Who Are the Masters of the Treaties? Law and Politics in the Birth of European Constitutionalism

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European integration is an acid test for the sociology of law and the sociology of fields. The institutionalization of transnational jurisdictional organs, the invention of original jurisprudential repertoires, the formation of bodies of specialized scholars and practitioners, the creation of distinct academic courses and programs; 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 within a larger field of power under structuration 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)[1].

The sociological issue at stake in the invention of a European legal and political 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 as "mere political coups de force"[2]), lies in the social conditions of possibility of the law itself, its "force," that is, the force that 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 and Garth 1996; Sacriste and Vauchez 2004, 2005, 2007; Madsen 2005; Vauchez 2007) 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

[1] 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.

[2] "Juridical *Coups d'Etat*", as Alec Stone Sweet recently coined the founding decisions of the ECJ (Stone Sweet, 2007b).

"constitutionalization" of European political, legal, and economic order (Stone 2004; Weiler 1999; Maduro 1998)[3]. 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 and Slaughter 1998) – on the multiple and decisive contributions of ECJ's "interlocutors" to the enforcement of European law (Mattli and Slaughter 1998; Weiler 1994, 1993; Burley and 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 and Slaughter 1995), or acting, on the contrary, in clear political collusion with and gaining support from the European Commission (Alter and Meunier 1994). All contributed to the process by acting in their best interest (Burley and Mattli 1993); all were quietly driven by the logic of market forces (Stone and Brunell 1998; Stone and Caporaso 1998), in the more general context of an absent-minded awareness or support from ordinary citizens (Gibson and Caldeira 1998, 1995)[4].

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 and Stone 1994; Weiler 1993), very few studies have actually focused on their particular role and social characteristics (noteworthy exceptions are Kenney (2000, 1999); Schepel and Wesseling (1997)). Paradoxically – given that the ECJ is deemed to be at the centre of this process (Burley and 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, the constitutionalization of European Community (EC) law only forms part of even more complex processes of emergence of a European legal field, that can neither be summarized as the result of the sole dynamics of one of the multiple arenas where European law arose (i.e. the European Community), nor reduced to its judicial (mainly jurisprudential) narrative (Cohen and Vauchez 2007). On the contrary, the formation of a European legal field is to be understood both through the internal dynamics and external relations between the multiple European organizations and institutions that resulted from European integration, among which the European Community and the Council of Europe (Cohen and Madsen 2007), *and* through the inter-relations of these specifically European organizations and institutions with the broader sets of transnational organizations and institutions that resulted from Global integration. 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) should be analyzed simultaneously with the interplay between these and other international courts, including for instance the International Court of Justice (ICJ) and International Court of Arbitration (ICA), as well as between the European/International networks of legal professionals orbiting these courts.

Moreover, the force of law at the European level is also the product of the formation of a European field of power were lawyers tend to occupy central positions (Cohen, Dezalay and Marchetti 2007). The part played by lawyers in the various economic, bureaucratic, and political institutions that emerged with European integration (i.e. the European Parliament (Marrel 2006) and Parliamentary Assemblies, the Commission (MacMullen 1997; de Lassale and Georgakakis 2007) and Council, and more recently the Conventions (Cohen 2007b; Madsen 2007)), as well as in the import-export of legal expertise from one set of institutions to another (i.e. from the judicial to the political institutions and vice-versa), are to be understood in the light of broader transformations that put legal knowledge and expertise at the core of International/European relations as a critical resources in State contests and corporate battles. Conversely, the social legitimacy of European law derives from the variety of roles lawyers played in the interdependent although relatively autonomous social

[3] 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").

[4] See Dulong (2001) for a good review of this literature followed by insightful research perspectives.

processes that made Europe, and were critical in producing the dominant representations and expert knowledge 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 2006, 2007), a European Charter of Fundamental Rights (Madsen 2007), a European Constitution (Cohen and Vauchez 2007).

Struggling to Unite Europe: The Birth of European Community Law in Context

The process of constitutionalization of EC treaties is embedded in the early investments and representations of specific agents with distinctive "portfolios of capitals" (Dezalay 2004), whose particular role in the making of a "European Constitution" must be understood in the light of the initial differentiation of a nascent transnational field of power. Early European integration can be described as a series of struggles between opposing types and segments of national elites (political, bureaucratic, juridical, economic, trade union, 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 (Cohen 2006). These struggles finally (but not in their finality) resulted in a very complex structure of intertwined international organizations in which central functions or forms of State power (defence, human rights, parliamentary representation, bureaucratic and legal market regulation) were dislocated and reallocated to specific organizations (the Western European Union and the North Atlantic Treaty Organization, the Council of Europe, the European Coal and Steel Community, and the European Economic Community), or even to specific institutions within these organizations (bureaucratic market regulation fell to the European Commission, whereas judicial market regulation fell to the European Court of Justice).

A key turning point in these processes is the failure of the ultimate attempt to unify the increasingly divided European organizations and institutions under a unique constitutional framework (Cohen 2007a). As a matter of fact, the failure to impose a European Constitution in the mid-fifties 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. While legal activities of constitution-making were, at first, closely linked to military issues and political mobilizations in which the American constitutional model tended to be the central point of reference and the American foreign policy establishment a key player, the legal work of constitutionalization subsequently took a different path, in which a transnational body of basic European law principles emerged, partly as the result of the internal and contradictory logics of a newly created legal institution: the ECJ. This small set of judges and advocate generals – whose own structure of capital perfectly reproduced the opposition of dominant capitals competing in the early European transnational space (composed, as it was, of former parliamentarians, trade-unionists, economic civil servants, supreme courts judges, and academics) – had to find their way through the contradictory constraints of State power and international organization, big corporations and individual citizens, the rule of the market and the rule of law. 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. In other words, constitutionalization came as a masterly and opportune substitute for a real constitution, and law as a convenient expedient for politics. While the promotion of European federalism based on the comparison of different forms of federations made of the U.S. Constitution the central point of reference, one may suggest that, at least for some of the founding fathers of European law, the invention of a common and specifically European legal tradition from which the fundamental principles of a European jurisprudence could be extracted was a powerful way to legitimize their "revolutionary" stance in favour of constitutionalism without a constitution (Cohen 2007a).

Competing Elites and the Unity of Europe

It seems essential first to highlight the generalized competition generated by the perspective of a united Europe in order to understand the various and competing plans that soon emerged for the definition of a yet loosely institutionalized transnational space (Cohen 2006). Even though political elites were relatively dominant at The Hague Congress of 1948 (representing 45% of all delegates), some lasting cleavages nevertheless arose regarding the institutional framework of European unity, broadly opposing professional politicians to the leaders of intellectual, economic, or trade-union elites (representing respectively 26 percent, 14 percent and 5 percent of the delegates)[5]. As a matter of

[5] The four principal "poles" – political, intellectual, economic, trade-union – to which 90% of the 776 known participants at The Hague Congress can be attached, are somewhat arbitrarily defined by the dominant type of capital of each individual, without taking into account the internal structure of their capital, according to which some of these individuals could be situated at two or three of these poles. These figures are

fact, social differences within national delegations at The Hague are key to understanding that ideological positions regarding early European integration (between "unionists" and "federalists") were not so much determined by national cleavages (between the British and the Continentals), but rather by a decisive social opposition between political elites, on one side, traditionally attached to parliamentary representation, and most of their direct rivals, on the other side, who had quite different ideas on how Europe should be concretely organized. Whereas political elites represented 57% of the delegates in the case of the United Kingdom, they only represented 38% in the case of France, and 33%, 32%, and 26% in the case of the Netherlands, Belgium, and Italy, respectively. This primary difference between national delegations should also be viewed in light of a series of secondary differences. Whereas economic elites, for instance, only represented 5% of the total British delegation, they represented 27% of the Dutch delegation, including a high proportion of executives of internationalized industries, 20% of the Belgian delegation, including a significant proportion of representatives of employers' unions and organizations, and, respectively, 18% and 16% of the Italian and French delegations.

Accordingly, as it was originally planned and debated at The Hague the transnational assembly designed to "represent" Europe was to be composed of an equal proportion of elected representatives of national parliaments and of non-elected leaders of non-parliamentary elites, drawn from the ranks of trade unions and corporate interests, intellectual and religious organizations, on a "corporative" basis. 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 agents. 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 (whereas national bureaucratic elites had been completely marginalized at The Hague) 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 European parliamentary control over this institution.) If MPs were somehow to succeed in imposing a parliamentary assembly as the political foundation of these two organizations, the Council of Europe (CE) and the European Coal and Steel Community (ECSC) – just as a small set of multipositioned legal entrepreneurs succeeded in imposing a legal body, i.e., the ECHR and the ECJ, as the cornerstone of these two dissimilar sets of institutions (Cohen and Madsen 2007) – the idea of a "corporative" representation would prove to be a failure. In all cases, however, legal professionals were at the core of these processes because of their specific expertise in building institutions.

This general context explains why, from 1948 to 1954, the European Constitution emerged as the only way to reconcile practically the competing and opposing plans for uniting Europe that would result in a set of differentiated institutional frameworks: a unified market regulated by bureaucratic authorities, an interrelated though divided set of parliamentary institutions (half of the members of the Common Assembly of the ECSC were also members of the Consultative Assembly of the EC), two separate legal bodies to enforce human rights violation or free trade infringements, and, as it soon turned out to be necessary given rising international tensions, a European defence or even a European army. As a way to reunify a European transnational space that was rapidly differentiating following the dynamics of this competition between elites[6], the European Constitution soon rallied a wide array of support. This time again, legal-political entrepreneurs, played a decisive part in this particular undertaking, for they quickly understood what was at stake in such a grandiose plan – the reproduction at the international level of the legal forms and norms that had made their specific capital at the national level. Originating in the transatlantic networks of the "European nebula", the European Constitution would soon attract high-profile law professors and practicing lawyers whose multiple positions in various informal groups and institutional venues put them in a strategic position to make it a (temporary) success.

Legal expertise in Transnational Mobilizations

Although various drafts of a European Constitution had come into being since the end of the thirtiess, it was

merely indicative. For further developments, please refer to: Cohen 2006.

[6] To give only but one example of the various attempts to reunify this increasingly divided space, in September 1952, in the wake of the so-called Eden Plan, the Consultative Assembly of the Council of Europe suggested that the existing supranational Courts (or Would-Be Courts, as the European Court of Human Rights was not yet inaugurated) should be replaced by a unique European Court of Justice in charge both of human rights and free trade.

not really until after World War II that the first transnational mobilizations in favour of such a constitution took form (Griffiths 2000). At that time, it received a strong support from the American foreign policy establishment, through in particular the American Committee on United Europe (ACUE) that one of its prominent members, Allen Dulles – partner at the largest U.S. law firm set up in Europe during the interwar period, Sullivan & Cromwell (Lisagor & Lipsisus 1988), former head of the Office of Strategic Services Mission in Berne in charge of secret operations and particularly the financing of Resistance movements during WWII, then Deputy Director (1950) and Director (1953) of Operations of the CIA –, soon turned into an instrument for the definition and implementation of U.S. foreign policy in Europe (Aldrich 1997). With the explicit aim of supporting the European Movement (EM), created under the honorary chairmanship of Winston Churchill after The Hague Congress on the initiative of Duncan Sandys (Churchill's son-in-law) and Joseph Retinger (the founder of the Bilderberg group), the ACUE financed up to half of the EM's operating budget (Aldrich 2001). During the first meeting of the ACUE in January 1949, Dulles made it clear that one of the main missions the committee would have to take on would, in fact, be to "raise funds to assist the European groups working for unity".

Indeed, the massive financial resources poured into the European projects logically became a major stake in the competition in which the various movements and leaders struggling for European unity were engaged. As part of a wider project to create an "upper chamber" to the Consultative Assembly of the Council of Europe – based on a local and corporative legitimacy (see further in: Cohen 2007a) –, a "committee of lawyers" met in 1951, soon proving to be a "matrix" in the subsequent mobilizations to convening a constituent assembly and drafting a European Constitution. Chaired by Fernand Dehousse, professor of international law at the University of Liège, but also senator, member of the European Union of Federalists (EUF), and of the Belgian Socialist Party (PSB), this committee was comprised of Altiero Spinelli, one of the main leaders of the EUF, and three international law professors, Hans Nawiasky (University of Munich), Piero Calamandrei (University of Florence), and Georges Scelle (University of Paris). This small circle of high-profile law professors immediately drafted a "statute for the European constituent assembly", aimed at the "defence of democratic Europe", the purpose of which was to create "an Authority invested with the political powers and financial means required to constitute and immediately control a European armed force".

With the exception of George Scelle, this small set of legal experts was at the core of the study committee for the European Constitution created one year later, in 1952. Formed at the initiative of the EM, the study committee was composed of Paul-Henri Spaak (chairman) – who had succeeded Sandys as chairman of the EM – Dehousse (secretary general), Henri Frenay – one of the main leaders of the EUF, founder of the Resistance movement Combat, with whom Dulles had been in regular contact since Berne (Belot 2003) – Spinelli, Calamandrei, and Nawiasky, together with four members of parliaments: Pierre de Félice (Assemblée Nationale), Lodovico Benvenuti (Camera dei Deputati), Max Becker, and Hermann Pünder (Bundestag) and two lawyers: Cornelis Van Rij, a member of the bar (who shared this professional quality with Becker, Pünder and de Félice), and Arthur Calteux, a councillor of the Superior Court of Justice in Luxembourg. The committee was also to seek the assistance of two American legal scholars much involved in U.S. foreign policy in Europe, Robert Bowie and Carl Friedrich, and some thirty lawyers and law professors were brought together under their lead, with the financial support of the Ford Foundation and the ACUE, for the purpose of studying comparative models of federalism. The resulting reports soon became a classic in comparative legal literature on federalism, the *Studies in Federalism* (Bowie and Friedrich 1954).

Of the six committee members to hold a parliamentary mandate, five became members of the ad hoc assembly convened from September 1952 to March 1953 to draft a European Constitution for the European Political Community (EPC) to be the common structure of ECSC and EDC: two socialists (Spaak and Dehousse), one liberal (Becker), and two Christian-democrats (Pünder and Benvenuti). Spaak became chairman of the ad hoc assembly, with Lucien Radoux as private secretary (Radoux was himself administrative secretary of the study committee). Pünder became vice-chairman while Benvenuti, Becker, and Dehousse (but also Spaak) were part of the constitutional commission created within the assembly under the chairmanship of Heinrich von Brentano. And all the reports made by the study committee (which continued to meet in parallel) were proposed to the constitutional committee as working documents on the basis of which it was then to conduct its activity.

The draft eventually adopted by the ad hoc assembly bears the stamp of these various political and legal investments. In a very emblematic way, the first words of the text echo those of the Constitution of the United States ("We, The People…"), corrected by a plural that designates all the European States that this constitution

intended to unite: "We, The Peoples of the Federal Republic of Germany, the Kingdom of Belgium, the French Republic …" Prior to the institutional organization provided by the text, the preamble stated how much a free and united Europe would contribute to "civilization" and to the "preservation of our common spiritual heritage", establishing three objectives for the "community" this Constitution intended to create: "the protection of human rights and fundamental freedoms"; "the co-ordination of the foreign policy of Member States in questions likely to involve the existence, the security or the prosperity of the Community"; and "the economic expansion, the development of employment and the improvement of the standard of living in Member States, by means, in particular, of the progressive establishment of a common market" (Article 2). Adopted on March 10, 1953, by the ad hoc assembly, and despite the intergovernmental conference that followed, the "Draft Treaty Embodying the Statute of the European Community" was nevertheless rapidly engulfed by the rejection of the EDC treaty by the French Parliament in August 1954 (Pruessen 1996).

This final setback did a lot to institutionalize the international division of labour that would result in separate European organizations, the CE, the ECSC, and later the Western European Union (1955) and the European Economic Community (1957).

From Politics to Law: the Constitutionalization of the Treaties

One of the side effects of EDC's failure was that it transferred the question of the "constitution" of Europe from a political arena to a legal one. While the question of inter-institutional relations between the Council of Europe and the European Communities always remained a problem, and in particular the relations between the ECJ and the ECHR, these legal institutions became a site of definition of their respective organization as a whole. At the ECJ, for instance, the judges and advocate generals themselves, but also the Commission and the States constantly struggled to define according to their own interpretation of the treaties the "nature" of the ECSC and later the EEC.

In particular, while the ECJ[7] endorsed the qualification of a "constitutional charter" to designate the founding treaties of the European Communities only very recently[8], this issue first appeared on the legal agenda 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 American law professors, such as 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 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)[9].

It is indeed this legal fiction of a constitutionalism without constitution ("as if") that logically authorized the shift from constitution-making to constitutionalization. As another Advocate General, Federico Mancini (who happened to be advocate general in the above-mentioned case of 1986 *Parti écologiste "Les Verts" v. European Parliament*), 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). In the complex competition that started to oppose Europe to the United States in the late 1950s, however, this legal fiction of federalism without federation emerged as a sort of law-based Europeanism, which Lagrange then summarized

[7] Created in 1951, the Court of Justice of the European Coal and Steel Community later became the Court of Justice of the European Communities. For the sake of simplification we will not distinguish between the two and use ECJ (European Court of Justice) as an acronym for both.

[8] It was in a decision of April 23, 1986 *Parti écologiste "Les Verts" v. European Parliament* that the ECJ first referred to the Treaty of Rome as a "basic constitutional charter". This semantic 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 sphere to the political sphere at the end of the 1990s. See: Cohen and Weisbein (2005); Cohen (2007b).

[9] 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 (Autret 1996).

in very direct terms: "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" in which the European norm would be situated at the top of the hierarchy of norms must simultaneously be understood, in its specific 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 the ECJ's rulings as the supreme rule of law in Europe was also a matter of "self-positioning" for the ECJ's new judges, who were 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

As a group, the judges and advocate generals at the ECJ 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; Feld 1963) – and more so when compared to the commissioners and judges of the European Court (and Commission) of Human Rights in Strasbourg (Cohen and Madsen 2007). 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. 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, were members of the highest judicial institutions of their respective countries at the time of their appointment to the ECJ: the Italian Court of Cassation (1949), the German Federal Court in Karlsruhe (1951), and the Superior Court of Justice of Luxembourg (1944). Another noteworthy career path towards 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 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. At the opposite end of the spectrum, the Belgian judge, Louis Delvaux (1952-1967), and the "Seventh" judge, Petrus Serrarens (1952-1958), both had pursued political careers before being appointed to the Court. A doctor in law and practicing lawyer, Delvaux had been a Belgian MP (1936 to 1946) and a Minister of Agriculture (1945) before returning to private practice and taking up a number of administrative 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. While the judges had pursued relatively different national career paths prior to appointment to the ECJ, most of them had in common an experience with international law and politics, including treaty negotiations and drafting. In the case of Pilotti, his involvement on the interwar international legal scene practically made up a whole "second career" that ended up in 1949 with his appointment to the Permanent Court of Arbitration.

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 1963 (Maurice Lagrange) and 1973 (Karl Römer). By 1967, with the exception of Advocate General Karl Römer, the Court had been completely renewed. In fact, by 1963-1964, at the time of the landmark decisions of Van Gend & Loos and Costa v. Enel, 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) was a member of the Italian Court of Cassation, as prosecutor and then judge, before he succeeded Pilotti; Robert Lecourt (1962-1976), barrister, member of the French Parliament from 1946, had been Minister of Justice several times before he succeeded Rueff; and Walter Strauss (1963-1970) 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 forty when he became the Dutch judge. Son of the president of the Dutch Court of Cassation, 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), former director of the legal service of the High Authority (who had replaced Serrarens). Replacing Rossi, Riccardo Monaco (1964-1976), had been professor of international law since the early thirties, before he became magistrate, member of the Italian Conseil d'Etat, and of the Permanent Court of Arbitration.

The social recruitment of the ECJ was even more heterogeneous when compared to the first judges of the European Court of Human Rights in Strasbourg (Cohen and Madsen 2007)[10]. From the outset, the ECHR recruited a more academic-oriented batch of judges. Of the first fifteen judges of the ECHR, nine were coming from academia, and for the most part specialized in international law: Kemal Fikret Arik was professor of private international law and Dean of the Faculty of Political Science at the University of Ankara; Frederik Mari Van Asbeck was professor of international law at the University of Leyden; Giorgio Balladore Pallieri was professor of public international law and Dean of the Law Faculty of the University of the Sacred Heart in Milan; Ake Ernst Vilhelm Holmback had been Rector of the University of Uppsala, and Georges Maridakis, Rector of the University of Athens; Hermann Mosler was professor of international law at the University of Heidelberg (and a member of the German delegation to the negotiation of the Schuman Plan); the proactive Henri Rollin was professor of international law at the University of Brussels; the Danish legal philosopher and expert of public international law and Constitutional Law, Alf Ross, was professor at the University of Copenhagen; the eminent expert of public international law, Alfred Verdross, was Dean of the Law Faculty of the University of Vienna. Magistrates were a minority: Einar Arnalds (Civil Court of Reykjavik), René Cassin (Vice-President of the French Conseil d'Etat) – who was really at the crossroads of academia and the judiciary –, Lord McNair (former President of the International Court of Justice), Eugene Rodenbourg (President of the Court of Luxembourg), and Terje Wold (President of the Supreme Court of Norway).

In many ways, conversely, the social recruitment of the High Authority (HA) of the European Coal and Steel Community tends to overlap with ECJ's. Of course, the HA had no professional magistrate among its members, but some had had a legal training (in 1956, before the EEC Treaty was signed, 5 out 7 members of the ECJ had legal diplomas, while only 4 out of 7 of the HA), but some had very similar professional backgrounds. Chaired by Jean Monnet (1952-1955) and later by René Mayer, 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 (Chemins de Fer du Nord), 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 – 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 (a German lawyer) and Albert Coppé (a Belgian economist), as well as Enzo Giacchero (an Italian engineer and professor at the University of Turin), were also members of parliament since after the war. Some of the members of the HA had more expert professional backgrounds in the sector of coal (Léon Daum was a mining engineer, former chairman and member of the board of French prominent industries, like Solac and Sidelor) and steel (Heinz Potthoff had had a long career in the steel industry before he joined the Nordrhein-Westfalen Ministry of Economic Affairs in 1946). But Paul Finet was really Serrarens *alter ego* as general secretary of the General Labour Confederation of Belgium (FGTB) and chairman of the International Confederation of Free Trade Unions (CISL), and Dirk Spierenburg was Van Kleffens' double, entering the Ministry of Economic Affairs in 1935 after having worked in the private commercial and industrial sector.

Their collective involvement on the international scene is quite important too, as representatives of their national States in various international or European organizations (United Nations, Organization for European Economic Cooperation, Ruhr Authority), or as members of transnational institutions (International Labour Office, Consultative Assembly of the CE). But it is crucial to underline that while, at the ECJ, only Lagrange could claim to have been part of the negotiation of the Schuman Plan – on a rather informal, though decisive, basis –, 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 on behalf of Sollac. It is even

[10] The ECHR was inaugurated only in 1958. See: Madsen 2005.

more crucial if we include the directors of the various divisions created at the HA who were one way or another involved with the negotiation: Max Kohnstamm, secretary general of the HA and director of the Press and Information service, Uri (Economy service), Hamburger (Cartels and Concentrations service), Rollmann and Vinck (Market service), Wagenführ (Statistics service), and Balladore-Pallieri (Personnel and Administration service).

The early differentiation of the two Courts in terms of social recruitment is a key to understanding the quite different paths of legalisation of the treaties taken by EC law and HR law (Cohen and Madsen 2007). While the ECHR developed a rather abstract body of noble principles in the tradition of *international* law – largely inherited from the interwar period (Koskenniemi 2001) –, the ECJ developed a much more practical jurisprudence with clear references to *internal* law. Maurice Lagrange many times insisted in his 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, in fact, the judges and advocate generals of the ECJ were for the most part specialized in public or private internal law of their respective States. At the same time, 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 internal 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* with a *comparative* method. 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 on the intention of the framers as to the ultimate goal of this Community: a Federal Europe.

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 the Costa case 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)[11]. 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 internal logics of the institution. Manifest in its landmark decisions (including in the decision-making process within the Court: Rasmussen, forthcoming), these tensions defined the main visible 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 their nomination is 55-56 – Miguel Maduro (Portugal) being the youngest advocate general ever appointed, at the age of 36 in 2003, while Pranas Kuris (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, 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

[11] 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).

them still being in office, which means that only two women were appointed in the period going from the early fifties to the late nineties (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 (and provisionally) 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 in office (with the exception of the six members still in office appointed during the third period). The first and second periods respectively run on twenty and sixteen years, and include twenty-two and twenty-four individuals each, the third period runs on thirteen years, and includes thirty-three 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[12], four career paths can be roughly and briefly distinguished, that are both dominant and evolving over time. Actually, these career paths remain the same as in the early days of the Court: the judiciary (either public or private, like, in the French case, the members of the Conseil d'Etat and the members of the Cour de cassation, following a succession that opposes the first and the second period), the administration (mainly the ministry of Justice or Economic Affairs, more rarely of another sector), academia, and politics. 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. 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 depolitization than the European Commission during the same period (MacMullen 1997). Actually, appointments of 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.

Finally, whereas, in the first period, obviously, none of the members of the Court had had previous functions at the Court, and, in the second period, only two (Alberto Trabucchi, as we saw, was 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 judge Francis Jacobs (1988-2006) was référendaire for Jean-Pierre Warner (1973-1981); the Danish judge Claus Gulmann (1994-2006) was a référendaire for Max Sorensen (1973-1979) before becoming advocate general (1991-1994) and then judge; the advocate general of Luxembourg Jean Mischo (1997-2003) was judge from 1986 to 1991; the British Judge Gordon Slynn (1988-1992) was advocate general from 1981 to 1988; as well, the Belgian Judge Romain Schintgen (1996-) and the British judge David Edward (1992-2004) were respectively judge at the Court of First Instance from 1989 to 1996 and from 1989 to 1992.

Conclusion

While the political ambition to give a Constitution to Europe misfired in the 1950s, this initial failure accounts for the international division of labour that resulted, 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. By analyzing the recurrent investments of specific social groups – and particularly of legal agents – in such transnational mobilizations, one can also understand how a series of

[12] Reflecting somewhat typical national career moves: 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…

State knowledges that were invented in the context of the formation of the parliamentary State were later to be reinvested at the international level (Dezalay 2004). In fact, 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. Likewise, the international transactions between different social groups pursuing very different interests in their respective fields of power could account for the institutionalization of transnational organizations through which these groups could more efficiently lean on each other in their respective national political struggles.

The structuration of a European transnational space in which the mechanisms of competition between nation-States could now 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 (Elias 1974, 1975, 84) or, in other words, the dissociation of pure force, which traditionally had defined international relations, on the one hand, and law, on the other, which now defined the legitimacy of political and economic action at the international level, led to the expansion and exteriorization of national economic administrations into transnational organizations and also to the creation of a body of specific legal norms through which lawyers could reproduce their power over the State. In promoting a transnational constitutional ideology, through the production and dissemination of a theory of legal and political order with which new "bottles" could be filled with old "wine" by borrowing from the different existing politico-legal repertoires and by articulating the different elements taken from these repertoires, legal agents followed the same path taken by their ancestors (Kantorowicz 1961; Hanley 1983): they produced "some State" (Dezalay 1993, 3).

In short, while the genesis of Europe's constitutional agenda was 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). It could be argued that these tensions so strongly determined the internal logics of the Court, as they determined the general dynamics of the field, that they must have had an influence 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.

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