LAWYERING EUROPE

While scholarly writing has dealt with the role of law in the process of European integration, so far it has shed little light on the lawyers and communities of lawyers involved in that process. Law has been one of the most thoroughly investigated aspects of the European integration process, and EU law has become a well-established academic discipline, with the emergence more recently of an impressive body of legal and political science literature on 'European law in context'. Yet this field has been dominated by an essentially judicial narrative, focused on the role of the European courts, underestimating in the process the multifaceted roles lawyers and law play in the EU polity, notably the roles they play beyond the litigation arena. This volume seeks to promote a deeper understanding of European law as a social and political phenomenon, presenting a more complete view of the European legal field by looking beyond the courts, and at the same time broadening the scholarly horizon by exploring the ways in which European law is actually made. To do this it describes the roles of the great variety of actors who stand behind legal norms and decisions, bringing together perspectives from various disciplines (law, political science, political sociology and history), to offer a global multi-disciplinary reassessment of the role of 'law' and 'lawyers' in the European integration process.

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Lawyering Europe

European Law as a Transnational Social Field

Edited by

Antoine Vauchez
and
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Introduction. Euro-lawyering, Transnational Social Fields and European Polity-Building

ANTOINE VAUCHEZ

I. INTRODUCTION

THE EU POLITY has long been referred to as a 'Community of Law' including by its actual craftsmen themselves.[1] Over the past decades, their idea has found strong support in the academic literature that has largely pointed to the critical role played by the European Court of Justice (ECJ) in market and political integration.[2] Political scientists have extensively mapped its decisive influence in pushing the scope of European integration way beyond what Member States had been prepared to accept (Europeanisation), while legal scholars have shown in great detail how the ECJ contributed to gradually transforming the EU treaties into a de facto 'constitutional charter' of Europe (Constitutionalisation). Strangely enough, however, such vibrant streams of research that range from 'law in context' approaches to sophisticated neo-institutionalist accounts of Europe's 'integration-through-law'[3] have left the lawyers' specific agency and agenda essentially unexplored.[4] While scholarly writing has extensively dealt with the role of

[1] The contributions put together in this volume originate in a conference sponsored by the Robert Schuman Centre for Advanced Studies and the Academy of European Law. The conference was convened by Bruno De Witte and Antoine Vauchez and took place on 25 and 26 September 2008 at the European University Institute. The co-editors would like to thank in particular Dia Anagnostou, Stefano Bartolini, Marise Cremona, Sara Dezalay, Hans Micklitz, Glenn Morgan and Heike Schweitzer who took an active part in our discussions.

[2] For a review of this literature, see: L Conant, 'Review Article. The Politics of European Legal Integration' (2007) 45 *Journal of Common Market Studies* 1, 45–66; and A Stone, *The European Court of Justice and the Judicialization of EU Governance*, http://europeangovernance.livingreviews.org/.

[3] See in particular A Stone, *The Judicial Construction of Europe* (Oxford, Oxford University Press, 2004) and R Cichowski, *The European Court and Civil Society. Litigation and Governance* (Cambridge, Cambridge University Press, 2007).

[4] There are exceptions: H Schepel and R Wesserling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) 3 *European Law Journal* 2, 165–88; see S Kenney, 'The Members of the Court of the European Communities' (1998–99) 5 *Columbia Journal of European Law* 1, 101–33; and the volumes or symposia edited by members of the Polilexes research group: A Cohen and A Vauchez (eds), 'Law, Lawyers, Transnational Politics and the Production of Europe' (2007) 32 *Law and Social Inquiry* 1, 75–82; P Mbongo and A Vauchez (eds), *Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de justice des Communautés européennes* (Brussels, Bruylant, 2009); J Christoffersen and M Madsen (eds), *The European Court of Human Rights between*

law in European integration processes, it has most often remained oblivious to that of legal practitioners, the world they live in, their particular know-how, skills and set of core principles and beliefs. *Lawyering Europe* suggests another standpoint. It brings together a variety of contributions that draw from different disciplinary backgrounds (law, political science, sociology) and rest on the view that Euro-lawyers and Euro-lawyering should be taken seriously and inquired into more thoroughly in *concrete* and *situated* historical processes. Rather than *leaving* legal arenas and their repeat players and observing them from afar when it comes to studying European law, the authors who contribute to the present volume actually step *into* them and look from close-up at the variety of actors and groups –whether national or transnational – that contribute to its fabric, whether it be EU- or European Convention on Human Rights (ECHR)-related. Just as there is no art without the 'networks of cooperation' that make up the 'art world',[5] we hypothesise that the production of European law can hardly be understood without references to the specific social 'world' of legal professionals that has historically emerged and solidified, from judges to private practitioners, law professors to the states' advisers, etc. From the perspective of political science, this impliedly presents a more complete view of the European legal reality, one that reaches *beyond* the European courts that usually draw most of the scholarly attention. From the perspective of European legal studies, this requires broadening the traditional horizon by questioning not so much the actual/authentic content of European law but rather the processes through which it is formed and transformed, that is by describing the roles, techniques and mindsets of the great variety of actors who stand behind legal norms and decisions. Methodologically speaking, this academic endeavour requires 'following the legal actors' themselves as they engage in their legal and extra-legal undertakings and as they connect with other EU-implicated undertakings outside the legal realm. By inserting concrete and purposeful individuals into what has often remained rather disembodied narratives of institutions and groups pursuing abstract goals (prestige, predefined interests, etc), *Lawyering Europe* is able to suggest new narratives for European legal and political integration. Such understanding of 'law' as a deeper social and political phenomenon[6] provides new insights and research hypotheses as to how law and polity-building have been connected throughout the history of European integration.

Most chapters draw, albeit in a variety of ways, on two critical concepts: 'transnational legal entrepreneurship' and 'European legal field'. This introductory chapter discusses their scope and added value. The first section questions the

Law and Politics (Oxford, Oxford University Press, 2011); S Hennette-Vauchez and JM Sorel (eds), *Les droits de l'homme ont-ils constitutionnalisé le monde?* (Brussels, Bruylant, 2011).

[5] H Becker, *The Art Worlds* (Berkeley, University of California Press, 1982).

[6] See in the same vein, C Joerges, 'Taking Law Seriously: On Political Science and the Role of Law in the Process of European Integration' (1996) 2 *European Law Journal* 2, 105–35 ; G de Búrca, 'Rethinking Law in Neofunctionalist Theory' (2005) 12 *Journal of European Public Policy* 2, 310–36; and J Shaw, 'The European Union: Discipline Building Meets Polity Building' in P Cane and M Tushnet (eds), *Oxford Handbook of Legal Studies* (Oxford, Oxford University Press, 2003) 325–52.

notion of 'legal entrepreneurship', hereafter defined as the innovative investment of one or more lawyers in the intellectual contests over the definition of the nature and future of European legal order.[7] I argue that it provides a more refined understanding of the politics of legal change. The following section discusses the notion of the 'European legal field', defined as the relatively autonomous and institutionalised social universe structured around a competitive struggle over the nature and future of European law. Such a notion helps to broaden the scope of what is generally studied in the discipline of European law and helps connect it to the bigger picture of European (economic, political and bureaucratic) integration processes. All in all, this edited volume renews our perspectives on how law and polity-building are interconnected, shaping and informing one another. It calls for new interdisciplinary encounters between a more reflexive European law scholarship on the one hand, and social sciences more sensitive to the 'world' lawyers live in on the other hand.[8]

II. THE VIEW FROM WITHIN. TRANSNATIONAL LEGAL ENTREPRENEURS AND THEIR EUROPEAN BIDS

This section, as indicated in section I, seeks to explore the specifics of legal and judicial entrepreneurship and questions its added value in producing a new understanding of legal change in Europe. Incorporating such living, acting and purposeful people into the study of European law is not just a matter of knowing more about its general 'context' or presenting a more colourful picture of the European courts. I argue hereafter that it provides a refined explanation as to how specific legal ideas and projects actually make it to the core of judicial, political, economic or bureaucratic agendas.

A. Legal Practices as Social and Professional Skills

There is a traditional reluctance to consider lawyers, in particular judges, as 'entrepreneurs'. Since courts are supposed to be purely reactive institutions driven by legal principles, and legal interpretation is supposed to be essentially about unveiling the 'authentic' content of the law, the innovative part of lawyering activities as well as its 'disequilibrating force' (Schumpeter) are often underestimated, if not entirely omitted. This may not be entirely surprising in a professional milieu – that of law – best defined as a 'static market'[9] in which the most successful legal entrepreneurs are often the ones who manage to prove that their interpretative take is the *least* innovative and the most faithful to the 'legal tradition'. It is well known that

[7] W McIntosh and C Kates, *Judicial Entrepreneurship. The Role of Judges in the Marketplace of Ideas* (Westport, Greeewood Press, 1997).

[8] On this last point, see Bruno De Witte's chapter in this volume.

[9] McIntosh and Kates, *Judicial Entrepreneurship* (n 7).

judges value references to the past and tend to frame their decisions within the boundaries of precedents (whether one calls this *stare decisis* or *jurisprudence constante,* depending on one's specific national legal culture).[10] Yet, jurists *can* be entrepreneurs too, a very specific blend of entrepreneurs, admittedly – one profoundly different from the political or business ones, but still entrepreneurs. To be sure, legal entrepreneurs very rarely publicise their undertaking, nor would they march or rally to promote them! They are bound by many shared yet oft unspoken norms as to how one ought to promote new ideas and projects. As a matter of fact, legal entrepreneurship takes on idiosyncratic forms and paths that are deemed more appropriate for knowledge-based professionals. They 'campaign' and peddle new legal ideas through more discrete channels, most often exclusively within the realm of the legal community: opinion-writing,[11] legal scholarship,[12] speeches in academic or bar conferences,[13] commemorations[14] constitute essential bricks of a specifically legal repertoire of action.

Research in legal entrepreneurship therefore impliedly shifts the focus from law to lawyers' practices. The immediate gain is the overcoming of the traditional opposition between activism versus restranist *problématique*[15] which ultimately always implies a normative standpoint from which it presumably becomes possible to draw a line separating 'judge-like' and 'unjudge-like', 'legal' and 'illegal' practices. Rather, such an approach that is taken here starts from the premise of law's relative indeterminacy and considers in a somewhat agnostic manner what judges and lawyers actually do and how they do it. Thus the focus and goals are broadened, from explaining European case-law to accounting for the great variety of legal and extra-legal actors that contribute to its fabric way beyond the judicial realm. Legal consultants or agents for national governments and EU institutions, expert-academics involved in political or legal undertakings, business lawyers working for corporate interests, cause lawyers, etc are all part of this story as they get involved in designing the institutional rationales and policy techniques in the realm of the single market, human rights, anti-trust regulation, constitution-making, etc. In those activities, lawyers often go beyond legal expertise and technicalities. For example, the role of governments' legal agents who plead before the

[10] See R Uitz, *Constitutions, Courts and History. Historical Narratives in Constitutional Adjudication* (Budapest, CEU Press, 2005).

[11] cf N Burrows and R Greaves, *The Advocate General and EC Law* (Oxford, Oxford University Press, 2007); L Clement-Wilz, *La fonction de l'avocat général près la Cour de justice des Communautés européennes* (Brussels, Bruylant, 2011).

[12] See, eg, J Bailleux, 'How Europe Became Law. The First International Academic Congress on the ECSC (Milan-Stresa 1957)' (2010) 60 *Revue française de science politique* 2, 67–90.

[13] L Scheeck, 'The Diplomacy of European Judicial Networks in Times of Constitutional Crisis' in F Snyder and I Maher (eds), *The Evolution of the European Courts : Change and Continuity* (Brussels, Bruylant, 2009).

[14] A Vauchez, 'Keeping the Dream Alive. The Transnational Fabric of Integrationist Jurisprudence' (2012) 5 *European Political Science Review* 1, 51–71.

[15] See the classic debate between H Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Boston, Martinus Nijhoff, 1986); J Weiler, 'The Court on Trial' (1987) 24 *Common Market Law Review* 555–89; and M Cappelletti, 'Is the European Court of Justice Running Wild' (1987) 12 *European Law Review* 1, 4–17.

ECJ or the European Court of Human Rights (ECtHR) involves more than a mere legal formalisation of pre-existing state interests. As pointed out by Marie-Pierre Granger in this volume, their activity requires a continuous and oft-unseen mediating act between the various national political and administrative interests involved in European case law with a view to building their country's legal position in Strasbourg or Luxembourg. Likewise, EU lawyers acting in the domain of commercial consultancy do not exclusively perform the technical task of checking or securing the legality of given deals. As Lahusen indicates in this volume:

> they also assist their clients in public or government relations by monitoring policy debates and legislative procedures, advising clients in the interpretation of this information, helping them to refine their interests, allies and opponents, supporting them in designing and implementing lobbying campaigns, drafting statements and documents, and assisting them in building coalitions

As a result, even though lawyers may in most instances appear as backstage actors working in the name of their principals (Member States, EU institutions, firms, interest groups, etc), it would be highly misleading to consider them as mere 'transmission belts'. This would be a short-sighted conclusion, one that misses their deeper role as 'brokers' decisively acting between groups, institutions and sectors.[16]

Furthermore, there is no doubt that in performing these main legal and extra-legal tasks, lawyers need to deploy a variety of social assets and professional skills. Chief among them are of course legal skills and, in particular, the practical mastery of law's technicalities. After decades of legal integration, there is no doubt that engaging in European law is not cost-free. Not all lawyers are equals in front of European law, and even less so before the ECJ and the ECtHR where the most successful litigants not only master the voluminous amounts of previous case law but are also well acquainted with the court's specific judicial style and customs. As Jean-Paul Jacqué puts it in his contribution to this volume, practising European law 'is not just a matter of using a specific legal vocabulary learned at university, it takes its substance from its practice and those who have taken their distances from the law for too long cannot possibly claim to master its intricacies'. Legal virtuosity, that is to say the ability to produce innovative legal arrangements, certainly requires more than formal knowledge of the law. Such ability depends first of all on a profound mastering of a limited set of previously established legal sentences, tools and arguments that form the commonly accepted bricks of EU law reasoning.[17] Walter van Gerven does not say otherwise when he looks back at how he 'convinced the Court to overrule its earlier judgment' (the *Comitology* decision):

[16] For macro-sociological consideration of the role of law and lawyers as brokers, see Y Dezalay and B Garth, 'Politics and Legal Markets' (2010) *Comparative Sociology* 9, 953–81.

[17] On the ECJ 'judicial style', see L Azoulai, 'La Fabrication de la Jurisprudence Communautaire' in P Mbongo and A Vauchez (eds), *Dans la Fabrique du Droit Européen* (Brussels, Bruylant, 2009); J Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford, Clarendon Press, 1993).

> the A. G. (as I then was) used another line of reasoning, namely that the distribution of competences between the institutions is not only a matter of institutional balance but that it has also a protection of legal rights dimension (. . .) The Court followed that reasoning. The distinction may seem to be a thin one but it is not[18].

Yet, even though legal virtuosity matters, lawyers should not be taken as purely legal animals and their extra-legal skills are equally critical in successfully promoting specific legal agendas. When it comes to convincing his or her peers, many of a judge's valued skills are not based on legal knowledge. In his contribution to this volume, Jean-Paul Jacqué details the *savoir-faire* that constitutes the necessary yet oft-unspoken assets of an influential institutional designer: 'a good lawyer – he indicates – needs to know when to keep quiet as well as when to speak up when there is a genuine legal concern'. Thereby, he points at something very close to what Pierre Bourdieu used to coin as the 'practical sense' of the game, namely a sort of pre-reflexive – yet socially acquired – ability to do things the way they are expected to be done (including self-restraint, mediating abilities, swiftness in designing alternative proposals or wording, etc . . .), anticipating possible reactions from peers.[19] When it comes to manufacturing consent, closing deals or weighing on the bargaining process, many of lawyers' valued skills are precisely *not* based on technical legal knowledge. Rather, they involve an important element of craftsmanship and a number of extra-legal skills (organisational know-how, ability to conduct personal relations, 'inside' knowledge of EU institutions, etc) that are equally necessary for them to push their legal agenda in the various institutional contexts in which they operate, whether it is in a bureaucracy, in a political setting, or in a business environment.[20]

B. Legal Entrepreneurs, Transnational Networks and Social Capital

While the mastering of specific crafts and know-how play a critical role in legal entrepreneurship, it would be foolish not to consider the role of social capital and networks.[21] Legal actors are not isolated and self-referential players: like any other social actors, they are embedded in a dense web of relations and bonds both within and across the legal realm. As such, these professional connections and networks are certainly unable to 'explain' or 'predict' specific legal outcomes. Such determinism would overlook the structuring capacity of institutional roles.

[18] W Van Gerven, 'Politics, Ethics & the Law, Legal Practice & Scholarship', LSE working papers, Department of Law (London, London School of Economics and Political Science, 2008) 8.

[19] P Bourdieu, *The Practical Reason. On the Theory of Action* (Stanford, Stanford University Press, 1998).

[20] In an interesting inquiry based on interviews with ECJ Advocate Generals, Iyola Solanke has recently documented the sort of such shared albeit unspoken norms of what constitute a worthy legal argumentation: I Solanke, 'Diversity and Independence in the European Court of Justice' (2008) 15 *Columbia Journal of European Law* 1, 89–121.

[21] W Kaiser, B Leucht and M Gehler (eds), *Transnational Networks in Regional Integration. Governing Europe* (1945–1983) (London, Palgrave Macmillan, 2010).

Suffice it to mention here the fact that active apologists of EU law supremacy in the early 1960s such as ECJ Advocate General Maurice Lagrange or the Commission's legal service director Michel Gaudet were simultaneously deeply embedded in the network of the French Conseil d'Etat, a court famously sceptical about European legal integration. Rather, networks and social capital allow an understanding of how innovation is turned into lasting and socially accepted institutional change. While connections and social capital do not 'create' ideas – even though they may act as filters and channels for their circulation – they are integral to their institutionalisation. As a matter of fact, the 'disequilibrating force' of legal entrepreneurship also relates to the capacity to strategically mobilise one's personal background, past experiences and social capital in the various professional and intellectual contests in which one is engaged. Such a perspective provides a renewed explanation for how specific interpretations of European treaties sometimes make their way to the ECJ or to the ECtHR and how they eventually manage (or not) to solidify into these courts' jurisprudence. Many of the early landmark cases at the ECJ have been launched by pan-European lawyers often members of the *Fédération international pour le droit européen* (FIDE) or closely connected to the community of EC law scholars: LFD Ter Kuile in *Van Gend en Loos* (1963), Elaine Vogel-Polski in the various *Defrenne* cases (respectively 1971, 1976 and 1978), Gert Meier in *Cassis de Dijon* (1979): each one of them had been decisively proactive in their abundant academic writings, op-eds, memos and conferences, peddling their new conceptions of EC law in the various national and transnational 'marketplaces of legal ideas'. The bold 'legal revolutions' they were conveying gradually gained social credit thanks to the range of support they found in (national and European) bureaucratic, academic, judicial and political fora.[22] All in all, the successful transformation of their new 'legal products' from mere trial balloons and floating ideas into consolidated jurisprudence is the product of an uninterrupted flow of ECJ decisions, academic studies and pan-European mobilisations in which these legal entrepreneurs take a central part.[23] Likewise, the 'juridification' of the ECHR is in large part due to the entrepreneurial role of a first generation of civil servants and legal advisers that populated the ECHR institutional site (members of the Court, of the Court's registry, of the Council of Europe's Human Rights Directorate, etc). The academic and political connectedness of this transnational group of 'insiders' was integral to their progressive monopolising of the transnational legal discourse on the European Convention. Through academic conferences, public lectures, doctrinal articles, *Festschriften*, legal instruments, they established the *legal* scope and value of a

[22] A Cohen in this volume; and A Cohen and A Vauchez, 'The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited' (2011) 7 *Annual Review and Law and Social Sciences* 417–32.

[23] See also K Alter, 'Jurist Advocacy Movements in Europe' in *The European Court's Political Power. Selected Essays* (Oxford, Oxford, University Press, 2009); M Rasmussen, 'The Origins of a Legal Revolution. The Early History of the European Court of Justice' (2008) 14 *Journal of European Integration History* 2, 77–99.

Convention that was initially thought of as an essentially *political* instrument.[24] On the other side of the temporal spectrum, Laurent Godmer and Guillaume Marrel consider Europe's constitutional agenda and its continuing saliency for the whole mid-1990s/mid-2000s decade. They point to the role of 'constitutional entrepreneurs' at the European Parliament with strong legal, political and academic credentials and connections who specialised in promoting this constitutional project, relentlessly suggesting new solutions, loopholes and techniques to bring it back to the forefront of EU politics.[25]

The importance of these transnational social networks is such that European institutions have actually engaged in manufacturing and cultivating them through a variety of policy instruments. With (national) heterogeneity being perceived as a permanent threat to European law's cohesiveness, the ECJ, the European Commission and the Council of Europe have developed a form of 'strategic functionalism',[26] relentlessly promoting legal networking across national and professional bodies – such networks being understood as essential devices for triggering a (much-hoped for) process of legal spill-over. Take for example the widely acclaimed 'judicial dialogue' that has unfolded over the past decade in Europe across national courts through a variety of meetings and tools (from procedural frameworks for collaboration to translation of judicial material and case law databases) that help connect and monitor national judicial practices vis-à-vis EU law.[27] In the same vein, one could mention the recent emergence of a rather informal dialogue between governments' legal agents engaging in 'experience-sharing, peer-learning and increased cooperation'.[28] In both cases, the expected outcomes are mutual understanding 'under the mellowing influence of wine and good cheer',[29] cross-fertilisation, mutual trust, loyalty, development of benchmarking or best practices, and last but not least, social capital. And the European courts are no exception to this proactive manufacturing of transnational networks. The many eulogies, jubilees and *Festschriften* that are organised or edited under their aegis exemplify how a group of centrally placed and transnationally recognised judges try to protect, defend, develop and revive the existence of a 'community of believers' structured around ECJ core legal principles and norms.[30]

On the whole then, *Lawyering Europe* depicts a Europe populated by legal actors with many connections within and across the European legal arenas who

[24] See S Hennette-Vauchez's contribution in this volume. And J Christoffersen and M Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford, Oxford University Press, 2011).

[25] See L Godmer and G Marrel's contribution in this volume.

[26] N Jabko, *Playing the Market. A Political Strategy for Uniting Europe* (1985–2005) (Ithaca, Cornell University Press, 2006).

[27] See Monica Claes and Maartje de Visser's contribution to this volume.

[28] In her contribution to this volume Marie-Pierre Granger indicates that, ever since 2002, governments' legal agents have met once a year usually for two days in the capital of the countries holding the Presidency for intensive 'closed' workshops.

[29] Brown and Kennedy, quoted in Monica Claes and Maartje de Visser.

[30] A Vauchez, 'Keeping the Dream Alive. The Transnational Fabric of Integrationist Jurisprudence' (2012) 5 *European Political Science Review* 1, 51–71; in the case of the European Court of Human Rights, see Stephanie Hennette-Vauchez's contribution in this volume.

therefore become essential drivers of legal and political changes by bridging gaps in communication between persons, groups, institutions, sub-fields, sectors and even legal cultures. These transnational legal networks -such as for instance learned societies like the *Fédération internationale pour le droit européen*, journals like the *Revue des droits de l'homme*, research institutes such as the Academy of European Law in Treves, etc – can be essential sites of coordination across national and professional borders, for they have provided along the years incentives and ideas for test-cases and a sense of a common 'mission'.[31] By cutting across national, professional and institutional divides (national/international, law/politics, etc), they extend beyond the *centres* of judicial, political or bureaucratic command ('the Court', 'the Parliament', 'the Commission', etc) officially entitled to interpret or produce the law of the European treaties, and they allow fewer institutionalised microcosms to enter where common understanding of European law's priorities and issues are produced. In turn, the understanding of Europe's key legal institutions is transformed: the image of the European Court of Justice (or of the European Court of Human Rights) as a self-sufficient and strategic actor delivering *judicial fiats* is being substituted by that of an institution deeply embedded in a number of social and professional networks that help define what the European courts' case law is and should be. On the whole, this allows for a reassessment of the well-established narrative of 'the constitutionalisation of Europe' as a self-reinforcing and ever-increasing process during which self-interested actors (firms, interest groups, EU institutions, etc) strategically seized the ECJ. Instead, the contributions of this book indicate a process shaped, both historically and in its contemporary design, by the result of the oft-competing dynamics of action of a whole series of entrepreneurs, networks, strategies, and mobilisations continuously playing on both sides of the border between law and politics.

III. FROM CONTEXT TO CONTESTS. THE EUROPEAN LEGAL FIELD AND EUROPEAN POLITY-BUILDING

The study of social capital and networks is not sufficient however to reveal how European law connects to the larger dynamics of the European integration processes. For this, one needs a complete picture of the overall 'field' of European law, its internal complexity and fragmentation as well as its many bonds with the neighbouring fields. Famously drawn from Pierre Bourdieu's sociology, the notion of field is well-suited to capture a constellation of oft-distant-yet-interdependent legal actors and institutions competing for the authoritative manipulation and interpretation of European law. As a prelude, it should be said that the usage of field-theory in the realm of European studies is rather recent. It was not until the early 2000s that

[31] See Alter (2009) and Vauchez, 'The Transnational Politics of Judicialization. Van Gend en Loos and the Formation of EU Polity' (2010) 16 *European Law Journal* 1–28.

some scholars introduced it.[32] The notion has now become quite ubiquitous and . . . polysemic.[33] As shown the contributions to this book, usages range from an essentially metaphorical and spatial notion – that of 'legal landscape' akin to the notion of 'context' in history – to a more orthodox Bourdieuan conception that carries along a whole set of related notions such as *capital*, *habitus*, etc. It is certainly not the purpose of this introductory chapter (nor of the volume as a whole) to try to discipline these usages and indicate whether European law does or does not constitute a fully-fledged/authentic 'field' in the precise meaning that was originally given by Pierre Bourdieu in the highly specific case of the French field of power. Field-theory's heuristic value lies first and foremost in its capacity to generate new hypotheses and research paths. Let us consider three of them.

A. Mapping Out the Field of Euro-lawyering

The first empirical added value of field-theory lies in the topographical perspective that incites researchers to consider constellations of seemingly disparate yet interdependent sets of actors, groups and institutions. As a matter of fact, European law has developed over time into a multiple set of specialised branches, to the point that its current structure is more accurately described as a complex mosaic of fragmented areas of legal practice that are largely autonomous from one another. The community-like atmosphere of the early days of European legal integration, when European law insiders constituted a stable and steady group and shared the common purpose of promoting the uniqueness of EC law (from *Van Gend en Loos* onwards), has progressively been undermined by the global expansion of EU-related legal functions and the successive waves of enlargement. The interpersonal trust that was once in-built in the daily interactions and informal coordination mechanisms that took place in transnational legal arenas such as the FIDE of the 1960s has no equivalent today. Over the years, Euro-lawyers have polarised around sub-fields of European law with specific bodies of rules and practical knowledge, ranging from competition to sex discrimination and from intellectual property rights to internal market rules. Such dynamics of differentiation can easily be seen in the changes that took place in the Brussels' transnational legal scene over the past decades. As early as in 1974, Eric Stein – one of the very American legal scholars interested in the developments of European law – described Brussels as unique

[32] N Kaupii, *Democracy, Social Resources and Political Power in the European Union* (Manchester, Manchester University Press, 2005); N Fligstein and A Stone, 'Constructing Polities and Markets: An Institutionalist Account of European Integration' (2002) 107 *American Journal of Sociology* 5, 1206–43.

[33] See, however, the papers by A Cohen, D Georgakakis and M Madsen in a symposium directed by Didier Bigo and Mikael Madsen (eds), 'Bourdieu and the International' (2011) 5 International Political Sociology 3; the edited volume by M Mangenot and J Rowell (eds), *A Political Sociology of the European Union. Constructivism Reassessed* (Manchester, Manchester University Press, 2011); and recently D Georgakakis (ed), *Le champ de l'Eurocratie. Une sociologie politique du personnel de l'Union européen* (Paris, Economica, 2012).

> in having developed an explosively productive 'critical mass' of legal talent. Neither New York nor Geneva, the principal seats of UN administration, have managed to provide a comparable atmosphere of sustained and organized interaction among the legal staff of the UN bodies, the local bar and law faculties. But in Brussels, the early leading figures of the European Communities – Hallstein, Rey, Von der Groeben, Gaudet, Verloren van Themaat – personally set a pattern of extensive scholarly writing, lecturing and teaching, and they frequently sought outside advice from legal scholars and practitioners.[34]

These first *légistes* of the European institutions found support for their institutional activities in the network of European lawyers that was particularly well-rooted at the time at the *Institut d'études européennes* of the *Université libre de Bruxelles*, thereby forming a rather small circle of EC-specialised lawyers. It was soon followed, in the wake of the Single European Act, by the development of an important pole of private legal practice essentially promoted by Anglo-American law firms. Today, there are no less than 197 offices of international law firms in Brussels, most of them branch offices of foreign-based companies, amounting to more than a thousand lawyers, most of them working in the area of competition and business law.[35] More recently, another pole of legal practice has emerged that relates to advocacy in the area of human rights and non-discrimination policies.[36] The establishment of well-funded programmes such as the EU's Initiative for the Promotion of Democracy and Human Rights (1994) has progressively transformed Brussels into the financial capital of European human rights activism.[37] Similarly, the development of a body of EU gender equality law and case law has provided the basis for women activists' non-governmental organisations (NGOs) to interfere in Brussels' politics. In other words, the growth of EC and EU policies has generated a huge diversification of legal practices.[38] As a result of these many political, economic and bureaucratic changes, Brussels has turned into one of Europe's biggest legal fora where a large variety of legal actors converge and compete.

This fragmented and competitive structure of European law should not lead us to neglect the common interests these various actors have in defining European law. Let us consider for example state legal agents from the Conseil d'Etat or the Avvocatura dello Stato pleading in Strasbourg or Luxembourg on behalf of their national governments, on the one hand, and competition lawyers trained in American LLMs and now working for Anglo-American law firms in Brussels, on the other hand. These two figures of European law practice certainly have little in common in terms of their training, career paths, amount of international

[34] E Stein, 'European Communities' (1974) 22 *American Journal of Comparative Law* 3, 573–75, 573.

[35] This multifaceted development of an EU-centered legal market is part of a larger market of EC-related expertise (consultancy firms, international media, region and city representation offices, universities' specialised programs) for whom Brussels has become an essential venue.

[36] Cichowski, *The European Court and Civil Society* (n 3).

[37] See Mikael Madsen's chapter in this volume. And also M Madsen, *La genèse de l'Europe des droits de l'homme* (Strasbourg, Presses de l'Université de Strasbourg, 2011).

[38] See JM Decroly et al, 'Local Geographies of Global Players: International Law Firms in Brussels' (2005) 13 *Journal of Contemporary European Studies* 2, 173–86. And Daniel Kelemen's chapter in this volume.

experience and, last but not least, conceptions of European law (a tool for diplomacies versus a critical device for market operations). They embody radically antagonistic views of European lawyers, their functions in EU polity, the specific criteria of legal excellence, the most valued legal credentials, the most estimated skills, degrees and professions, etc. Yet, even though they may plead against each other before national and European courts, both the *conseillers d'Etat* and the business lawyers share a common assumption that an essential part of Europe's future takes place in these judicial arenas and that all governments and market actors should act accordingly. While they contribute to building competing rationales and techniques for European integration, they are both engaged in elevating the general status of Euro-law in European affairs – be they private or public – turning it into one fundamental prerequisite for the access and ascent to private corporations or public bureaucracies. As such, they are best considered as 'associated rivals'.

B. The Emergence of the Euro-Lawyer

Secondly, talking about a European legal field also suggests the existence of a specific transnational social structure in which European law is produced, interpreted, applied and modified: 'Europe' is not a land of legal opportunities *equally* open and accessible to all lawyers regardless of their training, professions and previous working experiences. As a consequence of decades of strong dynamics of specialisation, the production and interpretation of European law takes place in a complex set of established institutions and reputable groups, specialised breeding grounds and *cursus honorum*, shared understandings and conventional wisdoms, that define specific 'European ways of law'.[39] This institutionalisation of Euro-lawyering takes many forms, most of them documented in this volume. Among them, the emergence and solidification of *specific* criteria and templates against which Euro-lawyers' worth and wealth are assessed. Some academic credentials, national professional affiliations or career paths are deemed more efficient in producing excellence in European law. The *Collège de Bruges* and the European University Institute, in particular, have become renowned breeding grounds for accessing the Commission's legal service or legal clerkship positions at the European Court of Justice. Even in the case of government agents, usually considered to be *ex officio* more reluctant to Europeanisation, Marie-Pierre Granger identifies a progressive – although limited – streamlining of their profiles along EU-specific credentials (diplomas in Bruges, working experience at the Court or in the legal services of one of the EU institutions, participation in academic activities in the field of EU law, etc). Another form of institutionalisation of Euro-lawyering lies in the progressive codification of a specific EU law vernacular ranging from legal methodology, *bibliothèques de phrases,* judicial compendiums,

[39] V Gessner and D Nelken (eds), *European Ways of Law. Towards of European Sociology of Law* (Oxford, Hart, 2007).

acceptable arguments and shared beliefs, some of which are being gradually codified in guides for professional practice or doctrinal treatises. These formal instruments include routinised legal formulas, key words and bureaucratic forms that have consolidated over the decades and, as such, are certainly also decisive in channelling newcomers' roles within a set of previously established legal alternatives and debates. Thereby, judicial deliberation in both European courts is not just about the open deliberation of independent judicial minds. It is embedded in a number of more or less codified (legal and non-legal) 'standard operating procedures' defined by internal services as diverse as the *greffier* office, translation services or the *Cellule de lecteurs d'arrêts.*[40] This is not to say that judges have progressively lost their margins of manoeuvre but rather that these instruments that codify rules for typing, quoting, writing (through the definition of 'best practices', of the most valued legal formulas and judicial techniques, etc) contribute to framing and structuring the ways in which judges and lawyers argue and plead in the European courts. This research path that points to the limited set of cognitive and technical (legal and non-legal) tools with which European law is produced still remains to be explored.

C. A Weak Field? A Framework to Analyse Law's Broad Definitional Power

Thirdly and finally, field-theory allows for a comparative assessment of the specific form of the European legal field vis-à-vis the more historically rooted and established national legal fields. In this regard, one should account for the fact that the transnational field of European law still remains deeply embedded in national fields of power.[41] To be sure, no one would deny that European Union law has been successful in becoming a separate academic discipline and distinct object of professional practice. By many standards, EU law is arguably the most federal and integrated area of Europe.[42] Most nationally-anchored professions, bureaucracies and courts have been subjected to the centralising pressure of the ECJ's constitutional doctrine.[43] Interestingly however, the progressive diffusion of this daring doctrine among Member States has not undermined national legal professions and their regulatory or gate-keeping capacities. The Euro-lawyers'

[40] The systematic codification of ECJ 'judicial style' undertaken by Pierre Pescatore during his stay at the Court (diffused internally in the early 1980s and only recently made public) gives an idea of the rich potential of such a research line: P Pescatore, *Vademecum. Recueil de formules et de conseils pratiques à l'usage des rédacteurs d'arrêts*, 3rd edn (Brussels, Bruylant, 2007). On the increasing role of the translation service, see K McAuliffe, 'Languages and the Institutional Dynamics of the Court of Justice of the European Communities: A Changing Role for Lawyer-Linguists?' in M Gueldry (ed), *Languages Mean Business* (Lampeter, The Edwin Mellen Press, 2010) 239–63.

[41] A Cohen, 'The European Court of Justice in the Emergent European Field of Power: Transnational Judicial Institutions and National Career Paths' in Y Dezalay and B Garth (eds), *Lawyers and the construction of transnational justice* (New York, Routledge, 2012) 239–57 ; and A Vauchez, 'The Force of a Weak Field. Law and Lawyers in the Government of Europe' (2008) 5 *International Political Sociology* 2, 128–44.

[42] On this, see JHH Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge, Cambridge University Press, 1999).

[43] K Alter, *Establishing the Supremacy of European Law* (Oxford, Oxford University Press, 2009).

'professional project'[44] has remained in large part unachieved as there is no such thing as a common European legal education or European legal professions able to 'control the production of (future) producers' as sociologists of professions would say. In few other domains of market integration was there more resistance than in that of legal practice and legal professions, a domain historically bound to states' and professions' regulatory powers.[45] It could even be argued that the European Union somehow reinforced national professional bodies as primary levels of regulation. The best example in this domain is the development of the 'mutual recognition' technique (as opposed to the more ambitious harmonisation approach) in the case of Higher Education Diplomas which had the effect of mutually interlocking the country-specific regulations of university certification and professional licensing procedures. It might be true that the Erasmus programme as well as the development of EU higher education institutions (such as the European University Institute or the College of Europe) have contributed to the harmonisation of educational and occupational requirements. Yet, as pointed out by Bruno de Witte in his contribution to this volume, this denationalising process has remained rather limited as the training of most lawyers continues to take place within the confines of national university systems, thus maintaining a 'nationally-colored outlook on EU law'. Such an absence of supranationally integrated European legal education and professions where EU-implicated legal professionals – judges, litigants, MEPs, law clerks, etc – could be trained and selected is a defining specificity of the European legal field. As a consequence, educational and professional socialisation still occurs in large part *outside* the European legal field and the selection to key positions in European law, such as appointment to both European courts, still depends on the *national* political and bureaucratic balance of power. As such, they are still heavily dependent on resources, the value of which is defined outside of the European legal field: the diplomatic influence of the home country, the burden of the mother tongue; the prestige of one's university, the reputation of the institutional group, and social capital of course, etc. Absent autonomous supranational professional/institutional poles, the European legal field can be coined as a *weak* field when compared to its national counterparts, in the sense that it has a weak centre, it is weakly differentiated internally and it has porous borders with neighbouring fields.

This implies first of all that transnational legal arenas such as 'academic congresses', 'learned societies', 'professions' or 'courts' are certainly different from what they are in national settings. Lacking supranational forms of regulation, these arenas remain largely indeterminate as they allow for a variety of nationally anchored elites to converge under the aegis of building European law. As such,

[44] M Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley, University of California Press, 1977).

[45] V Olgiati, 'The European Learned Professions and the EU Higher Education Project' (2008) 10 *European Societies* 4, 545–65; N Fligstein, *Euroclash. The EU, European Identity, and the Future of Europe* (Oxford, Oxford University Press, 2008).

these arenas function more as crossroads more than as endpoints.[46] This volume and other papers published in the framework of the Polilexes Research Programme (www.polilexes.com) offer a large variety of examples, from the current Trier Academy of European Law as studied by Guillaume Sacriste[47] to the old *Fédération international pour le droit européen*, from the Convention for the Charter on Fundamental Rights analysed here by Mikael Madsen to the Convention on the Future of Europe.[48] Under the aegis of building a united market, promoting a European Constitution, establishing a Charter of Fundamental Rights or developing judicial cooperation, one can see the afflux of a variety of (former or current) legal professionals involved in market integration, parliamentarian politics, lobbying activities, academic undertakings, and invoking a different portfolio of educational, professional and political credentials (political legitimacy, state expertise, educational credentials, legal technique, business connections and relational capital, etc) to interpret and build European law. As such, these transnational arenas make space and opportunities for the pooling of this highly diverse portfolio of resources and building of common cognitive and normative frames. Porous and overlapping with bureaucratic, economic and political sectors, the field of European law therefore appears as an essential site for coordination and homogenisation of common frames of understanding and building EU polity. This perspective is therefore essential for grasping how a given portfolio of resources (from within and outside legal arenas) is pooled under the aegis of European law, thereby shedding new light on the differential trajectories of European policy frames. This, we hypothesise, is one critical research path when it comes to questioning the changing saliency and broad definitional power of legal paradigms in EU polity. Such constitutive capacity of the European legal field as a 'weak field' is not unconditional but depends on the changing capacity of European legal arenas to be a crossroads of European elites: its position at the crossroads is certainly not automatically conducive to harmonious pooling of resources. This is a matter of empirical research assessing the measure in which law, legal arenas and legal frames have kept their traditionally central position in EU polity.

D. A General Decline? European Law in the Contest over Europe's Integrative Master Frame

The traditional role of legal training and *savoir-faire* as required skills and relevant 'languages' for Europe's political, bureaucratic and economic elites is well-

[46] M Madsen, 'Transnational Fields. Elements of a Reflexive Sociology of the Internationalisation of Law' (2006) 114 *Retfaerd* 3, 23–45.

[47] G Sacriste, 'L'Europe est-elle un Etat comme les autres? Retour sur la distinction public/privé au sein de la commission juridique du Parlement européen des années 1960' (2012) 85–86 *Cultures et conflits* 63–88.

[48] A Cohen, 'Legal Professionals or Political Entrepreneurs? Constitution Making as a Process of Social Construction and Political Mobilization' (2010) 4 *International Political Sociology* 2, 107–23.

known.[49] To put it in the words of Yves Dezalay, law has been 'an arena for mediation between the different axes of power'. Even though Euro-lawyers are no 'invisible college' of European integration, they have come to form a central tenet of the EU polity. Often combining the public functions of politicians and statesmen with their activity as prominent members of the bar or as the partners of law firms, a select group of centrally placed lawyers has managed to deploy its activities across social boundaries in all kinds of EU-related institutions and groups. The foundational legal concepts and theories that they have built have proved critical in providing EU institutions and policies with autonomous rationales.[50] However, this deep-seated centrality of EU law is currently being contested by other sciences of European government drawing from other functional logics such as economics, new public management, etc. Lawyers' jurisdiction over European public affairs has become a highly contested terrain: law's very ability to provide the EU with its overarching 'integrative' frame is now under fire. European decision-makers seem to prefer other integration mechanisms purported to be better adjusted to the new reality of European integration.[51] Has the substitution really taken place? Or is it more accurate to consider this 'EU-law-in-decline' thesis 'as not indicative of a move *away* from law, but as part of a distinct and novel stage of legal integration itself' as put forth by Mark Dawson in his analysis of the Open Method of Coordination?

There are many empirical ways of assessing this ongoing contest over sciences of government in Europe. One of them is explored in great depth in this volume: it consists of measuring the evolving pay-off of legal expertise in the variety of institutional or professional arenas where its value and its usefulness are being discussed. Three chapters of this book engage in this type of research: conducted in different institutional settings (the European Commission, the European Parliament and the transnational business community), all three offer empirical evidence of a weakening of the political and social leverage of Euro-law expertise. Didier Georgakakis and Marine de Lassalle wonder where the 'lawyers have gone' in the Commission, recalling the fact that jurists have long held top positions in the European Commission – not only in the Directorates General (DGs) but also in the *Collège des commissaires* – and have been essential in building the foundations of this supranational administration along the lines of the Prussian model of administration in which legally-trained public officials form the natural elite. As pointed out through a careful statistical overview of EU top officials'

[49] S Mudge and A Vauchez, 'Building Europe on a Weak Field. Law, Economics, Scholarly Avatars and the Construction of Transnational Politics' (2012) 117 *American Journal of Sociology* 2, 449–492.

[50] A Vauchez, *Brokering Europe. Euro-lawyers and the Building of a Transnational Polity* (Cambridge University Press, 2013, forthcoming).

[51] Among the researchers who have investigated these emerging alternatives, see C Joerges, *Integration through De-legalisation. An Irritated Hacker, European governance papers* (Connex Network, no 07-03, 2007); I Bruno, 'From Integration by Law to Europeanization by Numbers. The Making of a 'Competitive Europe' through Intergovernmental Benchmarking' in M Mangenot and J Rowell (eds), *A Political Sociology of the European Union. Reassessing constructivism* (Manchester, Manchester University Press, 2010) 185–205; and D Georgakakis and M de Lassalle (eds), *La nouvelle gouvernance européenne. Genèses et usages politiques d'un Livre blanc* (Strasbourg, Presses de l'Université de Strasbourg, 2007).

training, this long-lasting dominant position is increasingly contested by economists, even in DGs where jurists used to be prevalent (competition, external relations, regional policy). In a rather similar manner, Laurent Godmer and Guillaume Marrel show that the political pay-off of Euro-law capital has declined in the European Parliament. As the home of many legally trained political leaders, the COMINST (later transformed into the Committee for Constitutional Affairs – COMAFCO) has traditionally been the site where most of the European Parliament's institutional engineering was produced. A careful analysis of leadership positions (quaestors, group chairpersons, committee chairpersons, etc) held in the European Parliament by COMINST members since 1984 shows a sharp decrease in the number of lawyers from 40 per cent at the beginning of the period to merely 7.5 per cent at the turn of the millennium. Last but not least, both Yves Dezalay and Daniel Kelemen speculate on the failure of Euro-lawyers to position themselves as a central group in the economic advancement of European integration when compared to the model of American business lawyers. It is true that the rapid growth of European legal services and the 'merger mania' of the 1990s did generate a European variant of the legal multinational much inspired by Wall Street law firms. Daniel Kelemen points to the fact that the (partial) transplantation of American-style 'adversarial legalism' to Europe is linked to the dramatic increase of US law firms' presence in London, Brussels, Paris and elsewhere in Europe. Yet despite these many transplants and the general race to upsize, Dezalay argues that European law firms are not a functional equivalent to their US counterparts, for they never managed to secure a position in the 'cosmopolitan entrepreneurial elite' (eg the European Round Table) that emerged in the process of the economic re-launching of European integration in the early 1980s, nor did they succeed in setting a system of multiform exchanges ('revolving doors') with EU institutions as intense as the one that operates in Washington.

As can be seen from this introductory chapter, the contributions to this volume span a wide spectrum of domains and periods of European integration. They allow zooming in on different groups and institutional contexts where the law of Europe is debated. They consider a variety of critical junctures, from the early days of European legal integration to the recent constitutional saga. While all the chapters are connected in a variety of ways, we thought it would be more accurate to divide the volume in four parts. The first one explores Europe's legal repeat players with contributions on ECJ judges, the group of ECHR insiders and EU institutions' legal services. The second part, entitled 'Centres and peripheries', considers the hybrid and complex structure of this European legal field embedded as it is in both national and transnational dynamics; the third part – 'European elites and their legal credentials' – explores institutions and professions outside the legal realm *stricto sensu* and traces the changing value of legal credentials among commercial consultants, MEPs and the Commission's high-level civil servants. The last part, entitled 'The disputed role of law in the government of Europe', situates law and legal integrative frames in a wider competition for the definition of Europe's tools of government.

Part I

Repeat Players

1

'Ten Majestic Figures in Long Amaranth Robes': The Formation of the Court of Justice of the European Communities

ANTONIN COHEN*

At the back of the ultramodern Great Hall of this little, whitish 'Gare de Lyon', which, in Luxembourg City, houses the Cercle Municipal, a beige curtain rises. As if plucked out of a Rembrandt painting, here come ten majestic figures in long amaranth robes set off by velvet trim and a white collar. Adorning their heads are velvet caps, resembling Andorra's national headdress and a baker's hat at the same time. (*Le Figaro*, 1954)

These robes, which I am proud to have worn, are the proof that Europe exists. (Jacques Rueff, 1964)

I. INTRODUCTION

THE CONSTITUTIONALISATION OF the European Communities by their Court of Justice[1] is alternatively understood as the logical conclusion of a self-referenced legal reasoning or the inescapable consequence of a self-fulfilling social process, in sum as the output of the spill-over feedback of an autopoietic system.[2] Paradoxically, in this teleological narrative the 'political regime' of the European Union roughly occupies the place David Easton attributed

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[1] For convenience, I use 'Court of Justice' here to refer to the Court of Justice of the European Coal and Steel Community (1952), the Court of Justice of the European Communities (1958) and, henceforth, the Court of Justice of the European Union (2009).

[2] On these two notions, see EB Hass, *Beyond the Nation State/Functionalism and International Organization* (Colchester, ECPR Press, 2008 (1964); G Teubner, *Law as an Autopoeitic System* (Oxford, Blackwell, 1993).

to it in his famous construction;[3] a black box in which the Court of Justice is, more than any other institution, the last of the *matryoshkas*. This explicitly or implicitly functionalist interpretation of the constitutionalisation 'process' is paradoxically shared by legal scholars and political scientists, who in concert (even if playing from different scores) tend to take the Court of Justice for what it is at face value: a 'court', and the principal agents of this process for what their robes give them authority to be, 'judges'. This evolutionary illusion is further reinforced by the case law of the Court itself, which does not appear to have undergone a single *revirement* of jurisprudence until the very beginning of the 1990s,[4] thus perpetuating the belief in a continuous progression of Community law, in a 'direction' that has all the beauties of a sense of history in the making. Two series of reasons help fuel this history of law without history: on the one hand, the unrivalled work of the Court of Justice itself to obstruct outside scrutiny by protecting the secrecy of its deliberations and forbidding access to its own archives (the only one among all institutions of the European Union), and on the other, the historical narrative taking the 1957 turning point for granted, as well as the international division of labour among the different European organisations – that nonetheless simultaneously came into being in the post-war.[5] In such a context, the process of institutionalisation of the Court of Justice itself, of which its jurisprudence is nonetheless the product, usually goes unexamined.

Reconstructing the process by which the 'court' became *the* Court and the 'judges' judges (or, better yet, *the* Judge), through the analysis of both the career paths leading to the Court of Justice and its struggle with the formulation of 'Community' law, enables us to break away from those obvious facts, which are precisely responsible for bringing credit to Community law, and more generally to the entire political regime of the European Union. This in turn reminds us that jurisprudence is a social construction like any other. Understanding how a series of '*coups de force*', to use Pierre Bourdieu's term,[6] conferred the 'force of law' to one legal discourse (among many others) – which is precisely one of the original issues in a process at the end of which no one claims to contest this discourse any more

[3] See D Easton, *A Systems Analysis of Political Life* (New York, Wiley & Sons, 1965). On the debate surrounding the translation of the book into French, see B Lacroix, 'Systémisme ou systé-mystification?' and P Favre, 'Le systémisme: mythe et réalité' (1975) 58 *Cahiers internationaux de sociologie* 98–122 and 123–44.

[4] See A Arnull, *The European Union and Its Court of Justice* (Oxford, Oxford University Press, 2006) 629–30. See also R Mehdi, 'Le revirement jurisprudentiel en droit communautaire' in *L'intégration européenne au 21e siècle. Mélanges en hommages à Jacques Bourrinet* (Paris, La Documentation française, 2004) 113–36; N Molfessis (ed), *Les revirements de jurisprudence. Rapport remis à Monsieur le Premier président Guy Canivet* (Paris, Litec, 2005) esp 22–28 and 72–80; K Lucas-Alberni, *Le revirement de jurisprudence de la Cour européenne des droits de l'homme* (Brussels, Bruylant, 2008) esp 200–04.

[5] See A Cohen, 'Construction des espaces de pouvoir transnationaux en Europe' in A Cohen, B Lacroix and P Riutort (eds), *Nouveau manuel de science politique* (Paris, La Découverte, 2009) 611–24.

[6] P Bourdieu, 'La force du droit. Éléments pour une sociologie du champ jurdique' (1986) 64 *Actes de la recherche en sciences sociales* 3–19.

(or at least nearly no one)[7] – therefore implies going back to the genesis of an institution whose legitimacy does not so much result from the 'legal' and/or 'rational' character of its decisions, to use Max Weber's categories, but from the belief in the 'rational-legal' nature of Community law shared by various groups. As a matter of fact, if the authority of law is not intrinsically rooted in the law itself but in the various investments in law made by different actors, juridical or not, this is particularly true when it comes to transnational spaces where law appears to lack the type of authority it traditionally enjoys within national spaces, deriving from the monopoly to enforce law secured by the state over the course of centuries.

II. THE GENESIS AND STRUCTURE OF THE EUROPEAN TRANSNATIONAL LEGAL FIELD: A NEW RESEARCH AGENDA

Many scholars have scrutinised what is commonly termed the 'constitutionalisation' of the European political, legal and economic order.[8] Rejecting the heroic vision of a small elite of judges revolutionising national legal orders from the secret of their chambers – a vision that the principal agents of this 'process' have had a heavy hand in propagating[9] – most of this literature has on the contrary highlighted the role of the 'interlocutors' of the Court in the implementation of Community law[10] – in what has become a battlefield between intergovernmentalists and neofunctionalists.[11] Among these interlocutors, in particular, were

[7] For a discussion and critique of the judicial activism of the Court of Justice, see H Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Juridical Policymaking* (Dordrecht, Martinus Nijhoff Publishers, 1986).

[8] See, in particular, A Stone Sweet, *The Judicial Construction of Europe* (Oxford, Oxford University Press, 2004); KJ Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford, Oxford University Press, 2001); JHH Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge, Cambridge University Press, 1999); M Poiares Maduro, *We the Court: The European Court of Justice and European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty* (Oxford, Hart Publishing, 1998). For a definition of the process of constitutionalisation, see A Stone Sweet, 'Integration and Constitutionalism in the European Union' in A Cohen and A Vauchez (eds), *La Constitution européenne. Élites, mobilisations, votes* (Brussels, Presses de L'Université de Bruxelles, 2007) 7–14; A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford, Oxford University Press, 2000) 152 and following.

[9] See, eg, GF Mancini, *Democracy and Constitutionalism in the European Union: Collected Essays* (Oxford, Hart Publishing, 2000); R Lecourt, *L'Europe des juges* (Brussels, Bruylant, 1976); P Pescatore, *Le droit de l'intégration. Émergence d'un phénomène nouveau dans les relations internationales selon l'éxpérience des Communautés européennes* (Leiden, AW Sijthoff, 1972).

[10] JHH Weiler, 'A Quiet Revolution: the European Court of Justice and its Interlocutors' (1994) 26 *Comparative Political Studies* 510–34; JHH Weiler, 'Journey to an Unknown Destination: a Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration' (1993) 31 *Journal of Common Market Studies* 417–46; AM Burley and W Mattli, 'Europe before the Court: a Political Theory of Legal Integration' (1993) 47 *International Organization* 41–76.

[11] W Mattli and AM Slaughter, 'Revisiting the European Court of Justice' (1998) 52 *International Organization* 177–209.