What… Should Have Said

Rewriting Landmark Judgments of the Court of Justice

edited by Justin Lindeboom

Preface: Rewriting Landmark Judgments of the European Court of Justice: A New Project for *European Papers* and a New Way of 'Doing EU Law'

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One of the key tasks of legal scholars, in my view at least, is to critically analyse court judgments so as to, firstly, provide a "soft power based" check on judicial reasoning and, secondly, provide doctrinal and normative guidance for courts in future cases. These are important tasks. Although legal scholars usually lack hard power, critical analysis of case law nonetheless offers a check on the judicial process because it exposes – moving beyond the veil of the magisterial style of judicial reasoning – the virtues and vices of adjudication. Furthermore, legal scholars can guide courts in future cases precisely by reflecting on the reasoning and outcome of individual judgments in light of the broader context of the legal subdomains in which they are experts.

This role of the scholar, however, poses a problem. This problem may be summarised by a Dutch proverb that translates into "the best helmsmen stand on the shore".[1] It is in general easier to criticise others than to provide for a better solution oneself. In this regard, there are two challenges to scholarly critique of court judgments which in my view merit specific attention.

First, there is a perennial tension between the generality of legal rules and the requirements of justice in the individual case. This tension, which may be regarded as the essential hermeneutic problem,[2] confronts judges more directly and more pertinently

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[1] "De beste stuurlui staan aan wal".

[2] The *experience* of this tension between law and justice is aptly expressed by Derrida: "I think that there is no justice without this experience, however impossible it may be, of aporia. Justice is an experi-

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than scholars. Their responsibility encompasses both the outcome of the case at hand, as well as the foreseeable and unforeseeable consequences of their judgment in future cases.[3] This tension confronts the legal scholar only indirectly – in terms of the persuasiveness of their writings – but hardly ever in terms of real-life consequences.

Second, the *form* of legal scholarship both liberates and limits. The key dicta and holdings of court judgments are usually more concise and of a different style than doctrinal analyses in annotations or journal articles.[4] By pointing at all the inconsistencies, tensions and sources of injustice of a judgment, the legal scholar is usually able to evade the question how *they* – concretely – would have decided the judgment. This evasion is also incentivised by the expected form of legal scholarship. Law journals are primarily – and legitimately – interested in scholarship, not mock judgments.

By no means I want to criticise either law journals or legal scholars. As I mentioned at the start, the importance of legal-doctrinal scholarship for me is beyond doubt. Having said that, I also think it is important to recognise the limitations and tensions inherent in the way we "do law". Accordingly, this contribution offers another way of "doing law" – "doing EU law" more specifically – which in my view has great potential in complementing the usual form of legal scholarship. The basic modality is to have EU legal scholars *rewrite* – in full, and in judicial style – landmark judgments of the European Court of Justice.

I cannot claim any originality here. This project is inspired by a similar one across the Atlantic. For a series of fascinating books, constitutional law professor Jack Balkin asked leading US constitutional law scholars to rewrite landmark judgments of the US Supreme Court: *Brown v Board of Education*,[5] *Roe v Wade*[6] and *Obergefell v Hodges*.[7] In EU

ence of the impossible. A will, a desire, a demand for justice whose structure wouldn't be an experience of aporia would have no chance to be what it is, namely, a call for justice. Every time that something comes to pass or turns out well, every time that we placidly apply a good rule to a particular case, to a correctly subsumed example, according to a determinant judgment, we can be sure that law {droit) may find itself accounted for, but certainly not justice. Law (droit) is not justice. Law is the element of calculation, and it is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable; and aporetic experiences are the experiences, as improbable as they are necessary, of justice, that is to say of moments in which the decision between just and unjust is never insured by a rule". J Derrida, 'Force of Law: The "Mystical Foundation of Authority"', in D Cornell, M Rosenfeld and D Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge 1992), 3, 16.

[3] For completeness, I may add that this tension applies equally to the European Court of Justice in the context of the preliminary reference procedure, even though the Court does not apply the law to the concrete case at hand: the Court's judges surely are aware of the constraints which their interpretation of the law impose on the referring national court's application of the law in the case at hand, and the implications of these constraints for individual justice. Moreover, there are of course numerous cases – including *Keck and Mithouard* – in which the preliminary ruling leaves open only one solution to the case at hand, at least in terms of its EU law dimensions, such that the distinction between "interpretation" and "application" of the law is but a formality.

[4] Notable examples include some judgments of the American federal courts.

[5] J Balkin (ed), *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* (NYU Press 2002), rewriting the US Supreme Court's judg-

law, I am aware of one similar example, namely Joseph Weiler's integral rewriting of *Van Gend en Loos*.[8]

Two important differences with Balkin's series *What … Should Have Said* should be noted. Balkin's project follows the structure of US Supreme Court decision-making, combining a majority opinion with separate concurring and dissenting opinions. This is, of course, not relevant to EU jurisprudence (for better or for worse), and this contribution only includes full-fledged court judgments as if written by a chamber of judges, although most of them they are single-authored.

Secondly, US Supreme Court Opinions, in the classic common law style, are more similar in style to scholarship than the judgments of the ECJ. In line with the ECJ's judicial style, I asked the participating scholars to strictly follow the ECJ's style of adjudication: no fluffiness or academic elaborations. As a result, the rewrites are as straightforward and "dry" as actual ECJ judgments – I presume few would disagree that the ECJ's case law is typically less *enjoyable* to plough through than the average US Supreme Court opinion. In my view, however, they are exciting for precisely that reason: there is nowhere to 'hide' behind scholarly disquisitions. The participating scholars did, however, all write an accompanying note explaining how their judgment differs from the ECJ's judgment and why they made their respective choices.

The project of rewriting the ECJ case law offers a virtually unlimited pool of landmark judgments. The ambition is to publish a steady flow of issues, alternating between older classics and more recent landmark cases in a variety of sub-fields of EU law. Among many candidates for the first issue, I selected – quite unoriginally – the Court's judgment in *Keck and Mithouard* for three reasons. Firstly, it stands out as one of the most contested judgments of the ECJ's jurisprudence. Secondly, in infamously "clarifying" its earlier case law, the Court indirectly philosophised the nature of the internal market and the vertical divi-

ment in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), which held that state laws segregating schools based on race violate the Equal Protection Clause of the Fourteenth Amendment.

[6] J Balkin (ed), *What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision* (NYU Press 2007), rewriting the US Supreme Court's judgment in Roe v. Wade, 410 U.S. 113 (1973), which held that the fundamental right to privacy read into the Due Process Clause of the Fourteenth Amendment also implies a right to have an abortion.

[7] J Balkin (ed.), *What Obergefell v. Hodges Should Have Said: The Nation's Top Legal Experts Rewrite America's Same-Sex Marriage Decision* (Yale University Press 2020), rewriting the US Supreme Court's judgment in Obergefell v. Hodges, 576 U.S. 644 (2015), which held that the Equal Protection Clause and the Due Process Clause contain a federal right to same-sex marriage.

[8] JHH Weiler, 'Rewriting *Van Gend en Loos*: Towards a Normative Theory of ECJ Hermeneutics' in O Wiklund (ed), *Judicial Discretion in European Perspective* (Kluwer Law International 2003). While they are not rewrites of ECJ judgments, one may also point at former AG Sharpston's "shadow opinions": E Sharpston, 'Shadow Opinion of Advocate-General Eleanor Sharpston QC – Case C-194/19 HA, on appeal rights of asylum seekers in the Dublin system' (12 February 2021) EU Law Analysis www.eulawanalysis.blogspot.com; and E Sharpston, 'Shadow Opinion of former Advocate-General Sharpston: headscarves at work (Cases C-804/18 and C-341/19)' (23 March 2021) EU Law Analysis, www.eulawanalysis.blogspot.com.

sion of powers, making *Keck* crucial to the constitutional architecture of the Union. And thirdly, several alternative reasonings could be imagined which may have resulted in the same outcome, but nonetheless would have communicated a different vision of the EU internal market. Indeed, as the four contributions to *What Keck and Mithouard Should Have Said* demonstrate, it is not so much the outcome of the case at hand but the vision of the market that characterises *Keck* – and its rewrites.

After this general introduction to *What … Should Have Said*, this issue consists of a specific introduction to *Keck and Mithouard* and its legacy, and four contributions each focusing on an integral rewrite of the Court's judgment. In contrast to Balkin's series, which includes contributions by senior constitutional law scholars only, this issue combines contributions by junior and senior colleagues: two professors of law specialised in European (internal market) law, one doctoral researcher, and – uniquely – a team of undergraduate students supervised by their professor and advised among others by a judge of the chamber of the ECJ which had decided *Keck* and a former Advocate General at the ECJ.

I leave it up to the reader to decide which of these four rewritings is the better one, and whether any, some or all of them are better than the ECJ's actual judgment in *Keck*. Clearly, the four contributions have all provided distinct and thought-provoking alternatives to the Court's actual judgment. I could not have wished for a better start of this series, and I am sincerely thankful to all contributors for their willingness to stick our their necks, and engage in this common project. I hope that the contributions to his issue provide food for thought, and inspiration for rethinking the way in which we do EU law.