Europe's judicial narratives

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Through the representations of Europe that it conjures up and conveys, the European Court of Justice (hereinafter, ECJ) significantly influences the EU's self-perceived identity. In that sense, it contributes to the shaping of a European polity, i.e. a European political community united by shared representations about its history and identity.

It is this process and its outputs that a collective and interdisciplinary project called *Les récits judiciaires de l'Europe* or *Europe's Judicial Narratives* (hereinafter, EJN) has sought to investigate. It resulted in the publication of three books in French, dedicated respectively to the EJN's concepts and typology (2019), to their dynamics and conflicts (2021), and finally to their diffusion, reception and circulation (2023). Co-edited together with my esteemed colleagues Elsa Bernard, Sophie Jacquot and Quentin Landenne, these books are intended as the mere starting point of a research avenue that has much more to offer to EU scholars.

Using the concept of 'narrative' in a legal context is not very original. Narrative analyses of law have thrived in the United States for several decades. Most of these studies, however, use the notion of narrative to approach the story(ies) behind cases and/or legal texts. In other words, they understand 'narrative' in the plain sense of the word as referring to the telling of a specific sequence of events, typically by the parties to a trial.

But the notion of narrative has also been vested with a thicker dimension in humanities and social science. The 'narrative turn' – that originated in literary theory and made its way through philosophy into social science – is based on the idea that the meaning of practices, texts or events is only accessible through stories told about them. Brute facts or texts are meaningless. They can only be understood if they are reconstructed as part of a coherent set of meanings, values, etc., i.e. as a narrative. In that sense, a narrative refers to a coherent assemblage of representations about something, typically a concept (e.g. Europe) or an event (e.g. World War II).

This notion of narrative may seem very broad, and it is. But it allows for a subtler account of the ECJ's contribution to the shaping of collective representations about Europe than competing concepts such as ideology or discourse. Ideology echoes the notion of activism. It implies that the Court is pursuing a political agenda, which is essentially an unverifiable claim. Albeit more neutral, the notion of discourse still means that the Court is consciously telling an articulate story about Europe and that this story can be unambiguously 'received' by its audience. But reality is more complex. The ECJ does not speak with one voice and its accounts of Europe cannot be simply 'collected' by external observers. Any attempt at identifying Europe's judicial narratives entails a reconstruction by the analysts themselves. In other words, focusing on judicial narratives enables us to shift the attention away from the agents and their intentions to focus on the 'universe of meanings' that circulates *through* them.

The notion of narrative is also helpful insofar as it enables us to examine afresh the identity of the European Union project. The identity of the EU (its origin, its specificity, its enemies, its end purposes, etc.) is the subject of endless narratives carried by a variety of social actors

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(political parties, trade unions, opinion leaders, etc.) and circulating across people. Many such narratives have already been the subject of social science studies, which often aim to uncover the strategies of political actors. But none has ever studied the ECJ's position in this complex narrative web. Yet this place is quite specific on two accounts.

First, because of the performative effect of the ECJ's holdings. When the Court says that European citizenship is 'destined to be the fundamental status of nationals of the Member States' or that the EU is based on the premise that all Member States share and respect the same values, it also institutes such a reality. Because of its special relation to both power and truth, the ECJ shapes EU narratives more decisively than, say, the former president of the Commission declaring that 'Europe means peace'. This authority is further increased by the fact that rulings are usually designed as 'chain novels', with each judgment building upon some precedent and feeding into pre-existing narrative threads.

Second, the ECJ's position in the EU narrative web is also remarkable due to its centrality. As the EU's judiciary, it is constantly called upon to arbitrate between legal claims that rest on competing narratives about the EU. Most hard cases are hard precisely because they pitch against each other powerful but opposed visions of the European Union. In that sense, just like any (other) constitutional court, the ECJ acts as the ultimate umpire supposed to 'sew up' coexisting narratives about the EU.

As an introduction to the EJN project, a first attempt was made in 2018 to provide a preliminary and selective overview of such narratives, only based on the ECJ's case law (thus excluding other types of statements such as judges' academic writings or the president's institutional speeches).

These narratives were reconstructed having in mind two main features of the EJNs. First, Europe's judicial narratives do not deserve such a label if their existence is not borne out by abundant case law. It meant that in order to find evidence of EJNs one had to probe legally significant clusters of cases revolving around a few landmark judgments and bearing a close connection to general principles and doctrines of EU law as well as to primary law.

But this provided a mere starting point. After all, not every ruling is meaningful from a more general perspective. It is indeed the specificity (and second feature) of EJNs to operate *beyond* the law and to tell us something about European integration itself (its foundations, quality, objective, etc.). In our quest for EJNs, such a political or discursive dimension was typically evidenced in so-called 'narrative fragments' whereby the ECJ made explicit its views on the European Union.

This preliminary inquiry into Europe's judicial narratives led to the (re)construction of five different narratives: (1) *Europe is a free market*; (2) *Europe is based on shared values;* (3) *Europe is an association of citizens*; (4) *Europe thrives on diversity*; (5) *Europe has a social purpose*. These narratives were further categorized according to specific features (central vs marginal; predominantly vs scarcely judicial; ancient vs young; major vs minor)

The question that the reader might ask herself at this stage is: how can you ever prove that a narrative exists? Plainly, you cannot in the same way as you would demonstrate the existence of a planet or of a virus. Narratives result from a re-construction process that involves the interpreter(s) themselves. Narratives cannot be 'falsified' against some objective, irrefutable observation.

One could then ask further: why not work with statistics and other quantitative analysis tools, which would allegedly provide tangible evidence that specific cases are the most central ones in the ECJ's case law? The answer lies in the type of 'result' the EJN project is after, namely not *data* but *meaning*. Studying the meaning of statements and practices warrants a *qualitative* process, that requires interpretation. That said, once these narratives have been identified, citation network analysis could be of assistance in assessing some of their features, such as their pervasiveness and stability.

Does it mean that these EJNs are the result of a subjective and arbitrary analysis of the ECJ's statements and practices? No. The operation of reconstructing an EJN is very similar to that of interpreting legal materials to find the 'right answer' (only bottom-up instead of top-down). The correctness of a legal interpretation cannot be demonstrated either through the simple observation or computation of data. Legal reasoning is also a qualitative process. However, most lawyers would agree that, while not objective in the strict sense, it is not an arbitrary process. They will find some interpretations more *convincing* than others, based on specific assumptions and methods that they share about the law. Intersubjective agreement about the right answer is the closest that one can get to objectivity on interpretive matters.

The same applies to the reconstruction of EJNs. ECJ *aficionados* will be able to rationally examine the claims made about the existence and features of EJNs and they will also be able to make further claims to amend or supplement them. In fact, many contributors to the EJN's book series did just that: proposing new narratives or even 'meta-narratives'. As with legal interpretation, there is virtually no end to such discussions, only pauses when a temporary consensus has been reached.

Conversely, one could consider that these EJNs are utterly consensual, that they do not reveal anything new about the ECJ or about the EU. In other words, they would be so general in scope that they would not add anything to the existing knowledge in the field. Yet, the potential or added value of EJN-based research can be discerned at various levels.

First, it can enrich doctrinal analyses of the ECJ's case law. By revealing connections between cases that belong to different areas, it can contribute to a finer understanding of the Court's jurisprudence. For instance, bringing *Cassis de Dijon* and *Aranyosi* under the same narrative (Europe is based on shared values), reveals common traits which could go unnoticed from a purely technical viewpoint. In the same vein, this perspective has the potential of exposing missing narratives, i.e. narratives that one could have expected to find but that cannot convincingly be reconstructed from the case law.

EJNs also offer new insights into the analysis of the ECJ's *reasoning* itself. As Dworkin famously suggested, supreme courts are guided in their rulings by the need to fit them into a coherent story that puts legal practice in its 'best light'. By laying bare the symbolic background in which the ECJ operates, EJNs could offer a new key to understanding innovative interpretations in landmark cases. But EJNs can also provide ammunition for a purely textual analysis of the ECJ's judgments. By drawing attention to the 'narrative fragments', the EJN project places the emphasis on argumentation and rhetoric, an angle that is often neglected in EU studies about the ECJ.

Related to that, focusing on narratives might sometimes help explain the adverse reaction of Member States courts toward certain strands of case law. Beyond specific points of law, these

reactions can sometimes be traced back to different representations about the EU. To take just the most obvious example, issues of competence will be tackled differently depending on whether one conceives the EU as 'a new legal order' or as a '*Staatenverbund'* in the hands of the 'masters of the treaties'.

But the main added value of EJN lies probably in the way it connects legal analysis to social science issues. Once considered under the narrative prism, law no longer appears as a system of norms but also as a type of language that shapes our views on social institutions such as the European Union. This shift in perspective has an important corollary: unlike norms, language is not controlled by anyone and does not 'spring' from a limited number of sources in a top-down fashion. It is both elusive and pervasive. This means that judicial narratives of Europe cannot be *ascribed* to the ECJ. They are the subject of endless interactions between a variety of actors: the members of the Court and their staff, the Member States, the Commission, civil society organisations, trade associations, the media, EU scholarship, and even the 'public at large'. They are the code through which these actors decipher, *ex-ante* or *ex-post*, the 'political' dimension of 'stories' that transit through Luxembourg (such as: '*Viking* is the demise of social Europe'). And they are often instrumental in shaping the position of these actors *vis-à-vis* such cases or, more generally, toward the European Union itself (such as: 'the EU is an ultraliberal project').

With that in mind, research paths are virtually unlimited. Let me sketch out three of them which could foster a genuine interdisciplinary analysis.

The first one would consist in exploring the 'lifeline' of each judicial narrative, from its birth (in party submissions, scholarly writings, legislative preambles, political speeches etc.) to its heyday (its affirmation in ECJ's narrative fragments and its contestation by 'narrative entrepreneurs') and its potential demise.

A second approach would examine the *strategies* of specific actors to put forward their favourite narratives. Several participants in the EJN project have illustrated the distinctive contribution of advocate generals, cause lawyers, and even the ECJ's president to the development and circulation of specific narratives.

Finally, lawyers could team up with sociologists and communication scientists to contrast the EJN with the dominant narratives about the EU that circulate across society, for example in the mainstream press or in social media. This would undoubtedly go a long way toward revealing the gap, not between 'Europe as it (really) is' and 'Europe as it is (wrongly) perceived', but between expert and laymen's representations about the EU.