

Miguel Maduro and Loïc Azoulay (eds).  
***The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty***. Oxford: Hart Publishing, 2010.  
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The title could hardly be more portentous. *The Past and Future of EU Law*. All of it. In one volume. Luckily, neither the more down-to-earth subtitle – *The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* – nor the various contributions in this intriguing collection, edited by Miguel Poiaras Maduro and Loïc Azoulay, insist on the title's totalizing flight of fancy.

What we have here is an assortment of almost 50 short papers written by the great and good of EU law. They ponder select judgments of the ECJ, which are widely acknowledged to be titanic pronouncements that profoundly shaped the European legal landscape. Simply listing the names and affiliations of those involved in this project, let alone producing a synopsis of the substantive points raised, would have made this review resemble a telephone directory – both in terms of length and interest. I therefore content myself with the rider that it would be impossible to do justice to the subtleties developed in the individual papers in the space available and will instead dive right into the format and gist of the collection as a whole.

The editors have selected a dozen 'classic' judgments covering a certain set of legal

propositions for consideration in separate chapters. Occasionally they are clustered in groups of two or three where it is common to mention several decisions in the same breath. Each of these chapters is lavished with the attention of four authors, roughly corresponding to a quartet of views, with one from 'the inside' (i.e. a past or present judge or Advocate General of the ECJ), one well-established academic, a member of a newer generation of scholars and an 'outsider' (usually a commentator from a related discipline or a lawyer not necessarily specializing in EU law). This differentiation is neater on paper than in actual fact, but one should perhaps not obsess about a strict pigeonholing of the individual contributors, since those drawn from similar strata are not infrequently at loggerheads themselves. At any rate, this arrangement avoids the cruder charges of not even trying to present more than one type of outlook. Of course there are other significant decisions that could have been included and a myriad and one ways to slice the corpus of ECJ case law. The editors' selection of cases is certainly suitable for the task at hand; the tentative threefold division (authority, legitimacy, limits) appears to bear little on the single vignettes anyway.

The introduction by Maduro and Azoulay is as thin as it is confident. Four points in particular are noticeable. First, the book does not set out to appraise the Court's output in a normative sense (at xix). While not all contributors resist the urge to do so (see, e.g., Menéndez regarding the citizenship cases, at 388–393), those mainly looking for a substantive evaluation of the decisions discussed might be a little disappointed. The collection instead seeks to examine the responsiveness of the ECJ *vis-à-vis* its environment and the systemic impact of its judgments on the European legal order (at xiii). In short, it is more concerned with institutional or methodological matters.

Second, the introduction does well to allude to the manifold facets of legal evolution in the EU. Contrary to what is often intimated, the ECJ is evidently not just the handmaiden of Community interests (at xvi). Indeed, it is plain that the Court does not always promote unrestrained integration, as retailers oper-

ating pharmacies in Germany found out last year (Joined Cases C-171/07 and C-172/07). Mention is further made of the constant tinkering that goes on in the form of successive re-interpretation and re-conceptualization of legal doctrine. Attention is drawn to the multiplicity of actors involved. Besides the legal community, which itself is of course much larger than judges alone, political and social forces are important factors in the discursive fashioning of legal solutions (at xvii). The *Bosman* chapter brings this theme of competing visions out nicely. That is not to deny that the ECJ plays a focal role in this process. But the practical bluntness is welcome since it deals short shrift to the still surprisingly prevalent yet excessively reductionist depiction of the Court as the sole actor shaping the European legal environment with a supposedly uniform plan. Discounting the Commission or the Member States in the long run is sheer folly.

Third, the editors wear their jurisprudential hearts on their sleeves. We hear the rustling of the leaves of the living tree (at xviii). Dworkinian overtones are unmistakable, with 'integrity' and 'fit' making brief guest appearances (at xv). In deciding cases, the Court is said to do more than just settle disputes: it boldly establishes broad and general legal principles that reach far beyond the sundries of everyday proceedings in Luxembourg. In contrast hereto, most of the contributions come across as more jurisprudentially agnostic (see, e.g., Nicolaidis, at 450). There is hence no need for the more positivistically inclined reader to bin the book after the first few pages for fear of contamination of subsequent chapters. For all its lucidity, the introduction here also contains a fuzzy aside on the 'ideal interpreter', which reads like an attempt to reconcile the creative moment inherent in lawyering with legitimacy concerns. Metaphors abound. Over the course of a few sentences, this ideal lawyer morphs from an architect, to a narrator, to a historian, back to an interpreter (at xv). This is strongly reminiscent of a fairly prominent spat in Germany in 2006 between a senior judge, himself formerly at the ECJ, and two law professors. The judge considered his brethren

virtuoso pianists, tasked with interpreting the score written by the legislator (in turn likened to a composer) with some artistic licence, but short of irredeemably adulterating the set piece. The professors boomed. Fidelity to posited law and judicial independence were two sides of the same coin, one huffed. Not only the *Rechtsstaat* but liberty itself was in peril in a society in which one judge wants to be a Horowitz and the other a Rubinstein, the other puffed. Talk about a highbrow identity crisis. While such metaphors are certainly entertaining and can serve to vividly drive home a particular point (here: how creative an act is legal interpretation?), there tends to be so much baggage associated with particular images that the original narrow point is in this particular context nearly always in danger of being immediately obscured by other connotations. It would be unfair to blame H. L. A. Hart for this continued self-denying introspection, but perhaps more might be gained if one were to start from the premise that lawyers are, ultimately, just that.

Fourth and finally, the reader is left with the mysterious hint that ‘this book is more about the future than the past’ (at xx). Leaving aside the fact that this would probably not have made for a particularly snappy title (*A Bit of the Past but More on the Future of EU Law*, anyone?), this statement is puzzling. The past is not necessarily a good guide for the future, yet the introduction’s own forecast is curt. What will increase, we are told, is scrutiny of the Court and the strain it is under, most notably on account of enlargement and increases in EU competences and fundamental rights litigation (at xviii–xix). The odds hereof are indeed low. However, only few contributors subsequently venture forth to speculate about what will come to pass in more technical terms, with most hedging their bets regarding the ‘unclear’ future of their discipline. After all, lawyers tend to be cagey. Those expecting a crystal ball in paperback format will thus be dissatisfied. Conversely, readers more at home in this sprawling field of law might experience a sense of relief.

Turning to the individual sections, the contributions are refreshingly short. Naturally, there is some repetitive overlap, in particular

as regards the more or less accepted doctrinal basics, due to the quadruplet format and because the authors were asked not to share tasks among them. But this is weighed up by the occasionally rather divergent perspectives; compare only Edward to Sarmiento or Stone Sweet on judicial activism, ‘hard cases’ and the Court’s approach to its own body of case law (at 183, 192–3, 202) or the mixed opinions regarding *Francovich’s* legacy. Like toffee ice cream with *fleur de sel*, these contrasts give the whole project extra zing. It hence pays to read all four contributions to a chapter together, a suggestion reinforced numerically by the sequential footnotes.

As to the depiction of the substance of the Court’s classics, most papers are hard to fault. Some are masterful miniature synopses, getting straight to the point without the verbiage of so much of today’s academic writing. The more stimulating pieces question conventional Euro-catechisms by suggesting new paradigms for looking at old chestnuts. Hillion’s piece (on the external relations triad) and Regan’s (on the free movement of goods jurisprudence) are fine examples.

Some parts feel too brief. For a volume that appears to be at least as much about the law in practice as about the law in books, one expects something more than theoretical reconceptualization, innovative though it may be. Not all contributions, however, grapple with the reasons behind the ECJ’s reasoning. At times it would have been nice to learn a little more about the genealogy or sociology of a particular pronouncement or string of cases. What exactly were the driving interests or institutional factors at play? How were they later affected? Were there any alternatives and, if so, why did these fail to carry the day? Was it all just a curious accident of history? The ‘outsiders’ and ‘interdisciplinary’ tend to do best in this respect (e.g., Morten Rasmussen on *Costa v. ENEL* and *Simmenthal*), but there are other notable exceptions such as Sharpston (on *Defrenne*) or Jacqu e (on *Les Verts*). True, these are perhaps ‘stories that are more political science than doctrinal deduction’, to use Stone Sweet’s words (at 207). The former, Nicolaidis reminds us, concerns itself

with ‘the before and after, the role of politics in legal judgments and vice versa – the why and the so what?’ (at 448), but as a key to much of the Court’s jurisprudence such considerations are also an important part of legal inquiry.

Much of the subsequently applied doctrinal gloss is rather familiar, but peeling away old layers of varnish can be rewarding for a number of reasons. There is Rosas’ point about falling into scholastic traps when shoehorning the Court’s arguments into legal concepts, while ignoring the more instinctive aspects of judicial decision-making (at 444). Although conceptualizations enable some pruning of the wild growth of law, such reconstruction is often too neat to be true and also foregoes vital critical potential by dressing practical reasons up as higher callings. As the late Colomer notes in characteristically colourful language, legal disputes tend not to really suit the ‘fairy tale format’ (at 405–406). Accounts of inner strains and behind-the-scenes wrangling indicate that the European experiment is more complex than worn-out accounts of elite judicial interventionism make believe. Baquero Cruz captures the uneasy existence well (at 418–419). Rather than demonize the Court’s activity or stoke parochial fears of a Machiavellian plot unfolding in the Benelux, such candour about an ‘imperfect law’ deepens and fosters the larger debate by pointing to the fickleness of law as a social tool and the equally disquieting and comforting fact that nobody possesses a stranglehold on where the journey will eventually lead. It is hence mildly ironic that the exhortatory words of the first contribution, by the late Pescatore, were in the end not heeded by more of the authors. He opens with a thunderbolt, calling the commonplace reliance on cases as if they were legislative texts ‘mistaken’ (at 3). But if that is correct, what does this tell us about the decision-making of the ECJ, which, close to 60 years down the road, relies more on its own cases than on any other argumentative device?

Another area where this compilation could have set itself further apart from the more conventional publications on EU law is in the area of legal development by transnational dispute

settlement. How exactly does this work? Early on, the reader is promised answers to nagging questions like ‘what makes a case a leading case?’ (at xvi), but the individual contributions remain rather quiet on such matters. Overall, the interplay between adjudication and primary or secondary law could have been fleshed out more. This would not only have caught the attention of EU law specialists, but also of those interested more generally in the mechanics of the case law method or the role of the judiciary in the evolution of a legal system. To some extent the *CILFIT/Foto-Frost* section steps into the breach, yet the starkly contrasting perceptions of the Court’s approach whet the appetite for more. Colomer’s piece on *Francovich* sketches some incremental and temporal aspects of judicial creativity. Walker (on *Les Verts*) strikes a less congratulatory tone, arguing that the Court’s secluded and minimalistic tendencies might have contributed to recent constitutional woes and thus, ultimately, come undone. Now and again strikingly original points emerge in the process; this reviewer had certainly not heard that *ERTA* and *Open Skies* vindicated both Hannah Arendt and Carl Schmitt prior to perusing Post’s contribution (at 239). Finally and more mundanely, the book has its share of copyediting glitches. While not overly distracting, better attention to detail would have been warranted. Otherwise the book is good value for money.

Regrets aside, this collection is an enjoyable read. Approached as a buffet rather than as a set menu, it contains morsels to suit many tastes, although the more sceptically inclined might still feel a little peckish towards the end. The inventive format has its limitations, but it rewards the reader who is willing to connect the dots and fill in the gaps. That is by no means a bad thing.

## Individual Contributions

- Pierre Pescatore, Van Gend en Loos: 3 February 1963—A View from Within;*  
*Bruno de Witte, The Continuous Significance of Van Gend en Loos;*

- Franz C. Mayer, *Van Gend en Loos*: The Foundation of a Community of Law;  
 Daniel Halberstam, Pluralism in *Marbury* and *Van Gend*;  
 Nial Fennelly, The European Court of Justice and the Doctrine of Supremacy: *Van Gend en Loos*; *Costa v ENEL*; *Simmenthal*;  
 Ingolf Pernice, *Costa v ENEL* and *Simmenthal*: Primacy of European Law;  
 Herwig Ch. Hofmann, Conflicts and Integration: Revisiting *Costa v ENEL* and *Simmenthal II*;  
 Morten Rasmussen, From *Costa v ENEL* to the Treaties of Rome: A Brief History of a Legal Revolution;  
 José Narciso Cunha Rodrigues, The Incorporation of Fundamental Rights in the Community Legal Order;  
 Takis Tridimas, Primacy, Fundamental Rights and the Search for Legitimacy  
 Mattias Kumm, *Internationale Handelsgesellschaft*, *Nold* and the New Human Rights Paradigm;  
 Brun-Otto Bryde, The ECJ's Fundamental Rights Jurisprudence: A Milestone in Transnational Constitutionalism;  
 Francis G. Jacobs, *Wachauf* and the Protection of Fundamental Rights in EC Law;  
 Damian Chalmers, Looking Back at *ERT* and its Contribution to an EU Fundamental Rights Agenda;  
 Zdeněk Kühn, *Wachauf* and *ERT*: On the Road from the Centralised to the Decentralised System of Judicial Review;  
 Pedro Cruz Villalón, 'All the guidance', *ERT* and *Wachauf*;  
 David Edward, *CILFIT* and *Foto-Frost* in their Historical and Procedural Context;  
 Paul Craig, The Classics of EU Law Revisited: *CILFIT* and *Foto-Frost*;  
 Daniel Sarmiento, *Cilfit* and *Foto-Frost*: Constructing and Deconstructing Judicial Authority in Europe;  
 Alec Stone Sweet, The Juridical Coup d'État and the Problem of Authority: *CILFIT* and *Foto-Frost*;  
 Paolo Mengozzi, The EC External Competencies: From the *ERTA* Case to the Opinion in the Lugano Convention;  
 Piet Eeckhout, Bold Constitutionalism and Beyond;  
 Christophe Hillion, *ERTA*, *ECHR* and *Open Skies*: Laying the Grounds of the EU System of External Relations;  
 Robert Post, Constructing the European Polity: *ERTA* and the *Open Skies* Judgments;  
 Eleanor Sharpston, The Shock Troops Arrive in Force: Horizontal Direct Effect of a Treaty Provision and Temporal Limitation of Judgments Join the Armoury of EC Law;  
 Denys Simon, *SABENA* is Dead, Gabrielle Defrenne's Case is Still Alive: The Old Lady's Testament. . . ;  
 Siofra O'Leary, *Defrenne II* Revisited;  
 Horatia Muir Watt, Gender Equality and Social Policy after *Defrenne*;  
 Koen Lenaerts, The Basic Constitutional Charter of a Community Based on the Rule of Law;  
 Jean-Paul Jacqué, *Les Verts v The European Parliament*;  
 Alberto Alemanno, What Has Been, and What Could Be, Thirty Years after *Les Verts/European Parliament*;  
 Neil Walker, Opening or Closure? The Constitutional Intimations of the ECJ;  
 Christiaan Timmermans, *Martínez Sala* and *Baubast* Revisited;  
 Jo Shaw, A View of the Citizenship Classics: *Martínez Sala* and Subsequent Cases on Citizenship of the Union;  
 Agustín José Menéndez, European Citizenship after *Martínez Sala* and *Baubast*: Has European Law Become More Human but Less Social?;  
 Carlos Closa Montero, *Martínez Sala* and *Baubast*: An Institutional Analysis;  
 Damaso Ruiz-Jarabo Colomer, Once Upon a Time—*Francovich*: From Fairy Tale to Cruel Reality?;  
 Andrea Biondi, In Praise of *Francovich*;  
 Julio Baquero Cruz, *Francovich* and Imperfect Law;  
 Roger van den Bergh, *Francovich* and its Aftermath: Member State Liability for Breaches of European Law from an Economic Perspective;

*Allan Rosas*, Life after *Dassonville* and *Cassis*: Evolution but No Revolution;  
*Kalyso Nicolaidis*, Kir Forever? The Journey of a Political Scientist in the Landscape of Mutual Recognition;  
*Nicolas Bernard*, On the Art of Not Mixing One's Drinks: *Dassonville* and *Cassis de Dijon* Revisited;  
*Donald H. Regan*, An Outsider's View of *Dassonville* and *Cassis de Dijon*: On Interpretation and Policy;  
*Marko Ilešič*, The Development of the Law and the Practice in the Post-*Bosman* Era;  
*Stephen Weatherill*, *Bosman* Changed Everything: The Rise of EC Sports Law;  
*Stefaan van den Bogaert*, *Bosman*: The Genesis of European Sports Law;  
*Gianni Infantino* and *Petros C. Mavroidis*, Inherit the Wind: A Comment on the *Bosman* Jurisprudence.

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