**BEYOND METHOD: POLITICS OF LEGAL RESEARCH**

# Abstracts

## Christina Eckes

A Timid Defence of Legal Formalism

How does legal reasoning differ from other reasoning? Is legal reasoning distinctive because of how it proceeds, this is because of its methods? If so, how should the distinctiveness of legal reasoning be reflected in the study of European integration, considering that law plays a central role in this process? What is at stake in the choice between an approach to studying European integration that presumes the distinctiveness of legal reasoning and one that does not? These are the questions that this paper addresses.

At its core, the paper concerns the aged and controversial question of the appropriate conceptualization of legal reasoning – or, in other words, the relevance of methods for the process or even the outcome of legal reasoning. The paper relates this question to the particular context of the academic study of European integration and reflects on the merit and stakes present in choosing an external (social science) or internal (doctrinal legal) approach when studying European integration.

## Gareth Davies

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Taming Law: The Risks of Making Doctrinal Analysis the Servant of Empirical Research

Law is not a science, and its relationship with science is not always easy. Empirical Legal Studies, a relatively new movement in law schools and one that is being pushed by some European research funders, including that of the Netherlands, aims to bring legal and scientific research closer together. There are certainly practical advantages which can be achieved by this, but the closer two methodologically distinct disciplines come to each other, the greater the force that they may mutually exert, changing both their own nature and that of the other. The amount of social science that is done in law schools is but a small part of the total, so that the effects on social science as a whole of incorporating more law may be limited. However, the effects on law could be greater, and its evidence-free, truth-indifferent, essentially rhetorical character could be marginalized. That may be exactly what scientifically minded research funders aim at: reining in the narcissistic but epistemologically idiosyncratic practices of the legal wordsmith in favour of more conventional contributions to the advancement of knowledge about the world. On the other hand, textual analysis and critique of judgments and legislation – law, for short, or, more precisely, doctrinal legal research (DLR) – contributes unique elements to the world. Most banally, it provides a theoretical basis for the empirical part of empirical legal studies. It also plays an expressive role: liberated from the need to measure, the legal researcher can unpack the meaning of words and reveal their subtexts and the interests they represent, without needing to quantify their consequences. Concerns and values too diffuse, qualitative, complex, or ambiguous to be easily assessed by empirical science, but which are genuinely felt, and are embodied in the text, can be held up for scrutiny. In doing this DLR adds popular legitimacy to the legal process, taking it partly out of the hands of experts and giving a voice to the subjects of law. Perhaps that is why technocratic research administrators are so keen to get it under control.

In what follows I try to show DLR’s relationship to social science, and argue that while they can be meaningful for each other, we should be wary of allowing legal writing to be subordinated to the short-term needs of empirical research, and should not lose faith in the value of traditional DLR on its own theoretical terms – for neither empirical social science, public discourse, or the political process of law-making can proceed properly without it.

## Alessandra Arcuri

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On how (economic) knowledge sustains unsustainable economic law

The system of international (and EU) economic law is undergoing a serious legitimacy crisis because of its alleged role in fostering inequalities and environmental degradation. In his book Ill fares the Land, Tony Judt writes ‘to recast our public conversation-seems to me the only realistic way to begin to bring about change. If we do not talk differently, we shall not think differently.’ In these reflections, I take up this invitation and study how talking differently about international economic law may help us changing the current state of affairs. In particular, I discuss the usage of two concepts: ‘market creation’ and ‘economic.’ In relation to the former, I focus on WTO law and more specifically on the usage by the WTO Appellate Body of the concept of ‘market creation’ in the Canada Subsidy case. The reasoning of the Appellate Body has been heavily criticized by the secondary literature for going against the grain of basic economic theory. Yet, this very reasoning resonates with the work of political economist Marianna Mazzucato who has shown how markets are more often than not ‘created’ by the state (rather than ‘fixed’, as welfare economics has normally thought us). This case is illustrative of how different economic theories may change the legal text and how different (and possibly more sophisticated) conceptions of the ‘market’ could facilitate the transition towards a more equitable system of international economic law. The other concept discussed relates to the dichotomy ‘economic’ v ‘non-economic’. This juxtaposition is widely reproduced in trade and investment law literature and practice. I will challenge this dichotomy and show how the environment is clearly part and parcel of the economic realm, and reflect on the implications of this reconceptualizion of the economic sphere. At a more general level, it is argued that by engaging with the processes by which certain economic concepts are constructed and normalized, legal scholars and practitioners could come to a better understanding of whose interests are protected or marginalized by the system of international economic law. This can be done by drawing on the work of Science and Technology studies and TWAIL scholarship.

Amidst the current legitimacy crisis of global economic governance, time may be ripe for international and EU economic legal scholarship and practice to reconfigure their relationship with economic knowledge.

## Candida Leone and Marija Bartl

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Methodology and Ideology of Inter/National Legal Research

This paper focuses on the methodological gap between national and international (including European) in ‘core’ fields of law – such as private law, administrative law or constitutional law. While the nationally oriented legal scholarship in these domains is to a large extent traditional positive law scholarship, as is the teaching in these fields, the international debate has been methodologically far more open, and includes scholarship with strong theoretical, inter-disciplinary or empirical components. This paper aims to explore the relationship between the methodological openness of international legal research on the one hand and the (ideological) commitment to the international projects within framework they operate on the other. What does the (alleged) loss of purpose, or purchase, of European or cosmopolitical projects mean for the methodology of legal research? And can we methodologically open national legal research without a need to embrace the ideologies of cospomolitanism?

## Julien Bois and Mark Dawson

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(EU) Law and neo-institutionalism

EU law is an object of enquiry for both legal scholars and political scientists, with diverging lenses: while lawyers mainly focus on legal doctrine, political scientists insist on the social dynamics underlying legal ideas. Despite the common terrain of analysis, both disciplines struggle to find common angles: for political scientists, legal scholars tend to interpret EU law in a vacuum, underestimating the importance of the context while lawyers believe social scientists focus too much on power relations, neglecting to take into account how legal norms themselves shape opportunities for action (“taking the law seriously”).

This paper argues that neo-institutionalism, especially its sociological variant, leads to a better understanding of the production of EU law. Instead of focusing exclusively on the content of the law, this approach emphasises the role of actors in the European legal field, their interactions and the resources they mobilise both in the legal and the economic/political spheres of society. It thereby overcomes institutional barriers that traditionally segment different levels of governance (European, national) and different systems of the political order (economic, social) allowing the development of policies to be traced more comprehensively. Nonetheless, the approach take norms themselves as the point of departure for analysis, which structure both cognitive understandings and opportunities for action/reaction. SI attempts to overcome caveats present in both disciplines. Critiques of formal legal analyses stress the absence of redistributive stakes and socio-economic inequalities leading to unequal resources when mobilising EU law. If in theory the law applies equally for any citizen in a polity, its mobilisation as a tool to advance interests and preferences heavily depends on one’s own capabilities and networks to use legal tools (e.g. whether actors have knowledge of EU law). SI overcomes this difficulty by tracing descriptively how actors use EU law as a tool, investigating the reasons for such mobilisation or lack thereof. Political scientists focus almost exclusively on extra-legal considerations, yet have difficulties to explain decisions not fitting their predictive models of behaviour. If the turn to socio-legal scholarship welcome, political scientists arguing that EU law’s application goes beyond legal merit often underestimate how such legal means still play a major role when orientating thinking and action. SI thus attempts to reconcile these distinct stances by stressing the importance of legal norms while abstaining from the assumption that norms apply equally in all situations. The advantages of sociological institutionalism will be explored through one crucial area of EU law – economic governance. This is an area where the prevailing institutional and legal configuration is poorly explained by alternative approaches, such as traditional formal legal

analsysis or analysis based on rational choice. Neither approach explains the hesitancy of the EU Courts to assert the EU acquis against new economic governance arrangements nor the novel legal principles (e.g. on conditionality) developed in this area. The paper will use institutionalist analyse to explore the processes that occurred during the Great Recession in Europe, as several players from different social spheres tried to provide answers to the paradox between the (over)constitutionalisation of economic governance provisions and the widely shared drive to reform the EU’s economic constitution. In this sense, sociological institutionalism provides a useful framework to explore the boundaries between legal, economic and political order in Europe.

## Irina Domurath

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Interdisciplinarity in Law

In 2015, Nature published a special issue on inter-disciplinary research and its challenges, following the title ‘Scientists must work together to save the world’. Together with their colleagues from other fields, legal researchers are increasingly adopting interdisciplinary methods in their research projects. Law & Economics that applies economic theory to the analysis of law is only the most prominent example. It has been on the rise since Coase and Calabresi, but with higher speed since the big-data revolution. This phenomenon is due to mainly two larger developments. Both are political. On the one hand, the research environment has grown massively in the last decades. This is arguably due to mass education, which grew due to respective policies and the loss of job prospects on employment markets. With the growing body of knowledge, researchers are becoming increasingly and highly specialized. The spread of inter-disciplinarity can thus be seen as a response to this specialization. On the other hand, the research environment faces massive financing problems. In times of austerity and neoliberalism, public funding to universities is increasingly cut, forcing them to turn to competitive external funding possibilities. Such funding mechanisms habitually highlight the importance of interdisciplinarity.

On the normative level, the contribution argues for a self-confident legal discipline, which can be reasonably enriched through the use of external methods, but has self-standing value as a science with own methods. It is the realm of legal researchers to deeply analyse the law’s meaning and application – a realm that should not get lost and that is important if we want to understand a certain research problems and envisage its solutions. At the same time, adopting a contextual approach to law can reasonably enrich legal research. Especially when undertaken in an inter-disciplinary group, such research can lead to a more complete answer to a research problem. For example, quantitative methods can shed light on certain developments in court adjudication when calculating the number of judgments on certain legal provisions or terms. Sociological research can help legal researchers to understand the distributive effects of a legal norm in order to improve its functioning in society. That being said, the role of legal researchers in such projects is to put into context the findings of their legal research into the larger context of other social sciences.

## Poul F. Kjaer

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Why one should (not) care about methodology: Law as a methodology free zone

Doctrinal ‘black letter’ methods apart, methodology have traditionally not been a major concern or point of interest within legal scholarship. In the social sciences, most notably in economics, political science, psychology, empirical sociology and international relations this is very different. In these disciplines methodology and methodology questions has over the course of the last four decades become the central theme around which scholarly developments circulates. The social sciences have become ‘method driven’ to a degree which have made theory and theory driven research increasingly illegitimate and marginal. The legal discipline feels the heat of this development and consequently ‘empirical legal studies’ adopting methods and approaches from the social sciences have experienced considerable traction in recent years. This contribution aims to asses this development by advancing the argument that the ‘methodological backwardness’ of legal scholarship has been its core strength in recent decades.

The ‘methodology obsession’ within the social sciences has led them into a dead end, characterized by hyper formalistic and opaque modelling, simplistic assumptions and a structural incapacity of scholarly innovation which devoid them from answering ‘big questions’ and to reflect critically upon the basic structure of society and basic assumptions about the composition of the social world. As an alternative, a case is made for a return to generalized theorizing on societal structures. This is illustrated in relation to the issue of boundary construction within (EU) law as the issue of boundary construction only can be addressed on the basis of a general theory of society.

## Damjan Kukovec

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Regulating Chaos and Phenomenology of Justice

Legal method has relied on constitutionalism, democratic theory and coherence for analysis of society and for the production of normative and transformative claims. This chapter addresses contradictions and downsides of legal regulation in terms of these paradigmatic modes of thinking. It argues that law and the world should be understood in terms of a constant struggle. It puts forward a time-sensitive regulatory approach based on awareness of imperfections of paradigmatic modes of thinking. The chapter argues for a phenomenological idea of justice that incorporate the past into the present and the future, extending the range of discursive and transformative possibilities.

## Juan A. Mayoral & Tommaso Pavone

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Statistics as if Legality Mattered: The Two-Front Politics of Empirical Legal Studies

This article conducts a genealogy of empirical legal studies (ELS) and argues that it has developed via a two-front political battle. The first battle was waged in the arena of disciplinary politics: ELS sought to correct a perceived bias within law faculties in favor of normative and theoretical scholarship by transplanting methodologies primarily associated with American political science and economics departments. As proponents of ELS faced substantial resistances

from department colleagues, they embraced not a strategy of institutional conversion from within, but one of institutional displacement from without: The creation of autonomous ELS journals, conferences, and centers designed to project influence back into law facilities from the outside. The second battle was waged in the arena of knowledge politics: ELS embraced a thin and narrow conception of the &#39;empirical&#39; as quantifiable data lending itself to replicable statistical analyses, causal inference, and the production of large-N datasets. This approach proved thin because it is theoretically agnostic, selectively borrowing the methods – but not the substantive focus and theoretical foundations – of the social sciences. It also proved narrow because it excludes qualitative empirical inquiry based on ethnographic, case study, and archival methods. In the final analysis, both the disciplinary and knowledge politics of ELS have led to unnecessary self-estrangement from law faculties on the one hand and the social sciences on the other hand.

## Joana Mendes

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Normativism in EU Law: The Contribution of Comparative Administrative Law

Comparative administrative law has anchored the development of EU administrative law, both as a field of law and as an academic discipline. In this respect, legal scholarship has both mirrored and further enhanced the work of Court of Justice. Legal scholars engaged in a normative project to establish administrative law beyond the state, grounded on a state-matrix of general principles that the Court had developed on the basis of functional comparison. Those initial efforts shaped decisively the current foundations of EU administrative law. They have fed the scholarly efforts to give effect to an “utopia” of an integrated administration constitutionally framed by general principles and fundamental rights. The paper traces these foundations back to the work of Jürgen Schwarze, and analyses its contribution to imbuing EU administrative law with a normativist approach.

## Jessica Lawrence

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Excavating the Political in Legal Research: Post-positivism, Reflexivity, and Governmentality

This chapter argues, in the post-positivist tradition, that in addition to examining the politics of method in terms of how they impact our results—which ‘truths’ they reveal about the legal order—we ought also to excavate, evaluate, and emphasize the background assumptions and discursive commitments that produce these results. In other words, we should be aware of the impact that our ontological and epistemological commitments have on our research and maintain an awareness of the fact that they are contingent, constructed, and politically significant. There are many different means of attempting to excavate the ontological and epistemological framings that lurk in the background of ‘method’ and to attempt to piece together their impact on the politics of (legal) research. This piece presents one such means, offering the ‘toolbox’ of post-Foucauldian governmentality studies as a useful starting point for legal academics seeking to uncover how methods serve to produce truths regarding the social world in line with their background assumptions.

## Fernanda Nicola

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Narratives of Justice

Lawyers, judges and jurists have the tendency to fall into the ‘danger of a single story’ that is to offer a simplified version of reality when addressing the judicial decisions. This Chapter explores instead the co-existence of multiple narrative of justice in the jurisprudence of a Court that makes it possible for the many litigants and their lawyers to relate their local struggles to different visions of justice. The methodological shift in this Chapter pertains to the focus on the role of the different lawyers reconstructing the stories of their clients as they emerge from the original briefs of the cases rather than the judgement itself or secondary literature. Different powerful narratives of justice emerge from the lawyers’ briefs. These lawyers are the translators of everyday events into “legal facts.” Next they become a mediator using “legal forms” that connect the client’s story to the legal concepts in EU law. Finally, they are the advocates able to persuade the Court through a powerful “rhetoric” appealing to a particular sense of justice. These lawyers, embedded in different local contexts, languages and cultures have used facts, forms and rhetoric to translate their domestic struggles into European ones and to achieve what are the desired distributive outcomes for their clients. Narrating justice not only helps the plaintiff and their lawyers tell their personal stories, but at the same time, it allows lawyers to tell stories about the law itself. This double function of the narrative work happens “beneath the surface of routine law talk.” This approach shows the coexistence of multiple narratives of justice that have disappeared or have become dominant in the single story narrated by the judges. In departing from a uniform story, different, opposed and contested narratives of justice are truly representative of the legal community and the society that has suffered the injustice and around which lawyers have built their case.

## Siniša Rodin

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Telos of a Method

The main questions posed by the Beyond Method project are the following; is law science, is there the best way to study law and is a choice of research method political, ideological or biased in sense that it determines the result of the research. In the present contribution I will address these questions and suggest the following answers. Law is not a science but a profession, but for any practical purposes it does not matter. Study of law, however, can and does pick up ideas and methodology of natural sciences. The purpose of study of law is to predict how a case will come out. Therefore, the measure of success is a correct prediction. And, finally, choice of a research method is, indeed, not neutral.

Parameters of research are pre-determined by language. Language reflects structure of the world, social practices included. Social practices stabilize and become a tradition. Tradition presents to its participants as neutral. Appearance of neutrality manifests in conditions where a researcher and the object of research belong to the same tradition. Accordingly, any research method pursued within a tradition contributes to justification and perpetuation of that same tradition. So does the present essay.

## Lyn K.L. Tjon Soei Len

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On Politics and Feminism in Legal Academia

This article is an examination of politics and marginalization of feminism in legal academia. It addresses struggles around ‘doing feminism’ and on ‘raising’ or becoming feminist legal scholars in a space where ‘feminism’ is invisible and marginalized. The article discusses how one may attempt to ‘do feminism in law’ (i.e. what feminist legal methods are); what mechanisms of  power and privilege might work against such endeavors; and makes a case for feminist teaching in the institution of the law school and using feminist legal methods in legal academia and beyond. The article describes several feminist legal methods and their underlying commitments, notably commitments to assigning significance to women’s own experiences and the political dimensions of personal struggles. It asks questions about the conditions under which one holds such commitments, in particular in relation to mechanisms of power and privilege in legal academia at the intersection of gender and race. The article employs language of invisibility, intelligibility and illiteracy to describe the particular context of power and privilege. It asks how one can hold and come to hold feminist commitments, and use feminist methods effectively and successfully in law, in such a context. The last part of this article makes a case for feminist teaching in the institution of the law school as a response to invisibility, intelligibility and illiteracy.

## Ruth Dukes

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The Politics of Method in the Field of Labour Law

In English language scholarship in the field of labour law it has become increasingly common, in recent decades, to talk of labour markets. Indeed instead of labour law – the law of work – some have even begun to conceive of the field of study as comprising ‘labour market regulation’, assessing the desirability of particular laws with reference to their likely labour market impact, among other things. As I have argued in recent work, however, market framings and associated economic methods can serve to limit quite significantly the kinds of normative argument that can be made, obscuring the importance of certain values traditionally understood to underpin labour law and policy: human dignity, substantive equality, democracy at work. In this paper, the point is illustrated in by means of a discussion of the 2017 ruling of the UK Supreme Court, R (UNISON) v the Lord Chancellor, and associated scholarly commentary. In the final part of the paper, I propose that labour law scholarship reembrace its socio-legal tradition in a manner that allows for adequate attention to be accorded to the increasingly individualised and commercialised nature of working relations. An economic sociology of labour law holds the promise of allowing for analysis of labour laws and their impact on workers, employing organisations and wider society, in a manner that neither ‘oversociologises’ the field of enquiry, nor reduces it to a collection of abstract market transactions.