Finding Case Law on a European Scale - Current Practice and Future Work

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Abstract: There is a growing awareness that the national judge plays a vital role in the European legal system, as is illustrated by the emergence of various initiatives for the cross-border access of national (EU-related) case law. Because these and various national systems all use their own identifiers, findability and citability are seriously hampered. This paper assesses current developments and tries to define a solution for remaining problems. A European Case Law Identifier and a central index are fundamental elements in this solution.

1. Introduction

The last decades we witnessed a vast europeanisation of the law. Apart from the judicial proceedings of the Union itself, European law is also directly applicable within the Member States, making it part of the national legal domain. Awareness of the specific and important role of the national judge in applying European law has been growing slowly, in spite of specific projects in some Member States.[1]

The national judge has to be aware of the jurisprudence of the European Court of Justice (ECJ), but also of issues raised by other Member States' courts in the preliminary reference procedure (article 234 EC Treaty), in order to prevent raising the same issue twice. But European law being an integral of national law, knowledge of case law of other Member States is also important to decide whether a specific question is an 'acte clair'.[2]

The growing importance of national judiciaries for the application of Community law was recently stressed in the resolution of the European Parliament of 9 July 2008 *on the role of the national judge in the European judicial system*.[3] The resolution states that this role *"requires not only knowledge of European law, but also mutual general knowledge of the legal systems of the other Member States."* It then stresses the importance of the *"availability of national databases on national court rulings concerning Community law; considers that these databases should be as complete and user-friendly as possible"*, and declares *"that all national judges should have access to databases containing pending references for preliminary rulings from all Member States; considers it equally useful for judgments of referring courts applying a preliminary ruling to be further publicised."*

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[2] The acte clair theory means that a legal question does not have to be submitted to the ECJ if over the interpretation or validity of Community law reasonably no doubts can exist.

[3] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=
-//EP//TEXT+TA+P6-TA-2008-0352+0+DOC+XML+V0//EN

This resolution confirms and explicitly reinforces recent efforts to improve the European-wide access to national case law. These efforts face a number of problems, like differences in legal culture, multilinguality, availability of sources, semantic interoperability of metadata, methods of citation and findability of cited decisions.

This paper will focus on the last two aspects: how can judicial decisions within the EU Member States be identified in such a way that they can be found easily, regardless of their actual place of storage. To exemplify the problem § 2 gives an overview of various initiatives for cross-border access of national case law. § 3 deals with some theoretical issues on case law identifiers and formulates the requirements. § 4 assesses whether current interoperability initiatives meet these requirements. § 5 outlines a description of future work and § 6 contains some concluding remarks.

2. Assessing Current Initiatives

This section gives an overview of some recently developed systems which are intended to disseminate national case law of EU Member States to users in other countries.

The *Common Portal of National Case Law*[4] of the Network of the Presidents of the Supreme Judicial Courts of the European Union doesn't have its own repository, but offers a metasearch engine which performs simultaneous searches of almost all case law databases of the supreme courts of the EU. Using the Eurovoc-thesaurus[5] the user-query can be translated into the languages of each of the chosen databases. In the public access version the records found can only be accessed in the original language; users having a login code are also offered machine translations in various language pairs. No metadata search is possible, and although more than one hundred thousand records can be searched, a serious limitation lies in the fact that only cases of the supreme courts are searched, while in many countries also other highest courts are competent on issues related to Community law.

Being a metasearch engine the Common Portal assigns no identifiers of its own; it just uses the identifiers supplied by the connected repositories.

The commercial – although supported with EU-grants[6] – initiative Caselex[7], gathers via a network of national correspondents case law from EU and EFTA Member States which are deemed relevant for the interpretation of Community law. The search interface is very comprehensive; extensive metadata are supplied and decisions are summarized in English. For the moment[8] Caselex contains 1987 decisions; some countries are very well represented (Germany 332, France 271), while other countries don't have any decisions in the database at all (i.a. Belgium, Slovakia and Slovenia).

Caselex developed its own identifier, e.g. CASELEX:NL:2008:10, the first part being the name of the identifier ('Caselex'), the second the EU-countrycode[9], the third

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[4] http://www.reseau-presidents.eu/rpcsjue

[5] http://europa.eu/eurovoc/

[6] ftp://ftp.cordis.europa.eu/pub/econtent/docs/grants_expenditure_2004.pdf

[7] www.caselex.com

[8] This and other counts have been performed in july 2008.

[9] http://publications.europa.eu/code/pdf/370000en.htm, with 'EU' added for the courts of the European Union and 'EF' for the EFTA-court.

the year of the decision, and finally an ordinal number (related to country and year). National identifiers are also displayed and can be searched for.

The *Dec.Nat*-datbase[10] of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union contains ± 19,200 national decisions regarding Community law. The references and the legal analyses of the decisions have been supplied by the Research and Documentation Service of the ECJ. Search possibilities and metadata (mostly in French) are quite extensive. The usability is questionable though: despite extensive metadata on relevant legislation the actual dictum is often unclear, summaries are lacking and there are no links to original texts.

The Association is also responsible for *Jurifast*[11], which contains preliminary questions submitted to the ECJ, the Courts' answers, and the subsequent national decision(s). Although Jurifast contains much less decisions than Dec.Nat – at the moment 479 – usability is considerably better.

Both Dec.Nat (e.g. 'NL.20060127/03') and Jurifast (e.g. 'UK02000031') have their own identifiers, consisting of a country code, year of decision and an ordinal number, but these are only used in the URL and not explicitly presented to the user.

The EU Agency for Fundamental Rights (FRA) has a database[12] of national decisions of courts and special bodies related to issues of discrimination law. All cases are summarized in French, English and German, and have a rich set of metadata. Although the search interface is very comprehensive, the database itself only contains 170 cases.

FRA assigns its own (opaque) identifiers (e.g. '135/1'). National identifiers are displayed in the 'title' or in the 'subtitle', but can not be searched for.

The JUrisdiction Recognition Enforcement database (JURE)[13] was developed by the European Commission. It contains 1732 cases of the ECJ and the Member States' courts on the interpretation of Council Regulation (EC) no 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil Commercial Matters, and on the interpretation of the 1968 Brussels Convention and the 1988 Lugano Convention. Apart from the decisions in the original language, the database offers summaries in English, French, German and the original language. Metadata are extensive, and so is the search form.

JURE assigns its own (opaque) identifiers (e.g. '38621'), which can be used to search for, but are not displayed in the result page. It is also possible to search for national reference numbers (case or docket numbers) and publication references.

Not related to the EU, but to the Council of Europe, the European Commission for Democracy through Law (also known as Venice Commission) maintains an extensive database on constitutional case law: CODICES.[14] The database has a strong European focus (4883 European cases on a total of 5645). The metadata and the search interface are comprehensive.

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[10] http://www.juradmin.eu/en/jurisprudence/jurisprudence_en.lasso

[11] http://www.juradmin.eu/en/jurisprudence/jurifast/jurifast_en.php

[12] http://raxen.fra.europa.eu/1/webmill.php

[13] http://ec.europa.eu/civiljustice/jure/index.htm

[14] http://www.codices.coe.int

CODICES constructed its own identifier, e.g. 'NED-1998-3-022', consisting of the IOC country code, year of decision, an indicator for the printed copy of the Bulletin on Constitutional Case-Law, and finally an ordinal number. In the result list also the national (case or citation) number is shown, in conjuction with the CODICES-identifier.

Also to be mentioned here are the Legal Information Institutes, which are a typical phenomenon of the common law countries and therefore – with the exception of BAILII[15] (UK and Ireland) – not very well known within Europe. The term 'Legal Information Institute' (LII) refers *"to a provider of legal information that is independent of government, and provides free access on a non-profit basis to multiple sources of essential legal information, including both legislation and caselaw (…) They are therefore, in essence, aggregators of public legal information at a national or sometimes regional level."* [2, p5] At the moment twelve LIIs are active, co-operating within WorldLII[16], which was launched in 2001. Most LIIs have been very active in the development of 'Neutral Case Citations', to be discussed in § 4.1.

Apart from these sytems many others exist. They range from broad commercial aggregators like V|Lex[17], to niche systems like Oxford Reports on International Law[18] and the Legal Tools database of the International Criminal Court.[19]

3. Identifiers

3.1. Two Examples by Way of Introduction

How to cite a decision found in one of these described databases? The case with the 'attributes-triple' (court, date of decision, case number) *ECJ, 14-10-2004, Case C-299/02* could be cited as:

- European Court reports 2004, Page I-09761 (the authentic version)
- Celex-number: 62002J0299
- LJN AR7319 (LJN being the Dutch neutral case law identifier [3])
- CASELEX:EU:2004:8
- BAILII: [2004] EUECJ C-299/02
- NJ 2005, 421 ('NJ' being a Dutch law review)
- V|Lex: VLEX-17284540

It might be clear that citing this case from the database where it is found in such a way that it can be found by somebody using a completely different repository, isn't the easiest task.

Another example can be taken from Dec.Nat. A remark under the decision of Tribunal da Relação de Lisboa, 20-05-2004, 2320/04-8[20] reads: *"See also IH/04896-A"*. One can suppose – though not even be sure – that it's a judgment being referred to, but from which country? Which database to search? Google isn't of much help here...

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[15] www.bailii.org

[16] www.worldlii.org

[17] http://vlex.com

[18] http://ildc.oxfordlawreports.com/

[19] http://www.icc-cpi.int/legaltools/

[20] http://www.juradmin.eu/en/jurisprudence/jurisprudence_en.lasso?page=detail&doc=P..20040520/01

3.2. Theoretical Framework for Levels of Abstraction

Before taking stock of fundamental problems and assessing solutions, defining some terms is necessary. The term 'decision' (which is equal here to 'judgment') can relate to different levels of abstraction. These ontological levels are well defined in the Functional Requirements for Bibliographic Records (FRBR) of the IFLA [4] which are elaborated in the latest CEN/Metalex-proposal [5] [6, p. 46]. This paper uses the terms 'work' (*"a distinct intellectual or artistic creation"*), 'expression' (*"the intellectual or artistic realization of a work"*), 'manifestation' (*"the physical embodiment of an expression of a work"*) and 'item' (*"a single exemplar of a manifestation"*) accordingly, and also uses the definitions for 'identifier' (number of the bibliographic object itself) and 'citation' (the referral to a bibliographic object) as described by CEN/Metalex.

3.3. The Trouble with Traditional Concepts

[3] and [7] have dealt with some problems concerning traditional ways of citing case law. To assess some solutions it might be clarifying to reformulate these issues using the above mentioned ontological levels.

1. Case law identifiers are traditionally expression oriented. Previously, cases are cited by way of the identifier given by a law review, e.g. "NJ 2008, 200" – the expression identifier being vendor-specific. Lacking a subscription on the Dutch law review *Nederlandse Jurisprudentie*, one is hampered to find the case anywhere else, even if one follows editorial guidelines [8] which prescribe adding court and date.

2. Expression identifiers are often manifestation-oriented. Although most law reviews can be found on line nowadays, many of them point at the paper manifestion. The citation '*BVerfG NJW 2003, 3111 ff*' points to page 3111 ff of the German *Neue Juristische Wochenschrift* of 2003. In a digital environment it is problematic to work with identifiers which are based on a concept – the page number – which only exists in a paper environment. The problem is worsened if two cases are printed on the same page [3, § 4.2.1].

3. Work identifiers are absent or unusable. The attributes-triple can be perceived as being sufficiently unique to identify the work. Generally, in conjunction with an expression identifier at least one attribute is left out (the case number), depriving the triple of its identifying capabilities. Moreover, case numbers are often re-written by editors. Lacking a well-defined syntax the attribute-triple is hardly usable in an electronic environment.

4. No inheritance of identifiers to lower ontological levels. An identifier on expression level should also incorporate the work identifier, and from the manifestation the expression must be deductable [5]. Because such an inheritance is absent, it is necessary to state both work and expression level identifiers.

5. Opaqueness of identifier on the expression level. Traditional expression identifiers are often opaque. [7] 'NJ 2008, 200' says nothing about the court rendering the judgment or the date of decision (only about the year of publication). Therefore editorial guidelines [8] prescribe adding court and date of decision: to assess whether it is necessary to look for the cited case, a legal practitioner needs to know these two data.

6. Lacking an international standard. Because of the absence of an international or European standard on the syntax of case law identifiers, every system tends to develop its own identifier, thus adding to the problem.

3.4. Requirements for a Useful European Identifier

Having discussed current practice, it should be possible to deduct the requirements for a European case law identifier.
1. There has to be a (court designated) identifier at the work level.
2. Identifiability: case law identifiers are used in everyday legal writings. Therefore, a legal practitioner has to be able to recognize the identifier as such.
3. Meaning: apart from the identifier one shouldn't need any other data to assess the importance of the citation. So, country, court and year should be part of the identifier.
4. Error-proof
    a) Codes for courts are preferable to full names;
    b) The use of characters which are not common to lawyers should be avoided and preferably not more than one type of non-alphanumeric character is used;
    c) The shorter the better – information which is not necessary for identifying should not be included, but left to the metadata (e.g. the type of procedure);
5. Compliance with international standards or EU-practice (European country codes preferable to ISO 3166-1).
6. Extensibility; it should at least be possible to attach an identifier for a specific part (paragraph) of the decision.
7. For acceptance of the identifier it shouldn't be necessary to replace already existing national identifiers at the work level.

4. Assessing Recent Developments

4.1. The Medium and Vendor Neutral Citation Numbers / LIIs

Most judicial websites introduced their own numbering system, which was sometimes just used to cite the case, like any other reference. Especially within common law countries courts themselves and LIIs advocated the use of a 'medium and vendor neutral citation number', *"but where the Courts themselves add the citation to their decisions the expression 'Court-designated' is preferable as it indicates that it involves the Courts taking control of how their cases are cited."* [2, § 3.4.3] At the moment all LIIs use such neutral citations, which – for reasons of definition – will be called 'neutral identifiers' here. With some variants, the neutral identifier looks like this: [name of case], [year of decision*] [abbreviation for the name of the court*] [ordinal number*] where the parts indicated with * are mandatory. So, a Canadian neutral identifier of the Court of Appeal of Alberta can read: **Lewandoski v. Lewandoski, 2008 ABCA 11**
On the website of the Canadian Legal Information Institute we can find the item: http://www.canlii.org/en/ab/abca/doc/2008/2008abca11/2008abca11.html.We can also find the case on the website of the court itself, at the URL: http://www2.albertacourts.ab.ca/jdb/2003-\ca\civil\2008\2008abca0011.cor1.pdf

Although (nearly) all ontological levels inheret part of their identifier from higher levels, there are some flaws to be seen:
- the syntax of the work identifier within the item identifier is not the same everwhere ('2008abca11' versus '2008abca0011');
- corrections ('cor1') are not dealt with the same way at all expressions;
- the item-identifier (the full URL, especially the one from the court itself) contains information that is nearly impossible to be known by outsiders. So, constructing the hyperlink from just the work identifier is nearly impossible.

Knowing the neutral identifier one can search for expressions of the work in other databases than those of the LIIs – although these other databases sometimes strip the neutral identifier. But we have to search every database seperately to find expressions of the work, other than those on the LIIs – a cooperation with commercial publishers seems far away. Therefore legal practitioners still have to cite both work identifier and commercial expression identifiers – as is prescribed by offical instructions, e.g. [9].

4.2. Indexes with Identifiers on Work and Expression Levels

The problem of not knowing where to find (other) expressions, given the work or an expression identifier, is solved in the Netherlands by building a publicly accessible register with the URIs on work level, the attributes-triples and (nearly) all known expression identifiers [3]. Citing the work identifier manually (e.g. 'LJN AB1234') or electronically (e.g. 'http://www.ljn.nl/AB1234') suffices, but because of the opaqueness of the identifier there is a tendency to add court and date to the citation.

A public-private standardisation forum[21] provided for the adoption of this work identifier in commercial law reviews. [10] However, there is hardly any inheritance between the identifiers on work and lower levels. The anonimized expression in the HTML-manifestation can be constructed to the item level on the website of the judiciary (http://www.rechtspraak.nl/ljn.asp?ljn=AB1234), but other expressions do not have the work identifier included.

Another type of index can be found at the EUR-Lex database. Like any other EU legal document, all decisions of the ECJ have a so-called Celex-number, which can be regarded as an identifier on the work level. Whether because it was never propagated as such, because it looks to complex, or because the year of decision is not included in the code (only the year of registration), the Celex-number never had a breakthrough as the public identifier for EU-documents – although it is very stable in its syntax, meaningful and short [11].

The URI-system on the EUR-Lex website is very well thought-out:
1. Identifiers inherit from the higher ontological levels: language versions have a suffix with the European language code[22] (e.g. 'IT');
2. manifestations have a code added (e.g. 'HTML');
3. for the item level finally a URL is constructed[23] : http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0299:IT:HTML
4. There is also a page with a bibliographic notice, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0299:EN:NOT.

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[21] http://www.juriconnect.nl

[22] See footnote 9

[23] A complete overview of EUR-Lex' URI and URL construction can be found at http://eur-lex.europa.eu/en/tools/help_syntax.htm

This page contains relevant metadata, and a complete overview of all (language) expressions and (file format) manifestations known in the system.

Adding to this: on this last cited page one also finds – under the heading 'Doctrine'– an overview of expressions outside the EUR-Lex system, albeit only expressions with a substantial doctrinal value.

4.3. CEN/Metalex

The CEN/Metalex-initiative aims to offer an open XML interchange format for legal and legislative resources. Although case law is in principle included, the present draft [5] is focussed on legislation. Still though, one could assess its concepts for case law.

For identifying bibliographic entities CEN/Metalex uses mURIs ('meta URIs'), which take – in the form relative to the top level – for the work this syntax: country code / type of work / date (or year) of release / issue number. For case law the type of work should be the issuer, i.e. the name of the court. The 'issue number' should be the non-year and non-court part of the court designated identifier.

Although theoretically more well-founded and broader in scope, the identifier looks very much like that of the LIIs. Using the aforementioned example a CEN/Metalex-identifier for the work could look like: /EU/ECJ/2004/C299-02.

For the expression CEN/Metalex extends the work mURI with: / language code / date version (being '@' and a date). Both for national case law having a cross-border relevance, and for decisions which have more authentic language versions, the language could also be important. The date though is generally not relevant. Although revisions exist (see e.g. § 4.1 above), the date of the revision is not important enough to represent it in the identifier.

5. Future work

5.1. Identifier

The work identifiers of the LIIs and CEN/Metalex offer a good direction. CEN/Metalex offers one single standard, while the LIIs have some variations in syntax.

Some issues though remain:
1. Both the LII-solution and CEN/Metalex have no possibility to express specific editorial variants in the expression identifier. A paragraph of law is a paragraph of law, and – if of the same expression – it is the same text everywhere, at least it is supposed to be. A judicial decision though is not. At the expression level we have e.g.:
   a) the full text as handed out to the parties in the dispute;
   b) the version as disseminated to the public: in full, but rendered anonymous;
   c) the version in law journal X, where non-relevant objections are omitted, but relevant grounds from the decision in the first instance are added;
   d) the version in law journal Y, which is only an editorial summary of the operative part of the judgment.

In some cases it is relevant to be able to refer to a specific edition, especially in an electronic environment. Being one-expression oriented the LIIs don't offer a solution for this, but being an open interchange format CEN/Metalex should offer a way to include this editorial variant in the expression-identifier.

2. While laws and regulations are cited with their full name, cases are cited by the attributes-triple and/or some expression identifier. For human readability a work identifier has to be recognizable as such.
3. While the number of sites for legislation are quite limited, this is different for case law: it can be republished a hundred times in a hundred different ways. Findability is therefore a problem. The LIIs ignore this problem; they only identify cases which are within the LII-sphere, common law lawyers cite cases by all their expressions. Within the cited context of the national decisions relating to EU-law this is a serious problem. How does a Latvian judge know where to find all expressions of an Italian case, even if it has a well-constructed work identifier?

Because the number of editorial expressions is quite infinite, it is difficult to build parsers to reckon with all of them. Having one unified identifier to be used by all those who publish or use case law offers a more feasible solution.

For reasons stated above, this identifier has to be human-readable and recognizable. Naming it – as a working title – European Case Law Identifier (ECLI), it could be constructed as follows: *ECLI:[EU-countrycode]:[court code] :[year of decision]:[ordinal]* – staying close to the notation of the LIIs and CEN/Metalex. So, the decision of the Italian Corte Costituzionale 322/2008 has ECLI:IT:CC:2008:322, the Dutch Hoge Raad decision LJN BC8581 of 01-04-2008 has ECLI:NL:HR:2008:BC8581 and the Belgium Raad van State/Conseil d'État, 185.273 of 9 july 2008 has ECLI:BE:RSCE:2008:185273.

With a parser this number can easily be transformed from, an into a CEN/Metalex identifier or (for UK and Ireland) BAILII identifier. It should be stressed explicitly that the ECLI is not intended to replace other (national) identifiers, it is just a prerequisite for cross-border accessibility of national case law. On the other hand, for countries looking for a good solution of numbering case law on a national level, it could very well be used at the national level also.

5.2. Index

Even if all publishers of case law should use the ECLI, that wouldn't suffice to solve the problem of the legal practitioner. Being confronted with the citation ECLI:ES:TS:2008:5104, one wants to know where to find a summarized, translated or the original version. Quoting all known editorial expressions is not very useful, because the information might be outdated tomorrow.

So, an index is needed with (just) the ECLI and the availability of editorial expressions. This index has to be filled by the editors themselves, regardless of whether they offer access free of charge or subscription-based. So, e.g. LawReviewX communicates – via a webservice – the availability of ECLI:DE:BVG:2006:426 to the central index. The index knows the resolver of LawReviewX and constructs, after a request via a user interface (or webservice), a page (or message) showing the deeplinks:

We found these versions of decision ECLI:DE:BVG:2006:426
• Site of <u>Law Review X</u> – subscription-based.
• Site of <u>BundesVerfassungsGericht</u> – free access

In a simple form the costs of such a register could be limited, because the editors themselves provide the information. When the problem of digital access rights have to

be addressed too, a protocol like OpenURL[24] also has to be implemented. This would require a more thorough coordination on European scale.

6. Concluding Remarks

There is a political demand for an improved cross-border accessibility of national case law. Because of different needs in specific fields of law and different users groups, and because of political and technological complexity, it is impracticable to build a central database. That wouldn't even be desirable because existing solutions already show a variety of audiences, metadata, interfaces and content. Instead, it is better to facilitate the interchangeability of – at least – identifiers. Making use of the national identifier, a European identifier on the work level is constructed. On top of realizing the ECLI a central index keeps track of the availability of all decisions in public and private databases, with their ECLI and editorial expression and language expressions. Hyperlinks to a case can all point to the central index, giving users an always actual view of existing expressions of the decision.

Because of the specific responsibility of the EU – as expressed by e.g. the EP-resolution – the initiative for introducing ECLI and index is with the EU. Preferably, such an initiative should be broader than ECLI; providing a European-wide metadata schema, could improve case law search possibilities to a great extend.

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[11] EUR-Lex Advanced Search, http://eur-lex.europa.eu/fr/tools/help_advanced.pdf

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[24] ANSI/NISO Z39.88 http://www.niso.org/kst/reports/standards?step=2&gid=&project_key= d5320409c5160be4697dc04661 3f71b9a773cd9e