From Methodological Shifts to EU Law’s Embeddedness

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I Introduction: A Generational Shift

Mainstream legal scholarship on the European Community (EC) and the European Union (EU) has long been dominated by metanarratives and grand theories to explain European legal integration as a necessary, if not self-evident, process towards ever greater integration. The directional pull of these functional narratives, whether termed as Europeanization, federalization, or constitutionalization, is one towards an ever-closer EU, thereby replicating the original teleology of the 1957 Treaty of Rome. Although there are theoretical differences among these explanations, notably between intergovernmental and neo-functionalist narratives, most scholars agree that one particular institutional actor has played an outsized role: the European Court of Justice (ECJ) established in 1952, renamed the Court of Justice of the EU (CJEU) since the ratification of the 2009 Lisbon Treaty, which includes the Court of Justice and the General Court, created in 1988. For precisely the same reasons, the CJEU has become a coveted object of inquiry for studies of European integration and governance. We have for years learnt about its role in constitutionalizing Europe, establishing the supremacy of European law, creating a system of supranational

1 See The Evolution of EU Law (Paul Craig & Gráinne de Burca eds., 2nd ed. 2011).
governance, and in spurring new types of litigation and mobilization before the ECJ.

At the same time some critical voices departed from the integration through law narrative, taking seriously what Robert Lecourt, one of the most influential presidents of the ECJ, had called ‘L’Europe des Juges’, that is the power that the judges sitting in Luxembourg had throughout the EC. In this sense, Hjalte Rasmussen’s historical and comparative analysis of the ECJ departed from the mainstream analysis to highlight its activism as an excess of judicial power ending with the politicization of the court for which judicial independence was hard to justify unless judges use ‘commensurate restraint’. The perils of European constitutionalism leading towards a heightened tension between law and politics were well known in political science, which emerged not only through Scandinavian or American legal realism but also through another avenue of inquiry into the ECJ jurisprudence. A jurisprudential path was undertaken by positivists and normativists scholars such as Neil McCormick engaging with Hartian and Dworkinian legal theory to justify judicial lawmaking in hard cases. In reality these critical,

7 See William Phean, Great Judgments of the European Court of Justice (2019).
constitutionalist, and legal pluralist lenses on the ECJ jurisprudence developed by a number of legal scholars rarely aimed at offering a new methodological and interdisciplinary perspective on how to collect data or engage systematically with the case law; rather, they aimed to better conceptualize, through the ECJ jurisprudence, the philosophical foundations of EU law.

More recently, a number of scholars have explored the effects of the CJEU on the construction of different EU policies pointing towards a more modest Europeanization, such as EU social policy, external relations laws, and anti-discrimination law. Some have focused on the new activist role undertaken by the CJEU during the global financial crisis, and more recently its immigration and rule-of-law crisis.

See José Luís Da Cruz Vilaça’s EU Law and Integration: Twenty Years of Judicial Application of EU Law (2015).


Philosophical Foundations of EU Law (Julie Dickson & Pavlos Eleftheriadis eds., 2012).


The European Court of Justice and External Relations Law – Constitutional Challenges (Marise Cremona & Anne Thies eds., 2014).


Kim Scheppele & Daniel Kelemen, Defending Democracy in EU Member States, in EU Law in Populist Times 413–56 (Francesca Bignami ed., 2020); Carlos Closa &
or its role and judicial style after Brexit. In short, rather than a new methodological turn, the focus on the CJEU jurisprudence by legal scholars due to its voluminous docket has become even more specialized and compartmentalized within specific legal subjects comprised in EU law.

One might be excused for thinking that the subject has been exhausted and there is little new insight to add to the role of the CJEU in European integration. That would, however, entirely miss the fact that a great deal of innovation has occurred in the field in recent years, notably at the level of methodology and empirical analysis. Over the past decade, a new body of empirical and interdisciplinary scholarship has emerged which provides new avenues for research into the CJEU and its case law. While the long dominant viewpoint of scholarship was law and political science, or a combination of both, the new research featured in this book has approached the CJEU from other disciplines, and interdisciplinarities among law, sociology, linguistics, and history and network analysis.

The first move came from sociologists, who embarked on an exploration of the legal professional context of European law, using a conceptual artillery derived from post-structuralist sociology and notably Pierre Bourdieu’s work. Truly enough, they were able to draw from a sustained socio-legal tradition which had developed empirical studies into the ‘legal community’ of EU lawyers as well as on specific figures at the court, such as the advocate general (and its partnership with référendaires). Interestingly, at the same time, some legal scholars addressed


28 Solanke, supra note 21.
EU law through a doctrinal, biographical, and sociological analyses of the advocate general as a key player of the court’s jurisprudence. By focusing on professional networks, sociologists have revealed how the work of Eurolawyers was a powerful engine for the integration and liberalization of the single market. Picking up on some of these insights, historians soon joined the bandwagon and provided further empirical exploration using new sources. The findings of the new legal historians have brought to the surface legal and political resistances to the constitutionalization project and narrative of the ECJ. The joining of forces of these two new camps of research has borne fruit, for example, in narrating the jurisprudence of the CJEU and, more generally, in reopening the question of how European jurisprudence is developed. These works have inspired a number of other methodological innovations and involve a growing number of scholars committed to finding new ways of understanding and exploring the CJEU and its jurisprudence from a bottom-up perspective. This new body of scholarship has not only challenged the


grand and functionalist narratives of EU legal integration, but it has also provided a series of methodological innovations with regard to how to study EU case law and the types of data set: archival resources, biographies, or translation documents scholars should pay attention to. These new approaches have thereby helped find a path beyond the epistemological issues related to the crisis of EU law’s traditional paradigm of legal integration and associated idea of common legal order.

A new generation of scholars has gradually emerged from a number of disciplinary quarters including law, history, sociology, linguistics, and political science. They share a common interest in framing new research questions and exploring novel research strategies involving EU jurisprudence and the making of the CJEU from internal and external perspectives. While the first empirical results of this ‘methodological turn’ have already appeared in few edited volumes – addressing, for example, the composition, internal organization, and functioning of the ECJ, thus focusing on procedural and organizational rules in a historical perspective – none of them have discussed more in depth the underlying interdisciplinary and critical reflection on the shifts in methodology. The main goal of this volume is precisely to bring together these new emerging and multidisciplinary methodologies in a single coherent volume that outlines the intellectual resources and empirical strategies for novel research approaches to the CJEU and its jurisprudence. As is apparent from the chapters included, we deliberately tried to bring in researchers who had just concluded or were concluding a major research

34 See Kaius Tuori, Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe (2019).
37 See Antoine Vauchez & Bruno de Witte, Lawyering Europe: European Law as a Transnational Social Field (2013); New Legal Approaches to Studying the Court of Justice (Claire Kilpatrick & Joanne Scott eds., 2020).
38 Laure Clément-Wilz, La Cour de justice de l’Union européenne (LGDJ) 2020.
endeavour on EU law scholarship that involved novel methodological ideas and data sets. This provides very fresh perspectives of the new methodological frontiers and research avenues of the study of CJEU jurisprudence.

The book fills a surprisingly large gap in EU law on how to approach the CJEU jurisprudence from a socio-legal perspective. The field has long had a focus on the work of the CJEU and its central dialogue with the domestic courts of the member states or through the preliminary reference mechanism. More recently, several scholars have focused on the composition of the CJEU and its judicial appointments, narrowing in on questions of transparency, accountability, and racial and gender balance. Questions of methodology, research strategies, and access to documents have, however, rarely taken centre stage in these studies. This is the result of the particular scholarly interest reflected in dominant disciplines of EU law. European scholars have, for the most part, focused their analyses on the legal and judicial outcomes of EU jurisprudence. Political scientists have focused on large quantitative accounts of the CJEU rulings and their consequences. This particular summa divisio has long structured the field of EU law studies and its two distinct agendas: a legal concern with the authentic and legally valid meaning of EU jurisprudence, and a political-scientific concern with the alleged real drivers of the Court of Justice and its legal and political consequences. Although some important socio-legal studies and ‘law-in-context’ approaches have existed throughout the history of EU law


42 See Craig & de Burca, supra note 1.

scholarship, such interdisciplinary studies have occupied a limited space in the broader field and especially when referring to the court. It is fair to state that EU law studies, especially those dominated by legal analysis of the jurisprudence of the Court of Justice, have been highly segmented along disciplinary lines.

This volume seeks to expand the toolbox for undertaking research on EU case law, conceived broadly, by anchoring it in the development of the CJEU jurisprudence together with its institutional and political role. Contrary to most existing scholarship focusing narrowly on the CJEU or its jurisprudence, even when it addresses directly the political role of the ECJ, we deliberately seek cross-disciplinary lines of inquiry. Our goal is to provide examples and explanations of new ways of studying EU jurisprudence both inside and outside the court, including the interpretation of legislative and judge-made law, focusing on both formal and informal processes shaping the field at the centre as well as the peripheries of EU law. This approach is not only of interest to the new generation of scholars that are featuring prominently in this volume, but also to many well-established scholars who are in search of new ways of studying and researching EU law and the Court of Justice, using new archival sources, big data, or new forms of multi-disciplinary research approaches.

However, as we point out in the concluding chapter by Iyiola Solanke, in order to move forward, new research on the CJEU ought to address the many blind spots and gaps that still exist in the literature. One of the most striking ones is the lack of jurisprudence on racial justice. In a lecture delivered by Eddie Bruce Jones, whose work has focused mostly on race and inequality in the jurisprudence of the European Court of Human Rights (ECtHR), Gráinne De Búrca commenting on his work, explained how she found many cases of race discrimination in German


47 See Nicola, supra note 33.

48 See Eddie Bruce Jones, Race and Inequality – The Importance of the Single Case, Law & Society Institute Podcast, Humboldt-University in Berlin, Faculty of Law (July 2020).
courts that did not make it to the CJEU in Luxembourg⁴⁹ – a gap worth addressing through some of the methodological approaches and qualitative and quantitative tools we present in this volume.

II Beyond Grand Narratives

A Methodological Shifts

A new set of EU studies focusing on the CJEU has emerged over the past decade, which converge on the idea that they seek to provide ‘thicker descriptions’ of EU case law within or outside of the court and informed by a richer data set.⁵⁰ This takes a number of forms and includes more localized studies of EU law, more historical and sociological ones, which nevertheless have in common that they seek to understand the evolution of EU case law as a set of practices by a variety of different multilingual actors.⁵¹ Underpinning these studies are research strategies which have brought to the field of EU law a set of new methodological approaches that have rarely been employed in the context of the jurisprudence of the Court of Justice.⁵² This includes archival work using both private and institutional collections;⁵³ semi-structured interviews with CJEU plaintiffs, lawyers, and judges; on-site ethnographical observation at the CJEU; prosopography research into the ‘collective biographies’ of judges and other legal experts; and a number of other methods that are in most cases new to the field of EU law.⁵⁴

These innovations have already been integrated into EU law academia, in part as a response to the growing pressure from funding agencies which almost unanimously require explicit methodological reflection. We find such empirical research methods in courses offered at some of the major research institutions, for example at the European University Institute (EUI), the University of Amsterdam, the University of Oslo, or

⁵⁰ Hoevenaars, supra note 33.
⁵² See Cichowski, supra note 6.
⁵³ See Davies, supra note 31.
⁵⁴ See Fritz, supra note 35; Klostermann, supra note 35.
the University of Copenhagen, as well as many others. In international law more broadly, we similarly find a growing empirical orientation, notably in the context of large externally funded research endeavours.\(^{55}\) We can also observe that the turn to empirics in EU and international law scholarship has resulted in the build-up of a number of new databases and resources. These include databases covering citations of court cases, biographies focusing on EU judges, historical archives of the CJEU, and the compilation of large data, that to date had received very little scholarly attention (from Festschriften, eulogies, scholarly conference proceedings, parties’ submissions, media commentaries, private archives, and many other sources).

One motivation for turning to new methods and empirics is to challenge some of the presumptions of the field of study, notably the long-standing assumption of the unique role played by the CJEU as the engine of European integration. Many of these new studies highlight instead how the court, although powerful, is but a legal-political actor embedded in a transnational social and political fabric of lawyers and politicians.\(^{56}\) Moreover, challenging the ‘judicial empowerment thesis’, some of the chapters highlight the only relative ‘judicial’ nature of the court as a political actor in European integration.\(^ {57}\) Generally, this volume seeks to bring new insights to both old and new questions, such as the role of legal interpretation by judges, the legal authority of cases, how legal change takes place, jurisprudential continuity, and non-legal influences in law, including political ones. What is new is that we highlight the historicity and the sociology of these processes and provide explicit research strategies for attaining these objectives. Moreover, the chapters move well beyond the historical focus on outcomes of much earlier EU scholarship and introduce instead the importance of agency, actors, and their practices. This helps contextualize the political and normative direction taken


\(^{56}\) In related fields, similar observations have been made. See, e.g., Mikael Rask Madsen, La genèse de l’Europe des droits de l’homme: Enjeux juridiques et stratégies d’État (France, Grande-Bretagne et pays scandinaves 1945–1970) (2010).

\(^{57}\) As to the well-known Judicial Empowerment thesis some of the main references are: Weiler, supra note 3; R. Daniel Kelemen & Alec Stone Sweet, Assessing the Transformation of Europe, in The Transformation of Europe (Marlene Wind & Poiares Maduro eds., 2017); and for a critical view, Tommaso Pavone, Revisiting the Judicial Empowerment in the European Union: Limits of Empowerment, Logics of Resistance, J. of L. & Cts. 303–31 (Fall 2018). See also Chapter 4.