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Embedded Law.

Political Sociology of the European Community
of Law: Elements of a Renewed Research Agenda

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ISSN 1028-3625

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
<http://www.eui.eu/RSCAS/Publications/>
<http://cadmus.eui.eu>

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Abstract

Rather than considering legal and judicial arenas as the mere surface of the heavy 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 rather unexplored research paths are undertaken. First of all, a socio-historical perspective focuses on the critical junctures in which case-law and judicial governance have been formalized as the locus of European integration and as the most legitimate model for EU government. Second, a more sociological look is taken at the functioning of the “European legal field”. It shows the intense circulation of Euro-lawyers in-between the various (national or supranational) academic, bureaucratic, political and economic poles that make up Europe. Thereby located at the crossroads of European elites and sectors, the European legal field occupies a critical position in a EU polity deprived of a State organizing in a perennial way the mediation between social interests.

Keywords

European law; European court of justice; political science; legitimacy

*How to build Europe without Europeans,
if not by turning to independent personalities?*
(P. Reuter 1953 : 51)

*I invite you to discover with me the pure gold
of constitutional affairs underneath the
heaps of scrap and coal.*
(P. Pescatore 1965 : 522)

The uninitiated outsider, that is, in this case the political scientist, embarking upon a journey in European law, will inevitably feel at a loss.¹ Engraved in the foundations of the European treaties, elevated to the status of a cornerstone – or even a *raison d'être* – of the Union (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 sort of self-evident fact. In a way, Euro-law is so deeply *embedded* in EU polity that it is almost invisible². The conventional separation between 'law' and 'society' seems inadequate in this context as no clearly defined categories of European politics, economics, administration or civil society exist which have not been produced – or co-produced – by lawyers themselves. Consequently, it is difficult to grasp the Union and its borders, its institutions and their 'logic', its public administration and its organisation, its market and its 'principles', its civil society and its 'causes', without drawing on the impressive *corpus* of legal norms (treaties, directives, jurisprudence, etc.) and without a recourse to the very categories of understanding and modes of reasoning of EU law itself. Whilst the outsider's knees give way in his fruitless attempts to distance himself from this pervasive law, his discomfort reaches its paroxysm when he discovers that the historical 'meta-narrative' (s)he was hoping to build on law's social effects, etc. has in fact already been written by the law itself, which claims to be the driving force of European social, economic and political integration dynamics.³ And it almost comes as no surprise to the outsider that the construction of this legal order has progressively asserted itself as the very horizon of European politics through various projects, such as the European judicial cooperation, the European Constitution, the Charter of Fundamental Rights or the European Civil Code. By confronting himself imprudently with this 'cathedral' of EU law, this fulfilled legal utopia praised by so many lawyers, has he not accidentally entered this 'paradise of lawyers' (Mortelmans 1994 : 418 quoted in H. Schepel, R. Wessering 1997), an achieved auto-poietic system at the very core of the EU polity?

The outsider might however feel somewhat relieved when he discovers the unprecedented profusion of sociological and political science studies on his research object over the last fifteen years. There, he will find a fully-fledged explanatory paradigm of this full-scale 'legalization' of European politics, which can be sketched in three steps.⁴ Step 1, the point of departure: the 'constitutional' doctrine of the Court of Luxembourg (supremacy and direct effect of Euro-law). Through a series of judicial moves, the Court has built the conceptual framework (direct effect, supremacy of EC law) and the procedural framework (preliminary rulings) of a genuine legal federalism. Step 2, the driving forces: on the one hand, the mobilization of the European jurisprudence by multinational companies,

1 This article owes much to the works and discussions of the POLILEXES (*Politics of Legal Expertise in European Societies*-CNRS) research group. As the footnotes clearly indicate, it takes up a large number of key ideas that have been collectively elaborated by this group. A sample of this work is presented in a Symposium recently published in *Law and Social Inquiry* (A. Cohen, A. 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. Special thanks to Nadia Taouil, Stéphanie Hennette-Vauchez and Mikael Madsen for their help in translating this paper.

2 In this article, I will indistinctly speak about Euro-law, EU law and European law.

3 'What would the Community be without the Court of Justice?' repeatedly ask jurists when the ECJ is being criticised, cf 'Retour du mythe du gouvernement des juges ?', D. Simon (2006 :1).

4 Interestingly, it is a legal scholar, Joseph Weiler, who has given a new impetus with his *law in context* perspective (J. Weiler 1991) opening the way to American political scientists (Slaughter, Mattli 1993; Alter 1994 ; Stone 1998).

transnational interest groups and EU institutions that seize this institutional opportunity; on the other hand, the national courts' progressive – yet turbulent – acceptance of the general principles established by the ECJ (K. Alter: 2001). And step 3, the dynamic: this support by private and national actors offers in turn new opportunities for the Court to assert and extend the scope of its case law (discrimination, environment, fundamental rights, etc). This triggers an implacable iterative mechanism that catches interest groups, multinational companies, EU institutions, States and the ECJ in a virtuous circle of 'judicialisation', which has not been designed by any specific actor, but to which everybody contributes in its own way (A. Stone: 2004). Undoubtedly, the 'acquis' of this consistent body of European 'law in context' is impressive. It is now widely accepted that : i) European *political* and *economic* integration has been to a great extent a *legal* process; ii) the dynamics of that process do not rely exclusively on some inherent force of law, nor on the boldness or rightness of ECJ's rulings but more widely on the way specific and otherwise relatively autonomous groups have found it useful to use the 'supremacy' and 'direct effect' doctrine for their own sake (national courts trying to empower themselves vis-à-vis national supreme courts; firms engaged in cross-border trade seeking to expand markets undermining State control; lobbying groups trying to influence EC and national regulations, etc., etc.); iii) the rise of the ECJ itself stems from this 'reciprocal empowerment' linking the latter with all those various groups and institutions.⁵ However attractive it may be, this paradigm suffers from a certain number of dead-angles. Due to the ritualistic tension and controversy in the area of European studies between intergovernmentalists and (neo)functionalists – the expansionist dynamic of the ECJ constituting an ideal battleground for the confrontation of these two streams of the literature – social scientific studies of European law and politics remain unsatisfactory for at least two reasons: i) the very notion of 'interests' remains some sort of a black-box; ii) the role of law and lawyers has been overlooked. Overcoming these shortcomings, this paper argues, might offer a *second souffle* for this field of research.

Clearly, the raw realism of highlighting 'interests' has played and continues to play a key role in breaking the discrete 'charm' of EU law. Presented as exterior to the legal realm, interests are regarded as the hidden driving force of legal disputes. However, by identifying the whole dynamics of legalization in the successful adjustment of these interests to the opportunities and venues opened by the Court's jurisprudence, this literature has itself produced a dead-angle symmetric to the legalistic one it itself sought to surpass. Strikingly, interests themselves are considered as some sort of pre-given and a-historical *donnée* that 'actors' – purported to have a clear and unbiased perception of the various opportunities offered in the European arenas – in effect pursue. In this framework, the mobilization of the Court by all sorts of self-interested actors is viewed as the *natural* and rational adjustment to the opening of a new institutional venues, in this case the supremacy and direct effect doctrine of the ECJ. But what may seem totally natural to American or even common law scholars, that is the idea that a court, and particularly an international court, may be regarded by firms, interest groups or individual plaintiffs as a regulatory institution mediating contradictory social interests is far from evident, especially in the early period of the European Community dominated by countries such as France and Italy where such a conception of the judiciary is far from mainstream⁶. What is taken for granted may be actually the core of the research puzzle, that is how specific *representations* of European polity as an entity governed by law and regulated by a Court have emerged and been spread, that is, how 'interests' in law and the Court have historically imposed themselves among a large variety of actors taking part to the European integration process. In this case, the centrality of law is not seen just an emergent effect (*effet émergent*) of a dynamic of self-interested and clear-sighted actors, but as the historical (that is, contingent) outcome of a series of struggles for the definition of Europe, its forms

5 However, several observers have stressed the limits of the continuous expansion of the Court. They underline the 'obstacles' deriving from the Court's restrictive case law regarding the possibility for 'ordinary' citizens to refer to it and the cost and duration of this process, which limit this arena to a group of '*repeat players*' who have the means for long-term contentious strategies (R. Dehousse 1999 ; O. Costa 2001).

6 A comparative perspective on legal representations of the courts' role can be found in Benoit Frydman, 2005.

and its founding principles. Socio-historical analysis is probably here the most efficient tool when it comes to thwarting the different traps of functionalism that tend to naturalize the relationship between law and European politics, judges and integration, legal milieus and the government of Europe. By retracing the various *possibles historiques* which have been eliminated by the course of history, and by accounting for the uncertainty and the reversibility of social processes (P. Laborier, D. Trom 2004), this socio-historical approach is probably best suited to open up the black-box of Euro-law's centrality in EU polity. Such an approach will in effect focus on and highlight a certain number of the critical junctures and 'turning points' in which law, lawyers and the EU polity have been built *altogether*.

The second dead-angle of the currently dominant approach is produced by the fact that the very role of law and lawyers is largely, if not totally, overlooked. When law appears in this literature, it all occurs as if it was a resource *toujours déjà-là*, exterior to and opportunistically mobilized by self-interested social actors. The institutions, positions, groups and actors that shape this body of Euro-law have been ignored, except of course for the (national and European) judges who stand in the eye of the judicialising whirl. The invitation handed out more than twenty years ago by canonical authors of 'European studies' to chart the 'communities of European lawyers' (M. Shapiro 1980 ; E. Stein 1981) – that is, the group of practitioners with specialized skills in Euro-law, be they judges at the Court of Justice, consultants, lawyers, or legal advisers of the EU institutions – has essentially gone unheeded (for an exception, see H. Schepel, R. Wessering 1997). Although incidentally referred to as essential to the emergence (or not) of EU terrain of regulation⁷, lawyers' agency and agenda has never garnered significant attention. Most of the time, if not always, lawyers appear as mere *agents*, neutral and almost invisible defenders of the different heavy interests (companies, States, EU institutions, interest groups, associations, etc.) that confront each other before the Court.⁸ What law does to the interests it takes in charge seems to be irrelevant. It all occurs as if the literature had focused with much details on the foundations of this European legal 'cathedral' (i.e. interests) while at the same time neglecting the worship that is practiced in that church: the clergy officially entitled to speak in the name of this religion and therefore monopolizing the symbolic power it is endowed with; but also the knowledge and beliefs that are being produced which are not just some sort of esoteric or technical messages, but do form a set of representations of the Union, of its history, of its government and of the required competences for its various (political, bureaucratic, economic, etc.) elites. I contend that understanding the paramount role law plays in EU polity therefore requires to 'look through the other end of the telescope' (M. Galanter 1974: 97), that is, to try and follow lawyers in their (legal but also extra-legal) practices and undertakings rather than leave the legal realm.

What is usually considered as the mere surface of the heavy social processes that shape European integration may actually be one of the essential spaces and groups where the *government* of Europe is being shaped. More precisely, what if 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 (individuals, firms, national governments, EU institutions) was not peripheral but central to the processes of legalization of European politics? The very fact that law is somehow *coextensive* to the EU polity itself, in the sense that at any point of the complex and multi-layered structure of Europe (be it business, administration, politics or civil society, etc.) there are specific bodies of Euro-law as well as specialized groups of lawyers, is a first token in this regard. As a matter of fact, this pervasiveness locates law at the crossroads of various and often antagonistic sectors, institutions and elites that make up EU government. Here of course, the notion of *government* is not understood in an institutionalist sense (organisations in charge of that 'function'). Rather, it is conceived as the product of a composite and conflicting set of social activities which, without

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

8 The 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 (C. Harding 1992; A. Stone, T. Brunell 1998).

necessarily being oriented to this scope, shape (i) the organisation and the hierarchy of institutions and of the groups of actors which purport to occupy or influence them; (ii) the rules that govern their relation; and (iii) the competences considered necessary to participate in these debates.⁹ This conception of EU government suggests a research agenda that focuses on those arenas (such as le ‘Collège des commissaires’, or the COREPER) that mediate the vast and dense array of sector-specific policies where, more than anywhere, the unity and the legitimacy of the fragmented European mosaic are at stake (O. Nay, A. Smith 2002; A. Smith 2004). It is our hypothesis that legal and judicial arenas stand out as one, if not the major, forum of mediation in this regard. It is well known that lawyers do not lack mechanisms and tools to build compromises and arbitrations.¹⁰ In contrast to national settings where law and politics are often pictured as antagonistic, this centrality is made even more obvious because of the fact that the legitimacy claimed by EU institutions such as the Commission (apolitical and technical) is perfectly in tune with that of law.¹¹

This article suggests and exemplifies how legal and judicial arenas, which have somehow been banished from the European public space in the name of the neutral and/or technical nature of the law, in fact constitute a central crossroad at which the different economical, political, administrative or academic groups and actors turn in order to defend themselves efficiently in the EU. In a political system without a State capable of organizing stable relationships and hierarchies between these groups and institutions, I argue this position is thus a critical one in the production of a European government¹².

Consequently, working on European law and lawyers is not only engaging into a legal sociology that takes into account the various forms of specialisation and autonomisation of European ‘legal professions’ in terms of a Europeanisation process. It also implies mobilising a political sociology focusing on European legal spaces not only in order to study the the law they produce, but also in order to examine their contribution to the construction and legitimisation of a new political order (EU Government)¹³. 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 Europeanisation. It is the claim that this research agenda leads us to the core of EU polity. Rather than a full-fledged narrative, the tentative remarks presented here 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.

I. Judicial Governance: Genesis of a Model for European Polity

Be it European or national, law is a false friend. The historical permanence of its ‘names’ (rights, laws, courts, etc.) considered beyond the many political, administrative and economic ruptures that have marked fifty years of European integration only makes us perceive law as a reassuring backdrop, or as some sort of institution unchanged in its forms and equal in its effects¹⁴. Of course, neither in the 50s nor today, can a State or quasi-State formation be conceived of without the support of this

9 This definition of ‘government’ draws from that of Bastien François (B. François : 2006).

10 See, for example, the role of the ‘language of public law’ in the depolitization strategies in enabling the ‘constitutional’ compromise of the Convention for the future of Europe (P. Magnette 2006 : 83-87).

11 Concerning the apolitical discourse as the main mode of enunciation of EU politics, see (O. Baisnée, A. Smith 2006),.

12 For an analysis of the role of lawyers in the construction of international spaces, see (Y. Dezalay 2004 ; T. Halliday 1996).

13 If we had to identify a specificity of the French political science approach, it would without doubt lie in the study of this relationship (J. Commaille 2000 ; B. François 2000 ; L. Israël, G. Sacriste, A. Vauchez, L. Willemez 2005).

14 Such a functionalist conception of law’s functions in western societies was of course particularly heralded by sociologists like Talcott Parsons (T. Parsons 1964).

indispensable mechanism for the construction of political orders¹⁵. However, this apparent immobility of law may cloud our perception of the variations in the relative value of this legal competence vis-à-vis other *savoirs d'Etat*, like economic competences or bureaucratic *savoir-faire* but also in regard to the transformations of political and social functions which are attributed to the law in the 'government'. Matter-of-factly, 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 necessary expertise for achieving the then-on-going political aims, and the law-as-a-political-model in which law in the guise of the case-law of the European Court of Justice is regarded as the very *locus* of integration. This simple *constat* of law's relative indeterminacy compels the researcher to retrace the social and historical processes that has imposed it at the core of EU polity. Hereafter, I therefore suggest new research alleys drawing on a socio-historical perspective that would follow the critical junctures and the turning points of this transformation.

A. Building Law, Building Europe

So far, law's role in the formation of cognitive and normative frameworks organising the different sector-specific policies and the European political *system* as a whole has been largely neglected. Yet, by shaping foundational concepts and theories through which EU policies and sectors are perceived today, law and lawyers have constituted one of the principal levers of the autonomisation of the various European social arenas around *specific* stakes and logics of functioning (relatively different from national and political logics). 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 defining the very principles and the categories organizing EC policies, EC institutions or the common market. This very contribution in moulding and formalizing¹⁶ ad-hoc rationales for European polity has opened up an unprecedented room for manoeuvre for lawyers, which is way beyond the 'roles' they have traditionally been attributed in national political, bureaucratic or economic sectors.

The formation of a European *political* system is a striking example in this regard. Lawyers have spearheaded the efforts of defining a *specific* European architecture and rationality, distinguishable from that of national political systems and yet at the same time autonomous from the other European arenas (economic, bureaucratic, legal, etc..¹⁷ As a matter of fact, the first legal controversies about Europe were not exclusively focused on the technical issue of the supremacy and direct effect of EC law over national legal norms. They were at the same time conflicts over the definition of EC's 'political system' and, in particular, on the opportunity to apply some of the most classic categories of national constitutional law – 'separation of powers', 'legislation', 'judicial power', etc. As a matter of fact, the often quoted decision of the German Tax Tribunal of the Palatinate of November 1963 contested the 'supremacy' of the EC treaties precisely on the ground that it authorised an 'executive' body to adopt 'legislative' acts. Criticizing this decision, the ECJ's president Andreas Donner, a Dutch professor of constitutional law, invited the lawyers to 'get out of the straightjacket of the sacrosanct notions of traditional constitutional law', adding that 'it seems realistic to call these powers of the Commission by their rightful name, that is, legislative powers and measures' (A. Donner 1965: 7). The former diplomat Pierre Pescatore, another law professor and president of the Court, pursued this policy

15 For the genesis of this relationship between the emergence of a science of law and the consolidation of political systems in Europe, see (E. Kantorowicz 1961).

16 Following Bernard Lacroix and Jacques Lagroye, we defined 'formalisation' as 'the effect of the processes establishing the 'figure' of the institution and giving meaning to the practices that come along with them' (B. Lacroix, J. Lagroye 1992 : 10).

17 Besides, the definition of the basic principles of the political order is operated before and after the treaties they contributed to write and whose exegesis they ensure, two tasks that are often taken care of by the same people (A. Vauchez 2007a).

of blurring the traditional lines and principles of national constitutionalism by forging the highly successful notion of ‘institutional quadripartism’ to set out the relations between the institutions established by the Treaty of Rome without having to rely on classical theories of separation and balance of powers. In a seminal article, he claimed that the specific ‘rationale’ of this European political order which relies on a fragile, yet essential equilibrium between four institutions (the Commission, the Council, the Court and the Parliament) could not be boiled down to the ternary principle of ‘separation of powers’. In his view, rather than one specific function (legislative, executive or judicial), these institutions actually derive their legitimacy and their essentiality for European politics from the representation of each of the four types of *interests* involved in this process (‘the common interest’, ‘the States’, ‘the judicial values’ and ‘the popular forces’: P. Pescatore 1978 : 394). Undoubtedly, this very role in the blurring of the classic constitutional frontiers between executive/legislative/judicial power put lawyers in a very favourable position to redefine the relationship between law and political borders. When, in the 1970s, lawyers from various backgrounds (members of Parliament, experts, judges or law professors) engaged in the discussion about the reinforcement of the powers of the European Parliament, there was general agreement that the EP should be under the jurisdictional control of the ECJ, thus thoroughly linking the strengthening of EC institutions to their submission to a law thought of as the real sovereign (G. Sacriste 2006). The 1984 ECJ decision *Luxembourg vs. European Parliament* (april 10th 1984, aff. n°108/83) which firmly ties the two together is quite emblematic in this regard. By excluding a certain number of constitutional options¹⁸, starting with classic parliamentarism (the organic nature of the *lois* defined as the acts adopted by the Parliament, the judicial ‘immunity’ of parliamentary acts, etc.), in order to impose a polity centred on the subordination to the judge and constitutionalism, Euro-lawyers have dismantled the historically stabilized definitions of the relationship between law and politics and of their own role¹⁹. Freeing themselves from their structural subordination to politicians and political logics in national parliamentary regimes, they have gained on the Europe level unprecedented degrees of freedom in the promotion of their classic professional agenda, that is a polity governed by law.

Equally, the rise of European Commission is difficult to analyze without referring to its legal advisers. As they were providing the Commission with legitimizing theories regarding its various ‘functions’ and ‘missions’, they progressively installed themselves at the heart of this rising bureaucracy. The role of Michel Gaudet, a member of the Conseil d’État, who directed the Commission’s *Service juridique* for nearly 18 years (1952-1969) still needs to be analyzed. By tying his service to various legal networks (starting with the International Federation of European Law – FIDE –, which negotiated its agenda with Gaudet himself), he actively engaged in the first formalisations of the legal architecture of the Communities, while imposing the Legal service as a crucial interlocutor of the College of Commissioners.²⁰ As the only common *bureau* of the three executives from 1958—that is almost ten years before their actual fusion in 1967—it claimed a transversal and generalist expertise which happened to be an essential resource to counter sector-specific knowledge and expert networks developed by the different Directorates-Generals. Likewise, the role which professors of corporate law (Berthold Goldman) and lawyers representing large companies (Jean-Claude Goldsmith, Fernand-Charles Jeantet) managed to play in the emerging

18 Actually, the ECJ acknowledged 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, decembre 17th 1970, Rec. p. 1125.

19 The 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 23rd 1986) following twenty-five years of doctrinal investments in this direction (A. Cohen, 2007).

20 The director of the legal service was the only senior official to sit in the meetings of the College of Commissioners. Paul-Henri Spaak also asked Gaudet to help him represent the High Authority during the negotiations of the Treaty of Rome.

Common Market remains to be studied²¹. They built the legal frameworks of this unified economic space, just as much as they invented a new legal discipline ('European business law', in contrast to the 'old' national commercial law which was, at best, for 'shopkeepers') defined as an organisation and management technique for companies (J.-C. Goldsmith 1964 ; F.-C. Jeantet 1964). It was in the wake of these efforts that the very notion of 'business lawyer' (*avocat d'affaire*) was invented – at least in France – (the expression goes back to this period) that is a legal professional who is not anymore a mere specialist of litigation, but appears as a business professional (L. Gueguen 2005)²².

Consequently, for lawyers, 'building Europe' also meant 'building themselves', that is freeing themselves from their roles at the national level and finding a new *raison d'être* in a European polity in search of both professional models and political canons. This critical contribution to the definition of the '*métiers de l'Europe*' (D. Georgakakis 2002) without doubt contributes to the understanding of the role lawyers play today at the heart of political, administrative and economic European elites. Although still incomplete, 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 (C. Lahusen 2002). But the same could be told of European Commissioners (A. Mac Mullen 1997), high-ranking Commission officials (D. Georgakakis, M. de Lassalle : 2007), members of the Convention for the Future of Europe (A. Cohen 2006) or of the Committee on Constitutional Affairs of the European Parliament (G. Marrel 2006), not to mention 'civil society' activists themselves (J. Weisbein 2006). One could of course argue that this legal capital of European elites only mirrors the 'incestuous' relationship between law, lawyers and the State in European countries as well as the fact that law schools remain essential an breeding ground for national elites. But such an explanations do not prove satisfactory for they neglect that the prevalence of lawyers at the national level varies from country to country, depends on the sectors of activity and on the historical period.²³ This would also mean to ignore 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 European debates.²⁴

B. Judge-made Law: A Science of the European Government

As a matter of fact, European law does not come down to an accumulation of sector-specific knowledge about various EU policies and institutions. *Jurisconsultes* of the EU institutions, law professors but also judges of the Court of Justice have turned it into a genuine science of government, a cross-sector knowledge capable of seizing the 'system' (a 'legal order') of institutions, positions and groups that shape 'Europe' and enable actual evaluation of the evolution of politics with regard to its

21 See for example the role of Fernand-Charles Jeantet in-between academic and practice-oriented areas of Euro-law. Partner in the law firm created by his father in the early 1920s and specialized in private international law, Fernand-Charles Jeantet (PhD in law at the Sorbonne) is at the same time lecturer of 'business law' at Sciences Po Paris, commentator of ECJ's decisions for the *Juris-classeur périodique* and an active member of numerous national, European and international legal networks and groups (he directs the Association nationale des avocats international section; he participates to the anti-trust commission of the Fédération internationale pour le droit européen...).

22 See the European seminars of the *Commission Droit et Vie des Affaires* of Liège law school that have been held annually since 1957.

23 From this point of view, the apparently attractive hypothesis explaining the massive investment of lawyers in the process of European integration as a form of compensation of a regression and decline in national politics and within Welfare States, even if it seems to work for certain countries, for certain sectors and at certain periods, can not be accepted a general explanation.

24 In 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 European profession (V. Schnabel 1998).

very specific rationality.²⁵ Principles such as ‘direct effect’, ‘supremacy’, ‘principle of proportionality’ or ‘principle 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 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 that allows to conceive of a ‘European public space’ (the distinction between the public and the private, the national and the supranational, the political and the legal space, etc.) that it nowadays appears as an essential knowledge for those who want to understand the inner workings of this multi-level, multi-sector and poorly institutionalized space.²⁶

This alleged capacity of Law as *the* science of European government owes part of its position to the fact that it is based on a genuine ‘metaphysics of Europe’, which turns the lawyer, and especially the judge, into the ultimate guardian of European integration processes. Beyond their diversity, the legal theories of the European Union that have been elaborated since the middle of the 1960s share a common devotion of the Court’s historical role. Its founding ‘doctrine’ – the ‘magic triangle’ of ‘direct effect’ and ‘supremacy’ of Euro-law combined with the ‘preliminary reference’ procedure – is regarded as the backbone of European integration as much as the best way of describing the functioning of the EU. This legal triptych not only provides for an integrated vision of EU polity that classical theories struggle to grasp, it also entails a meta-narrative of the dynamics of European construction themselves. It is through the mechanism of preliminary references to the Court that individuals, interest groups, companies, etc. 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 judge appears as the only actor able to forge lasting relationships between the various social interests crossing at the European level. Taking up with the traditional legal criticism of the ‘political’ (deemed incapable of producing anything else than artificial and ephemeral arrangements), the jurisprudence of the Court (*judge-made law*) appears to be Europe’s ‘real Constitution’, rather than the treaties themselves, which are still subject to unknown variables of political trends.²⁷ Put in relation with the very ‘key drivers’ of Europe, the ECJ’s ‘judicial law’ fosters integration much more efficiently than does ‘political law’ and its inter-state precarious 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 related to economics, but to law (essentially private law) endowed with a particular ability to ‘build’ Europe.²⁸ In this model, the European Court of justice 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, hierarchisation). From this perspective, European law is the bearer of a genuine ‘political model’ which tightly links law and politics, judges and integration. As we cannot detail here the historical and social conditions of success of this metaphysical view of Europe, we will merely zoom in on one ‘critical juncture’ in the following box.

25 The fact that the legal service of the executives and the Court of Justice 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 15 July 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’.

26 This capacity of orientation explains 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 (C. Lahusen 2002).

27 The discourse on the European Constitution (A. Cohen 2005), which the Court has praised since its origins, might also be interpreted in the same way.

28 In their most political version, these judicial theories glorify the emancipatory capacity of a Court whose daring jurisprudence would contribute to give back to ‘the people’ and the ‘European citizens’ the reins of a power they had been denied by the States and inter-governmental arrangements. When analyzing this type of speech, Harm Schepel talks of an ‘emancipatory functionalism’ (H. Schepel 2004 :3).

Coming back on two legal cornerstones of the EU : *Van Gend & Loos* (1963) and *Costa c/ENEL* (1964)

In most accounts of the history of the EU, the *Van Gend & Loos* (1963) and *Costa c/ENEL* (1964) ECJ cases stand out as the date of birth of the European legal order. What I would like to argue here is that, besides the legal principles established by these two decisions, they in fact paved the way for putting law and lawyers at the core of European polity. Contrary to what *ex-post* is often suggested, in the very first years of the EC's existence, European integration was thought of as being mainly economic and the role devoted to lawyers was essentially limited to providing technical expertise in dealing with harmonization of national legislations under the political lead of the Council of Ministers. Considered mostly as an administrative and constitutional court, the ECJ itself had not particularly attracted the attention of lawyers who, at the time, were even considering establishing another institution devoted to mediating private law litigations (J.-L. Roper 1962; C. Cheval 1962). To understand how this 1963-1964 period initiated a shift that turned the ECJ and its case-law into the very locus of European integration, one should bear in mind two elements of context: i) the 'legal harmonization', which had initially concentrated most of Euro-lawyers' hopes in the first years of Rome Treaty, had substantially failed; ii) political integration was seriously halted by the crisis of the Community institutions of 1962-1966 which seemed to alter the possibility of pushing further the idea of a political Europe sought by a number of pan-European actors like Walter Hallstein or Fernand Dehousse.²⁹ In that particular moment of European history, *Van Gend & Loos* and *Costa c/ENEL* opened a window of opportunity for a variety of political, bureaucratic, economic and academic actors with strong legal capital (PhD's in law, legal professionals of all sorts) to redirect the core of the European process of integration toward case-law and legal federalism rather than legislation and politically driven federalism (see the recapitulative table below). From different sites of the European polity (European Parliament, Commission, Fédération internationale pour le droit européen, academic arenas etc.) and under various forms (academic, political, bureaucratic, etc.), lawyers then converged in inventing and theorizing a new European commonsense that combined the criticism of governments' inertia and the promotion of the integrative (or even emancipatory) potential of case-law. Three particularly symbolic elements illustrate the various, but generally convergent, uses of these two decisions (A. Vauchez 2007b). Only a couple of days after the publication of *Van Gend & Loos*, Robert Lecourt, a judge at the Court of Justice, offered an enthusiastic comment in the French newspaper *Le Monde*. Lecourt, PhD in law and a former lawyer, as well as a former minister of the Popular Republican Movement (MRP) who had become marginalised in French politics, personally worked out the link between the political context and the judicial event—'at the height of the crisis in Brussels, the judicial world just brought European integration a founding stone' (R. Lecourt 1963 : 1)—and described the law as 'one of these forces, which despite the weakening of political motives keeps Europe moving on' (R. Lecourt 1963 : 1). Nor did Walter Hallstein, an international law professor, a former judge and sitting President of the European Commission, miss the opportunity to highlight the political stakes of these judicial decisions. Systematising the interpretation of the Court ('the European Community law, as a 'Common law', directly binds the nationals of the Member States and themselves', it forms 'a new legal order'), he wrote that - as laid down in article 177 - each 'citizen is invited to participate in the achievement of integration'. In several public interventions specifically dedicated to EC law (in particular, before the European Parliament in June 1964 and in June 1965), he theorised about a 'Community of law' where 'it is not the force or the conquest that serve as a means for unification, but a spiritual force: the Law' (W. Hallstein 1964: 1). And Fernand Dehousse, a professor of international law experienced in European politics (he was the President of the Consultative Assembly of the Council of Europe), who was very committed to the defense of European Parliament's prerogatives, also addressed this question in the framework of the Legal committee of the Parliament he presided over. In the parliamentary report he wrote in 1965, while stressing the 'extreme importance' of these two ECJ judgements, he underlined their 'vital interest for the present and future of the EC' and warned against the threat that divergences of jurisprudences would pose for European integration (European Parliament 1965). These convergent contributions of different European political entrepreneurs who all had a strong legal capital (one could add Pierre-Henri Teitgen and Ivo Samkalden) goes hand in hand with the mobilisation of various transnational networks of lawyers which, like the International Federation of European law, the College of Europe, the International Union of Lawyers or the International Union of Judges, dedicated their congresses (in April 1963, October 1963, April 1965, September 1965, etc.) to the relations between the European judges and the national judges, in particular through the use of article 177. In a few months, under the effect of this corroborating work that was meant to highlight the political stakes of *judicial* integration, the Court emerged as a pivotal arena of European integration, replacing and relegating the political or intergovernmental level - a level which in the eyes of these same actors was considered inconsistent or even absent after the 'empty chair' crisis.

29 It very rapidly became 'unrealistic' to try to achieve a perceptible increase of the power of the Parliament in the context of the planned fusion of the executives of the Communities that Fernand Dehousse initially had hoped for.

It would certainly be useful to outline other critical junctures³⁰ that shaped this theory of judicial integration in order to demonstrate how this initially prospective model of a judge-made integration became a predictive one, serving as a blueprint for very diversely situated actors of the European polity. It would allow for understanding how what was initially considered as a simple tool at the service of the ‘political’ institutions (the Commission, the Council of Ministers) progressively transformed into the very core of the integration process. This changing role also came along with a change in the type of figures (from the *jurisconsulte* to the judge/lawyer duet) and in the sort of legal practices (from expertise to jurisprudence) that are most legitimate.

Euro-Law’s Two Bodies

	LAW AS AN INSTRUMENT 1950-65	LAW AS A REGULATOR 1965-
DOMINANT FIGURE OF THE LAWYER	<i>Jurisconsulte</i> and legal expert	Judge and lawyer
TYPE OF LAW	Political law (Approximation of national legislations)	Judge-made law (Construction of a jurisprudence)
CENTRAL EC INSTITUTIONS	Commission and Council of Ministers	European Court of Justice
DOMINANT ACTORS OF INTEGRATION	Political and administrative actors	Economical and social interests
VECTOR	<i>EC policies</i>	Preliminary ruling <i>procedure</i> (art. 177)

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

These first sketches of a history of the functions attributed to the law in the process of European integration also calls for a conceptualization of the relationship between legal arenas and the political, administrative and economical scenes of EU government. Coining the global system of positions, actors and institutions that constituted itself progressively around the interpretation of EU law not only as a ‘field’ (P. Bourdieu 1987), but as a weak one with porous internal and external borders³¹, makes it possible to explain how this interstitial can be critical for the production of representations and principles of legitimisation that govern the European polity.

A. A ‘Weak Field’

There are different ways to characterise the individuals whose job is to put EU law into practice. One can choose to underline the large variety of *roles* legal professionals play in the EU (lawyers of the various interest groups and companies, corporate lawyers, legal advisors or lawyer-linguists in the

30 For another critical juncture, see the cross-sector mobilisations that followed the decision ‘Cassis de Dijon’ (February 1979), which made the Commission work on a ‘political relaunching’ by basing its arguments on the decision of the Court, see (K. Alter et S. Meunier-Aitshalia 1994).

31 As such, the notion of field as defined par Pierre Bourdieu on the case of French « field of power » could hardly seize a set of positions, careers, and inter-relations far less institutionalized and hardened than those of the national settings. On « transnational fields », see also Y. Dezalay, M. Madsen (2006).

European institutions, experts in the many committees advising the Commission, law professors, judges, etc.). It is possible to highlight the existence of *epistemic communities* which bring together professors, experts, lawyers of the EU institutions and lawyers of the different ‘branches’ of EU law: from the old ones (anti-trust law, freedom of movement or human rights) or more recent ones (fiscal law, social law, environmental law, law of judicial cooperation, etc.).³² Another way of identifying these practices is to emphasise *clusters of specialized practice*. First of all, an economic pole structured around consultants, legal advisers working in the legal service of big firms and business lawyers; secondly, a bureaucratic pole that links the legal services of the EU institutions, experts in the dense array of EU working groups and committees and specialized lawyers in the different national bureaucracies implicated in European negotiations; thirdly, an academic pole should also be mentioned, organized around a set of chairs, research centres and journals devoted to EU law. And finally, a judicial pole, structured around the 200 law clerks (*référéndaires*), the 70 magistrates of the three EC Courts (Court of Justice of the European Communities with its 27 judges and 9 advocates general, the Court of first instance with its 27 judges and the Civil Service tribunal with its 7 judges) and the group of repeat players that regularly plead in the front of those jurisdictions.

1. Interdependences

Despite their diversity, these various legal roles, poles, epistemic communities and clusters of specialized practice can hardly be considered separately. First of all, they are linked by forms of competition, since European law has constituted one of the privileged battlegrounds for the various types of legal capital (e.g. between the academic and the practice-oriented forms of legal credentials), but also for the different ‘national models’ or ‘legal traditions’, setting the scene for a *regulatory competition*. Yet, these venues for competition should not lead to overlook forms of complementarity. However different and often antagonist European lawyers may be (e. g. the ‘State lawyers’ working on behalf of their national diplomacies and the ‘merchants of law’ committed to the defence of corporate interests), each one of them contributes in their own manner to transform a composite set of EC rules into a proper legal *corpus*. While they advise their different ‘clients’ (companies, interest groups, EU institutions, members States, etc.) on the ways to mobilise, defy, or even circumvent the provisions of the treaties to their advantage or while they carve out ‘fundamental principles’, ‘inherent logics’ or ‘legal vacuums’, allowing them to play with, against or without the European legal instruments (in accordance with the interests of their constituents), European lawyers all contribute to certify the existence of a European law. They all converge in promoting legal skills and competence as a precondition for participating in the various European arenas and social plays (intergovernmental conferences, internal negotiations within national or EC bureaucracies, political mobilisations, economic exchanges, etc.). As a matter of fact, they are confronted with competing *savoirs d’Etat* – such as political economy, bureaucratic savoir-faire, etc. – that equally aspire to provide the various European sectors of activity with an efficient ‘unification technique’. From this point of view, the relative decline of the legally-trained professional profile among Euro-bureaucrats in favour of economists over the last twenty years, a trend which coincides with the reconfiguration of the hierarchy of the DGs within the Commission (D. Georgakakis, M. de Lassalle 2007), can be understood as a more general competition over the definition of knowledge and know-how that are required for exercising these public or private, national, transnational or European roles that interact in the European polity. By studying the precise modalities of the legal professionals’ involvement in these struggles, it becomes possible to write the so far neglected history of these rivalries and of the forms of hybridization and the deriving equilibriums that are *constitutive* of the government of the

32 A recent issue of the journal *Cultures et conflits* (« Arrêter et juger en Europe ») analyses one of these specialist communities, with regard to the establishment of the law of European judicial cooperation (A. Mégie 2006). On the human rights’ community, see M. Madsen (2005).

European Union³³. The utility of the concept of field lies in its ability to shed a light on the relations and interplays between legal professionals in a wider context of struggles for the production of the most legitimate principle of legitimacy governing the European Union.

2. Specialization without autonomization

Paradoxically, whereas lawyers have been critical to the autonomisation of various European institutions, professions and forums (cf. above in Part I), the autonomy of the European legal field remains rather limited. Of course, European law is nowadays subjected to strong dynamics of specialization. The EU institutions now offer a vast array of positions for lawyers or lawyer-linguists. The development of the Common Market and of EC legislation led to the emergence of a real legal market in Brussels and in the capitals of the Member States specialized in eurolitigation.³⁴ Although there are different temporalities from one country to another (J. Bailleux 2006 ; B. Davies 2005 ; J. Shaw 1996), Euro-law has also become institutionalized as a specific and legitimate academic discipline (with its codes, manuals and treaties but also with academic chairs and research centres, etc.).³⁵ In many ways, it has thus become possible to make a *career* in European law. Yet, this specialization pattern should not be confused with a process of autonomization. In many ways, the European legal space still appears to be a weak field if we adopt the definition Christian Topalov put forward in his analysis of French ‘social reformers’ of the late 19th century (C. Topalov 1994) that is a ‘field, which is completely immersed into other fields that are mapped out and constituted more firmly’ (C. Topalov 1999 : 464), such as the national / transnational legal, bureaucratic and political fields. Not weak in its social effects, but with regard to its autonomy and internal differentiation.

It is not exempted from this ‘irreducible diplomatic pattern’ (C.A. Colliard 1984), which still hovers over the European institutions. The respect of the equilibrium between the member States not only governs the nomination of the ECJ judges and of members of the legal services in EU institutions but it also continues to affect the truly European character of what is being accomplished in many *transnational* legal spaces, be it in learned societies or in professional associations. The intrusion of this quasi-diplomatic logic into the realm of law shows that, as in all other European areas, legitimacy is still construed in terms of the (equal) *representation* of ‘national traditions’ that conditions the fact that the law produced is truly *common* (A. Vauchez 2007a). This is probably the price to pay for the ‘Europeanness’ of EU law, i.e. its capacity to convince of its neutrality with regard to the equilibrium between Member States. However, this condition of representativity is merely one of the many expressions of the heteronomy of the European legal field. As this field only very marginally relies on autonomous certification capacities (the College of Europe in Bruges, the European University Institute in Florence), it is highly dependent on the various national law-teaching systems for the recruitment of its ‘members’, which are known to be organized around the principles and values of the *national* legal fields (B. de Witte 1989). In the absence of a truly European training system, the only *common* breeding ground of European lawyers remains the United States. Through the very diversified set of programs offered to foreign lawyers (JD, LL.M., PhD, visiting fellow), American law schools stand out as the major, if not the only, academic institutions capable of delivering an internationally valuable legal capital (Y. Dezalay 2007 ; C. Silver 2006). The heteronomy of this ELF is not only remarkable as far as initial legal socialization is concerned. Its dependence on *national* logics can only

33 For example, ‘competition law’, which emerged at the crossroads of ordoliberalism and the theories of private law, could be studied from this perspective (C. Joerges 2006).

34 See the data base of lawyers pleading before the ECJ that Christèle Marchand (post-doc, CURAPP) and Antoine Vauchez are setting up (Marchand, Vauchez, 2007) and the research conducted by Yves Dezalay and Mikael Madsen on law firms dealing with competition law in Brussels.

35 However, this consecration did not put an end to the various ‘conflicts of the faculties’ about whether constitutional law, civil law or Community law should be the cornerstone of the law organizing and structuring all the others (C. Joerges 1995).

be easily ascertained for careers themselves. Access to positions such as director or deputy-director at 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 concerns in each of the member State (S. Kenney 1998). While in France, a previous working experience in the EU institutions is an asset (but certainly not a condition) to be appointed to the Court, there has been no exception since the early 1980s to the unwritten rule that court appointees are alternatively chosen from the Conseil d'État and the judiciary (A. Boigeol 1998).

Consequently, the European legal field is made up of agents whose characteristics, socialization and logics of action are often structured *outside* this field.³⁶ This is very much the case when it comes to the modalities by which actors become authoritative in the European legal field. Put differently, the modes of capitalization inherent to this space are defined by resources that are less related to a long and ancient investment in Euro-law than to a set of previously acquired attributes.³⁷ This doesn't mean that the value of a lasting experience in European law (as an academic, legal adviser, lawyer, etc.) has not increased over time. The very process of specialization of European legal practice has indeed raised the entrance fee that newcomers have to pay in order to be recognized as legitimate practitioners of that area of specialisation. Yet, access to the central positions of the ELF remain heavily dependant on resources and assets whose value is defined outside this field. The diplomatic influence of the home country, the burden of the mother tongue, the prestige of the attended university, the reputation of the institution one belongs to 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 French national diplomacy, which allowed them to obtain key positions in the emergent Europe of law (advocate-general at the ECJ, director at the legal services of the institutions, etc.). 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 reaches way beyond national borders.

B. The European Legal Field as the Crossroads of European Elites

One might ask the question whether these characteristics of a 'weak [heteronomous] field' in fact represents a transitory stage (a prehistory) of a long convergence process towards the ideal-type of a [highly autonomous and segmented] national judicial field, as a teleological reading of European integration as a 'super-state' *in nuce* would suggest? My response is, not necessarily. As we have suggested above, the rise of specialized patterns of European legal practice did not substantially affect the heteronomy of the European legal field. Consequently autonomisation does not appear as a satisfactory notion to account for its dynamics. Put differently, the 'weakness' of this field is not necessarily a sign of imperfection or incompleteness, but could be regarded as the hallmark of its relatively *stable* relationship with the European field of power at the crossroads of national, transnational and international spaces, on the one hand, and at the crossroads of political, bureaucratic, academic, economic and jurisdictional spaces, on the other³⁸. This is where the study of law is most promising for a political sociology of the government of the European Union. It requires a particular methodology – for instance prosopography – which suits particularly to this approach³⁹. Tracing the careers of particular individuals, their personal and professional trajectories, giving an account of their

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

37 This 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.

38 This notion of Europe as a 'crossroad' has been developed by Dezalay and Madsen (Y. Dezalay, M. Madsen 2006).

39 On such a research strategy, see specifications in M. Madsen, 2005.

social networks is an essential tool in trying to assess this cross-boundary position of the ELF. Personal and professional moves 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 (P. Bourdieu 1996). Because they shed a light on social ties and inter-locking networks, they reveal what sort of relationship exists between the various poles, roles and institutions of that particular field, well beyond the classic dichotomies (private vs. public, legal practice vs. academia, national vs. EU level vs. international, etc.) that officially organize the European polity. Because they enable to identify common patterns of primary and secondary socialization (particularly familial and professional mobility, multi-linguistic skills, training, etc.), career paths and *cursus honorum* within the ELF, but also arenas of sociability and of interconnection (professional associations, pan-European movements, cause-driven coalitions, etc.), one can show a European polity made up by the interplay between law and politics in a much more complex way than that presented in either the inter-governmentalist or neo-functionalist approaches.

1. Multi-level circulation

Far from being a sign of an exclusively European vocation, the access to EC positions often remains a detour for national carriers.⁴⁰ Most of all, engaging in a European legal career requires the upholding of various networks that link an individual to his/her home country (participation in conferences, professional associations, and ministerial commissions, etc.); not only in order to ‘prepare’ his/her possible return, but also because it is at the *national* level that a lawyer partly gains his/her legitimacy in the European debates (from his/her status as a representative of a national legal tradition), as well as the necessary resources to obtain key-positions at the European level. This system of multiple affiliations is not limited to the national and European arenas. It extends to transnational, European and international positions which stand out as spaces where an experience in the EC is considered as an asset and vice-versa.⁴¹ Positions such as trial lawyer, international judge (at the European Court of Human Rights, international criminal courts, WTO, etc.), arbitrator, or high-ranking civil servant in an international organization or an expert in think tanks or NGOs are frequently-used *points de passage*. This is where Michel Gaudet’s trajectory is particularly interesting. Upon leaving the Commission’s legal service he so much influenced, the former member of the Conseil d’État did not return to his ‘alma mater’. After heading for a number of years an insurance company, he engaged in 1977 a sort of ‘second life’ in private international arbitration becoming the president of the International Chamber of Commerce, succeeding Jean Rey, himself a former member of the EC (he was president of the European Commission between 1967 and 1970). He only left office in 1988 at the age of 73. This might be an extreme case, but it is also a very instructive one: the personal and professional trajectories of the individuals who hold key positions in the ELF might actually shed light on a social configuration that is much larger than the European Union. At this initial stage of research, it is possible to formulate the provisional hypothesis that the trajectories of Euro-lawyers display a ELF which, far from being held together ‘by itself’, 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.

40 Of course the value of a 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 (M. Mangenot 2006).

41 For example, the progressive convergence of the two European courts (the ECJ and the European Court of Human Rights) over the construction of a ‘Europe of Human Rights’ is a multiplier for the circulation of European lawyers: 23,5% of the ‘decision makers’ (judges, advocate generals, clerks) presently working at the ECJ previously worked for the Council of Europe (L. Scheeck 2006).

2. Inter-professional mobility

One might add to this multi-layered game the intense circulation of European lawyers in-between the various academic, bureaucratic, political and jurisdictional poles of the EU. 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 (M. Osiel 1990 ; Y. Dezalay 2007), the circulation from one European legal role to another (lawyer, judge, professor, expert, business lawyer, consultant, etc.) forms a classic pattern 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%) (H. Schepel, R. Wesserling 1996). This lack of differentiation of traditionally compartmentalised spaces is all the more striking by the fact that during this period, only 8 of the 32 most prolific writers on European law had never worked directly for a European institution. Such data shows how frequently actors of the ELF switch and cumulate roles and how well its different poles are interconnected. But it also exemplifies how porous the institutional boundaries and dividing lines that organize the so-called European public space (national level/European level, public sector/private sector, Commission/Parliament/Council, etc.) are for lawyers. As exceptional as it might seem, the career of Claus-Dieter Ehlermann – successively a member and the Director General of the Commission’s legal service, a law professor at the European University Institute and at the Collège de Bruges, and an associate at the law firm *Wilmer, Cutler & Pickering* – nevertheless shows, in its most accomplished form, the various bridges and *passages* that relate otherwise conflicting institutions. Such an inquiry in the trajectories of Euro-lawyers will probably get to the core of the issue when it reaches out to the *référéndaires’* group – the more than six hundred law clerks that are or have been working in the cabinets of the judges of the four European Courts (ECJ, TFI, CST, European Court of Human Rights). Often thrown into these four landmarks of the ELF through *national* connections with one of the courts’ judges, they form an essential breeding ground for the various legal venues of the European polity. Provisional research shows that they sell this prestigious experience in various ways: to the national and EU high civil service, to universities, to law firms specialising in European law or to consultants’ companies in Brussels.

I have illustrated this mobility pattern for the first generation of EC lawyers (1950-1970). This research has contradicted the retrospective view of the ‘founding fathers’ as a homogeneous group of cosmopolitan scholars naturally and exclusively attached to the transnational cause of a European rule of law. Far from sticking to the defence of one sort of interest such as that of the European institutions, or that of their own government diplomacy, they would frequently move to the representation of other causes representing in the European polity national interests as *jurisconsultes*, the Commission’s interests as legal consultants, and then again legal science as academics, as well as companies and interest groups as trial lawyers, and sometimes even the judiciary as judges at the ECJ. By successively or even concomitantly assuming all possible legal roles in Europe, they represent a large diversity of causes and groups, consecutively pleading ‘for’ and ‘against’ each one of the administrative, economic, ‘civil society’, and political 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, etc. which structures many careers of EU lawyers would seem more incongruous, even inconceivable for other European actors, especially for diplomats and high civil servants⁴². But for lawyers, I argue, it is some sort of a *point d’honneur*. Their professional equipment is particularly suited for engaging in such a circulation in-between sector-specific and national-specific forums. Their ordinary practice and know-how precisely requires that they are able – in each case – to divide the facts from the law, the social or political issues at stake from the legal ones, the legal person (*personne morale*) from the real person (*personne physique*), etc. It is one of the main features of concepts like ‘legal representation’, ‘mandate’, ‘trustee’, ‘procurator’, ‘proxy’ or

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

‘delegation’ jurists have codified over the centuries to enable them to be at one and the same time engaged in the defence of their clients’ interests and to keep the distance (neutrality, independence, etc.) to them ‘in the name of law’. This complex game of adherence and distance, representation and independence, militancy and aloofness from the various interests and causes they are asked to defend is essential to understand how they can actually at the same time intervene *in* and circulate *in-between* the various social interests that are intertwined in the European construction. This legal equipment and savoir-faire, particularly suited to the particularly fuzzy and blurred structure of European polity, is all the stronger that it can back itself to the ideal of the rule of law they have the mission to guarantee. Far from endangering their credibility, this stepping across these many dividing lines that shape European polity is actually considered as an essential part of the lawyers’ professional excellence (A. Vauchez 2007a)⁴³.

3. Embedded law

These hypotheses for an analysis of the position of law at the crossroads of Europe might actually shed a new light on the relationship between European lawyers and other European elites, between legal spaces and EU government. In a European polity deprived of a State that would organize in a stable and perennial way the relationship and the mediation between social interests, it is our hypothesis that lawyers tend to occupy a ‘structural hole’ (R. Burt 1992) bridging and mediating otherwise conflicting interests and institutions. This presence – even omnipresence as we have tried to show – of legal professionals in the various groups that are building and re-building the ‘Common Market’, the ‘common policies’ or the European ‘civil society’, etc. puts legal arenas in a privileged and sometimes monopolistic position when it comes to putting in connection the various interests and groups that interact in the European polity. Three research paths could be drawn from this point:

i) Following various insights of networks’ and social capital theories, it is quite safe to assume that this position is particularly critical when it comes to accumulating very diverse social resources. Law’s centrality probably lies in this capacity of legal arenas to attract very diverse segments of the various European elites. Lawyers’ sociability in the various jurisdictional arenas (at the ECJ), academic forums (at conferences, especially at the EUI in Florence) or at inter-professional gatherings (at the conventions of the *Association of European Lawyers* and FIDE, at 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, etc. 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 and debate. This fact is essential to account for law’s centrality and, relatedly, to understand the multiple positioning of European lawyers and their mobility between institutions and groups. Consequently, one might wonder if and to what extent European legal professionals have taken on the role of ‘crossroad professionals’ they used to play in the national settings before the emergence of Welfare States (R. Darendorf 1964 ; C. Charles 1989 ; Y. Dezalay 2007), providing its members with a wide range of careers and possibilities of redeployment in economic, political, administrative or academic affairs.

ii) In turn, this fact that the ELF does not stand on its own but is deeply embedded and entangled in EU polity *latu sensu* is critical for examining its contribution to the building of a ‘common sense’ on Europe and its government, its problems, its future reforms, its key institutions, its knowledge and its know-how. In this perspective, legal arenas can be seen as an essential forum where a coherent system of beliefs is forged which is all the more prominent as it is defended and propagated in all its sectors and institutions of the EU. Consequently, inter-professional mobilizations of ‘European jurists’ are of interest not only because of their contribution to the unification of the various legal professionals and the various segments of EU sub-fields around a common understanding of their role and function in

43 On this model of professional excellence of international lawyers, see G. Sacriste, A. Vauchez, 2005.

the EU (defending rights, promoting a rule of law, building of European civil society, etc.), but also because the consensus that are built there are in turn very influential in defining what Europe is and ought to be. From cause-driven groups such as the anti-corruption mobilizations led by the Agon (Associations of lawyers for the protection of the financial interests of the European communities) or the Arpe (Association de recherches pénales européennes) to the more general gatherings of the old Fédération internationale pour le droit européen (created in 1952) or the more recent European Jurists' Forum, the large array of legal mobilizations offer a entry into such a inquiry.

iii) These processes however require that law, lawyers and legal arenas have appeared and have somehow been acknowledged by all European actors as independent and neutral. In other words, law's authority at the core of EU polity depends of the capacity of EU lawyers of all sorts (legal scholars, judges, clerks, officials of the Commission, private practitioners, etc.) to collectively maintain the symbolic power of Law as an objective resource exterior to the conjunctures and the social contexts it is intervening in. The challenge is of particular importance in the current context in which (i) 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 (G. Majone 2006); (ii) 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, etc.). It is well known that over the past 15 years, ECJ's critics have widened far beyond the restricted circles of euro-skeptics. Member-states (see particularly their reaction after the September 2005 decision, *Commission des Communautés européennes / Conseil de l'Union européenne*) have become more and more sceptic about Euro-law self-proclaimed disinterestedness. And it comes as no surprise that the recent politicization of EU debates is now touching the European Court of justice 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, etc.). And these criticisms even come now from within as shown in the controversy raised by CFI judge Hubert Legal's statement on « *les collaborateurs des juges, appelés référendaires, [qui] croyaient de leur devoir d'agir vis-à-vis de leur juge, parfois handicapé par une maîtrise limitée de la langue du délibéré, en ayatollahs de la libre entreprise* » and his subsequent removal from the Microsoft case... Therefore, one of the major puzzles is how this political model of judicial integration we have identified can actually secure its legitimacy in a context in which the 'permissive consensus' that has governed EU development since the 1950s now seems increasingly fragile.

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