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Euro-Lawyers and the Making of a Transnational Polity

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Brokering Europe

Since the 1960s onwards, the nature and the future of the European Union have been defined in legal terms. Yet, we are still in need of an explanation as to how this entanglement between law and EU polity-building emerged and how it was maintained over time. While most of the literature offers a disembodied account of European legal integration, *Brokering Europe* reveals the multifaceted roles Euro-lawyers have played in EU polity, notably beyond the litigation arena. In particular, the book points at select transnational groups of multipositioned entrepreneurs that have elevated the role of law in all sorts of EU venues. In doing so, it draws from a new set of intellectual resources (field theory) and empirical strategies only very recently mobilized for the study of the EU. Grounded on an extensive historical investigation, *Brokering Europe* provides a revised narrative of the 'constitutionalization of Europe'.

Antoine Vauchez is a research professor at the Centre européen de sociologie et de science politique, Université Paris 1-Sorbonne / CNRS.

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This series aims to produce original works which contain a critical analysis of the state of the law in particular areas of European law and set out different perspectives and suggestions for its future development. It also aims to encourage a range of work on law, legal institutions and legal phenomena in Europe, including 'law in context' approaches. The titles in the series will be of interest to academics; policy-makers; policy formers who are interested in European legal, commercial and political affairs; practising lawyers, including the judiciary; and advanced law students and researchers.

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Series Editors' preface

In this groundbreaking addition to the series *Studies in European Law and Policy*, Antoine Vauchez invites the reader to rethink the interconnection of law and the polity of Europe. How exactly, he asks, did Europe come to be defined in legal terms?

Vauchez argues that the shift away from a set of treaties which simply provided technocrats and politicians with the technical expertise in comparative law needed to bring about an alignment of economic interests through common economic laws towards a set of arrangements comprising various sources of law (treaties, legislation, case law, etc.) which can be seen as an overarching constitutional settlement requiring the crucial agency of humans: Euro-lawyers. But this is not a book as such about those personalities and personages, better or worse known, but rather about the power of law itself which displays a brokering capacity helping to hold together Europe's rather disorganized and disjointed polity.

Thus, in contradistinction to political science narratives which have identified various (essentially) external factors, which contribute to law's power, Vauchez's is an internal analysis, underpinned by legal and social theory. Empirically, this is fleshed out by a uniquely wide-ranging set of sources about law, legal activities and lawyers, including biographical details, archival information from the European institutions and legal scholarly outputs. This, therefore, is a theoretically informed book, but not a book about theory. We commend it warmly as an important edition to our series.

Jo Shaw
Laurence Gormley

Acknowledgements

Before turning into its present form, this book has had many lives that span over almost a decade. Its origins can be traced back to many heated discussions over Europe's polity and transnational fields within a small group of friends (Antonin Cohen, Mikael Madsen, Guillaume Sacriste) and, later, within a more formal research network named Polilexes ('Politics of Legal Expertise in European Societies') and financed by the French *Agence nationale de la recherche*. Throughout its development, the critical input that I received from Yves Dezalay and his tireless passion for transnational research have been widely inspirational. All these exchanges grew into an individual project parallel to the collective and collaborative one, on which I started working during my stay at the European University Institute in Florence as a Marie Curie fellow. There, I greatly benefited from the critical mass of EU scholarship and the interdisciplinary atmosphere that is so particular to that place. Many discussions and debates with wonderful scholars such as Bruno de Witte, Yves Mény, Christian Joerges, Karen Alter, Kiran Patel and Heike Schweitzer have helped me a lot. Eventually, the project was turned into an *Habilitation à diriger des recherches* that I presented at the Université Paris 1-Sorbonne in March 2010, with the support of Bastien François. Along the way, some early parts of this overall research were published in a variety of disciplinary fields including law (the *European Law Journal* and *Law and Social Inquiry*), sociology (the *American Journal of Sociology* and *International Political Sociology*) and political science (*European Political Science Research*, *Revue française de science politique*, etc.), and I am therefore indebted to my co-authors and co-editors (Bruno de Witte, Antonin Cohen, Didier Georgakakis, Mikael Madsen, Stephanie Mudge and Cécile Robert) as much as to various referees for pushing me forward. I turned most of the *Habilitation* into a book entitled *L'Union par le droit. L'invention*

d'un programme institutionnel pour l'Europe published in 2013 in a series co-directed by Patrick Le Gales at the Presses de Sciences Po. As the present book was progressively taking shape, I had countless opportunities to present sections of the manuscript in many venues. In particular, I benefited from early book talks at Sciences Po-Lille, Lyon, Strasbourg and Paris, the American Bar Foundation in Chicago, the London School of Economics, Siena University, the Central European University, and Berlin's *Wissenschaft Zentrum*. It was, however, during the academic year 2013–14 that I completed the English-language version of this manuscript (Meg Morley was the main translator of the text, and I wish to thank her here), as I benefited from invitations from Columbia University Law School (as an Alliance visiting professor during the Fall semester) and from New York University Law School (as a Senior Emile Noël fellow during the spring semester). That year spent in New York proved instrumental to my completing this project, and again I benefited immensely from feedback after talks given at New York University, Columbia, Cornell, Princeton and the American University in Washington, and discussions with scholars and experts of the EU such as Grainne de Búrca, Daniel Kelemen and Peter Lindseth. Of course, all these years spent in the academic trenches have a special *fil rouge*, Stéphanie Hennette-Vauchez, with whom I have loved to share this intellectual and personal journey.

Contents

Introduction

By any standards, Europe is a lawyers' paradise.[1] Many figures illustrate the extent to which 'Europe' is juridified and could well be called upon here: the number of pages of European regulation in any given field, the percentage of national legislation originating in EU norms, the ever-increasing caseload of the European Court of Justice (ECJ, or 'the Court'), etc. Figures, however, fail to grasp the very deep entanglement between Europe and the law that has kept the European integration process rolling over time. In a political context in which the pan-European horizon is fading away, it seems that 'Europe is nowhere so real as in the field of law', to quote a recent 'wise men' report on the reform of the French Constitution.[2] Strikingly, while political scientists, historians and even economists in the field of European studies are still having a hard time agreeing on the 'nature of the beast', EU law appears to be this very unique type of knowledge capable of providing some forms of certainty when it comes to making sense of what the European Union is about and how it ought to function. In fact, 'the law' is so instrumental to Europe's very existence and identity that it has become almost 'natural' to continuously draw on a whole set of legal concepts, categories and theories when thinking about Europe's nature and future. Elevated to the rank of

[1] While the book puts a lot of emphasis on the *political* significance of the symbolic unification of European constructions into one consistent and historically constant reality named 'Europe', I use – for the sake of simplicity in writing – the terms 'Europe', 'European Union' and 'European Communities' (and, similarly, the terms 'European law', 'EC law' and 'EU law') as synonymous. Similarly, while I study the transformation of the founding Treaties into a *de facto* Constitution of Europe, I still follow the commonly shared convention of EU official documents that use capital letters in order to distinguish the founding European Treaties from ordinary international agreements.

[2] Comité de réflexion sur le préambule de la Constitution – 'Comité Veil', *Rapport au président de la République*, Paris, La documentation française, 2008, p. 47.

founding rock, or even to that of the *raison d'être* of the Union (a 'Union of law'), the law seems so well acclimated in Europe's polity that it has become difficult to see its pervasive presence as anything other than a self-evident fact.

The truth of the matter is that, over the years, EU law, and its underlying constitutional paradigm, has affirmed a strong hold on Europe's political imagination. Strikingly, despite the fact that all constitutional treaties (from the 1954 *Communauté politique européenne* to the 2005 constitutional treaty and the 1984 Spinelli treaty) have failed to be approved in national political fields, Europe still seems to be thinking of itself in constitutional terms. Need it be recalled here that the many reformist ambitions that aimed to address Europe's 'deficits' (lack of: democracy, common values, budgetary and economic coordination, etc.) have developed into a corresponding number of *constitutional* projects, from the Constitutional Treaty to the Charter of Fundamental Rights or the more recent budgetary 'golden rule' of the 2012 Fiscal Compact? How can one then account for this structural preference for law and the related resilience of a constitutional paradigm that seems to maintain itself throughout all the Union's re-foundings and reorientations ever since the 1960s?

For a long time, this symbiotic relationship between Europe and the law did not receive much attention. While lawyers would simply state that the European Union *is* a 'Union of law' (and that the European Treaties *are* a 'constitutional charter', or that the ECJ and the European Commission *are* the institutions that embody the EU's general interest, etc.), historians considered this constitutional path undertaken by Europe as essentially unproblematic and uneventful[3] (after all, no State- or quasi-State-building could be conceived of without the support of legal technologies). Yet, the presence of law's names and symbols (a '*de facto* Constitution', 'a court', 'judges', legal scholars, etc.) at the European level conveys a false sense of resemblance to national polities.[4] In fact, this apparent permanence of law from national to European settings clouds our perception of the *specific*

[3] But for more recent developments of EU historiography on transnational networks, cf. Wolfram Kaiser, Brigitte Leucht and Morten Rasmussen (eds.), *The History of the European Union: Origins of a Trans- and Supranational Polity 1950–72*, London, Routledge, 2008; and on the history of European law, see also the special issue edited by historians Bill Davies and Morten Rasmussen, 'Towards a New History of European Law', in *Journal of Contemporary European History*, 21(3), 2012.

[4] See Pierre Bourdieu, *On the State: Lectures at the Collège de France*, London, Polity, 2014.

political and social arrangement that is 'Europe' where the law has come to play a highly singular function.

Certainly, over the past two decades, a rich strain of interdisciplinary literature, initially inspired by American legal scholars and political scientists, has contributed to dispel the not very discreet charm of this 'Law State'[5] and has provided an overarching paradigm for the wide-ranging legalization of the terms and scope of the European project.[6] This stream of research has pointed in particular at the formation in the mid-1960s of a constitutional doctrine at the ECJ which, by a series of forceful jurisprudential blows, has constructed the conceptual and procedural frameworks of a genuine legal federalism. In turn, then, the ECJ's case law opened up institutional opportunities for multinational enterprises, transnational interest groups and EC institutions to circumvent and undermine national forms of regulation. The progressive, if somewhat chaotic, movement through which national courts eventually rallied the broad principles established by the ECJ consolidated the movement[7] – and this judicial consolidation itself generated new opportunities for the Court to further broaden the scope of its case law to new domains such as anti-discrimination, the environment, fundamental rights, etc. These further moves triggered an implacable iterative mechanism associating interest groups, multinational enterprises, EU institutions, States and the ECJ in a virtuous (or vicious) circle of judicialization with no single author or source, but to which each entity contributed in its own way. Or so have the neo-functionalist account of integration and its later neo-institutionalist variant[8] claimed, thus

[5] Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in Europe*, Cambridge, MA, Harvard University Press, 2011.

[6] The bibliography is immense, but seminal papers or books certainly include: Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', *International Organization*, 47(1), 1993, pp. 177–209; Joseph Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors', *Comparative Political Studies*, 26(4), 1994, pp. 510–34; Alec Stone, *The Judicial Construction of Europe*, Oxford, Oxford University Press, 2004; Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford, Oxford University Press, 2001; Rachel Cichowski, *The European Court and Civil Society*, Cambridge, Cambridge University Press, 2007; for an overview, see Alec Stone, 'The European Court of Justice and the Judicialization of EU Governance', *Living Reviews and European Governance*, http://europeangovernance.livingreviews.org/Articles/lreg-2010-2 (accessed 15 May 2013).

[7] Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford, Oxford University Press, 2001.

[8] Neil Fligstein and Alec Stone, 'Constructing Polities and Markets: An Institutionalist Account of European Integration', *American Journal of Sociology*, 107(5), 2002, pp. 1206–43.

shedding much-needed light on the specific contribution of law to the European integration project and process.

Yet, in its very attempt to break with a legal-centric reading of legal integration by bringing *external* factors back into explanations and theories of its sweeping dynamics, this scholarship has, I argue, missed an important point: in the European Union, even more than anywhere else, there is no possible distinction between the 'law' and the 'society'. There are no areas of Europe's politics, economics, bureaucracy or civil society that have not been produced or co-produced to some extent by lawyers, whatever their guises may be. Legal Europe is *co-extensive* with Europe itself, and it is hardly possible to think about the Union and its 'system', its institutions and their 'logic', its markets and their 'functioning', its civil society and its 'causes', without delving into the impressive corpus of *ad hoc* legal theories and methodologies of Europe.[9] Consequently, the very categories that are considered as *explanatory* factors for the legalization of Europe (institutions' 'rationales', professional groups' 'interests', sector-specific 'frontiers' between the 'national' and the 'European', or between the 'legal' and the 'political', etc.) have actually been produced *alongside* the history that this literature is trying to account for. At the time of the ECJ's first landmark cases (1963–4), Europe's law had no inherent logic of its own, the ECJ itself was hardly perceived as a 'court' worth its name, companies and interest groups had no view of 'Europe' as making up one open land of opportunities, and there was certainly no institutional terrain 'out there' that would have been mechanically derived from the mere signing of the Rome Treaties, or even from a sudden judicial *coup* coming from the judges in Luxembourg.

The fact of the matter is that we are still in need of an explanation as to how the law and the polity of Europe have been interconnected, and how they have been shaping and informing one another. We actually know very little about the manner in which 'Europe' has initially come to be defined in *legal* terms (a *de facto* 'Constitution', an *acquis*, a supranational court, etc.) rather than economic or political ones, and how this particular path was actually chosen (and consolidated) for *the institution of Europe*. As is well known and often recalled, the European Communities had a primarily *economic* (if not merely commercial) scope that did not call for any sort of overarching mission for the law. There were good reasons for

[9] On this, see Antoine Vauchez, 'The Force of a Weak Field: Law and Lawyers in the Government of the European Union (for a Renewed Research Agenda)', *International Political Sociology* 2(2), 2008, pp. 128–44; and Julie Bailleux, *Penser l'Europe par le droit. L'invention du droit communautaire en France*, Paris, Dalloz, 2014.