DO INTERNATIONAL COURTS MAKE LAW IN SMALL STEPS? EVIDENCE FROM THE CITATION WEB OF CJEU CASE LAW

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A. INTRODUCTION

The story of the Court of Justice of the European Union (CJEU) is a story of judicial success.[1] The CJEU has from its modest beginnings grown into the most powerful international court in the world. It has weathered political, economic, and financial crises, Treaty reforms and constitutional stalemates. It has gained (and maintained!) unprecedented political power and interpretive authority.[2] One particularly effective strategy of the CJEU, it was argued, was to avoid political conflict and significant push back from the legal community, by constructing its legal doctrines in a series of small steps, or incrementally.[3] In the paper I examine this claim empirically.

The analysis is set against the framework of principled incrementalism, that is, a step by step judicial decision making that strives for a workable balance between societal and legal concerns. In other words, courts consciously or unconsciously balance the demands of the individual case against the

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[1] Laurence R. Helfer & Anne-Marie Slaughter, *Toward a theory of effective supranational adjudication*, 107 YALE L.J. 273(1997); Alec Stone Sweet, *The European Court of Justice*, *in* THE EVOLUTION OF EU LAW (P. Craig & G. De Búrca eds., 2011).

[2] KAREN J. ALTER, THE EUROPEAN COURT'S POLITICAL POWER : SELECTED ESSAYS (Oxford University Press. 2009).

[3] TREVOR C. HARTLEY, THE FOUNDATIONS OF EUROPEAN UNION LAW : AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN UNION (Oxford University Press 7th ed. 2010).. See also Helfer & Slaughter, ; SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS : A THEORY OF NATIONAL AND INTERNATIONAL COURTS (Cambridge University Press. 2015). 134; and Weiler, Transformation.

demands of the whole body of law, in particular legal coherence and consistency,[4] which lets them preserve the authority to interpret legal norms in the long run. In the case of international courts the balancing is additionally strained by the increased political pressure from various states with dissimilar legal systems, conflicting political interests, varying degrees of international commitment and, of course, the absence of a central enforcement mechanism that makes international courts particularly vulnerable and dependent on the cooperation with powerful political actors.

The definition of principled incrementalism is informed by three strands of literature on international courts and judicial decision making more generally. First, it draws on the latest literature on judicial authority of international courts, which sees the success of an international or a supranational court as dependent on a mixture of internal and external factors.[5] As Madsen demonstrates, by observing the rules of legal diplomacy international courts can significantly increase the odds of success in terms of effectiveness of their rulings, interpretive authority and institutional legitimacy.[6] Second, the definition rests on a dynamic understanding of judicial authority of international courts, which means that international courts can shift the meaning of international norms by drawing on their privileged position as law interpreters, but only as far as the legal actors recognize this authority and adapt their arguments to new interpretations in an ongoing discursive process.[7] Third, the definition is clearly inspired by the theory of judicial incrementalism,[8] which suggests that courts will adopt a way of thinking and a style of decision making akin to policy makers; but use a specific technical vocabulary.[9] For instance, they will develop legal doctrine gradually rather than abruptly, mitigate the effects of their rulings, and insist that they are following precedent.

An international court, such as the CJEU, which acts in line with the theory of principled incrementalism, will try to balance individual rulings that transform existing doctrines or importantly add to the established interpretations of law or set strong precedents for future cases (the law making

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[4] Urška Šadl, *The Role of Effet Utile in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-accession Case Law of the Court of Justice of the EU*, 8 EUROPEAN JOURNAL OF LEGAL STUDIES 18(2015).

[5] Helfer & Slaughter, 314.

[6] Mikael Rask Madsen, *'Legal Diplomacy' – Law, Politics and the Genesis of Postwar European Human Rights*, *in* HUMAN RIGHTS IN THE TWENTIETH CENTURY (Stefan-Ludwig Hoffmann ed. 2010). See also

7 Ingo Venzke, *Understanding the authority of international courts and tribunals: on delegation and discursive construction*, 14 THEORETICAL INQUIRIES IN LAW, 397 (2013).

[8] M. SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES (Free Press. 1968). 80

[9] Stare decisis is not a unique tradition but "incrementalism dressed up in the peculiar language of the law." Id. at. 80-81

cases) with outcomes that have little practical effect on the balance of rights and duties in national law, or remedies that require little to no legal action on behalf of the Member State, or are not costly, in terms of finance and economy (non demanding remedies[10]). Moreover, the CJEU will not apply the principle that it established in the same case, qualify the principle that it established in the same case, or not disclose its full potential.[11]

Over a longer period of time, the effects of this type of decision-making will be observable on the citation structure and the citation patterns of individual cases and groups of cases. For instance, the CJEU might refrain from explicitly relying on the law making cases in subsequent jurisprudence immediately following the ruling until the new principles become, step by step, through a series of subsequent less controversial rulings, a part of its established legal repertoire. They will therefore, as a group, have a prolonged delay in the citation pattern, meaning that relatively more time will pass before their effects on the case law will be fully visible.[12] That said, the Court will cite them more often in later periods and in more important posterior cases compared to cases that will not make a significant contribution to the development of jurisprudence (law applying or routine cases). Furthermore, their legal or precedential value will not diminish as fast the precedential value of routine cases, and it will not follow the same downward trend. Rather, their citation pattern will have several peaks over a prolonged time period suggesting that they can be continuously revived as precedents. This further leads to an assumption that cases with an even more exalted status in the EU case law, the so called foundational cases,[13] which established the fundamental principles of EU law (cases with symbolic effects), might be cited less, and that even more time might pass before the CJEU begins to explicitly refer to them.

To study these patterns systematically the paper applies an empirical legal approach that underpins legal analysis with a more comprehensive quantitative analysis of case to case citations, using different tools of citation network analysis. In particular, it focuses on the citation patterns of 50 cases decided

[10] See for instance DOTHAN, Reputation and judicial tactics.

[11] On this type of incrementalism see HARTLEY, The foundations.; on strategies of political actors using incrementalism in the process of constitution making see HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES (Cambridge University Press. 2011).

[12] There might be other reasons for this pattern, which I consider and distinguish in section C, Empirical Approach and Materials.

[13] On the concept and role of foundational cases see A. Vauchez, *Keeping the dream alive. The Transnational Fabric of Integrationist Jurisprudence* 5EUROPEAN POLITICAL SCIENCE REVIEW 51(2012).

between 1963 and 2004[14] that are considered landmark cases in EU law, and compares their citation patterns with citation patterns of a random sample of 50 cases, selected from the dataset of all judgments decided by the CJEU in the same period. The analysis is based on a unique dataset of all judgments of the CJEU, including metadata for cases and links (direct citations) between them.[15] It also further refines this approach, building on the methodology that importantly advances the study of citation structures, focusing on their long term dynamics.[16]

The main findings demonstrate that law making cases have very different citation patterns than randomly selected cases and, as a group, also different characteristics.

First, a great majority of what stands as the most important cases ever decided by the CJEU, judging by the fact that the CJEU included them in the selection of its historic or important pre-accession case law and their treatment in academic literature,[17] has had significantly delayed visible effects on the subsequent case law. In fact, most cases became most important after more than 11 years from the time when they were handed down. Second, the time lag between the date of decision and the date on which the case was of highest importance of cases that introduce new doctrines or principles is twice as long as the time lag of cases that further develop or entrench them (8,7 years and 17,2 years). By contrast, factors such as whether the principles established or entrenched in individual cases were judge made or based on the interpretation of Treaty articles, do not seem to affect the length of the time lag. Together, these findings suggest that the CJEU has been careful to (not) immediately apply the newly established principles, especially in cases with symbolic rather than practical importance. Third, when the CJEU introduces or extends its doctrines it often mitigates the effects of the judgment by decoupling the abstract rule or principle from its effects (remedy from the principle), or delaying its effects. Sometimes, the CJEU offers a more symbolic gesture on the level of language, and refers to the fundamental principles of the EU and common traditions. This shows that the judges of the CJEU use their situation sense in individual cases, and more often in cases with structural effects, that is the effects that spread throughout the EU legal order and from there into national legal systems.

On this basis it can be concluded that the CJEU develops its doctrines in a step by step fashion, as predicted by the theory of principled incrementalism.

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[14] More on data selection and historic case law in section C, Empirical materials and approach.

[15] The dataset was compiled within the project led by iCourts Centre of Excellence for International Courts.

[16] See Urška Šadl & Yannis Panagis, *What is a Leading Case in EU Law? An Empirical Analysis*, 40 EUROPEAN LAW REVIEW 15(2015); Urška Šadl & Mikael R Madsen, *A 'Selfie' from Luxembourg: The Court of Justice and the Fabrication of the Pre-Accession Case-Law Dossiers*, COLUMBIA JOURNAL OF EUROPEAN LAW (FORTHCOMING, 2016).

[17] For the selection of historic case law see section C, first subsection.

The analysis thus adds to a lively debate on judicial authority and law making of international courts in Europe and more broadly, [18] an investigation that is relevant also because of the increasing normative, interpretative and political authority of international courts.[19] It importantly adds to the existing literature by first, demonstrating empirically how international courts make international law and second, by providing a deeper insight into the long term maintenance rather than establishment of (legitimate) supranational judicial authority. Finally, the study has a broader relevance with regard to judicial precedent as it suggests that the established model of the depreciation of precedent and the life span of cases according to which precedents depreciate gradually and very fast,[20] should be further developed, in the way that distinguishes the law-making cases of symbolic importance, the landmark cases and routine cases.

The argument proceeds in four sections. In section B the paper lays out the theoretical framework and develops the concept of principled incrementalism. In section C, it presents the empirical materials, in particular the CJEU's historic case law and the process of its selection, and approach. The finding are presented and discussed in Section D. Concluding remarks and suggestions for future research are outlined in Section E.

B. THEORETICAL FRAMEWORK AND HYPOTHESES

PRINCIPLED INCREMENTALISM

Principled incrementalism is a type of judicial decision making, according to which international and supranational courts proceed in a series of small steps to preserve or increase their interpretive authority. They balance the social factors surrounding each case with the demands of the body of law that they are interpreting, in particular its legal coherence and continuity. Seen from this perspective, courts do not adopt strategies that further personal preferences of judges or avoid the so-called deep

[18] INGO VENZKE, HOW INTERPRETATION MAKES INTERNATIONAL LAW : ON SEMANTIC CHANGE AND NORMATIVE TWISTS (Oxford University Press. 2012); MARC A. JACOB, PRECEDENTS AND CASE-BASED REASONING IN THE EUROPEAN COURT OF JUSTICE : UNFINISHED BUSINESS (Cambridge University Press. 2014); Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 EJIL 7(2012)..

[19] KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (Princeton University Press. 2014).

[20] Ryan C. Black & James F. Spriggs, *The Citation and Depreciation of U.S. Supreme Court Precedent*, 10 JOURNAL OF EMPIRICAL LEGAL STUDIES 325(2013).

and wide judgments (they are not unprincipled, nor "minimalist"[21]), nor are they completely immune to the pressure of the outside world.

This understanding of principled incrementalism is based on three converging strands of literature on the decision making and authority of international courts and judicial decision making more broadly. First, as argued in the most recent literature on authority of international courts, the success of an international court hinges on a mixture of internal and external factors.[22] Madsen, in particular, shows how international courts develop into effective, legitimate and politically powerful decision makers by observing the rules of legal diplomacy: they activate mechanisms that are responsive to their legal and social environment and enable them to steer clear of direct confrontation with powerful political players.[23] For instance, they balance the bold rhetoric of far reaching legal principles and judicial doctrines with outcomes that do not compromise vital social, economic or security interests of the losing party, especially when that party is a powerful state.

Second, principled incrementalism rests on the dynamic understanding of judicial authority of international courts as the interpreters of international law. The interpretive authority of international courts is expanded, maintained and weakened in a dynamic process, where the judgments of international courts force international legal actors to relate their arguments to these judgments as precedents when advancing their legal claims.[24] This creates a particular dynamics of international law making by international courts, where the use of precedents by the parties in concrete disputes gives international courts an opportunity to change the meaning of law, and establish new precedents, to which the participants in the legal discourse will have to adapt their arguments, and so forth.[25] This means that international courts are in a privileged institutional position to shift the meaning of international norms, but they can only maintain this position of authority if the legal actors continue to recognize it and adapt their arguments to new interpretations.[26]

Third, the understanding of principled incrementalism is most closely inspired by the theory of judicial incrementalism, as adapted from the general theory of incremental decision making of political and

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[21] CASS R. SUNSTEIN, ONE CASE AT A TIME : JUDICIAL MINIMALISM ON THE SUPREME COURT (Harvard University Press. 1999).

[22] Helfer & Slaughter,

[23] Madsen, Legal Diplomacy. See also

[24] VENZKE, How interpretation makes international law.

[25] Venzke, 397

[26] Id. at.

administrative actors, primarily by Martin Shapiro.[27] The general theory of incrementalism argues that policymakers adopt policy decisions in a series of incremental judgments and not in a single judgment rendered after rational manipulation of all relevant considerations.[28] They are motivated by the logic of self-preservation and legitimation, and to a lesser extent by costs involved in gathering additional information necessary to make a "correct" or "best" policy.[29] The theory of judicial incrementalism similarly postulates that courts will change established doctrines in a series of small doctrinal changes undertaken in different judgments.[30] They will look for the closest possible alternative (embodied in a specific past decision) to the status quo[31] and avoid abrupt changes. Pursuant to this view courts differ from policymakers, such as administrative agencies, only on the level of their technical vocabulary, especially stare decisis and precedent, and not on the level of a particular way of thinking or style of decision making.[32]

Finally, a general account of incrementalism as a judicial strategy presupposes that the natural long term trend is expansion of legal principles and judicial authority unless the CJEU faces hefty external pressure to retreat and yield authority to either the European legislator or national governments. Because principled incrementalism relies on a dynamic understanding of judicial authority, it presupposes that courts can either expand or restrict legal doctrines and principles in exceptional situations (the example of the latter is the development of the judge made principle of Member State liability in EU law for damages caused to individuals).

Various theoretical as well as qualitative and quantitative empirical studies support the rationale underlying the practice of incrementalism.[33] The CJEU, it was argued, established its doctrines

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[27] SHAPIRO, The Supreme Court and administrative agencies. 80

[28] Citation marks in the original. See id. at, 74.

[29] Incrementalism as a general theory of decision making is (was) a reaction to the so called rational decision making of economic and political actors, which was being increasingly challenged by the practice of political bodies, working on the basis ad hoc compromises between conflicting interests, basically, by "muddling through." This allows the decision makers to adapt the policy in the face of resistance, noncompliance and harsh criticism. See Charles E Lindblom, *The science of" muddling through"*, PUBLIC ADMINISTRATION REVIEW (1959).

[30] DOTHAN, Reputation and judicial tactics. 135

[31] SHAPIRO, The Supreme Court and administrative agencies. 80

[32] Stare decisis is not a unique tradition but "incrementalism dressed up in the peculiar language of the law." Id. at. 80-81

[33] For an older study in the internal market domain see MIGUEL P. MADURO, WE, THE COURT : THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION : A CRITICAL READING OF ARTICLE 30 OF THE EC TREATY (Hart. 1998). For more recent contribution to the incremental decision making of the ECrtHR see DOTHAN, Reputation and judicial tactics. For WTO and UN see VENZKE, How interpretation makes international law. For a recent survey of

gradually, mitigating legal innovation either on the level of practice or on the level of rhetoric to enhance the authority of law and upgrade its own powers.[34] While the former included delaying the full effects of established principles,[35] the latter form was marked first, by the use of lofty formulas to lift the level of discussion away from the facts and the consequences of concrete cases and decisions to the long term common goals and interests of integration,[36] and second, by continuous insistence that novel developments were a logical consequence of already established ones.

C. EMPIRICAL MATERIALS AND APPROACH

HISTORIC CASE LAW

The starting point of the inquiry is the so called historic case law of the CJEU. It is a set of 50 cases, decided between 1954 and 2004, and selected from among more than fifteen thousand documents at the point of the 2004 enlargement.[37] From the internal documents of the CJEU[38] it follows that these judgments were included in the selection as cases that were unanimously recognized as leading cases (*arrêts de principe*), structuring the legal order of the Community, and generally considered as the most important references in various substantive areas of European law. Although the criterion based on the frequency of citations in subsequent judgments was not a decisive factor,[39] many of these cases

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empirical quantitative studies on how the CJEU considers the interests of the Member States in its decision making see CLIFFORD CARRUBBA & MATTHEW GABEL, INTERNATIONAL COURTS AND THE PERFORMANCE OF INTERNATIONAL AGREEMENTS: A GENERAL THEORY WITH EVIDENCE FROM THE EUROPEAN UNION 66 (Cambridge University Press. 2014).

[34] Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INTERNATIONAL ORGANIZATION 41, 69 (1993).

[35] "[I]n the first case that comes before it, the CJEU will establish the doctrine as a general principle but suggest that it is subject to various qualifications; the CJEU may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many protests, it will be re-affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed." HARTLEY, The foundations 74.

[36] Burley & Mattli, 68-69

[37] The same cases were also sent to the new member states in the 2007 and 2013 enlargements of the European Union. Anecdotally, a selection of important or historic case law was compiled already at the time of the accession of Sweden and Austria.

[38] Internal Memorandum of the CJEU from 17 September 2003, which is on file with the authors. All documents were obtained from the CJEU Pursuant to Article 15(3) of the Treaty on the Functioning of the European Union, and Decision of the CJEU of Justice of the European Union of 11 December 2012, putting in place rules concerning public access to the documents held by the CJEU in the exercise of its administrative functions.

[39] Internal Memorandum of the CJEU from 17 May 2002.

are among the most central and widely cited cases in the CJEU's overall jurisprudence, based on objective citation scores.[40] In fact, their importance, measured by the average authority score of historic case law (see below) is ten times higher than the average authority score of all cases in the network.

The basis for the analysis is a case-to-case citation network of all cases decided between 1954 and 2013 by the CJEU.[41] In a case-to-case citation network individual cases are represented as dots and citations between them as arrows, pointing from the citing case to the cited cases. Some cases will receive more citations by other important cases while others might never get cited. In the vocabulary of citation network analysis, they will have either high or low hub and authority scores.[42] The mapping of the case-law on the basis of hub and authority scores gives us a static picture of the case law. To explore the long term dynamics within this structure and account for the fact that the authoritative value of a case will change over time, as new cases are being decided, it is possible to compute the so called *initial* authority/hub score of a case; that is the extent to which this case forms an authoritative

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[40] Mattias Derlén & Johan Lindholm, *Goodbye van Gend en Loos, Hello Bosman? Using Network Analysis to Measure the Importance of Individual CJEU Judgments*, 20 EUROPEAN LAW JOURNAL 667(2014).

[41] The case to case citation network is built by extracting all citation information and the processing of the bibliographic data associated with each case (document). The bibliographical data include information on Case name (the name of the parties), Case id (CELEX number), date of judgment and date of the application, authentic language, the reporting judge and the advocate general, subject matter and case-law category, as well as links to cases cited in the document. For processing we used Python 2.7 together with the packages BeautifulSoup (http://www.crummy.com/software/BeautifulSoup/), lxml (http://lxml.de/) and networkx (http://networkx.lanl.gov/).

[42] Centrality scores are regarded as objective importance measures that can be calculated for each case. There are several measures of case centrality. Among the most used are eigenvector centrality, and *hub* and *authority* scores. Eigenvector centrality and *hub* and *authority* scores are based on the number and also on the importance of the connections of individual nodes. Eigenvector centrality score of each node is proportionate to the sum of the scores of its neighbors. Hub and authority scores result from a mutually reinforcing citation setting; a good authority is cited by a good hub and vice versa. Typical for main authorities in case citation networks is that they are widely cited, meaning that they have influenced subsequent case-law. Kleinberg was the first to model this network phenomenon with the help of linear algebra. By modelling the network with the adjacency matrix A of the network graph, the vectors x and y, representing all hub and authority scores in the network, can be computed as $x = A^{T}y$ and $y = Ax$, A^{T} being the transpose of A. Kleinberg was able to show that after a number of iterations, vectors x and y converge to x^* and y^* the principal eigenvectors of $A^{T}A$ and AA^{T}, respectively. Jon M. Kleinberg, *Authoritative sources in a hyperlinked environment*, JOURNAL OF THE ACM (JACM) 46.5 604(1999).

judgment, in the years after it is decided.[43] Thus, a series of successive "snapshots" of the network for each consecutive year after gives us a relational and dynamic picture of the case-law with the peak points in the citation history of each case included in the package of historic case law, and its relative importance in the case-law of the CJEU over 50 years (from the perspective of the CJEU).

Importantly, citations extracted from the CJEU's website as a part of the bibliographical information are citations of the case-law *of* the CJEU *by* the CJEU, in the main document, meaning that they are not citations, made by the parties, but by the CJEU in the argumentative part of the judgment. This significantly increases the precision of the analysis, and the reliability of the findings, even though the method does not distinguish between all possible modes of citation (for instance, was the cases cited in a string citation, distinguished or followed).[44]

With regard to the limitations of the method, the CJEU's change in the citation practice is the most significant. For instance, the CJEU was and remains known for reproducing the wording of past decisions without an explicit citation of a case, from where the formulation is being reproduced. Also, the citation practice changed in the late 70s, where the CJEU, accumulating a significant case law inventory, began to increasingly refer to its past decisions. At a later point the citation practice was guided by internal citation guidelines, which are rarely discussed openly.[45] That said, a closer comparison of citation patterns of cases decided at approximately the same time indicate that this does not significantly alter the findings. Moreover, recent studies show that the method is reliable also in the case of the so called civil law courts like the CJEU.[46] Last but not least, including quantitative or qualitative data on the historical, political and economic context would certainly enhance and fine tune the analysis.

RESEARCH DESIGN AND HYPOTHESES

To examine whether the CJEU decides according to the premises of principled incrementalism, the basic dataset is examined in the light of four broadly formulated hypotheses. **First**, the cases in which the CJEU introduces new doctrines, will *as a group* have a longer gestation period compared to the

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[43] For literature using initial hub scores on a USSC dataset see Yonatan Lupu & James H. Fowler, *Strategic Citations to Precedent on the U.S. Supreme Court*, 42 JOURNAL OF LEGAL STUDIES 151(2013).

[44] Given the common practice of the CJEU and the criticism, most citations will be string citations. For empirical demonstration of this practice see JACOB, Precedents and case-based reasoning.

[45] Id. at., however, briefly discusses internal citation guidelines of the CJEU, 101.

[46] Urska Sadl & Mikael R Madsen, Becoming European (Legally): Unpacking the Self-Portrait of the EU Legal Order in the Pre-Accession Case-Law Dossiers (November 2014); Mirshahvalad, et al., *Significant Communities in Large Sparse Networks*, 7 PLOS ONE e33721(2012); Derlén & Lindholm, 667.

cases, in which the CJEU elaborates the details of new doctrines, and even the cases, in which the CJEU extends these doctrines to new circumstances. The gestation period is defined as time, which passes between the date, when the case is decided, and the date, when its authority or importance score is highest, meaning that it becomes widely cited and used by the CJEU. **Second**, in the citation pattern of *individual* cases, in which the CJEU proclaims new principles, like direct effect or the liability of the Member States, that expand its authority, a considerable delay will occur between the points when they are decided and the points when their initial authority scores are highest (that is, their gestation period will be longer). **Third**, the same delay in the citation pattern will occur in *individual* cases that might have potential systemic impact. A case has a systemic impact if its effects extend far beyond its facts. In EU law, this will usually mean that the case will change the relationship of EU law to national law, either in terms of the division of competences or in terms of jurisdiction, and effects in the interpretation of national law that was not a subject of dispute (for instance, direct effect, introduced in Van Gend, had an effect on the relationship between the EU law and the national law beyond it object of dispute, that is, customs duties). Moreover, in these cases the CJEU will mitigate the concrete consequences on the level of language or in practice. For instance, in Defrenne II case, the CJEU ruled that now Article 157 TFEU, which lays down equal pay for equal work, was applicable between private individuals. At the same time it limited the temporal effects of the judgment to minimize the financial impact of the judgment on private employers. **Fourth**, cases with potential systemic effects will, *as a group*, have a longer gestation period than cases, which resolve concrete doubts of Treaty interpretation and establish reference points in specific substantive areas of law. While the first and the fourth assumptions, if established, would indicate that the CJEU uses incrementalism in creating doctrines, the second and third assumption would demonstrate the use of judicial situation sense.

After the case to case citation networks are constructed, the inquiry proceeds in two stages. In the first stage, the cases are systematized on the basis of their empirical properties, such as: **(1)** their **practical and symbolic importance**. For instance, according to the criteria cases like Van Gend and Costa v ENEL will be classified as cases with mainly symbolic importance, while Gebhard and Brasserie will be classified as cases that had primarily practical importance; **(2)** the Court's law-making initiative (establishment of **new judge-made principles v interpretation of Treaty Articles**). This category divides historic cases in two subcategories, distinguishing between outcomes that were not strictly based on the Treaty Articles, like Hauer, and cases, which were grounded in the interpretation of concrete Treaty Articles, like Bosman; **(3) juridical consequences and effects** (did the CJEU limit the consequences of its rulings in practice); and **(4) the extent of doctrinal innovation**, that is with regard to whether the cases introduced or extended/modified or adapted the existing doctrines. Following the latter criterion cases like ERTA will be considered as cases which introduced new doctrines and cases like Simmenthal as cases that extended existing doctrines. This does not mean that

Simmenthal was not a substantive doctrinal innovation, but that it was based on the principle already established in Costa v ENEL, which it upheld and extended).[47]

The basis for the classifications are the texts of individual judgments, and also other qualitative criteria such as the subject matter assigned to the case by the CJEU, the keywords that accompany each judgment, and the case-law directory in which the case is placed, as well as scholarly commentary or *notes de doctrine* (case comments) discussing individual cases as judicial contributions to the acquis.[48] Admittedly, the classifications are not entirely objective, and can be debated, especially because cases included in the historic case law are known for more than one specific contribution to the acquis (Bosman is a typical example,[49] as is Defrenne), and eschew classifications.

The historic case law is then compared to the citation pattern of 50 randomly selected cases among the dataset of all cases of the CJEU, decided in the same period (until 2004).

In the second stage the citation patterns, including the gestation periods and the dynamics in initial authority scores, of different categories as well as individual cases are compared to each other. Cases that deal with basic doctrines, en bloc, are compared to individual cases, establishing and extending these doctrines. The method is primarily qualitative in the first stage and quantitative in the second stage, however, the examination of the third assumption is supplemented with a more detailed qualitative analysis of juridical consequences.

D. FINDINGS

The examination renders three main findings. The first and most distinct finding is that cases included in the package of historic cases law have a prolonged gestation period. They reach the highest authority score a decade from when they are handed down by the CJEU, as Figure 1 demonstrates. The delay in citation scores is partly related to the fact that it takes time before the cases get cited by the CJEU, which depends on several factors, including the case load, the volume of citable decided cases and doctrinal similarity of subsequent cases, which would merit citations. Still, it can be argued that the general trend is plainly evident, and that a great majority of most important cases ever decided by the CJEU has had significantly delayed *observable* effects on the subsequent case law. In fact, most cases, as is shown in Figure 1 below, have reached their highest initial authority score after more than 11 years from the time of decision.

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[47] The vast majority of the historic case law package can be labelled as judge-made law. See Sadl & Madsen

[48] Notably MIGUEL POIARES MADURO & LOÏC AZOULAI, THE PAST AND FUTURE OF EU LAW : THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY (Hart. 2010). and generalist textbooks.

[49] JACOB, Precedents and case-based reasoning. 52

As shown in Figure 2 below, the historic cases have a very different citation patter when compared to randomly selected cases. The latter display a pattern, which follows the classic model of the depreciation of precedent and the life span of cases, namely, that cases are relevant precedents in the first period after they are decided, and depreciate in the subsequent periods, where they are replaced with newer and more relevant cases.[50] This model taken into account many variables, which influence the speed with which precedents depreciate but it does not take into account the symbolic importance of cases. As Figure 1 suggests cases that have a historic status also have a very different citation history. Their influence is greater overall, and they might be used less over specific periods but then suddenly revived decades later. Of course, the style of citation might be very different in the United States Supreme Court (USSC) from the style of citation at the CJEU, and the former court has a much longer history than the CJEU, but that should be further investigated.

Second, with regard to the factors that influence the gestation period, the findings imply that the latter varies with average centrality scores: cases that rank highest in the whole citation network (top 1% of all cases) have shorter gestation periods than lower ranking cases. The latter often have greater symbolic importance, which means that they have become famous in literature as *constitutional* milestones,[51] providing Europe with so far the most persistent and straightforward *theory* of integration through case law.[52] By contrast, higher ranking cases with shorter gestation periods address specific practical problems of Treaty application, and work out the more detailed aspects of the "grand" doctrines. For example, Simmenthal is a well-known and in many ways a groundbreaking case, but its immediate impact is due to its clarification of what supremacy implies for the national court and its duty to protect rights that individuals derive from EU law.

The average gestation period of cases that introduce new doctrines or principles is twice as long as the average gestation period of cases that further develop or entrench them (8,7 years and 17,2 years). By contrast, factors such as whether the principles established or entrenched in individual cases were judge made or based on the interpretation of Treaty articles, do not seem to affect the length of the gestation period. Together, these findings suggest that the CJEU has been careful to (not) immediately apply the newly established principles, especially in cases with symbolic rather than practical importance. Moreover, the cases with greater symbolic importance, it can be observed, have – as a group and individually – broader systemic effects, structuring the European legal order as a whole and

[50] Black & Spriggs, 325.

[51] Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 1(1981).

[52] Antoine Vauchez, *The transnational politics of judicialization. Van Gend en Loos and the making of EU polity*, 16 EUROPEAN LAW JOURNAL 1(2010).

in turn also national legal orders, which in the eyes of the CJEU possibly merited a greater sensitivity to the reaction of the legal actors and the Member State governments.

Additionally, considerable delay occurs in cases, which introduce new doctrines, compared to the cases, which further elaborate or extend them. The example of this incremental doctrine building while using judicial situation sense is the development of direct effect, as shown in Table 1 below. Similarly, with regard to primacy, the gestation period of Costa v ENEL, which introduced the notion, is more than five times longer than the gestation period of Simmenthal, which entrenched and extended it (16 and 3 years), and the gestation period of Francovich, which introduced the liability of the Member States for breaches of EU law, is almost three times longer than the gestation period of Beasserie, in which the CJEU elaborated the conditions for liability of the Member State (11 and 4 years). The principle of institutional balance was fully developed in over 20 years, with gestation periods of Roquette Freres (Isoglucose) and Les Verts being seven times longer than the gestation period of Chernobyl, where the *locus standi* of the European Parliament was fully recognized.

Third, and related to the previous point, when the CJEU introduces or extends its doctrines it often mitigates the effects of the judgment, by decoupling the abstract rule or principle from its effects (remedy from the principle), or delaying its effects (14 cases included in the selection). Sometimes, the CJEU offers a more symbolic mitigating gesture in the form of a reference to the fundamental principles of the EU and common traditions (4 cases). These findings indicate that the judges of the CJEU use their situation sense in individual cases, and more often in cases with structural effects. For instance, the average gestation period of CILFIT, Costa v ENEL, Van Gend, Les Verts, Hauer and ERTA is 20 years, double the average.

CASE NAME	CELEX	PRINCIPLE ESTABLISHED/DEVELOPED	INCREMENTALISM	PEAK IN IAS
Van Gend	61962CJ0026	Direct effect of Treaty articles	none	16
Reyners	61974CJ0002	Extension of direct effect (direct effect as a sanction)	principle v remedy (practical effect)	7
Defrenne	61975CJ0043	Horizontal direct effect of Treaty articles	principle v remedy (temporal limitation)	6
Von Colson	61983CJ0014	Indirect effect	principle v remedy (practical effect)	6
Faccini Dori	61992CJ0091	No horizontal direct effect of directives	none	4
CIA Security	61994CJ0194	Incidental horizontal effect	principle v remedy (practical effect)	8

Table 1: The selection of judgments included in the historic case law, in which the CJEU developed the doctrine of direct effect (ordered by Celex number), and their gestation period (first column from the right)[53]

[53] The column "Incrementalism" indicates whether the CJEU limited or delayed the effects of the judgment.

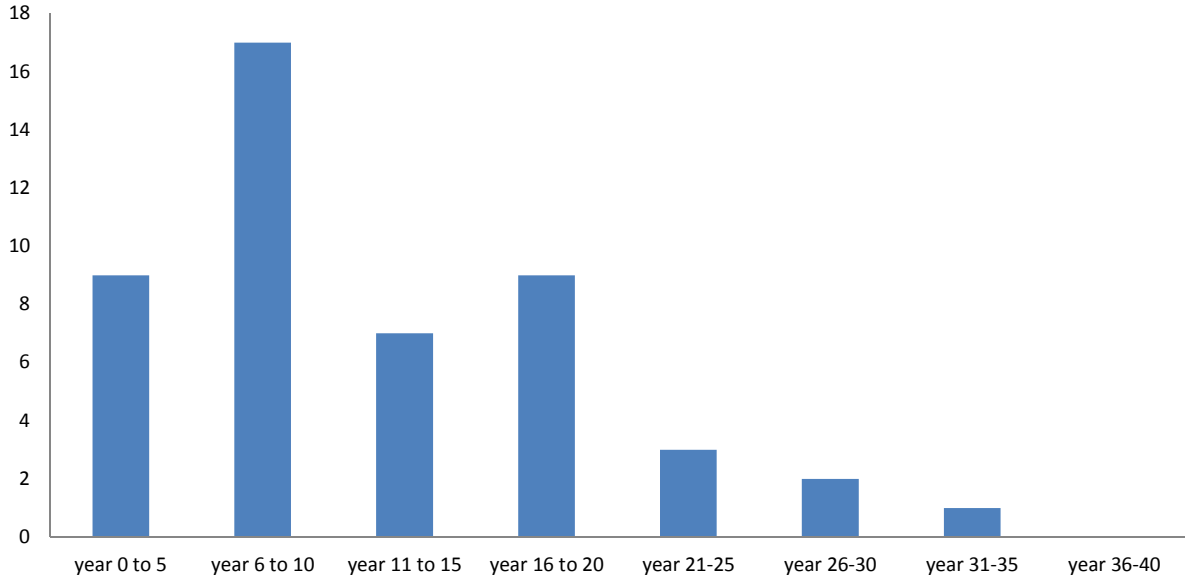

Figure 1: Gestation period of historic case law, in years from when they were decided. The vertical axis indicates the number of cases; the horizontal axis indicates their gestation periods in years from when they were decided by the CJEU

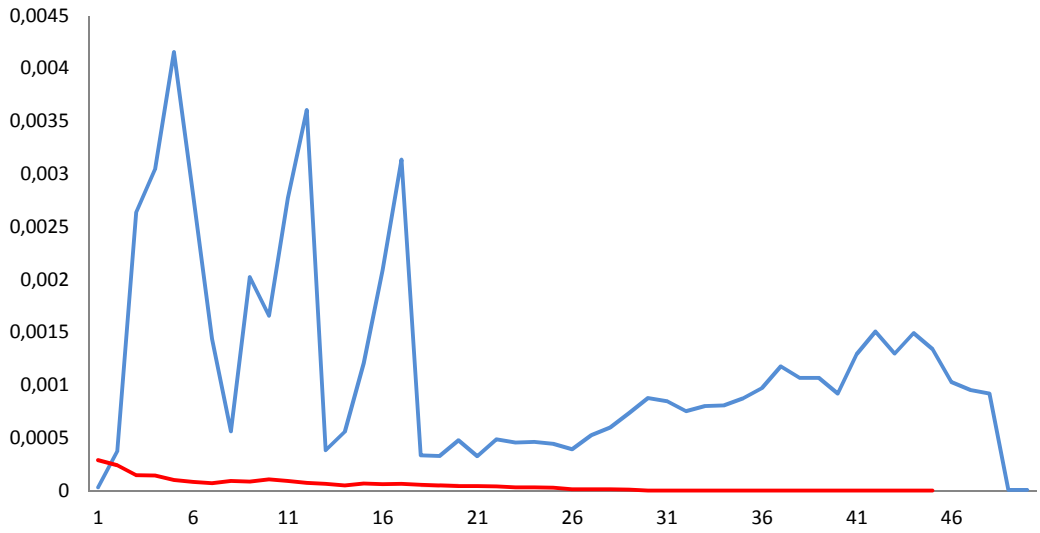

Figure 2: Fluctuations in the average initial authority scores of historic case law (blue line) as compared to the randomly selected cases (red line) from the year of decision (1 on the x axis is the year after the cases were decided)

E. Discussion and concluding remarks (to be completed)

This paper examined whether international courts will adopt a step by step approach in their decision making, empirically.

In order to frame the empirical inquiry, it introduced a theory of principled incrementalism, which postulated that international courts would balance the social factors surrounding each case with the demands of the body of law that they are interpreting, in particular its legal coherence and continuity. This definition is based primarily on the insights of the theory of judicial incrementalism as developed in older literature and then adopted to discuss the rise of judicial and political success of the CJEU. However, it also combines the classic theory of incrementalism with newer literature, which developed a more nuanced model of judicial power (authority), and a more sociological rather than legal political understanding of judicial behaviour (judicial politics). Thus, from this angle courts do not adopt conscious strategies and judges do not further their personal preferences. In other words, courts are not afraid of adopting, in the terminology of Cass Sunstein, "deep and wide" judgments.[54] Rather, they do not avoid them, but hand them down and mitigate their practical effects. In this sense, they behave, as Madsen argued, like *legal* diplomates: they balance the bold rhetoric of legal principles with undemanding remedies, and outcomes that do not compromise vital social, economic or security interests of powerful states.[55]

The findings indeed suggest that the CJEU developed fundamental doctrines and legal principles in smaller steps, and kept its interpretive authority in check by giving substantive leeway to the political actors.

The history of the CJEU suggests that some judge made doctrines and the authority of the CJEU to fashion and develop them, like direct effect, the principle of Member State liability or the principle of institutional balance, were accepted in practice. Others, like the standing of the European Parliament and primacy, were explicitly written into the main Treaty text[56] or at least into Annexes and declarations to the Treaties.[57]

The findings of a comprehensive empirical enquiry support the claims that the CJEU often mitigated legal innovation either on the level of practice or on the level of rhetoric: it delayed the full effects of established principles, and found ways to limit the practical effects of individual judgments.

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[54] SUNSTEIN, One case at a time : judicial minimalism on the Supreme Court.

[55] Madsen, Legal Diplomacy.

[56] The status of the European Parliament as a privileged applicant was formalized in the Maastricht Treaty (ex Article 173 EEC is now Article 263 TFEU).

[57] The Declaration number 17 (Declaration concerning primacy) to the treaties, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon (Official Journal C 326 , 26/10/2012 P. 0001 – 0390) states in the first paragraph that "[t]he Conference recalls that, in accordance with well settled case law of the CJEU of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law."

The analysis is not without limitations, which were pointed out above, and include everything from the internal citation guidelines and the change of citation practices throughout the years (the CJEU got computers in 1994, which made the searching for cases easier, and its own database), to the proverbial habit of reproducing chunks of texts without any reference at all. That said, a closer comparison of citation patterns of cases decided at approximately the same time indicate that this does not significantly alter the findings, and the differences between the historic case law and the random set of cases decided over the same period are significant. Albeit including quantitative or qualitative data on the historical, political and economic context would certainly enhance and fine tune the analysis, the qualitative analysis, which was carried out systematically on the basis of the quantitative findings, did not lead to diverging interpretation.

Nonetheless, other alternative explanations come to mind, such as institutional factors and institutional alliances, in particular between the CJEU and the Commission. Perhaps the CJEU only responded or followed the strategy of the Commission. These should certainly be further investigated. Still, they do not convince as much as the principled incrementalism thesis, given the very clear political orientation of the Commission, and the fact that most cases (also most historic cases) were brought via the preliminary rulings mechanism by private litigants and Euro-lawyers rather than by the Commission via direct actions.

Fianally, the analysis also indicates that the model of the depreciation of precedent and the life span of cases, suggesting very fast depreciation of precedents, as demonstrated empirically on the case law of the United States Supreme Court (USSC),[58] should be further developed, to distinguish between cases of symbolic and cases of practical importance. This gives nee impetus not only to quantitative research on precedent and judicial politics but also to comparative studies, which can reveal important differences in the style of judicial decision making between continental and common law courts.

Draft completed in February 2016

[58] Black & Spriggs, 325.