

The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)

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Rather than considering legal and judicial arenas as the mere surface of the weighty social processes that shape European integration, this article contends that they are actually one of the essential spaces where the *government* of Europe is being produced. To account for this paramount role played by law in EU polity, two hitherto unexplored research paths are followed. First of all, a socio-historical perspective focuses on the critical junctures at which Law has been formalized as a science of European government providing critical devices for integration. Second, a more sociological stance is taken in relation to the functioning of the “European legal field” (ELF). A preliminary inquiry leads to its characterization as *weak*, with porous internal and external borders. This article argues that this weak autonomy is what makes it strong and influential when it comes to shaping the representations and principles of EU government.

The uninitiated outsider, in this case the political scientist, embarking upon a journey in European law, will inevitably feel at loss.¹ Engraved in the foundations of the European treaties, elevated to the status of a cornerstone of the Union (defined as a “Community of law”) and glorified as a genuine “engine” of European integration, Law seems to have adapted so well to Europe that it is hard to understand it differently than as a kind of self-evident fact.² The conventional separation between “law” and “society” seems inadequate in this context as there is no category or institution of European politics, economics, administration or civil society that has itself not been produced—or

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¹This article owes much to the discussions engaged within the POLILEXES (*Politics of Legal Expertise in European Societies*—CNRS) research group. As the bibliographical references indicate, it takes as its starting point many of the key ideas collectively elaborated. A sample of this work is presented in a symposium recently published in *Law and Social Inquiry* (Cohen and Vauchez 2007). For a complete bibliography of POLILEXES' research, please visit the following website: http://www.u-picardie.fr/labo/curapp/ATIP_AVpolilexes/ATIP_Polilexes.html

²In this article, I take Euro-law, EU law, EC law and European law as synonymous.

co-produced—by lawyers. Consequently, it is difficult to grasp the logic of EU polity, the organization of its bureaucracy, the rules of its market, the causes of its civil society, without drawing on the impressive legal *corpus* of norms (treaties, directives, and jurisprudence), categories and modes of reasoning. While the outsider's knees give way in his attempts to distance himself from this pervasive law, his/her discomfort reaches its paroxysm when he discovers that the historical “meta-narrative” (s)he was hoping to build on law's social effects has in fact already been written by Law itself, which claims to be the driving force of European social, economic and political integration dynamics under the guise of the European Court of Justice (the Europeanization-through-law paradigm). And it almost comes as no surprise to the outsider that the construction of an achieved legal order has progressively asserted itself as the horizon of European politics through various projects, such as European judicial cooperation, the European Constitution, the Charter of Fundamental Rights, or the European Civil Code. When confronted with this “cathedral” of EU law, this fulfilled legal utopia, praised by so many lawyers, has he not accidentally entered the lawyers' paradise, an achieved auto-poietic system at the very core of the EU polity?

The outsider might feel somewhat relieved when he discovers the unprecedented profusion of sociological and political science studies on his research object over the last 15 years.³ In this body of “European law in context” (Weiler 1991), the dynamics of legalization of the EU polity appears essentially as the “emergent effect” of a successful adjustment of legal (lower national judges) and non-legal (multinational companies, EU institutions, transnational interest groups) interests in the opportunities opened over the years by the jurisprudence of the European Court of Justice, or ECJ (Stone 2004). That Law and lawyers can be something other than a dependent variable and actually participate in the building and shaping of EU polity has remained largely, if not totally, overlooked. Although incidentally referred to as essential to the emergence of an EU terrain of regulation,⁴ lawyers' agency and agenda have never garnered significant attention. Most of the time, lawyers appear as mere *agents*, neutral and almost invisible defenders of the different groups (companies, Member States, EU institutions, interest groups, associations) that confront each other before the ECJ.⁵ What Law *does* to the interests of whom it takes charge seems to be irrelevant. It all occurs as if the literature had focused in detail on the foundations of this European legal “cathedral” while at the same time neglecting the worship that is practiced in that church: the properties and scope of Euro-law heavily depend on the specific clergy (of legal professionals) entitled to speak in the name of this specific religion (the European rule of law) and, therefore, monopolize the symbolic power with which it is endowed. The knowledge and beliefs that are being produced, however, are not just some sort of esoteric or technical message, but form a set of representations of the European Union, its history and its government. In other words, what is usually considered as the mere surface of the social processes that shape European integration could well be one of the essential spaces where the *government* of Europe is being shaped. It is our assumption that the variety of roles lawyers actually play in European affairs (as consultants or advisers for national governments or European institutions; as experts and academics involved in political or civil society mobilizations; as legal practitioners and judges), and the variety of clients they actually serve

³For a more detailed discussion of this literature, see Vauchez 2007b and for an update on the most recent research in that field, see Conant 2007.

⁴Various case studies allude to the critical role played by a number of *repeat players* (see Rawlings 1993 on Sunday trading and Cichowski 2004 on women's rights) but never actually study them as such.

⁵The various quantitative studies dealing with the Court of Justice have almost exclusively focused on the clients and on the legal domain, thus ignoring the lawyers who represent them (Harding 1992; Stone and Brunell 1998). For an exhaustive account of these statistical analyses, see Conant 2007.

(individuals, firms, national governments, EU institutions), is not peripheral but central to an understanding of law's position within EU polity. The very fact that Law is somehow *coextensive* with the European Union, in the sense that at any point of its complex and multilayered structure (be it business, administration, politics or civil society) there are specific bodies of Euro-law as well as specialized groups of lawyers, is a critical element in this regard. We contend that this pervasiveness locates Law at the crossroads of European construction; this is a critical position in a political system deprived of a State capable of organizing stable relationships and hierarchies between groups and institutions.

In order to seize this position of Law in EU government, one has to adopt a renewed analytical framework, partly different from the one that has prevailed over the years in EU studies: the issue here is not to work out which logic dominated the treaty-making process (the inter-governmental or supranational one), or which of the various EU or national institutions or bureaucracies has proved most influential in the process; nor is it to study the centers of political and bureaucratic command within European polity. Rather we try to understand how Law permeates the way actors and groups conceive of European government, its functioning, its architecture, and its possible futures. Here, of course, the notion of *government* is not understood in its classic institutionalist sense (the-institutions-in-charge-of-that-“function”). Rather, it is conceived as the composite set of social activities which, without necessarily being oriented to this scope, shape (1) the organization and hierarchy of EU institutions, and of the groups of actors which purport to occupy or influence them; (2) the rules that govern their relation; and (3) the competences and credentials considered necessary to participate in the debates over EU institutions' functioning and possible reform. This broad conception of EU government suggests a research agenda that focuses on those cross-sector arenas where, more than anywhere else, the unity and legitimacy of the fragmented European mosaic are at stake.⁶ It is our hypothesis that legal arenas stand out as the (main) forum of mediation between the dense array of sector-specific policy networks. This article suggests that despite (or, more rightly, because of) the fact that Law has somehow been banished from the European public sphere in the name of the neutral and/or technical nature of the Law, legal arenas stand out as one, if not the major, forum of mediation in this regard.⁷ Consequently, working on European law and lawyers is not only engaging in a legal sociology that takes into account the various forms of specialization and autonomization of European “legal professions” (Europeanization). It also implies mobilizing a political sociology focusing on European legal spaces, not only in order to study the law they produce, but also in order to examine their contribution to the construction and legitimization of a specific political order (EU government). In other words, the overall claim of this article is that studying lawyers in Europe is not *just* studying one of the many processes of Europeanization. We argue that this research agenda leads to the core of EU polity. Rather than a fully-fledged narrative, the tentative remarks presented here have the ambition to open up new venues for empirical research on law and politics in Europe by combining historical (I) and sociological (II) tools of understanding.

Law and Lawyers in the Framing of EU Polity: A Socio-Historical Approach

Be it national or European, Law is a false friend. The historical permanence of its “names” and symbols (rights, laws, courts) only makes us perceive it as a

⁶For a similar research agenda, see Smith 2004.

⁷For an analysis of the role of lawyers in the construction of international spaces, see Halliday 1996; Dezalay 2004.

reassuring backdrop, or as some sort of institution unchanged in its forms and equal in its effects.⁸ To be sure, neither in the early days of the European construction nor today can a State or quasi-State formation be conceived of without the support of this tool deemed indispensable for the construction of political orders.⁹ However, this apparent immobility of Law may cloud our perception of the many variations it undergoes in the course of history: changes in the relative value of legal competence vis-à-vis other *savoirs d'Etat*, like economics' knowledge or bureaucratic savoir-faire (as far as EU elites are concerned), but also changes with regard to the political and social functions with which it is endowed in EU government. As a matter of fact, there is little in common between the law-as-a-tool model of the first years of European integration, when *jurisconsultes* were asked to provide EU institutions and diplomacies with the technical expertise required in order to achieve the then ongoing political aims (Madsen and Vauchez 2005), and the law-as-a-political-model-of-integration in which ECJ's case-law is endowed with a political capacity of its own. This simple acknowledgment of law's relative indeterminacy compels the researcher to retrace the social and historical processes that have imposed it at the core of EU polity. Rather than considering *ex post facto* that "law" and "judges" have been and are functional to European integration (Weiler 1981), socio-historical analysis examines *what sort* of Law (and, relatedly, what sort of representation of EU polity) has prevailed over other *possibles historiques*. I therefore suggest new research avenues that would follow the critical junctures and turning points of such a process. The general idea is that Euro-law's force is not a substantive feature related to a-historical characteristics of Law, but rather that it comes out of the various sorts of EU-related economic, political or bureaucratic struggles in which it has been enrolled in the course of European history.

Building Law, Building Europe

Strikingly enough, the role of Law and lawyers in framing the sector-specific policies, as well as the European political *system* as a whole, has been so far largely understated. Yet, by shaping the foundational concepts and theories through which EU institutions and policies have established themselves, they have constituted one of the principal levers of the autonomization of specifically European social and political arenas. In a context where no national model (political, administrative or economic) seemed able to impose itself in a European polity usually regarded as *sui generis*, lawyers have played a critical role in formalizing EC-specific rationales, opening up at the same time an unprecedented space for manoeuvre for themselves, often way beyond the role they have had traditionally been granted in national settings.

The formation of a European *political* system is a striking example in this regard. Lawyers have spearheaded efforts to define a rationality that would make sense of the set of EC institutions built in the Paris and Rome treaties, one that would be distinguishable from that of national political systems and yet, at the same time, autonomous from the other European arenas (economic, bureaucratic and legal). As a matter of fact, the first legal controversies over Europe were not focused exclusively on the issue of EC law's supremacy, or direct effect, as it is said nowadays. They were at one and the same time conflicts over the definition of the EC political regime and, in particular, over the opportunity to apply some of the most classic categories of national constitutional law—the

⁸Such a functionalist conception of law's functions in western societies finds its first theoretical formalization in Talcott Parsons' work (Parsons 1964).

⁹For the genesis of this intricate relationship between the autonomization of a legal science and the consolidation of political systems in Europe, see, particularly, Ernst Kantorowicz 1961.

separation of powers, legislation, fundamental rights, government responsibility before the Parliament, and so on. Part of the resistance of national legal actors to the supremacy of EC treaties precisely lay with the fact that they were authorizing an “executive” body to adopt “legislative” acts.¹⁰ Euro-implicated lawyers, on the contrary, were promoting the idea of the *sui generis* nature of EU institutions, a feature that would therefore require jurists to get out of what was frequently termed “the straightjacket of the sacrosanct notions of traditional constitutional law,” and to accept that, for example, the “powers of the Commission [be called] by their rightful name, that is, legislative powers and measures” (Donner 1965:7). As they were critical in legitimizing this unprecedented blurring of some of the classic principles of constitutional law, they provided EU institutions with an ad hoc explanatory framework. For example, Pierre Pescatore’s highly successful notion of *quadripartisme institutionnel*. A former diplomat and treaty-negotiator, turned law professor, and a long-term president of the ECJ, Pescatore had by the 1970s become an influential jurist. In a seminal article, he claimed that the specific rationale of the European political order could not be boiled down to the ternary principle of the “separation of powers.” Instead, he argued that the four institutions (the Commission, the Council, the Court and the Parliament) actually derived their legitimacy from the representation of each of the four types of *interests* involved in this process (“*l’intérêt communautaire*,” that of “the States,” “the treaties” and “the popular forces”: Pescatore 1978:394).

As they were called upon to blur the traditional constitutional frontiers between executive/legislative/judicial powers, Euro-lawyers were in a favorable position to redefine the relationship between law and political borders within that emerging polity. Strikingly enough, the strengthening of the two pan-European institutions—the Commission and the Parliament—is tightly related to their own relinquishing to the sovereignty of law. In the case of the European Commission, its legal advisers were progressively installed at the heart of this rising bureaucracy just as they were providing it with theories critical for its legitimation. As the only *common* directorate of the three existing European executives from 1958 to their fusion in 1967, the Legal service claimed a transversal and generalist expertise that happened to be an essential resource for the commissioners in order to counter sector-specific knowledge and expert networks that were developing at the same time in the different Directorates-Generals. Similarly, the reinforcement of the European Parliament goes hand in hand with its submission to a Law thought of as the real sovereign (Sacriste 2006). Strikingly, the discussions over the strengthening of its powers during the 1970s was essentially led by legal professionals intervening under different guises (Members of Parliament, experts, judges or law professors) and yet all agreeing on the fact that it should be put at the same time under the jurisdictional control of the ECJ. The 1984 ECJ decision, *Luxembourg vs. European Parliament “Les Verts”* (April 10, 1984, December no. 108/83), which ties together the two aspects, is emblematic in this regard. By excluding a number of constitutional options,¹¹ starting with the traditional features of *parlementarisme* (the organic definition of the legislation as the acts adopted by the Parliament; judicial immunity of parliamentary acts; government responsibility before the Parliament), Euro-lawyers have not only contributed to the imposition of an authentic

¹⁰See the often-quoted decision of the German Tax Tribunal of the Palatinate of November 1963. On these arguments and, more generally, on the resistance of the German legal doctrine, see Davies 2007.

¹¹Actually, the ECJ sanctioned this decoupling of the national constitutional traditions and the European Community regime by ruling that “the validity of a Community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that state or the *principles of a national constitutional structure*”; *Internationale Handelsgesellschaft*, 11/70, December 17, 1970, Rec. p. 1125.

European *rule* of law, but they have also dismantled the historically stabilized definitions of the relationship between law and politics.¹² Freeing themselves from their structural subordination to politicians in national parliamentary regimes, they have on the European level gained unprecedented degrees of freedom in the promotion of their traditional professional agenda of a polity governed by Law. The same could be said of the role played by Euro-implicated corporate law professors and business lawyers in defining the legal frameworks of this unified economic space. Just as much as they invented a new legal speciality (“European business law,” in contrast to the “old” national commercial law was, at best, for “shopkeepers”), providing a technique of managing multinational companies, they forged a new representation of the business lawyer (the French expression *l’avocat d’affaire* was coined by one of them at the time) whose professional task is not limited to litigation, but also concerns the day-to-day management of the firm.¹³

On the whole, therefore, “building Europe” also meant for lawyers “building themselves”; that is, freeing themselves from their roles at the national level and finding new *raison d’être* in a European polity in search of both professional models and political canons. If Europe could appear as such a land of opportunity for lawyers, it may also be the result of a general decline experienced within national settings at the time because of the emergence of welfare policies that were propelling new sorts of expertise and elites at the core of Western states. As attractive as it may be, such an explanation of lawyers’ investment in the European construction is certainly far too general, as it seems to work only for certain countries, for specific sectors and in some periods of time. In the case of France, however, this hypothesis might well be a heuristic one as the 1950s/1960s were marked by a general depreciation of the value of legal capital in national political and bureaucratic settings. The setting up of the Vth Republic between 1958 and 1962 even accelerated that process with the coming to power of new political elites from which legal professionals were almost totally absent. As a result, many prominent pan-European political leaders of the IVth Republic, such as law professor Pierre-Henri Teitgen, or former legal practitioner Robert Lecourt, suddenly had to put an end to their political careers. Their subsequent investment in the formalization of the European rule of law—the latter as the grand theorist of the ECJ’s political role (after his nomination at the Court in 1961) and the former as the “founding father” of EC law as an academic discipline in France—can probably not be understood without keeping in mind this specific *national* context.

Judge-Made Law: A Science of European Government

This critical contribution to the definition of the European professions is essential to explain the role that lawyers and legal credentials play today at the heart of political, administrative and economic European elites. Although still incomplete and dispersed, sociographic studies show the preponderance of legal education, but also the dominant presence of lawyers in various EU venues. Commercial consultancy in Brussels is a good example, as more than 50% of them are lawyers (Lahusen 2002). But the same could be said about European Commissioners (Mac Mullen 1997), high-ranking Commission officials (Georgakakis and de Lassalle 2007), or the members of the recent Convention for the Future of Europe

¹²The most striking example in this regard is the fact that the ECJ’s jurisprudence allowed itself to designate the founding treaties of the EC as “a constitutional charter” (*Parti écologiste “Les Verts” v. Parlement européen*, 294/83, April 23, 1986), following 25 years of doctrinal investments in this direction (Cohen 2007). Importantly, this European experience in turn had countereffects on the way the law-and-politics relationship was defined in each of the member states.

¹³Some first historical elements can be found in Laurent Gueguen’s (2005) research.

(Cohen 2006), not to mention pan-European activists themselves (Weisbein 2006). One could, of course, argue that this legal capital of European elites only mirrors the deep-rooted “incestuous” relationship between law and the State in European countries, as well as the fact that law schools remain an essential breeding ground for national elites. However, such an explanation would neglect the fact that lawyers’ positions vary from country to country, depending on their sectors of activity and changes with the historical period concerned. This would also mean ignoring the historical processes that have established law as a *generalist* or transversal knowledge of European government, whose mastery is deemed indispensable for those who want to authoritatively participate in debates over its functioning or dis-functioning.¹⁴

As a matter of fact, European law does not come down to an accumulation of sector-specific knowledge about various EU policies and institutions. EC institutions’ legal advisers, law professors, but also judges of the European Court of Justice (Alter 2007), have turned it into a genuine science of government, a cross-sector knowledge capable both of seizing the “system” (a “legal order”) of the institutions, positions and groups that make up “Europe,” and of evaluating its functioning with regard to a specifically legal rationality.¹⁵ Principles such as “direct effect,” “supremacy,” “principle of proportionality” or “rule of speciality,” which have become undisputed description tools of the EU polity, are specific legal constructions that do not draw on the treaties themselves as much as they do on the science of law for which, at the end of the day, lawyers are the only judges. It is certainly because EU law gives access to a set of categories allowing Euro-implicated actors to conceive of a “European public sphere” (the distinction and the relations between the public and the private; the national and the supranational; the political and the legal space) that it nowadays appears as essential knowledge for those who want to understand and situate themselves within this multilevel, multisector and poorly institutionalized space.¹⁶

This alleged capacity of Law to be *the science of EU polity* lies in the fact that it provides a genuine *metaphysics* of Europe, which turns the lawyer, and especially the judge, into the ultimate engine of European integration processes. What I actually have described elsewhere as Europe’s magic triangle (Vauchez 2008)—that is, the combined effects of preliminary reference rulings to the ECJ with the direct effect and supremacy of European law—is commonly regarded as the backbone of Europeanization dynamics. This legal triptych not only provides for an integrated vision of EU polity that classical legal theories struggle to grasp, it also entails a meta-narrative of the dynamics of European construction, itself abundantly exemplified by neo-functionalists’ literature (“Europeanization-through-case-law”). Polished and codified over the years by an impressive amount of legal and non-legal literature, the model now reads as follows. Through the mechanism of preliminary references to the ECJ, individuals, interest groups and companies have engaged directly in the European integration process, thus short-circuiting the inter-governmental level. In direct touch with European citizens and groups through this justiciable body of law, the ECJ

¹⁴In this vein, the central place of EU law in the education of the students of the College of Europe in Bruges is a good indicator for what has imposed itself as an essential credential for the practice of a Euro-related profession (Schnabel 1998).

¹⁵The fact that the legal service of the executives and the ECJ were the only common institutions (with the Parliament) of the three Communities between 1957 and 1968 is no doubt related to this capacity of European law to conceive the principles of unity of a Community that is singularly heterogeneous. On July 15, 1960, the Court actually started to contribute to these principles with a decision that defined “the operational unit of the European Community and its associated institutions.”

¹⁶This specific orientation skill that Euro-law provides is certainly key to the preponderance of lawyers in commercial consultancies in Brussels, whose profession it is to guide their clients through the labyrinth of the European decision-making process (Lahusen 2002).

appears as one, if not the only, actor capable of forging lasting relationships between the various social interests that cross at the European level. Building on the traditional legal criticism of the “political” (deemed incapable of producing anything other than artificial and ephemeral arrangements), the Court’s jurisprudence appears to be Europe’s “real Constitution,” rather than the treaties themselves, which are still subject to the unknown variables of political trends. Put in relation to the “key drivers” of Europe, the ECJ’s judge-made law fosters integration much more efficiently than do inter-state arrangements. It triggers a genuine intra-community solidarity, which turns the Court into the real engine of European integration. In this vein, functionalism is no longer primarily related to economics, but to law (essentially private law) endowed with a particular ability to “build” Europe.¹⁷ In this model, the ECJ stands out as a natural receptacle of this “real” Europe and appears as the most legitimate institution for executing the political task of regulating interests and groups (mediation, arbitration, hierarchization). From this perspective, European law is far from being just a technique. It is the bearer of a genuine political model which links law and politics, ECJ and integration.¹⁸

The study of the genesis and consolidation of this judicial theory of integration is a still-open research field (Vauchez 2008). It would certainly require to outline critical junctures¹⁹ that shaped it in order to demonstrate how this initially prospective model of a judge-made integration emerged and became a predictive one, serving as a blueprint for diversely situated actors of the European polity. To be sure, such a history would also have to take into account the various competing sciences of EU government that have offered concurrent techniques of unification, and particularly economics, that have recurrently provided Europe with models for integration from the toll-free zone of the early years to the more recent open method of co-ordination (OMC) of the Lisbon agenda. As a matter of fact, recent developments in EU modes of regulation could well mark a decline in the Europeanization-through-law pattern. Euro-implicated decision makers now seem to prefer other integration devices (mutual learning of “good practices” and benchmarking) purported to be more flexible and more adjusted to European realities, as Christian Joerges has discussed in relation to Europeanization through de-legalization (Joerges 2007). From this point of view, the relative decline of the legally trained professional profile among Euro-bureaucrats in favor of economists over the last 20 years (Georgakakis and de Lassalle 2007) can be understood as part of a more general competition over the definition of the knowledge and know-how that are required for authoritative intervention in debates over the reform of EU polity. By studying the precise modalities of the legal professionals’ involvement in these struggles, it becomes possible to write the neglected history of these rivalries and of the forms of hybridization and the deriving equilibria that are *constitutive* of EU government.²⁰

¹⁷In their most political version, these judicial theories glorify the emancipatory capacity of a Court whose daring jurisprudence would contribute to giving back to “the people” and the “European citizens” the reins of a power they had been denied by the States and inter-governmental arrangements (Schepel 2004:3).

¹⁸The law and politics’ relationship is therefore not a matter of *functional interdependency* in which political and judicial supra-nationalism are the “antidotes to each other” (Weiler 1981). It is the outcome of a specific and reversible historical process where lawyers have been in a position to define and promote the strong political potentialities of their legal tools.

¹⁹For another critical juncture, see the cross-sector mobilizations that followed “Cassis de Dijon,” an ECJ decision (February 1979) that made the Commission work on a “political relaunching” of the EC by basing its arguments on the decision of the Court (see Alter and Meunier-Aitshalia 1994).

²⁰Competition law, which emerged at the crossroads of ordoliberalism and of the theories of private law, could be studied from this perspective (Joerges 2004).

The Force of a Weak Field: Law and Lawyers in the Government of Europe

These first sketches of a socio-historical approach now call for a conceptualization of the relationship between legal arenas and the many political, administrative and economic scenes of EU government as it has progressively been defined in the course of history. As a result of this already-long European integration, Euro-lawyers cannot be regarded as free-floating actors constantly re-inventing their role and functions. Instead, one has to consider them as driven by a preexisting set of historically defined positions and power relationships with which they cannot but deal in their own endeavors. Understanding lawyers' position in EU polity, therefore, requires the evaluation of the system of positions, actors and institutions—here coined as a *field* (Bourdieu 1987)—in which they are situated. Among its many advantages, the notion of a field helps in an appraisal of what brings and keeps together European legal actors; namely, the contest for control over the specific symbolic resources of Euro-law and the capacity to persuasively speak in the name of that specific body of law. At the same time, it displays forms of interdependence between, say, State lawyers working on behalf of their national diplomacies, and business lawyers committed to the defense of corporate interests. Each contributes in its own manner to the transformation of a composite set of EC rules into a proper legal body of knowledge. While they carve out Euro-law's "fundamental principles," "inherent logics" or "vacuums," allowing them to play with, against or without the European legal instruments in accordance with their clients' interests (companies, interest groups, EU institutions, members states), European jurists contribute to certifying the existence of a European law. As they converge in promoting legal skills as a necessary asset for participating in the various European sites (inter-governmental conferences, negotiations within national or EC bureaucracies, political mobilizations and economic transactions), they compete with other *savoirs d'Etat*—such as economics, new public management, political science and bureaucratic *savoir-faire*—that equally aspire to provide the various European sectors of activity with an efficient unification technique. On the whole, the notion of field therefore points at the specific pattern of internal and external power relations that lawyers maintain. Such an inquiry into the structure and position of the European legal field (here-after ELF) leads to its characterization as *weak*, with porous internal and external borders.²¹ We argue that this weak autonomy is what makes it so strong and influential when it comes to shaping the representations and principles of EU government.

A Weak Field: Specialization Without Autonomization

Paradoxically, whereas lawyers have been critical of the autonomization of various European institutions, professions and forums (see above), the autonomy of the ELF remains rather limited. Of course, European law is now subjected to strong dynamics of specialization that have no equivalent in any other transnational area of legal practice. The EU institutions offer a vast array of positions for lawyers or legal translators. The development of the Common Market and of EC legislation has opened a real legal market in Brussels and in the capitals of the Member States, specializing in eurolitigation or legal consulting (Keleman 2006). Particularly under the Jean Monnet Chairs' program launched in 1989, Euro-law has also become institutionalized as a specific and legitimate academic discipline (with its codes, manuals and treaties, but also with academic chairs

²¹Admittedly, the notion of field as defined par Pierre Bourdieu in the case of the French "field of power" was not initially intended to seize upon such a weakly institutionalized set of positions, careers, and inter-relations. This article argues this should not, however, preclude the mobilization of such concepts for the study of "transnational fields." On this, see also, Dezalay and Madsen 2006 and Madsen 2005 for the related empirical research strategy.

and research centers). In many ways, it has thus become possible to make a *career* in European law. However, this specialization pattern should not be confused with a process of autonomization. In many regards, the European legal space still appears to be a *weak* field, if we adopt the definition that French sociologist Christian Topalov puts forward in his analysis of “social reformers” of the late nineteenth century; that is, a “field which is completely immersed into other fields that are mapped out and constituted more firmly” (Topalov 1994:464), such as the (national/transnational) legal, bureaucratic and political fields. It is not weak in its social effects, as we intend to show in the following work, but weak with regard to its autonomy and internal differentiation.

Certainly, the dynamics of specialization have increased the cost of entry within the ELF. It may be sufficient to look at ECJ judges’ biographies to notice that they all now share a previous experience in international or European law. Strikingly, however, this elevation of the threshold does not undermine the heteronomy of the ELF. First of all, it is not exempted from the diplomatic pattern that still hovers over the European polity. The need to respect an equilibrium between the various Member States not only governs the nomination of the ECJ judges, and of the Commission’s main legal advisers, but it also continues to condition the authentically European character of what is being accomplished in many *transnational* legal fora, be they learned societies, professional associations, or even academic journals. The persistence of this quasi-diplomatic logic in the realm of law shows that, as in most European affairs, legitimacy is still construed in terms of the equal (or, at least, fair) *representation* of “national traditions,” which conditions the fact that the law produced is truly *common* (Vauchez 2007a). This is probably the price to pay for the “Europeanness” of EU law; that is, its capacity to convince of its neutrality with regard to the equilibrium between Member States. However, this constraint of representativity is merely one of the many expressions of the heteronomy of the ELF. As this legal field can only marginally rely on autonomous certification capacities (the College of Europe in Bruges, or the European University Institute in Florence), it remains highly dependent on the various national law-teaching systems for the recruitment of its affiliates, which are known to be organized around the principles and values of the *national* legal fields (De Witte 1989). In the absence of a specifically *European* legal training system, American law schools often appear to be the *common* breeding ground, capable of delivering an internationally valuable legal capital through the very diversified set of programs (JD, LLM, PhD, and visiting fellows’ programs) offered to foreign lawyers (Silver 2006; Dezalay 2007). The heteronomy of this ELF is not only remarkable as far as initial legal socialization is concerned. Its dependence on *national* logics can only be ascertained for European careers. Access to key positions, such as director or deputy-director of the legal services of the Commission and the Council, or as judge at the ECJ, is still largely dependent on a subtle balance between political, bureaucratic and judicial logic in each of the Member States (Kenney 1998). To give just one example, there has been no exception since the early 1980s to the unwritten rule that French ECJ appointees are chosen alternately from the *Conseil d’État* and the judiciary (Boigeol 2000).

Consequently, the ELF is made up of agents whose characteristics, socialization and models of action are structured and defined (in part) *outside* this field.²² The modalities by which actors become authoritative in the ELF are quite telling in this regard. Certainly, one capitalizes authority through seniority and the degree of investment in Euro-law, but previously acquired capitals and extra-legal assets remain a critical factor.²³ Access to the central positions of the ELF remains

²²Of course, many of these characteristics are not, as such, specific to the legal field (Bigo 1996).

²³This statement should, of course, be qualified in the sense that a lawyer engaged in a Euro-law issue has inevitably to make considerable efforts to assimilate this particularly substantial corpus of law.

heavily dependant on resources, the value of which is defined outside it. The diplomatic influence of the home country, the burden of the mother tongue, the prestige of the attended university, the reputation of the institutions to which one belongs and the capital of political, administrative and, maybe, family relations that can be mobilized at the national level are variables which, taken together, enable an individual to speak in the name of European law or impede him from doing so authoritatively. For instance, the central role played by French lawyers in the genesis of EC law is surely related to the weight of their national diplomacy, which allowed them to obtain key positions in the emergent Europe of law (advocate-general at the ECJ and director at the legal services of the institutions, for example). They also benefited from the dominance of French as a working language through which they were able to access the heart of the European legal debates without having any particular international assets, as they did from their being part of the *Conseil d'État* (with very few exceptions), an institution endowed with a prestige that still reaches way beyond national borders.

Euro-Lawyers' Mobility Patterns

One might wonder whether these characteristics of a “weak [heteronomous] field” in fact represent a transitory stage (a prehistory) of a long convergence process toward the ideal-type of [highly autonomous and segmented] national legal fields, as a teleological reading of European integration as a “super-state” *in nuce* would suggest? My response is: probably not. As we have suggested above, the rise of specialized patterns of European legal practice did not substantially lower the level of heteronomy of the ELF. Our assumption here is that the “weakness” of this field is not necessarily a sign of imperfection or incompleteness, but should be regarded as the hallmark of its relatively *stable* relationship with EU polity at the crossroads of national, transnational and international levels, on the one hand, and of political, bureaucratic, academic, economic and jurisdictional spaces, on the other. The study of this specific relationship is very promising for a political sociology of EU government. It requires a particular methodology—for instance prosopography—which is particularly suited to this approach. Tracing the careers of particular individuals, their personal and professional trajectories, and giving an account of their social networks, is an essential tool in trying to assess this cross-boundary position of the ELF. The personal and professional movements of individuals are indeed a critical indicator of the characteristics of a given social structure—such as the ELF, in this case—and of its transformations (Bourdieu 1996). As they indicate breeding grounds, career paths and *cursus honorum*, as they shed a light on social ties and inter-locking networks, trajectories reveal specific patterns of relationships between the various poles, roles and institutions of that particular field, well beyond the classic dichotomies (private versus public, legal practice versus academia, national versus EU level versus international) that officially organize the European polity. As such, they display a far more complex understanding of the intricate relationship between Law and EU government.

Multilevel Circulation

As a result of its weak autonomy, the ELF cannot be considered on its own as an isolated and self-sufficient social universe. The study of lawyers' careers confirms this fact as entering the Euro-law realm cannot be regarded solely as a sign of an exclusively European *beruf*, as it often remains a detour for national carriers or a step toward international venues.²⁴ Far from being a point of arrival, positions

²⁴Of course, the value of professional experience at the European level varies from country to country, from profession to profession and from institution to institution. See, for example, the “difficult” return of the members of the *Conseil d'État* to their home institution as they return from the European Court of Justice (Mangenot 2006).

within the ELF are often a passage to other national, European²⁵ or international jobs. It might well be telling that between 1970 and 1988 the International Chamber of Commerce Court of Arbitration has been presided over by two prominent EU lawyers: a former head of the European Commission, Jean Rey, and the former director of its legal service, Michel Gaudet. And even when they are purely European, successful professional trajectories require the upholding of *multilevel* networks. First of all, one needs to maintain his home country networks (through party affiliation, pan-European associations, alumni or professional group memberships) because it is at the *national* level that part of the legitimacy is gained in the European debates (as a result of the status arising from being a representative of a national legal tradition), as well as some of the necessary resources to obtain key positions within EU institutions. Second, transnational networks' membership (international learned societies, transnational professional associations) are crucial when it gets to strengthening one's expert and neutrality credentials (Sacriste and Vauchez 2007). Far from being held together "by itself," therefore, the ELF is deeply embedded at one and the same time in national spaces that still have a grip on the European level *and* in international/transnational spaces, to which it is related through numerous bridges and exchanges.

Inter-Professional Mobility

The second aspect of this field's weakness is the intense circulation of Euro-lawyers in between the various EU-implicated academic, bureaucratic, political and jurisdictional settings. Contrary to the strongly segmented national legal fields, where jumping from one profession to another (and, even more, holding simultaneously various positions) is obstructed by multiple barriers and incompatibilities (Osiel 1990; Dezalay 2007), the circulation from one European legal role to another (lawyer, judge, professor, expert, business lawyer, consultant) forms a classic pattern of the ELF. I have shown in previous works (Vauchez 2007a), the genesis of this mobility pattern (1950–1970). Far from being exclusively devoted to the transnational cause of a European rule of law, the first Euro-implicated lawyers were representing all sorts of causes, from national interests as *jurisconsultes*, European Commission interests as in-house legal advisers, and then again in legal science as academics, as well as with companies and interest groups as trial lawyers, and sometimes even within the judiciary as judges at the ECJ. By successively or even concomitantly assuming all possible legal roles in Europe, they represented a diverse body of causes and groups, consecutively pleading "for" and "against" each one of the interests present in Europe. This movement back and forth from the public to the private sector, from law to politics, from the national or the international to the European level would seem incongruous, even inconceivable, if it had been carried out by other players of the European games, beginning with diplomats or public officials.²⁶ But to the lawyers, I argue, this is some sort of a *point d'honneur*. This ease with which lawyers stepped across the dividing lines that shape European polity is incomprehensible if one does not refer to the fact these lawyers shared a common legal *habitus* characterized by a proclivity to defend contradicting social interests and to deal with competing social allegiances "in the name of law."²⁷ This specific disposition is incorporated in lawyers' professional equipment that is particularly suited for engaging in such a circulation. For sure, modern legal science offers tools (such concepts

²⁵Laurent Scheeck (2006) notes that 23.5% of the judicial "decision makers" (judges, advocate generals, clerks) presently working at the ECJ had previously worked for the Council of Europe.

²⁶As a matter of fact, Didier Georgakakis and Marine de Lassale have shown the progressive autonomization of EU bureaucratic careers (2007).

²⁷The hypothesis of such a legal *habitus* shared by the jurists from the six founding Member States is backed by various historical accounts of their common legal history (Kantorowicz 1961; Osiel 1990).

as “legal representation,” “mandate,” “trustee,” “procurator,” “proxy” or “delegation”) codified over the centuries enabling jurists to be at the same time engaged in the defense of their clients’ interests and distanced from anyone of them. An understanding of this complex game of adherence and distance, representation and independence, militancy and neutrality from the various interests and causes they are asked to defend is essential to an understanding of how lawyers can actually, at the same time, intervene *in* and circulate *in-between* the various social interests that are intertwined in the European construction. Although no systematic research has been undertaken so far, some evidence shows that this mobility pattern has not been altered by the development of the ELF. It is quite revealing in this regard that between 1970 and 1995, a large part of the Euro-law doctrine has been produced by non-academics (43.5%), be they Commission officials (17%), judges (11%) or lawyers (8%) (Schepel and Wessering 1997). This lack of differentiation of traditionally compartmentalized spaces is all the more striking when, during this period of time, only 8 of the 32 most prolific writers on European law had never worked directly for a European institution. Such data show how frequently actors of the ELF switch and accumulate roles. But it also exemplifies how porous the dividing lines still are that organize the European public sphere (national level/European level, public sector/private sector, Commission/Parliament/Council). Such an inquiry into the trajectories of Euro-lawyers would probably get to the core of the issue when reaching out to the *référéndaires*’ group—the more than 600 law clerks that are or have been working in the cabinets of the judges of the three European Courts (the ECJ, CFI, and the European Court of Human Rights). Often thrown into these three landmarks of the ELF through *national* connections with one of these courts’ judges, they form an essential breeding ground for the various legal venues of the European polity, be they national or European, academic or practice-oriented, private or public.

A Field at the Crossroad of EU Elites

This focus on lawyers’ patterns of mobility within the ELF allows us to consider in a new light their role in the European construction. In a European polity deprived of a State that would organize in a stable and perennial way, the mediation between social interests, it is our hypothesis that they tend to occupy a “structural hole” (Burt 1992), bridging and mediating otherwise conflicting institutions and groups. This presence—even omnipresence, as we have tried to show—at any point or pole of EU polity puts them in a privileged and sometimes monopolistic position when it comes to defining the cross-sector principles of unity of this fragmented and multilevel ensemble. Three research paths could be drawn from this point.

Following various insights of social capital theories, it is quite safe to assume that this position is particularly critical when it comes to accumulating diverse social resources. Law’s centrality probably lies in the capacity of legal *fora* to attract and aggregate diverse segments of the various European elites. Lawyers’ sociability in the various jurisdictional arenas (ECJ, ECHR), academic forums (conferences, journals, learned societies) or inter-professional gatherings (congresses of the *Association of European Lawyers* of the FIDE, or of the European Law Academy in Trier) could be studied using this perspective. Under the aegis of law, Euro-parliamentarians meet consultants, professors encounter European civil servants, and judges talk to corporate lawyers. To put it differently, under the guise of promoting or enhancing the “rule of law” and its technicalities, very different and otherwise conflicting segments of European polity cross over. Thereby, one might wonder if and to what extent European legal professionals have taken on the role of the brokers they used to play in the national settings

before the emergence of welfare states (Darendorf 1964; Charle 1989; Dezalay 2007), providing its affiliates with a wide range of careers and possibilities of redeployment in economic, political, administrative or academic affairs.

Thus, the ELF seems to operate at the site of coordination *par excellence* where a common sense of Europe is built. Just as in other complex and highly differentiated societies, it is safe to hypothesize that these purported neutral *fora* located at the cross-roads of otherwise distinct, if not antagonistic, institutions and groups are essential engines of the alignment of cognitive and normative frames within that European polity. Such a research focus is certainly not a revival of a conspiracy theory, but rather an interest in the complex and un-orchestrated social processes through which a cross-sector understanding of Europe is being produced and re-produced. Consequently, mobilizations of European jurists are of interest not only for their contribution to the definition of law's and lawyers' social functions within the EU (defending rights, promoting the rule of law, building of European civil society), but also for the de facto coordination of the various European games in which they engage at the same time.

Yet, for the ELF to be the host of such cross-sector transactions, it requires that Euro-law and Euro-legal arenas appear and be acknowledged by most European actors as independent and neutral. In other words, law's authority at the core of EU polity relies on the capacity of EU lawyers of all sorts (legal scholars, judges, clerks, officials of the Commission, private practitioners) to *collectively* maintain its symbolic power as an objective resource exterior to the conjunctures and social contexts in which it intervenes. The challenge is of particular importance in the current context in which: (1) the Union is undergoing an unprecedented legitimacy crisis in which the role of Law and other non-democratically elected EU institutions is particularly at stake (Majone 2006); and (2) the cohesion of the EU-specialized legal community is jeopardized by its very success (enlargement of the EU, development of new EU legal domains and sub-fields). It is well known that over the past 15 years the number of critics of the ECJ has increased far beyond the restricted circles of euro-sceptics. It comes as no surprise that the recent politicization of EU debates is now touching the European Court of Justice (Rasmussen 2007), itself denounced for its many biases (from its neo-liberal or ordo-liberal agenda to its "tentacular" development at the expense of national legal sovereignty). The vivid reactions to two of its most recent decisions (*Commission des Communautés européennes/Conseil de l'Union européenne*, September 13, 2005 and *Viking*, January 10, 2007) exemplify the fact there is more and more scepticism about the self-proclaimed disinterestedness of Euro-law. One of the major puzzles is therefore how this specific position that Euro-law and its interpreters have managed to secure over the years can be maintained in a context in which the "permissive consensus" that has governed EU development since the 1950s seems increasingly fragile.

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