

# Europe's Judicial Narratives

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SIEJ, 7 December 2017

The purpose of this research is to shed new light on the case-law of the European Court of Justice ("the ECJ" or "the Court") by combining the methods and paradigms of both law and social science.

What lawyers typically do in law journals and textbooks is describe, analyse and criticise judgments based on criteria that are internal to the legal system. They appraise the coherence and persuasiveness of court rulings in light of precedents and other relevant legal materials. Referred to in French as "*la doctrine*" or "*la dogmatique juridique*", this type of analysis is highly developed when it comes to ECJ case-law.

Social scientists usually go down another path when they consider law in general, and EU law in particular. Their research purportedly does not take legal discourse seriously. Quite to the contrary, it seeks to "pierce the legal veil" by contextualising court judgments, that is by analysing them as the product of a specific and ever-changing social, ideological and political background.

Unsurprisingly, these two bodies of scientific literature have largely grown in isolation from each other – not due to any kind of mutual disdain between (legal) "believers" and "atheists", but because these scholars belong to two separate "epistemic communities". Their scientific productions are based on different premises, and they consider that their own research has little to benefit from whatever stems from the other side of the wedge – however valuable that output can be in its own right.

A narrative approach to the ECJ's case-law would overcome this gap. The notion of "narrative" is well known to the social sciences and has been so much in use lately that one could be tempted to roundly dismiss the term as a fancy, fashionable, buzz word. Yet, this notion scarcely features in the field of European studies and, as far as we can tell, has never been systematically applied to the Court of Justice's jurisprudence – or, for that matter, to that of any high-profile court.

This astounding silence is all the more surprising considering the benefit that lawyers and social scientists alike could derive from a narrative reading of the case-law. Such an approach would not only feed new insights into their respective research fields. It would force them to venture outside of their comfort zone and, without jeopardising the identity of their epistemic community, allow them to borrow from each other's research.

How would that work? Social scientists and lawyers would join their efforts to unravel and bring to the fore the various narratives of the European integration project that are conveyed in the ECJ's case-law. Defining the content of each narrative and tracing its origin in the case-law would be just one objective of such a collective research. An in-depth analysis

would also call for an inquiry into the pervasiveness and efficacy of each narrative, both within and outside the Court's case-law (and courtroom).

Social scientists would presumably feel at home with the type of issues just mentioned. They would probably be less comfortable with the kind of research the exploration of such questions hinges on, namely the meticulous tracking-down of narratives about legal integration *within* the "fine grain" of rulings and not (only) beyond or below the inner structure of judicial reasoning.

To be sure, this type of work would not intimidate lawyers. But the overall ambition of this research could, insofar as it entails treating the ECJ's output as more than just a source of law. Most crucially, however, the concept of narrative – unlike that of ideology – does not require lawyers to embrace a social science perspective which would treat the case-law – and more generally legal reasoning – as little more than a convenient cloak for judges to advance their political agenda. It only draws lawyers' attention to the fact that the case-law conveys defined images of the European integration process, regardless of whether these pictures are the perfect reflection of the legal material submitted to the Court (as the official legal doctrine would have it in civil law countries) or the by-product of a few judges' integrationist agenda (as most social science research implies).

The first and most obvious objective of the research would thus be to "map out" and classify the various narratives conveyed in the Court's case-law. This re-construction exercise would not only draw on the EU judiciary's own "narrative practices", whereby the Court explicitly – and often eloquently – spells out its vision of European integration. It would require processing the entire case-law based on the premise that any judgment, any piece of reasoning, any *obiter dictum*, any judicial practice, is rooted in a defined conception of the EU and contributes to diffuse it to the public at large, beyond the specifics of a particular case.

This first stage of the research has already started. In a very sketchy manner, we have identified a series of narratives and attempted to categorise them according to a number of criteria. The table enclosed summarises the main results of this preliminary exploration. It shows promising insights but only offers a glimpse at what the result of an in-depth case-law analysis could look like.

Besides this macro-level hermeneutical work, the Europe's Judicial Narrative research could unfold in various directions.

First of all, the case-law analysis could be carried further at a *micro* level. This would involve zooming in on a limited number of landmark cases and carefully scrutinising the submissions of the parties, the Advocate General's opinion and the Court's reasoning in order to get a better grasp at the genesis and development of narratives at the "case" level.

Comparing the Court's narratives with those emerging from other legal bodies such as the EU legislature (Commission, EP, Council) or the Member States' constitutional courts appears to be another promising research avenue. It would enable us to gauge the influence

of the ECJ's narratives on the representations of its "epistemic community", offering new insights into the authority of the EU Courts beyond the run-of-the mill issue of primacy.

This collective research would also benefit from an "actors-oriented" investigation, which would appraise the extent to which the Court's members contribute to diffusing "their" narratives when they act in a non-judicial capacity, for instance as professors, conference speakers or writers, or simply when they pay a visit to fellow judges across (or outside) the European Union. By questioning their roles as "narrative entrepreneurs", this part of the research would shed new light on the oft-repeated claim that judges are just a particular breed of political actors.

Finally, the Europe's Judicial Narratives research would also provide an opportunity to tackle afresh a daunting and central issue of legal philosophy, namely the role of adjudication. At the heart of this research lies the assumption that law has two different roles to play in an adjudication context. First, it translates the (opposing) claims of the parties into a common language. The ECJ's narratives of Europe can be regarded as the result of this translation work. They aim to reflect competing visions of the European Union and build them into one single legal system. Once couched in legal terms and connected to a narrative, these competing claims are ready for settlement. Here comes the second task of law: "sewing together" the various narratives brought forward by the parties, coordinating them into one operational system and ultimately adjudicating on their disputes. Our intuition is that, in order to achieve that crucial objective, law ultimately relies on a very limited number of concepts and principles of justice – proportionality, equality and predictability.

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