrine of binding precedent[5].

To be precise, the issue which needs to be addressed might be framed as follows: is it possible to reconcile the fact that Court of Justice justifies many of its rulings by an appeal to rules laid down exclusively in its previous judgements with the lack of recognition of binding force of precedent? A pivotal aspect of the practice in question, which need to concern us here is the one, whereby the Court refers to rules originating exclusively from its earlier judgments, i.e. the rules which arguably are not explicitly expressed anywhere in the Treaties. Such reconciliation is vital, taking into

[4] Takis Tridimas, *Precedent and the Court of Justice: A Jurisprudence of Doubt*, [in:] *Philosophical Foundations of European Union Law*, ed. Julie Dickson and Pavlos Eleftheriadis (Oxford: Oxford University Press, 2012), p. 309.

[5] Ibidem, p. 308.

consideration that many of the fundamental principles of European law are developed within the "case law" of Court of Justice and can hardly be derived from the text of the Treaties.

PRECEDENT OF SOLUTION AND PRECEDENT OF INTERPRETATION

Similar difficulties might arise in case of any court operating in civil law jurisdiction, whose jurisprudence is marked by pervasive recourse to prior rulings, either in public justification or in unrevealed motivation, which actually guides its decisions. In order to address the difficulties in question, some legal scholars invoke the distinction between two different kinds of precedent: precedent of solution and precedent of interpretation. The distinction originating in French legal fought, although sometimes expressed in slightly different terms, is known to legal scholars for a long time, at least implicitly[6].

The former type of precedent is precedential decision, which is in itself a foundation for a particular legal rule. This kind of precedential ruling has its own autonomous normative force, which might be independent of any other formal source of law, such as a constitution, a statute, a statutory instrument etc. Thereby the rule's very existence is dependent upon the court's decision in question. In case of this kind of precedent, rule does not exist prior to the moment, when the sentence of the ruling is issued. This kind of precedent is clear example of judge-made law, deemed unacceptable according to strict civil law attitude[7].

The precedent of interpretation, on the other hand, does not create any new legal rule, but merely provides a new and supposedly best interpretation of the pre-existing rule. Usually, but not necessarily the rule, which is being interpreted is a statutory rule. If one court issues a precedential decision of this kind and thereafter other courts follow this precedent, they do

[6] John Bell, *Comparing Precedent*, Cornell Law Review 82, no. 5 (May 1997), p. 1265.

[7] D. Neil MacCormick and Robert S. Summers, *Further General Reflections and Conclusions*, [in:] *Interpreting Precedents: A Comparative Study*, (ed.) D. Neil MacCormick and Robert S. Summers (Aldershot ; Brookfield, Vt: Ashgate, 1997), p. 541.

so not forasmuch as they are bound by a new rule established, but because of the conviction that the interpretation was the correct one then, so it is correct now as well. This conviction may additionally be warranted by the particular institutional setting of the court establishing the precedent or especially convincing justification[8].

To clarify the aforementioned distinction, it has to be highlighted, that interpretation of the statutes made by the courts of law are not always merely precedents of interpretation. It is possible, at least conceptually, that court interprets a statutory provision and declares that one of the meanings attributable to that provision is the only correct one. Depending on the formal status of precedent as a source of law, this declaration might constitute a new legal rule, binding courts in subsequent cases. Thus, declaration that particular understanding of statutory or constitutional provision is a correct one is not only an interpretation of the pre-existing legal rule embodied in the legal text, but also establishes a new one, namely the rule that says, that from now on, this interpretation is legally binding. Since the moment when the ruling in question is made, the interpretation bounds the lower courts and to some extent, the court rendering the judgement itself (even if in some circumstances it might be overruled). Therefore, discussed distinction is a typology, rather than strict partition. This however, does not need to be further elaborated on, since the concern herein is jurisdiction, which does not include precedent in the catalogue of formal sources of law.

PRECEDENT IN COURT OF JUSTICE'S PRACTICE

It remains to be said, what is the bearing of the distinction sketched above on the answer to the problems posed by Court of Justice's practice, which were formulated at the beginning? The distinction supposedly may help to demonstrate, that Court of Justice's heavy reliance on precedent

[8] Michel Troper and Christophe Grzegorczyk, *Precedent in France*, [in:] *Interpreting Precedents: A Comparative Study*, (ed.) D. Neil MacCormick and Robert S. Summers (Aldershot ; Brookfield, Vt: Ashgate, 1997), pp. 126–27.

is not in excess of the Court's authority conferred by the Treaties. Some scholars claim, that unlike precedents in common law jurisdictions, whose binding force is formally acknowledged and which hence can be classified as precedents of solution (at least on some occasions), Court of Justice precedential rulings despite being pervasively cited as motivations of subsequent decisions are merely precedents of interpretation[9]. Their reasoning may roughly be presented as follows: these precedential rulings lack constitutive character (they do not constitute legal rules) and are devoid of normative force enjoyed by statutory provisions. Hence, notwithstanding inestimable justificatory significance of that "case law", Court of Justice does not cross the demarcation line between application of law and covert judicial legislating.

Though, some scholars in civil law traditions maintain, that the distinction between precedent of solution and precedent of interpretation suffices to address the discussed problem, unfortunately, this reasoning is not as promising, as it seems to be at the first glance. Living aside general prospects of this argument, it has to be noted, that it fails to account for some crucial aspects of Court of Justice practice. Even superficial knowledge of its jurisprudence is sufficient to observe, that numerous legal principles developed within the Court's body of rulings are not explicitly expressed, neither in the Treaties nor in secondary European Union law. These principles were somehow constructed by the Court of Justice and acknowledged as binding legal norms. The most significant examples include principle of primacy of European union law[10] (but there are many others, which pose similar doubts). This, obviously does not mean that Court of Justice did not cite any legal provisions to justify judgements in question. The point is that, neither of this provisions entailed these principles explicitly.

It is useful to illustrate the matter by particular landmark judgments, which on the one hand are precedential in the sense, that they are cited by the Court of Justice, but on the other can hardly fit into the category of precedent of interpretation, due to lack of the provision, which express principle they pertain to. Judgement in case *Costa v ENEL* from 15 July 1964 established the principle of primacy of European Community law

[9] e.g. Tridimas, *Precedent and the Court of Justice*, pp. 309–310.
[10] Ibidem, p. 310.

over laws of individual Member States[11]. The main arguments in favour of that principle roughly read as follows. Firstly, were Member States' national laws to prevail over European law, the States would effectively be permitted to exempt themselves from any provision of European law they wished. However, were they so permitted, the Treaties would not create a genuine obligation to obey European law and the latter could not be said to be really binding. Secondly, the Court asserts, that European Treaties differ significantly from ordinary international treaties, by a number of features e.g. ability of institutions, which they established to create legal rules directly binding Member State's citizens, very often without consent of that Member State. These differences suffice to claim, that Community law (nowadays Union law) should not be treated as a regular international law[12]. The Court proclaimed: "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply"[13]. This stance was subsequently confirmed and even strengthened[14].

Another and even more striking example is judgment in case of *Francovich v Italy* rendered on 19 November 1991, whereby Court of Justice established liability of the Member State to compensate for loss and damage individuals suffer because of the State's failure to transpose directive. Such liability were not expressed anywhere in the Treaties and many unsuccessful attempts were made to add relevant provisions to them. In the discussed ruling the Court decided,that despite failure of said attempts, such liability already exists[15].

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[11] Henry de Waele and Anna van der Vleuten, *Judicial Activism in the European Court of Justice-The Case of LGBT Rights*, Michigan State Journal of International Law 19, no. 3 (2010), pp. 643–645.

[12] On Kelsenian traits and criticism of the first, conceptual argument and possible interpretations of the second see: Mattias Kumm, *The Moral Point of Constitutional Pluralism,* [in:] *Philosophical Foundations of European Union Law*, (ed.) Julie Dickson and Pavlos Eleftheriadis (Oxford: Oxford University Press, 2012), pp. 228–229.

[13] Case 6/44 Costa v ENEL [1964] ECR 585;

[14] de Waele and van der Vleuten, *Judicial Activism*…, p. 645.

[15] Ibidem.

It is highly questionable, that aforementioned judgements purportedly declaring existence of principles, which are clearly detached from legal text, might be classified as precedents of interpretation. There is no provision or even cluster of numerous provisions, which those principle might be derived from. If precedential rulings in fact establish new legal rules, rather than interpret pre-existing ones, it probably has to be admitted, that the ruling has constitutive character and therefore amounts to a precedent of solution, in the sense defined beforehand. It is so, because what actually distinguishes precedents of solution from the pure interpretive ones, is that the former are sole normative source of the rule, which existence they acknowledge, instead of any legal text, which had existed before and independently of the ruling rendered by the Court. And this is the case of rulings *Costa, Francovich* and many other landmark judgements.

This feature of the Court of Justice jurisprudence is very similar to the practice of constitutional and supreme courts in national jurisdictions. It is well known phenomenon, that this kind of courts, being very often forced to interpret legal text formulated in language full of contested, value-laden concepts like democratic legal state, due process of law etc., sometimes formulated many years before the day the interpretation is conducted, face the problem of determining their actual meaning and sometimes adjusting them to current needs. This phenomenon is considered by many scholars, not as a mere adjustment of pre-existing law, but as a creation of a new law. The clearest example is probably Supreme Court of the United States, known for its politically laden rulings, but this problem is not unknown in civil law jurisdictions as well. It was foreseeable, that similar tendencies would appear in Court of Justice's jurisprudence, if the process of constitutionalization of the European Treaties was taken into account.

JURISPRUDENTIAL REMARKS

One way of defending the interpretive character of the rulings in question is to accuse the foregoing analysis of covertly assuming positivistic stance, whereby if a judicial decision is made and it cannot be justified by an appeal to legal rules derivable from recognised sources of law (rec-

ognised in particular legal system), then this entails, that the court in fact created a new rule for the case at hand. If other courts or the court, which created the rule, subsequently justify other rulings solely by a recourse to the rule then created, it means that judge-made law is in fact recognised in this system, rendering the case a precedent of solution (this is not to say, that positivism as such opposes judicial law-making; positivism understood as a descriptive theory of law limits itself to choice of particular conceptual framework, rather than warrants any view about the proper extent of power residing with courts)[16]. A lawyer inclined to think about law in interpretive terms, the sort Ronald Dworkin promoted, rather than positivistic ones, may oppose this conclusion by claiming, that every adjudication is effectively interpretive in nature. Even if seemingly there was no law on particular matter (as in the case of judgements in *Costa* or *Francovich*), court interprets the entire institutional history (whole relevant statutory material, previous rulings etc.; in the case of Court of Justice, probably entire *acquis communautaire* is relevant) in light of values underling legal system in question and reaches the best possible decision. Precedent thereby laid down still can be counted as a precedent of interpretation, but what it interpreted is entire "institutional history", rather than particular provision or provisions[17]. This jurisprudential controversies however, cannot be settled herein. It suffices to point out, that firstly, even if the interpretivist account of adjudication is taken for granted, civil law courts' authority to engage in such "widely understood" interpretation is what is at stake here and what requires substantial argument. Arguably, question remains the same, but is put in slightly different terms. Secondly, it is not clear to what extent Dworkinian interpretivism designed as a "local" legal theory of American law may be easily adjusted to other legal systems, especially system of European Union law.

[16] For brief clarification on what counts as law for positivist see: Jules L. Coleman and Brian Leiter, *Legal Positivism*, [in:] *A Companion to Philosophy of Law and Legal Theory*, (ed.) Dennis Patterson (Chichester: Wiley-Blackwell, 2010), pp. 235–237.

[17] Zenon Bankowski et al., *Rationales for Precedent*, [in:] *Interpreting Precedents: A Comparative Study*, (ed.) D. Neil MacCormick and Robert S. Summers (Aldershot ; Brookfield, Vt: Ashgate, 1997), p. 485.

CONCLUSIONS

Foregoing considerations raise serious doubts as to the plausibility of a claim, that entire body of Court of Justice precedential rulings are to be classified as precedents of interpretation, as the claim is not capable of accounting for some of the features of these rulings, first and foremost, the apparent creation of new legal rules. Arguments for the thesis, that these precedents lack constitutive character based on that distinction between precedents of solution and precedent of interpretation seem to be at least inconclusive, if not entirely deficient. Therefore, it should be admitted, that some of these precedential rulings are precedents of solution, with all the consequences it entails, unless other valid and sound argument to the contrary is found.

Again, it need to be emphasised, that this article has established neither that Court of Justice engages in unauthorised law-making, nor that it acts exactly like common law courts do. It was not meant to do so in the first place. Instead it argued, that one of the standard ways of fitting Court of Justice's jurisprudence into civil law scheme is inadequate.

Consequently, either some other way is figured out or legal scholars would be forced to acquiesce to the fact, that European law converged with common law jurisdiction to a much greater extent, than some are inclined to think. The issue demands some settlement, as apart from being of interest for legal theory, it has a significant bearing for disputes about judicial activism, legitimacy of power of courts, sovereignty of Member States and many others. None of these debates can be legitimately carried on, if they are ill-informed on how precedent in fact works.

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