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Introduction to EU Law Stories

Contextual and Critical Histories in European Jurisprudence

BILL DAVIES AND FERNANDA NICOLA

In 2014, the Court of Justice of the European Union (CJEU) began shipping more than 270 boxes of official documents with restricted access to the public to Villa Salviati, home of the Historical Archives of the European Union at the European University Institute (EUI) in Florence. At a grand opening ceremony in December 2015, the Court's President Koen Lenaerts welcomed scholars to conduct their research in the official archive for the very first time. This opening of the judicial archives was celebrated as the result of concerted efforts to overcome the fears of loss of confidentiality in a Court that, safely 'tucked away in the fairyland Duchy of Luxembourg',[1] has been thoroughly committed to maintaining the secrecy of its deliberations. In the careful balance between secrecy and transparency – or, as President Lenaerts put it, between 'the proper functioning of the judicial proceedings and openness' – the pendulum has now shifted towards the latter. In search of greater transparency in its legal reasoning, the Court has struggled to preserve general principles such as equality of arms and access to a fair trial while also enhancing its visibility to the general public.[2] Yet the symbolic opening of the judicial archives of the Court might not fully appease its critics because important documents such as the preliminary report of the *juge rapporteur* or the personal papers of the judges are not included in the public files in order to maintain the secrecy of judicial deliberations.

As observers of the debates over the balance between secrecy and transparency, we are interested in the context in which such debates take place, what

[1] Eric Stein, Lawyers, Judges and the Making of a Transnational Constitution, 75 Am. J. Int'l. L. 1 (1981).

[2] See Case C-199/11 European Union v Otis N.V. and others (2012) ECR I- 0000 (holding that the right of access to a tribunal and the equality of arms principle are safeguarded by the system of judicial review of the Commission).

developments helped to locate them, and how EU legal scholars shape them. Since 2008, the EU has been hit by simultaneous crises that have shaken the foundations of the integration project more than any other time in its sixty-year history. Faced with significant problems in financial and democratic governance, extreme recalcitrance in certain Member States, the imbalance and change caused by the growing dominance of individual Member States, and the largest flow of migrants across European borders since World War II, scholars of EU law have developed new awareness of the significance of the legal regime they study. On the one hand, in the face of the political and economic maelstrom, EU law is recognized as a powerful, pervasive, uniform and binding force across European borders. The public and politicians alike have used this as a crucial rallying point for debates in the United Kingdom about whether it should leave or remain in the EU. Given this growing recognition of the impact of EU law on the lives of European citizens, scholarship on EU law has moved beyond simple doctrinal analyses, relevant only for practitioners and judges, to a more nuanced retelling of the cases that have shaped this system within their contextual framework. This more mature approach in scholarship is slowly beginning to match the growing maturity of the legal system. On the other hand, given the existential nature of the crises facing the EU, there is also awareness that despite its strength, EU law might not be enough to 'save the day'. EU lawyers and scholars, as a result, have also become less self-assured. This change in legal consciousness has prompted more grounded, deeper research into how EU law came to be and how it is rooted in the developments of a European society emerging as a result of both the integration of the Member States and also of private and public interest lawyering spurred by judges, scholars, lawyers and other non-legal interlocutors of the Court.

The cover of this book originates from a sketch that was amongst the papers transferred to the EUI Historical Archives by the Court. It depicts one of the very first designs for the European judges' robes, that crucial part of the judicial armoury that separates the adjudicator from the mere mortals in the courtroom and displaying the intimate connection between justice, law and morality.[3] We selected this particular drawing for the cover of this volume because it very much encapsulates the essence of a relatively young Court committed at the same time to build its jurisprudence and its aesthetic. The focus of EU law stories is in as much the outcome of the law as its construction, its symbolism, its synthetic creation and its design. The Court of Justice is

[3] See Ronald Dworkin, Justice in Robes (2008).

a unique institution, sitting in a precarious and powerful position as the leading court of an often fractious European Union. How the semantic, jurisprudential and doctrinal principles that the Court has helped to create came to be warrants and deserves our full attention.

This collective volume is a first step in this direction, combining an appeal for scholars with a utility for students of EU law. We brought together lawyers, historians and political scientists to engage in an interdisciplinary analysis of well-known or enigmatic EU law cases. *EU Law Stories* collects 'thick' descriptions, critical narratives and contextual histories engaging with the major and minor personalities involved behind the scenes of each case. Our collaborative research departs from the notion that the history of EU law should be narrated linearly and incrementally. We instead show that EU law evolves in a contingent manner in response to efforts by private and public interest lawyers, social movements, leading personalities or jurists working behind the scenes. If the volume demonstrates that the effects of EU judge-made law remain relatively indeterminate and that each case can be retold through different contextual narratives, by the same token it shows the commitment of the European legal elites to the experience of legal reasoning and the construction of a European legal consciousness.[4] *EU Law Stories* shows that European legal consciousness shares the belief that the constitutionalization of EU law that included broader competences and fundamental rights happened through *bricolage* rather than in a linear manner, reaffirming persistent gaps between the law in the books and the law in action, the indeterminacy and open texture of rights arguments and the reproduction of inequalities.[5]

The idea to cluster the stories around case law is in part a function of EU law as taught especially in the classic Anglo-American tradition through its evolving adjudication.[6] The focus on the decisions of the CJEU is also the product of the way in which European legal consciousness was consolidated: through the predominance of a judicial formant that could unite its legal

[4] See Duncan Kennedy, Legal Reasoning, Collected Essays (2008) (legal consciousness represents the shared legal ideas, intellectual constructs and judicial langue spoken by lawyers).

[5] See Duncan Kennedy, The Critique of Rights in Critical Legal Studies, in Brown and Halley, eds., Left Legalism/Left Critique (2002); Susan S. Silbey, After Legal Consciousness, 1 Annu. Rev. L. Soc. Sci. 323 (2005).

[6] See Damian Chalmers, Gareth Davies, & Giorgio Monti, European Union Law: Text and Materials (3rd ed. 2015); Paul Craig & Grainne De Burca, EU Law: Text, Cases, and Materials (6th ed. 2015); Roger Goebel, et al., Cases and Materials on European Union Law (4th ed. 2015).

elites.[7] Of course, there are endless arguments to be had that Case X should be included at the expense of Case Y, or that Case Z has been forgotten entirely. Our goal in this volume is not to be fully comprehensive, but instead to begin a focus in scholarship and teaching that looks beyond the black letter of EU law and unravels the lawyering techniques used to achieve different policy results. Not surprisingly, in the past sixty years, EU scholars have developed a solid canon of CJEU jurisprudence tracing its doctrinal evolution rather than the policy implications and the different lawyering techniques driven, for instance, by parallel importers rather than public interest lawyers. The existing canon plays a central role in the legal consciousness of EU-trained lawyers and their ability to deliver skilled lawyering for their clients.[8] Each chapter in our volume challenges the dominant story or creates nuances by retelling a story through a variety of legal and non-legal key 'interlocutors' who re-encounter their lawyering strategies and their policy goals through adjudication. EU law provides new lawyering tools for both institutional and private litigants to gain economic benefits or to achieve public interest and social justice goals. In mapping these different strategies we show that EU law not only creates incentives for litigation but, more interestingly, allows 'new voices and new constituencies' to develop critical lawyering strategies often overshadowed by canonical narratives of EU law.[9]

We have encouraged the authors of this volume to work as EU law 'detectives' and focus on what causes brought a case to the CJEU by analyzing the strategic forces at play and/or the impact litigation behind each case, as well as the results produced by the judgment. As these classical causal questions stem from a law and society approach, we asked our collaborators to pay close attention to legal and non-legal actors involved in developments leading up to each case. This *ex ante* approach is represented by a majority of chapters included in the volume. Yet, in line with the notion that law has its own relative autonomy from society, many of these EU judgments tend to have a life of their own in European legal reasoning, and among legal and judicial elites in certain Member States, and even outside the European borders. Therefore, even though cases like *Zhu*, *Gravier or Centros* stand for well-known EU law doctrines or reinforce a

[7] See Rodolfo Sacco, Legal Formant: A Dynamic Approach to Comparative Law, 39 Am. J. Comp. L. 1 (1991).

[8] See The Court of Justice and the Construction of Europe, The Past and Future of EU Law, La Cour de justice de L'Union Europeene sous la presidence de Vassilios Skouris [2003–2005] (Bruylant 2016).

[9] See Gordon Harrison & Sanford M. Jaffe, The Public Interest Law Firm: New Voices for New Constituencies (1982); Louise G. Trubek, Critical Lawyering: Towards a New Public Interest Practice, 1 B.U. Pub. Int. L.J. 49 (1991).

determinist narrative of greater or deeper Europeanization, their consequences for particular groups are very different from how standard narratives portray them. These *ex post* causal chapters such as *Melki*, *Centro Europa 7Srl* and the *Hungarian Judges* show how the impact of EU jurisprudence – despite its promises of equal treatment – might lead to consequences opposite from those intended and reproduce systemic inequalities.

Our main purpose in this volume is to shift the current dominant approach from the doctrinal, which emphasizes the necessary evolution of EU law by bracketing questions about the nature or correctness of legal rules, to a more historical and critical understanding of the dimensions along which EU legal consciousness has evolved.[10] We take an interdisciplinary approach to show how other dimensions of European integration, beyond the legal, historic, ideological and professional, have influenced the jurisprudence of the CJEU. In addition, the rich interdisciplinary and international backgrounds of our authors provide this volume with different methodologies ranging from archival work and interviews with litigants, judges, advocates generals, lawyers and *référendaires* to the analysis of transatlantic relations and political economies of integration. This rich interdisciplinary methodology allows us to track the different experiences in legal reasoning that constitute the langue and parole of European legal consciousness across a variety of legal doctrines such as corporate, constitutional, anti-discrimination and consumer law. Moreover, we asked our authors to write not only for scholarly peers but also for a student audience, since we argue strongly that a more contextual approach to the teaching of EU law to the next generation of scholars and practitioners is the crucial next step in consolidating the maturity of this field.

THE IMPETUS BEHIND EU LAW STORIES

At least three different inspirations deeply influenced us when we began articulating this project in 2013. A first influence was the existential crisis articulated in EU law scholarship; a second was the work by the new EU legal historians and their call for more contextual, historical and interdisciplinary research in EU law; and a final impetus came from our own teaching of EU law from the outside, which generated a feeling of self-estrangement towards a discipline that marked our own identity.[11]

[10] See Kennedy, Legal Reasoning, p.3.
[11] See David M. Trubek & Mark Galanter, Scholars in Self-Estrangement: Reflections on the Crisis in Law and Development Studies in the United States, 4 Wis. L. Rev. 1062 (1974).

In the aftermath of the EU financial crisis in 2008, many EU scholars began looking back; they focused on what went wrong in European integration, instead of on its successes. Scholars from different disciplines commonly articulated the existential crisis around the mission of EU law, its lack of a solid justice paradigm[12] and the fact that as a discipline, it received relatively little scholarly attention globally, particularly in the United States. In the past, comparative lawyers criticized European legal reasoning for being dogmatic,[13] compartmentalized[14] and formalist.[15] More recently, however, scholars exposed the malaise of EU law,[16] its misplaced global human rights ambitions[17] and its rise and fall in US legal academia as a by-product of transatlantic political and economic divergences.[18] In our view, however, a more fundamental problem is that EU legal scholarship tends to structurally disregard legal reasoning and methodologies from outside Europe. For example, while EU scholars do undertake comparative law analyses, these are mostly inward looking, with some exceptions addressing the mainstream areas within the US legal experience, such as law and economics in competition law[19] or federalism in constitutional law.[20] To engage in a global and interdisciplinary conversation, EU lawyers should be more receptive to influences outside the EU and the different methodologies common within other legal regimes, such as law and society, critical legal theory and post-colonial studies that remained relatively underdeveloped in

[12] See Europe's Justice Deficit (Gráinne de Búrca, Dimitry Kochenov & Andrew Williams, eds., 2014).

[13] Kristoffel Grechenig & Martin Gelter, The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism, 31 Hastings Int'l & Comp. L. Rev. 295 (2008).

[14] Mauro Cappelletti, John Henry Merryman, & Joseph M. Perillo, The Italian Legal System: An Introduction (1967).

[15] Christian Joerges & Florian Rödl, On De-Formalisation in European Politics and Formalism in European Jurisprudence in Response to the Social Deficit of the European Integration Project - Reflections after the Judgments of the ECJ in Viking and Laval EU Law, 4 HanseLR. (2008).

[16] Joseph H. H. Weiler, Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay, in Philosophical Foundations of European Union Law 157–58 (Julie Dickson & Pavlos Eleftheriadis eds., 2013).

[17] Gráinne de Búrca, The Road Not Taken: The EU as a Global Human Rights Actor, 105 A.J.I.L. 649 (2011).

[18] Daniela Caruso, European Union Law in U.S. Legal Academia, 20 Tul. J. Int'l & Comp. L. 175 (2011).

[19] EU Competition Law and Economics (*Damien Geradin*, Anne Layne-Farrar, & Nicolas Petit, eds. 2012).

[20] Miguel Poiares Maduro, We the Court: The European Court of Justice and the European Economic Constitution (1998).

EU law. In the aftermath of the EU's many crises (financial, institutional and democratic), we have been thinking how to teach EU law and its history as a way to take a step back and reflect on the *raison d'être* of the project of European integration.[21]

A second impetus behind *EU Law Stories* has been the work of the New Legal Historians that offers a different way to reflect, in an interdisciplinary manner, on what EU law scholarship has accomplished until now and how it has shaped our shared European legal culture. Among their attained goals, the New Legal Historians have demonstrated a commitment to better understand how legal change occurred in EU law through critical legal histories of understudied everyday practices. The aim is to offer new and multiple narratives to shed light on Europe's past with implications for its future.[22] The work of the legal historians has revealed a more fragmented, contested legal practice that has to be understood in the context of the continuous interchanges among Luxembourg, Brussels, the Member States' courts, their parliaments and their fragmented public opinions.[23] The work of the New Legal Historians does not emerge in a vacuum. They are in the company of other scholars who are offering textured accounts and narratives that often conflict with mainstream versions of European integration for a critical understanding of the EU's past and future. For instance, political scientist Kalypso Nicolaïdis departs from the stifling debate surrounding a pervasive democratic deficit in the EU, and instead moves in a new direction that involves imagining the EU as neither a state nor a federation, but as a 'demoicracy' that supports a union of citizens and states governing jointly.[24] More radically, Alexander Somek challenges the narrative of European citizenship as creating beneficial individual rights for EU citizens. Through a critique of rights, Somek shows the increasing alienation of the European bourgeois that has lost touch with its *citoyen* side still rooted in the home country.[25] Finally Antoine Vauchez foregrounds the social world in which Euro-lawyers practice legal and non-legal skills to solidify transnational

[21] See Gráinne De Burca, Europe's Raison D'Etre in The European Union's Shaping of the International Legal Order (Dimitry Kochenov & Fabian Amtenbrink eds., 2013).
[22] See Robert Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57, 112 (1984).
[23] The first monograph in this area is by Bill Davies, Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949–1979 (2012). This has been accompanied by special issues of historical and legal journals, including *Journal of European Integration History*, Vol 14 (2), 2008, *Contemporary European History*, Vol 21 (3), August 2012 and *American University International Law Review*, Vol 28 (5).
[24] See Kalypso Nicholaïdis, European Demoicracy and Its Crisis, 51 Journal of Common Market Studies 351 (2013).
[25] See Alexander Somek, Accidental Cosmopolitanism, 3 Transnational Legal Theory 371 (2012).

networks of legal entrepreneurs committed to promote the rule of law in Europe.[26]

A third impetus behind *EU Law Stories* began by feeling self-estranged, though not for the first time,[27] from the process of European integration when looking back at what we did and how we participated directly or indirectly in setting the canon of EU law as scholars and teachers of this discipline. As scholars committed to teach and write on EU law and its history from outside the United States, we realized that our American students needed more context to grasp the many layers that are part of European jurisprudence. We thought that the best way to offer more contextual background for how judges and lawyers make conscious choices about legal doctrines was to offer the multiple stories behind the case law. Inspired by the *Law Stories* volumes, commonly used in US law schools to complement doctrinal courses, we decided that EU law needed more of those stories, especially when taught outside its context. *Law Stories* aims to fill a gap between "monotonous" case reports and accounts of the vivid, colourful and complex motivations of the actors behind them. As David Luban explains, the '[s]tories come naturally to us, because human beings are born storytellers and story-hearers. We experience our own lives as stories unfolding through time, stories radiating out from ourselves and encompassing the people around us. We make sense of human events as complex narratives weaving together the separate stories of all their actors."[28] Influenced by socio-legal studies, this approach pervades the teaching of US doctrinal courses in a way that was never exported to the teaching of EU law. In contrast, the dominant EU law paradigms have been shaped across the Atlantic by either the Eric Stein–Joseph H. Weiler approach, which puts 'constitutionalisation' at the centre of European legal evolution, or the Andrew Moravcsik–Lisa Conant approach, which we call historical and empirical liberal intergovernmentalism, where political scientists dominate legal narratives. Neither of these two strains deployed sociological jurisprudence or a law-in-context approach to show the relevance of European jurisprudence and its historical and cultural context in the creation and consolidation of a European legal consciousness. While a growing number of EU law scholars are committed to map the ideologies and historical narratives that have formed

[26] See Antoine Vauchez, Brokering Europe: Euro-lawyers and the Making of a Transnational Polity (2015).

[27] See David M. Trubek & Marc Galanter, Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development in the United States, 1974 Wis. L. Rev. 1062 (1974).

[28] See David Luban, Introduction, in Legal Ethics Stories (Deborah L. Rhode & David Luban eds., 2005).

European legal consciousness,[29] we believe that *EU Law Stories* contributes to such an endeavour while closing the gap in the United States by offering a less formalist and more contextual narrative behind the evolution of European legal doctrines.

CONTEXTUAL AND CRITICAL APPROACHES IN EU LAW

The law in context approach is not new in EU legal scholarship, and it has long been the mission of the *European Law Journal* (ELJ) to explore EU law "in context." In a similar way, scholars like Mauro Cappelleti, Francis Synder, Gunther Teubner and Christian Joerges, who came to European Union law from different schools' jurisprudence, have contributed to spreading the socio-legal method in EU law. For many reasons that might have to do with distribution, style and idiosyncratic legal professional standards, we think that the sociological approach promoted by the ELJ has not fully penetrated US legal academia. In addition, law review articles and collections only offer glimpses of larger methodological projects. This edited volume is – we believe – a much needed contribution, especially for academics and students who are looking at EU law from the outside and who desire to better understand how European courts deliberate, how lawyers and other people contribute to the shaping of EU law and how in turn the legal reasoning of European jurists is influenced by societal and political elements. Even though the ELJ has produced wonderful symposia, we nonetheless believe that in this volume we can develop a more in-depth and nuanced approach aimed both at scholars and students.

At the turn of the twentieth century, French and German legal scholars as well as leading US jurists such as Felix Cohen and Roscoe Pound launched a critique to classical legal thought through the elaboration and development of a sociological jurisprudence.[30] Interestingly, sociological jurisprudence was both a common law *and* a civil law obsession that migrated to the United States later in time.[31] For instance, Rudolf Von Jhering's critique of individual sovereignty brought into question the coherence of legal reasoning, arguing that sovereignty was not a matter of deductive interpretation, but instead was

[29] See Lawyering Europe: European Law as a Transnational Social Field (Antoine Vauchez and Bruno de Witte, eds. 2011); Antoine Vauchez, Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity (2015).

[30] See Duncan Kennedy, The Globalizations of Law and Legal Thought, in The New Law and Development: A Critical Appraisal (David Trubek & Alvaro Santos eds., 2006).

[31] See Mathias W. Reimann, The Reception of Continental Ideas in the Common Law World, 1820–1920 (1993).

rooted in mechanical social causes that were moved by human ends.[32] In addition, French jurists such as Francois Gény, Eduard Lambert and Louis Josserand developed, as a reaction to the formalist thinking of the classical era, some of the canons of sociological jurisprudence.[33] According to these, law had a particular organic function such that there was no distinction between law and society; law was simply a reflection of social change according to a mirror theory of law and society.[34]

While sociological jurisprudence scholars are like "scientists" in that they conceive of law as responding to social forces, legal realists are "instrumentalists" in their approach to how law shapes behaviour with its own internal logic in conversation with political ideologies. In both cases, scholars agree that law is socially constructed, but their research questions lie on different premises. On the one hand, a scientist would question societal forces that are the main cause of legal change and that achieve common and organic goals for the society at large. On the other, an instrumentalist would question whether the internal logic of the law plays a strategic role in triggering legal change at the advantage of certain individuals rather than others. Many of the instrumentalist critiques of the scientists were developed on both sides of the Atlantic, starting, for example, with the Weberian disenchantment towards legal reasoning.[35] In the United States, the critique by Karl Llewellyn against Roscoe Pound's sociological jurisprudence challenged distinctions such as "is versus ought" or "facts versus ends"; rather, sociological jurisprudence tailored the best legal rules solution to a mere social purpose. Thus, no further attention was paid to how the legal rule should enjoy a certain level of abstraction to solve problems in different social contexts.[36]

The Law and Society movement arose as an extension of Legal Realism's effort to criticize the dominant internal point of view, which corresponded to

[32] See Rudolph von Jhering, The Struggle for Law (1879).

[33] See Marie Claire Bellau, Les juristes inquiets: Classicisme juridique et critique du droit au début du vingtième siècle en France, 40 Cahiers de Droit 507 (1999) (translation published in M. C. Belleau, The "Juristes Inquiets:" Legal Classicism and Criticism in Early Twentieth Century France, 2 Utah L. Rev. 379 (1997)).

[34] See William B. Edwald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43. Am. J. Comp. L. 489 (1995).

[35] Duncan Kennedy, The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought, in Max Weber's Economy and Society. A Critical Companion (Charles Camic, Philip S. Gorski & David M. Trubek, eds., 2005).

[36] See M.E.H. Hull, Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence (1997) (showing a similar divergence in American Legal thought and detailing the controversy between Roscoe Pound and Karl Llewellyn).