



European  
University  
Institute

Robert Schuman Centre for Advanced Studies

# **EUI Working Papers**

RSCAS 2008/35

**Scarlet Robes, Dark Suits:  
The Social Recruitment of the European  
Court of Justice**

**Antonin Cohen**

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE  
ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES

*Scarlet Robes, Dark Suits:  
The Social Recruitment of the European Court of Justice*

ANTONIN COHEN

This text may be downloaded only for personal research purposes. Additional reproduction for other purposes, whether in hard copies or electronically, requires the consent of the author(s), editor(s).  
Requests should be addressed directly to the author(s).

If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper, or other series, the year and the publisher.

The author(s)/editor(s) should inform the Robert Schuman Centre for Advanced Studies at the EUI if the paper will be published elsewhere and also take responsibility for any consequential obligation(s).

ISSN 1028-3625

© 2008 Antonin Cohen

Printed in Italy in December 2008  
European University Institute  
Badia Fiesolana  
I – 50014 San Domenico di Fiesole (FI)  
Italy  
[www.eui.eu/RSCAS/Publications/](http://www.eui.eu/RSCAS/Publications/)  
<http://cadmus.eui.eu>

## **Robert Schuman Centre for Advanced Studies**

The Robert Schuman Centre for Advanced Studies (RSCAS), directed by Stefano Bartolini since September 2006, is home to a large post-doctoral programme. Created in 1992, it aims to develop inter-disciplinary and comparative research and to promote work on the major issues facing the process of integration and European society.

The Centre hosts major research programmes and projects, and a range of working groups and ad hoc initiatives. The research agenda is organised around a set of core themes and is continuously evolving, reflecting the changing agenda of European integration and the expanding membership of the European Union.

Details of this and the other research of the Centre can be found on:

<http://www.eui.eu/RSCAS/Research/>

Research publications take the form of Working Papers, Policy Papers, Distinguished Lectures and books. Most of these are also available on the RSCAS website:

<http://www.eui.eu/RSCAS/Publications/>

The EUI and the RSCAS are not responsible for the opinion expressed by the author(s).



## **Abstract**

This paper analyzes the social recruitment of the European Court of Justice from the early 1950s to the late 1990s with special focus on the early days of the Court (1950s-1960s). Early European integration can be described as a series of struggles between opposing types and segments of national elites (political, bureaucratic, juridical, economic, intellectual), competing to define an institutional framework for this yet loosely institutionalized transnational space, and seeking to reproduce, through these institutions, their national power, positions and capital at the international level. As part of this process of institutionalization and differentiation of the European field of power, the European Court of Justice itself was (and still is) relatively heterogeneous. Composed of former parliamentarians, trade-unionists, economic or judiciary civil servants, academics *and* (but not solely) supreme courts' judges, the "court" of "justice" perfectly reproduced these tensions between opposing types of capitals and legitimacies. As Norbert Elias once put it, "an initial antagonism and struggle for position between rival groups, may be found in the early history not only of professions, but of almost every institution". I argue that these structural tensions not only strongly determined the internal logics of the institution, but also its legal output: the jurisprudence.

## **Keywords**

European Court of Justice, Social Recruitment, Constitutionalization, Legal professions



*“Cette robe, que je suis fier d’avoir portée, est la preuve que l’Europe existe.”*  
Jacques Rueff, 1964

## **Introduction\***

European integration is an acid test for the sociology of law, as well as the sociology of fields.<sup>1</sup> The institutionalization of transnational courts, the formulation of innovative corpuses of case law, the formation of new bodies of specialized professionals, the creation of distinct university courses; in short, the social construction of a system of both practical and symbolic objective relations between legal institutions and agents on the scale of several nations, which one might theorize as the emergence of a field, are all research questions still largely open for investigation. To refer to the genesis of European law as the formation and formalization of a set of specifically legal social relations in a broader process of structuration of a transnational field of power amounts to addressing once again “the question of the historical conditions that must be fulfilled in order for an autonomous social sphere to emerge, as a result of the struggles in the field of power, capable of producing and reproducing, through the logic of its specific functioning, a legal corpus relatively independent from external constraints” (Bourdieu 1986: 3; 1992).<sup>2</sup>

The sociological issue at stake in the making of a transnational European order, where law appears both dominant and relatively “naked” – unable to present themselves as “the necessary outcome of a regulated interpretation of unanimously recognized texts” (Bourdieu 1986: 4), the landmark decisions of the European Court of Justice (ECJ) have quite often been denounced (or praised) as mere political *coups de force*<sup>3</sup> – lies in the social conditions of possibility of the law itself, its “force,” that is, the force that specific social groups authorized to speak in its name succeed in conferring upon law. If the social authority of law does not lie primarily in the law itself but in the multiple investments in law from legal and non-legal social actors and sectors (Kantorowicz 1961; Weber 1978; Bourdieu 1986), this might be particularly true in the case of transnational social spaces (Dezalay & Garth 1996; 2002a; 2002b; Madsen 2005; Madsen & Vauchez 2004; Sacriste & Vauchez 2004; 2007; Vauchez 2007a; 2007b; 2008) where law seems deprived of the kind of authority it was conferred in national spaces, over the centuries, by the *State*, by virtue of its monopoly to enforce law.

## **Genesis and Structure of the European Legal Field: A Research Agenda**

Most of this process has already been researched and well documented in what is generally described as the “constitutionalization” of European political, legal, and economic order (Stone 2004; Weiler 1999; Maduro 1998).<sup>4</sup> Turning their backs on the heroic vision of a small elite of judges remodelling on its own the national legal orders through supranational jurisprudence (Mancini 2000; Pescatore 1992; Lecourt 1976), many scholars insisted – in what became a battleground between intergovernmentalism and neo-functionalism (Mattli & Slaughter 1998) – on the multiple and decisive contributions of ECJ’s “interlocutors” to the enforcement of European law (Mattli & Slaughter 1998;

---

\* This paper was originally presented at the Conference “The European Legal Field-Le champ juridique européen” organized by Bruno de Witte and Antoine Vauchez with the Robert Schuman Centre and the Academy of European Law (European University Institute, 25-26 September 2008).

1 This article draws from the collective research programme on the European legal field undertaken in the framework of POLILEXES (Politics of International Legal Expertise in European Societies). I am especially indebted to Mikael Rask Madsen, Guillaume Sacriste and Antoine Vauchez for our many conversations and collaborations.

2 Translation of quotes from French books, articles, and documents cited in the text and notes are my own. They might eventually differ from existing English translations.

3 “Juridical *Coups d’Etat*,” as Alec Stone Sweet recently coined the founding decisions of the ECJ (Stone Sweet, 2007b). See also: Rasmussen 1986.

4 See Stone Sweet (2007a) for a definition of the constitutionalization process (“the mutation of the EC from an international regime to a quasi-federal polity”).



Weiler 1994; 1993; Burley & Mattli 1993). These included national courts (Alter 2001; Golub 1996; Weiler 1994), private corporations (Rawlings 1993), and individual citizens (Harding 1992), enjoying variously silent political assent, misperception, or dissent from European nation States (Alter 1998; 1996; Garrett 1995; Mattli & Slaughter 1995), or acting, on the contrary, in clear political collusion with and gaining support from the European Commission (Alter & Meunier 1994). All contributed to the process by acting in their best interest (Burley & Mattli 1993); all were quietly driven by the logic of market forces (Stone & Brunell 1998; Stone & Caporaso 1998), in the more general context of an absent-minded awareness or support from ordinary citizens (Gibson & Caldeira 1998; 1995).<sup>5</sup>

Yet, of the various social groups that Eric Stein once identified as major players in the “making of a transnational constitution” (Stein 1981) – judges and advocate generals of the ECJ, members of the legal services of the European Commission and Council of Ministers, legal consultants of the national ministries, legal scholars and law professors, to which one should add the “middlemen” of European integration (Scheingold 1971: 36), i.e., private practice lawyers and attorneys – most remain to be studied as social groups. Among them, some did both influence and benefit from the constitutionalization process. But, albeit the need for research has been constantly underlined (Shapiro & Stone 1994; Weiler 1993), very few studies have actually focused on their particular role and social characteristics (noteworthy exceptions are: Kenney 2000; 1999; Schepel & Wesseling 1997; Condorelli Braun 1972). Paradoxically – given that the ECJ is deemed to be at the centre of this process (Burley & Mattli 1993), and that the nomination of supranational judges by national governments seems a key issue in the intergovernmental/neo-functional controversy (Weiler 1994) – the potential impact on ECJ’s jurisprudence of a long-term transformation in the social recruitment of its members has been completely overlooked.

Besides, European Community (EC) law only forms part of a broader set of rules also including Human Rights (HR) law, and the constitutionalization process is itself embedded in more complex processes of emergence of a European legal field. In other words, the emergence of European law can neither be summarized as the result of the sole dynamics of one of the multiple arenas where a European rule of law arose, nor reduced to its judicial (mainly jurisprudential) narrative (Cohen & Vauchez 2007a). On the contrary, the formation of a European legal field is to be understood both through the internal dynamics of, and external relations between the multiple organizations and institutions that resulted from European integration, among which the European Community *and* the Council of Europe (Cohen & Madsen 2007). As well, these specifically European organizations and institutions are themselves interlinked with the broader sets of transnational organizations and institutions that resulted from Global integration (Dezalay & Garth 2002b). The specifically European and the more general Global processes *simultaneously* redefined the force of law at the international level. In other words, the interactions between the ECJ and the European Court of Human Rights (ECHR) (Scheeck 2005) matters as much as the interplay between these and other international courts, including for instance the International Court of Justice (ICJ) and International Court of Arbitration (ICA). The emergence of a European legal field is a product of the complex interlocking of European/International networks of legal professionals orbiting these courts.

Moreover, the force of law at the European level is highly dependent on the parallel formation of a European field of power where law tends to be one of the dominant capitals, and lawyers keep on occupying central positions (Cohen, Dezalay & Marchetti 2007). Lawyers certainly played a crucial part within the various economic, bureaucratic, and political institutions that emerged with European integration, among others, the European Parliament (Marrel & Godmer 2008) and Commission (MacMullen 1997), the Brussels administration (de Lassale & Georgakakis 2007), and more recently the European Conventions (Cohen 2008; Madsen 2007). But they also played a pivotal role in importing and exporting legal expertise from one set of organizations or institutions to another – e.g., from the Council of Europe to the European Union, from the judicial to the political, and vice-versa.

---

5 See Dulong (2001) and Conant (2007) for good reviews of this literature followed by insightful research perspectives.

The social legitimacy of European law derives from the variety of role lawyers played in the interdependent although relatively autonomous social processes that made Europe, putting legal knowledge and know-how at the core of International/European relations as a critical resources in State contests and corporate battles, and producing the dominant representations and expertises in which most of today's European politics and economics are embedded: a market regulated by law, an integrated juridical space (Megie 2006), a European Civil Code (Schepel 2007), a European Charter of Fundamental Rights (Madsen 2007), a European Constitution (Cohen & Vauchez 2007b).

This paper will briefly summarize the broad social processes and political context in which the early institutionalization and decisions of the ECJ were embedded, and then go on analyzing the social and in particular professional profiles and trajectories of the members of the ECJ, mainly focusing on the early days of the Court.

### **A Divided European Unity: The Formation of the European Field of Power**

Early European integration can be described as a series of struggles between opposing types and segments of national elites (mainly political, bureaucratic, economic, but also military or intellectual), competing to define an institutional framework for this yet loosely institutionalized transnational space, and seeking to reproduce, through these institutions, their national power, positions, and capitals at the international level (Cohen 2006).

One of the main issues in these elite struggles was the fate of parliamentary sovereignty. While political elites were traditionally attached to parliamentary representation, most of their direct rivals were quite ready to get rid of party politics, at least at the supranational level. Some lasting cleavages therefore arose, that were not so much determined by national or ideological antagonisms (between the British and the Continentals or between the federalists and the functionalists), but rather by an underlying social conflict, broadly opposing professional politicians to the leaders of intellectual, economic, or trade-union elites. As it was originally planned and debated at The Hague Congress of 1948, for instance, the transnational assembly designed to embody European unity was to be composed of an equal proportion of elected representatives of national parliaments and of non-elected leaders of non-parliamentary elites. It is therefore not particularly surprising that the creation of the Consultative Assembly of the Council of Europe one year later, strictly composed of members of parliaments, came as a disappointment for many of these elites. In many ways, the Schuman Plan was a direct reaction to the institutionalization of the Consultative Assembly. The latter emerged as an initiative from a very specific bureaucratic segment of the French State elite and its main institution, the so-called High Authority, was to be composed of independent (i.e., non-elected) experts managing the central aspects of European coal and steel markets. The official declaration through which European countries were invited to join this new organization did not even mention any sort of parliamentary control over this institution, neither at the national nor at the supranational level. If political elites were nevertheless to succeed in imposing a parliamentary assembly as a democratic prerequisite for the creation of the Council of Europe and the ECSC, a small set of multi-positioned politico-legal entrepreneurs were also quite successful in imposing judicial bodies (i.e., the ECHR and the ECJ) as the cornerstones of these two dissimilar sets of institutions (Cohen & Madsen 2007). In these struggles, indeed, legal elites soon gained a competitive advantage over their rivals, inasmuch they could provide for a specific type of expertise in shaping these very diverse organizations and institutions, importing models from abroad, and in particular from the United States, but also exporting traditions from the national level.

These struggles finally (but not in their finality) resulted in a very complex structure of differentiated but intertwined international organizations in which central functions and forms of State power (defence, law, parliamentary representation, market regulation) were dislocated and reallocated to specific organizations (the Western European Union and the North Atlantic Treaty Organization, the Council of Europe, the ECSC and the European Economic Community (EEC)), or even to specific

institutions within these organizations (human rights law fell to the ECHR while competition law fell to the ECJ) – under the control of a separated though interlinked set of parliamentary institutions. This early path towards a divided European unity explains why, from 1948 to 1954, the European Constitution emerged as the only way to practically reconcile the competing and opposing plans for uniting Europe, and to reunify a European transnational space that was rapidly differentiating following the dynamics of this competition between elites. This time again, a transnational network of high-profile politico-legal entrepreneurs whose multiple positions in various informal circles and institutional venues put them in a strategic position to influence the political agenda, played a decisive part in promoting such a grandiose plan, for they quickly understood what was at stake here: the reproduction at the international level of the legal forms and norms that had made their specific capital at the national level.

A key turning point in these processes derives from the successive failures to unify this increasingly divided set of European organizations and institutions, and in particular from the unsuccessful attempt to integrate defence policy, human rights protection, market regulation and parliamentary control into a unique constitutional framework. The failure to impose a European Constitution in the early 1950s led to a shift of strategies, as well as to a practical transformation of the role of legal professionals collectively engaged in shaping this new transnational order. In a short period of time, legal investments in favour of a European Constitution were turned into a legal enterprise to constitutionalize the European treaties, and constitution-making activities, while originally deeply rooted in political mobilizations, subsequently took a more judicial path. In other words, constitutionalization came as a masterly and opportune substitute for a real constitution, and law as a convenient expedient for politics. The ECJ played a decisive part in this process. This rather select club of judges and advocate generals – whose own structure of capital, as we will see, perfectly reproduced the opposition of dominant capitals competing in the early European field of power – had to find their way through the contradictory but convergent (external) constraints of the nascent European legal field and (internal) logics of this newly created legal institution – the invention of a common and specifically European legal tradition from which the fundamental principles of a European jurisprudence could be extracted being a powerful way to legitimize their “revolutionary” stance in favour of constitutionalism without a constitution (Cohen 2007a).

### **From Constitution-Making to Constitutionalization: Changing of the Guards**

One of the collateral effects of the constitutional defeat of the early 1950s was to transfer many of the architectural problems, left unsolved, from a political arena to a legal one. While inter-institutional relations between the Council of Europe and the European Community always remained an issue, and in particular the relations between the ECJ and the ECHR, these legal institutions themselves became a site of definition of their respective organization as a whole. The judges and advocate generals of the ECJ, but also the members of the High Authority and Commission, as well as the various representatives of the States constantly struggled to define the “nature” of the ECSC and later the EEC according to their own interpretation of the treaties. The constitutionalization process was, indeed, structurally embedded in the initial differentiation of the nascent European field of power.

While the ECJ<sup>6</sup> endorsed the qualification of a “constitutional charter” to designate the founding treaties of the European Communities only very recently<sup>7</sup>, this issue first appeared on the legal agenda

---

6 Created in 1951, the Court of Justice of the European Coal and Steel Community (CJECSC) later became the Court of Justice of the European Communities (CJEC). For the sake of simplification, unless necessary, I will not distinguish between the two and use ECJ (European Court of Justice) as an acronym for both.

7 It was in its decision *Parti écologiste “Les Verts” v. European Parliament* (1986) that the ECJ first referred to the Treaty of Rome as a “basic constitutional charter” (“The European Economic Community is a community based on the rule of law, inasmuch as neither its member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional Charter, the Treaty”: CJCE 1986: 1357). This semantic

at the beginning of the 1960s. Architect of this “silent revolution,” the first Advocate General of the ECJ, Maurice Lagrange, expressed this legal opinion in his preliminary conclusions to a landmark decision (*Costa v. Enel*) stating that the Treaty of Rome had “the nature of a real constitution” (CJCE 1964: 1178). Prominent law professors, such as the American Eric Stein, immediately concurred, stating that “the Court could be said to have dealt with the Community treaty as if it were a constitution rather than a treaty” (Stein 1965: 513). It was as far back as 1952, however, in the context of intense political mobilizations in favour of a “genuine” European Constitution, that Lagrange – a member of the French *Conseil d’Etat* who had actively participated in the drafting of the articles and protocols of the ECSC treaty relating to the ECJ before becoming the same Court’s advocate general – expounded what was to become a jurisprudential policy: “Is it not clear that, just as the European Coal and Steel Community is the embryo of a federal organization, the Court of Justice itself appears as the embryo of a real Federal Court? Can it not be stated that, just as the Treaty has a truly constitutional nature (and it undoubtedly does), the Court of Justice itself has a constitutional role?” (Lagrange 1954: 434-35).<sup>8</sup> This legal fiction of a constitutionalism without constitution (“as if”) logically authorized the shift from constitution-making to constitutionalization. As another Advocate General, Federico Mancini (who happened to be advocate general in the abovementioned case of 1986), was later to state: “the Court has sought to ‘constitutionalize’ the Treaty, that is to fashion a constitutional framework for a federal-type structure in Europe” (Mancini 2000: 2). But for Lagrange, this teleological federalism was even further legitimized by a rather unusual sort of legal Europeanism: “We will thus end up – when the European Federation comes into being – with a federal Court that will have no need to borrow its judicial system from overseas, but will quite naturally find its original foundations in the best of the legal experience of its own members” (Lagrange 1954: 435).

If this was the legal reasoning in which the birth of a transnational (both constitutional and federal) body of European fundamental law principles was grounded, the legal activity of the ECJ to enforce the principles of supremacy and direct effect of European law and thus impose “a specific legal order” must simultaneously be understood, in its genesis, not only as the translation of a political mobilization into the language of law, but also as the legal expression of the social autonomization of a specialized body of lawyers. To put it differently, the “positioning” of ECJ’s rulings at the top of the hierarchy of norms in Europe was also a matter of “self-positioning” for the new judges, searching for a position vis-à-vis the legal corporations and professions historically constituted at the national level, but also vis-à-vis the newly established European institutions.

### ***The Making of a European Judicial Elite: Paths to the Early European Court of Justice***

It is all the more important to first point out the institutional and political logics of appointment to the Court (Kenney 1999; Condorelli Braun 1972) that these were the main visible constraint on its autonomy. As stated by the treaties of Paris (Article 32) and Rome (Article 167) the Court was originally composed of seven judges appointed for a renewable term of six years by “common agreement” among the governments of the member States. The treaties also stated that a partial renewal of the Court would occur every three years (the first, to take place in 1955) and that the president of the Court would be designated by his fellow judges for a renewable term of three years. By derogation, however, the first presidents of the CJECSC (1952) and CJEC (1958) were appointed by the governments themselves (Section 5 of the Convention containing the transitional provisions annexed to the ECSC Treaty and Article 244 of the EEC Treaty). Of course, as we will see below, appointments at this level of judicial power always involve a high degree of politics and social capital.

(Contd.) \_\_\_\_\_

play on words is quite significant, as it enabled different political and legal entrepreneurs to successfully shift the issue of the Constitution of Europe back from the legal to the political sphere at the end of the 1990s. See: Cohen 2008.

8 For Lagrange, regarding its “true legal nature,” the ECSC Treaty is “fundamentally a Constitution” (Lagrange 1954: 419). This opinion, published by Lagrange in 1954 in the *Revue du droit public et de la science politique en France et à l’étranger* is an abstract of a *Legal Note on the Court of Justice of the ECSC* written in 1952. From the inauguration of the Court in December 1952 to its first ruling in December 1954, Lagrange in fact spent his time writing “dry” case studies (*Trockenstudien*) on the basis of the comparison of the different European laws (Autret 1996: 11, 20).

What Nicole Condorelli Braun convincingly shows, however, beyond the usual networking, is that appointments and reappointments to the Court were themselves embedded in a permanent negotiation process of nomination to all four supranational institutions of the European Communities, the High Authority, the two Commissions and the Court itself, and that the governments gradually synchronized the originally different rhythms of appointments (every year from 1958 to 1967!), in order to “facilitate the transactions” (Condorelli Braun 1972: 73). This not only led to the allotment of the four possible institutional presidencies – and there is no reason to believe that the system did not also include the presidencies of the Common Assembly or of the other European organizations’ institutions – on a national basis (Feld 1963: 44), but also to an indirect control of the governments over the Court: Judges Pilotti, Van Kleffens and above all Serrarens (who had been reappointed in 1955) were not reappointed in 1958 when the CJECSC in fact “expired” to make way to the new CJEC (Feld 1963: 46-7, 52).

Quite vague on the actual procedure<sup>9</sup>, the treaty of Paris did not mention any necessary legal competence for being appointed to the Court either. It only mentioned that the judge should be “of recognized independence and competence.” Article 32 was later reformulated by Article 167 of the treaty of Rome which clearly specified that appointees (now including the advocate generals) “shall be chosen from among persons of indisputable independence who fulfil the conditions required for the holding of the highest judicial office in their respective countries or who are jurists of a recognized competence.” Many authors pointed out that this wording reproduced Article 2 of the Statute of the ICJ: “The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.” But Article 39 of the draft European Constitution (“a hidden source of inspiration” according to one of the negotiator of the treaties of Rome: Pescatore 1981: 65) had already imported this provision, stating that “the candidates must be of the highest moral character, and must either possess the qualifications required, under their national legislation, for the exercise of the highest judicial functions, or be jurists of unquestionable ability.”

As a group, actually, the judges and advocate generals were relatively heterogeneous – their professional backgrounds ranging from national judiciaries, judicial administration, private legal practice, banking, politics, trade-unionism, and the law faculty (Kenney 1999; Condorelli Braun 1972; Feld 1963) – and more so when compared to the commissioners and judges of the European Court (and Commission) of Human Rights in Strasbourg. Conversely, the members of the early ECJ had a lot in common with the members of the High Authority of the ECSC or the Commission of the EEC.

Of the first seven judges, three had long careers behind them as magistrates in their respective national legal systems prior to appointment.<sup>10</sup> The Italian judge Massimo Pilotti (1952-1958), the German judge Otto Riese (1952-1963), and judge Charles Hammes (1952-1967) of Luxembourg, all three doctors in law, had started their career as members of the bench (Pilotti in 1901, Riese in 1923, and Hammes in 1929, after several years of practice of the bar), and were members of the highest judicial institutions of their respective countries at the time of their appointment to the ECJ: the *Corte di Cassazione* (1949), the *Bundesgerichtshof* (1951), and the *Cour supérieure de justice* (1944). Another noteworthy career path to the ECJ was the financial administration of the State as in the cases of the French judge Jacques Rueff (1952-1962) and the Dutch judge Adrianus Van Kleffens (1952-1958). A member of the French *Inspection des Finances*, Rueff had pursued most of his career as a civil servant in the French central financial administration (the Ministry of Finance and the National

---

9 The treaty itself was actually completely mute on the advocate generals, who, until 1958, were dealt with only in Article 10 of the Statute of the Court.

10 The following information is selected from sources ranging from scholarly publications (Mangenot 2004; Kenney 1999; Autret 1996; Condorelli Braun 1972; Feld 1963), published internal documents of the European institutions (<http://www.curia.europa.eu> 2006; CECA 1956), the various national versions of the *Who's Who*, as well as documents gathered through the biographical indexes of K.G. Sauer.

Bank of France), whereas Van Kleffens, had entered the Ministry of Economic Affairs after having been in charge of the litigation department of the Royal Dutch Navigation Company and, briefly, a member of the bench. At the opposite end of the spectrum, the Belgian judge, Louis Delvaux (1952-1967), and the “Extra” judge Petrus Serrarens (1952-1958) both had pursued political careers before being appointed to the Court. A doctor in law and practicing lawyer, as well as a journalist, Delvaux had been a Belgian MP (1936-1946) and a Minister of Agriculture (1945) before returning to private practice and taking up a number of corporate responsibilities, for example, at the National Bank of Belgium. Serrarens had been secretary general of the International Confederation of Christian Trade-Unions (CISC) (1920-1952), as well as a Dutch MP (1929-1952), and a member of the Consultative Assembly of the Council of Europe (1949-1953).

Of these first seven judges, three stayed in office only until 1958 (including the first president of the Court, Massimo Pilotti), two until 1962-1963, and two until 1967, while the two advocate generals stayed in office until respectively 1964 (Maurice Lagrange) and 1973 (Karl R  mer). By 1967, with the exception of Advocate General Karl R  mer, the Court had been completely renewed. In fact, by 1963-1964, at the time of the landmark decisions of *Van Gend & Loos v. Administratie der Belastingen* (1963) and *Costa v. Enel* (1964) respectively, four and five of the seven judges had been replaced. Among the new judges, some followed similar paths to the Court: Rino Rossi (1958-1964), a member of the bench since 1920, was judge at the Italian Court of Cassation before he succeeded Pilotti; Robert Lecourt (1962-1976), a member of the bar since 1928, member of the French Parliament since 1945, had been Minister of Justice several times before he succeeded Rueff; and Walter Strauss (1963-1970), a member of the bench, was an administrative State Secretary at the German Federal Ministry of Justice (1950-1963) before he succeeded Riese. However, a younger academic elite was making its entry to the Court: Andreas Donner (1958-1979) was only 40 when he became the Dutch judge, and his entire career had been as a professor of constitutional and administrative law at the University of Amsterdam (1945-1958) before he became president of the ECJ. Alberto Trabucchi (1962-1972) was a professor of private law at the University of Padua when he succeeded Nicola Catalano (1958-1961), a member of the bar, of the *Avvocatura dello Stato*, and a former director of the legal service of the High Authority (who himself had replaced Serrarens). Succeeding Rossi, Riccardo Monaco (1964-1976), a short time member of the bench (1931-1933), had been teaching international law since then, before he entered the Ministry of Foreign Affairs, and finally returned to the bench, member of the Italian *Consiglio di Stato*, and of the Permanent Court of Arbitration (PCA).

### ***The European Court of Justice in the European Field of Power: Circulation and Autonomization***

The social recruitment of the ECJ was even more heterogeneous when compared to the first judges of the ECHR in Strasbourg (Cohen & Madsen 2007).<sup>11</sup> From the outset, the ECHR recruited a more academic-oriented batch of judges, most of them being university professors of international law, including Kemal Fikret Arik in Ankara, Alf Ross in Copenhagen, Hermann Mosler in Heidelberg, Frederik Mari Van Asbeck in Leyden, Giorgio Ballardore Pallieri in Milan and Alfred Verdross in Vienna, while Ake Ernst Vilhelm Holmback was rector of the University of Uppsala, and Georges Maridakis, rector of the University of Athens. Magistrates were thus a minority: Einar Arnalds came from the Civil Court of Reykjavik, Eugene Rodenbourg from the Council of State of Luxembourg, and Terje Wold from the Supreme Court of Norway – of which he was the president (European Yearbook 1959). It is true, however, that, most of them were really at the crossroads between academia and politics, magistracy and diplomacy, very much alike the most prominent of them, Henri Rolin, Ren   Cassin or Lord McNair, former judge (1946-1955) and president of the ICJ (1952-1955).

As suggested above, the circulation between Courts is a good indicator of the gradual differentiation and interdependence between the various organizations structuring the early European

---

11 The ECHR was inaugurated only in 1958. See: Madsen 2005.



legal field. Although rather limited in numbers, the paths between Courts nevertheless existed: from the PCA to the ECJ, as in the case of Pilotti and Monaco, but also from the ICJ to the ECHR, as in the case of McNair. Later, Lord Humphrey Waldock, himself a professor of international law at Oxford, made the reverse trip from the ECHR – in fact the Commission (1954-1961) and Court (1966-1974) over which he both presided from 1955 to 1961 and from 1971 to 1974 – to the ICJ (1973-1981) – over which he also presided from 1979 to his death in August 1981 (Rosenne 1991: 811-19). He was promptly followed there by Hermann Mosler (1976-1985), who had the opportunity to meet again with André Gros (1964-1982), both having taken part in the negotiations of the Schuman Plan, respectively on the German and French sides. However, it is quite important to underline that there is a rather strict partition of career paths to the ECJ and ECHR until the beginning of the 2000s – the case of René Cassin, whose appointment at the ECJ was envisaged to succeed Rueff before it was finally rejected (Mangenot 2004), being particularly interesting in this perspective.

These differentiated paths are all the more surprising that one of the important issues of the time was the institutional relations between the Council of Europe and the European Community. The protocols annexed to the treaties encouraged a closer cooperation between the two organizations, and, for that matter, in June 1953, the Common Assembly and the Consultative Assembly organized the first of long series of joint sessions (while already sharing the same building and the same secretariat). More than this institutional relation between these two assemblies, it should be emphasized that half of the members of the Common Assembly of the ECSC were in fact also members of the Consultative Assembly of the Council of Europe. These differentiated paths, conversely, were quite coherent with the constant claim from part of the members of the ECJ that “their” Court was in fact very different. In September 1952, in the wake of the so-called Eden Plan, the Consultative Assembly of the Council of Europe for instance suggested that the existing supranational courts (or would-be courts) should be replaced by a unique European Court of Justice in charge of both human rights violations and free trade infringements. To Maurice Lagrange’s opinion, however, there was an incompatibility in “nature” between the Council of Europe and the European Community that prevented any such project, the later being governed by “internal” rules of law closer to the national laws of its member States than to international law.<sup>12</sup> Of course, Henri Rolin had quite a different opinion: “It is necessary to substitute [the CJEC] for a unique European Court, both court of human rights and judicial organ of the various European communities that will please the members of the Council of Europe to create, elected by majority vote by the Consultative Assembly on a list of candidates comprising more than one name per member State as well as lawyers from other countries.”<sup>13</sup>

In many ways, conversely, the social recruitment of the High Authority (HA) of the ECSC tends to tally with ECJ’s. Of course, the HA had no professional magistrate among its members, but some had a legal training (in 1956, before the EEC Treaty was signed, five out seven members of the ECJ had legal diplomas, while only four out of seven of the HA), and most had very similar professional backgrounds. Chaired by Jean Monnet (1952-1955) and later by René Mayer (1955-1958), the HA had obviously a slightly more political composition. A member of the French *Conseil d’Etat* from 1920, Mayer had been vice-president of a railroad company from 1928 to 1940, before entering the *France Libre* (he was a member of the *Comité Français de la Libération Nationale* and of the *Gouvernement provisoire de la République française* from 1943 to 1947). In 1946, he became a Member of Parliament, successively Minister of Finance (1947-1948 and 1951-1952), Defence (1948), and Justice (1949-1951), before being appointed as Prime Minister in 1953. With different backgrounds, the two vice-chairmen, Franz Etzel (1952-1955), a German lawyer, and Albert Coppé (1952-1967), a Belgian economist, were also members of parliament since after the war, as well as Enzo Giacchero (1952-1958), an Italian engineer and professor at the University of Turin. Some of the members of the HA

12 Library of the Court of Justice of the European Communities (LCJEC), Box A501, “Examen critique de la recommandation 36 de l’Assemblée consultative du Conseil de l’Europe relative à l’institution d’une Cour européenne de Justice,” 3 November 1952.

13 See: “La Cour du charbon et de l’acier,” *Journal des tribunaux*, 3899, juin 1951, quoted in Autret 1996: 14.

had more expert professional backgrounds, in the sector of coal – Léon Daum (1952-1958) was a mining engineer, former chairman and member of the board of French prominent industries, like *Solac* and *Sidelor* – and steel – Heinz Potthoff (1952-1961) had had a long career in the steel industry before he joined the *Nordrhein-Westfalen* Ministry of Economic Affairs in 1946. But Paul Finet (1952-1964) was really Serrarens *alter ego* as secretary general of the General Labour Confederation of Belgium (FGTB) and chairman of the International Confederation of Free Trade Unions (CISL); and Dirk Spierenburg (1952-1961) was Van Kleffens' double, having entered the Ministry of Economic Affairs in 1935 after having worked in the private commercial and industrial sector.

While the members of the Court had pursued relatively different national career paths prior to appointment to the ECJ, most of them had an experience with international law and politics, as juriconsults or arbitrators, in various treaty negotiations or dispute resolutions, in matters involving the collective military security or economic stability of European countries. In the case of Pilotti, his involvement on the interwar international legal scene practically made up a “second life” that ended up in 1949 with his appointment to the PCA. The collective involvement of the members of the HA on the international scene was quite important too, as representatives of their national States in various international organizations (United Nations, Organization for European Economic Cooperation, Ruhr Authority), or as members of transnational institutions (International Labour Office, Consultative Assembly of the CE). One important pre-war intersection between them all was of course the League of Nations. In particular, the two first presidents of the High Authority and Court of Justice, Monnet and Pilotti, had been deputy Secretary General of the League (respectively from 1920 to 1923 and from 1932 to 1937).

But it is crucial to underline that while, at the ECJ, only the two advocate generals, Lagrange and Römer, and judge Van Kleffens could claim to have been part of the negotiations of the Schuman Plan, and, as such, to have a privileged interpretation of the “intentions” of the framers, most of the members of the HA *did* actually draft the treaty, Monnet of course, Spierenburg and Wehrer, chairing the delegations of the Netherlands and Luxembourg, and to a lesser extent Daum, representing employers to the French delegation.<sup>14</sup> This is even more striking if we include the directors of the various services created at the HA who were one way or another involved with the negotiations: Max Kohnstamm, secretary general of the HA and director of the Press and Information service, Pierre Uri (Economy service), Hamburger (Cartels and Concentrations service), Rollmann and Vinck (Market service), Wagenführ (Statistics service), and Ballardore-Pallieri (Personnel and Administration service) (CECA 1956: 70-71). While, at the Court, after 1958, only Catalano had participated in the negotiations of the treaties of Rome, as a member of the “*groupe juridique*” (with Pierre Pescatore, who was to become a judge in 1967: Pescatore 1981; 2007), the European Commission was presided by one of its prominent architects, Walter Hallstein, who had chaired both German delegations to the negotiation of the treaties of Paris and Rome. Commissioners Hans Van der Groeben, Jean Rey and Lambert Schauss were also members of the German, Belgian and Luxembourg delegations at Messina, Venice or Val Duchesse. As well, the executive secretary of the Commission, Emile Noël, was a member of the French delegation, and Michel Gaudet, heading the legal service of the HA at the time of the negotiations, took part in the “*groupe juridique*,” before he became director of the nascent legal service of the Commission.<sup>15</sup>

---

14 Archives nationales de France (ANF) 81AJ131, Liste des délégations et répartition au sein des groupes.

15 Archives nationales du Luxembourg (ANL) AE 7701, Les délégations des Six à la Conférence de Messine; Archives historiques du Conseil de l'Union européenne (AHCUE) CM3, Conférence des ministres des Affaires étrangères (both documents can be found at <http://www.ena.lu>).



***Building Law out of Politics: Capitals and Constraints in the Genesis of European Law***

Quite early in the process of European integration, however, most of the would-be judges and advocate generals at the Court had built on a nascent European legal capital born out of practice at the Court (Vauchez 2007a; 2007b; 2008). The first case ever judged by the Court in December 1954 (*France v. ECSC High Authority*) confronted Michel Gaudet, representing the High Authority, and two of the legal architects of the European community, Maurice Lagrange, advocate general, and Paul Reuter, representing France. Monnet's legal adviser from the inception of the Schuman plan to the drafting of the ECSC treaty (Cohen 1998), Reuter had actually turned down the offer made by Robert Schuman to appoint him as the French judge after his long time friend Pierre-Henri Teitgen had himself refused.<sup>16</sup> Neither Gaudet, nor Reuter ever became members of the Court. But the following cases proved to be a breeding ground for later appointments to the Court. In the second case (1954), Monaco was representing the Italian government while Catalano was representing the High Authority. They were quickly followed by Pierre Pescatore, representing the Grand Duchy (1954), Josse Mertens de Wilmar, representing Belgian coal companies (1955), and Alberto Trabucchi, representing the High Authority (1956).

Another crucial element lies in the social and, for that matter, family capital of the judges and advocate generals of the Court. Impossible to resist mentioning, in this regard, that the Villa Vauban, where the Court first sat, was in fact called the Villa Pescatore (CJEC 1988: 70). A good illustration of this social capital, more generally, is the dense network of family ties that linked the "revolutionary" Court of 1963-1964 – comprising Donner (president), Delvaux, Rossi, Trabucchi, Riese (*Van Gend & Loos*, 5 February 1963), replaced by Strauss (*Costa v. Enel*, 15 July 1964), as well as Hammes and Römer, respectively *rapporteur* and advocate general in *Van Gend & Loos*, Lecourt and Lagrange, respectively *rapporteur* and advocate general in *Costa v. Enel* – to prominent political and juridical figures of the time. The president of the Court, Andreas Donner, was the son of the former Minister of Justice (1926-1933), Jan Donner, president of the Dutch Court of Cassation, the *Hoge Raad*, from 1946 to 1961 – Van Kleffens, to whom he had succeeded, was the younger brother of Eelco Van Kleffens, a former member of the secretariat of the League of Nations (1919-1921), before he entered the Ministry of Foreign Affairs and became himself Minister of Foreign Affairs (1939-1946). Alberto Trabucchi was the brother of Giuseppe Trabucchi, Minister of Finance in the Tramboni and Fanfani cabinets (1960-1963), and Minister of Foreign Trade in the short-lived Leone cabinet (June-December 1963) – when Catalano was reappointed by Antonio Segni, Minister of Foreign Affairs, the understanding was that he would later resign to make way to Trabucchi (Condorelli 1972: 80; Feld 1963: 45). And Karl Römer was both a relative of Heinrich Von Brentano, Minister of Foreign Affairs (1955-1961), and the nephew (by marriage) of nobody else than Konrad Adenauer himself (CJEC 1988: 49) – and, according to Donner, he would probably had become the president of the Court in 1958 if, after Walter Hallstein had been appointed at the Commission, the allotment system did not prevent that two presidencies fell to the same country (CJEC 1988: 16).

The process of institutionalization of the European field of power is, of course, both internal and external to the institutions themselves (Stone Sweet, Sandholtz & Fligstein 2001). Institutions are both an issue and a venue for competing national elite groups, modelling them according to their own national and professional patterns. But they also tend to produce transnational elite groups, which, in turn, develop a distinct professional/institutional ideology. The early differentiation of the two Courts in terms of social recruitment, for instance, is a key to understanding the quite different paths of legalization of the treaties taken by EC law and HR law (Cohen & Madsen 2007). While the ECHR developed a rather abstract body of noble principles in the tradition of *international law* – largely

---

16 See his letter to Robert Schuman (30 August 1952): Fondation Jean Monnet, Fonds Robert Schuman 3/1/327. Also see Jacques Rueff's letter of acceptance of 3 September 1952 (3/1/338). Paul Reuter considered himself as being too young for "such a prompt ending." He would not be the only one to turn down a judgeship at the ECJ over the years, which is also an indication of the fact that the office was not very attractive in the early days.

inherited from the interwar period (Koskenniemi 2001; Sacriste & Vauchez 2004; 2007) –, the ECJ developed a much more practical jurisprudence with clear references to *internal* law. Maurice Lagrange and his fellow members of the Court many times insisted in their early writings that the framers did not intend to create another *international* organization, but a European community where the rule of law should be *internal*, and not international. And, for the most part, the judges and advocate generals of the ECJ were *de facto* specialized in public or private internal law in their respective States. On the other hand, the Court constantly had to reaffirm that EC law was not on an equal footing with internal laws of the member States, which had delegated part of their sovereignty to the Community, and therefore to seek higher principles emerging from the common heritage of European national laws that could justify the fact that a new legal order had been created by the treaties. These principles were of course subject to *interpretation*, and the *comparative* method could best fit their search for a third way between international and national laws. As Donner once remarked, the deliberations of the Court became a “seminar in comparative law” (CJEC 1988: 18). This legal science based on the comparative exegesis of European internal laws rather than on an international *Professorenrecht* also had to lean on the interpretation, not so much of the intention of the framers as to the letter of the treaties (to which the States or the HA could more legitimately refer), but of the intention of the framers as to the ultimate goal of this Community, a Federal Europe (of which they could claim to be the forerunners). This became the professional ideology of the Court.

As Karen Alter has pointed out, nevertheless, “the ECJ expanded its jurisdictional authority by establishing legal principles but not applying the principles to the cases at hand”; in *Costa v. Enel* particularly, “the ECJ declared the supremacy of EC law” but “found that the Italian law [nationalizing] the electric company did not violate EC law” (Alter 1998: 131).<sup>17</sup> As shown above, the emerging European field of power was primitively structured around opposing types of capitals, which the early composition of the ECJ perfectly reflected. These structural tensions – between law and politics, market forces and bureaucratic intervention, academia and the judiciary, international order and national power – strongly determined the external logics of appointment to the Court, but also the internal logics of the institution. Manifest in its landmark decisions (including in the decision-making process within the Court: Rasmussen 2007), these tensions defined the main intellectual constraint of the Court, torn between the pure logic of abstract and universal legal principles and the contingent arrangement of day-to-day State politics and economics, between the supremacy of a supreme court and the absence of enforceability of its decisions. Most of the decisions of the early ECJ were a direct product of this duality: and this is particularly apparent in the *Costa* case. While leaning on a sophisticated legal reasoning to claim the supremacy of EC law over national legislations (the-pure-logic-of-abstract-and-universal-legal-principles-resulting-in-the-supremacy-of-a-supreme-court), the Court immediately dismissed Flaminio Costa in his claim that the nationalization of an economic activity by the Italian State was an infringement to the treaties (the-contingent-arrangement-of-day-to-day-state-politics-and-economics-amounting-to-the-absence-of-enforceability-of-its-decision).

### ***The Socio-Professional Recruitment of the European Court of Justice: Some Long Term Trends***

On the total population of 106 judges and advocate generals appointed to the ECJ from the early 1950s to the mid 2000s (1952-2006), the average age at the time of nomination is 55-56 – Miguel Maduro (Portugal) being the youngest advocate general ever appointed, at the age of 36 in 2003, while Pranas Kūris (Lituania) is the oldest judge ever appointed, at the age of 76 in 2004 – both of them still being in office. Among the oldest members of the Court, four out of eight are Italians: Pilotti (73), Bosco (71), Rossi (69), and Mengozzi (68), while, among the youngest members of the Court, four out of eight are either Portuguese or Spanish – which is quite remarkable considering the fact that Portuguese and Spanish judges and advocate generals represent a much smaller group (four each) than the Italian,

---

17 As Karen Alter specifies: “Of course the ECJ was not going to overturn the nationalization of the Italian energy industry on the basis of a \$3 challenge in a small claims court” (Alter 2001: 19).

the German or the French (thirteen each). Actually, the Italian judges and advocate generals are on average quite older (60) than the modal French (56) and German (55), or the considerably younger Spanish (49) and Portuguese (47). Regarding gender, the Court is obviously a man's body: only seven women were appointed to the Court, five of them still being in office, which means that only two women were appointed in the period going from the early 1950s to the late 1990s (Simone Rozès was advocate general from 1981 to 1984, and Fidelma O'Kelly Macken was judge from 1999 to 2004). If we exclude the last appointments (from 2000 to 2006), three periods can be roughly distinguished as to the professional profiles of the remaining 79 members of the ECJ – these periods being closely linked to the general evolution of the European communities, and more particularly to the successive enlargements. The first period goes from 1952 to 1972: from the first appointments to the Court to the last appointment of a member coming from one of the countries of the Europe of the Six, and before the first appointments of the members coming from the new countries of the Europe of the Nine. The second period goes from 1973, when the Danish, Irish and British judges (and, in the last case, advocate general) were appointed to the Court, to 1985, after the last appointment of a judge coming from the Europe of the Ten (with the enlargement to Greece). The last period goes from 1986, when the Spanish and Portuguese judges (and, in this last case, advocate general) were appointed to the Court, to 1999, excluding the judges and advocate generals appointed thereafter (with the exception of the six members still in office appointed during the third period) – in particular after enlargement to the Eastern European countries. The first and second periods respectively run on 20 and 16 years, and include 22 and 24 individuals each, the third period runs on 13 years, and includes 33 individuals.

Although the main characteristic of the judges and advocate generals of the ECJ is the very high multiplicity of national and/or transnational positions and occupations they successively, and sometimes simultaneously, held before appointment to the ECJ<sup>18</sup>, four career paths can be roughly and briefly distinguished, that are both dominant and evolving over time.<sup>19</sup> Actually, these career paths remain the same as in the early days of the Court: the judiciary (either civil or administrative, like, in the French case, the members of the *Conseil d'Etat* and of the *Cour de cassation*), the administration (mainly the ministry of Justice or Economic Affairs, more rarely of another sector), politics, and academia. According to this typology, while the judges and advocate generals mainly coming from the judiciary and the administration tend to dominate the professional recruitment of the Court during the first two periods, academics tend to represent a higher proportion of the total members of the Court in the third period. Moreover, whereas the first two profiles are clearly dominant among French and German judges and advocate generals, the third profile is massively dominant among Italian judges and advocate generals, and among the smaller groups of Greek, Spanish or Portuguese judges and advocate generals. The two trends being therefore interdependent: enlargement to Southern European countries having led to a greater “professorialization” of the Court. Finally, while the political path to the ECJ tends to remain constant during the first two periods, it considerably decreases during the third period – following a reverse trend of de-politicization than the European Commission during the same period (MacMullen 1997). Actually, appointments of prominent politicians to the Court, like President Robert Lecourt, are becoming all the more rare that, with very few exceptions, only the founding Six (and in particular Belgium) do proceed with such appointments.

Another evolution is worth mentioning here. Over the years, the length of service at the Court tends to decrease. While the average length of service is of nine years, it was a bit longer in the first period (10) than it is in the second (8) or third period (7.5). But this is only one aspect of the total time spent at the Court. Whereas, in the first period, obviously, none of the members of the Court had had

---

18 Reflecting somewhat typical national career paths: barristers becoming high court judges in the English-speaking countries of Europe, judges or prosecutors entering the ministry of Justice in the French- and German-speaking countries, law professors becoming judges at the Constitutional tribunal in the Latin-speaking countries... See Mangenot 2004 for the French case.

19 The following paragraphs draw on an ongoing research in the framework of POLILEXES and are, at this stage, merely indications.

previous functions at the Court, and, in the second period, only two (Alberto Trabucchi was, as we saw, judge from 1962 to 1972 before he became advocate general from 1973 to 1976, and Francesco Capotorti, was briefly judge from February to October 1976 before he became advocate general from 1976 to 1982), the circulation inside the Court considerably increases in the third period: the British Francis Jacobs was *référéndaire* for Jean-Pierre Warner (1973-1981) before he became judge (1988-2006); the Danish Claus Gulmann was *référéndaire* for Max Sørensen (1973-1979) before he became advocate general (1991-1994) and then judge (1994-2006); the British Gordon Slynn was advocate general from (1981-1988) before he became judge (1988-1992), as well as the Italian Federico Mancini, advocate general (1982-1988), and then judge (1988-1999); Jean Mischo of Luxembourg, on the contrary, was judge (1986-1991) before he became advocate general (1997-2003); and the Italian Antonio Mario La Pergola was briefly judge (October-December 1994) before he became advocate general (1995-1999) and again judge (1999-2006). As well, the British David Edward and the Belgian Romain Schintgen were judges at the Court of First Instance (respectively from 1989 to 1992 and from 1989 to 1996) before becoming judges at the ECJ (respectively from 1992 to 2004 and from 1996 to this day).

## Conclusion

While the genesis of Europe's constitutional agenda is rooted in the early investments of lawyers in the political mobilizations of the 1950s, it is in the autonomous work of a specific social group – the judges and advocates general of the ECJ – at the core of an emerging European legal field that one can detect the process of transformation of a political issue (the European Constitution) into a regulated exchange of rational legal arguments that paved the way to the constitutionalization of Europe. The Court, however, is not a socially and politically unified group of actors. As Norbert Elias once put it, “an initial antagonism and struggle for position between rival groups may be found in the early history not only of professions, but of almost every institution” (Elias 1950: 308). In this paper, we hypothesize that these tensions so strongly determined the internal logics of the Court, as they determined the general dynamics of the field, that they had an impact including on its output. As a matter of fact, the jurisprudence of the Court could be viewed as a product of both these specific internal tensions between opposing types of capitals, evolving over time, and the more general external contradictory constraints of a nascent European legal field.

However, the emergence of a European legal field is not an autonomous process. While constitutionalization came as a substitute for a failed constitution, this initial failure also accounts for the international division of labour that resulted in a very complex structure of differentiated but intertwined international organizations, taking to “pieces” the different State monopolies – defence, market, law – that were originally to be articulated in a single organization, in the traditional forms of representative democracy. In turn, the structuration of a European field of power in which the mechanisms of competition between nation-States could be regulated – the continuing process of expansion of their respective political and economic power now prohibiting any legitimate use of their specific monopoly (physical violence) – is coincident with a transformation of the respective chances of the different social groups in competition within each of these States to gain access to positions of power, and particularly power over the State and its administrations (Bourdieu 1989: 539-59). This process of disembeddedness *at the international level* (Elias 1974 & 1975: 84) – or, in other words, the dissociation of pure force, which traditionally defined the politics and economics of international relations, on the one hand, and law, on the other hand, which from then on defined the legitimacy of political and economic action at the international level – led to a changing balance of power *at the national level* in which lawyers in particular gained a “new” form of power over the State, albeit through transnational institutions and administrations.

By analyzing the varying investments and strategies of competing social groups in the making of Europe, one can thus understand how a series of State knowledge that were invented in the context of the formation of the parliamentary State were later to be reinvested at the international level (Dezalay

2004). Actually, one explanation for the international reproduction of national legal forms and categories, such as the Constitution, can be found in the competition between national social groups to preserve or increase their chances of gaining access to positions of power within and over the State. In promoting a transnational constitution, in producing and disseminating a novel theory of legal and political order borrowing from the different existing politico-legal repertoires – filling new bottles with old wine –, legal elites followed the same path taken by their ancestors (Kantorowicz 1961; Hanley 1983): they produced “some State” (Dezalay 1993: 3).

## REFERENCES

- Alter, Karen J. (1996) "The European Court's Political Power," 19(3) *West European Politics* 458-87.
- (1998) "Who Are the "Masters of the Treaties"?" European Governments and the European Court of Justice," 52(1) *International Organization* 121-47.
- (2001) *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*. Oxford: Oxford University Press.
- Alter, Karen J., & Sophie Meunier-Aitsahalia (1994) "Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision," 26(4) *Comparative Political Studies* 535-61.
- Autret, Florence (1996) "La Cour de Justice des Communautés Européennes 1952-1964: Création d'un pouvoir juridictionnel." Mémoire de DEA, Département de science politique, Université Paris 1 Sorbonne.
- Bourdieu, Pierre (1986) "La force du droit: Éléments pour une sociologie du champ juridique," 64 *Actes de la recherche en sciences sociales* 3-19.
- (1989) *La noblesse d'État: Grandes écoles et esprit de corps*. Paris: Minuit.
- (1992) *Les règles de l'art: Genèse et structure du champ littéraire*. Paris: Seuil.
- Burley, Anne-Marie, & Walter Mattli (1993) "Europe Before the Court: A Political Theory of Legal Integration," 47(1) *International Organization* 41-76.
- Cohen, Antonin (1998) "Le Plan Schuman de Paul Reuter. Entre communauté nationale et fédération européenne," 48(5) *Revue française de science politique* 645-63.
- (2006) "De congrès en assemblées: La structuration de l'espace politique transnational européen au lendemain de la guerre," 18 *Politique européenne* 105-25.
- (2007a) "Constitutionalism Without Constitution: Transnational Elites Between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s-1960s)," 32(1) *Law & Social Inquiry* 109-35.
- (2008) "Transnational Statecraft: Legal Entrepreneurs, the European Field of Power, and the Genesis of the European Constitution," in H. Petersen et al., *Paradoxes of European Legal Integration*. Aldershot: Ashgate.
- Cohen, Antonin, et al. (2007) "Esprits d'Etat, entrepreneurs d'Europe," 166-167 *Actes de la recherche en sciences sociales* 5-13.
- Cohen, Antonin, & Mikael R. Madsen (2007) "Cold War Law: Legal Entrepreneurs and the Emergence of a European Legal Field (1945-1965)," in V. Gessner & D. Nelken, eds., *European Ways of Law: Towards a European Sociology of Law*. Oxford: Hart Publishing.
- Cohen, Antonin, & Antoine Vauchez (2007a) "Introduction: Law, Lawyers, and Transnational Politics in the Production of Europe," 32(1) *Law & Social Inquiry* 75-82.
- Cohen, Antonin, & Antoine Vauchez, ed. (2007b) *La Constitution européenne: Elites, mobilisations, votes*. Bruxelles: Presses de l'Université de Bruxelles.
- Communauté Européenne du Charbon et de l'Acier, Assemblée commune (1956) *Annuaire-manuel de l'Assemblée commune*. Luxembourg: Division des études et de la documentation.
- Conant, Lisa (2007) "The Politics of Legal Integration," 45 *Journal of Common Market Studies* 45-66.

- Condorelli Braun, Nicole (1972) *Commissaires et juges dans les Communautés européennes*. Paris: Librairie Générale de Droit et de Jurisprudence.
- Cour de Justice des Communautés Européennes (1964) *Recueil de la Jurisprudence de la Cour*. Luxembourg: Service des publications des Communautés européennes.
- (1986) *Recueil de la Jurisprudence de la Cour*. Luxembourg: Service des publications des Communautés européennes.
- (1988) *XXXV ANNI 1952-1987*. Luxembourg: Service des publications des Communautés européennes.
- (1964) *Audiences solennelles 1959-1963*. Luxembourg: Service des publications des Communautés européennes.
- Dezalay, Yves (1993) “Multinationales de l’expertise et “dépérissement de l’État”,” 96-97 *Actes de la recherche en sciences sociales* 3-20.
- (2004) “Les courtiers de l’international. Héritiers cosmopolites, mercenaires de l’impérialisme et missionnaires de l’universel,” 151-152 *Actes de la recherche en sciences sociales* 5-35.
- Dezalay, Yves, & Bryant G. Garth (1996) *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. Chicago: The University of Chicago Press.
- (2002a) *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*. Chicago: The University of Chicago Press.
- , eds. (2002b) *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy*. Ann Arbor: The University of Michigan Press.
- Dulong, Delphine (2001) “La science politique et l’analyse de la construction juridique de l’Europe: bilan et perspectives,” 49 *Droit & Société* 707-28.
- Elias, Norbert (1950) “Studies in the Genesis of the Naval Profession,” 1(4) *British Journal of Sociology* 291-309.
- (1974 & 1975) *La civilisation des moeurs & La dynamique de l’Occident*. Paris: Calmann-Lévy.
- European Yearbook* (1959). The Hague: Martinus Nijhoff (VI: 1958).
- Feld, Werner (1963) “The Judges of the Court of Justice of the European Communities,” 9(1) *Villanova Law Review* 37-58.
- Garrett, Geoffrey (1995) “The Politics of Legal Integration in the European Union,” 49(1) *International Organization* 171-81.
- Gibson, James L., & Gregory A. Caldeira (1995) “The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice,” 39(2) *American Journal of Political Science* 459-89.
- (1998) “Changes in the Legitimacy of the European Court of Justice: A Post-Maastricht Analysis,” 28 *British Journal of Political Science* 63-91.
- Golub, Jonathan (1996) “The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice,” 19(2) *West European Politics* 360-85.
- Hanley, Sarah (1983) *The Lit de Justice of the Kings of France: Constitutional Ideology in Legend, Ritual, and Discourse*. Princeton, NJ: Princeton University Press.
- Harding, Christopher (1992) “Who Goes to Court in Europe? An Analysis of Litigation against the European Community,” 17(2) *European Law Review* 105-25.

- Kantorowicz, Ernst (1961) "Kingship Under the Impact of Scientific Jurisprudence," in M. Clagett, et al., *Twelfth-Century Europe and the Foundation of Modern Society*. Madison: University of Wisconsin Press.
- Kenney, Sally J. (1999) "The Judges of the Court of Justice of the European Communities," in S. Kenney et al., *Constitutional Dialogues Comparative Perspective*. New York: St. Martin's Press.
- (2000) "Beyond Principals and Agents: Seeing Courts as Organizations by Comparing Référendaires at the European Court of Justice and Law Clerks at the U.S. Supreme Court," 33(5) *Comparative Political Studies* 593-625.
- Koskenniemi, Martti (2001) *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*. Cambridge: Cambridge University Press.
- Lagrange, Maurice (1954) "La Cour de Justice de la Communauté européenne du charbon et de l'acier," 70(2) *Revue du droit public et de la science politique en France et à l'étranger* 417-35.
- De Lasalle, Marine, & Didier Georgakakis (2007) "Genèse et structure d'un capital institutionnel européen: Les très hauts fonctionnaires de la Commission européenne," 166-167 *Actes de la recherche en sciences sociales* 38-53.
- Lecourt, Robert (1976) *L'Europe des juges*. Bruxelles: Bruylant.
- MacMullen, Andrew (1997) "European Commissioners 1952-1995: National Routes to a European Elite," in N. Nugent ed., *At the Heart of the Union: Studies of European Commission*. London: Macmillan.
- Madsen, Mikael R. (2005) "L'émergence d'un champ des droits de l'homme dans les pays européens: enjeux professionnels et stratégies d'Etat au carrefour du droit et de la politique (France, Grande-Bretagne et pays scandinaves, 1945-2000." PhD Dissertation, Ecole des hautes études en sciences sociales.
- (2007) "'For a Europe of Human Rights and the People.'" The EU Charter of Fundamental Rights in the Post-Cold War Democratisation of Europe," in A. Cohen & A. Vauchez eds., *La Constitution européenne. Elites, mobilisations, votes*. Bruxelles: Presses de l'Université de Bruxelles.
- Madsen, Mikael R., & Antoine Vauchez (2004) "European Constitutionalism at the Cradle: Law and Lawyers in the Construction of a European Political Order (1920-1960)," in A. Jettinghoff & H. Schepel eds., *In Lawyers' Circles: Lawyers and European Legal Integration*. The Hague: Elsevier.
- Maduro, Miguel P. (1998) *We the Court: The European Court of Justice and European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty*. Oxford: Hart Publishing.
- Mancini, G. F. (2000) *Democracy and Constitutionalism in the European Union: Collected Essays*. Oxford: Hart Publishing.
- Mangenot (2004) "Les membres du Conseil d'Etat dans l'institutionnalisation de la CJCE et des services juridiques du Conseil et de la Commission." Presented at the conference Les juristes et la construction d'un ordre politique européen, University of Picardie (Amiens), 1st April 2004.
- Marrel, Guillaume, & Laurent Godmer (2008) "Le leadership constitutionnel au Parlement européen : le capital juridique actualisé du groupe d'autorité de l'AFCE." Presented at the conference The European Legal Field, European University Institute, Robert Schuman Center for Advanced Studies, 25-26 September 2008.
- Mattli, Walter, & Anne-Marie Slaughter (1995) "Law and Politics in the European Union: A Reply to Garrett," 49(1) *International Organization* 183-90.
- (1998) "Revisiting the European Court of Justice," 52(1) *International Organization* 177-209.



- Mégie, Antoine (2006) "Généalogie du champ de la coopération judiciaire européenne," 62 *Cultures & Conflits* 11-41.
- Pennera, Christian (1995) "The Beginnings of the Court of Justice and its Role as a Driving Force in European Integration," 1(1) *Journal of European Integration History* 111-27.
- Pescatore, Pierre (1992) "Une révolution juridique: le rôle de la Cour de Justice Européenne (entretien avec Hugues Calvet)," 15(59) *Commentaire* 569-74.
- (1981) "Les travaux du "groupe juridique" dans la négociation des traités de Rome," XXXIV(1-4) *Studia Diplomatica* 159-78.
- (2007) "Europe: Mon Plan B." Presented at the conference Racines et développements de la Gouvernance européenne: l'apport du traité de Rome instituant la Communauté économique européenne (mars 1957), Université du Luxembourg & Institut Pierre Werner, 23-24 April 2007.
- Rasmussen, Hjalte (1986) *On Law and Policy in the European Court of Justice*. Dordrecht: Martinus Nijhoff Publishers.
- Rasmussen, Morten (2007) "From Costa v. Enel to the Treaties of Rome: A Brief History of a Legal Revolution." Presented at the conference The Historical Roots of European Legal Integration, University of Copenhagen, 26 October 2007.
- Rawlings, Richard (1993) "The Eurolaw Game: Some Deductions from a Saga," 20(3) *Journal of Law and Society* 309-40.
- Rosenne, Shabtai, ed. (1991) *Documents on the International Court of Justice*. London: Martinus Nijhoff Publishers.
- Sacriste, Guillaume, & Antoine Vauchez (2004) "Les origines de la définition d'un ordre politique international. La "guerre hors la loi", 1919-1939," 151-152 *Actes de la recherche en sciences sociales* 91-95.
- (2007) "The Force of International Law: Lawyer's Diplomacy on the International Scene in the 1920s," 32(1) *Law & Social Inquiry* 83-107.
- Scheeck, Antoine (2005) "Solving Europe's Binary Human Rights Puzzle: The Interaction Between Supranational Courts as a Parameter of European Governance," 15 *Research in Question*: <http://www.ceri-sciences-po.org/publica/question/menu.htm>.
- Scheingold, Stuart A. (1971) *The Law in Political Integration: The Evolution and Integrative Implications of Regional Legal Processes in the European Community*. Cambridge, MA: Harvard University, Centre for International Affairs.
- Schepel, Harm (2007) "The European Brotherhood of Lawyers: The Reinvention of Legal Science in the Making of European Private Law," 32(1) *Law & Social Inquiry* 183-199.
- Schepel, Harm, & Rein Wesseling (1997) "The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe," 3(2) *European Law Journal* 165-88.
- Shapiro, Martin, & Alec Stone (1994) "The New Constitutional Politics of Europe," 26(4) *Comparative Political Studies* 397-420.
- Stein, Eric (1965) "Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case," 63(3) *Michigan Law Review* 491-518.
- (1981) "Lawyers, Judges, and the Making of a Transnational Constitution," 75(1) *American Journal of International Law* 1-27.
- Stone Sweet, Alec (2004) *The Judicial Construction of Europe*. Oxford: Oxford University Press.

- (2007a) “Integration and Constitutionalism in the European Union,” in A. Cohen & A. Vauchez eds., *La Constitution européenne: Elites, mobilisations, votes*. Bruxelles: Presses de l’Université de Bruxelles.
- (2007b) “The Juridical Coup d’Etat and the Problem of Authority.” Unpublished paper, Yale Law School.
- Stone Sweet, Alec, & Thomas L. Brunell (1998) “Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community,” 92(1) *American Political Science Review* 63-81.
- Stone Sweet, Alec, & James A. Caporaso (1998) “La Cour de justice et l’intégration européenne,” 48(2) *Revue française de science politique* 195-244.
- Stone Sweet, Alec, et al. (2001) *The Institutionalization of Europe*. Oxford: Oxford University Press.
- Vauchez, Antoine (2007a) “Une élite d’intermédiaires: Genèse d’un capital juridique européen (1950-1970),” 166-167 *Actes de la recherche en sciences sociales* 54-65.
- (2007b) “Embedded Law: Political Sociology of the European Community of Law: Elements of a Renewed Research Agenda.” European University Institute, EUI Working Paper RSCAS # 2007/23.
- (2008) “The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda),” 2 *International Political Sociology* 128-44.
- Weber, Max (1978) *Economy and Society: An Outline of Interpretative Sociology*. Berkeley, CA: University of California Press.
- Weiler, Joseph H. H. (1993) “Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration,” 31(4) *Journal of Common Market Studies* 417-46.
- (1994) “A Quiet Revolution: The European Court of Justice and Its Interlocutors,” 26(4) *Comparative Political Studies* 510-34.
- (1999) *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration*. Cambridge: Cambridge University Press.

Antonin Cohen  
University of Picardie – CURAPP/CNRS  
antonincohen@aol.com