
The European Perspective on the Notion of Precedent – are EU and Czech Court Decisions Source of Law?*

David Sehnálek**

Summary: The article focuses on the substance and effects of judicial decisions. Judgements of domestic courts and those of the Court of Justice of the EU are examined separately in terms of their nature. Specifically, the article deals with the question of their binding effect and also whether they can be considered a source of Czech and EU law. The author discusses and questions the opinion, which is currently prevailing among Czech authors, that decisions of supreme courts should be considered binding and simultaneously a source of law comparable to precedents, as they are known in Anglo-American law. The article further points out that the alleged similarity between judgements rendered by the Czech courts and the Court of Justice of the EU is merely ostensible, as each of them has a different nature and effects in the Czech legal environment. The conclusion is, in simple terms, that judgements of domestic courts generally cannot be considered a source of law, that they do not contain any new legal norms and, finally, that they comprise merely a simple and changeable interpretation of legal norms created by the law-making body.

Keywords: Court decision; Court of Justice of the EU decisions; Precedent; Source of Law; Persuasive Judgment; Binding Effect of the Judgment.

1. Introduction

The question of the nature of judicial decisions is certainly not new,¹ but has yet to be conclusively resolved (and I should add, on a rather pessimistic note,

* The Article was originally published in Czech language as SEHNÁLEK, D. Je soudní rozhodnutí (české i unijní) obecně závazné a má povahu pramene práva? In KYSELOVSKÁ T., SEHNÁLEK D., ROZEHNALOVÁ, N. (eds.) *IN VARIETATE CONCORDIA soubor vědeckých statí k poctě prof. Vladimíra Týče*. Brno: Masarykova univerzita, 2019. pp. 295–324.

** Doc. JUDr. David Sehnálek, Ph.D., Faculty of Law, Masaryk University, Brno, Czech Republic, email: David.Sehnalek@law.muni.cz

¹ Just a list of domestic literature would cover at least one page of this text. Šrůtková provides an overview of all important articles on the topic. See ŠRŮTKOVÁ, J. Závaznost rozhodnutí

that it might never be resolved). This is so despite all the considerable attention paid to this question, not only in Czech legal literature. If we take a closer look at Czech contributions to the debate on this topic, we can see that their scheme resembles – with a slight exaggeration – the popular story about a smart princess written by famous Czech 19th century novelist Božena Němcová. Just like the ingenious princess in that story both arrived and not arrived, dressed and not dressed at the same time, in the view of various legal theorists, judicial decisions are simultaneously binding and not binding,² and are not a source of law formally, although they are one in reality.

Legal texts, usually dull and concise, often become a work of art and incite fantasy when it comes to judicial decisions (or, in English terminology, case-law). And this really is not common for legal texts. Instead of exact conclusions, various works almost poetically refer to a “*certain normative force*”³ of judicial decisions or “*some binding effect*” on their part, or that they are “*normative in a certain sense*”.⁴ The authors thus, however, ultimately undermine their own conclusions. In any case, they try to interconnect the terminology and institutions of the civil-law system with concepts and institutions of common law. However, the risk entailed in such an approach is that by concentrating on sometimes seeming, but elsewhere actual, similarities of individual aspects, one could miss the broader context.⁵

However, it is not the aim of this paper to criticise or question the quality of my colleagues’ work. I would just like to add my small contribution to the debate and, in doing so, outline a certain system of individual judicial decisions depending on whether they are rendered by Czech courts or the Court of Justice of the EU. The key question remains the same: are judgements of these courts a source of law? And are these judgements generally binding? I am well aware that the topic is too extensive in its substance to be dealt with in a relatively short text. I will therefore not be able to answer a number of questions to the full extent as they would otherwise deserve.

Ústavního soudu z pohledu doktríny a judikatury. [Binding Effects of Rulings of the Constitutional Court in Terms of Doctrine and Case-law.] *Časopis pro právní vědu a praxi*. 2009, vol. 4, p. 294.

² KACZOROWSKA-IRELAND, A. *European Union Law*. Routledge: 2016, p. 150.

³ KÜHN, Z. Nová koncepce normativity judikatury obecného soudnictví na pozadí rozhodnutí Ústavního soudu. [New Conception of Normativity of Case-law of Common Courts Against the Backdrop of Rulings of the Constitutional Court.] *Právní rozhledy*. 2001, no. 6. p. 265 et seq.

⁴ ŠRŮTKOVÁ, J. Závaznost rozhodnutí Ústavního soudu z pohledu doktríny a judikatury. [Binding Effects of Rulings of the Constitutional Court in Terms of Doctrine and Case-law.] *Časopis pro právní vědu a praxi*. 2009, no. 4, pp. 293–301, p. 297.

⁵ General differences in the system of separation of powers and in the mechanism of checks and balances, and specifically different mechanisms of appointing judges, different mutual links and powers of courts within the judicial system, different emphasis on individual methods of interpretation, different manner of creating and capturing the contents of written law, etc.

2. Background

I believe that any debate on the nature of judicial decisions should start with properly defining the basic terms and setting their meaning. Individual authors ascribe different contents to these terms and tend not to understand each other. Their approach to the nature of judicial decisions is also influenced by their legal-philosophical opinions. These opinions are, however, only rarely revealed. One and the same phenomenon is therefore perceived in different ways depending on the chosen theoretical and legal background. But no simple synthesis can be carried out in this regard as the initial subjective view of each author is determinative of the eventual conclusions.

The influence of the social context on Czech jurisprudence, primarily in the 1990s, also represents a no less significant problem. Fragmentation of opinions in the judiciary and the poor quality of decision-making at the lowest levels often resulted in completely illogical different solutions to otherwise factual and legal problems. The ensuing frustration on the part of supreme courts must have been considerable.⁶ It will therefore come as no surprise that their case-law, too, perhaps overly inclined towards emphasising uniformity of the legal order, and thus also uniformity of judicial decision-making.

It is thus quite possible that some of the opinions expressed in the past in professional literature or case-law would never have been presented under standard conditions of development of the legislation in a country belonging to the system of civil law.

2.1. The notion of binding effect

But let us return to the issue of terminology. This issue can well be demonstrated on the notion of *binding effect*. E.g. Kühn claims that a concept of binding effect where each norm or decision is either binding or not binding has already become obsolete.⁷ He concludes that various levels of binding effect can in fact be seen between the two antipoles. Instead of a black-and-white view of the problem, we should thus adopt a “*fifty-shades-of-grey*” attitude, admitting a possible existence of various intensities of the binding effect.⁸

⁶ Cf. KÜHN, Z. O velkých senátech a judikatorních odklonech vysokých soudů. [On Large Chambers and Deviations in Case-law of Supreme courts.] *Právní rozhledy*. 2013, no. 2, p. 39 *et seq.*

⁷ KÜHN, Z. Nová koncepce normativity judikatury obecného soudnictví na pozadí rozhodnutí Ústavního soudu. [New Conception of Normativity of Case-law of Common Courts Against the Backdrop of Rulings of the Constitutional Court.] *Právní rozhledy*. 2001, no. 6, p. 265 *et seq.*

⁸ Similar to Kühn, *Smejkalová* also speaks about various degrees of binding effect, being inspired by the same author – theorist *Aleksander Peczenik*. She distinguishes between formal binding

I believe that this concept of binding effect includes both a phenomenon that could be denoted, without a moment of hesitation, as a “*legal binding effect*”, and something that would be better described as “*persuasiveness*” or “*convincingness*”, or even “*authority*”.

Indeed, a certain idea, rule or decision might not be respected because of its formal nature (*legal binding effect*), but rather in view of its contents (*persuasiveness*). Not because it would have to be respected, but because it *deserves respect*. But this characteristic does not make it legally binding in any shade of grey or even black. These are completely different categories.⁹

An authority may also follow from the position of the body that formulated the given idea or rule or which issued the given decision.¹⁰ While the authority of a decision can be associated with specific judges, it will more likely relate to the institution that rendered the decision.¹¹

The same is true of cases where a lower-instance court deals with a case in the light of case-law of higher instances. The fact that such a lower court will surely approach a case in the same way as it would be assessed by its superior court, in order to avoid potential reversal of its decision, need not necessarily be tied with a potential binding effect of a decision rendered by the higher court, but may also be a manifestation of the principle of legal certainty, economy and procedural economy.¹² These principles, of course, are binding under the Czech laws. But that is no longer true of decisions made by superior courts.¹³ A judge may deviate from such

effect, normative force, supporting argument and exemplary or other value. I believe that the effects of case-law can indeed be divided in this way also in the conditions of our legal order. However, we need not go beyond the established terminology and artificially extend the meaning of the notion of binding effect. And the reason is not merely formalistic. By using a certain term, we attribute to a decision certain characteristics that it might actually not have. This phenomenon is well known, e.g., in medicine – especially in the case of psychiatric terminology. SMEJKALOVÁ, T. K otázce normativity judikatury v České republice. [On the Question of Normativity of Case-Law in the Czech Republic.] In *Dny práva – 2008 – Days of Law*. Brno: Masaryk University, 2008. pp. 1302–1311.

⁹ As a matter of fact, it is also true that a non-binding rule can be persuasive, just like a binding rule can be quite unconvincing.

¹⁰ As pointed out by *Posner*, decisions of a higher court may have a higher authority than rulings rendered by lower courts, e.g. because the choice of their judges is subject to stricter criteria. Consequently, the chances that they will decide correctly may be higher than in the case of judges of lower courts. POSNER, A. R. The Jurisprudence of Skepticism. *Michigan Law Review*. 1988, vol. 86, p. 841.

¹¹ POSNER, A., R. The Jurisprudence of Skepticism. *Michigan Law Review*. 1988, vol. 86, p. 843.

¹² And also fairness, justice and impartiality. See MCGREGOR, D. B.; ADAMS. C. M. *The International Lawyer's Guide to Legal Analysis and Communication in the United States*. Aspen Publishers, 2008, p. 16.

¹³ In this case I refer to a general situation, ie. not to a case of a higher instance court decision in one and same proceedings.

a decision but has to consider the possible consequences this could have for him or her in relation to the said principles, rather than the preceding decision as such.¹⁴

I acknowledge, nonetheless, that if our intention is to convince lower-instance courts that they should pay attention to how other courts make their decisions,¹⁵ and in particular, how supreme courts decide their cases, we should talk to them in a language they will understand, and use terms that will put more emphasis (than would otherwise be necessary) on the fact that such considerations are indeed appropriate. But this changes nothing about the fact that, in formal terms, the variable of *binding effect* can only have two values – either there is such effect or there is not. Anything between is not a binding effect, but rather persuasiveness or worth, whether based on authority related to the contents or on the institution or judges that made the decision.

Moreover, a binding effect can also have various dimensions in the case of judicial decisions. A decision may be binding itself, in a form communicable *erga omnes* or, more traditionally – in the conditions of the Czech legal order – *inter partes*; in other cases, the binding effect will be carried merely by a certain part of a judicial decision (typically, the operative part, or operative part and reasoning);¹⁶ and in yet other cases, the binding effect may be attached to the manner of interpretation as such, and not to the arguments and reasons that led to the given interpretation.

We can also say that a binding effect is directed outwards, in relation to citizens, or inwards. The direction inwards can affect all bodies of the State and courts, or could even be construed narrowly as the binding effect of a certain solution or rule issued by a certain court for that very court, or even more narrowly for a specific chamber or specific judge. Indeed, the aforesaid principles undoubtedly prevent the occurrence of a situation where, for example, one chamber rules in some way in a certain case, and later makes a different decision in a matter involving the same facts and legal questions, without providing any justification.

Similarly, the binding effect can be understood – in somewhat simplified terms – as a sign of a precedential nature of judicial decisions. It then tends to be inferred that if a court decision is binding (without distinguishing in which of the ways mentioned above), then such a decision must necessarily be *a source of law*. And then, in order to downplay this assertion, it is added that such a decision is, of course, not a formal,

¹⁴ *Posner* also notes that if we were to place another court instance above the last-instance court, it is likely that decisions of the current last instance would often be reversed. POSNER, A., R. *The Jurisprudence of Skepticism*. *Michigan Law Review*. 1988, vol. 86, p. 841.

¹⁵ This also entails the question of suitable publication of the decisions of all domestic courts in such a way that they will also be accessible to the public. It is surprising that, in view of today's technical possibilities, all the decisions of all court instances are still not available to the public by electronic means in a single database.

¹⁶ Šrůtková summarises the debate on this issue. See ŠRŮTKOVÁ, J. *Závaznost rozhodnutí Ústavního soudu z pohledu doktríny a judikatury*. [Binding Effects of Rulings of the Constitutional Court in Terms of Doctrine and Case-law.] *Časopis pro právní vědu a praxi*. 2009, vol. 4, p. 295.

but rather a factual source of law. The court thus creates or complements the law, and other courts – usually those which are subordinate to the given court – then have the duty to follow the thus-created law as they are bound by it.

It tends to be neglected, however, that while a binding effect is a qualitative feature of a legal norm, “source of law” is (in formal terms) only a form in which legal norms are embedded, i.e. through which the law is communicated. Therefore, one cannot be equated to the other. These are two completely different categories, albeit interconnected through the given legal norm. Separate debates must therefore be held with regard to whether a judicial decision is a possible source of law, on the one hand, and as to what part of a decision is or can be binding and in what way, i.e. whether this is, e.g., a legal norm encompassed in it or the manner of interpretation of a legal norm which, however, is enshrined in some other source, on the other hand.

At the same time, the concept of a court judgement as a source of law also has its legal and philosophical dimension closely related to faith. Indeed, different answers will be reached if we believe in the existence of gaps in the law, on the one hand, and if we deny their existence, on the other hand.¹⁷ The role of a judge and thus also the nature of a judicial decision are perceived in different ways, depending on our position.¹⁸ And even if we believe in gaps in the law, the process of filling the gaps is a process of interpretation¹⁹ in the conditions of our legal order,²⁰ rather than that of law-making, as might perhaps appear

¹⁷ The issue of gaps in the law goes beyond the scope of this paper. I therefore refer to professional literature in this regard. *Hlouch* provides an excellent summary of the current trains of thought. See HLOUCH, L. *Teorie mezer a současné právní myšlení*. [Theory of Gaps and Contemporary Legal Thinking.] *Časopis pro právní vědu a praxi*. 2013, no. 2, pp. 129–136.

¹⁸ The differences follow from how various authors approach the role of a judge when he or she works with the legislation in a situation where, in view of its general nature, its text does not provide any direct solution. One group considers the judge’s work, who complements the legal regulation, to be law-making, while the other does not. In the first concept, the judge creates the law together with the legislature, while in the second, the judge’s work is limited to mere interpretation. Textualism then takes things to the extreme. This approach is defined by *Sobek* as a theory of “interpretation of legal regulations which emphasises the separation of powers, and therefore rejects that judges could ignore, under various pretences, that the legislature has explicitly laid down something, and thus play the legislature. SOBEK, T. *Argumenty teorie práva*. [Arguments of Theory of Law.] Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2008, p. 283. For interpretation of this concept, see also ŠKOP, M. *Interpretace práva jako literární interpretace*. [Interpretation of the Law as Literary Interpretation.] In Dávid, R., Sehnálek, D., Valdhans, J. (eds.) *Dny práva – 2010 – Days of Law*. Brno: Masaryk University, 2010, p. 2983 *et seq.*

¹⁹ TÝČ, V., SEHNÁLEK, D., CHARVÁT, R. *Vybrané otázky působení práva EU ve sféře českého právního řádu*. [Selected Questions of the Influence of EU Law in the Czech Legal Order.] 1st edition. Brno: Muni PRESS, 2011, p. 157.

²⁰ However, this is also true of European Union law.

from contemporary professional literature dealing with the nature of judicial decisions.²¹

Work of a judge is often perceived as a truly norm-making process. Such an approach, however, downplays or even overlooks boundaries set by the written law to the judge's discretion compared to the breadth of the freedom of policy-making that is generally available to the legislator. The quality of the so-called "law making" or "creation of law" is therefore fundamentally different. I myself identify with Istrefi, who claims that even in situations where judges "create" the law, they ought, as representatives of the legislator, complement it in a way the legislator would make it.²²

2.2. The notion of precedent

Another key notion, which is often neglected, is *precedent*. Decisions are said to have precedential nature if they have to be followed by other courts, naturally those of lower instances, on the grounds of their alleged binding effect or persuasiveness.²³ This concept corresponds to the general Czech language, in which the notion of "precedent" is understood as a *model solution to a certain problem* or situation that will be repeated in the future. The reasons for such repetition are neglected as they are not decisive. Thus, even a solution that is followed solely because it was first of a kind is thus denoted as a precedent.

In this paper, I will understand a precedent as a *communicable form*, i.e. a decision that is a consequence of a specific situation that cannot be resolved on the basis of an already existing legal norm. The court therefore formulates – in highly simplified terms – a new rule which it accompanies by an appropriate reasoning,²⁴

²¹ Komárek claims the opposite. He is right to state that a number of theoretical legal approaches actually perceive law-making in a judge's work. But not all of them. And primarily, they disregard the fact that a judge is limited by written law, as compared to the freedom enjoyed by a law-maker in the creation of policies. Their "law-making" therefore fundamentally differs in terms of quality. KOMÁREK, J. Reasoning with Previous Decisions: Beyond the Doctrine of Precedent. *The American Journal of Comparative Law*, 2013, vol. 61, no. 1, p. 167 *et seq.*

²² ISTREFI, K. The Application of Article 103 of the United Nations Charter in the European Courts: The Quest for Regime Compatibility on Fundamental Rights. *European Journal of Legal Studies*, Winter 2012, vol. 5, no. 2. [online]. Available at: https://ejls.eu.eu/wp-content/uploads/sites/32/pdfs/Autumn_Winter2012_2013/UNITED_NATIONS_CHARTER_IN_THE_EUROPEAN_COURTS_%20THE_APPLICATION_OF_ARTICLE_103_OF_THE_.pdf

²³ Foreign literature therefore distinguishes between "*binding precedents*" and "*persuasive precedents*", see e.g. MCGREGOR, D. B., ADAMS, C. M. *The International Lawyer's Guide to Legal Analysis and Communication in the United States*. Aspen Publishers, 2008, pp. 18 and 19.

²⁴ As pointed out by Posner, the said conception, where the judge fills gaps in the law that have not been filled by the legislature, is naturally a simplification, also because of many differences in institutional and procedural terms. POSNER, A. R. The Jurisprudence of Skepticism. *Michigan Law Review*, 1988, vol. 86, p. 862.

and communicates the rule to the public through its decision – a precedent as a kind of “carrier”.

And this is precisely where there is an enormous difference between a civil-law judge and an Anglo-American judge. What appears identical if viewed from a distance, i.e. the creation of law by an Anglo-American judge and the “creation” of law by a civil-law judge in the process of filling gaps, are in fact very different processes.²⁵ But the differences become perceptible only if we disregard the categories of “*binding effect*” and “*precedent*” and take a look under the hands of the judge dealing with a given matter.

For an English judge, the absence of a clear and specific legal norm in a legal regulation is not a problem, but rather a challenge and an opportunity to freely create a new rule.²⁶ The judge will make a decision based on a rule he/she would create him/herself if he/she were the legislature.²⁷ For a civil-law judge, the same situation poses no smaller challenge to identify an already existing rule of written law, which he/she will then apply to the given case based on *analogia legis* or *analogia juris*.

The consequence are different approaches to interpretation of written legal norms.²⁸ For an English judge, extensive interpretation of legal norms of written law means in fact a restriction of his/her own freedom and his/her intellectual potential to create a new rule. It also means that the judge subjects him/herself to the legislature’s authority in a situation where this is not actually required. The practical consequence is therefore a lesser willingness to undertake extensive interpretation and the related greater emphasis on the linguistic method of interpretation.²⁹ In the case of English courts, this is manifested, e.g., by a preference for interpretation based on a “*plain meaning rule*” in a situation where a civil-law judge might be inclined to use teleological interpretation.³⁰

²⁵ Even if they may seem identical or similar at first glance. For a detailed explanation, see KISCHEL, U. *Rechtsvergleichung*. C. H. Beck, 2015. p. 464.

²⁶ In a same situation a German or a Czech judge would fill the gap through the “creative” interpretation of some already existing norm which is something the common law judge cannot. See BRENNCKE, M. *Judicial Law-Making in English and German Courts: Techniques and Limits of Statutory Interpretation*. Cambridge, 2018, p. 127.

²⁷ POSNER, A. R. The Jurisprudence of Skepticism. *Michigan Law Review*, 1988, vol. 86, p. 862.

²⁸ Brenncke refers to the different roles of the English and German judges and to the different starting point settings which results from a different constitutional doctrinal setting and which are manifested in a different emphasis on the various methods of interpretation. The result is fundamentally different approach to the gap filling in the legislation. BRENNCKE, M. *Judicial Law-Making in English and German Courts: Techniques and Limits of Statutory Interpretation*. Cambridge, 2018, p. 129.

²⁹ BRENNCKE, M. *Judicial Law-Making in English and German Courts: Techniques and Limits of Statutory Interpretation*. Cambridge, 2018, p. 127 and 128.

³⁰ Viz CANOR, I. Primus inter pares. Who is the ultimate guardian of fundamental rights In: Europe? *European Law Review*, 2000, no. 25, footnote 32.

On the other hand, if it is found that a legal norm is absent or is overly general, a civil-law judge will find him/herself in an irregular and, as a matter of fact, quite unpleasant situation.³¹ The judge will then try and resolve the problem by creative interpretation of existing written legal norms. He/she will not compete with the legislature, but will rather be subordinate to the latter in view of the system of separation of powers in law-making. At the same time, he/she will be forced to co-operate with the legislature. This is what it means when it is said that a judge *complements the law*. The judge seeks a specific rule in legal norms that have already been created by the legislature, first on the basis of linguistic interpretation, which is always the initial approach, and then also with regard to their sense, purpose, intent, logic or system.

When an English judge is to create a precedent, he/she focuses his/her intellectual power on creating a new rule that will resolve a certain situation and, in this process, he/she has freedom and potential to express his/her own policy, i.e. promote his/her own understanding of the right solution to the given situation. In contrast, a civil-law judge directs his/her energy towards creative interpretation of a rule that already exists and he/she therefore does not, or should not, form any policy of his/her own.³² The judge is bound by the policy expressed in the rule he/she is to interpret.³³

Furthermore, it could be postulated that the problem of contemporary Czech jurisprudence lies in its considerable dependence on sources from the Anglo-American legal environment and a concealed, but still discernible, influence of the English language. Indeed, the very notion of “*case-law*” has found

³¹ I admit that this claim applies primarily to first instance courts. In the case of supreme courts, especially the Constitutional Court, a different approach can often be observed. It seems to me as if some of judges saw in the possibility to work creatively with the law on the mere edge of law making and policy determination, some sort of their self-realization and the main purpose of their activities.

³² The French legislation even explicitly prevents such creativity on the part of a judge – Article 5 of the Code of Civil Procedure states: “*Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.*”

³³ I add that a legal norm communicated in a decision that we denote as a precedent can then itself serve as an object of interpretation in further court decision-making. However, it is always the law, i.e. the manner in which written law has been construed, and not an earlier decision rendered by domestic courts, that is interpreted in the Czech legal order. Such earlier decisions are often approached mechanically, reading primarily the “headnotes”, which, in substance, are a bizarre result of an attempt to generalise otherwise comprehensive legal problems. The same is true of interpretation of decisions rendered by the Court of Justice. This court, too, works with its decisions in this way. It mechanically refers to “headnotes” of earlier decisions without any indication of a more thorough analysis. According to *Streinz*, this creates an impression of major and complex dogmatics, which often lacks even the most basic foundations. See STREINZ, R. *Europarecht*. 10th edition. 2016. C. F. Müller. p. 228.

its way into our legal environment and is used in cases where judicial decisions rendered by Czech courts, the Court of Justice of the EU and the European Court of Human Rights are referred to in English. But the Czech expressions “*ustálená judikatura*”, German “*Rechtsprechung*” or French “*jurisprudence constante*” have somewhat different connotations – they are not a “*law*”.

A natural consequence is a suppression of the actual nature of judicial decisions. By choosing the English designation, like it or not, we ascribe to them properties of rulings made by *common law* courts. This creates the deluding impression that these two are (almost) identical. But they are not. While new legal norms can be found in English precedents, *civil-law* judgements comprise merely a reversible interpretation of legal norms.³⁴ While precedents actually form the law, the same is only interpreted or complemented in *civil-law* rulings.³⁵

It should be noted that this approach has also been adopted by the courts themselves. E.g. the Court of Justice commonly refers to its previous decisions as *case-law* in English. This may indicate how it approaches the nature of its decisions and thus subliminally influences everyone who later works with them. It suggests that these are not earlier decisions, but rather *decisions which, in aggregate, form a law*. Czech practice is more moderate in this respect as it tends to refer to “*ustálená judikatura*” (“*settled decision-making*”).³⁶ There is indeed a fundamental difference between *settled decision-making* in this sense and *precedents*, as they are the result of different intellectual processes.³⁷

The language also influences the perception of judicial decisions in one other way. In parts dealing with the question of binding effect of judicial decisions, Czech treatises follow basically exclusively from English authors and sources. There is a vast quantity of English literature written by English-thinking authors comparing *common law* with the system of *civil law*. *Audi alteram partem*, one would tend to say. Why are we not listening that much to German or French authors?³⁸

³⁴ KISCHEL, U. *Rechtsvergleichung*. C. H. Beck, 2015. p. 463.

³⁵ This is true not only of Czech, but also of German legal environment. See the ruling of the first chamber of Bundesverfassungsgericht, File No. 1 BvR 418/71 of 19 February 1975.

³⁶ *Pound* and *Dawson* mention the decision-making practice of the French Cour de cassation and note that the court does not quote its previous decisions consistently. POUND, R., DAWSON, J. *The French Bifurcation* in LASSER, M. de S.-O.-l’E. *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy*. Oxford: Oxford University Press, 2009, 2010. p. 32.

³⁷ KISCHEL, U. *Rechtsvergleichung*. C. H. Beck, 2015. p. 464.

³⁸ For example *Kühn* utilizes and quotes German sources, but draws different conclusions. He plays down conceptual differences between the activities of a judge of the continental legal system and common law by putting an emphasis on a looser concept of bindingness. In this respect, Brenncke’s publication, which carefully and systematically maps the differences in the work of judges from both legal systems and confirms the existence of the differences, is extremely valuable. See BRENNCKE, M. *Judicial Law-Making in English and German Courts: Techniques and Limits of Statutory Interpretation*. Cambridge, 2018; and KÜHN, Z. *The binding nature of*

Jurisprudence itself might actually be contributing to the impression that judicial decisions are something more than they in fact are. Looking at articles, as well as academic textbooks, we can see that they often concentrate primarily on individual judicial decisions. This becomes absolutely clear in the case of the European Union law and its Court of Justice. An unbiased observer might feel that this is the only, or the most important, institution standing behind the entire process of European integration and development of EU law.

I do not deny the influence of the Court of Justice; it was undoubtedly substantial but if it were not for the Member States as law-makers, it would never have become reality. The Member States were the ones that created the legal framework in which the Court of Justice makes its decisions, and they are also the ones that voluntarily ensure, via their national courts, that the solutions inferred by the Court of Justice are implemented in practice. And it is also jurisprudence in the Member States and their courts who warn the Court of Justice from time to time that it might be venturing beyond the limits of mere, even if creative, interpretation.

While the role of case-law of the Court of Justice is admittedly considerable, it would be incomplete without primary and secondary law. Without voluntary subordination by the Member States and their courts, it would also be absolutely irrelevant. As a matter of fact, a similar ethos was also developed around the rulings of the European Court of Human Rights and decisions of Czech supreme courts, and especially those of the Constitutional Court.

It is symbolic that the binding effect of case-law and its “precedential nature” are primarily mentioned by the courts themselves and also by their judges. This is true of both European Union law³⁹ and of domestic law. It is only logical that if someone is in a position where he or she can influence others, he/she will hardly tell them: *do not listen to me*.⁴⁰ But without such a power being enshrined in a legal regulation, ideally in the Constitution, such a statement will merely be a simple expression of an opinion maintained by one of the parties involved.⁴¹

the European Court of Justice ‘s decision for human rights for domestic justice. *Právní rozhledy*, 2005, no 1, pp. 1 et seq.

³⁹ In the case of European Union law, this effect is inferred from the judgment of the Court of Justice of 6 October 1982 in Srl CILFIT and Lanificio di Gavardo SpA v Ministero della sanità (Case 283/81).

⁴⁰ From this point of view it is worth noting that Pavel Rychetský, the President of the Czech Constitutional Court, declared one of the decisions of this institution to be wrong, he also said he is ashamed of it and most importantly that this decision should not be followed. Strictly speaking, this declaration by the highest representative of the most important Czech court *de facto* denies the thesis of the precedential character of the Constitutional Court’s decisions. The verdict concerned is the Constitutional Court’s decision of April 17th, 2019, file no. II. ÚS 3212/18.

⁴¹ Cf., e.g., the powers to provide legal interpretation enshrined in Art. 5 (1) of Constitutional Act No. 91/1991 Coll., on the Constitutional Court of the Czech and Slovak Federal Republic, or

Under the current circumstances, therefore, any considerations regarding the precedential or generally binding effect of case-law in the Czech legal environment merely express a stance of one component of power in the country. This, however, is an opinion that gets constantly repeated, and maybe that is why it is gradually becoming the truth.⁴²

The fact that judges often disseminate their own ideas, as well as ideas of their colleagues by means of commercial lectures and also in the form of education of future lawyers, or in professional articles and commentaries, is also not negligible in terms of perception of the nature of case-law. I would not reproach them for doing so; this is quite understandable. But this, too, contributes to the impression that a judicial decision is something more than it actually is. And listeners like listening since the role of jurisprudence as an important source of recognition of law, e.g. in Germany, often lags behind the development of case-law. However, criticism can also be targeted at legal theorists – many articles or other publications only passively take the former conclusions of supreme courts, therefore, the Czech jurisprudence does not “actively” shape the law, but only retrospectively and passively maps it.⁴³

The problem may also be that academic staff at Czech faculties ought to critically reflect on judicial decisions and thus contribute to the formation of law in a similar way as in Germany and France. This, however, is effectively prevented by the existence of personal links, where those who are employed full time as decision-makers tend to have another full-time job as lecturers at faculties and elsewhere.

3. On the nature of Czech judicial decisions – a normative point of view

I am convinced that judgements rendered by Czech courts cannot be considered a source of law nor can they be considered to have a general legally binding effect

similar powers of the Court of Justice embedded in Article 19 of the Treaty on European Union, which will further be analysed in this text below.

⁴² As a matter of fact, the rule has stood the “test of time”, as mentioned by *Posner*, and it thus, pragmatically speaking, “has to” be true. However, he also adds that the existence of a long-term consensus on a certain conclusion or idea need not necessarily mean that the given conclusion or idea is indeed the truth. *Posner* points out that the Earth thus used to be flat and the Sun used to orbit around it. POSNER, A. R. *The Jurisprudence of Skepticism*. Michigan Law Review, 1988, vol. 86, p. 855.

⁴³ It is too often possible to find in Czech articles and commentaries the conclusion “*only the judicial practice will show what the solution to the problem will be*”. But that is not, and cannot be, a true conclusion to any article or other scientific work.

in any shades of grey. Article 15 (1) of the Czech Constitution quite clearly vests the legislative power in the Parliament. Only this body forms the policies in this country and puts them into practice by means of law-making, thus prescribing the way our society will function.⁴⁴

The courts lack the power to make norms in this country's system of law. That would be at variance with the basic principles of separation of powers. Consequently, where theory refers to judicial filling of gaps in the law, this means an activity that takes place at an imaginary level which is below the actual law-making. From this point of view, a court is not in a position equivalent to the legislature and is therefore not a law-maker itself, as it operates solely within the limits set by the legislature. There is, in fact, no other way – the law cannot be case-specific in its substance. A certain degree of creativity is therefore expected of the courts. However, this is not a matter of independent and law-making creativity, as it is strictly bound by the limits laid down by existing law. It is implemented not generally and politically, as is true of the activities of a law-making body (and in some cases, English courts), but exclusively in individual cases.⁴⁵

According to the Constitution, a judge is bound in his/her decision-making by the law and international treaties.⁴⁶ Not by the law and international treaties as interpreted by another court. A judge is independent, and this independence has to be understood broadly, i.e. also as independence of any other court or judge and their legal opinion. But not of the law as created by the legislature. Any exceptions to this rule are strictly defined by the law and are, in principle, limited only to aspects of superiority and subordination in particular court cases.⁴⁷

⁴⁴ It is true that the executive branch can also participate in the creation of norms which, in their aggregate, form a part of the law applicable in the Czech Republic. In this case, the communicable form consists in law-making international treaties. But this kind of law-making takes place in co-operation with other members of the international community, under control of the Chamber of Deputies and within the limits of the Constitution.

⁴⁵ In these very reasons, I perceive the main differences between the concept described here and the approach taken, e.g., by *Komárek*. I do not deny the creative role of a judge; I merely do not believe that the law is created in a manner that is characteristic of a law-maker. I can see substantial differences in the quality of work of a judge and that of the legislative body. See KOMAREK, J. Reasoning with Previous Decisions: Beyond the Doctrine of Precedent. *American Journal of Comparative Law*, 2013, no. 1, pp. 149–172. at p. 167.

⁴⁶ Article 95 of the Constitution.

⁴⁷ This is a matter of “*cassation binding effect*”. Šrůtková points out that there actually exist certain problems in this regard as well. Indeed, there is no consensus in the Czech Republic whether only the operative part or the operative part together with the fundamental reasons is what carries the binding effect. See ŠRŮTKOVÁ, J. *Závaznost rozhodnutí Ústavního soudu z pohledu doktríny a judikatury*. [Binding Effects of Rulings of the Constitutional Court in Terms of Doctrine and Case-law.] *Časopis pro právní vědu a praxi*, 2009, no. 4, p. 295.

Historical comparison also provides an argument for exclusion of a binding or precedential nature. In Art. 5 (1) of Constitutional Act No. 91/1991 Coll., on the Constitutional Court of the Czech and Slovak Federal Republic, the Czechoslovak legislation explicitly granted the Federal Constitutional Court the power to provide legal interpretation.⁴⁸ There is no such provision in the new legislation; the Constitutional Court, just like any other court, thus cannot have such a competence.⁴⁹ Section 20 of Act No. 6/2002 Coll., on courts and judges, which is to ensure unification of case-law, cannot play this role. On the one hand, this is a simple – rather than constitutional – law, which cannot change the separation of powers as laid down in the Constitution, and moreover, the nature of the provision is procedural.⁵⁰

Czech supreme courts quite naturally perceive the situation differently, and the precedential nature and a “certain binding effect” of judgements tend to be inferred on the basis of their own decisions.⁵¹ But it has to be emphasised that this is the view of merely one component of power in this country, which goes beyond what is stated in the Constitution.

This case-law of supreme courts has also found its reflection in written law, specifically in Section 13 of the Civil Code. However, the rule contained therein – and one can entirely agree with *Lavický* in this regard – represents a mere procedural

⁴⁸ It stated that “[i]n disputable cases, the Constitutional Court shall provide interpretation of constitutional laws enacted by the Federal Assembly. The conditions shall be laid down in a law enacted by the Federal Assembly.”

⁴⁹ It has to be noted that the binding and precedential nature of judicial decisions is also often inferred on the basis of Art. 89 (2) of the Constitution and Section 82 (2) of Act No. 6/2002 Coll., on courts and judges. However, in both these cases, the legal provisions are read by the courts in a manner that goes well beyond the simple meaning of the text of the two provisions. See ŠIMÍČEK, V., FILIP, J., MOLEK, P., BAHÝŤOVÁ, L., PODHRÁZKÝ, M., SUCHÁNEK, R., VYHNÁNEK, L. *Ústava České republiky – Komentář. [Constitution of the Czech Republic – Commentary.]* Prague: Linde Praha, 2010. pp. 1286 and 1287.

⁵⁰ I.e. it provides the procedure in achieving the broadest possible consensus regarding the correct interpretation, but does not give the power to create a norm nor does it form the basis for the power to provide legal interpretation.

⁵¹ Unfortunately, in view of the scope of the present paper, it is not possible to provide a thorough analysis and a summary of all court decisions comprising this conclusion. I therefore refer to professional literature, especially commentaries. See LAVICKÝ, P. *Komentář k občanskému zákoníku: Předmět úpravy a její základní zásady (§ 13).* [Commentary on the Civil Code. Subject of Regulation and its Basic Principles (Section 13).] In LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část. (§ 1 až § 654). Komentář.* [Civil Code I. General Part. (Sections 1 to 654). Commentary.] Prague: C. H. Beck, 2014, p. 118 et seq.; further, MACKOVÁ, A. *Předmět úpravy a její základní zásady (§ 13).* [Subject of Regulation and its Basic Principles.] In ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek I. (§ 1 – 654).* [Civil Code. Commentary. Volume I. (Sections 1 to 654).] Prague: Wolters Kluwer, 2014. pp. 963–992, at p. 61 et seq.; and also MELZER, F., TÉGL, P. *Komentář k § 13 OZ.* [Commentary on Section 13 of the Civil Code.] In MELZER, F., TÉGL, P. et al. *Občanský zákoník – Velký komentář – Svazek I. § 1–117.* [Civil Code – Large Commentary – Volume I. Sections 1 to 117.] Prague: Leges, 2013. p. 227 et seq.

requirement, rather than a substantive rule.⁵² Consequently, according to this provision, earlier court decisions cannot be understood as forming one binding whole and one binding legal norm in the broader sense together with the law that they interpret and complement, but rather in that the conclusions contained therein affect the procedural duties of judges in the future. Consequently, if a judge resolves to approach a case involving identical facts in a different way than other courts in their earlier decisions, he/she must comply with procedural duties consisting in proper explanation of the reasons for his/her conclusions. Nothing more, nothing less.⁵³

Since Section 13 of the Civil Code comprises a simple procedural rule, rather than a substantive rule, this provision cannot be relied on to make a conclusion on a precedential nature of judicial decisions. The rationale behind the mentioned provision is different. It clearly aims to limit the influence of individual and subjective factors affecting qualification, interpretation and decision-making, including the aspects of “*pre-knowledge*” and “*pre-understanding*”.⁵⁴ It is also supposed to contribute to better awareness of the principles of procedural economy, economy and legal certainty. These principles would be binding on every judge even without this provision of the Civil Code. However, they were often not adhered to in the past.

Moreover, it is easier in practice to reflect earlier court decisions. By doing so, the court borrows someone else’s authority and simplifies its own work especially in terms of providing reasons for its decision – this is the substance of the aforesaid *persuasiveness*. The earlier judgement is thus not binding; it is a mere shortcut (or abbreviation). On a similar note, it is pleasant and effective for an attorney-at-law to adopt arguments and conclusions from earlier case-law than to arduously conceive own conclusions and arguments. It is then all the more valuable when someone can oppose such deep-rooted and comfortable manner of operation. These cases become medialised and the lawyers involved often eventually find their way into the supreme judiciary.

I have already pointed out that – in order to make good on the assertion that a judicial decision cannot be a precedent in our system – professional literature tends to speak about a certain factual form of binding effect of judicial decisions. However, if drawn *ad absurdum*, such a binding effect could also be inferred

⁵² LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část. (§ 1 až § 654). Komentář.* [Civil Code I. General Part. (Sections 1 to 654). Commentary.] Prague: C. H. Beck, 2014, p. 115.

⁵³ Similarly, the manner of resolving variances in the case-law of our courts through the work of grand chambers of the Supreme Court’s divisions and the extended chamber of the Supreme Administrative Court also has procedural nature. Cf., in this regard, KÜHN, Z. O velkých senátech a judikatorních odklonech vysokých soudů. [On Large Chambers and Deviations in Case-law of Supreme courts.] *Právní rozhledy*, 2013, no. 2, p. 39 et seq.

⁵⁴ On both these notions, see ŠKOP, M. ... *právo, jazyk a příběh. [... the Law, Language and Story.]* Prague: Auditorium, 2013, p. 73

from Section 13 of the Civil Code in the case of decisions made by foreign courts which are applied in our legal environment.

This is so because, in respect of certain provisions of the Civil Code, the legislature in no way denied that inspiration had been taken from foreign legal environments. It is then only logical from this point of view that it was not the legislature's intention to adopt the simple text of foreign legal norms without reflecting on the meaning attributed to them in practice of the given country. Quite naturally, the legislature thus had to adopt both the law formed by the legislature, as embodied in the text of the given legal norm, and also the “judge's law”, formed by judicial work. Indeed, the opposite would be an expression of the condemned and obsolete simple view of the law.⁵⁵

If we acknowledge that judges complement the law by filling the gaps and also the thesis on a *certain form* of a binding effect of case-law filling these gaps, we then necessarily have to conclude that Czech courts also have to reflect on foreign case-law insofar as it relates to legal norms taken from abroad. This will be true at least with regard to those rules where the legislature admitted in the explanatory memorandum that it had found inspiration in foreign laws. Simply because it relates to such an adopted provision, such case-law has to be *persuasive and worthy of following* with regard to the common origin. However, I am not sure whether this conclusion is one that our courts would like to hear. I sincerely doubt that they would be able to systematically monitor and evaluate case-law of German, Austrian, Canadian and other courts.⁵⁶ That, in my opinion, should primarily be the task of jurisprudence.⁵⁷

By the way, the above-described approach is not foreign to courts in the Anglo-American environment; to the contrary, it is considered a matter of course.⁵⁸

⁵⁵ KÜHN, Z. K otázce závaznosti rozhodnutí Evropského soudu pro lidská práva pro domácí soudnictví. [On the Binding Effect of Decisions of the European Court of Human Rights for Domestic Judiciary.] *Právní rozhledy*, 2005, no. 1, p. 1 et seq.

⁵⁶ It should be noted that the Czech highest courts manage this and often do so as can be demonstrated on their decisions adopted in the area I am familiar with. For example the Czech Constitutional Court in its judgment on the Lisbon Treaty had no problem identifying the case-law of its German counterpart as “interesting” and inspiring for its own decisions. See Constitutional Court decision of November 26th, 2008, file no. Pl. ÚS 19/08, paragraph 60 and paragraphs 116–118 or the admission to the German Federal Constitutional Court doctrine in the decision of the Constitutional Court of January 31st, 2012, file no. Pl. ÚS 5/12, in the case of the so-called “Czechoslovak pensions”.

⁵⁷ As a matter of fact, where persuasiveness is mentioned in this paper, according to *Posner*, the opinions of jurisprudence should, under normal circumstances, have a greater persuasive effect than the courts' conclusions, even if the courts were to agree on them across the individual instances. He sees the reason in the scientific methods of work. POSNER, A., Richard. *The Jurisprudence of Skepticism. Michigan Law Review*. 1988, vol. 86, p. 841.

⁵⁸ ROUDIK, P. The Impact of Foreign Law on Domestic Judgments. [online]. [retrieved on 2019-05-03]. Available at <https://www.loc.gov/law/help/domestic-judgment/impact-of-foreign-law.pdf>

At the same time, the influence of court decisions originating from some other legal order is perceptible both among federal states⁵⁹ and with regard to foreign rulings.⁶⁰ This is precisely the influence which is classified by American authors not in the category of “*certain binding effect*”, as is true in this country in similar cases, but rather in the category of “*persuasiveness*”. However, this will always be easier for these courts because of the common language they share – they understand one another. Moreover, they mostly rely on a single legal tradition.

I personally again consider the existence of the Constitution and the way the power is separated in this country to be the strongest arguments against such interpretation of Section 13 of the Civil Code, as well as of any other norm in the Czech legal order that would be invoked in an attempt to infer a precedential effect of judicial decisions. The legislature, as the creator of norms, is subject to direct political control by the people. On the other hand, the judicial branch quite naturally lacks any such accountability. Any control by the people, as well as by other branches of power, is strongly limited. Consequently, if we admitted the possibility of any law-making activity by the courts, this would ultimately mean that law-making, and thus also decision-making on political issues, would be entrusted to a branch that is under very limited control and that is not directly accountable to the people for its acts. We would thus be in the process of forming an elite in our environment that does not operate in line with the principles of representative democracy.

What is therefore the role of earlier decisions (case-law) in the Czech legal environment?

Primarily, it is manifested in the mutual relationships among various court instances. It is claimed that a decision of a lower court may later be cancelled or changed if it is at variance with decisions of a court of higher instance.⁶¹ While this may be true, it need not occur if the case is later dealt with by a chamber of a superior court with a different approach to the matter. In view of how the courts operate in the Czech Republic, this certainly is not unlikely, but the risk has been lower following the legislative changes made after 2000.⁶²

⁵⁹ MCGREGOR, D. B., ADAMS, C. J. *The International Lawyer's Guide to Legal Analysis and Communication in the United States*. Aspen Publishers, 2008, p. 17.

⁶⁰ This issue is extensively empirically dealt with by MAK, E. *Judicial Decision-Making in a Globalised World. A Comparative Analysis of the Changing Practices of Western Highest Courts*. Hart Publishing, 2013.

⁶¹ However, all the above is conditional on filing a remedy. While this can be expected, it is neither automatic nor certain.

⁶² KÜHN, Z. *Judikatura a precedent v kontinentálním a angloamerickém právu*. [Case-law and Precedent in Civil-Law and Anglo-American Legal Systems.], in ŠÁMAL, P., RAIMONDI, G., LENAERTS, K. *Závaznost soudních rozhodnutí - vnitrostátní a mezinárodní názhledy*. [Binding Effect of Judicial Decisions – National and International Views.] Prague: Wolters Kluwer, 2018.

Furthermore, case-law manifests itself at the procedural level. If a judicial decision is identical with previous decisions, reference to such a decision may serve as an abbreviation (or shortcut). The court thus relieves itself of the duty to provide a detailed explanation of the reasons for its decision if they are obvious from previous case-law. If a new decision differs from previous judgements, the judge is required to properly explain the reasons that led him/her to make the decision and to deal with arguments put forth in earlier case-law.⁶³ In that case, neither earlier case-law nor any part of its contents is binding as the binding effect is attached to general legal principles that the judge must follow in procedural terms.

In this approach, the nature of case-law of Czech courts is, in my opinion, similar to the nature of judgements rendered by German and French courts. Judicial decisions are thus not a source of law and the only effect they can have on other courts is informal and persuading. The authority of case-law is thus not connected with its form and thus official, but rather follows from its contents and persuasiveness.⁶⁴ In this concept, the courts and judges are independent and mutually equal both at one and the same instance and among individual instances.

4. On the nature of rulings of the Court of Justice of the EU – a normative point of view

An important proviso has to be made in the introduction to this part. The nature of a court decision is often conceived in general, regardless of whether the decision is made under national or other law. But the characteristics attached to court judgements under Czech law cannot be automatically transposed to decisions adopted in some other system of law. Moreover, when several legal systems are approached simultaneously, one has to deal with the issue of their mutual relationships, which also needs to be reflected in evaluation of any potential effect of a court decision across these systems.

European Union law has an autonomous position in relation to Czech law. It has its own sources of law and, at the same time, the potential for its interpretation by Czech courts is limited. Indeed, self-interpretation of the founding treaties and the law issued by the Member States on their basis was limited by the TEU and TFEU, and the task of their binding interpretation was entrusted to the Court of Justice of the EU.

⁶³ Or proceed pursuant to Section 20 of the Courts and Judges Act, i.e. refer the case for a decision to the Grand Chamber of the Supreme Court. However, the substance (absence) of powers in the area of law-making and provision of legal interpretation remains unchanged.

⁶⁴ Cf. KISCHEL, U. *Rechtsvergleichung*, C. H. Beck, 2015. p. 265.

In the very founding treaties, and specifically in Article 19 of the Treaty on the Functioning of the European Union, the Member States granted this institution an exclusive position in interpretation of European Union law. Týč infers that this exclusivity consists in the power to determine which line of interpretation is correct and thus binding on the other bodies of the European Union and the Member States.⁶⁵ The Court of Justice has had this competence from the very beginning of its existence.⁶⁶ In this regard, the position of the Court of Justice fundamentally differs from the powers vested in Czech courts.

However, it cannot be inferred from this specific position of the Court of Justice of the EU that it also has a law-making power. Quite to the contrary, the founding treaties did not entrust any such power to this authority. The Member States are therefore the exclusive law-makers in terms of primary law, and the Union itself in the case of secondary law. Even unwritten general legal principles are not created by the Court of Justice; the Court merely determines such principles.⁶⁷ As a matter of fact, even the concept of a preliminary ruling procedure as such gives the Court of Justice – subject to possible assessment of the validity of secondary law – exclusively interpretative, rather than law-making, power.⁶⁸

Thus, if we apply the terms defined above to rulings of the Court of Justice, we can conclude that although they are not a source of law (precedent), they contain elements which are generally binding – in the domain of interpretation of law. Nonetheless, the professional public sometimes claims that decisions of the Court of Justice do have a precedential nature. The most common reasons stated in this regard as summarised by *Kaczorowska* include, in particular:

- exceptionality of deviations by the Court of Justice from its previous case-law;⁶⁹ and thus

⁶⁵ TÝČ, V. *Základy práva Evropské unie pro ekonomy. [Basics of EU Law for Economists.]* 7th edition. Prague: Leges, s.r.o., 2017, p. 108.

⁶⁶ Article 31 of the Treaty establishing the European Coal and Steel Community, Article 136 of the Treaty establishing the European Atomic Energy Community, and Article 164 of the Treaty establishing the European Economic Community, as well as Article I-29 of the Treaty establishing the Constitution for Europe, and the current wording of Article 19 of the Treaty on the European Union have materially identical wording and have not undergone any change over time that could affect the concept and role of the Court of Justice of the European Union in interpretation of EU law.

⁶⁷ It often uses the induction method when it infers the existence and contents of principles from national laws and international law.

⁶⁸ Nonetheless, some Czech authors approach the problem in factual terms. E.g. Komárek thus considers rulings of the Court of Justice to be a source of law. KOMÁREK, J. Federal elements in the Community judicial system: Building coherence in the Community legal order. *Common Market Law Review*, 2005, vol. 42, č. 1, pp. 15 et seq. See also STEHLÍK, V. Účinky rozhodnutí Evropského soudního dvora v řízení o předběžné otázce. *Právní obzor*, 2005, vol. 88, no. 4, pp. 312–334.

⁶⁹ the Court of Justice *de facto* respects the principle of *stare decisis*.

- stability of case-law, related to the motivation of the Court of Justice not to impair its own authority;
- coherence, stability and consistency of opinions expressed in its decisions;
- the principle of legal certainty and predictability of judicial decision-making;
- the conclusions inferred in relation to Art. 267 (3) TFEU and exemption from the duty of a last-instance court to initiate a preliminary ruling procedure in cases of *acte éclairé*;
- systematic references to previous decisions;⁷⁰

However, *Kaczorowska* unambiguously rules out at the same time that decisions of the Court of Justice could be a source of law. We can agree with this assertion as it is based on what is (and what is not) enshrined in the founding treaties. This actually is also implied by the Court of Justice itself. However, further specification is required for conclusions concerning the precedential or binding character judgements rendered by this institution.

In my opinion, all the reasons mentioned above merely describe the actual state of affairs. They characterise how the Court of Justice decides its cases but say nothing about how it should make decisions in relation to its previous decisions. They are a simple expression of the general legal principles identified above. Indeed, in our European legal environment, these principles necessarily form a part of any legal order, and thus also of European Union law, which was created on the basis of national laws.

A ruling rendered by the Court of Justice can thus factually influence the General Court in the same way as judgements of higher instances affect subordinate courts in the Czech Republic. But the situation is different with regard to courts of the Member States. There can naturally be no talk about any instances. However, based on the principle of sincere co-operation, the courts of Member States are obliged to comply with European Union law. They are thus required to apply it correctly and thus, pursuant to Article 19 of the EU Treaty, as interpreted by the Court of Justice.

Pítrová states in this respect that sources of European Union law include indirectly, as interpretation of specifically defined sources of EU law, also case-law of the Court of Justice,⁷¹ from which one can infer that interpretation provided by the Court of Justice is binding. She states in fact that the Court of Justice complements the law as it fills gaps (also called loopholes) in its activity.⁷² But

⁷⁰ See KACZOROWSKA-IRELAND, A. *European Union Law*. 4th edition. Routledge, 2016. p. 150.

⁷¹ SYLLOVÁ, J., PÍTROVÁ, L., PALDUSOVÁ, H *et al.* *Lisabonská smlouva. Komentář.* [The Lisbon Treaty. Commentary.] 1st edition. Prague: C. H. Beck, 2010, p. 11.

⁷² The problem with gaps and interpretation by courts has already been pointed out and, therefore, this notion is used as an abbreviation.

such an activity, and it is irrelevant at this point how we will approach and denote it in terms of legal terminology, is basically pursued by any court in some form, including national courts. But the substance lies elsewhere.

If European Union law is an enclosed system, within which the Court of Justice was entrusted with interpretation by Article 19 of the Treaty on the European Union, and Article 267 of the Treaty on the European Union created an internal mechanism for unifying interpretation, the decisions of the Court of Justice cannot be treated in the same way as decisions of courts in a single Member State. The purpose of the mentioned provisions is to secure compliance with EU law as a supranational system of law and to ensure its uniform interpretation. It can therefore be concluded that national courts do not enjoy full freedom to interpret EU law, as they have to respect it as a whole, i.e. not only in the form in which it is formally captured, but also as interpreted through internal mechanisms.⁷³

The aforementioned duty can be inferred from the general duty of sincere co-operation as laid down in Art. 4 (3) of the Treaty on the Functioning of the European Union.⁷⁴ National courts, as bodies of the State, have the duty of sincere co-operation, which can also be construed in that they are also bound, pursuant to Art. 4 (3) of the Treaty on the Functioning of the European Union, by loyalty to the Court of Justice and the manner in which EU law is interpreted.

In my opinion, the difference compared to other methods of interpretation provided by other international courts, such as the European Court of Human Rights, lies in the fact that they often lack a provision analogous to Article 19 of the EU Treaty and also provisions excluding self-interpretation.

The situation is further complicated by two problems. They both stem from the Court of Justice itself. First, the Court of Justice often goes beyond the limits of interpretation in the sense that it suggests to national courts not only how the EU rule in question should be interpreted, but also how it should be applied, or even how national law should be interpreted or whether it is in accordance with

⁷³ However, *Malenovský* points out an interesting fact. In systematic terms, the competence to decide on preliminary questions can be found, in *Malenovský's* words, “at the very end of the list of its powers, next to the competence to resolve disputes on compensation for damage and employee disputes”. The latter, *Malenovský* notes, are now decided by the General Court, rather than directly by the Court of Justice. According to *Malenovský*, this indicates that the original concept of the preliminary ruling procedure and thus also of the role of the Court of Justice in interpretation of European Union law was to be merely complementary. See *Malenovský*, J. Triptych zobrazování Soudního dvora ES: arbitr, “motor integrace” nebo “velký manipulátor”? [The Triptych of Depicting the Court of Justice of the EC: an Arbitrator, “Driving Force of Integration” or “Great Manipulator”?] *Právník: Teoretický časopis pro otázky státu a práva*, 2007, no. 10, p. 1068.

⁷⁴ STREINZ, R. *Europarecht*. 10th edition. 2016. C.F. Müller. p. 249.

EU law.⁷⁵ But the Court of Justice lacks power to do any of that. Consequently, the relevant part of the judicial decision is *obiter dictum* and is not binding on anyone, i.e. not even on the court that made the reference for a preliminary ruling.

Second, the Court of Justice is forced to work with law that is, at least at the level of primary law, general and full of gaps.⁷⁶ This fact enables it to creatively fill this space in the legislation. There are many examples, and let me therefore mention only the best known and most striking – Van Gend en Loos,⁷⁷ Costa,⁷⁸ Gravier,⁷⁹ Chernobyl,⁸⁰ Francovich,⁸¹ Mangold,⁸² Metock⁸³ and others. These rulings are characterised by purpose-driven interpretation, *effet utile* arguments, and weak or methodologically problematic reasoning of both the decision itself and the power to make the decision.⁸⁴ By virtue of those decisions, the Court of Justice created and promoted the policy of ever closer integration.⁸⁵ This, however, was done at the cost of often only a limited respect for the wording of the founding treaties.⁸⁶

⁷⁵ In *Miret*, e.g., the Court of Justice stated: “*It would appear from the order for reference that the national provisions cannot be interpreted in a way which conforms with the directive on the insolvency of employers and therefore do not permit higher management staff to obtain the benefit of the guarantees for which it provides. If that is the case, it follows from the Francovich judgment, cited above, that the Member State concerned is obliged to make good the loss and damage sustained as a result of the failure to implement the directive in their respect.*” See judgement of the Court of Justice (Fifth Chamber) of 16 December 1993 in Teodoro Wagner Miret v Fondo de garantía salarial (Case C-334/92), paragraph 21.

⁷⁶ TÝČ, V., SEHNÁLEK, D., CHARVÁT, R. *Vybrané otázky působení práva EU ve sféře českého právního řádu*. [Selected Questions of the Influence of EU Law in the Czech Legal Order.] 1st edition. Brno: Muni PRESS, 2011, p. 156.

⁷⁷ Judgement of the Court of Justice of 5 February 1963 in NV Algemene Transport – en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen (Case 26/62).

⁷⁸ Judgement of the Court of Justice of 15 July 1964 in Flaminio Costa v E.N.E.L. (Case 6/64).

⁷⁹ Judgement of the Court of Justice of 13 February 1985 in Françoise Gravier v Ville de Liège (Case 293/83).

⁸⁰ Judgement of the Court of Justice of 4 October 1991 in European Parliament v. Council of the European Communities (Case C-70/88).

⁸¹ Judgement of the Court of Justice of 19 November 1991 in Andrea Francovich and Danila Bonifaci and others v Italian Republic (Joined Cases C-6/90 and C-9/90).

⁸² Judgement of the Court of Justice (Grand Chamber) of 22 November 2005 in Werner Mangold v Rüdiger Helm (Case C-144/04).

⁸³ Judgement of the Court of Justice (Grand Chamber) of 25 July 2008 in Blaise Baheten Metock and others v Minister for Justice, Equality and Law Reform (Case C-127/08).

⁸⁴ Cf. STREINZ, R. *Europarecht*. 10th edition. 2016. C.F. Müller. p. 228.

⁸⁵ In the case-law of the Court of Justice of the EU, the above is manifested in the form of an argument by “*an ever closer union among the nations of Europe*”, which can be seen as an expression of the legislature’s intention and which could also be approached more abstractly as one of possible arguments in teleological interpretation (*argumentum ad Unionis Europaeae*)

⁸⁶ TÝČ, V., SEHNÁLEK, D., CHARVÁT, R. *Vybrané otázky působení práva EU ve sféře českého právního řádu*. [Selected Questions of the Influence of EU Law in the Czech Legal Order.] 1st

As a matter of fact, all these cases could have been decided in a different way. All these decisions, with the exception of the one in the Chernobyl case, could have ended by merely stating that the issue in question is not addressed by European Union law and thus does not fall within its framework. This would not mean an absence of law, but merely that the relevant problems would be assessed according to the rules of national law.

Legal literature legitimately and frequently criticises this creative activity of the Court of Justice.⁸⁷ At the same time, however, this case-law creates a tension between the Court of Justice and national courts. Indeed, the latter are well aware of the scope of power on the part of the Court of Justice. Nonetheless, there is a clear tendency on the part of national courts to follow and comply with decisions of the Court of Justice of the EU, even where the case at hand appears to be problematic in terms of theory of law.⁸⁸

Šadl points out a remarkable aspect in the functioning of the Court of Justice.⁸⁹ Indeed, it is strange how it treats its previous decisions in new rulings. The Court of Justice regularly refers highly assertively and self-confidently to

edition. Brno: Muni PRESS, 2011, p. 153.

⁸⁷ Quite well known is Lord Denning's statement: „*The Treaty is quite unlike any of the enactments to which we have become accustomed. The draftsmen of our statutes have striven themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them. They have sacrificed style and simplicity. They have foregone brevity. They have become long and involved...In consequence, the judges have followed suit. How different is this Treaty. It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty, there are gaps and lacunae. These have to be filled in by the judges, or by regulations and directives. It is the European way.*“ Cited from SHARPSTON, E. *The Shock Troops Arrive in Force: Horizontal Direct Effect of a Treaty Provision and Temporal Limitation of Judgments Join the Armoury of EC Law*. In: MADURO, M. P.; AZOULAI, L. *The Past and Future of EU Law. The Classics of EU law Revisited on the 50th Anniversary of the Rome Treaty*. Oxford: Hart Publishing, 2010, p. 257.

⁸⁸ The Court of Justice thus a high authority and its decisions are therefore very persuasive. Týč notes that this authority was not explicitly vested in the Court of Justice by the founding treaties, but was rather gradually built by the Court. *Ibid.*, p. 167. Malenovský describes this development in similar terms. See MALENOVSKÝ, J. *Triptych zobrazování Soudního dvora ES: arbitr, „motor integrace“ nebo „velký manipulátor“?* [The Triptych of Depicting the Court of Justice of the EC: an Arbitrator, “Driving Force of Integration” or “Great Manipulator”?] *Právník*, 2007, no. 10, pp. 1065–1084.

⁸⁹ ŠADL, U. *Case-Law: Ruiz Zambrano as an Illustration of How the Court of Justice of the European Union Constructs Its Legal Arguments*. *European Constitutional Law Review*, vol. 9, no. 2, 2013. Differences between the EU legal system and common law with regard to the concept precedent see also STEHLÍK, V. *Řízení o předběžné otázce v komunitárním právu*. Olomouc: Univerzita Palackého v Olomouci, 2006, pp. 140–141.

its own case-law (its previous judgements) without addressing, however, what *common law* courts do absolutely regularly and as a matter of course.⁹⁰ Therefore, judgements of the Court of Justice lack any detailed analysis of facts in relation to the rule on the basis of which the decision was made. In principle, it merely constantly repeats its general conclusions⁹¹ until it creates the impression of a law – a precedent.

In order to avoid confrontation with the rulings of the Court of Justice, some courts deal with cases on a factual basis. They have created a doctrine based on which they do not rule on the case itself (*in rem*) and are therefore not required to refer preliminary questions to the Court of Justice. The Czech Constitutional Court is one of these courts.

Such an approach is not particularly brave and is primarily needless. As mentioned above, rulings of the Court of Justice are not a source of law and their binding effect is limited only to those parts which provide interpretation of EU law. This gives national courts some space for their own assessment of the disputed matters in relation to the facts of the case and the legislation concerned. It should be noted that this space is not too broad and the Court of Justice has gradually begun to guard it, which strikingly resembles the efforts to achieve a unity of interpretation on the part of domestic supreme courts.⁹² What is important in this regard is that the Court of Justice enforces its ideas on the basis of Art. 267 (3) of the Treaty on the Functioning of the European Union.⁹³ Consequently, the infringement does not lie in the fact that a national court has interpreted EU law incorrectly and at variance with previous case-law of the Court of Justice, but rather in the fact that it has failed to initiate a preliminary ruling procedure. And here, in my opinion, lies a substantial difference as regards the possible concept of rulings of the Court of Justice as a source of law or as a source of single correct interpretation of the law. Indeed, the procedure of the Court of Justice implies that not even this court ultimately conceives its case-law in this way.

In view of the above, I do not consider the decisions rendered by the Czech Constitutional Court in the case of Czechoslovak pensions⁹⁴ and by the Danish court in *Ajos* wrong, as a matter of principle. Similarly, I do not consider it incorrect that, in its ruling⁹⁵ responding to the decision of the Court of Justice

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Judgement of the Court of Justice (Fifth Chamber) of 4 October 2018 in *European Commission v French Republic* (Case C-416/17).

⁹³ And in infringement proceedings pursued against a state.

⁹⁴ Judgement of the plenum of 31 January 2012, File No. Pl. ÚS 5/12 in the case of “Czechoslovak pensions”.

⁹⁵ Judgement of the Danish Supreme Court in Case 15/2014 of 6 December 2016.

in *Ajos*,⁹⁶ the Danish Supreme Court assessed the situation differently than would follow from the decision of the Court of Justice.⁹⁷ Indeed, it managed to avoid the requirements of the Court of Justice by relying on the Danish accession legislation, which lacks any explicit legal basis for a transfer of power enabling the Court of Justice to order a Danish court, with a direct effect for individuals, not to apply Danish legislation that is in contradiction with unwritten general legal principles of the European Union.⁹⁸ But it would already be a mistake, in my opinion, if the national court itself interpreted a specific European Union norm in a different way, at variance with an earlier decision of the Court of Justice.⁹⁹

Consequently, the decision of the Czech Constitutional Court is problematic not in that the court expressed its own legal opinion regarding the given facts, even if I disagree with it, but primarily in that it did not itself initiate a preliminary ruling procedure.¹⁰⁰ As a matter of fact, the Danish court very elegantly avoided the above binding nature of interpretation of EU law provided by the Court of Justice and did so in a much better way than its Czech counterpart. It interpreted its own national law and a treaty concluded on its basis. Nevertheless, the Dutch court might have erred in that it probably should have continued in the judicial dialogue with the Court of Justice and referred to it a second preliminary question.

However, the question is different. It is not about the binding effect of case-law of the Court of Justice or its precedential character. The question stands whether or not the two national courts should nevertheless have continued in, or rather established, a judicial dialogue with the Court of Justice by virtue of making a preliminary reference – the second in the case of Denmark and the first

⁹⁶ Judgement of the Court of Justice (Grand Chamber) of 19 April 2016 in *Dansk Industri (DI), agissant pour Ajos A/S v Sucession Karsten Eigil Rasmussen* (Case C-441/14).

⁹⁷ The ruling of the Court of Justice called for a change in the previously settled case-law of the Supreme Court of Denmark.

⁹⁸ See the ruling of the Danish Constitutional Court in Case 15/2014 of 6 December 2016 (English translation), p. 12, available at <http://www.supremecourt.dk>.

⁹⁹ The Danish court's approach is also supported by the scientific literature. For example, *Schilling* concludes, that a distinction should be drawn between the formal and material powers of the Court of Justice to interpret the law Of the European Union with the view that the role of the Court of Justice of the EU is only advisory in matters of competence and the strength of its argument lies not in the binding effect of its decisions but in their persuasiveness. This is a somewhat controversial argument as it is based on national constitutional law as well as on international public law and there is no support for it in written law of the European Union. The regulation of the preliminary ruling procedure in Article 267 of the TFEU does not make any such distinction. See SCHILLING, T. *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*. *Harvard International Law Journal*, 1996, no. 37.

¹⁰⁰ Another error lay in an attempt to use a non-existent institute of *amici curiae*.

in the case of the Czech court. It is also a question what these courts actually achieved by their quarrelsome decisions.

5. Conclusion

The basic conclusions intertwine the entire text, which is already too long anyway. Nonetheless, each of the questions addressed here could be analysed in more detail, but that would go beyond the scope of the present paper. Its aim is to point out that the nature of judicial decisions, as systematically presented in Czech case-law and professional literature, lacks a corresponding basis in the legislation and may be owing to the time when the case-law was developed. Condemning a conservative approach to it as something that is already obsolete, socialist and simplifying¹⁰¹ ultimately itself represents a simplifying view of the world. An ideology drawn from the Anglo-American environment is not the only possible way to approach the problem under scrutiny. Inspiration can also be found in the German and French doctrines, which are much closer to us and our legal system. Although this might not be clear at first sight, European Union law also originates from this very environment. We should thus also perceive rulings of the Court of Justice from this angle. Nonetheless, I am aware of the force of a self-fulfilling prophecy. And the thesis on a binding effect of case-law and its precedential nature is already deeply rooted in Czech jurisprudence.

Equating the nature of Czech judicial decisions and those of the Court of Justice is also problematic. Indeed, there are fundamental differences between them which relate to the powers vested in these courts and the law that these courts work with. Unlike Czech courts, the Court of Justice is authorised to provide legal interpretation of EU law on the basis of Article 19 of the EU Treaty; the existence of a binding effect of such interpretation is also supported by purpose-driven interpretation of Article 267 of the Treaty on the Functioning of the European Union, and finally, the binding effect of the Court of Justice's interpretation is confirmed, in relation to both said articles, by the duty of sincere co-operation as laid down in Article 4 of the Treaty on the EU, which binds both the Member States in general and their courts.

¹⁰¹ See KÜHN, Z. K otázce závaznosti rozhodnutí Evropského soudu pro lidská práva pro domácí soudnictví. *Právní rozhledy*. 2005, no. 1, pp. 1 et seq.

List of references

- BRENNCKE, M. *Judicial Law-Making in English and German Courts: Techniques and Limits of Statutory Interpretation*. Cambridge, 2018.
- CANOR, I. Primus inter pares. Who is the ultimate guardian of fundamental rights In: Europe? *European Law Review*, 2000, no. 25.
- HLOUCH, L. *Teorie mezer a současné právní myšlení*. [Theory of Gaps and Contemporary Legal Thinking.] *Časopis pro právní vědu a praxi*. 2013, no. 2.
- ISTREFI, K. The Application of Article 103 of the United Nations Charter in the European Courts: The Quest for Regime Compatibility on Fundamental Rights. *European Journal of Legal Studies*, Winter 2012, vol. 5, no. 2. [online]. Available at: https://ejls.eui.eu/wp-content/uploads/sites/32/pdfs/Autumn_Winter2012_2013/UNITED_NATIONS_CHARTER_IN_THE_EUROPEAN_COURTS_%20THE_APPLICATION_OF_ARTICLE_103_OF_THE_.pdf
- KACZOROWSKA-IRELAND, A. *European Union Law*. Routledge: 2016.
- KISCHEL, U. *Rechtsvergleichung*, C. H. Beck, 2015.
- KOMAREK, J. Reasoning with Previous Decisions: Beyond the Doctrine of Precedent. *American Journal of Comparative Law*, 2013, no. 1.
- KÜHN, Z. Judikatura a precedent v kontinentálním a angloamerickém právu. [Case-law and Precedent in Civil-Law and Anglo-American Legal Systems.], in ŠÁMAL, P.; RAIMONDI, G.; LENAERTS, K. *Závaznost soudních rozhodnutí – vnitrostátní a mezinárodní náhledy*. [Binding Effect of Judicial Decisions – National and International Views.] Prague: Wolters Kluwer, 2018.
- KÜHN, Z. K otázce závaznosti rozhodnutí Evropského soudu pro lidská práva pro domácí soudnictví. [The binding nature of the European Court of Justice ‘s decision for human rights for domestic justice]. *Právní rozhledy*, 2005, no 1.
- KÜHN, Z. Nová koncepce normativity judikatury obecného soudnictví na pozadí rozhodnutí Ústavního soudu. [New Conception of Normativity of Case-law of Common Courts Against the Backdrop of Rulings of the Constitutional Court.] *Právní rozhledy*, 2001, no. 6.
- KÜHN, Z. O velkých senátech a judikatorních odklonech vysokých soudů. [On Large Chambers and Deviations in Case-law of Supreme courts.] *Právní rozhledy*, 2013, no. 2.
- LAVICKÝ, P. Komentář k občanskému zákoníku: Předmět úpravy a její základní zásady (§ 13). [Commentary on the Civil Code. Subject of Regulation and its Basic Principles (Section 13).] In LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část. (§ 1 až § 654). Komentář*. [Civil Code I. General Part. (Sections 1 to 654). Commentary.] Prague: C. H. Beck, 2014.
- MACKOVÁ, A. Předmět úpravy a její základní zásady (§ 13). [Subject of Regulation and its Basic Principles.] In ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek I. (§ 1–654)*. [Civil Code. Commentary. Volume I. (Sections 1 to 654.)] Prague: Wolters Kluwer, 2014.
- MAK, E. *Judicial Decision-Making in a Globalised World. A Comparative Analysis of the Changing Practices of Western Highest Courts*. Hart Publishing, 2013.
- MALENOVSKÝ, J. Triptych zobrazování Soudního dvora ES: arbitr, “motor integrace” nebo “velký manipulátor”? [The Triptych of Depicting the Court of Justice of the EC: an

- Arbitrator, “Driving Force of Integration” or “Great Manipulator”?] *Právník: Teoretický časopis pro otázky státu a práva*, 2007. No. 10.
- McGREGOR, D. B., ADAMS, C. M. *The International Lawyer’s Guide to Legal Analysis and Communication in the United States*. Aspen Publishers, 2008.
- MELZER, F., TÉGL, P. Komentář k § 13 OZ. [Commentary on Section 13 of the Civil Code.] In MELZER, F., TÉGL, P. et al. *Občanský zákoník – Velký komentář – Svazek I. § 1–117. [Civil Code – Large Commentary – Volume I. Sections 1 to 117.]* Prague: Leges, 2013.
- POUND, R., DAWSON, J. The French Bifurcation. In: LASSER, M. de S.-O.-l’E. *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy*. Oxford: Oxford University Press, 2009.
- POSNER, A., R. The Jurisprudence of Skepticism. *Michigan Law Review*. 1988, vol. 86.
- ROUDIK, P. The Impact of Foreign Law on Domestic Judgments. [online]. Available at <https://www.loc.gov/law/help/domestic-judgment/impact-of-foreign-law.pdf>.
- SHARPSTON, E. The Shock Troops Arrive in Force: Horizontal Direct Effect of a Treaty Provision and Temporal Limitation of Judgments Join the Armoury of EC Law. In: MADURO, M. P. a L. AZOULAI. *The Past and Future of EU Law. The Classics of EU law Revisited on the 50th Anniversary of the Rome Treaty*. Oxford: Hart Publishing, 2010.
- SCHILLING, T. The Autonomy of the Community Legal Order: An Analysis of Possible Foundations. *Harvard International Law Journal*, 1996, č. 37
- SMEJKALOVÁ, T. K otázce normativity judikatury v České republice. [On the Question of Normativity of Case-Law in the Czech Republic.] In *Dny práva – 2008 – Days of Law*. Brno: Masaryk University, 2008.
- SOBEK, T. *Argumenty teorie práva. [Arguments of Theory of Law.]* Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2008.
- SYLLOVÁ, J., PÍTROVÁ, L., PALDUSOVÁ, H. et al. *Lisabonská smlouva. Komentář.* [The Lisbon Treaty. Commentary.] 1st edition. Prague: C. H. Beck, 2010.
- ŠADL, U. Case-Law: Ruiz Zambrano as an Illustration of How the Court of Justice of the European Union Constructs Its Legal Arguments. *European Constitutional Law Review*, vol. 9, no. 2.
- STEHLÍK, V. Účinky rozhodnutí Evropského soudního dvora v řízení o předběžné otázce. *Právní obzor*, 2005, vol. 88, no. 4.
- STEHLÍK, V. *Řízení o předběžné otázce v komunitárním právu*. Olomouc: Univerzita Palackého v Olomouci, 2006.
- ŠIMÍČEK, V., FILIP, J., MOLEK, P., BAHÝLOVÁ, L., PODHRÁZKÝ, M., SUCHÁNEK, R., VYHNÁNEK, L. *Ústava České republiky – Komentář.* [Constitution of the Czech Republic – Commentary.] Prague: Linde Praha, 2010.
- ŠKOP, M. ... *právo, jazyk a příběh.* [... the Law, Language and Story.] Prague: Auditorium, 2013.
- ŠKOP, M. Interpretace práva jako literární interpretace. [Interpretation of the Law as Literary Interpretation.] In DÁVID, R., SEHNÁLEK, D., VALDHANS, J. (eds.) *Dny práva – 2010 – Days of Law*. Brno: Masaryk University, 2010.
- ŠRŮTKOVÁ, Jitka. Závaznost rozhodnutí Ústavního soudu z pohledu doktríny a judikatury. [Binding Effects of Rulings of the Constitutional Court in Terms of Doctrine and Case-law.] *Časopis pro právní vědu a praxi*, 2009, No. 4.

TÝČ, V., SEHNÁLEK, D., CHARVÁT, R. *Vybrané otázky působení práva EU ve sféře českého právního řádu.* [Selected Questions of the Influence of EU Law in the Czech Legal Order.] 1st edition. Brno: Muni PRESS, 2011.

TÝČ, V. *Základy práva Evropské unie pro ekonomy.* [Basics of EU Law for Economists.] 7th edition. Prague: Leges, s.r.o., 2017.