Contents

INTRODUCTION
Lawyers and European Legal Integration
Introduction to the Issue
Alex Jettinghoff 3

EUROPEAN INTERNATIONAL LAW
European Constitutionalism at the Cradle
Law and Lawyers in the Construction of a European Political Order (1920-1960)
Mikael Rask Madsen, Antoine Vauchez 15

EUROPEAN COMMUNITY LAW
Regulatory Entrepreneurs and the Commission
The Case of the DG Environment
Mark Stout 37

The Brussels Law Office
Between Realism and Functionalism
Robert Lee 65

Lawyers, Networks and EU Race Equality Law
Iyiola Solanke 87

EUROPEAN PRIVATE LAW
Professorenrecht?
The Field of European Private Law
Harm Schepel 115

The Common Core of Trento
A Socio-legal Analysis of a Research Project on European Private Law
Agnes Schreiner 125
## Contents

**LEGAL EXPORT**

Western Legal Experts go East  
The Dutch CILC Organisation and Legal Reconstruction in Central and Eastern Europe  
*Alex Jettinghoff*  
143

**LEGAL HISTORY**

Lawyers as Political Entrepreneurs?  
An Historical perspective on the Contribution of Lawyers to Legal Integration in Europe  
*Peter van den Berg*  
163

About the Authors  
191
INTRODUCTION
Lawyers and European Legal Integration

Introduction to the Issue

Alex Jettinghoff

The abhorrent experiences of the two World Wars and the collective trauma of the Depression during the interbellum, have resulted in initiatives to prevent future war, to protect human rights and to warrant prosperity. At various moments during the twentieth century, politicians of the victor countries reached for intergovernmental or supranational fora, where dangerous conflicts could be resolved, rogue governments could be corrected and free trade could be restored. For these ends various institutions have been established. Some, such as the League of Nations and its successor the United Nations, had a universal scope. Curiously, others had a more regional application. The Council of Europe and the European Union can be regarded as examples of the regionalisation of international politics and, eventually, law.

In the efforts to institutionalise peace and prosperity in Europe, lawyers seem to have seized an influential role. They emerged initially among the promoters and institutional designers, and later became prominent operators inside the institutions that had to turn the good intentions into a fruitful practice. Thus, they made a career out of serving a great cause. More importantly, their work appears to have affected the landscape of legal science as well as the political and legal order of the nation States of Europe.

In this special Issue we want to explore this European line of lawyers’ work. There is considerable justification for this attention. Some reasons for attention are of a more theoretical nature, another is derived from the recent history of European integration. Therefore, before we turn to the individual contributions collected here, we will explain the reasons for this exploration of the role of lawyers in European legal integration.

1. Historical Parallel and Socio-legal Theory

The first ground justifying attention for the role of lawyers in European integration can be found in historical comparison. When trying to get a grip on European political and legal integration it seems natural to turn to the past. Political and legal integration are not entirely new phenomena. The process of political centralisation, that historical sociologists have called the ‘process of state for-
mation’ in Europe, offers an obvious parallel. In the history of European state formation, lawyers have been among the influential players among the forces of political centralisation. State formation provided opportunities for lawyers, mostly people of burgher origin, on account of their training in practice or at a university, to advance towards important (and rewarding) positions in the central administration, especially in and around the royal law courts. This expert stratum gradually replaced uneducated nobility and furthered the introduction of written records and decision-making on the basis of authoritative texts and precedents as means of governance. Although nominally the king’s servants, they were rather successful in gradually sealing off their work from ‘lay intervention’ of their monarchs. The close relation that developed between state and law gradually affected both deeply. The state was transformed by law, because learned law became a prominent language and conceptual toolbox of political legitimation of political order and decision-making, facilitating both the expansion of rule and the challenge of political discretion on the basis of sacred text and precedent. In its turn the state affected law. While originally rulers had been primarily regarded as the protectors of the feudal order and thus also as the protectors and enforcers of its fragmented legal traditions, they were transformed in later centuries into the makers of law, into legislators. The period of codification since the eighteenth century meant the completion of this transformation by establishing the monopoly of the nation-state to make law. This history of European states has invited comparison with the process of European integration. One obvious similarity is the constitutive part played by lawyers in both developments. A recent example is Puntscher Riekmann, who characterises both EU-laws and the legal traditions of the later Middle-ages and the early modern period as Juristenrecht, lawyers’ law. In the early phases of European state formation the new legal order was not created by imperial, royal or

3 Poggi (1990), op. cit., 28 ff.
5 Cf. the contribution of P. van den Berg in this Issue
7 Puntscher Riekmann (2000), op. cit., 142-143.
papal decree, but foremost slowly emerged out of the daily legal practice of lawyers, such as judges, advocates, counsellors and teachers. According to her judgement, the development of EU-law reveals a similar development, especially under the guidance of the European Court of Justice in Luxemburg. Both developments highlight in her opinion the ‘power of lawyers’. Implied is clearly, that the activities of these lawyers working on European projects demand our attention.8

There is a second approach that also leads to attention for the role of lawyers in European legal integration. It is socio-legal theory adopting a Bourdieu-sian perspective. At the moment this appears to be the most prominent socio-legal perspective to focus directly on the role lawyers in establishing new areas of legal expertise. This approach has received a boost by a series of studies by Garth and Dezalay on role of lawyers (especially those working in international organisations and multinational law firms) in the establishment of a ‘world legal field’ in the context of expanding international markets.9 The intention is to avoid vague notions such as ‘globalisation’, “to return to the more concrete strategies of agents, themselves defined by their dispositions (linked to a social position and a trajectory), their assets and their interests”.10 The central concepts of Bourdieu’s reflexive sociology: field, actor, habitus and social capital, can also been applied to European law. This is exemplified in an article by Schepel and Wesseling on the ‘European legal community’.11 One of the main points that they wanted to establish (on the basis of an analysis of the contents of a selection of leading European law journals) is how legal actors in the Luxemburg Courts, the Commission, the Law Firms an in Academia have concurred (as a legal community) in creating a strongly cohesive legal field. This community is homogeneous in the sense that it “identifies with the project of European integration both intellectually and socially, and that identification expresses itself in a widely shared conception of law and of what law can and should do”.12 The ‘habitus’ (defined as a widely shared basic mindset) of the European legal community is depicted as one that “depoliticises European integration by creating an opposition between a realm of European ‘law’ as a ratio-

12 Ibid., 176.
2. Lawyers and European Legal Integration

Against this more general backdrop, a particular development triggered the initiative for this issue. This development is a movement among civil lawyers, discussing the possibility of a European Civil Code.\(^\text{14}\) On the one hand, for continental lawyers codification is a very ‘normal’ notion. The history of codification is one of the master narratives of the civil law profession. Legal codes have become almost self-evident institutional furniture in the nation State in continental Europe and many other States all over the world. And lawyers have played a central role in their construction and diffusion. So the association of political centralisation in the EU with codification seems only natural.\(^\text{15}\) On the other hand however, the suggestion of codification appears a little farfetched, considering the history of European integration. Usually codification implies exclusivity of legislative authority and that would be a step far beyond where the present Member States have so far been prepared to go.

What is particularly striking in these initiatives is their entrepreneurial quality. Apparently, in line with the standard set by the European Court of Justice, we have here another group of lawyers looking for an opportunity to advance a centralist legal innovation at the European level. This development makes one wonder whether there is more of this going on in Europe than can be readily observed by the outsider. The Bourdieusian logic of the competitive establishment of legal fields might suggest there is. Puntscher Riekmann seems to agree, when she quotes the legal historian Koschaker, stating that ‘lawyers’ law’ has an inclination towards centralism.\(^\text{16}\) But we need more evidence, before these suggestions can be accepted.

Therefore, we have meant this issue to be an exploration of some departments in the European legal field, where enterprising lawyers have been, are or might be furthering European legal integration. We are curious about the motivation and methods of initiatives in that direction. A further issue is what opportunities they exploit and how they deal with the obstacles encountered in the process. Finally, the likely results of the described efforts have to be considered.

Because of the exploratory nature of this collection, there is no common conceptual framework for the contributions. The authors have employed various approaches to order and make sense of their findings. The concept of ‘le-

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13 Ibid., 186.
gal integration’ can best be understood here as a continuum of national differentiation with transnational unification at one end of the scale. By ‘lawyers’ we generally mean people with an academic legal education, but here and there we have loosened this conceptual noose to include promising topics. Also, the contributions are not confined to lawyers working the field of European Community law alone.

3. In European Legal Fields

European legal integration is not only the exclusive interest of lawyers working in the field of European Community law. The ‘Europe’ in ‘European legal integration’ is not defined by the ‘Europe’ of the Community, however flexible it proves to be. Other lawyers, like those in the field of international law or occupied with comparative private law, are also involved in ‘European legal integration’. Therefore, we have included a contribution on lawyers working on the wider Europe of what was to become the Council of Europe, and another on Western legal experts travelling towards the wider Europe of ‘Central and Eastern Europe’.

In the first contribution, Madsen & Vauchez return to the emergence of ‘Europe’ as a region of international law and a regional political entity. This regionalisation of international law and politics is to be understood as a reaction to the decay of European imperialism, the result of the two World Wars and the ascendance of the United States, demanding the European powers to de-colonise. Madsen & Vauchez address roughly the period 1920-1960. In this period the relation between law and politics was in flux and this allowed the pioneers of European law to try to get a grip on the construction of a European polity. Two case studies are analysed to explore the conditions and tactics that could favour such aspirations. The case studies concern the ‘Briand-Project’ on a Federal Europe (1929-1930) and the drafting and institutionalisation of the European Convention of Human Rights (ECHR) in the period directly after the Second World War. The Briand Project was an eminent opportunity for a small group of international lawyers to construct an institutional framework for a politically integrated Europe on the basis of equality. One of the results of their efforts was that legal expertise gained credibility as an instrument of diplomacy. Some of the basic ideas developed during this period (especially that of a

17 Until quite recently the European Community was largely defined by the contentious relations between West and East. The astonishing end of the Cold War has resulted in a dramatic political redefinition of ‘Europe’, with the extension of the region still in progress. Even the last EU enlargement of 2004 is not necessarily final. Turkey has presented itself forcefully as accession candidate. The upcoming referenda in some Member States on the Constitution (in the course of 2005) may in fact come to reflect the voters’ attitude on Turkey’s future EU membership. And Oleg Rybachuk, chief of staff of Yuschenko, the leader of the Orange Revolution in Ukraine, was recently quoted saying: “We’re not going to merely knock on the European Union’s door. We’re going to knock it down.” Newsweek (Dec. 2004).
Common European Court) were to return after the Second World War, when a new effort was made at European institution building. Although the initial proposals of the legal experts were subjected to close political scrutiny due to their political sensitivity in the context of the Cold War, the work of legal experts could gain more autonomy later during the process of institutionalisation, and still more when the institutions were in operation.

The next three contributions concern the field of European Community law. First Stout tries to answer the question how the section of the Commission services he studied, the Directorate General Environment, could develop into the impressive regulatory production unit that it has become. On the basis of extensive interviews, he reconstructs the inner dynamics of the production of regulatory proposals in DG Environment. An important part of his answer concerns the influence of what he has called the ‘regulatory entrepreneurs’ of the DG. They are the officials (‘desk officers’ and ‘heads of unit’) responsible for drafting legislative proposals in the policy area of the DG, with the intention of having these proposals approved later as a Commission initiative. They use their qualities and resources to select promising issues for legislation, make a draft proposal and manoeuvre the developing dossier up the hierarchy towards approval. The road to approval is long and full of hurdles and the officials employ all kind of tactics to negotiate these, often with success. A very striking and central element in his account is the fact that these officials work in (and are selected for) the context of an organisational setting that makes an entrepreneurial attitude indispensable for a DG and sets a high value on the officials who exhibit it. This is due to the fact that in the Commission, the production volume of accepted regulatory proposals by a DG has until recently been taken as the indication of success for this DG. This standard plays a decisive role in the competition between DGs for funds, for staff expansion and tends to reward and attract what he calls ‘regulatory entrepreneurs’ in the ranks of the officials.

Next, Lee examines the work of the lawyers of Brussels law office, lawyering mainly for transnational business corporations. The work of the Brussels law office is to collect and digest the flow of EU information of relevance for their clients and securing access to the deliberations on EU legislation representing individual or sectoral business interests (a.k.a. lobbying). Typically, they are law offices being parts of the larger international or multinational law firms involved in cross border trade and corporate or commercial transactions. The Brussels law office is usually a small cog in a large international (law firm) wheel. This is due to the fact that the work the office does is not very profitable compared to other lines of work within these firms. Lee perceives a paradox in the efforts of the Brussels law office in relation to the apparent interests of the larger law firms that they are a part of. These law firms derive much value from the differences between national legal orders and are therefore served by the retention of these national systems. The lawyers of the Brussels law office however, no doubt in the interest of their corporate clients but also because they have become part of the Brussels circuit, will be engaged in the harmonization policies of the EU diminishing the national differences.
In the contribution of Solanke the focus shifts to another group of European Community lobbyists, the so-called ‘cause lawyers’. Cause lawyers strive to ‘deploy their legal skills to challenge prevailing distributions of political, social and economic and/or legal values and resources’ wherever inequities are found. Their actions are not confined to litigation, cross national borders and can concern the omission of legal rules as well as challenge existing ones. Solanke has studied the exploits of one particular group of cause lawyers who, in a concerted operation with a network of anti discrimination organisations (together the Starting Line Group or SLG), have played an important part in the adoption of the ‘Race Directive’ in 2000, establishing a minimum level of legal protection against racial and ethnic discrimination for persons within the EU. She analyses what motivated this group and by what methods and strategies it tried (over a long period) to succeed in its objective, the adoption of the Race Directive. The involvement of the group in this action was a reaction to the initiatives to create a Single Market in Europe. It was feared that the new freedoms would not be equally available to racial and ethnic minorities. Another important element in what has turned out as a success story, is the leverage provided by the European Parliament for putting racial discrimination on the European agenda. The emergence of right wing political parties in the E.P. since the mid 1980s gave cause for concern and also a stimulus for action in a neglected policy field. The E.P. was instrumental in constituting a consensus among the EU legislative institutions that there was a problem here. This created an opportunity for the SLG for initiatives. Shrewd tactics eventually resulted in amendment of the Treaty of the EC and the sought Race Directive.

The following two contributions consider the legal circles that whipped up the discussions about a European Civil Code. Over the last decades the lawyers participating in these discussions have constructed a relatively new field of legal expertise, the field of ‘European Private Law’. Schepel gives a critical analysis of these developments and the lawyers involved in it. An important element in his account of events is that the discussions and activities concerning the Code were the result of sustained concerted action between some comparative and private law professors and representatives of the European Commission, dating back to the mid 1970s. The Commission provided the funds to get the activities started. Since then a whole new European private law industry has emerged at the university. Schepel points out that the relation between this new field and the established field of European Community law is a competitive one. The Community lawyers are practical and technical engineers of the Common Market. The European comparative and private law professors are opposed to the piecemeal tinkering of regulations and directives that upsets the coherence of the national systems of private law. In their view only a European science of private law can remedy these ailments. In the mean time, the idea of a European Civil Code seems to have stranded since it became clear that it had little practical value in terms of the Single Market. This battle lost, European private lawyers seem to have taken their cause home, to the Law Faculties. They have – with the help of Community funds – taken it upon themselves to
uncover the common private law rules and principles of Europe, manoeuvring in the process national private law experts in defensive positions.

Where the paper of Schepel is more of an overview and analysis of the various initiatives developed in this field, Schreiner focuses on one particular group, the ‘Trento Group’. In her paper Schreiner gives a detailed account of the participants in the Group and their motives, the funding of the research, the working method and the results. The official goal of the Group is to make a ‘geographical map of the law of Europe’. The method used to make such a map is the analysis of cases concerning tort, contract and property and a comparison of the ways similar cases would in all probability be handled in the jurisdictions of the European Member States. This method is supposed to reveal the ‘common core’ of European private law. Apparently, this Group has understood that the prospects of a common code are dim. The work of the Group primarily intends to be an educational experience for the participating scholars. The results might be used for harmonisation or unification, but that is explicitly not the concern of the Group.

Comparative private law experts also play an important (though not exclusive) role in the paper of Jettinghoff. They appear among legal experts involved in legal assistance projects in Central and Eastern Europe. The collapse of the Soviet regime and the subsequent preparation in many of the former Soviet satellite states for accession to the EU, have resulted in considerable traffic of Western legal experts to various Central and Eastern European countries (CEECs). Jettinghoff describes the activities of one of the Dutch organisations (the Center for International Legal Cooperation – CILC) involved in mobilising legal expertise for CEECs. He is mainly interested in the question whether these lawyers have influenced the direction of these assistance efforts in terms of the countries selected. The collected data suggest that CILC works in the shadow of Dutch foreign politics and that the lawyers recruited to execute the projects generally have not much influence on the selection of countries and projects. Also the shaping of the projects is mainly directed by the ‘demand’ of the CEECs. Jettinghoff traced a few important exceptions to these rules, however. The net result of the accession-related legal reconstruction efforts in terms of legal integration appears to be ambivalent. The quasi imposition of the acquis may be expected to have a harmonising effect. Also other reconstruction targets, like the re-codification of national private law and administrative law will bring these Eastern law regimes more in harmony with Western models. But at the same time a great variety a national differences appears to become entrenched.

The issue is concluded by Van den Berg. He makes an analysis of the historical trajectories of legal unification in the States of Europe (mainly France and the UK) in order to fathom the influence of lawyers in the processes of European State formation and to evaluate (by means of comparison) the chances of success of contemporary initiatives concerning the European Civil Code. In his analysis lawyers have in several ways been important for State making. They have made states providers of a more attractive quality of justice than local institutions could provide; lawyers came to the fore in periods of
constitutional uncertainty; and they played an important role in the opposition to the State. Considering the short history of European integration, Van den Berg suggests that also in this process of centralisation lawyers play a crucial role on all three points. The role of law and lawyers is the more important since the military method, so important in the history of the States of Europe, has been neutralised in the contemporary European context. He judges the unification of European private law, however, to be too much an essentially political issue for national politicians to leave it to be decided by legal experts alone.

4. In Conclusion

We are aware of the fact that this Issue is far from a full account of the role of lawyers in European legal integration. We have not included a contribution on the European Court of Justice because it already has drawn much attention. Other legal circles, like the lawyers working on the Convention and those working in legal education, might have been included if we had tracked appropriate authors in time. Thus the search for some common ground in the papers can only arrive at tentative conclusions. We will offer three.

First, the contributions to this special Issue suggest that the constitution of European ‘legal fields’ may involve the deployment of initiatives in various directions. From the perspective of the lawyers involved, establishing a legal field may require initiatives on a diversity of ‘fronts’. One such front is facing the ‘lay people’. In the paper of Madsen and Vauchez on the Briand Project and the ECHR, politicians were the lay people to be convinced that the design and institutionalisation of the projects needed considerable input from legal experts. Legal expertise is developed by means of familiar processes: in international networks that organise conferences and found expert journals. That initiatives on this front are not necessarily successful is shown in the papers concerning the European private lawyers. They may eventually be successful however on another front: the colleagues at the Law Faculties. The expertise developed in conferences and expert literature can also be instrumental in establishing a position there as a new transnational discipline vis-à-vis the already established national private law disciplines. A possible third front is one between legal experts and other experts. Stout mentions an example of such a potentially contentious relation. It concerns the relation between Commission regulatory experts, designing and proposing draft regulation, and Commission economists, subjecting the drafts to cost/benefit calculations. These relations will probably reflect the relative authority of academic disciplines in the political and bureaucratic context. Finally, it is imaginable that the various European legal fields will come to face each other.

Further, when transnational institutions are taking shape, lawyers appear as ‘organisation people’, at work in these organisational complexes or in other organisations related to them. This does not necessarily curtail an entrepreneurial attitude on their side. On the contrary, often the organisations that employ them are dependent exactly on these qualities. The initiatives of Commission
officials, cause lawyers, law firm attorneys and Law School professors are the life blood of the organisations they serve. So if we want to understand the activities of the lawyers, we have also to acknowledge the interests of organisations that employ them and the (cooperative or competitive) relations of these organisations with others. Within these organisational configurations lawyers play an important role in the bureaucratic political processes that may further develop the institutional mission in unplanned fashion. The contributions in this Issue provide some instances these processes. Stout describes the position play of the different DGs inside the European Commission, that he holds responsible for the generation of an impressive (and for some alarming) volume of EU regulation. Solanke provides another example of similar position play between the EP and the other European legislative institutions, inviting regulatory initiatives from lobby circuits.

Finally, all the initiatives indicated here appear to have contributed together to a higher degree of European legal integration. Especially the last EU enlargement in 2004 promises enormous legal harmonisation between East and West. But uniformity is still very far away and at the moment not desired by the CEECs. These new Member States are anxious to retain as much as possible of their newly won sovereignty and this is also expressed in the process of legal reconstruction that is still going on. National peculiarities appear to be cherished. The accession of this large group of Member States will probably further diminish the chances for the adoption of a European Civil Code in the near future. Apart from the fact that the idea is not supported by Common Market interests, codification also has constitutional implications that the national polities of the CEECs as well as those of the older Member States are not likely to voluntarily leave at the discretion of legal experts.
EUROPEAN INTERNATIONAL LAW
1. Introduction

The ongoing debates concerning the new European Constitution Treaty seem to be informed by a set of political dichotomies – intergovernmental v. supranational, liberal democratic v. social democratic, etc. – that share a common blind spot: the tacitly assumed capacity of legal technology – here an uncertain European constitutionalism – effectively and enduringly to organise intra-European affairs, as well as the supposition of this technology’s superiority over other forms of European government. It seems to be virtually beyond discussion whether the articulation of the political preferences of the future architecture of the European Union, its functioning and legitimacy, have to be enunciated in legal terms of the highest order. This place of law at the very core of European politics can be regarded as an impensé of the legal impact on the project of European integration and, at the same time, as a sure sign of its very success.

The mainstream explanations for this legal centrality seem to fall in two groups. One focuses on a common European history and cultural heritage of valorising law and lawyers in the art of governance and institutionalisation of the State. The other emphasises the functional necessity of law, either as a response to growing intra-European economic and cultural exchanges or as an answer in the form of a legal “engine of integration” helping to remedy the insufficiencies of the political promotion and progression of Europe. Somehow such explanations seem to be not only tautological (explaining the centrality of law by its centrality in European history or in the process of European integration), but seem also to underestimate the specific history concerning the particular space that law and lawyers have gradually conquered in the construction of an integrated Europe. Moreover, they tend to take for granted what remains highly under-explained, namely the processes of differentiation and autonomisation of European law and lawyers and the legal interests, often exterior to political positioning and national diplomatic interests, that have driven them. From this point of view, a return to the early history of the construction of Europe may provide a useful perspective on contemporary processes of European unification which
could lead to a more subtle understanding of the dominant role law generally takes in these processes.¹

With the objective of advancing our understanding of contemporary European politics, this article focuses on two different yet interconnected processes which contributed to the emergence of the very idea of European integration in the period roughly delineated as 1920-1960. This move back to the initial history of European unification generally suggests that the imposition of law and lawyers hardly took place as a linear historical progression. This early phase of Europeanisation was marked first and foremost by a high degree of indeterminacy in the critical relationship between law and politics, allowing the pioneers of European law – a group of politically interested and endowed legal experts – to seize the construction of a European political organisation. Conversely, the initial blurriness of the frontiers between law and politics allowed for the constant interplay and crossover between the agents of each side of the fence, contributing, paradoxically, to the simultaneous attempts to differentiate each of these areas of expertise. These basic dynamics of the construction of European legal and political orders raise some essential sociological questions on the conditions of the emergence of a legal ‘science’ providing legitimacy to the European Union as part of an autonomisation process of respectively European law and politics. To provide both an empirical and an analytical account of these problématiques, we draw on research in progress on law and politics in Europe and focus particularly on two case studies: the failed ‘Briand-Project on a Federal Europe’ (1929-1930) and the drafting and initial institutionalisation of the European Convention on Human Rights (ECHR) in the aftermath of the Second World War. Rather than providing a complete analysis, our main objective is to suggest a general research agenda on the origins of European law and politics, their relationship and their transformation. The general thesis presented here suggests that the intensification of political and social mobilisation of ‘Europe’ in its legal and political institutionalisations can be regarded as a basic process of rationalisation in a Weberian sense.² However, the jurists investing in European constitutionalism, a concept with only very vague contours in the period studied here, were mainly politically dependent generalists of law who typically occupied strong positions in their native legal fields with various levels of connections to their national foreign services. The analysis focuses on the relative professionalisation of these actors and on the autonomisation of the law they sought to promote vis-à-vis competing diplomatic and other political interests.

¹ In this regard, please see the set of articles to be published in the dossier “Les juristes et l’ordre politique européen”, Critique internationale, coordinated by Antoine Cohen et Antoine Vauchez.

2. From the Briand-Project to the ECHR: Two Case Studies on the Origins of Europe

As examples of initial processes of Europeanisation, both the ‘Briand-Project on a Federal Europe’ of 1929 and the formative years of the ECHR of the 1950s and 1960s provide interesting accounts of the origins and central dynamics of European law and constitutionalism and, importantly, of the role of lawyers in their development. The debates between learned jurists on the Briand-Project, and in particular on the legal definition of its desired outcome – ‘Union’, ‘Federal Union’, ‘Federation’, ‘Association’, ‘Moral union’, etc. – presented an early opportunity for legal actors to invest in the conceptualisation of Europe as a political entity. More successful than the Briand-Project, the idea of drafting a ‘European bill of rights’ – the ECHR – became the framework for a pioneering codification of European human rights practices in terms of a novel European law which greatly mobilised the international legal intelligentsia. In a way, looking into these two socio-political and legal processes supplies an access to the laboratory of what currently is taken for granted, namely a European law formed by a set of practices and an objectified knowledge capable of withstanding the challenges of European and national political interests and through which one can visualise the political organisation of Europe. This is composed, on the one hand, of a corpus of relatively unified knowledge applied by a community of specialised professionals and, on the other, of a legal community acting with a degree of independence, particularly in regard to the diplomatic interests of their home-country in the maintenance and further development of this knowledge. As we shall return to the specific cases of the Briand-Project and the early history of the ECHR throughout this article, it may be useful first to provide a brief overview of these two moments in the construction of European legal and political orders.

2.1 The Briand Project and the Invention of Europe as a Legal Category

The Briand-Project on a ‘Union fédérale européenne’ provides an interesting account of the genesis of the relations between law and politics in Europe. Importantly, the Project was conceived in a context where the leading body of

expertise on European integration was economics. In the dominant view at the
time, the question of Europe did not appear as a legal one, but rather as mainly
requiring economical tools and concepts. The promotion of the idea of Europe
was, then, in practice led by large corporations (predominantly the coal indus-
tries) and corporate interest organisations. These economic actors vividly inter-
related with each other and contributed to the focusing of the initial encoun-
ters on economic strategies (lowering of tariff-walls, the creation of a customs’
union, etc.) as the means for creating *de facto* integration which would, ulti-
mately, contribute to peace on the continent. Reflecting these stakes, in the ini-
tial phases law was hardly considered as the relevant science of government for
engineering a peaceful Europe. It is in this light that the originality of the Bri-
and-Project presented by the French delegation in 1929 before the General As-
sembly of the League of Nations can be fully appreciated. The Project rejected
these politics of *de facto* economic integration, asserting “the general subordi-
nation of the economic issue to the political issue”. Building on this radically
new European political standpoint, a 1930 Memorandum substantiating and
specifying the 1929 Project laid out a first institutional architecture for a Euro-
pean legal and political order.

A highly novel idea at the time, the key objective was to engineer a Euro-
pean political structure that could ensure an equality of rights among all the
Member States and avoid the hegemony of the large European powers which so
far had structured inter-State relations on the continent. The project was in
many ways preoccupied with finding institutional solutions that would guaran-
tee such a political equality. Thereby, the Project not only offered a first out-

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6 These included the newly created International Chamber of Commerce and Industry as well as a number of associations, ranging from the famous ‘PanEuropa’ to the ‘Union douanière européenne’ to the ‘Coopération européenne’.
7 It should be pointed out that the French Ministry of Foreign Affairs, the Quai d’Orsay, was at the time dominated by the centre-Left politics of the ‘parti radical’. Inspired by the ideas of multilateralism and the so-called ‘esprit de Genève’, the promotion of peace among nations through international political cooperation became a priority. Correspondingly, the Briand-Project was an attempt to transpose the international political ideals of the League of Nations to the new emerging terrain of Europe.
9 In practice, the Project suggested setting up three institutions in order to secure a ‘moral Union’ between European nations, an idea at the heart of the thinking of Aristide Briand: a ‘Conférence européenne’ made up of the Member States; a ‘Comité politique permanent’ in charge of the daily operations of the Union, and a ‘Secretariat administratif’.
10 For example, displaying its vision of a real ‘Conférence européenne’ it recommended that “in order to avoid any form of domination by one of the member States, the presidency should be annual and exercised by rotation.” The same principle was to apply to the ‘Comité politique permanent’. See further the “Memorandum sur l’organisation d’un régime d’Union fédérale européenne”, in A. Fleury and L. Jilek (eds), *op. cit.*
line of a constitutional organisation of a ‘European Union’, but also mobilised a whole new vision of institutional engineering of a supranational political organisation. Because of this emphasis on the political integration of Europe, it also offered an opportunity for jurists – mainly public law professors – to start reflecting on European constitutional law and, more specifically, on a constitutional frame for such a political European organisation. Of particular interest here, jurists from a number of European countries and various ‘Sociétés savantes’ dedicated to international law tried (and mainly failed) to seize this project. In face of this diplomatic move, they tried to build a legal criticism of the project (considering it too vague and too political), as well as showing how necessary legal schemes were, not only in order to be precise about terms, definitions and procedures, but also because of, or in the name of, the superiority of the legal approach to any other way of resolving conflicts. They generally promoted the ‘rule of law’ and specifically the idea of a common European court as the most reliable and durable mode of establishing a harmonious political union. This was regarded as the essential instrument for solving, in a more efficient way than the various institutional and political “tricks” suggested by the Briand-Project, the conflicts inherent in the idea of European integration, including hindering any predominance of the large European powers within such a ‘Union fédérale européenne’. Despite the short life of the Briand-Project, in regard to the subsequent European construction it was a critical moment in respect to the legal categorisation of Europe and, more generally, in the mobilisation of a European political project using constitutionalism.

2.2 The ECHR – Human Rights in the Genesis of Post-War Europe

The drafting and institutionalisation of European Convention on Human Rights (ECHR) provides a different, most conspicuously more successful, instance of the advancement of the legal integration of Europe. Yet, a number of the dynamics of the Briand-Project were replicated, particularly as concerns the interface of law and politics, as well as the legal strategy of promoting a central Court (and Commission) to uphold and police the project. The contexts and the scopes of the two projects were, however, significantly different. This influenced the political stakes and ultimately the concrete legal innovations coming out of the ECHR. Above all, the ECHR, as well as the Council of Europe, continued an idea already initiated by the UN of building international cooperation and law in order to safeguard against a repetition of the Second World War. Reflecting this specific post-war sentiment and its European particularity, the ECHR project was regarded as a particularly suitable instrument to prevent new fascist atrocities.11 The rapid drafting of the ECHR further reflected the new

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11 Another more immediate concern, among the many resistance fighters participating in the negotiations, European human rights provided the concrete measures to remedy the odious protection of fundamental rights that the ‘occupied’ legal system had furnished during WWII. A good account of WWII justice is found in A. Bancaud,
fear of Soviet expansion into Western Europe. Indeed contrary to the universalistic rhetoric deployed at the UN during the drafting of the Universal Declaration of Human Rights (UDHR), the ECHR itself and the Treaties establishing the Council of Europe applied a deeply Westernised vocabulary of ‘liberty and democracy’. The ECHR was, in other words, drafted in full Cold War-mode and virtually constituted a continuation of the resistance fight against oppression and foreign occupation. But for these reasons, the ECHR was not to be paralysed by bloc politics as had happened to the UN Human Rights Commission in charge of the UDHR. Even if some of these original objectives were lost along the way, the ECHR was also an element of a larger European scheme for developing a geo-political European alternative, a European ‘third position’ which required European integration and cooperation. But, as we now know, European economic and political integration was in practice to find a different venue in Brussels, whilst Strasbourg became the new capital of European human rights.

As with the negotiations of the Briand-Project – or indeed the reactions to the Project by the community of legal scholars with international and European interests – the ECHR offered a chance for jurists to develop and impose their expertises in the pursuit of European unification. Given the specific context and political stakes, this group of actors comprised a number of ‘resistance lawyers’ such as the French resistance leader and Christian Democratic Minister of Justice, Pierre-Henri Teitgen, but also leading jurists with good command of the political game such as the British Conservative and barrister, Sir David Maxwell Fyfe, and the Belgian professor, Fernand Dehousse, all belonging to the ‘International Juridical Section’ of the European Movement. The drafting of the ECHR took place in a new, more coherent European policy space than had been the case with the Briand-Project. In practice, whereas the jurists provided a great deal of the finer details, as well as the innovative idea of a Court, their endeavours were subsequently screened and fine-tuned by the Conference of Senior Officials before being put before the politicians. At this stage, due to the political importance attached to the ECHR, the autonomy of the legal expertise was in many ways limited. Subsequently, however, in the institutionalisation of the Convention, the jurists gained a far stronger presence and more direct influence. Operating in an altogether different configuration of politics and law, the network of jurists – predominantly law professors – appointed to carry out this task gradually helped turn the political master-plan of the ECHR into solid law, taking off in the 1960s and going so far as to actually challenge the conduct of some leading Member States. Together with the parallel projects undertaken in Brussels, this was the first indication of a growing force of European law.


3. From International to European Affairs: Outline of a Structural Framework

These early events in the process of Europeanisation illustrated by the Briand-Project and the ECHR were more than just historical preliminaries to the current debates; they are illustrative on the way that “legal thinking” on Europe and the associated set of actors – European jurists – emerged as distinct categories. There are indeed some noteworthy similarities between the arguments and institutional solutions put forward during these two formative episodes and the ones evoked more recently in the intervention of law and of lawyers in the building of a new European Constitution. The original genesis of a European constitutionalism, of a rationalised and systematic set of legal rules concerning the organisation of intra-European relationships among States, has generally to be related to the broader socio-political processes that made it perceivable as a specific topic of interest in the form of a new field of application of legal expertise. In a context where law professors tended to regard themselves not only as legal scholars but also as experts of politics, as well as international advisers of governments, the transformation of the geo-political context from the inter-war to the post-war period greatly structured the way these key actors defined their subjects and venues. Generally, the rise of Europe as a legal subject reflected the transformation of the international field with the decline of the European imperial powers and the emergence of new terrains for international influence. We can briefly chronicle the structural framework of international legal invention of Europe.

Already in the 1920s, European jurists with a taste for international law – for example those gathering at the various learned societies like the Institut de droit international founded in 1873 or the Union Juridique Internationale founded in 1919 – were more and more obliged to start perceiving themselves less like the guardians of doctrine and the “legal conscience of the civilized world” involved in a mission to spread (legal) civilization throughout the world, and more as a group of European lawyers increasingly investing in European affairs. This mirrored a larger geo-political context. The League of Nations itself was progressively loosing legitimacy to speak in the name of the ‘international community’ in the 1920s and looked increasingly like a predominantly European organisation: the absence of the United States, the gradual withdrawal by many Latin American states during the 1920s as well as the critical entrance of Germany in 1926 confirmed this trend. This process of nar-

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14 Although most of Central and Latin American States had initially taken part to the League of Nations, they gradually withdrew from the international organisation in the 1920s: Argentina left in 1920, Peru and Bolivia in 1921, Costa-Rica in 1924 and finally Brazil in 1926.
rowing European ambitions to the continent itself (and its colonies) was in a way exacerbated by the fact that, on the other side of the Atlantic, the strategies of Pan-Americanism enjoyed a certain success. Very much contrary to the inertia marking the League of Nations, the different inter-American conferences were leading to concrete results, especially in the area of law: the advancements of the codification of Pan-American law, the development of institutions of arbitration among American States, etc.\textsuperscript{15} What emerged was almost a competition between a European-dominated League of Nations and a rising Pan-American Union, a competition and growing separation also visible within the community of international legal scholars: a European counterpart to the rapid and successful codification of a truly American law was even promoted by the League of Nations itself in 1930. These ideas were further refined and advanced by the input of a number of learned societies, particularly the Union juridique internationale where the thesis of regionalized international law was gaining substantial support.\textsuperscript{16} Hence, with the failure of the League of Nations, the idea of a new approach to international law sidelines the traditional universal canon and focusing on (pan)European/(pan)American structures started developing from the mid-1920s and gained momentum soon after. It is this reorientation in the scholarship and activism of the international law community which generally helps to explain the investment by international legal scholars in the Briand-Project of a Union Fédérale Européenne, offering a first practical test to these new ideas and doctrines.

This inter-war reorientation in the definition of the subjects of the legal science of international relations, as well as the transformation of the concrete problems this knowledge was facing, were to gain further momentum after the Second World War. Paradoxically, both the ideas of regionalisation and the universal ambitions of international law were gaining terrain in the post-war period. The abandoning of the League of Nations in favour of the creation of a more truly international, although Western-dominated, successor in the form of the United Nations took place in parallel to great regional developments, for example the ECHR itself which had its Pan-American counterpart in the Inter-American Declaration of the Rights and Duties of Man (1948). Other key examples were the comparative bodies of the Council of Europe and the Association of American States, as well as the military strategic organisations of NATO and the Warsaw Pact. In this process of intensification of inter-national institutionalisation, the European processes stand out both in the form of the European Community and in the form of the ECHR by the fact that they reached far

\textsuperscript{15} Cf. See the various Inter-American specialised agencies such as the International Law Commission (1915). See C. Stoetzer, \textit{The Organization of American states}, London: Praeger (1993).

\textsuperscript{16} The Chilean Alejandro Alvarez, co-founder in 1906 of the American Institute for International Law and \textit{grand-maître} of American codification but also leading member of the Union juridique internationale (a group close to French diplomatic interests and engaged in the defence of the Briand-Project), had a great impact on the idea of regionalization of international law. He went on to become a judge at the International Court of Justice (1946-1955).
more sophisticated legal and political results than any of their counterparts. On a structural level, the constructions of distinct European legal and political orders took place as part of a transformation of the international field seeing the imperial powers decline and reorient themselves towards the still relatively uncharted land of Europe. Basically, the idea of Europe as a coherent entity rather than the crossroads, or indeed battle-zone, of the interests of the ‘imperial societies’ was emerging at this point as a consequence of the lost initiative and potency of these key European countries.17

The conjunction of the decay of the European imperial powers and the rise of the European idea was fundamental to the success of the new regional projects such as the ECHR. One might even consider it a historical irony that the decline of French and British imperial power coincided with the internationalisation and Europeanisation of one of the greatest accomplishments of their respective political and democratic culture, human rights, something which had been practically impossible under the imperial model of conducting international affairs.18 Freed from both the constraints of decolonisation and of direct Cold War politics, European integration allowed a high degree of technicalisation and scientification which favoured the original pioneers of this idea. Concretely, the autonomisation of these European orders was pushed forward by the gradual emergence of a legal science focusing on European matters as the essential means of differentiating these institutions from direct political and diplomatic interests and stakes. Also, the corps of jurists seeking to develop and apply this new more specialised legal science was eventually to define themselves as the professionals of European law and institutions. The autonomisation of the supranational European institutions, and thereby more generally of Europe, was closely linked to the autonomisation of this legal corps and its knowledge on Europe. In many ways, this is the key point of divergence between the success of the regional European arrangements and the relative lethargy of competing, mainly Pan-American, arrangements.


As indicated, the genesis of European constitutionalism and the various investments in this idea cannot solely be explained from an outside perspective focusing on the transformation of the structure of political opportunities and interests. Attention should also be paid to the specific history of the autonomisation and professionalisation of legal fields and the consolidation of law as a specific body of scientific knowledge particularly applicable to European politics.


4.1 Law as a Science of International Politics

Due to the emergence of modern law as a part of the genesis of the State, jurists have inherently been agents of State expertise, generally playing key roles in the international import and export of State knowledge and institutions which has long defined the international field. However, in the original configuration of the international field of the late nineteenth century dominated by the imperial European powers, international jurists as such were not yet present on the international scene. Instead, a group of ‘gentlemen legal politicians’ with significant social and political resources shared the business of international relations with an equally exclusive group of cosmopolitan notables trading in State expertise. Made up by nationals from a series of countries, this cosmopolitan elite shared the privilege of not only belonging to a national upper class but to an international one as well. While the international field was historically marked by this closed, exclusive club of States experts who adopted a largely dilettante approach to their international activities, the intensification of both legal and political interaction in the period 1920-1960 led to a significant investment in international and European institutions, changing the game. What simply used to be the hobby of the aristocratic generalists was increasingly to become a full-time occupation for an array of professional specialists, competitively trying to construct new international and European venues configured around their own specific expertises. International and European legal science more generally went from being an affair between gentlemen conducted in closed networks to eventually becoming part of an increasingly differentiated domain of practice.

This overall transformation is not only interesting because it helps explain the formation of a group of professionals specialized in the building of a European legal science, but also because it provides an account of the emergence of a body of beliefs and doctrines structured around the superiority of law as the means of rationally organising European politics that helped define contemporary European jurists and their self-perceptions. The belief in the law and the ‘rule of law’ had its roots in the differentiation of national legal fields, a process accelerating in the late nineteenth century as part of the redefinition of the modern States in Western Europe. Moreover, the rise of a scientific paradigm

21 On these transformations, see O. Beaud & P. Wachsmann, La science juridique française et la science juridique allemande de 1870 à 1918, Strasbourg: Presses Universitaires de Strasbourg (1997); G. Sacriste, ‘Droit, histoire et politique en
at the law faculties helped transform law from being a humanistic knowledge to becoming a social science focused on the rational organisation of social relations and conflicts. One of the central beliefs coming from this new credo was the assumption that legal models of conflict-resolution were superior, more advanced and more civilised, than traditional means, including politics, of mediating social conflicts. These new legal ideals and technologies were transferred to the international level, seeing the appearance of an embryo of an international legal community with its own venues and subjectively organised around the objective of spreading the ‘rule of law’ as the means to build durable international peace.\textsuperscript{22} If there was one thing that supplied a degree of coherence to this otherwise fluid international legal community, it was the internalised beliefs in the ‘inner force’ and the efficiency of law. With the growing institutionalisation of this body of knowledge, a legal critique of politics emerged which emphasised rational arguments deriving from legal reflection over the allegedly irrationality of the political decision-making processes. It is on the basis of this basic belief in science that the whole community of international legal scholars for example criticised the Briand-Project, pointing out the incoherencies the project contained.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{22} Being among the first international legal ‘venues’ and universities, the \textit{Institute des Hautes Etudes Internationales} was founded in 1926 and the Hague Academy of International Law was founded in 1921. During the same period international law reviews and various \textit{Sociétés savants} started emerging, including the \textit{Institut de droit international}, the \textit{Union juridique internationale} and \textit{Société internationale de législation comparée}. See G. Sacriste & A. Vauchez, ‘Les ‘bons offices’ du droit international. La constitution d’une autorité non-politique dans le concert diplomatique des années 1920’, (2005, forthcoming) \textit{Critique internationale}.
\item \textsuperscript{23} For example, Louis Le Fur, one of the first theorists of international law, denounced the confusing ideas of the Project as it both sought “some sort of federal link”, whilst simultaneously affirming that the Project did not imply handing over of sovereignty. This critique was, at the same time, also an attempt to gain ‘jurisdiction’ over these politics on Europe: the lack of legal coherence and precision exhibited how the Project had been drafted by people who exclusively had in mind the political issues at stake as well as its possible promotion vis-à-vis fellow European diplomats. In other words, they perceived the text as the product of principally political interests and tactics, a fact highly contradictory to the supposed objective of building solid and durable institutions. Needless to say, only law and lawyers could provide such lasting and consensual institutional models. Ferdinand Larnaude, dean of the Parisian Law school and a leading figure in the negotiations of the Versailles treaty, plainly argued that only legal science and disinterested actors – jurists – were capable of offering a serious and solid model for building an effective supranational European organization. Hence, only the force and ideal of legal science (neutrality, universalism, autonomy) would provide the means for trespassing the competitive diplomatic interests.
\end{itemize}
4.2 Transnational Legal Communities

The exportation of these ideas to the international field was facilitated by the emergence of more substantial transnational networks of jurists in the 1920s. These networks of mainly legal academics also started challenging the traditional assumptions that legal practice on the international level was best carried out by legal counsellors working at foreign services as civil servants, having the restricted work-load of legally rationalising and clarifying the diplomatic interest of the State. Two processes contributed to the rise of international legal science and of transnational networks of legal scholars. One was spurred by the considerable investments by a number of US philanthropic foundations, particularly the Rockefeller and the Carnegie Foundations, in law and learned lawyers as the means for building international organisations and promoting international humanitarianism and peace. This allowed an intensification of the encounters of the small community of law professors claiming an expertise in these subjects. The second process was related to the overall emergence of multilateral institutions in the 1920s – the League of Nations, the International Labour Organisation, a permanent Court of International Justice, etc. – which not only offered professional positions relatively independent from national allegiances but also an opportunity to test the legal theories and technologies of peace. The utopia of a law of international relations gained momentum at this point by the promotion of international legal science as a superior tool to establish peace and prosperity than the increasingly old-fashioned politics of power.

However, apart from opening a few academic positions (for example at the Institut des Hautes Etudes Internationales of Geneva or the Académie de droit international of The Hague), the international community of international legal scholars in charge of this mission remained fragile and weakly specialised. In practice, the learned jurists engaged in this work could hardly claim to be a network of specialists of international law and, obviously, much less so of European law. Their discipline (European and international law) was far from securing even minimal academic acceptance in European universities where public international law remained a domain of little significance compared to the core subjects of the legal curriculum. By the pioneering nature of these projects, the protagonists were drawn from the ranks of various legal sub-disciplines as well as various legal professions, brought together by little more than a common international interest. They could hardly be further away from the world of contemporary European and international law, having considerable resources in the form of differentiated knowledge nurtured by an array of textbooks, legislation, professional journals, and specialised university programmes. The list of the main French legal scholars intervening in the discussion related to the Briand-Project is highly illustrative in this regard: Ferdinand Larnaude, dean of Paris law faculty, Georges Scelle, Louis le Fur and Boris Mirkin-Guetzevich were very well-established nationally as scholars of public law; their international and European activities represented but a very small part of their academic practices.
Whereas there was no clear rupture with this model of producing international law in the post-war period, there was a considerable change in the perceptions of the international community. Generally, the network structure and the feeble differentiation of law from international politics remained a conspicuous feature, but the acceleration in the creation of international organisations and conventions created far more positions for internationally interested jurists. While the euphoria coming out of the victory over Nazi-Germany greatly helped the rapid post-war international institutional build-up, the rise of Cold War tensions only a few years later made this international jubilation come to a sudden halt. In the community of international law, the combined effects of the devastation of the Second World War and the new constraints of the Cold War contributed to the fall of the grand idealism of international law of the inter-war period.24 In itself the mounting of Cold War politics effectively deprived universal doctrines of international law of meaningful applications, exemplified by the destiny of post-war master plans such as the Universal Declaration of Human Rights. This sentiment was, for example, reflected in the writings of the eminent Cambridge professor of international law, Sir Hersch Lauterpacht, who launched a heartfelt critique of the lack of substantial legal protection in the high-prose of the human rights declarations being drafted at the time.25 Before the war he had belonged to the academic, cosmopolitan circles interested in the League of Nations, but his post-war offensive into the concretisation of a global world order was of a far less ambiguous and less formal character. At the same time, however, unfulfilled universalists such as the French professor, René Cassin, continued the quest for a universal law. But even Cassin had to come to terms with an international political order constraining this idealism on both the international and European levels.26 In this context, the legal concretisation of the European terrain through the ECHR and the other parallel projects on European integration offered the venues for an international legal engagement which was both less formal and more technical. In that sense, the overall construction of post-war Europe as a concrete task corresponded with a change in the visions of the international legal community. This did not necessarily imply that they were more autonomous, but they had more practical tasks in hand and worked mainly on the regional level.

24 See further in M. Koskenniemi (2002), op.cit.
25 Ibid., 398.
5. Building Law out of Politics: The Legal Stakes in the Political Encircling of Europe

5.1 The Dependence of Legal Expertise on “National Interests”

Although an embryo of an international and European legal field was emerging in the inter-war period, taking off more strongly after the war, on the whole national governments remained the key actors. They held the power of nomination to the relatively few positions available to international legal experts and had very direct stakes in the fabrication of a European order. Despite their belief in the notion of a trans-national science, international legal scholars promoting the idea of Europe remained entangled in, dependent on, and even the straightforward advocates of, the interests of their home foreign policies. Ranging from direct dependency on their domestic foreign ministries to more ad hoc relationships, the core group of actors comprising mostly foreign office legal advisors and professors were permanently under pressure from diplomatic interests in their legal positioning in these projects. Consequently, rather than the product of an autonomous scientific community, the legal scientification and reconstruction of Europe owed much of its breakthrough to the growing interests of European governments themselves in the beginning of the 20th century towards legally formalising their new politics of Europe. The post-war processes only confirmed this tendency, although the concretisation and new importance of the European master plan offered more professional work to this community, accelerating the processes of differentiation.

The polemics associated with the Briand-Project are highly illustrative of the inter-war period and the interplay between national diplomatic interests and European jurists. Far from providing a coherent and unanimous reaction to the project, the community of international legal scholars was deeply divided along the lines of their national origins. In a context where law generally remained heavily dependent on the political field and in which international legal scholars were frequently directly employed as legal advisors and consultants to their respective ministries of foreign affairs, hardly any of them could claim to be free-moving experts acting beyond the imperatives of national interests. Strikingly, despite the fact that the Briand-Project objectively sought to promote the idea of multilateralism to which international legal scholars scientifically and ideologically subscribed, the large majority of the law professors involved tended to stay loyal to their respective governments’ position. Echoing the position of the British Foreign Office, for example the involved British international legal scholars denounced quite sharply the very idea of a regional perspective and argued for an international organisational solution to the international crises – in this view, the Briand-Project was basically not just useless but directly counterproductive as it greatly impaired structures such as the League of Nations. This position of criticising the new regionalism from the point of view of the alleged universalism of international law was also repeated by Alfred Zimmern, a prominent figure of the emerging transnational field of international law, professor of international law at Oxford and Director of the Insti-
Moreover, jurists from Italy and Germany gave the Project a rather chilly reception, curiously mirroring the positions of their own governments. As a matter of fact, the only jurists outside France who gave credit to the Briand-Project were those who belonged to countries with close connections to French diplomacy, for instance Romania and Poland. The emerging legal science thus appeared deeply interwoven with the various national fields of power, unable to impose itself as an autonomous and scientific knowledge on international government during the 1930s. Indeed, the case of the Briand-Project demonstrated how very different national interests were projected into the international/European idea by a whole ensemble of European foreign services seeking to deploy a legal argumentation to defend their essentially political positions on the questions raised by the Project.

5.2 Legal Expertise as a Diplomatic Tool

The post-war politics of European integration as it was exhibited in the specific case of the ECHR showed some of the same traits of a diplomatic imposition on the production of a new legal field of expertise. However, the mere fact that the ECHR was actually finalised and adopted by a majority of Western European countries offered a framework consisting of both an overall plan for an institutional architecture and a document containing generally defined legal provisions to be concretised by the creativity and expertise of European jurists. The institutionalisation and legalisation of the Convention basically offered a novel opportunity of creating European law of which the failure to adopt the Briand-Project had deprived the jurists of the 1930s. But the case of the institutionalisation of the Convention paradoxically both suggests the beginning of a new phase in the production of an autonomous European legal knowledge and a continuation of diplomatic hegemony in the area of allegedly pure European law. This has to be explained in terms of the specific climate of the ECHR. Recalling the specific geo-political context of the drafting of the ECHR, it is probably not an exaggeration to claim that the majority of States adopting the ECHR initially perceived of European human rights as measures against external threat and generally as a means to help deter the future rise of fascism in Europe, rather than as an instrument for substantially altering or unifying the practices of the legal systems of the Member States. It was fundamentally an export-trade to a new European legal and political terrain, and the intricate questions related to compliance between national practices and the European level were far off. In other words, the production of an effective European human rights law was not immediately supposed to impose great legal changes on the Member States, putting some serious constraints on the jurists appointed to develop this machinery.

This mental and political exteriorisation of the reach of the Convention also helps explain how, for example, French and British agents could pursue key roles comfortably assuming that the ECHR was merely a Europeanisation of their own particular national practices of ‘libertés publiques’ and civil rights –
and this in a context of mounting human rights problems in the colonies. The case of the declining imperial societies is generally illustrative of the question of the relationship between European law and European diplomacy in the immediate post-war period. The French stance towards the ECHR was generally structured around a ‘latter-day imperialist balancing act’ consisting of both securing that colonial matters remained an issue of national sovereignty and, simultaneously continuing a tradition of supplying ‘universals’, in this context the self-promotion in the area of human rights. The French investments in European – and international – human rights were significant at the genesis of the regime but, curiously, France did not ratify the Convention until 1974 and did not allow individual petitions before the Court until 1981. Overall, this was due to a general disbelieve in supranational control in the area of ‘libertés publiques’, a perception only exacerbated during the colonial battles where the quest for sovereign control and non-intervention of the international community seemed paramount. Because of this curious position vis-à-vis the ECHR, France only had one representative in Strasbourg, René Cassin, who nevertheless went on to become both Vice-President and President of the Court. In terms of the development of the institutional identity of these institutions, the ambiguous French position had an important indirect effect. These strategies generally projected the logics of international cooperation to the institution in the sense that it promoted a measured development, preventing even its own high-profile envoy to get carried away with the universalist discourses intrinsic to human rights.

Both the British stake in the ECHR and the group of actors involved were different from the French, but the outcome was similar and further advanced the ‘diplomatic’ approach to the institution. While the French ‘model of excellence’ relied on entrepreneurial law professors with links to the resistance movements as well as to politics (notably Pierre-Henri Teitgen and René Cassin), the British Foreign Office and its own agents were largely to control this pole of international and European development. After having assured that the Council of Europe only developed as a conventional international institution, the UK generally sought to play a leading role in the development of the system. When the ECHR was ready in 1950, the UK was the first state to sign; in 1966, after overcoming the chronic debate on whether it was acceptable that an international legal institution should oversee national British law, the UK accepted the right to individual petition for British individuals under the ECHR and did the same for individuals in its Crown Dependencies and dependent territories in 1967. However, the subject was kept under a certain control by a nomination strategy that greatly favoured Foreign Office legal experts. With the exception of the occasional grand professeur being promoted – and then only after having passed the test of being a ‘pure’ jurist with an understanding of British interests – Foreign Office legal advisors as well as a few other qualified

civil servants were to dominate the area of human rights at the birth of its institutions. This appointment strategy greatly enhanced the importance of conventional public international law in the on-going process of conceptualising and defining human rights, and helped maintain the diplomatic values of the Foreign Office at these venues: nation, national interests, geopolitics, pragmatic diplomacy, etc. The impact of this strategy can be illustrated by the fact that Sir Hersch Lauterpacht, unquestionably the leading authority on international human rights law in the post-war period, was never appointed to a central human rights office and only worked in the periphery of the field. Overall, the Foreign Office’s offensive into the domain had the effect of a diplomatic imposition in the production of the new European human rights doctrine.

These dynamics of the emergence of the European human rights institutions were illustrated in the initial institutional genesis. The Court and Commission were generally hesitant for the first ten to fifteen years, a fact partly attributable to the key agents’ habitus influenced by diplomacy and public international law. As well, the basic uncertainties as to the reach of these institution in the light of its parallel genesis to the Cold War and the constraining national strategies in respect to the institution contributed to this situation. But, this constraining inter-nationalisation of the institution had the paradoxical effect that it not only helped the institution manoeuvre the Cold War landscape and the politics of decolonisation, but also turned out to be critical for gradually convincing the Member States that it was a serious legal and, in a way, “international” institution. The reluctance basically helped build up the confidence of the Member States: in the words of a former British judge at the Strasbourg Court, “they didn’t feel that the system was going mad and that, you know, any applications from any old chap that felt his rights had been violated would be successful before the Commission.”

The institution’s gradual move towards the position as the supreme author of human rights law in Europe was helped by this image of the institution as a reliable, respectable, legally conservative institution of no

28 We cannot go into details about the first decisions of the two European bodies but only refer to the gradual construction of these institutions through the concrete cases. One of the first cases, which took new institutions to the test was the inter-state complaint filed by Greece alleging British practices on Cyprus in the mid-1950s to mount to torture. This prompted a mission to be sent to the troubled island by the European Council. Headed by the distinguished professor, Max Sørensen, much to British regrets the mission started actively gathering information. But, what was building up to become a serious conviction in Strasbourg imploded with the 1959 Zurich settlement on Cyprus by the use of diplomacy rather than law. Shortly after, however, the so-called Lawless-case concerning the use of detention without trial in Ireland – a procedure also used by the British in Northern Ireland – once again put the British Foreign Office on alert. This warning of the mounting force of human rights law, however, ebbed out as Ireland won the Lawless-case. The British Foreign Office as well as their European counterparts could on the basis of these cases conclude that the ECHR system was in fact not too dangerous if handled correctly. For an excellent account of these early cases, see A. W. B. Simpson (2004), op.cit., 1086-1088.

29 Interview, 25 April 2001, transcript on file with authors.
particular danger to the specificities of the national ways of securing human rights and justice. That was to change subsequently, but this transformation of the institutions from reluctant to activist was made possible only by the initial positioning of the institutions and their actors very close to the diplomatic interests of the Member States.

5.3 The Blurred Boundaries between Law and Politics as a Multi-Positional Game

The beginning differentiation of the legal and political international arenas did not overshadow the constant interplays and crossovers between the agents of the two camps of law and politics and of legal expertise and diplomacy. Despite the autonomous and universalist claims of the corps of mainly law professors, the possible success of their legal formalisations ultimately depended on their capacity of gaining access to the relevant political actors and arenas and to promote their specific programmes of Europeanisation. When seen in a broader perspective, it was in fact mainly those law professors who benefited from substantial networks and relationships within the national political fields who managed to take their ‘theories’ to the realm of ‘serious’ international politics. In this regard, the actual starting-points of the various projects of Europeanisation influenced the legal actors’ ability to impose themselves both legally and politically. The two cases of the Briand-Project and the ECHR showed some important differences in this respect. Contrary to the imposition of the Quai d’Orsay and its diplomatic arsenal as the spokesmen of a new European order in the Briand-Project, the ECHR was more of a popular idea, at least among European elites, which allowed the politically endowed jurists a key position. The original ideas were, if not born from, then at least matured in the minds of jurists who shrewdly mastered the interaction with the political sphere – an area many of them quite directly belonged to themselves – and effectively positioned themselves in the popular European integrationist movements of the late 1940s. Also, as noted above, in itself the geo-political climate of the drafting of the ECHR made the project far more concrete and attractive than the far more abstract Briand-Project appearing as originating from French diplomatic interests.

The core group of jurists involved in the drafting of the ECHR exploited the complementarities of their legal specialisations and political contacts. Also, the key legal players involved with the ECHR were well aware of the importance of pursuing the legal idealism of Europe in pragmatic way. The best example in this regard was the effective political-engineering of the project by the law professor, Pierre-Henri Teitgen. Drawing on his considerable political experience and on his authority as a resistance fighter in the War, Teitgen had his finest hour when he convinced the negotiating parties of the need to first develop the European protection of civil and political rights “before undertaking the generalisation of social democracy” – he effectively imploded an otherwise explosive socio-political issue which was at the heart of the welfare orthodoxy in vogue
European Constitutionalism at the Cradle

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across Western Europe at the time. More generally, the group of legal experts of the ‘Committee on Legal and Administrative Questions’, set up at the Congress of Europe meeting in the late 1940s, helped push forward a legal agenda and advocated the idea of a ‘real’ Court when the pertinence of such institutions were questioned by the negotiation partners. What is remarkable about this group of actors was that their considerable legal competences could not be clearly distinguished from their equally impressive political contacts and personal political resources. More generally, the blurred boundaries between European law and politics was in itself a product of the relatively central position lawyers had occupied in national politics throughout the 19th century and the beginning of the 20th century. The leading members of the ‘legal’ contingents of the delegations sent to the League of Nations, the UN and the Council of Europe tended to have a double-profile as both technical experts on the State and practitioners of politics. For the same reason, these lawyers could position themselves with relative ease on both sides of the weak boundary between law and politics and so valorise their legal competence and seek to impose legal tools and legal idealism at the core of politics. This relationship generally suggests one of the key paths for transporting the legal utopia into the construction of Europe and highlights the problems of the more ‘pure’ international lawyers in their interaction with the politics of Europe.

6. Concluding Remarks

In great contrast to the ideal-type of the latter-day technocratic European jurist having a certain independency in respect of national interests and working in a tightly structured European legal space, the generation of European jurists ad-


31 This linkage between the rise of European institutions and the broader European movements has been analysed in a number of works. On the European Community and the Schuman Plan, see for example A. Cohen, ‘Le plan Schuman de Paul Reuter. Entre communauté nationale et fédération européenne’, (1998) 48(5) Revue française de science politique, 645-663.

32 This subjective feature of the production of international and European law can be illustrated by the success of actors such as the aforementioned Pierre-Henri Teitgen on the drafting of the ECHR: A law professor, well-known member of the French ‘Résistance’, Christian Democratic politician with good contacts to Monnet and Schumann and express anti-communist, he embodied some of the key objectives at stake.

dressed in this article were essentially more the promoters than the appliers of European law. They were pioneering a new legal domain concerned with the uncharted terrain of Europe, but by doing so they also contributed greatly to both the definition and the renewal of the legal and political orders of Europe. We can draw some basic conclusions about the key dynamics of this new field of law and politics and the role played by legal actors in respect to its emergence. It appears that the production of European law can be framed through a complex array of conflicting allegiances – commitment to national diplomacy/commitment to multilateral institutions, participation to national academic field/position in the emerging transnational legal field – and as a multi-level game with a great deal of cross-over between the core orientations in respect to the dichotomies of national/transnational and political/scientific. This multi-positioning of the early European jurists imposed a certain constraint on them in the sense that they were continuously obliged to compromise and mediate these different, and occasionally conflicting, interests and mandates. At the same time, because of this lack of disciplinary boundaries, as well as the knowledge vacuum they faced, the original pioneers could zigzag between and exploit the various forms of national and international law and politics in the pursuit of European legal and political objectives. In other words, the relative autonomous European legal field of today is paradoxically the historical product of the heteronomy of its initial promoters, capable of mobilising a variety of non legal actors and resources around a legal credo of an autonomous law governing inter-national politics. This deconstruction of European law and its assumed guardians, the European jurists, might offer a contrast to the general perceptions guiding the current debates on a new European constitutionalism. The technicalisation of modern European law seems to mute politico-legal claims and to separate the politics of Europe from the law of Europe. Thereby, it might deprive the debate from one of the inherent dynamics of this very discussion.
EUROPEAN COMMUNITY LAW
1. Introduction

The recent elections to the European Parliament (EP) in 2004 revealed one or two curious facts. On the surface the elections appeared to have been a defeat for the European ideal as citizens voted for national issues rather than European ones. However, a closer look at many of the issues which dismay voters nationally reveals a subtly different picture. The various national media and their governments present legislation as national which is fair enough at first glance but odd when several European Member States (MSs) introduce the same legislation at the same time. Observing several national Medias over a period of time appears to confirm the pattern outlined above. And in the UK it has been estimated that around 60% of the new legislation owes its origins to the Union. Thus it is reasonable to say that voters were unintentionally quite justified in interpreting national issues as appropriate to be voted on at a European level. The merging of the two levels is complete enough to often justify such action by voters. The EP has been involved in the passing of much of the legislation which the voters perceived as national and it is therefore quite right that the Members of the European Parliament (MEPs) should be held to account. That said, a question arises as to how a seemingly small Commission manages to generate such huge quantities of legislation for all the nations in the Union.

The intention of this contribution is to explore the internal dynamics of the Commission which may at least provide part of the answer, taking the Directorate General (DG) Environment as an example. DG Environment is a good example, because it has generated vast amounts of legislation in a relatively short period of time, so much legislation in fact that some political authorities came to see this as a problem. In order to consider the Commission as a whole and its stance towards legislation generation, the DG is a useful case study. The DG reveals several structural and personnel elements which result in legislation generation. One group emerged from the investigations and interviews on which this article is based as particularly efficacious in furthering the legislative output of the DG, namely, that of the designers and bureaucratic stewards of EU environmental regulation. This group will be referred to here as the ‘regulatory entrepreneurs’.

Regulatory entrepreneurs are to be understood as a sub-species of ‘entrepreneurs’ as for instance defined by Schneider, Teske and Mintrom. They attribute three qualities to all entrepreneurs. First they discover unfulfilled needs and select appropriate prescriptions for how those needs may be met. Second,
they bear the risks involved in seizing these opportunities. Finally, they assemble and direct the resources necessary to undertake change.\textsuperscript{1} This definition is clearly related to the notion of the entrepreneur as an ‘agent of (economic) change’.\textsuperscript{2} For the regulatory entrepreneurs to be discussed here, the indicated qualities can be translated as:

- alert to and seizing opportunities to advance regulatory proposals fitting the opportunities;
- motivated to do so e.g. by reward and/or commitment to the European project;
- able to mobilise and exploit resources (such as expertise and support) instrumental to the eventual acceptance of the proposal.

This shortlist of qualities is useful for the reconstruction, on the basis of the gathered data, of the dynamics of regulatory production of the DG Environment, in which the DG officials – who will take centre stage in the first part of this paper – deploy their initiatives.

These regulatory entrepreneurs can be regarded as lawyers in the sense that they are involved in the drafting and promotion of EU secondary law. Part of them are academically trained in law due to the fact that a legal training is advantageous in many nations’ civil services; the Federal republic of Germany is a case in question where the majority of higher civil servants are lawyers. But that is not the case in all Member States. Therefore, lawyers along with economists make up the majority of the officials.\textsuperscript{3}

The article is based on the contents of interviews carried out in DG Environment, the European Parliament, The European Environment Agency and with leading Brussels based NGOs. In DG Environment nine desk officers were interviewed, one Head of Unit, one deputy Head of Unit, the deputy head of the Cabinet, one ex cabinet member and three seconded national officials. In the Agency five officials were interviewed. One MEP and one MEP assistant were interviewed and two NGO heads. The interviews were based on an open question format which allowed the interviewees the maximum control over the discussion.

In the following sections we will first locate the level in the Commission organisation where the tasks of designing and forwarding legislative proposals are primarily located (section 2). Secondly, the conditions at the Commission level that come forward in the interviews as to be crucial (either stimulating or constraining) for legislative production are described (section 3). Next, the charac-


\textsuperscript{2} This concept has its roots in Webers historical sociology and Austrian economics. Cf. G. Poggi, \textit{Calvinism and the Capitalist Spirit}, London: Macmillan (1983); Schneider c.s., \textit{op.cit.}, 234, refer to Hayek and Von Mises.

\textsuperscript{3} 36.6% were lawyers in the early nineties, and over a third are economists. See: E.C. Page, \textit{People who run Europe}, Oxford: Clarendon Press (1997), 78; and interviews with Commission Officials.
teristics and resources of the ‘regulatory entrepreneurs’ that have been indicated as crucial for the job by the interviewed Commission Officials will be summarized (section 4). Further, the possible obstructions in the trajectory towards acceptance of a legislative proposal and the tactics developed by the regulatory entrepreneurs to negotiate them, are discussed in section 5. Finally this analysis will be projected onto the larger canvas of the history of the development (the ‘rise and stagnation’) of the DG Environment.

2. The Commission and the Initiatives to EU Legislation

The initiative for regulatory proposals formally rests with the EU Commission. But that formal representation hides the actual daily practice of initiating proposals for secondary EU-law.

2.1 The College of Commissioners

The Commission consists of two main elements, the College of the Commissioners which is considered to be the political layer and the services which means the DGs, Directorate Generals, the administration. Each DG covers a defined area of competence, usually sectoral, such as DG Competition and DG Environment. Occasionally DGs are set up to perform specific tasks. For instance, DG enlargement has been created to ensure that the Community’s decisions with regard to the enlargement are fully implemented.

The basis of decision making within the College is by means of voting, as a collegial approach is favoured. This results in the rather curious situation that the president is very much, one amongst equals, and the Commissioner in charge of the budget equally so. Until recently the president had extremely limited means available to ensure that all the Commissioners acted in a responsible manner. In reality only the extremely political decisions and in particular those which the Commissioners have proven unable to solve amongst themselves arrive for the vote.

Each Commissioner is assisted by a Cabinet that acts as a bridge between the Commissioner and the services. Each Cabinet has a chef, and there are regular meetings of chefs of Cabinets to reach decisions on as many of the decisions which the DGs have not been able to reach themselves. Only after this stage are decisions then submitted to the Commissioners. DGs normally avoid too much conflict with each other since the DGs require each others support to get legislation through the inter-service deliberations and officially adopted by the Commission as a whole. The majority of decisions are reached by what is known as the ‘inter-service consultation procedure’, which is now done in a purely written manner. Here legislative proposals of one DG are put forwards to the others for discussion and, of course, amendment. Should the administrative process carried out by the DGs fail, then the Commissioners’ Cabinets take over.
2.2 Council and Member States Officials

The services of the Commission have managed to become the administrative power centre partially since the Commission has the task of policy initiation. This power has been exploited and become inclusive in such a way that the Member States staff working for the various ministries, as well as the various committees of the Council have been described as the Commission’s assistant bureaucracy. This may seem rather puzzling until it is remembered that the Council and MS staff are actively involved in Commission proceedings and committees, thus putting them in the position of having to participate in the creation of legislation rather than simply in its rejection at the vote.

In practice it means that the Council’s legislative activity is largely supranational in flavour, as its staff have been wooed over to the Commission’s side. There can be many reasons for this. One is the sense that both groups of staff represent Europe more than their political masters. Another, that often they are the experts in a certain topic and not the politicians. Thus the civil service dislike of political masters combined with a sense of common purpose shared with Commission officials can have the effect that the MS staff are more than content to go around the backs of their ministers with the connivance of Brussels, or ministries in one sector are happy to pursue a sectoral policy at the expense of another sector. The MSs are literally divided up and ruled by the Commission and the process of dividing and ruling runs right through the Council. MS staff are divided into their sectors and ministries and often fail to correspond adequately with their central government masters; the MSs themselves are often divided by their different governments’ political preferences, which can via the backdrop of future ‘qualified majority vote’ be played against each other. Whilst it is true that the Commission also has difficulties adopting a common position with its various sectoral DGs, the MSs have a harder position. Thus in reality the main legislature of the Union can be argued to be the Commission. It is the ‘major EU legislator’ with the Council of Ministers rapidly losing what sovereignty and power over legislation that it ever had.

2.3 The Services

Having considered the Union as a whole and the Commission’s position within it, an outline of the basic structure of a Directorate General is required. Each DG is headed by a Commissioner, who is chosen usually by MSs with the par-

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7 Van Schendelen, *op. cit.*, at 64.
The administrative structure is managed by a Director General, who is responsible for the day to day work. They are also considered to be political appointees and up until recently these individuals often ran the same DG for many years. Under recent reforms, this has been altered with mobility being required by President Prodi. Director Generals have to move from their current positions after seven years. The Director General is supported by either a deputy Director General and around five directors who are responsible for the directorates which have to consist of at least two units to justify a director. Staff members often consider directors to be there to represent the units and to fight for them politically with other DGs and with the MSs.

The units are the real legislative engine in the DG and have Heads of Unit who are usually experienced officials of A4 grade who are not normally directly chosen by politicians. The rest of the policy making officials are ‘A’ grade staff called Desk Officers who are usually of international origin and full time officials very often lawyers or economists and motivated Europeanization supporters. Seconded officials from the MSs and MS experts and other experts advise and assist the Commission officials in the drawing up of legislation. Some sources state that these officials are also placed within the system by MSs to ensure that their views are respected, and that they are fully informed of all prospective legislation. B or basic clerical staff who are usually Belgian or Italian.

Desk Officers are extremely important in the Commission. Officials are sometimes considered to be kings, they have broader responsibilities than civil servants in MS ministries, their salary reflects responsibilities and not rank. “The Commission’s legalism is also reflected in the extraordinarily large number of staff with formal backgrounds in law. Prior to 1990, most of the competitive exams (‘concours’) for entry into the Commission civil service were open only to candidates with an academic background in either law, politics or economics. […] The ideal fonctionnaire was therefore typically a highly trained university graduate with a specialist knowledge in European Law, EC institutions and economics […] over half of all A grade Commission officials were lawyers and economists”.

9 Ibid., 52.
10 Discussions with Commission Officials.
11 Shore, op.cit., at 135.
The majority of legislative proposals are put forward to the DG by NGOs and other stakeholders, lobbyists, MSs, and the EP.\textsuperscript{12} The administration decides what proposals are pursued and developed into policies. Often the choice is down to the Heads of Unit or the Desk Officers themselves.\textsuperscript{13} According to one source over 80\% of the final proposals adopted by the Council is the same as that prepared by the desk officer \textit{supervising} the directive.\textsuperscript{14} The same source stressed the fact that the desk officer is alone in the initial process of developing the proposal.\textsuperscript{15}

3. Conditions at the Commission Level

Having considered the formal structures of the Union and the Commission, it appears that the grass roots reality of EU legislation allows and even in fact promotes an entrepreneurial spirit.

One of the conditions that appears to be most favourable to regulatory entrepreneurship is the fact that success in legislative production is crucial to bureaucratic survival and expansion. Other general conditions seem to allow, but not necessarily provoke, entrepreneurial initiatives.

3.1 Reward: Legislation Generation as a Performance Benchmark

In the Commission, the DGs which are responsible for the core Community freedoms are relatively secure. The other DGs like DG Environment have a less secure position and have therefore generated significant amounts of legislation to justify their continued existence, since for the Commission efficiency is measured in legislation produced. This is traditionally how the Commission has considered its existence to be justified. It should be stressed that whilst a DG justifies its existence on the strength of its legislative record, staff are not allocated according to results but rather to requests.\textsuperscript{16} Proposed legislation is submitted to the College of Commissioners with a suggested number of required staff attached to it.\textsuperscript{17} In such an environment it is understandable that the DG will, for institutional survival, strive to get as much legislation to be accepted as possible. If it is considered to be appropriate and have a good chance of being smoothly passed by the Council and the EP, the College will accept the proposal. Considering the record of steadily increasing staff figures from the few of the early seventies to the 500 odd now, combined with the vast amount of


\textsuperscript{13} Discussions with Commission Officials.


\textsuperscript{15} \textit{Ibid}.

\textsuperscript{16} Interviews with Commission Officials.

\textsuperscript{17} \textit{Ibid}.
environmental legislation that the DG has produced, there would appear to be a clear enough correlation between staff figures and legislation. But there is often a major delay in the allocation of staff and the DG has complained about being understaffed from 1980 onwards,\(^{18}\) despite the average size of unit being smaller than that of other DGs-staff members per Head of Unit ratio. Given that the DG is understaffed, a common enough complaint in the Commission as a whole, it might appear odd that it still takes every opportunity to create more work for it’s already over worked staff. The answer lies in the Commission’s internal measurement of success which leaves the DG in a vicious circle, to survive it must be entrepreneurial and propose new legislation, but the staff increments are never enough or on time, leaving the staff working even harder and maybe subsequently producing legislation which could be improved. Which of course raises the risk that implementation will get worse. Many legal writers consider the legal basis of much of the initial legislation to have been relatively weak.\(^ {19}\) Even then, it is remarkable how the amount of European environmental legislation soared.

### 3.2 Opportunity: Room for Bureaucratic Politics

What may help entrepreneurs is the fact that the Commission does not conform to the model of a machine bureaucracy. Whilst the DG and the Commission are said to follow the French bureaucratic structural style, which is very hierarchical with every one checking everything, in practice these are routinely avoided: “rules and procedures are rarely broken but are constantly distorted, manipulated and ignored”\(^ {20}\) and again “the annoying habit of people using national and party links to circumvent the system”.\(^ {21}\) In larger DGs with longer traditions there are considered to be so many checks and balances built into them that it is almost impossible to follow a formal route. In fact the Commission is known to be full of networks: “If you’re not catholic, socialist, or from the right class it is difficult to make your way here. By class I mean the system of networks […] Under Delors the French got all the best jobs […] Before Delors came it was the Italian lobby which held the reins of power. Then the French replaced the Italians”\(^ {22}\) and again: “This pattern of cultivating personal networks within the organisation by planting trusted supporters in key positions was extended even further during the Delors era. These positions placed one in an ideal position to cultivate ‘friends in high places’ which was widely acknowledged as the ‘way to get ahead’ in the house”.\(^ {23}\) Some officials have been baffled as to why cer-

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18 COM (80) 222 final.
tain individuals are promoted and as to why certain decisions are taken; it is more than likely that one of the many networks provides the answer. For the entrepreneur with social skills, the Commission’s informal administrative system would appear to be ideal ground for pursuing policy interests: “The evidence from my research suggests that the ‘informal’ system based on pragmatic codes and norms is the effective system of administration”.24

The plethora of committees, lobbyists, MS officials and of course Commission officials operate in a policy arena that is both opaque and in flux, which offers huge scope for entrepreneurialism and even encourages it. The Commission official has a large amount of discretion when drawing up legislation and there are few procedures and set administrative ways of doing things to guide the desk officer as they decide on the framework and contents of policies. Gathering a large network of officials in various European institutions is inevitable during the life time of a dossier and if one institution creates obstacles then appeal can be made to one of its competitors. As was mentioned earlier, European institutions are divided both along national as well as sectoral lines and there is little integration between the sectors and between the senior management and politicians in the various institutions. The existence of these multiple divisions can result in a situation in which the lines of responsibility and accountability are confused, potentially contradictory policy is developed in different sectors which compete rather than cooperate. For the entrepreneur the situation is ripe for devising complex individual solutions which might well not be those which any given hierarchy or political leadership would have agreed to.

3.3 Constraint: Contradictory Loyalties

One of the conditions that may constrain entrepreneurial efforts consists of the contradictory loyalties of their possible counterparts. The Commission has since its inception enjoyed an entrepreneurial, almost pressure group like mentality. In its first few years it was a flexible, highly active organisation like a partisan band, which took every opportunity to expand its competences and to move into other sectors.25 After the SEA, the same dynamic sense of enterprise drove the Commission towards the single market, the Maastricht treaty and the enlargements. The individuals which it attracted at the beginning were European enthusiasts who were willing to accept the unique approach of the institution. “In this it behaves less like a normal international secretariat and far more like a promotional group, or even a political party with a firmly rooted ideology”.26 According to one source this remains the case even after the significant time lapse that has occurred: “My research found evidence of a strong sense of

24 Ibid., at 214.
26 Ibid., at 89.
Community and esprit de corps among staff—even among new recruits […] all of which suggest a highly developed sense of solidarity and consciousness of kind."  

But there are other allegiances as well, sometimes at odds with the European spirit. One emanates from the Member States. MSs have used their power of patronage and appointment to great effect in their choice of Commissioner and often top civil servants within the Commission, despite the latter’s supposed independence. Certain DGs are ‘flagged’ as belonging to certain nationalities. It has been stated that the senior ranks in the Commission’s DGs are chosen and ‘parachuted’ into their positions by MSs who desire to place their man or woman in a position where they will be able to affect policy outcomes. Openly, MSs claim that their use of parachuting is so, that candidates have a certain political status because they have an important promotional role to play vis-à-vis the MS ministerial level and politicians.

There is also loyalties to bureaucratic sectors to consider. The Commission expects the College of Commissioners and the Commissioner directly concerned to set general policy direction, whilst policy is developed by desk officers. The Commissioners appoint Cabinets of their own choosing and often there are conflicts between Commissioners and their Cabinets and the administrative management of the DGs. In the Commission there is an almost constant struggle between the Cabinets and the Director Generals, with successive presidents attempting to finalise a working arrangement with the Cabinets playing a lesser role. In some DGs the Director Generals issue bans on staff being approached by Cabinet members and vice versa, although this usually occurs to accelerate policy making decisions. Every communication between the Cabinet and the administration has to pass over the Director General’s desk, whilst this improves the management’s control over their staff, it can also be counter productive. It leads to the odd situation of individuals working in the same building, officially at least, having to pass paper slowly up through the hierarchy rather than knocking on a door two storeys up, which is far from efficient.

3.5 Constraint? Understaffing

The understaffing of the Commission means that often there have been huge amounts of potential work and too few to perform it and manage it. According to one source officials in DG environment there used to be more than enough possible policy regulations to be made, and low staff numbers was the issue. The levels of understaffing allow the officials some element of discretion in which dossier they choose to follow and how. Heads of Unit have been known to decide to make a new policy and to see it become law on all the MSs’ law books. Sometimes the lack of real management direction adds to the above to allow the official a unique amount of discretion in which dossier they choose to

27 Shore, op. cit., at 132 and 140.
28 Interviews with Commission Officials.
follow, although key dossiers will be allocated to certain units. There are plenty of statements made by officials that dossiers can be chosen or not by themselves and that it is possible for officials to simply decide to create a dossier even where none existed before.

4. Qualities of Desk Officers and Heads of Unit

The desk officers and the administration can be said to be expected to play a political role and usually to take the initiative. This observation is confirmed by the statement of Jacques Delors when he said that Commission officials had six professions: to be a law maker, to innovate (generate policy proposals), to control respect for Community decisions, to negotiate with the different actors involved in the Community process and to be a diplomat. Rarely are national civil servants called on to perform such a combination of tasks, the use of the word ‘law maker’ by Delors rather than any other phrase appears to place the desk officers on a par with legislators and emphasises that their work is political as well as bureaucratic. As one senior official put it officials are paid to be ‘creative’ and by this he meant to find ways of promoting their dossier and getting around organisational, managerial blockages.

4.1 Motivation: The Effect of the Selection Process for Desk Officers

The tough nature of the competition to enter the Commission encourages only the most intelligent and dynamic individuals with a legal or economic background to enter the institution. However, this sense of elitism is compounded by a further twist insofar as even after successful applicants have passed the competition their names are then simply on file. A position within the Commission is dependent on the individual approaching a DG and getting themselves known, noticed and finally requested. Thus initiative, social networking skills, where possible political connections and determination, are required from the start. The applicant is in effect alone even before starting their career. This sense of being alone and solely responsible for yourself, your success, and that of your dossier permeates the whole Commission. As indicated above promotion is considered by officials to be, once more, down to the official. The formal method of achieving promotion is not considered by many officials to really matter. You have to network, get onto Cabinets, ensure that you are noticed, i.e. sell yourself and your dossier. They can choose to get themselves known, to make contacts to the Cabinet and higher management. The absence of an effective career structure forces officials to be self contained and dynamic, to show entrepreneurial qualities in effect. The combination of a sense of elitism and the tough selection procedure promote a certain mentality and

29 Edwards & Spence, op.cit., 95.
30 Interviews with Commission Officials.
perception of their profession, ‘Many Commission fonctionnaires clearly do not see themselves as public servants or mere administrators…many preferred to see themselves in grander political terms as “policy-makers”, “innovators”, “intellectuals”, “architects” of the new European order whom the treaties (and “history” itself) had proclaimed “custodians of the European interest”.’

Thus a specific type of individual has traditionally been attracted to work at the Commission and this type can be defined as being both motivated, political and would probably in a free market setting be considered entrepreneurial-like.

4.2 Resources: The Desk Officer’s Monopoly of Dossier Expertise

Usually the officials are the absolute experts, often in the whole of Europe, of the complete dossier. The Commissioner and her supporting Cabinet can only have the very broadest of ideas about the contents of the directives. According to several sources a high proportion of the management from Heads of Unit to Director Generals are often not experts and the higher their rank the more likely it is that they owe their position to factors other than ability and knowledge. Desk officers are often guided by MS experts on the committees which are related to their dossiers and a close detailed knowledge network can evolve around a dossier with the desk officer managing it. That said the initiative remains with the official and not the MS committee. For the directive on hazardous waste, a technical adoption committee met twice a year. Although such committees meet for one issue they can be asked to vote on more issues as well, which can leave scope for officials’ discretion. This expertise means that the sometimes less expert and politically chosen and motivated hierarchy are dependent on the officials to generate the legislation necessary for them to survive as an institution. Obviously a huge amount of discretion is at the disposal of the official concerned and it is also to be expected that a degree of loyalty to the dossier and the networks concerned will also develop, potentially at the expense of loyalty to a distant DG hierarchy. Given the many splits and principals the official has to overcome in the DG, the Commission and the rest of the institutions, their expertise has to be used carefully to win arguments often of a legal nature in

4.3 Resources: Building Networks

The process of adopting legislation can be very complex and chaotic and the desk officers, who are alone responsible for the dossier they have either chosen or been allocated, are expected to promote and follow the dossier without any real support.

31 Shore, op.cit., 144-145.
32 Discussions with Commission Officials.
33 Ibid. and see Edwards & Spence, op. cit., 75.
The effective culture is one of backwoodsmanship with a lone official having to reach decisions often of a political nature and then interacting with MSs, MEPs, lobbyists and forming networks to achieve the adoption of their dossier. The absence of any real formal procedure to follow let alone a standard filing system for support, or the firm guidance of superiors means that the official must be a decision maker and that often his attitude will be decisive in how a dossier is followed. The confusion of principals means often the absence of effective checks and balances an example of which is the following. Environment ministers often vote yes for legislation when their national treasury departments would have rejected it outright. Usually treasuries will notice later on but sometimes not and often it is too late. If the official can market his or her dossier effectively to the environmental ministers, who are often loyal to their sector, then national parliaments and governments can be avoided.

Figure 1. Formal and informal lines of hierarchy

Without networking an official will not be able to complete their dossier. He is expected to overcome the many splits mentioned above and to forge compromises, whilst the actors the Commission would expect the official to have to overcome would be limited to the MEPs, the lobbyists and the MSs, in practice the skills are very relevant within the Commission itself and of course the DG.
The desk officers are at the centre of a network of actors coalescing around the directive which is beginning to be formulated\textsuperscript{34}. It takes 9 months for a member of staff to become operational with a dossier, so short term trainees are not even put on them. A dossier’s life can vary, mining waste was very quick, another took eight years, 4-5 years is a good average\textsuperscript{35}. The desk officer is alone in the initial process of developing the proposal.\textsuperscript{36} It is only once the policy has been adopted internally by the DG and adopted by the College that the Commission can be said to provide policy direction.\textsuperscript{37} The network that the official is in frequent contact with can be vital in order to overcome opposition and blockages within the DG and the Commission. The desk officers initially decide policy direction maybe with their unit heads\textsuperscript{38}, the DG hierarchy and the College sometimes provide reactive policy direction, and sometimes this has to be circumnavigated to promote the dossier.

4.5 Resources: An Eye for Opportunity

In order to succeed, officials, the DG and Commission must be able to be extremely sensitive of the changing policy environment. They must, in economic terms, be very much up to date on the present market situation; they must know what products can succeed and what not. Application of SWOT, strengths, weaknesses, opportunities and threats, is a basic to companies in the market and a form of this is necessary for officials to follow. They must recognise the opportunities and the strengths of the Commission position, and its product, at any given time, and of course the weaknesses and threats. The basic Commission product is legislation in its various forms and in particular legislation that enhances the Commission’s competencies. Usually there will be the threat of MS opposition, other DG opposition and of course lobbies and the EP. However in the event of an industrial accident then it is suddenly easier to get environmental legislation passed, or in the event of a rise in unemployment then suddenly other DGs will find themselves in a position to rapidly generate legislation to exploit the opportunity. Unavoidable facts, media attention and public opinion are suddenly in the equation. The reason for this is quite simple the MSs and the EP will do all they can to avoid being seen to oppose obviously beneficial legislation at times of change and crisis. Officials have to possess this entrepreneurial sensitivity to recognise the perfect moment to either reintroduce legislation previously put on the backburner due to opposition, or to quickly generate new legislation before the political agenda moves on. Not only dramatic events and trends decide the time to re-launch legislation if the EP committee concerned with the sector is more favourable owing to a change in

\textsuperscript{34} See Mazey & Richardson, \textit{op. cit.}, 179.
\textsuperscript{35} Discussions with Commission Officials.
\textsuperscript{36} Grant, Mathews & Newell, \textit{op. cit.}, 19.
\textsuperscript{37} See Mazey & Richardson, \textit{op. cit.}, at 112 and 120.
\textsuperscript{38} Ibid.
its membership then this is a favourable opportunity to be exploited, or if an unfavourable hierarchy changes an opportunity is there.\textsuperscript{39} Or if the balance of environmentally active MSs in the Council changes this is a moment to act, or if a MS decides to promote a certain policy domestically, then the Commission can suggest the benefits of a European approach, which would of course have the same domestic effects. The official has to remain ‘on the ball’ at all times, keeping in with his networks and ready to act.

5. Pushing a Legislative Proposal towards Adoption: Hurdles and Tactics

When an official decides to work on a piece of legislation, and to act as an entrepreneur, he or she will face many opponents both legal and otherwise. The first struggle is for the legislation proposal and draft to be adopted by the administrative management of the DG. It is not uncommon for the official to have to sell their dossier to the hierarchy and the Cabinet.\textsuperscript{40} When the request for a dossier comes from the Cabinet it is possible for the DG hierarchy to oppose it and the official may have to sell it to them. The same can happen if the hierarchy request a dossier and the Cabinet oppose it, again selling is on the cards. If the dossier has been started, as many are, by an official deciding to follow it, then they can expect to have to sell it to their hierarchy and the Cabinet. Given that political motivations become steadily more important the higher in the hierarchy, it is not particularly odd to find that the official can often feel rather alone and having to hunt for allies amongst the management in order to see their dossier through to fruition. A degree of political and diplomatic ability and salesmanship are necessary for the dossier to be adopted by the DG.

5.1 The Role of Directors

As the DG will only adopt a certain amount of dossiers which have the highest chance of successfully being adopted by the Commission, competition can often occur between different directors, units, dossiers and their officials. It can be extremely difficult to successfully compete at this stage and a lot can depend on the official’s director who has to sell the official’s dossier. The other directors will naturally promote the drafts prepared by their units and only a limited number of drafts can be passed on to the next level, thus the political ability of an official’s director may prove to be decisive, combined with the carefully created legislative product and the sales angle provided by the official. The arguments which are made at this point are both of an economic and legal na-

\textsuperscript{39} Discussions with Commission Officials.

\textsuperscript{40} The statements throughout this section are based on discussions with Commission Officials, unless otherwise indicated.
5.2 Economists and Lawyers

The problems between the economists and the lawyers in the DG and the Commission as a whole emerge at this point. The two professions are known to find communication problematic and the style of argument in particular. Lawyers find it easier to argue legally than economically and a draft which may make excellent legal sense may well fail to stand up to the scrutiny of the economists. The problem is similar to that in the market where businessmen find red tape frustrating and often nonsensical, ironically in the DGs it is often the lawyers that perceive the economists as the bringers of red tape stopping their legitimate entrepreneurial legislation production. Recently the position of the economists and financial experts has been strengthened in the Commission as a whole. The next stage involves persuading the political level of the Cabinet and the Commissioner that the draft is worth sponsoring. Since 1992 and the ‘less but better’ legislation drive, the Commissioner is most likely to back a proposal that: has a good legal coherence and content, makes economic sense but also which is likely to have powerful political supporters to give it a guarantee of success. The legal unit of the DG may well have a say on the proposed legislation, although their task mostly involves taking legal steps against MSs.

5.3 Circumnavigation of Hierarchy

In the event that the official faces opposition from his Head of Unit, they are able to attempt to circumnavigate their Head of Unit and to get the proposal sponsored by the upper levels in the hierarchy. It is a curious fact that in many DGs whilst a Head of Unit is above the official in the hierarchy, the official is responsible to a director. If an official wants a directive to be passed which is likely to be opposed by senior management sometimes their own director, or the other directors then a useful method of avoiding management opposition is to get Cabinet involvement in the dossier and thus that of the Commissioner too. Cabinets have often sought direct contacts with the officials to avoid the sometimes slow hierarchy, officials, logically enough, will also try and attract Cabinet attention if possible. It is for this reason that many of the heads of the DG management, the Director Generals seek to forbid and prevent any contact between officials and the Cabinet, regardless of whether this would be more efficient. Even so Director Generals will bypass their own administrative management to get policies enforced

\[41\] Discussions with Commission Officials.
\[42\] Ibid.
and so speed up the system and can also prove to be a useful ally in dealing with lower management.

Figure 2. Choice of principals of the desk officer

![Diagram of hierarchical structure with Commissioner at the top, followed by Cabinet, Director General, Director, Head of Unit, and Desk Officer at the bottom. Arrows indicate the flow of authority and influence.]

5.4 External Sources of Support

Even if a dossier is not directly wanted by the Commissioner and or the management so long as the proposal has strong sponsors like the EP or a MS then a certain amount of pressure can be brought to bear. In the event of opposition from the higher management then the official can go around the hierarchy to EP and Commissioner or the MS’s ministers concerned. This is what happened with the regulation on electronic waste, the environment ministers from the MSs were highly supportive of it, and the officials had to sidestep the more industry friendly Commission, which was, in this respect, a problem that had to be circumvented. This is a useful tool to force a directive past internal blockages, and the traditionally environmentally friendly committee of the environment of the EP, can usually also be counted on to apply pressure where necessary. MS environmental ministries like EU legislation which costs them less and is easier to get into their countries’ law books.

Whilst MSs can be useful in overcoming management difficulties the official has to deal with the MSs which have their own methods and tactics of at-
Regulatory Entrepreneurs and the Commission

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tempting to harness the entrepreneurial spirit of the Commission. The MS lawyers and officials can apply their pressure in the committee stages of the dossier, as the official concerned is gathering information, or they can parachute another official, an END, into the DG to run a dossier. As the MSs are not a block but rather a group of independent actors, the official potentially has the advantage of being able to appeal to different MSs for knowledge and support. MS lawyers and officials in the Council and the same applies to the MEPs and any of the other institutions officials involved, all have a chance to press for amendments and changes and the DG official will have to answer questions and challenges from them.

5.5 Opposition from Within the Commission

The next opponents that the official will face are in the so called inter institutional stage. Now other DGs can apply pressure for changes and delay the passage of the dossier. It used to be the case that two months was a realistic period for the DG to wait before its dossier reached the final Commission agreement stage on adoption, now that time is more like twelve months, which reflects, no doubt the increased competition mentioned earlier. It is not unknown for other DGs to notify lobby groups about another DG’s dossier and to thus encourage them to protest to the lobby sensitive College of Commissioners and the Heads of Cabinet and as a result dossiers may well be altered. The lawyer official will have to defend their dossier from legal challenges from other DGs representing industry or transport, and of course the lawyers of the lobbyists. The economists of the other DGs will also closely scrutinize the text. The final decision on adoption will be taken by the College or the Heads of Cabinet after compromises have been made, sometimes quite serious compromises, e.g. according to one source the official who drew up the proposal for environmental liability policy saw his text watered down after industry lobbied the Commission at the various stages, the directive had called for strict liability and this was changed to fault based liability.43 Two exemptions were added which toned down the legally enforceable implementation text, which apparently turned the strict liability to a negligence only liability. The Heads of Cabinet changed the text even further, weakening it from the stand point of the original draft.44 The legal service of the Commission will have to approve a law and this can be a stage at which the lawyers test their skills. The legal service lawyers are said to often be conservative in their decisions, particularly since they must be sure that they will be able to win any Court of Justice cases which may well result.45 But also they tend to concentrate on the treaty and the four basic freedoms which can be both a benefit and a curse for DG Environment. On the one hand sometimes the lawyers of the legal service accept that they are not environ-

43 Interviews with NGO.
44 Ibid.
45 Interviews with Commission Officials.
mental law specialists and allow legislation to proceed if the DG explains its case. On the other hand if the basic freedoms are in any way challenged then there is said to be tendency for them to be conservative.

The last hurdle can be reasonably said to involve the Court of Justice and its lawyers. As stated previously, the DG has a major problem with implementation and many of the MSs land in front of the Court of Justice and once again lawyers are opposed, quite possibly the DG’s lawyers will be called on to state the DG’s view and the work of the original official will be crucial for the process of the case.

6. The Larger Canvas: DG Environment from Rise to Stagnation

In this section we address the larger framework the history of the development of the DG Environment. Questions here are: how are the entrepreneurial dynamics of the DG Officials reflected in the history of the DG Environment and what indications can be detected that confirm (or refute) the presence of these entrepreneurial activities. Also this history may reveal other forces than those of the regulatory entrepreneurs, that are crucial for the regulatory production of the DG.

6.1 The Rise of DG Environment

Modest Beginning
The history of the DG has reflected that of the ecological movement in general, starting off from scratch as an idealistic group of individuals loosely organised with the desire to further an environmental agenda. At first it was given the limited remit by the Commission of providing other DGs with advice. In 1972-3 there were just six officials working for the nascent DG Environment46, allegedly environmentalists rather than Commission officials by career.47 Originally the DG was a “special service on environment and consumer protection” between 1973-1981. Owing to the inherent potential of the environmentalist agenda and the dynamic, original leadership of a French Director the number of officials leapt to around 40 with the absorption of engineers from the Euratom project which had recently been halted. The motivating and organising force for the DG was the French Director. Around 1978 he was given the title “a titre personnel” and became a Director General. The final chapter of the first phase of Community environmental activity was completed in 1982 with the establishment of a Directorate General for the environment whereas before it had been part of a joint directorate.

46 The statements throughout this section are based on discussions with Commission officials, unless otherwise indicated.
Originally, environmental issues had not been addressed explicitly under the founding treaties and were dealt with piecemeal as required by the various DGs affected. Environmental concerns had been “motivated by the strong desire to eliminate trade distorting regulatory differences in national environmental regulations concerning product standards”. After the 1972 Paris summit the Community openly began its own environmental policy, primarily all of the resulting policies (70 legislative texts) and legislation were based on Articles 235 EC and 100EC but the Environmental action programmes were perhaps more important as these and some broad frame work directives served to prepare the way for the gradual extension of Community and DG Environment’s competencies into new areas; these acted as bridgeheads for follow up ‘daughter’ directives.

The intention of the founding fathers of the DG was to find policy areas, like water and waste, which did not come under the traditional sectoral headings of agriculture, trade etc. There was in effect a deliberate desire to separate a purely environmental sector from the rest of the Community activities and to thus derive independent competencies which would justify fully fledged institutional and later treaty based autonomy. Policy integration with the other DGs was also deliberately avoided, to ensure that the nascent DG went beyond being an internal Commission pressure group. From the start the DG used every opportunity to promote new legislation. One example of this opportunism came when the French decided to improve the quality of their bathing water, the Commission quickly stepped in with the idea of extending such a goal to the Community, six months later the Council adopted the proposal. It is interesting to note that a lot of environmental legislation was and is increasingly discussed first in Brussels and then adopted by MSs. Today 75% of environmental legislation in Germany is of Brussels origin, Norway is the same, 80% of the UK’s environmental legislation is from Brussels and 100% of that of Portugal and Spain. Legislation is literally created at European level or adapted from legislation already in existence in some MSs and then imported into other MSs.

**Legislative Success**

A second phase of legal and institutional development began with the 1983 Stuttgart European Council which emphasised the need to clean up pollution and in 1985 the European Council decided that the environment should be included in the Single European Act. Finally in 1987 environmental concerns and Community activities were given their own clear legal form under chapter seven. How DG ENV expanded both its competencies and staff numbers surprised many, a good summary of the second phase of legal development is quoted below:

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48 Ziegler, *op.cit.*, 134.
51 Interviews with Commission Officials.
‘The case of environmental legislation is significant and not untypical …
The SEA changed this by introducing a specific legal basis for environmental
legislation, albeit requiring unanimity (and with a first reference
to subsidiarity). The next stage was inclusion in the Treaty on European
Union of new provisions switching the voting basis from unanimity to
qualified majority. The question of whether the Commission is successful
in its attempts to expand competencies is thus far from rhetorical. ... it is not unreasonable to suggest that the Commission has been a power-
ful catalyst in making environmental standards a European issue.’

The inclusion of the EP in the co-decision making procedure on environmental
issues has weakened the Commission and the Council as a whole and strength-
ened that of the environmentalists as the parliament has up until recently proven
to be more environmentally oriented than elements of the Commission and
Council.

Entrepreneurial Use of the Complaint Procedure
Quite apart from the large amounts of legislation which the DG generated dur-
ing the period in 1986 a decision was reached to develop an instrument previ-
ously used for trade and industry, that of a formalised complaints procedure.
Individuals could now send complaints about MS failures to implement envi-
ronmental legislation direct to the Commission. The Commission has tradition-
ally had too few staff to effectively monitor the implementation of legislation
by MS ministries. The decision was publicised and as a result the number of
complaints went from 6 per year in the early 80s to 600 a year in 86 and 87. As
each complaint had to be seen by the Commissioner, the limited resources
available to the legal unit were increased. The pro active approach of the DG
had once again resulted in an extension their influence over MS implementa-
 tion rights and also resulted in an increase in staff numbers. What also emerged
from this move was that the Commission decreased their perceived distance
from the European citizen, this was and is a desirable institutional goal. Also
the DG and therefore the Commission succeeded in thereby evading accepting
responsible for the failure of the MSs to fully implement environmental legi-
slation. The complaints procedure was not required of the DG and was delib-
ately created from a particular interpretation of Article 169. It is in effect a vo-
luntary service offered to the public by the Commission and as such has to be
considered an extra, which could be removed, should the Commission consider
it a liability. The Commission is at pains to stress this point when they receive
complaints about the slowness of the process.

52 Edwards & Spence, op. cit., 19.
53 Liefferink & Andersen, op. cit., 79.
54 Discussions with Commission Officials.
55 House of Lords session 97-98, Select Committee on the European Communities,
It is a curious construction rather similar to the initial environmental legislation, founded on an elaborate interpretation of an article. A complaint sets off a procedure with the Commission alarming the DG about a potential failure of a MS to follow and implement legislation and inevitably plunges the individual making the complaint into the labyrinthine politico/bureaucratic world of the Community. Articles 26-28 allow the Commission to take legal proceedings against the MS should it be necessary. Complaints can take on average of 50 months and are often wound up for political reasons by other Commissioners or MSs, with the decision clouded in secrecy and often far from satisfactory for the person making the complaint. In fact after the report of the European Ombudsman in 1996 emphasised that citizens were feeling more antagonistic towards the Commission as a result of the process and not the opposite there have been indications that the Commission is backing away from the infringement, complaints process. NGOs want to retain the process because there is nothing else available. Ironically the Commission and the DG have in a sense become victims of their own success. According to some sources almost half of the infringement cases outstanding in the EU between the Commission and the MSs are environmental in their origin. Environmental laws have become highlighted as a result and high level disputes have occurred between MSs and the Commission. The friction caused by the increase in infringements cases would appear to have led to the next phase in the development of the DG. Despite the increase in cases, averaging around 600 a year there has not been a parallel increase in staff numbers, in fact only fifteen employees are involved.

6.2 Intermezzo: Seizing Opportunities

The Seveso Tragedy

When considering the case of the DG in question, it is noticeable that it appears to have behaved in an entrepreneurial manner both during its development and in its exploitation of windows of opportunity. One official stressed the connection between an environmental disaster and the generation by the DG of a piece of legislation in response. Prior to the accident or disaster any Commission policy for the sector concerned may well have been opposed by lobbyists and MSs, afterwards there is almost a common consensus on the need for action which the DG uses to its advantage. On 10 July 1976, an explosion occurred in a trichlorophenol reactor of the ICMESA chemical plant near Seveso in, Italy. A toxic cloud descended on Seveso and resulted in serious health problems for

56 Ibid., 153.
57 Ibid., 73.
58 Ibid., 150.
59 Ibid., 89.
60 Ibid., 153.
61 Discussions with Commission Officials.
62 See: Select Committee on the European Communities, op. cit., 76.
63 Ibid.

Further Disasters
The sinking of the tanker Prestige in November 2002 led to the Commission producing a proposal for a directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences (COM(2003) 92 – C5-0076/2003 – 2003/0037(COD)).65 The sinking of the tanker Erika in 1999 was the last straw which allowed the Commission to reintroduce the proposal for environmental liability.66 The explosion at the AZF site in Toulouse led the Commission to immediately consider the need for an amendment of the Seveso II Directive, although one of the Community commentators on the proposal stresses that the site of the explosion was already fully covered by existing legislation.67 In 2000 the serious mining accident at Baia Mare resulted in the Commission generating first a communication entitled, “Safe operation of mining activities” (COM (2000)664 final) and then the proposal for a complementary directive.68 According to internal sources the DG had responded in a particularly entrepreneurial manner with the mining directive.69

64 DG Environment ‘Chemical Accident Prevention, Preparedness and Response’, http://europa.eu.int/comm/environment/seveso/
68 IP/03/784 Brussels, 2 June 2003. The proposed Directive will help prevent serious accidents resulting from the mismanagement of mining waste, like the disaster in Baia Mare in 2000, where the whole of the Danube was polluted with cyanide, said Environment Commissioner Margot Wallström.
69 Discussions with Commission Officials.
Exploitation of a Consensus

One final point is that the Commission also uses the accidental existence of a common consensus on an issue to press for legislation. In 1981/2 there was considerable concern about the acidification of rain and the woods dying which forced governments to get together to find a solution. At the same time the UK wanted to introduce lead free petrol to deal with the social problems of children suffering from lead poisoning as a result of living next to major roads. The DG sensed their chance so in 1983 there were three to four successful proposals on air pollution. On a treaty level the disaster led to the SEA and the Maastricht Treaty expanding the rights of the public to information.

National or Community Legislation

Whilst the above are proof that the DG responds to accidents with legislation this could be merely the common-sense act of a government department. But the interviews which were carried out appeared to reflect an entrepreneurial approach beyond that of a normal government department. Why was legislation generated at Community level when arguably national legislation could have been sufficient? As with the bathing water directive the DG was extremely pro-active in pushing for the Community to set standards for all the MSs despite the reluctance of many of them. At times the proposed Community legislation potentially duplicates or confuses already existing international and national laws. This raises the question of motive; why not leave the already existing standards in place? The same question can be raised with regard to the Toulouse accident and the Commission desire to implement an amendment although there was already legislation in place which should have been implemented.

72 Report on the proposal for a European Parliament and Council directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences (COM(2003) 92 – C5-0076/2003 – 2003/0037(COD)). “Danger of conflict between legal regimes. The Commission is proposing to incorporate the MARPOL rules on discharges into Community law. In so doing, however, it also makes a number of modifications to the internationally agreed texts. For example, it abolishes the derogation introduced for discharges resulting from damage to a ship. These modifications are undesirable in terms of content but also contribute to a proliferation of divergent global, European and national rules. Your rapporteur intends therefore to table an amendment reversing this mistaken approach.”
The Problem of Implementation

The apparent failure of the DG to generate legislation which results in implementation taking place by the MS ministries can be seen either as the problem of the MSs or of the DG. According to one DG source, when 15 MSs fail to properly implement legislation, as is true for one directive, then there must be something wrong with the law. An implication being that the law was not precise enough, or too precise and not easy for the civil servants on the ground to enforce. Possibly the entrepreneurial nature of some of the legislation is reflected in it being easier to generate than finally to implement, the goal of the generating legislation in the DG at all costs could be said to have been, at times, incompatible with the goal of creating legislation which can be and is implemented on the ground. This was also mentioned as a problem by the author of the EP’s opinion. Another point is that little is done by the DG itself to ensure that implementation takes place, and monitoring is treated as a minor issue when compared to generating legislation despite the general understanding of the need to improve implementation. The Legal unit which has to apply legal pressure on MSs which fail to comply is badly understaffed and there has so far not been any reallocation of resources to ensure that it occurs.

6.3 Stagnation

Commission Slow Down

By the beginning of the 1990s all the major types of environmental problems were covered by EU policies and there were a broad range of policy instruments in position: environmental standards, product norms, emission standards, economic instruments and agreements. The environment had moved effectively from being a low politics to a high politics issue, as was proven by its being included in the Maastricht treaty in article 2 on an equal footing with economic matters. Two trends began to emerge during this period, one was a general slow down in Commission legislative activity which was matched in the environmental field by a slow down in most MS environmental ministries. The second was a greater emphasis on alternative approaches to both implementation and integration. There was a growing recognition within the Commission as a whole, as there was in national ministries, that environmental concerns and legislation could no longer be allowed to develop independently from mainstream policies. The DG had reached its limits and needed to spur on the integration process with other DGs in order to change issues like transport. In order

74 Report on the proposal for a European Parliament and Council directive on ship source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences (COM(2003) 92 – C5 0076/2003 – 2003/0037(COD)). “Some forms of wording in the proposal are unclear or open to various interpretations. Precisely because legal provisions are involved, accuracy and clarity matter greatly. Your rapporteur is accordingly proposing a number of improvements.”

75 Select Committee on the European Communities, op. cit., 112.

76 Edwards and Spence.
for there to be progress environmentally, the other DGs were assisted to adopt greener agendas and also there was a movement towards enforcing legislative consistency within the Commission. Integration units were created in other DGs to try and ensure that environmental concerns were considered in, for example, agriculture. The move towards Commission integration heralded a change in the Commission’s attitude towards the DG, which was considered in some quarters to be ineffective for improving the environment.  

The 5-6 Environment Action Programmes (5-6 EAP)
Certainly the 5 EAP was different to what had gone before and reflected a change in attitude/ideology of some within the DG. This programme marked a watershed and it is worth mentioning some of the variant ways that it has been perceived. In some ways the 5 EAP has been argued to be an excellent strategic move, an entrepreneurial merger or franchise operation with other DGs which recognised the changes in the operating field or market of the DG and quickly adapted to them, recognising the opportunities and threats that the status quo held. Generating legislation had become harder to justify after the Danish referendum and the promotion of the concept of subsidiarity and the issues have become more complex too and involved more sectors. Thus some officials considered it to be inevitable that the 5 and 6 EAP were more and more complex. The playing field has changed for policy making has changed so DG performance has to be assessed bearing that in mind. “Things are not as simple anymore nor as proscriptive as in the old days”. Certainly with regard to the changed institutional balance between the Commission and the European Parliament, strategy was very much in play. The growth in EP involvement meant that the 6 EAP had to go through the co-decision process. It was obvious that any targets included would be debated for months and more studies would be needed and analyses, which would have made it impossible to get the programme through. Therefore it made sense for the officials responsible, to avoid listing targets and concrete goals as had been the case in previous EAPs. According to some, the recent EAPs represented a victory by the environmentalists since they were more strategic in their approach than the previous ones and showed that the DG had learned from previous mistakes, the worst of which was the lack of implementation.

The programme stressed the need to concentrate on implementation and less on legislation and of course more on the integration of the Commission implying “the inclusion of environmental concerns into sectoral policy domains”. The same author states that it could be the case that DG Environment staff now

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77 Cini, op. cit., 84.
78 Ibid., at 87.
79 Discussions with Commission Officials.
80 Ibid.
81 Select Committee on the European Communities, op. cit., 119.
82 Ibid., at 116.
83 Cini, op. cit., 81.
Mark Stout

has to consider the “practical feasibility of their proposals”. Sustainability is the guiding principle in the present programme and it aims to encourage patterns of development, which would allow economic growth for future generations. The Director General felt the need to use seconded national officials to develop the 5 EAP rather than permanent officials because of personnel problems which led to ‘tension and conflict’ within the DG as staff formed into what were effectively blocks based on their backgrounds and interests. The detractors from the recent EAPs make a less polite assessment of the programmes, stating about the 6 EAP “it usually amounts to little more than ‘mission’ statements, biased research objectives and pious ‘strategy jargon’ to which few strings are attached”. A major weakness of the programme was, according to some, that it lacked real goals and was far too vague. This last point could be seen as a strength: “It is the vagueness and all embracing nature of it […] that has made it acceptable to many political dimensions, environmentalists and industrialists”. The sixth programme was devoid of any timetable and even vaguer, continuing the process started with 5 EAP.

De-regulation and Nationality

Some commentators have linked the move towards de-regulation in the DG to the growing presence of British officials both permanent and seconded. Both the 5 and 6 EAP were the work of British officials and the UK has been noted as having a strong presence in the management of the DG. Others have highlighted a clash in the Franco/Germanic proscriptive legislative approach and the UK one. Up until 2000 the DG remained to some extent divided with some units still producing impressive amounts of legislation, whilst some in the hierarchy favored less legislation and greater use of softer methods.

But it was already difficult for the DG to succeed in having its proposals accepted by the Commission and during the inter DG discussion phase many of the policies were drastically watered down or refused entirely. Industry had and has a strong presence in at least four of the major DGs and DG Environment often only has one possible coalition partner in DG SANCO. When compared to the boom times of the late 1980s and early 1990s the rest of the 1990s have been a time of stagnation or maturing depending on the perspective adopted. The common phrase of the Santer College was ‘less but better’. In the mid 1990s the DG began discussing policy chains, and the focus became more

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84 Ibid., 82.
85 Ibid., 124.
86 Select Committee on the European Communities, op. cit., 177.
87 Discussions with Commission Officials.
88 Lieferink & Andersen, op. cit., 119.
89 Discussions with Commission Officials.
90 Ibid.
91 Ibid.
92 The waste unit for example. Discussions with Commission Officials.
93 Discussions with Commission Officials.
94 Ibid.
on policy outcomes rather than just the production of legislation. Given the impressive amounts of legislation but less impressive state of the environment, there was a perceived need to improve on implementation, policy outcomes had to match the policies themselves and that required new methods.95 Other policy tools were introduced to try and achieve what legislation previously achieved, but some of these have been quite unsuccessful.96

Legislation Generation Attains Scarcity Value

The ‘less but better’ approach meant in effect that although the unspoken benchmarking method of legislation generation proving a DG to be successful remained true, the Commission would only adopt water tight dossiers with a real chance of easier adoption by the MSs and the EP. The competition between DGs to get legislation adopted therefore became harder and the hurdles that legislation was expected to pass became tougher. The introduction of impact assessments on legislative proposals placed another hurdle in the way of the official. Now the other DGs had to be involved earlier on and detailed assessments of the social, economic, environmental impact of legislation had to be carried out. Whilst the measures were intended to raise the standard of legislation and to increase the likelihood of it becoming law, it also added possibilities for more competition to take place between the DGs. Legislation adoption has become more valuable as it becomes scarcer. In a tough market place entrepreneurial instincts and abilities are even more called for in DGs and officials.

Given that there has been a gradual move from environmentalism to concern about economic issues, the difficulties in selling environmental legislation to the College has become steadily harder. The result is a DG which is concerned with only backing legislation which it is sure will be adopted by the College and the MSs. It has become harder for officials to get their legislation selected by the DG let alone adopted by the commission. For normal officials this would be annoying, but the response of the DG officials has been to leave the DG and to move where their legal entrepreneurial talents can better be used. There is a clear correlation between the level of staff turnover and the decline in the possibilities for legal entrepreneurial activities, particularly when compared to the possibilities available in other DGs and sectors.

7. In Conclusion

At a macro level the Commission has often shown itself to be entrepreneurial and ready to exploit situations in the interests of the European project. The appearance of the famous rigid hierarchical structures inside the organization ap-

96 Cini, op. cit., p. 84.
pear contradictory and immediately suggest to the observer that non hierarchical possibilities must be available for the Commission to have enjoyed the success it has. Closer examination reveals that the micro level of the officials shows the entrepreneurial qualities that the hierarchy appears to lack. Furthermore the rigidity of the hierarchy seems less dramatic when observations are made about how the Commission works in practice and what sort of behavior it tacitly encourages.

The Commission has been shown to encourage self sufficiency in the officials with staff members having to fend for themselves. Initiative is promoted as any success gained is often down to the decision to act being taken by an official. Freedom is very present with the official possessing incredible room for choice and discretion, quite unlike anything their equivalent in the MS civil services would possess. The official must be able to network and thus possess the social skills which are basic to success. Officials are encouraged to compete for everything in the commission, for their position, their promotion- the possibilities for which can be extremely scarce in particular to the position of Head of Unit, for their dossiers, and for early retirement.\footnote{Discussions with Commission Officials.} And finally entrepreneurial sensitivity to the opportune moment to introduce a legislative product that is sure to succeed. The DGs which possess these officials, who have, as it were, been through fire, are in possession of a valuable commodity. If correctly placed these officials could be expected to carry their DG to success.

The vast amounts of environmental legislation that Europe has produced combined with the information gained during interviews, appear to show that the DG Environment is made up of extremely capable officials, often lawyers, who have not only been quite entrepreneurial in their behavior but also successful in ensuring the passage of their laws, a task which involves political and networking ability. So whilst some officials have played down the entrepreneurial element and stressed that there was always more than enough work to be done to make opportunism irrelevant, this seems to be only a part of the truth. The DG created work for itself. The absence of European law at all in the 1950s maybe meant that there was a vacuum waiting to be filled with few institutional opponents present, ‘an ecological niche’ as one official put it,\footnote{Ibid.} or a market opportunity which allowed the DG to be so successful. In fact the combined evidence of the accident legislation correlation and the increased staff turnover in the face of decreased legislative activity within the DG would appear to be convincing evidence that entrepreneurs have been present in the DG.
1. Introduction

The intensification of economic globalisation calls for continual re-assessment of its institutional frameworks. This is especially true in relation to the now expanded region covered by the European Union. This essay looks to locate the Brussels law office in the process of European integration. Note the word office, because generally there are transnational law firms with many offices including almost invariably one in Brussels, often in the legal quarter of Avenue Louise. The paper explores how these firms, through their work in Brussels, shape European integration by employing existing insights into the process of integration taken from writings in international relations. It does so not to comment on their persuasiveness as explanations of integration (though it will in the end make some comment on this). Rather it deploys these theoretical insights as a tool with which to categorise and gauge the impact of the work undertaken in the Brussels law office. After introducing the theoretical models of integration, the paper explores the nature of the now highly developed EU regulation in order to place the firms in an operational context. It then offers a brief historical account of the Brussels law office and explains the type of work done there. This leads to a conclusion that fits the law office into the theoretical accounts of European integration, and which posits a possible tension between the work of, and commitment to integration in the Brussels office and the wider commercial aspirations of the multi-national firm.

2. European Integration Theory

There is no shortage of literature seeking to theorise about or account for European integration, though there are many references, too, to the puzzling or problematic nature of offering a compelling account. McKay heads his introduction to his book on Federalism and Europe, The Puzzle of European Union. I am grateful to the editors of this special issue for their assistance with this paper, and to the other contributors to this edition for their helpful comments at an earlier stage of its development. I should like to acknowledge the kind assistance of Jiri Priban in the development of the ideas for this paper.

ion, and this theme is re-visited in a number of studies of the phenomenon.\textsuperscript{3} The puzzlement seems to arise from the curiosity that nation states might cede sovereignty to a pluralist union of states. Although over time they have become greatly refined and carefully nuanced, there are two dominant theses, largely driven by writing in the field of international relations, neo-realism and neo-functionalism. However, before reviewing these theoretical approaches to European integration, they can be juxtaposed against traditional legal scholarship in EU Law – what Burley and Mattli have described as legalism.\textsuperscript{4}

**Legalism**

By legalism, Burley and Mattli refer to little more than a dominance of doctrinal, black letter approaches to the study of EU law (and particularly in the context of their paper the role and jurisprudence of the European Court of Justice). Quoting Shapiro this is seen as positioning:

“The Community … as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law of the inevitable working out of the correct implications of the constitutional text and the constitutional court as the disembodied voice of right reason and constitutional teleology.”\textsuperscript{5}

The limitations of this approach are well recognised by socio-legal scholars. It treats law as self contained and autonomous. There is nothing available to explain the process of integration in such analyses other than the driving force of law itself.\textsuperscript{6} The lead from the law-making institutions in the European Union is


\textsuperscript{5} M. Shapiro, ‘Comparative Law and Comparative Politics’ (1980) 53 *Southern California Law Review*, 538.

followed inevitably by the legal systems of member states in adopting and applying the supreme body of EU law. Thus law is presented not only as autonomous, on this analysis, but also as self-sustaining.7

By confining legal scholarship in this way, we learn little of the motivation of member states in the process of integration or of the interplay between law and politics. Although for their part those in the field of international relations and political science have been slow to position law in their analysis, there is now more “interdisciplinary theoretical work …(trying) to tackle the more substantive normative, functional, legal and political questions of European integration.”8 As Weiner suggests, some of this work is conducted by legal scholars drawing heavily upon the insights of their colleagues in politics and international relationships.9

Neorealism

Set against the legalist approach, realist theory views the state as imbued with ‘resilience’10 in the face of the growth of international institutions. In this analysis, the legal order of the EU is tolerated by member states in their self-interest because of the gains that can attach to the trade liberalisation agenda pursued within the EU. Thus integration arises out of the national interests of the states rather than being forced through by the EU institutions. In relation to law it has been suggested that any statement of the primacy of EU law remains subject to the capacity of states to re-assert their sovereignty.11 In the context of my own jurisdiction, that retains a strong sense of Parliamentary supremacy in the absence of any written constitutional settlement, this remains compelling. But it has also been argued that the statement of the primacy of EU law, not found as such in the Treaty of Rome but propounded through the case law of

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11 It is worth remembering that Greenland entered the Community at the time of the Danish Accession, but having gained home rule withdrew in 1985 with the ratification of a Treaty signed by other Member States – for a discussion of the issues from an international law perspective see M. Akehurst, ‘Withdrawal from International Organisations’ (1979) 32 Current Legal Problems, 143.
the European Court of Justice, does not fully reflect the highly consensual approaches to law-making elsewhere.  

Proponents of this approach focusing as it does on the rational actions of member states in co-operative negotiation have been described as intergovernmentalists. The process of co-operation has to be managed and bargains enforced, but these tasks can be depicted as part of a subservient role rather than as the exercise of power by an overarching supranational authority. For the most part, this neorealist emphasis need not be seen as restricting the growth of the Union since greater benefits of trade liberalisation may attach to larger trading blocs. Nonetheless, the integration is measured and controlled, especially by the larger states, which may be willing to pool sovereignty to advance self-interest but which remain the prime movers of European initiatives. This view is most strongly and most coherently presented by Moravcsik,14 who focuses on three factors, namely the patterns of commercial exchange, the relative bargaining power of national governments, and the incentives for joint commitments between the states concerned. Importantly for our purposes, however, is that the most fundamental of these is commercial interest:  

“European integration resulted from a series of rational choices made by national leaders who consistently pursued economic interests – primarily the commercial interests of powerful economic producers … that evolved slowly in response to structural incentives in the global economy.”15  

Neofunctionalism  

In contrast, institutionalist writers have sought to promote neofunctionalism – in which the integration of the European Community results from the work of the European institutions. Integration mirrors the growing confidence and competence of the supranational actors, which become growing political forces, assuming the power conceded by the states. Indeed integration becomes the goal of these actors since their power-base derives from it, not least because integration enhances the authority of the institutions themselves. Even if such institutions set out in a technical support role, their assumed expertise, and cen-
tral role in marshalling member states creates a significant institutional framework. Sandholtz and Stone Sweet\textsuperscript{16} provide a revised neofunctionalist account of some importance to us in attempting to show in an edited collection covering some of the major policy developments in the EU how a supranational polity has been shaped by the institutions of the E.U. arguing that their institutionalist account is more compelling than those of intergovernmentalists, which they present as rigid or static. This fluid neofunctionalist model generates its own internal dynamic as European legal integration generates transnational economic activity. This in turn creates demand for supranational rules, forcing further legislative activity that in turn drives integration.

It may be that neofunctionalist explanations have an inherent appeal to lawyers, stressing as they do the institutional framework. In addition those drawn to teaching about or researching E.U. law may be attracted to an explanation of the supranational role of the institutions in transnational governance. Burley and Mattli have argued that the neofunctionalist theory better explains the “creation of an integrated and enforceable body of community law.”\textsuperscript{17} In a section of their work entitled ‘Law as a Mask’ they depict law as a ‘neutral zone’ in which it is possible to reach outcomes difficult within purely political arenas. They would not deny the political significance of legal decision-making, but would assert some ‘non-political’ rationale that political actors must defeat. They suggest that:

“Law functions as a mask and a shield. It hides and protects the promotion of one particular set of objectives against contending objectives in the purely political sphere.”\textsuperscript{18}

This emphasis on what is in effect the legitimating influence of law is no surprise coming from writers of a neofunctionalist perspective, since accounting for legitimacy presents the neorealists with a problem that they are accused of sidelining.\textsuperscript{19} For a number of years following the Treaty of Rome the slow pace of the common market programme presented no great difficulty in handling legitimation arguments. Following the Single European Act and the Maastricht Treaty, the expansion and increasingly wide scope of regulation caused a re-examination of the legitimating base of the Union, which then took a “constitutional turn”.\textsuperscript{20} This is of relevance to us since we argue below that Brussels lawyers have not in general been engaged with wider constitutional issues in their day-to-day work.

\textsuperscript{17} Burley and Mattli, \textit{op. cit.}, 57.
\textsuperscript{18} Ibid. at 72.
\textsuperscript{20} Weiner (\textit{op. cit.}) and see comment by N. Walker, ‘Reconstituting European Integration in Theory and Practice’, Jean Monnet Working Paper 9/03.
The purpose of this analysis is not to offer any new insights into this theoretical framework. Indeed these arguments are so well rehearsed that there may be little new to add. But this forms their value, as it is intended not to argue for one theory in preference to another to account for European integration, but to employ a well-understood theoretical analysis as a mechanism to evaluate the work and role of lawyers in Brussels in terms of their contribution to European integration. The theories concern the relationship between actors in the public sphere, but we are concerned here with how actors in the private sector may influence the playing out of these models of integration. In order to advance this notion, however, it is necessary to reflect on the nature of that work beginning with some reflections on the nature of E.U. law in a practice setting.

3. The European Regulatory Framework

Amongst the issues that amplify the questions of legitimacy referred to above is the pervasive nature of European Union regulation, which in the mid 1990s was estimated to impose annual costs of up to 250 billion ecus on European commerce and industry. This must be offset against the gains from the single market programme falling to the large corporate players for whom the Brussels lawyers act. These gains may come both in terms of reductions in transaction costs brought about by concepts such as mutual recognition (see below) and increases in GDP brought about by the larger trading bloc. The European Union is one of the oldest and the largest trade sectors. In this mature phase, regulation is often specific, detailed and voluminous, coming through in hundreds of measures each year and accompanied by tens of directives that bring major policy shifts in areas involving the central economic liberalisation agenda of the single market. For all the regulation, the irony is that the imperative is one of de-regulation (and/or re-regulation), privatisation, the termination of Fordist type welfarism and the transferring of power from the public to the pri-

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vate sector. This agenda is part of a well-recognised process and global programme of economic integration. Moreover the programme of ‘globalisation of state regulation’ is pursued with almost evangelical zeal, because the continuing success depends upon the expansion of markets. The expansion of the Union may assist in securing stability in Europe following the collapse of the Eastern Bloc, but economic integration is its prime purpose. This process privileges the richer states against the poorer and is driven increasingly by international organisations, of which the EU is but one, but also by transnational corporations with an increasingly tight control of global financial and other resources.

In its nature it operates in multi-levels. It is global, regional, national and even local. Nation States remain the location of citizenship and political activity, and they are the most immediate point of the reception and enforcement of the regulation emanating from the regional level. We see through the elections to the European Parliament in 2004 that while there might be broad trends in voting across Europe, offering at best a reluctant and dubious mandate, this falls a long way short of transboundary political movements. Political parties remain rooted in the nation State.

This may not be so surprising. As a common market, a clear division was made between the economic agenda to be served by attempts to harmonise key areas of commercial regulation and the social agenda left to Member States. There are many elements of this settlement that have changed. The ‘constitutional turn’ signalled by the Nice Treaty, the Charter of Fundamental Rights, the Laeken Summit and the European Convention certainly blur this division. Yet curiously, along with globalisation comes an increase not a decrease of

26 It is a curiosity that the development of global legal systems above the level of the nation state seems to be accompanied by the devolution of power below this level – see in the UK the development of legislative assemblies for Scotland, Wales and Northern Ireland: see A. Rodriguez-Pose & N. Gill, ‘The Global Trend towards Devolution and its Implications’ (2003) 21(3) Environment and Planning, Part C: Government and Policy, 333.
28 If only because of the necessity of institutional reform with a view to enlargement but also because of consideration of requirements for accession countries.
certain elements of state control in areas such as criminal justice, immigration, and state security. So any ceding of national sovereignty in such areas is selective, shifting and highly contested. Indeed it might be argued that the concentration on state redistributive social policy and the jealous protection of taxation powers have pushed the Community more and more into the realm of economic regulation.29

At the same time the whole economic agenda of the Community has changed markedly over the years. Attempts to harmonise laws in the areas of fundamental freedom of movement of capital, of persons, of services and of goods proved too tall an order not least because of prevailing differences in state legal systems. The Single European Act signalled a new phase of essential harmonisation in which core features of the regulatory structure would be subject to agreed minimum standards that would allow mutual recognition of those subject to regulation in other Member States. It remains open for Member States to impose higher standards than this minimum requirement on a non-discriminatory basis. Moreover the legislative instrument for more extensive measures is the directive, which allows considerable choice about the precise mode of implementation, including on issues such as the body to be constituted as the competent authority for regulatory supervision and enforcement.

In this structure, although the Member States shape the integration process (in line with intergovernmentalist thinking), they are recipients and objects of regulation (in line with institutionalist ideas). The point that must be emphasised here is that, while Member States (or transnational corporations lobbying through such States) may strive to shape policy within Europe through influencing the institutions both of the Commission and the Parliament in Brussels, uniformity of regulation does not result. In consequence it remains imperative to determine how that regulation has been transposed into national law. This leads to an important understanding of the work of the Brussels law firm. Although located at the seat of EU power, it is not dealing with a single transnational legal system, but rather with a plethora of systems sharing a common core. A client seeking advice on where in Europe to locate in order to access the Single Market may learn very little from a simple description of directives that might apply to it,30 as opposed to how law in accordance with those directives operates at State level.

It is the transnational corporation that in its very nature has most at stake as regulatory initiatives develop. Because it works across borders any measure is likely to affect operations in more than one jurisdiction. It might help the corporation if the same approach to interpretation and transposition of a directive

29 See G. Majone, Regulating Europe (op. cit.)
30 The author was involved in precisely such advice for Japanese financial institutions in the early 1990s because of the requirement of the Second Banking Co-ordination Directive for reciprocity of market access in third countries once the Directive was in force. Notwithstanding the essential harmonisation that had already taken place in the banking sector, the clients recognised well enough the choice between tougher and gentler regulatory regimes in different Member States.
was taken across Member States, but we know that this is somewhat unlikely. In the Netherlands one of the criticisms of the Koopmans Report was the opaque nature of proposed measures given the lack of explanatory memoranda. Moreover, the Commission is far more concerned with policy development than with monitoring implementation across Member States.

Measures promulgated by the Union institutions may be the subject of agreement by the Member States, but very often the costs of implementation will be borne by commerce and industry. There will be constant dialogue between the bureaucracies at State and Union level not least through the Comitology, which has been criticised as a process that lacks transparency. Corporations or sectoral interest groups on their behalf will seek a constant flow of information on and access to these deliberations. Smith has pointed to the possibility that Member States may position the Community institutions as ‘scapegoat’ for burdensome regulations that they might actually support. An Agriculture Minister may find a greater commonality of interest between other Ministers with the same portfolio in Europe than with other cabinet colleagues at home. What may be difficult domestically may be achievable in Europe. From the point of view of the transnational corporation, information on positions being taken across Member States may be vital. Questions such as which DG might handle a measure could crucially determine the nature and form of regulatory intervention, and territorial disputes are not uncommon.

In seeking to lobby and influence policy, transnational corporations face difficulties inherent in the nature of the regulatory process in the European Union. There are many more policy initiatives mooted than initiatives that are successfully implemented. A broad and imaginative policy such as a proposal to

32 Examples of this include integrated product policy and producer responsibility initiatives such as the WEEE Directive (Directive 2002/96/EC on Waste Electrical and Electronic Equipment) which may require the re-design of goods to assist recycling and recovery and which imposes requirements for the collection and treatment of electrical waste, the cost of which must be borne by the producer.
34 See for example the dispute in the Parliament Committee Structure on whether the Legal Affairs or Environment Committee should be charged with primary responsibility for the Environmental Liability Directive: see “Environmental Liability: Will New EU Legislation Finally Make the Polluter Pay?” (March 2003) Friends of the Earth European Bulletin, 4.
unify civil liability for environmental damage may take years to come to fruition and may be the subject of continual change and dilution as interested parties influence the political process. The legislative process in Europe is not obviously efficient or effective and much of the substance of the regulation is highly technical and driven forward by individual bureaucrats lobbied by other experts in a painful process of negotiation. The constant bargaining around legislation does not reflect a hierarchical system, in which the Commission imposes the regulatory framework. The growth of the importance of Parliament is a bulwark to this as is the Commission’s own lack of democratic mandate. Instead we have a horizontal structure, which mixes the private sector interests of firms and the public sector responsibilities of States and bureaucrats. Nonetheless, it remains problematic for the private firm to exert direct influence on the process, and Radaelli makes the following interesting observation:

“The system of incentives is such that regulatory policies whose costs fall in the first instance on firms rather than on States are more developed than others.”

So firms are often the focal point of regulation but struggle to engage with and influence the policy development and law making process. This is an important consideration (as we shall see) when considering the work of Brussels lawyers.

In this section of the paper, I have tried to depict the nature of EU law. It is part of a process of global structural adjustment driven by an economic liberalisation agenda. It is technical and detailed because it is concerned with de-regulation – pulling apart national barriers to trade and commercial exchange – but then re-regulating on an essential harmonisation basis. In many instances this regulation is directed at or impacts upon private business that has (on the face of it) little immediate access to the policy making table. The regulatory provisions do not apply evenly across national boundaries, which remain robust notwithstanding fifty years of Community endeavour. Therefore transnational corporations must engage in a largely horizontal process of bargaining, negotiation and (where necessary) challenge in order to protect and promote their interests. In the midst of this technical, regulatory, multi-layered structure, it is to the Brussels law office that the transnational corporations turn for information advice and legal assistance.

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36 Radaelli (op. cit.) at 6. In my own area of environmental law this is possible to see in the form of a wave of ‘producer take-back’ legislation, such as the End of Life Vehicles Directive (2000/53/EC), that puts the responsibility for dealing with waste products back to the manufacturer.
4. A Short History of the Brussels Law Firm

The first law firms from the USA arrived much earlier than one might imagine at the end of the 1950s or beginning of the 1960s. There were three firms: Baker and McKenzie (which famously went on to become the first global law firm) Cleary Gottlieb Steen and Hamilton and Frank Boas. These firms possibly became pioneers because they assumed that Brussels would become Washington D.C., a common misapprehension on the part of many entrants to the market even at a much later date. On the other hand, given how early this was in the life of the common market, it is equally plausible that they saw themselves as meeting the needs of U.S. corporate clients in the Belgian market. Belgium having an open market has perhaps seen the same level of takeover activity in its corporate sector as the Belgian law firms based in Brussels. Even today, given the lack of a domestic industry base, a Brussels law firm will have plenty of scope to act for transnational corporations within the Belgian market.

Following this trail-blazing activity was a long quiescent period reflecting the ‘Eurosclerosis’ in the Common Market. For example British entry into Europe in 1972 seems to have generated little interest in locating to Brussels. It was only after the Single European Act and the 1992 initiative that a wave of Anglo-American migration took place. So, for example, leading UK firms such as Slaughter and May and Freshfields arrived only in 1989. At this stage there were 50 foreign law offices of which 20 were from the UK. Jones Day arrived from the USA in 1989 and Skadden Arps in 1990. The explanation offered by many firms was client demand for a Brussels presence:

“UK and overseas clients viewed it as essential that the firm should have a presence at the heart of the Community institutions in order to offer an effective service on E.C. and competition matters. Certainly from the Brussels office the firm is more able than before to service effectively the needs of these clients by monitoring developments in the European Community and by ensuring that their interests are adequately represented to the relevant Community institutions.”

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37 Frank Boas’ firm is no longer in existence.
38 Although under English partnership law a restriction on the size of partnerships meant that there could be a maximum of 20 partners until 1967 when this restriction was lifted. At that time numbers of partners in law firms would not have been near this maximum number, so that by 1972, English law firms were still small enterprises.
40 Not all of these firms had a smooth ride. The Skadden Arps office sought to practice local law in Belgium and proved to be ‘a thorn in the side’ prior to the decision to abandon that strategy in the late 1990s and slim down the office. This and office closures in Prague and Budapest seems to have caused a re-think of the firms international strategy – see C. Timmis, ‘Domestic Bliss’ (1999) 95 Legal Business, 34.
41 J. Mills, ‘Sprouting a Brussels Office: One Firm’s Experience’ 1(4) Lawyers in Europe, 9 – interestingly the firm in question did not last too far into the 1990s hav-
There may be another simple alternative explanation, however. Many of these firms were cash rich at the end of the 1980s following a significant economic boom and unprecedented growth in corporate transactional business. Opening in Brussels became a fashion, but as with all fashions some jumped on board a little too late. The recession of the 1990s hit certain firms very hard and the downturn of corporate work meant that the newly opened offices had few instructions and little chance to make a profit. Even today, however, Brussels is not a high cost location and by keeping overheads low, many firms kept their toehold feeding off work referred over to Brussels from within the firm pending better times. In addition the important psychological date of 1 January 1993 and the opening of the single market had yet to arrive, encouraging firms to bear losses in Brussels.

In understanding the global expansion of law firms generally it is important to have regard to the work of Galanter and Palay. They suggest a tournament in which lawyers compete for the prize of partnership. This tournament is fuelled by an internal dynamic, which drives the growth of firms at an exponential rate. In the early stages although fee-earners bring in far more billable income than they take out of the firm, this can be seen as a rent payable to the partners who provide the human capital in the form of client relationships that bring in the work. Eventually, however, the fee-earner acquires human capital in her own right, and if this is not to be sacrificed then the partnership prize must be awarded. But not everyone can make partner. The success of the firm depends on its gearing – having younger fee-earners below partnership generating the rents for the partners’ pockets. One analysis of the UK firms is that driven by this exponential growth, they became too big for the national market and needed to feed on markets elsewhere. This is an analysis that, in part at least, the firms acknowledge. The Managing Partner of Clifford Chance has said:

“Quite frankly we have had to be international in our approach. The UK market is relatively small. We had to look on Europe and Asia as our market.”

As ked the same question regarding international expansion, the Chief Executive of Linklaters said that the only alternative was: “to flog yourself to death to acquire a minimal increase in the UK market”.

The reaction of Belgian firms to the entry of foreign firms into the market is interesting to observe. By 1990 there were about one-third of Belgian admitted lawyers operating from the Bar in Brussels – 2000 members at the French


Speaking Bar and 1000 at the Flemish speaking bar. Prior to 1990 lawyers from E.U. States could represent clients before the Belgian courts if accompanied by a Belgian admitted lawyer. Then in March 1990, a National Order was passed allowing all Belgian advocats/advokaten to enter into partnership and/or cost sharing arrangements with other E.C. nationals or non-E.C. nationals from a recognised bar. The latter category clearly included the USA, and in Gibson Dunn and Crutcher opened a joint office with Van Bael and Bellis. A similar strategy was pursued by Cameron Markby Hewitt (UK); sharing an office with the Brussels firm of De Smedt and Desasse.

On the whole, this was not the most immediate strategy of the Brussels firms. There seems little doubt that there was some early complacency. The centre of this activity, Brussels, was after all their home market. The Anglo-American firms lacked local knowledge and expertise in the central areas of Community law. Even as the international consolidations took place around them, many of the better Brussels firms, realising the need to grow looked not to the Anglo-Americans but to the Dutch – the ‘Benelux effect’. The highly regarded firm of De Bandt joined with De Brauw and thereafter sought to pull together an Alliance of European Lawyers involving Spain and France. Today De Brandt remains an important player but as part of the Linklaters (UK) network. A similar set-up, the Conference of European Lawyers was formed by Brussels firm Liedekerke teaming up with Houthoff Buruma from the Netherlands and Simeon from France and Wessing from Germany. This consolidation fell apart when Simeon in the Paris Market and Wessing in Germany formed other alliances with UK firms. Similarly co-operation between Coppens Van Ommeslaghe and Faures in Brussels and Dutch firm Nauta Dutilh fell apart fairly quickly.

There are a number of possible reflections on the Benelux effect. Clearly it was prompted by concern on the part of firms well established in the market at the invasion of the Anglo-Americans. The need for expansion through merger to challenge the might of the new competitors was realised. Yet merger with the competition seemed hard to swallow, and wider European alliances beginning with a more comfortable relationship with Dutch cousins seemed preferable. At the same time, however, forces of globalisation were unleashed, and it was not

45 Ibid.
46 The firm of Van Bael and Bellis mentioned above was set up in the mid 1980s by Ivo Van Bael and Jean-Francois Bellis in the knowledge that on the back of their writings on EU Competition Law (which were the most authoritative in the market) they could build an EU practice. This forms an excellent example of what has been described as ‘Professorenrecht’ from the ‘grand old men’ of the Brussels legal fraternity – see further H. Schepel & R. Wesseling, ‘The Legal Officials: Judges, Lawyers Officials and Clerks in the Writing of Europe’ (1997) 3 European Law Journal, 165.
47 A phrase coined by K. Parsons, ‘What Lies Beneath’ (May 2003) The European Lawyer, 20, from which much of the material on law firm merger is taken.
only in Brussels that firms wished to form relationships. Where these were formed elsewhere in the world in new confederations, hopes of reciprocal work referrals based on trust seemed to evaporate and alliances collapsed.\textsuperscript{48} Moreover, the strategy is flawed in that it ignores the resource base, of the larger firms from the UK and (especially) the USA. Eventually these firms would expend the necessary resources to buy out the talent of the home firms. In 2002 the US firm Wilmer Cutler and Pickering hired the competition team from Stibbe and one of the top Belgian firms, Liedekerke, lost its competition team to the English law firm Ashurst Morris Crisp - one of the top corporate practices in the UK. These types of move bring not merely a heightened remuneration package but also significant access to corporate players in what, by 2002, had become a very flat market for competition law because of the lack of activity in the mergers and acquisition market.

As the last comment suggests times have been hard recently in the Brussels market, and what helps in such a market is deep pockets elsewhere in the global network of the firm and strong contacts with transnational corporations. As Bellis is quoted as saying from a background in one of the premier domestic firms:

\begin{quote}
“We realised that it was impossible to have an EU practice based solely on Belgian clients – that we needed to attract them from outside the country, and that to do that you need to be well known internationally.”\textsuperscript{49}
\end{quote}

In 1998 of 36 English law firms represented in Brussels, two-thirds had four lawyers or fewer, and a managing partner of one firm stated that ‘whatever firms tell you, half the offices here lose money’.\textsuperscript{50} The low state of the market in 2002 and 2003 is now turning around. Apart from a general pick up in corporate work, enlargement is likely to bring work as transnational corporations exploit opportunity in new Member States. Already we see the arrival of the Central European Law Offices Alliance made up of Polish and Czech firms.

In part, however, the reason for the low profitability of the Brussels law office relates to its workflow. Set quite apart from the remainder of the firm, much of the activity is connected with advising clients of new legal developments and lobbying on their behalf. This is significant work, of importance to clients, but carrying fees much below those that result from the successful com-


\textsuperscript{49} Quoted in Parsons, \textit{op. cit.}

pletion of transactions, not least because success in the lobbying enterprise is much harder to judge. Lobbying demands close and personal contact. The closeness of the relationship between the Brussels law firms and the Community institutions cannot be overemphasized. It is common for lawyers in private practice to have spent time working in or for the Commission; as an official, on a stage, on secondment or undertaking work contracted out. It has been claimed that the activity of the firms generates EU law in what has been described by Schepel and Wesseling as “the ‘juridifying’ of the whole regulatory environment (which) secures a quasi monopoly of political influence at the Commission.” 51 This creates an actor socialization whereby “participants in policy making … begin to develop new perspectives, new loyalties and identifications as a result of mutual interaction”. 52 In words commonly used in British circles to describe changes in political affiliations experienced by party politicians turned commissioners, they ‘go native’. They do not remain neutral actors but, no doubt under the influence of corporate clients, buy into the harmonization policies that support the economic liberalization agenda of the European Union.

Looking at the law firm history in Brussels in 2004, we must assume that the law firms that have remained there over a fifteen-year period are there to stay, subject to seemingly endless changes in personnel as partners jockey for position according to the fortunes of the firms. Partner loyalty to the firm is gone, 53 and the continuing arrival of US firms into the Brussels market, 54 looking to hire locally, can only exacerbate movement between firms. National allegiance has disappeared and the firms move to becoming multi-national global firms that increasingly mirror their transnational corporate client base. In such firms the Brussels office becomes a small cog in a large international wheel. It is not an unimportant cog, but it is increasingly dwarfed by the development of these firms elsewhere in Europe, in the UK (which instigate many of the mergers) Germany, France, Italy and, increasingly, Central Europe. 55 In a survey of international law firms based in Europe in January 2000, only four percent of firms named Brussels as their most important European Market. 56

5. Brussels Law

I now wish to make certain claims about the work of the Brussels law office and then to try and substantiate these. Before doing so it is useful to reflect upon a categorization of commercial firms offered by Stephen Mayson. This states that there are three types of firms in cross border legal practice. The international firm practices its home law only even though it may have some foreign offices and work in alliance with firms from other jurisdictions in the manner described in the preceding section of the paper. The multinational law firm practices both home law and the local law of the jurisdiction in which it is located. The global firm has lost the concept of home or local offices and practices around the world. According to Mayson there are few truly global firms and there can only be a few. The important difference between the global firm and the international or multinational relates to client base and work type. The work of the global firm is driven by mature global financial markets, and from the major financial centres of the world such as New York, London, Frankfurt, or Tokyo. The corporate finance work itself is stateless, existing almost virtually, wherever the flows of capital demand services. This is different from the other two types whose work flow stems from cross border trade and everyday corporate and commercial transactions (such as contracts) that involve more than one jurisdiction but rarely involves the major financings of business restructurings or huge infrastructure projects that are the domain of the global firm.

As these global firms are few most of the firms in Brussels are of the international or multinational type. We can make some broad assumptions about there work. First, the source of work is private business. This need not be a transnational corporation, since a domestic business within any jurisdiction may need advice on EU law. The transnational corporation however is a more likely work source because of its dealings in different jurisdictions in the market. Secondly the majority of the work arises in the context of private law in the sense that even though the advice concerns regulatory issues such as merger control or public procurement rules, the reason for the advice or intervention is a transaction or contract between private parties. Parties here are dealing on a horizontal axis rather than in some top down regulatory system. Private law here does not refer to a lex mercatoria but to laws that apply in the heart of the major jurisdictions of Europe albeit with subtle differences from jurisdiction to jurisdiction and under the possible supervision of the Commission as regulator or Court of Justice as arbitrator. Finally even where work is more within the


58 Shearman and Sterling, who as we see arrived in Brussels only in 2001, are clearly one of these, and have attained this status without presence in Brussels. Others might include White and Case, Clifford Chance and Freshfields Bruckhaus Deüinger — although Mayson would see these firms as globalising rather than truly global firms.
public law setting, such as a challenge to action taken by one of the European institutions, the issues are unlikely to involve broad questions of constitutionality but much narrower and more particular questions of administrative law.

To unravel this a little, EU regulation consists of “an interplay between the different, parallel, overlapping and competing legal competences of different organisational levels”. This is highly resonant of Luhmann’s theory of social differentiation, suggesting that parallel, but interdependent communicative systems in politics and science as well as law. The interplay between these different rationalities begins to replace earlier structures based on national sovereignty. This leaves room for law firms to become interpreters across the levels and codes then operative in the complex system. In the early phases of the Brussels office the mere delivery of the latest draft of legislation might constitute a valuable service to the client. With the advent of the internet, this material is readily available to the client directly, but the informational task may still be outsourced by the business since, however important the material, the gathering of it is not a core activity. Moreover, even if the text is available, in the absence of consolidation of EU legislation placing that draft in the context of earlier measures may require some lawyerly skills. Transnational corporations may also require assistance in penetrating the complex overlay of different sub-systems – not least in order to influence change through lobbying. This may be available from a host of non-legal agencies in Brussels, but where the argument involves the precise wording of the measure the appropriate institutional competence may be that of law. Care is needed, however, since the composition of the Commission reflects that of the Member States of the Union in which cultural tolerance of lobbying is not uniform. In some Member States lobbying may carry resonances of corruption, political manipulation or the undermining of democracy. Political sensitivity may be required and is perhaps best gained through experience within Brussels.

Earlier we saw that the development of EU law took place in the heartland of the economic freedoms of the Treaty, and there is no doubt that the early legal work in Brussels international offices was primarily competition law. Close contact with DGIV (the competition Directorate) was vital. In an article for lawyers on dealing with the Directorate, Frederickson argues that time must be spent establishing informal contacts and building relationships with officials at all levels including case handlers, because:

“the resulting ease of contact with DGIV will make the process of steering a notification through much smoother when the time comes”.62

Initiating an approach, claims Frederickson, is similar to the way one might approach a national competition authority. DGIV is “a bureaucratic body with … a complex decision making process”63 This regulatory bureaucratic framework has now been followed in a wide range of other policy areas – of which one of the latest is the European Food Safety Agency. This body makes risk assessment determinations of food safety prior to risk management decisions by DG Sanco. Influence may be required in a number of sub-systems and at various levels with in this model, and has to be exercised on a whole range of fronts beyond competition issues including (e.g.) consumer and environmental protection, labour rights, and information technology.

The carrying on of this lobbying work necessitates certain skills and attributes. Lawyers may be recruited from similar backgrounds (archetypically a College of Europe graduate having completed a stage at the Commission). These recruits will be surrounded by some of the big names of European Union law, perhaps working of counsel following office in one of the institutions of the Community. It forms a multi-lingual community that is tight knit within the relatively small area of Brussels. It bonds not merely through the workplace but through the social interaction of lunches and cocktail parties, but working relations are important as lawyers are poached from one firm to another or act as counter parties on important transactions. Among the youngish elite in these firms a sense of common identity emerges and some sense of common enterprise. Looking at the heart of Brussels law, competition policy, Gerber has shown through interviews with judges officials and academics how a European model of competition law emerges with common threads woven from different national experiences and systems64 The depiction is classically of neofunctionalist endeavour.

Where traditional competition issues arise, they do so in the context of huge transactions involving major corporations usually acting across borders. It does not follow from that that the main forum for dispute will be Europe. There may be many possibilities to challenge corporate behaviour at a national level, whatever notification need be given to the European institutions. In other words the legal action takes place between private parties in the shadow of the complex pattern of regulation that is EU law. Thus much of the horizontal dealings may only marginally affect the institutions of the Union, but even where this is not the case, Harding’s analysis of the European Court’s roster finds it domi-

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nated by business parties.\textsuperscript{65} This is very much as one would expect. The central processes of economic integration with freedoms to establish offer services and trade goods across borders without restriction ought to generate dealings between businesses and across borders. Acting for such businesses is \textit{raison d'être} for the international/multinational law firms. Much of the work need not and will not be conducted in Brussels – since a barrier to trade may be litigated in the jurisdiction in which it exists. On the other hand, EU law forms the backdrop and expertise is required in it. Where else in the firm’s empire would you locate this but in Brussels.

This leads to my claim that we are not dealing with a \textit{lex mercatoria} here. Just as EU expertise is located in Brussels, it is most likely to be the Paris office (close to the ICC) that will deal with the close network of international commercial arbitration.\textsuperscript{66} The depiction of \textit{lex mercatoria} is that it is purely a private contractual ordering and a self-contained system. Although the European Union may help drive the development of \textit{lex mercatoria} through the easing of trade and the internationalisation of capital, it is EU law that brings the regulatory conditions of such trade that negate an independent purely private ordering of the type suggested above. The lawyers within the international Anglo-American law firms may well construct \textit{lex mercatoria} in the drafting of transactional documents that opt for the private, non-state resolution of disputes, which at some later date may loop into arbitration that (being non-state) the same firm can then oversee. In relation to those areas regulated by EU law, however, it may not be possible to isolate all issues within its regulatory reach.

Another way of putting this is that while the work of the Brussels office inevitably involves the horizontal dealings between the transnational corporations that form the client bases of the firms, it is rarely purely private law because of the pervasive influence of regulation. Nor however is it entirely a matter of public law. Rather it is hybrid in nature. Moreover even when involving public law, although it can include questions of legislative competence,\textsuperscript{67} it will more commonly involve narrower and more detailed questions of procedural correctness or interpretation of legislative provisions. Such provisions may increasingly be of a ‘soft’ law\textsuperscript{68} nature as the bureaucratic spread of the institutions


\textsuperscript{67} Case C-300/89 Commission v Council (Titanium Dioxide) [1991] ECR 1-2867.

grows. It is important for our analysis, however, to note that even with a constitutional turn in the European Union, there is little sign that Brussels law involves wider or more significant vertical questions of constitutionality.

6. Neorealism or Neofunctionalism – A Conclusion

Returning to debates about integration, one would not expect any theory to be set in stone when it theorises about political structures. We have seen throughout the paper the shifting nature of the Union itself. We might expect that as these changes occur, the evidence base for one or other theory may be strengthened or weakened. If required to offer an overview of the relative strengths of these theoretical positions, one might say that neorealism is more persuasive in the early stages of the Union when the very institutional framework emerges from intergovernmental concession. As time goes by it becomes increasingly easier to develop a neofunctionalist analysis – not least because the institutions are more highly developed and their character better defined. Having said that neither remains fully convincing as an exposition of European integration – hence the puzzle to which we earlier referred. For all that neofunctionalism may be in the ascendant, nation States retain considerable sovereignty. One pertinent example of this in our context is the lack of penetration of EU law into the private law systems of Member States. Although there are some instances of efforts in this direction such as the product liability directive or the environmental liability Directive, neither has been a resounding success.

As for the Brussels law office in this context, it occupies a curious position. Within the horizontal, multilayered structure outlined above it looks to represent transnational corporations. Brussels is not the only office. Indeed as we have shown it is but one small part of the international network. Much of the action in representing clients will take place within the different jurisdictions of Europe. Law firms would not wish it otherwise. The retention of national systems plays to their strength. Firms sell their services on the back of an ability to respond anywhere within Europe as the following marketing demonstrates:

“… a truly multinational law firm dedicated to providing legal advice on complex local, international, and cross-border transactions as well as assisting clients in dispute resolution in major business and financial centres around the world. … Our philosophy is to deliver top quality services, tailor made solutions and to build strong local practices in each of the 30 cities where we operate.”


70 Taken from the marketing material of Coudert Brothers LLP (www.coudert.com).
This speaks better than I can to the overlapping and interdependent mix of the local regional and international, but note the emphasis of local representation. Having privatised telecommunications in jurisdiction X under the overarching regulatory purview of EU rules, there is every capacity to offer these services in jurisdiction Y as under the forces of economic structural adjustment of the telecommunications sector – driven by the US telecommunication giants – the markets open up.

In this way the Nation State as a sovereign law-making body with an independent legal system remains of crucial economic importance for the international law firm. It fundamentally affects its revenue and strategy. On this analysis, intergovernmentalist approaches should find favour with the firms. But there is an irony here. The very work of the firms have an inevitable tendency to push forward a neofunctionalist model, with its emphasis is on the achievement of economic rather than ideological goals for the client. In the Sandholtz and Stone Sweet dynamic model of neofunctionalism the Brussels office acts as a conduit between member states and European institutions through which messages as to the regulatory framework of transnational economic systems are transmitted. The Brussels law office has come to occupy a space between State and supranational structures. It is woven into the institutional fabric of Brussels itself. Its lawyers work with bureaucrats, Government, corporate clients within a shared culture, over time incorporating shared values in a functional regime, alongside though apart from the political sphere. As Burley and Mattli claim, the actors in integration are above and below the nation state. And they make the claim that:

“The proliferation of Community lawyers laid the foundations for the development of a specialised and highly inter-dependent Community above and below the member state governments.”

This then becomes the irony. The neorealist account of a weaker less effectual Union, with considerable scope for the realm of the national to assert itself, in many ways best suits the opportunistic instincts and wide geographical reach of the international/multinational law firm. Yet every day, transacting in the shadow of EU law and mixing with players on the Brussels stage, the Brussels office against the wider interests of the firm as a whole breathes life into the neofunctionalist account.

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73 Ibid. at 59.
Lawyers, Networks and EU Race Equality Law

Iyiola Solanke

1. Introduction

In 1728, two priests and a canon from the diocese of Orleans were suspended by their Bishop for being in violation of the papal Bull, Unigenitus. They appealed this suspension to the Parlement, but the Bishop had the question brought before the Kings Council. The three Jansenist clergymen then engaged a lawyer, who drew up a legal brief in their defence. This has been described as a ‘violent’ text, which went way beyond the judicial and religious issues at hand to make broader comments upon the general principles of the monarchical state and the shift of power towards the Parlement. The brief was eventually signed by forty lawyers. Three thousand copies of the brief were then printed and distributed. An injunction was sought and won against the signatories, calling for them to retract their statements or lose the right to ‘exercise their functions’ as lawyers. In response, the general assembly of lawyers penned a common defence, which was then signed by an additional 250 lawyers, as well as the President of the Parisian Bar.¹

This story is an 18th century example of lawyering. These French lawyers acted collectively in order to defend firstly a political commitment to the role of the Parlement in law making and secondly their professional independence. Karpik describes them as acting politically because it is clear that they were challenging the power structure of the day. Who would have thought that even then, members of the neutral, aloof legal profession acted in this way! Similar tales of lawyering can be found in the 21st century. In this paper, I will present a modern-day example of lawyering at the European level for the purpose of securing a reform to European law. It is a story which places a different emphasis on the evolution of EU law.

It is widely accepted that judges and clerks at the European Court of Justice (ECJ) have played a central role in the creation of European Community law.² The impact of the decisions and rulings of the ECJ on policy integration within the Community has also been well documented.³ The role of national judges...

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³ K. J. Alter, ‘The European Court’s Political Power’, (1996) 19 Western European Politics, 458; A.M. Burley & W. Mattli, ‘Europe before the Court: A political the-
and lawyers bringing cases before the ECJ has also contributed to the creation of a the European legal system, as have legal scholars through placing EC law on educational curriculum for study.4

Less attention has been paid to the phenomenon whereby lawyers seek legal reform via lobbying in Brussels, a sphere perhaps more the domain of interest groups and social movements. The Starting Line Group (SLG) is the story of lawyers who co-operated across jurisdictional boundaries, working together with lawyers and non-lawyers throughout the EU to influence the appearance of the European legal system. This phenomena gives rise to many questions, some of which have been explored in both national and global contexts.5 It can be argued that the SLG, which lobbied for legislative reform, is a clear example of cause lawyering within the supra-national context of the EU.

The motives for supra-national cause lawyering, especially in the legitimacy-challenged EU are unclear. It is perhaps understandable why members of the same profession in the same jurisdiction, such as the French lawyers, would decide to act collectively in relation to what are seen as their common interests. However, it is less clear why lawyers would band together across borders to promote causes on which the law is silent, and why they would team up with non-lawyers to do so. Why co-operate across borders rather than within the legal infrastructure of the member states? Furthermore, why create a pan-European movement rather than operate through the European Court of Justice? Why target the Commission?

The paper attempts to answer these questions by looking at the composition, motives and objectives of the Starting Line Group. I begin in Section 2 with a discussion of cause lawyering and lobbying. In Section 3 I present the factual background: the constitutional omission in the Treaty of Rome, the evolution of Article 13 TEC and the Race Directive, and examine the characteristics of the Starting Line Group – does this network fall into the category of ‘rule of law’ or ‘political’ cause lawyering? Having examined the empirical evidence, I conclude that the creation of this European legal network falls into neither camp, but may be an illustration of a new type of lawyering which I have titled ‘embedded’.

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2. Cause Lawyering

2.1 Lawyering

The bold members of the Paris Bar engaged in what is now known as ‘cause lawyering,’ a phenomenon present in some but not all member states of the EU.6 ‘Cause lawyering’ has been identified as both distinct from yet related to conventional lawyering. It also bears some similarities to public interest law. Whilst similarities are visible in relation to the types of work and practices of these types of lawyering, there is a marked difference in the targets, values and objectives which inform them. For example, the main target in public interest litigation is an act of a regulatory body whilst the targets for cause lawyers can be employers, insurance companies or other bodies that do not necessarily have authority to make binding rules, or where they possess this power may fail to do so. This is an important differentiating factor: in the example presented here the motive for the SLG was what it saw as an omission to act on the part of the Commission.

Public interest litigation is less focused on the protection of specific individual subjective rights and more on the defence of the public interest in general. The classic definition of public interest law is derived from advocacy which has the specific mission of seeking to improve social and legal structures for the benefit of the wider public good, where this may be compromised by the actions and rulings of regulatory bodies. These actions may also be detrimental to under-represented sections of society thus public interest litigation is pursued in order to bring such cases to court. Doing so often requires the relaxation or broadening of rules governing access to the courts so that cases can be brought by groups which would otherwise not have standing to do so, such as informal associations or movements. The main areas of public interest litigation are those where vulnerable and unprotected citizens are pitted against powerful commercial interests, such as consumer or environmental protection, safety at work and discrimination.7

Cause lawyering appears dissimilar to traditional public interest litigation for a number of reasons: the latter occurs primarily at the national level whilst cause lawyering can occur beyond national borders;8 cause lawyering can equally be concerned about the omission of legal rules as well as challenge an aspect of already existing ones; cause lawyering can be either objective or subjective; and perhaps most importantly, as will be seen below, cause lawyering is also not confined to action within courts.

8 Sarat & Scheingold (2001), op. cit.
However, the main differentiating factor between conventional lawyering and cause lawyering is the values which drive it. Cause lawyers can be said to strive ‘to deploy their legal skills to challenge prevailing distributions of political, social and economic and/or legal values and resources’ wherever inequities are found. Cause lawyers are said to select their case load in accordance to personal ideological and redistributive projects rather than income generation. This personal engagement, an identification with the clients represented, makes cause lawyering stand in sharp contrast to the conventional distant, disinterested lawyers who keeps values outside of their work. Two strands of cause lawyering have been identified. The first, rule of law lawyering, is less controversial, as it seeks to use legal tools and institutions to pursue its goals. The second, political lawyering, is seen to be more risky, as it involves lobbying, direct action, and social movement mobilisation, modes of action more often associated with pressure groups operating in civil society.

Rule of law lawyering, described as apolitical, is perhaps closest in mission and method to conventional lawyering. It functions at the level of that which is acceptable to the mainstream profession, limiting its goals to those which are seen as legitimate according to liberal values such as strengthening the rule of law, the enhancement and protection of rights, the building of civil society, and the promotion of democratic accountability. The main approach to pursuing these goals is to use the legal method, engaging in disinterested, legal representation. The main forum of action is therefore legal institutions. Due to its focus on objectivity and litigation, it also resembles to some extent public interest law.

In return for promoting a liberal legal agenda, cause lawyers acting within this ‘democratic’ paradigm can often rely on professional and political support. ‘Those lawyers who are seen to have the skill and the commitment to champion the causes that exemplify the commitments of the liberal state swim in the mainstream of professional life’ as seen by the professional accolades granted to Michael Mansfield for his work in relation to bringing to court the five white youths who murdered Stephen Lawrence in London, and the routing out of institutional racism within the Metropolitan Police.

Political cause lawyering on the other hand goes beyond the pursuit of detached democratic principles to declare solidarity with clients and causes, making it inherently more subjective. Constitutional and democratic goals are re-

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9 Ibid, 13.
10 However, given market imperatives, the necessities of professional survival may mean that the same lawyer engages in both types of lawyering.
placed by an open commitment to and solidarity with a political agenda, specific redistributive goals, or one side of a conflict. Identification with a cause is prioritised above professional constraints. It can involve a number of activities: overt lobbying, the creation of or participation in social-movements, and the use of direct action or the encouragement of this. Thus political lawyering is pursued in various venues and institutions – legislative, judicial and administrative institutions, in the media and at the grassroots level.  

The price for turning to these methods and tools is less widespread support and even a negative effect on status. This can be seen by the less positive response to the solidarity which informed the efforts of Imran Khan to keep the enquiry into the above-mentioned murder of Stephen Lawrence at the forefront of media attention for six years until a public enquiry was granted. His actions, which included some practices questionable for a lawyer, far from being lauded were seen as ‘transgressive’. There is therefore a considerable risk of loss of regard for lawyers who step beyond professional bounds to engage in a clearly political cause, even if the long term goal is the achievement of a liberal democratic principle – in this case, justice.

Just as cause lawyering and conventional lawyering can exist side-by-side, it has been known for both political and rule-of-law cause lawyering to be engaged in simultaneously. Nonetheless, rule of law lawyering emerges as the dominant democratic paradigm. The more political cause lawyering remains the exception rather than the norm – very few examples exist. The fact that it is also known as ‘lost-cause’ lawyering, may give some indication as to why!

The overlap makes these categories difficult to use. Where, for example, would the 18th century French legal activists fall: are they rule of law or political cause lawyers? They were challenging the act of the regulatory authority of the ancien régime. They were supporting the bullied priests, protecting their professional independence and defending democracy. Their method was both legal (the drawing up of a defence brief) and political (petitioning for signatures). Elements of both types of cause lawyering are therefore evident. Perhaps categorisation should be avoided. It may be more helpful to plot lawyering upon a continuum rather than within boxes, with political cause lawyering and conventional lawyering at the two ends:

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17 Or more positively, ‘critical cause lawyering’.

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Such a continuum would also help to explain the SLG, which also does not fall neatly into any of these categories. This European lawyers network illustrates that the boundaries are not so clear as the goals may be liberal (legal) and yet the method political. This is especially the case where no route exists for action via the courts. It may be for this reason that lawyers resort to lobbying.

2.2 Lobbying

In order to understand the implications of lawyers lobbying, it is perhaps necessary to know something about lobbying itself. Much has been written about lobby groups. These exist in every polity, though their scope for action varies widely depending on the local political economy. The aspects of lobby groups to be discussed below are their form, their purpose and their modes of action.

Lobby groups can be long term organisations, with well established aims, a formal constitution and a centralised management and decision-making structures where officers are elected, meetings are minuted, records are kept and formal reports are issued. In contrast to this are ad hoc groups which do not have these institutional features. An ad hoc organisation can be defined as a ‘a temporary arrangement of persons interested in accomplishing a common purpose.’ Umbrella organisations often have such ad hoc structures. They are highly informal and can only operate at all because the organisations cooperating share a direct interest in the issue being tackled.

It is due to this sense of common cause within the SLG that functionality was possible without a clear allocation of responsibility. It is clear to all participants that the group exists for a specific purpose, and will disband when this has been achieved, or become inactive until another common concern arises. However, it is not unknown for an ad hoc group to become permanent if the issue is one which subsists, or if interests are solidified and crystallised with a leadership structure or the group has a dominant leader.\(^{18}\)

There is some ambiguity as to what lobby groups actually seek to do. It can be argued on the one hand that the ultimate aim of lobbying activity is to ensure that certain views and interests make a contribution to any solution adopted.\(^{19}\) Alternatively, it has been argued that much of the efforts of lobby groups has “little direct connection with efforts to influence policy decisions as such”\(^{20}\) but rather to provide information either to politicians or to the public in general, or

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to monitor events. In relation to the EU, however, it has been emphatically argued that interest groups are “protagonists, seeking to influence policy rather than simply monitor events.”

A wide range of tools and methods can be used to achieve this influence including confrontation (such as protests and demonstrations), information (releasing research results, public relations campaigns), direct personal presentations to government or testimony before congress; and constituency influence (organising letter writing campaigns, publicising voting records and contributions). The choice of strategy is said to depend upon the internal characteristics of the group and the topic at issue. Internal characteristics can include internal resources, the character of the groups’ membership, its sources of financial support, and the degree of conflict faced. Lobbying can therefore, depending on the type of issue, or policy circumstances, involve participation in actions which conflict with professional standards.

Research has found that groups highly reliant on patrons tend to use lobbying, litigation and electioneering (‘insider’ strategies) more than ‘outsider’ strategies such as protest. The type of issue being tackled also influences strategy: newer issues may be more controversial than older ones, and have less public salience, in terms of public visibility, and the size and composition of the public whose interest they arouse. Whilst some publics are homogenous and small, others are heterogonous, large and divided.

Strategy is tailored to issue: a group with either important patrons and/or little public support is likely to ‘endeavour to keep things quiet’. Publicity can be an effective tool for lobbying, but usually on a less controversial issue, which is likely to be received favourably by the public. In the case of a controversial theme such as racial discrimination, the use of publicity can be a double-edged sword. Discreet discussions and direct contact may be more effective. The more successful methods used in relation to race equality law include direct methods (personal visits or letters, phone calls, or informal contact) and indirect approaches utilising friends within the system, or contacting assistants of decision makers, mid-level civil servants, expert knowledge.

Lawyers, Networks and EU Race Equality Law

The extent to which lobbying activity is pursued, and to which members of the legal profession engage in that pursuit depends very much on the prevailing legal and political culture. Cause lawyering is rarer, for example, in Australia than in the UK, and far more prevalent in the USA than in either of the two former jurisdictions. There is no common pattern of lawyering within the EU member states. To date within the EU itself, as mentioned earlier, lawyers have a clear profile as consumers and creators of European law within the legal arena, an involvement which has contributed to the legitimisation of the European legal order. Lawyers are as active, but less profiled, in the political processes of law-making in the EU.

This is likely to increase as a result of the Commission’s search to introduce a ‘reinforced culture of consultation and dialogue’ into European Union governance. Lobbying is being taken more seriously. In 2001 the Commission produced a White Paper on Governance designed to connect the institutions of Europe with European citizens.26 The White Paper put forward proposals to make the policy-making process more democratic, by opening participation up to more people and organisations. Although the Commission ‘runs nearly 700 ad hoc consultations bodies’ little is known about how these consultations are run or the impact of them. In order to make this more transparent, minimum standards in the form of a code of conduct for consultation by the Commission of civil society – including churches, religious communities, trade unions and employers organisations – are proposed. It was also planned to publish guidelines on the collection and use of expert advice.27

The aim of making greater use of the practical experience of local actors provides ample opportunity for national legal experts to be more overtly involved in the EU policy-making process. This use of legal expertise in the policy making process has already been put into practice in relation to the new competence on racial discrimination. An independent group of experts on race and religious discrimination, funded under the Community Action Programme to combat discrimination, was created to monitor the progress of Member states in implementing the Race Equality Directive. Such participation simultaneously achieves another aim of the White Paper, namely to promote the training of lawyers in Community law. With the increased efforts of the Commission to engage the minds of European citizens through civil society, it may become increasingly common in the EU to see lawyers lobbying the Commission in Brussels as well as litigating in Luxembourg.


With this theoretical background in mind, I will now turn to discuss the background to Article 13, and the SLG in more detail.

3. The Constitutional Omission in the Rome Treaty

3.1 The Facts

The Treaty of Rome (hereafter ‘TEC’) set out that free-market principles were to be employed in creating a ‘common market’. It established a customs union, a competition policy, co-ordination of a general economic policy, a common agricultural policy, a common transport policy and an energy policy and regional policy. It provided for the dismantling of all obstacles to trade and free movement of the factors of production: labour, services, goods and capital. It lay down a system of rules forbidding any restriction on competition and any action by individuals or the state which threatened to distort competition.28

A unifying concept for achieving the desired integration in the EEC was the principle of non-discrimination. This principle was given explicit legal form in the Community in just two areas: nationality (Article 12 TEC) and gender (Article 141 TEC). Neither of these principles were clearly defined, and it has been left to the ECJ to give a more precise meaning to the broad wording of these provisions. Over the course of the last five decades, the ECJ has been called upon to comment upon many aspects of gender discrimination including pensions, pregnancy and parental leave.29 The role of the courts in so doing, and thereby establishing a legally integrated Europe, has been both well discussed and decried over the same timeframe.

Both the Treaty of Rome and the ECJ were silent on any other form of discrimination. If it can be said that the EU has a constitution then black Europeans were the ‘objects of a constitutional omission’.30 The Treaty did not guarantee equal treatment without discrimination on the grounds of skin colour, race, religion, or ethnic origin. The vision for an ‘ever closer union’ did not initially include a guarantee of non-discrimination for members of Europe’s black and migrant communities. The Treaty contained no reference to racism although at the time of the signing of the Treaty of Rome, at least two of the

member states had large communities of black migrant workers: France had a large community of Algerians and Germany a growing community of Afro-Germans. It is indeed paradoxical that, although the idea of the European Community resurfaced after World War II as the most viable hindrance to the ravaging impact of rampant nationalism, the Treaty did not create any direct powers for addressing its manifestations: racism, fascism, and xenophobia. At the time of its inception, there was no consciousness of this problem as a European concern.

The absence of this specific prohibition of racial discrimination from the Treaty has been interpreted as further proof of the narrow economic aims of the founding Six members. Curtin and Geurts suggest that at the time the EEC Treaty was signed, the issue of sex discrimination was much more likely to play a distorting role in the establishment of a common market than race discrimination. This clause was included for economic rather than social reasons. Discrimination was only clearly outlawed where it could have an effect on the functioning of the common market. As far as the six founding member states were concerned, this made only the issues of gender and nationality relevant for EC law.

Without this legal reference, the Community had no competence to act in the field of racial discrimination. It was only in the mid-1980s that this omission was problematised, when the composition of the European Parliament began to directly reflect the widespread appeal of discriminatory and xenophobic values pervading the Community. It was finally addressed with the insertion of Art 13 TEC in 1997, and the creation of a Community action plan on racism in 2000, which included a directive prohibiting racial discrimination (2000/43).

In June 1997 at the Intergovernmental Conference of Heads of State and Government in Amsterdam, it was finally formally agreed to amend the Treaty of Rome to include a prohibition of discrimination on the grounds of race, gender, sexual orientation, religion or belief. Article 13 of the Treaty of Amsterdam provides that the Council,

“acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.  


33 A condition of legality for action by the Community is the presence of a legal base, i.e. a treaty provision.

34 Article 13, Treaty of the European Community, as amended by the 1997 Amsterdam Treaty.
The unexpected electoral victory of Haider’s right wing party in Austria and a
determined Portuguese presidency were the background to the two Directives
swiftly agreed as part of a package of measures concerning race in 1999.35
Consultations with non-governmental organisations, the member states and the
European Parliament resulted in a consensus that Community action in the field
of racial discrimination should be on the widest possible basis, addressing many
forms of discrimination. There was therefore a consensus both within and out-
side of the Union institutions. A package was agreed as a ‘comprehensive basis
for action’, to provide a minimum level of legal rights not to be discriminated
against and a framework for practical action to promote the effective applica-
tion of those rights.36
The package included a directive specifically to combat discrimination on
grounds of racial and ethnic origin in areas beyond the labour market (Race
Directive); a general directive to combat discrimination in the labour market on
all grounds referred to in Article 13, with the exception of sex; and a pro-
gramme of action to complement the legislative proposals through support for
initiatives taken by the member states to combat discrimination. Council Direc-
tive 2000/43 (the ‘Race Directive’)37 implemented the principle of equal treat-
ment between persons irrespective of racial or ethnic origin. Council Directive
2000/78 (the ‘framework Directive’)38 establishes a general framework for
equal treatment irrespective of religion, belief, disability, age or sexual orienta-
tion only in regard to employment and occupation. A further Council Decision
2000/750 established a Community action programme to discrimination.39 All
these measures are based on Article 13 TEC.
The Race Directive set out a framework creating a minimum level of legal
protection for persons within the EU, leaving member states free to introduce or
maintain provisions more favourable than those contained within the Direc-
tive.40 Member states were expected to frame their action within the set of
principles which the Commission intend to become common throughout the
Union. These principles, through being applied in all member states, would
provide certainty for individuals on the common level of protection they could
expect.41 The Directive also forms part of the acquis which the candidate coun-
tries who joined the EU on May 1st are to accept, respect and implement.42

35 The onus on speed gave the European Parliament additional leverage to have its
amendments accepted. These included a prohibition on instruction to discriminate
in the definition of discrimination, and the inclusion of healthcare and housing in
the material scope of the Directive (see Bell 2002, 74). As will be seen later, how-
ever, the EP was unsuccessful in having a number of its other proposals accepted.
42 At the European Summit held in Copenhagen on the 21-22 June 1993, the Euro-
pean Council of Heads and States and Ministers, agreed that a criterion of member-
In other work, I have attempted to show how the issue of race comes to be a formal part of the European legal architecture, 40 years after the founding of the European Economic Community. This process should not be taken for granted. Rules do not just appear in national legal systems, and the fact that some situations are deleterious to particular groups of people is not enough to grant them recognition as neither important social nor legal problems. In spite of a formal definition of racial discrimination in the post war period entrenched in the United Nations international non-discrimination statute — the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) — the evolution of national legislation binding in private relations has not followed swiftly on, and is often accompanied by political controversy. For example, in Germany proponents of a new prohibition in civil law on non-racial discrimination in employment have been labelled as the ‘new Jacobins’. The focus of this paper is on the role played specifically by lawyers acting in a European network. I will now turn to examine the activities of the Starting Line Group between 1985, the time of the first EP enquiry into racism and xenophobia and 1997, the time of the Treaty amendment. I will first of all discuss the composition of the network — who were its members, and what brought them together? After examining their motives, I will then look at their mission, and the values which informed the methods chosen to achieve the goal of a Treaty amendment.

3.2 The Starting Line Group

a) Members

The SLG was an ad hoc group, formed for a specific purpose – to bring the Community to act against the racial discrimination which was occurring in its
member states. When it was discovered that this would not be possible without a Treaty amendment, the SLG embarked upon an initiative known as the Starting Point, to secure this formal prohibition of racial discrimination in the EC Treaty, which would give the Community competence to act in this area via a Directive.

The core composition of the SLG were either practising lawyers working on in the area of immigration law, or trained lawyers working in NGOs concerned with migration and racial discrimination. Dr Jan Niessen, for example, played a crucial role in the creation of the SLG. Niessen has not only written widely on issues related to international migration and anti-racism, but is also director of the Brussels-based Migration Policy Group, an independent organisation committed to participatory policy development on migration and mobility, diversity and anti-discrimination. He worked with lawyers, such as Elspeth Guild, who practices in immigration law. She, together with other lawyers, wrote the draft for a Directive prohibiting discrimination.

The formation of the SLG was spearheaded by an interesting combination of individuals like Guild and Niessen, trained lawyers who were strategically situated in national and international legal practice or organisations. The core organisations were statutory bodies. They included the Commission for Racial Equality in the UK, the Dutch National Bureau Against Racism, and the Churches Commission for Migrants in Europe. This statutory status gave them two important assets. Firstly, they had experience and authority at the national level in dealing with racial discrimination which could be transferred to the European level. Secondly, they had longevity in the promotion of racial equality and protection of migrants rights – these were not bodies whose funding would suddenly disappear.

This core were soon joined by other equally authoritative national and international organisations with similar goals such as the Berlin Office of the Commissioner for Foreign Affairs, the Belgian Centre for Equal Opportunities and Against Racism, Caritas Europe, the European Jewish Information Centre, and the European Anti-Poverty Network.

What these bodies shared was a common concern in issues of migration and racial discrimination and an interest in promoting a European approach to them. This common concern was the glue which held the Group together. It was an ad hoc grouping, with no office or officers. The SLG was driven by the ideological convictions of its members.

47 As is often the case with organisations active in the anti-racial discrimination field.
49 Isabelle Chopin is now Director of the Starting Line Group.
and functioned by the grace of the organisational support and resources they brought with them.

There were therefore two levels of the SLG. There was a core group, comprising a mix of practising and non-practising lawyers. The founding members were trained lawyers situated in organisations with national profile, pooling and transferring their resources to operate in the European arena. The wider group included academic experts in immigration matters, trade unionists, faith leaders, academics, social workers – mostly professionals, who regularly came through their work in contact with the legal system. It was the core group of lawyers who designed the legal draft presented to the Commission in 1993, and availed themselves of the wider group, which constituted a pan-European social movement, to promote it.

This was an interesting and powerful combination which placed the SLG in a privileged space between law and politics. It gave the organisation an ability to use both legal and political methods to get their point across: its core members with their understanding of national and European law could lobby without fear of attracting the stigma endured by Imran Khan because they were using a legal tool whilst the wider group could engage in more overtly political lobbying. The organisational support base provided by the wider group also gave the legal reformers not only access to stable resources but also provided publicity for their work. This freed them from the constraints of the legal profession, but did not divorce them from its ethics and principles.

The result was that their legal professionalism was not compromised – the group was able to maintain the status of independent legal experts necessary to make it worthy of the Commission’s attention. Responsibility for the dossier on Article 13 was co-incidentally given to a British lawyer, Adam Tyson. Ultimately, lawyers in the SLG were talking to a lawyer in the Commission, coming from a Member State with a mature legal system for the protection from racial discrimination. Tyson could therefore understand both the form and concepts of the draft Directive. He also appreciated the social movement of quangos, ngos and cbos behind these lawyers, which gave their legal voice crucial additional political weight.

It is difficult to fit the two-pronged approach used by the SLG into the categories of rule of law or political cause lawyering. It appears that the former was contained within the latter. I would therefore describe their lawyering as ‘embedded’, making it neither rule of law nor political but a combination of both.

b) Motives

What propelled these individuals – lawyers and non-lawyers – to bring their resources together in this way? Why pick up what seems to be a lost cause?

50 This concept of ‘embedded’ lawyering differs from that discussed by Trubek in her work on the role of private legal practices in the USA which work within local communities to provide services for ‘subordinated people’. See L.G. Trubek, ‘Embedded Practices: Lawyers, Clients and Social Change’, (1996) 31 Harvard Civil Rights-Civil Liberties Law Review, 415.
And why continue with it, once this is made clear by an unequivocal rejection from the Commission? In order to understand why they acted as they did, and why they were able to, it is necessary to understand the political atmosphere within the EU member states, and in the EU institutions during the early 1990s. Arising from this was a wider concern for the situation and future of black and migrant people living in Europe in the face of a completed single market, which it was feared would become a fortress for this constituency. Single market concerns also played a role: how could black and migrant people enjoy the freedoms of the Treaty, in particular the freedom to move around, if they were not treated equally? Furthermore, why would black and migrant workers even want to move if there was no guarantee that they would be protected in the way they would be at home? Would the consequence be an economic ‘bottleneck’? There was therefore a desire to create a minimum standard of protection against racial discrimination so as to enable persons of migrant origin to participate and enjoy the social and economic fruits of European integration.

*The political atmosphere*

The pervading political atmosphere throughout Europe in the late 1980s and into the 1990s was one of protest. This may not have come to the fore of attention within the EU when it did were it not for the introduction of direct elections to the European Parliament. One result of these elections was an increase in the presence of representatives of right wing groups in the Strasbourg chamber. Italy’s Movimento Sociale Italiano (MSI), for example, secured 5.4% of the vote. This trend continued following the second direct elections in 1984. The Front National secured 11% of the vote in France, and ten seats in the Strasbourg Parliament; the Fremskridtspartiet won 3.5% in Denmark. The Belgian right wing Vlaams Blok held on to 1.3% of the vote. The electoral success led to the creation of a right wing grouping in the EP. The EP was therefore the first European Union institution to find its democratic purpose challenged by the presence of directly elected representatives of the right wing in its chamber. As this success was primarily based on the use of an electoral mandate dominated by immigration, the EP was made acutely aware of the extremist tendencies gripping parts of Europe.

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51 The draft Directive presented in 1993 was unequivocally rejected by the Commission due to lack of a legal basis.
52 The first representatives who sat in the European Parliament were not elected. The members of the European Assembly created by the Treaty of Rome in 1957 were chosen from within the governing ranks of the member states. This procedure changed in 1979, when parliamentarians in Europe were directly elected for the first time.
53 Evrigenis Report, 44.
54 In the 1994 elections for the European Parliament, fascist parties secured 10 million votes, creating a body of 32 MEP’s openly promoting a racist and fascist agenda in the EP.
It was this presence of extremists within their own ranks that was a primary cause of concern for the European Parliamentarians and led to the first inquiry into race relations in Europe in 1985. This is stated in the 1991 Ford Report:

“One reason why Parliament had begun to take a greater interest was, of course, the fact that in the years 1984-89 it had to contend with an increased presence of elected representatives of such extreme right-wing groups in its own chamber.”

The Evrigenis Committee inquiry was a reaction to what was seen as a protest at the national level to the apparent irrelevance of mainstream politics to everyday life.

Then as now, the EP can take no action to set the Union political agenda. Yet in taking this step it was able to influence that agenda. Through its study, the EP gave the issue of racial discrimination an institutional profile, which it then built upon by conducting subsequent studies over the next decade. It also created an important symbol of joint inter-institutional intentions in the 1986 Declaration. A normative standard, albeit with no attached commitments, was created when the Parliament, Council and Commission issued a Joint Declaration against racism and xenophobia. In signing the declaration, both the institutions and the individual member states resolved to take all necessary steps to protect the individuality and dignity of every member of society and to combat all forms of intolerance, hostility and use of force against persons or groups of persons on the grounds of racial, religious, cultural, social or national differences. On the same day that the Declaration was signed, the EP adopted a resolution approving it, and assumed a watchdog role over the adherence to the commitments laid down in the Declaration.

Furthermore, the EP studies set the scene for the SLG: a long term result of the fieldwork conducted was the bringing together of a multitude of NGOs working in the field of migration and racial discrimination across the EU, who until then were largely unaware of each others existence. The Evrigenis Report was based upon information gathered through public meetings and hearings conducted in Brussels, and written submissions. Representations were received from individuals, the Council of Ministers and the Commission, the European Trade Union Confederation (ETUC) and a number of representatives from non-governmental organisations, for example, SOS Racisme, the Joint Council for

59 It focused its attention on fields where concrete expression could be given to the intentions of the signatories, such as Community and national legislation on the right to asylum, identity checks and the social rights of black and migrant workers.
the Welfare of Immigrants (JCWI) and Mouvement contre le racisme, l’antisémitisme et la xenophobie (MRAX). Further documentation was obtained from a variety of national and international bodies, such as, national parliaments, the United Nations (Centre for Human Rights and Committee for the Elimination of All Forms of Racial Discrimination), the Council of Europe, the Court of Human Rights, and the ILO. The Ford Committee built upon this by visiting various member states in order to hold consultations with small, local groups which would otherwise not have been able to participate. Consultations, attended by local NGOs, were not only held in Brussels, but also at public meetings in Marseilles, Luxembourg and London.60 Thus an informal network already existed which could form the political basis of support for the Starting Line Group.

* The protection of migrants

In almost all cases, the extreme right had been able to win votes from the established political parties. In almost all cases the issue which had allowed them to do so was the same: migration. The manipulation of this single issue can explain the meteoric rise of the extreme-right wing across European electorates. In the post war period, a simplistic equation has been used repeatedly to unite an otherwise disparate band of voters spanning the political spectrum. Ultimately, anxiety has been instrumentalised to change the political spectrum. This equation becomes especially powerful during times of economic slump or crisis, when disillusionment with mainstream politics and politicians is high. Public hostility can then be concentrated on any group unfortunate enough to fall prey to the attention of extremists – in the post war period the unlucky group have been black and migrant peoples. The overt appeal to racism widens the support base for the right wing because not all racists subscribe to extreme or fascist viewpoints. There is wide agreement that “hostility to immigration, rather than anti-Semitism or explicit neo-Nazi or fascist slogans has provided the extreme right with its best political opportunity for decades”.61 In the face of this concerted, co-ordinated and increasingly successful pan-European attack on vulnerable sections of society, advocates for migrants rights were increasingly concerned about the lack of a similarly co-ordinated committed response from the EU to protect migrants rights.

Fundamental rights were not a part of the legal framework established for the European Community in 1957. Their relevance for the Community was rejected by the European Court of Justice until this threatened to undermine the continued supremacy of European law.62 The rise of rights in the European

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Union can be seen as part of a global trend to identify common principles and values in what has been called a ‘godless world’.\(^6\) The recognition of rights as part of European law can therefore be seen as a regional translation of these growing global concerns. However, it can also be seen as the expression of a political concern within the Community to make European integration matter to the peoples of Europe.

The European Union was constructed upon a less economic and more social rationale than the Community. Whilst the EC was founded upon market principles, the European Union was founded upon the principles of fundamental freedoms and human rights. This is illustrated by Article 6, which affirmed that the Union “is founded upon the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”.\(^6\) Article 6 (2) identified the two sources of these fundamental rights: as already laid out by the Court of Justice, these were the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on November 4 1950 and the constitutional traditions common to the member states.

The concept of European citizenship was also introduced in an attempt to integrate the people of Europe into the European polity rather than just the economies of the Member states. In 1999 the Member states set themselves the further objective of creating ‘an area of freedom, security and justice’ within the EU thus harnessing the idea of rights to migration and migration to security issues.

* The Single European Act and Fortress Europe

The protection of migrants and the prevention of discrimination became an even more poignant issue in the run up to 1992 – the deadline for the creation of the single market, and the beginning of a new phase in European integration. The model for the European single market is the United States, where people, capital, services and goods are more or less free to travel from one state to the other in search for work, consumers or producers. In order for this to become a reality within the EC, internal borders were to be removed. The deadline for the removal of these borders was laid out in the Single European Act as 1992. Just as with goods and services, persons were to be able to cross borders without having to undergo the inconvenience of checks and document inspections. This seemed however a distant reality for black and migrant people, who as studies and test cases had shown were unable to employ the ‘Bangemann wave’ when crossing country frontiers. This was the case for both citizens and non-citizens alike.

A number of fears therefore arose. The first related to the persons affected. There was a concern that with the arrival of the single market, the removal of internal borders and the foregrounding of security issues, skin colour would


\(^6\) Article 6 TEU (ex Article F).
become a proxy for nationality. Black or non-white people would be singled out for checks at best and refused entry at worst. Were this to be so, the single market would actually give rise to a ‘fortress’ for this constituency of persons: they would not be free to move at all. The second concern related to the market itself: if this group of persons were not able to behave as the market expected them to this would be likely to create both pockets of inefficiency and perhaps even bottlenecks of poverty, which in the long term would seriously damage market efficiency and undermine its competitiveness. A further concern related to the extent to which black and migrant persons would WANT to work outside of their own member state, if their rights were not protected to the same extent as at home, again a reticence that could undermine the economic balance and competitiveness of the single market. The fact that each member state had its own set of rules protecting migrants and preventing racial discrimination was seen to import a “lack of balance”65 at the European level. Only a few member states had specific regulations;66 these were found in constitutional provisions, or penal and civil codes. A large majority had no specific provisions at all. The result was an incomplete system of protection.

These issues were exacerbated by the introduction of the concept of EU citizenship at Maastricht in 1992. The construction of this concept drew a clearer line between migrants settled in the EU and persons carrying the nationality of an EU member state. In the absence of common policies in the field of integration of migrants from outside the Union (TCNs), EU citizenship created further inequalities between these persons and EU citizens living in a member state other than their own.67

The absence of clear protection for black and migrant persons in the face of this combination – an increasingly confident right wing, racial discrimination, unequal treatment, ‘fortress’ Europe – pointed to a dangerous destabilisation which, given the breadth and depth of the problem, called for co-ordinated action at the EU level rather than by the individual member states. Put together these trends had the potential to destabilise social and economic integration in the EU. In the face of the enlargement of the EU to countries with different traditions of human rights, it became even more urgent to set a minimum standard which would apply across the EU. The SLG called for this to be done in the shape of a Directive.

c) Mission
There were therefore a number of values informing the SLG, most of which can be said to fall within the neoliberal market agenda – non-discrimination, equality, market efficiency, strengthening of law. The goal was to ‘remedy an obvi-

66 Austria, Belgium, France, the Netherlands, Sweden and the UK.
67 Niessen & Hix, op.cit, 19.
ous defect in the original Treaty of Rome’ and complete the equality framework. Their aims fell in line with the NGO agenda, which called for core democratic objectives such as a strengthening of democratic (openness, transparency) and judicial control, more ‘communitarisation’ of immigration and asylum policies (securing residence rights, family reunion) and the promotion of equal treatment and non-discrimination (race, colour, nationality).

The pursuit of these were in the public interest rather than for the benefit of any individual subject. As can be seen from the first draft Directive, the SLG were not promoting equality per se. They did not promote equal treatment for the elderly or homosexuals. This entered the discussion later as a result of the Khan Report. Thus there was a specific agenda focusing on protection of migrant persons. Though not individual, the SLG stood with the migrant cause. There was therefore a level of solidarity with and commitment to the migrant populations of Europe. A further important aim was to ‘augment the debate’ and to develop a basis for discussion and negotiation.

These values informed the goals set and led to the objective of legal reform. As the core members were lawyers, it is perhaps not surprising that a legal response was sought. The Starting Line Group sought to insert an unequivocal prohibition of racial discrimination into the Treaty which would also give the Community institutions legal authority to take action to combat discrimination. Its proposal contained two parts. The first element concerned the addition of an Article 3u to Article 3, which would add the elimination of discrimination on the grounds of race, colour, religion, nationality, social or ethnic origin and the promotion of good race relations to the objectives of the Community. The second element was the addition of a new chapter on non-discrimination, which would create a competence for the Council, acting together with the Commission and the European Parliament, to agree Directives or regulations to achieve this objective.

**d) Method**

Other values informed, however, the method chosen. The law-making process in the EU must be borne in mind here. The Treaty of Rome gives the Commission a monopoly on regulatory initiative. Although the EP has authority to present proposals to the Commission, the Commission retains discretion to respond. The basis of Community law remains with the Commission. Within the EU sphere, this body is the main regulatory authority. The task for the SLG was therefore to persuade this institution to present the Council with a proposal. Given the nature of the topic – race and migration – and the small heterogeneous public it commanded, a very confrontational campaign may not have been advantageous. The SLG did not want to enter into conflict with the Commission, just as the Commission in turn did not want to be seen to be bulldozing into sensitive national issues.

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68 Chopin, *op. cit.*

69 Niessen & Hix., *op. cit.*, 28.
It must also be remembered that the core organisations were statutory bodies. Whilst they may have been marginalized at the national level, their relation to the public purse gave them a profile which restricted the kind of activities they could engage in. This core shied away from outsider tactics which smaller organisations may have pursued and restricted itself to the promotion of legal measures to fill the identified gap. The movement itself did not expand its aims to incorporate the broader goals of its member organisations. It chose to use insider tactics, and continually rejected any calls to get involved in protest actions. Their main form of direct action was not confrontational but co-operative. Building on their combined asset – legal expertise – they presented a draft Directive.

According to Article 249 TEC (ex 189), “a Directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods.” Unlike a Regulation, a Directive allowed for flexibility in acknowledgement of the different traditions prevailing within the member states. The SLG draft linked the European Union construction of racial discrimination directly to the United Nations Declaration on Human Rights, the ICERD, and other international instruments for the regulation of racial discrimination.70

This instrument was chosen for its flexibility, and also for its potential to promote debates at both EU and MS level as a result of the involvement of parliaments. In 1993, a concrete proposal was prepared for the EU commission, by a group of independent experts from both southern and northern MS. It was argued that “by formulating and presenting a concrete proposal and by ensuring its diffusion and support, the SLG contributed to a growing awareness that racism is still very much alive in Europe and that a European legal measure can be one of the best ways to confront it”.71

The Starting Line Group modelled their draft Directive upon Equal Treatment Directive 76/207/EEC of 9 February 1976.72 on the principle of equal treatment for women and men. The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and social security. The Starting Line argued that racial discrimination was a corollary of gender discrimination and thus for the same reasons could be the subject of a Directive.73

70 RD 2000/43, par. 3, preamble.
71 Chopin, op. cit., 114.
72 OJ L 039, 14/02/1976, 0040-0042.
73 These Community legal traditions on non-discrimination, in particular the long-standing commitment to equal treatment between men and women, did indeed become an important model for the definition of racial discrimination in the Race Directive. The Community based its strategy on race on its experience in the field of gender, where legislation was used as an essential part of a strategy to change attitudes and behaviour. Similar to the Equality Directive, the purpose of the Race Directive was to act as a guide to official policy in the area: it served as a clear signal as to what is acceptable or unacceptable in society with regards to gender. ‘Com-
The definition of the principle of equal treatment in the Race Directive was taken directly from the Equal Treatment Directive, where the principle of equal treatment in this Directive meant that “there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status”.\textsuperscript{74} The definition of equal treatment proposed by the Starting Line Group was:

“the absence of any discrimination, direct or indirect, on grounds of race, colour, descent, nationality, national or ethnic origin in the economic, social and cultural fields, and also, subject to certain conditions, at the level of public life...”\textsuperscript{75}

These basic rights were to be protected for everyone within a jurisdiction,\textsuperscript{76} and restricted to neither employees nor Community nationals and their families since ‘many people suffering the most severely from racial/ethnic discrimination are third country nationals’.\textsuperscript{77} Given the wider concerns for third country nationals, the SLG sought not only to link the European instrument with leading international instruments in the field,\textsuperscript{78} but also to link the Union with its residents rather than its citizens. Racial discrimination was defined in Article 1 (2) as:

“any distinction, exclusion, restriction or preference based on race, colour, descent, nationality or national or ethnic origin which has the purpose or the effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms or participation in the political, economic, social, cultural fields or any other field of public life.”\textsuperscript{79}

\textsuperscript{74} Directive 76/207/EEC, Article 2 (1).
\textsuperscript{75} Art 1 (1). A narrower definition was eventually inserted into Article 1 of the Race Directive, where the ‘principle of equal treatment’ was taken to mean that ‘there shall be no direct or indirect discrimination based on racial or ethnic origin’. This principle of equal treatment was to apply irrespective of any real or assumed racial or ethnic origin.
\textsuperscript{76} The draft used the neutral ‘person’ or ‘persons’ (see Article 2 (2), or Article 3 (4a) or Article 4a).
\textsuperscript{78} Amendment 2.
\textsuperscript{79} Following the introduction of Article 13, the Starting Line, the definition of racial discrimination given in the new Article 1 included after the word ‘cultural’ the words “…religious life or any other public field on the grounds of racial or ethnic origin or religion or belief”, The Starting Line, 1998.
This broad definition encompassed national laws, regulations and administrative provisions. The words ‘purpose or effect’ covered both direct and indirect discrimination, thus those ordinances which made a clear distinction between, for example, citizens and non-citizens as well as those which appeared to apply to everybody but in effect targeted a particular group. As long as this group was not a group due to religion or belief, it would be covered by this definition. The definition spanned a scale of infringements from an absolute refusal to reduced ‘recognition, enjoyment or exercise’ of human rights. However, provision was therefore made for positive action passed in favour of a disadvantaged group for the purpose of “removing existing inequalities ... and promoting effective equality of opportunity between members of society”.80

It would be going too far to attribute the existence of the Race Directive to the SLG, yet their activities played a key role in its emergence, even if they did not sit around the negotiating table in 1997. It is difficult to assess the extent to which the SLG did set the doctrinal parameters for Directive 2000/43, bearing in mind the regulatory competition from the EP and other organisations to influence the proposal put forward to the Council by the Commission. The continuing alliance between the EP and the SLG helped to some extent, with the EP putting forward some proposals found in the SLG draft. This was also a surer route of influence: whilst the SLG has no privileged consultation rights in the EC law-making process, under the consultation procedure enshrined in Art 13 TEC the opinion of the EP must be taken into consideration, though not necessarily followed. An evaluation of this kind could be conducted through comparing the SLG drafts, and the final Directive.81

However, although there may be some common elements seen in both the SLG proposal and the final Directive, it may not be possible to deduce from this alone that the SLG had an impact on the Directive. The Commission may have been intending to act in this way. This is quite likely – it is known that the SLG draft tailored its proposal to the Commission requirements. The contents of the draft were increasingly brought in line with the goals of the Council and the Commission.82 For example, its 1998 draft no longer called upon Member States to meet external standards, but encouraged them to use national ones. The judicial remedy was also changed to be ‘in accordance with the most effective national procedures.’ Member states were therefore no longer called upon to meet external standards, but were encouraged to use national yardsticks. The draft did however stress that ‘adequate’ compensation for pecuniary and non-pecuniary damages was to be provided.83 In addition, the more important ele-

80 Article 3.
83 Article 4 (4)(b).
ments of the SLG draft – the inclusion of nationality – were explicitly excluded from the material scope of the Directive. In 1993 conciliation between individuals was to be made available as an alternative remedy. In 1998 conciliation was to be provided as a non-mandatory alternative to judicial procedures.  

4. Conclusion

I have attempted to tell the story of how lawyers acted collectively cross-nationally in order to address the omission of regulatory action by the Commission. The grouping of lawyers was an ad hoc collaboration, entered into because the individuals and groups concerned shared fundamental ideas and principles relating to immigration and racial discrimination. The ad hoc origin has been transformed into something more permanent. Today the Starting Line Group is a loose, informal network of up to 400 NGOs including trade unions, churches, individual independent experts, and academics sharing the common aim of combating racial discrimination in the European Union.

The study of the SLG illustrates clearly that cause lawyers are found not only in private practice, but also in non-governmental organisations and are active both nationally and across the EU. Those active within NGOs demonstrate a deep political and moral commitment to issues with which they are involved. Practising lawyers volunteer to work in NGOs to promote a non-national, in this case European, agenda. Increasingly, these lawyers develop transnational networks to both defend their causes and tap into additional resources.

Why work at a level other than the national? In relation to the issue of discrimination and migration, transnationalism afforded the actors involved opportunity to draw strength and resources from one another. This is one important reason for working across jurisdictions. In addition, the issue of migration and discrimination is one which straddles national and international boundaries, therefore lend themselves to transnational networking. Less altruistic reasons have also been identified: “(status and representation) in the construction of a transnational legal field depends largely on whether that investment figures to increase their social capital”.

The main intention was to stir the Commission into action. The goal was singular and the methods non-confrontational. The main tool was a draft proposal for a Directive. Because of the limited scope for public interest lawyering

84 Article 4 (4)(d).
86 Chopin (1999), op. cit.
in the traditional sense in the EU due to – amongst other things – the present rules of standing in EC law\textsuperscript{90} lobbying was therefore more appropriate than litigation. This lobbying was not in the sense of direct action by a social movement: the demands did not come from below but were increasingly tailored to the needs from above. The lobbying of these lawyers was encouraged by support from an EU institution, the EP. Its cause was legal but it was adopted by political actors. Would it have been successful without this important patron? It was encouraged to lobby, and was used as a mechanism to raise awareness. It had important widespread organisational support.

The mission and the method illustrate the hybrid nature of this EU lawyering project: the target was the EU’s regulatory authority; the goal a ‘constitutional’ one; the tool – a draft for a Directive – was clearly legal yet they did not target legal institutions. In the absence of a legal remedy there was little point in proceeding through legal arenas such as the ECJ, the CFI or the national courts. Armed with the draft Directive they lobbied, at both the European and national level, parliamentarians and decision-makers. At the same time they were supported by a pan-European movement. There was a general pressure on the Council to improve the image of EU immigration policies and to deal with the growing phenomenon of cross border racist crime.\textsuperscript{91}

How therefore should lawyering in the EU be understood? Is it a democratic project or an ideological one? It appears to have characteristics of both. The core comprised a mix of practising and non-practising lawyers, supported by a wider network of experts in immigration matters, trade unionists, faith leaders, academics, social workers. It was, therefore, lawyers who designed the legal draft presented to the Commission in 1993, and availed themselves of a pan-European social movement to promote it.

This powerful combination freed them from the constraints of the legal profession, yet the organisational support base meant they did not have to compromise legal professionalism. There was therefore no potential for involvement in activities and political mobilisation which would take them beyond professional boundaries and no backlash as a result of putting the legitimacy of an independent law at risk.\textsuperscript{92} I would therefore describe their lawyering as ‘embedded’, making it neither rule of law nor political but a mixture of both. It was liberal lawyering embedded in a political movement.

How effective was this embedded lawyering? In terms of the doctrine, the Council placed the Directive within narrow economic parameters rather than the broad moral and social ones put forward by the SLG. In terms of stimulating a dialogue within the EU institutions and a section of the public in various member states, the Starting Line was successful. However, this is yet to trickle down as desired to a broader debate at the national level. The appearance of race on the EU agenda has not so far had radical implications for the legal sys-

\textsuperscript{90} Article 230 (4) narrowly defines those of ‘direct and individual’ concern. Current case law does not suggest that the parameters will be broadened (Jego Quere, UPA).

\textsuperscript{91} Bell (2002), \textit{op.cit.}, 68-69.

\textsuperscript{92} Sarat & Scheingold (1998), \textit{op. cit.}, 3-28.
tems of the EU member states, primarily because so few member states are yet to implement it. The dialogue has therefore been halted due to the sluggish response of most national administrations. Whilst there is now a common regulatory framework in the field of racial discrimination at the European level, there is not a single approach at the national level. Far from it: a range of different regimes are still visible within the national legal systems.  

As laid down by the Treaty of Rome, the current fifteen member states were obliged, in accordance with their national traditions, to incorporate measures achieving the ends envisaged by the Race Directive within their legal orders by 19 July 2003 at the latest. This date has come and gone, and sadly little has been done at the member state level. In the Green Paper on equality and non-discrimination in an enlarged European Union, the Commission stated that infringement proceedings would befall any member state which missed the transposition deadline. Indeed, infringement proceedings have already been started against Ireland and other member states. Due to infringement proceedings, a dialogue of some sorts will continue at the European level, which – I think it is fair to say – would not be at the stage it is today in the absence of the phenomenon of embedded lawyering.

94 Article 234 TEC.
95 Directive 2000/43, preamble, para. 16.
96 See ENAR Reports on transposition patterns.
98 Written Question E-3840/03; written answer given by Mrs Diamantopolou, 2nd June 2004.
EUROPEAN PRIVATE LAW
1. Introduction

Pierre Legrand is a comparative lawyer of great prestige, known not least for his taste for battle. In 1997, he published ‘Against a European Civil Code’, a diatribe against what he considered the arrogant and backward idea of harmonising European private law, a project which ‘partakes of an ahistoricist reinvention of Europe’, seeks to produce ‘a new separation between the legal-political function and social life,’ and ‘reflects the advance of a European Union bureaucracy consisting largely of uprooted civil servants’. At the time, there seemed to be something almost Don Quijotesque about the exercise. However big the guns, the target seemed but a rather vague idea floating around without any serious intellectual foundation, ideological support or political sponsorship. In 2002, Yves Lequette, a private lawyer of great prestige, published his own tirade against the idea of a European civil code. By now, the fight was no longer merely a battle of ideas. Scores of private lawyers from around Europe had gathered in study groups and projects supported by lavish research funds to draft articles and principles; the political institutions of the European Community had passed resolutions, published white papers, launched consultation rounds, and produced action plans. And the target, this time, had a name. Professor Von Bar, the man at the heart of the most prominent project for a European civil code, had gained access to the Grand Chambre of the Cour de Cassation to expose his plans. In English. And so Professor Lequette made public his concern over Von Bar’s talk, ‘tant il montre à quel point est délibérée, organisée et avancée l’entreprise qui entend priver, de manière purement technocratique, les peuples qui composent l’Europe de leurs Droits civils, alors même que ceux-ci constituent une pièce importante de leur histoire, de leur culture et de leur identité.’

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2 Legrand himself described his subject as ‘a propoundment which is apparently meeting with increasing favour in various political, professional and academic circles’. Ibid.
In the meantime, it is submitted, a field of European private law had emerged.\textsuperscript{4} One aim of this article is to describe the contours of that field – its players, its support structures, its intellectual and ideological underpinnings, and its stakes. A further aim is to analyse the interaction of the new field with the established field of Community law. Indeed, the debate over a European civil code, however interesting on its own merits, is fascinating above all for what it suggests about the social construction of the role of law – and of lawyers – in the process of European integration.

\section*{2. The Enterprise of a European Civil Code}

The enterprise has been carried forward, from its inception, by a mutually reinforcing alliance of academic and political actors. One evening in 1974, over dinner in Tivoli Gardens after a conference in Copenhagen, Professor Ole Lando and Winfried Hauschid of the European Commission decided that ‘we’ needed a European Code. Lando then went on the search for ‘qualified people,’ meetings were held in Brussels, the Commission provided some funding, and in 1982 the Commission on European Contract Law, a group of highly regarded Professors of private law from all EC Member States, started the task of working out Principles of European Contract Law.\textsuperscript{5} In 1989, the European Parliament passed a Resolution requesting that a start be made on drawing up a ‘common European Code of Private Law’ and calling for ‘moral and material encouragement to studies of comparative law carried out within the Community and to codifying endeavours in general’\textsuperscript{6}. In 1994, the Parliament repeated its call for a Code to be drawn up and urged for support to ‘be continued to be given to the Commission on European Contract Law, better known as the Lando Commission’.\textsuperscript{7} In 1998, Von Bar established the Study Group on a European Civil Code. Whether this was the original intention or not, the Study


\textsuperscript{5} Lando tells the story in his preface to O. Lando & H. Beale (eds), Principles of European Contract Law (Parts I and II), The Hague, Kluwer (2000). It should be noted that the idea had already been floating in high-level Commission circles much earlier. See for example W. Hallstein, ‘Angleichung des Privat- und Prozessrechts in der Europäischen Wirtschaftsgemeinschaft’, (1964) 28 Rabels Zeitschrift, 211.

\textsuperscript{6} European Parliament Resolution on action to bring into line the private law of the Member States, (1989) OJ C 158/400. A. Hartkamp et. al. (eds), Towards a European Civil Code, Dordrecht, Martinus Nijhoff, (1994), was explicitly written to rise to the challenge posed by the Parliament.

Group has become the successor of, rather than a rival to, the Lando Commission, absorbing into its ranks a good many members of the latter group.

In 2001, the Commission finally resurfaced in the story with the publication of its Communication on European contract law. As had become policy from the days of subsidiarity and good governance, the Communication didn’t explicitly offer specific proposals but, rather, limited itself to listing a range of options for purposes of stimulating debate and consultation. Apart from the obviously popular idea to improve the quality and coherence of existing EC legislation, the serious options were two: one to promote the development of common contract law principles leading to more convergence of national laws, the other to adopt comprehensive legislation at EC level. The European Parliament wasted little time to make clear that the options should be seen sequentially rather than as alternatives. It even laid out a timetable: the comparative research on common principles and terminology should be finished by 2005; from that year, the newly found treasures are to be disseminated in academic training and the legal profession, so that by 2010 a body of rules on contract law can be adopted in the European Union. The Commission came out in 2003 with an Action Plan, announcing its intention to concentrate efforts on developing what is now called a ‘Common Frame of Reference,’ a model code of contract law that, so the hope, will be widely accepted by economic operators and taken as a point of reference by national legislatures, thus doing its harmonizing work gradually and from ‘below’. For this to be drafted, of course, needs a lot of research. But, as the Commission notes:

[I]t should be emphasised that it is not the Commission’s intention to ‘re-invent the wheel’ in terms of research activities. On the contrary, it is remarkable that never before in the area of European contract law has there been such a concentration of ongoing research activities. It is essential that these research activities are continued and exploited to the full. Therefore, the main goal is to combine and co-ordinate the ongoing research in order to place it within a common framework following several broad approaches.

8 Communication from the Commission on European contract law, COM (2001) 398. Option I was ‘no action’, in the hope that the market would find its own solutions. The Commission has posted reactions to the Communication on its website. See further e.g. S. Grundmann & J. Stuyck (eds), An Academic Green Paper on European Contract Law. Deventer, Kluwer (2002).
3. The Field of European Private Law

There is, indeed, an impressive amount of academic activity going on here there and everywhere in Europe. For a subject that is still largely waiting to happen, the success of European private law is even staggering. Academic journals are thriving, courses and modules are offered throughout the continent; graduate schools are dedicated to the subject, joint research projects are being funded not just by the Commission but also, and even more significantly so, by national science foundations. Much of the activity, of course, consists of writing the subject into existence. The ‘Trento Group’ brings together scores of comparative and private lawyers in Italy each year to ‘unearth’ the common core of European private law. The *Ius Commune* casebook project directed by Walter van Gerven, and based in Leuven and Maastricht, is publishing tome upon tome of bulky teaching material that ‘uncovers’ common principles.

The construction of a field of European private law is, in many ways, the result of a struggle of different disciplines for epistemic superiority. Comparative law is going through something of a renaissance thanks to the political and academic excitement around the idea of a common private law. Though some, like Legrand, protest vehemently to their art being reduced to a purely instrumental toolkit for codification, the fact remains that comparative private law is now an exciting and thriving area of study, richly endowed with research funds and politically sustained by the Community institutions. The emergence of a

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12 In 1992 and 1993, respectively, the *Zeitschrift für Europäisches Privatrecht* and the *European Review for Private Law* were first published.


15 This Kantian ‘Streit der Fakultäten’ for the heart and soul of European legal integration has been a constant theme in the work of Christian Joerges. See, for example, C. Joerges, ‘The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Disciplines - an Analysis of the Directive on Unfair Terms in Consumer Contracts’, (1995) 3 European Review of Private Law, 175.

16 For an example of newly found confidence, see e.g. K.P. Berger, ‘Harmonisation of European Contract Law - The Influence of Comparative Law’, (2001) 50 Interna-
‘European’ private law is reconfiguring established national fields of private law. As research funds and political visibility are being moved over to collaborative European projects, ‘national’ private lawyers such as Lequette find themselves in defensive postures, characterised if not ridiculed as old-fashioned, conservative and provincial. The ‘new’ legal science is not about providing order to positive enactments but about uncovering deeper structures and similarities between different legal systems. Most significantly for present purposes, the emergence of the field of European private law involves a struggle with the field of European Community Law.

EC lawyers are a closely knit group, effortlessly spanning academia, the political institutions, and commercial practice. Their ethos is deeply pragmatic, characterised by a distinct aversion to grand ideas and a clear instrumental vision of law. Political differences and controversies over legal technique dissolve in their common commitment to integration. They are also almost exclusively public lawyers. With the very notable exception of Walter van Gerven, formerly Advocate General at the European Court of Justice and one of the most influential people in the field, there are very few people who span the two spheres.

4. Competing Narratives: The Necessity for a Harmonised Private Law

For EC lawyers, the impact that European integration has had on national private law is a logical consequence of the nature of European law. On the one hand, it is but a normal manifestation of the supremacy and direct effect of provisions of EC law. From the point of view of European law, wherever it impedes the effectiveness of European law there is little conceptual difference between national product safety law, procedural law, company law or contract law: it needs to be set aside. On the other hand, it is inherent in the concept of market integration. The Directives on unfair contract terms, product liability, time sharing, and even electronic commerce are conceptualised as “market correcting” measures to protect consumers and workers from the deregulatory ef-
fect of the legal regimes on the free movement of persons, goods and services.  
From the point of view of EC law, there is little conceptual difference between 
the need to introduce harmonised public product safety requirements for toys 
and the need to introduce ways of invalidating contracts concluded on door- 
steps or websites. What is needed is not so much the harmonisation of private 
law per se; what is needed is a harmonised machinery for the uniform imple- 
mentation of the legal framework of the internal market.

But whereas EC lawyers think in terms of objectives, private lawyers tend 
to think in terms of systems. And from their point of view, the Community 
approach to market integration leads to disintegration of their lives’ work. As Von 
Bar puts it:

“European jurists sense that matters cannot stay the way they are with 
the present approach to lawmaking in the institutions of the European 
Union. Many directives are only a harmonization success story from the 
perspective of Brussels: from the perspective of national legal systems, 
they lead to new fault lines. (--) The current sectoral and ‘piecelaughter’ ap- 
proach of directives, exclusively conceived from the perspective of con- 
sumer protection law, is already placing the quality and systematic co- 
herence of our national systems of private law in permanent danger.”

To merely concentrate on the ignorance of ‘Brussels’ in matter of private law 
is, in this view, to overlook the systemic problems posed by European law. The 
quality and coherence of national systems of private law is not something that 
‘better’ piecemeal legislation can ultimately maintain: it is something that only 
a truly European science of private law can guarantee.

Scientific integrity and systemic coherence are, however, not sufficient 
grounds for the European Community to start enacting measures to harmonise 
contract law. It is one of the paradoxes in the debate over European private law 
that the proponents of the idea of a European civil code, so full of the grandeur, 
elegance and symbolic force of their ambition, have been reduced to fight their 
battle according to the rules and validation structures of EC Law. The battle is 
over competence; the need is to establish that divergences in national systems 
of contract law constitute an impediment to the functioning of the Internal 
Market. Ole Lando famously made the argument in a simple syllogism:

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21 In this sense, it is significant that the dossier on European contract law in the Euro- 
pean Commission is still a matter of the Directorate-general for Consumer affairs.
23 Von Bar protests that the Commission’s Communication ‘is plainly directed to- 
wards the economic requirements of the common market; the symbolic force of a 
uniform European private law does not come in for a mention.’ C. von Bar, ibid., 
383.
“The foreign laws are often difficult for the businessman and his local lawyer to understand. They make him feel insecure, and may keep him away from foreign markets in Europe. Thus, the existing variety of contract laws in Europe may be regarded as a non-tariff barrier to trade. It is the aim of the Union to do away with restrictions of trade within the Communities, and therefore the differences of law which restrict this trade should be abolished.”

In days of old, such reasoning might have been enough to establish Community competence. With modern constitutional sensitivities in the Union, however, it falls far short. The Commission’s 2001 Communication called for better arguments and empirical evidence which Von Bar and Lando duly tried to provide. All of that has ceased to make any sense, however, after the European federation of small and medium sized enterprises, UAPME, made it clear that the divergence did not constitute a significant problem for cross-border transaction.

Fighting on the opponent’s turf is, of course, seldom a good idea. The cluster of arguments bolstering the case for Community competence to enact a European civil code had to be framed in a language and in an intellectual mould that European private lawyers never owned or felt comfortable with. The messy realities of the European policy process, the empirical swamp of business preferences and consumer needs, the constitutional limits to legitimate legislative action of the Union- these are the rules of another game, the game played in the field of Community law. This is not the place where European private lawyers are really looking to invest their capital.


27 The submission, along with all others received in the consultation process, is posted on the Commission’s website. Von Bar keeps a straight face: ‘That diverse private law hampers the internal market is everyday experience, whether that admits of empirical representation or not.’ Sic. C. von Bar, ‘From Principles to Codification: Prospects for European Private Law’, (2002) 8 Columbia Journal of European Law, 385.
5. Law, Lawyers, and Legal Integration

The field of European private law is positioning itself as the true guardian of the European ideal. And it is another paradox of the whole debate that the new field is even morerenched in the symbolism and associations with state-building of private law codification than are the provincial guardians of legal nationalism in contrast with which it has built its identity. That private law is a part of a people’s history, culture, and identity is not something that European private lawyers will argue over with Lequette. But, with Von Bar, ‘it is collective responsibility for private law that is at stake, not modes of expressing national sovereignty; it is culture that is at issue, to be sure, but it is the culture of a truly European private law.” The project of a European civil code is legitimised on the one hand by its scientific sophistication – and isolation from “political” pressure – and on the other hand by grand historic and sociological theorising about the common legal heritage of Europe and the cultural, social and political functions of private law – and private lawyers – in society. Indeed, the fundamental move behind the enterprise is the collapse of these two strands of legitimisation discourse.

Charges of ‘technocratic’ scientific abstraction from social life and legal culture are countered with assertions of underlying similarity. This, for example, is Ole Lando’s upbeat appraisal of the sociological preconditions for the unification of European private law:

“[M]ost of the guardians and preachers of our law and justice grew up in well to do bourgeois homes with moral traditions. In Europe the middle class has in fact been the guardian of ethics and so have, in general, the parents of the judges and professors. Their fathers were there, and behaved themselves. In school and at the universities the lawyers in spe were good, relatively virtuous students with strong ties to their homes. Many of them were right-wingers. Their professional life has maintained their bourgeois attitudes, and has confirmed their conservative response to life. Thus, the legal values of the European brotherhood of lawyers are very similar. And so are, it is submitted, the legal values of the European peoples who live in societies of a similar economic and political structure and share the same ethics. This should enable us to make a European Code of Obligations.”


31 O. Lando (1998), op. cit., 825-826.
What is being taught and learned in academia by these well-behaved bourgeois family men is the very construction of the field of European private law. As it turns out, law-as-science is European legal culture. A feeling of ‘togetherness’ of European lawyers by itself will generate a true European legal culture and a common European legal consciousness. And the building stones on which to construct this feat are the ‘rule of law’ expressed by the authority of general abstract legal rules, the systematisation of law by legal science, and the technicality of law as the domain of legal scientists under exclusion of laypeople.

National codifications are but political aberrations and interruptions of scientific progress, but ‘a transitional stage in an ongoing tradition.’ Indeed, every codification by a legislature is bound to disrupt the inexorable march towards true legal Europe: ‘Like Savigny, we should put our faith in an “organically progressive legal science” rather than the legislature.’ All these legal scholars ‘unearthing’ and ‘uncovering’ common rules and principles are doing nothing less than laying bare the European Volksgeist. It is Professorenrecht that bridges the gap between the political-legal function and social life and dissolves the tension between ‘top-down’ and ‘bottom-up’ harmonisation of private law. With Von Bar and Lando, the Europeanization of private law ‘can only be achieved by an impartial formulation of principles in the light of detailed comparative law research, transcending legal diversity by a dispassionate development of the most appropriate rules for a Community wide private law. Any other method would be entirely inappropriate’.

It is, of course, a delicate balance, and not so unfamiliar. On the one hand, the field needs to maintain its autonomy. On the other, it needs the political support from the Community institutions to maintain momentum, to keep the flow of research funds going, and to open the doors of the Grand Chambre of the Cour de cassation. And it is now clear that the field will need to open up if it is to keep up that momentum. If anything has become obvious from the Commission’s consultation process, it is that Europe is not ready for Professorenrecht. Trade associations complain that scientists and experts ‘lose sight of the practical aspects’ because the business community is not involved in the

36 Yves Lequette (2002), op. cit., 2210 ([L]’autorité scientifique de M. von Bar aurait-elle suffi à lui ouvrir les portes de la Grand’Chambre de la Cour de cassation? Il est permis d’en douter.’).
Bar associations stress that initiatives ‘should be driven by practitioners rather than academics’. Pierre Legrand even finds an unlikely ally in the mega law firm of Clifford Chance which feels the need to explain that the differences between the contract laws of the Member States ‘are shaped not merely by scientific considerations but by structure, philosophy and language of a country’s entire legal system.’ The European Parliament and Council have taken note and are directing the Commission to open up the process. Whether the field is able to allow entry to new players, and still maintain its autonomy and epistemic dominance, remains to be seen.

6. Conclusion

The building of a transnational legal field in Europe has for decades been the work of a relatively homogeneous community, a cosmopolitan crowd of lawyers, officials, and judges steeped in the idea that law, in its essence, transcends political and cultural national boundaries. For decades, this group has held an epistemic monopoly on virtually all matters relating to European integration. The advent of the debate on a European civil code has opened up the field to a whole new group, of comparative and private lawyers, mostly not hitherto involved in European matters. The field of European private law lays much greater stake in technical sophistication than the pragmatists of Community law, identifies itself much more proudly as a professional elite than do the relatively modest classic servants of integration, and have generally much grander ideas and visions on the proper role of law and lawyers in the project of European integration: European private lawyers locate the transcendent quality of law in themselves. The clash between the two fields will lead inevitably to the reconfiguration of both, and to the reshaping of dominant ideas about law and legal integration that underlie the project of European integration. This paper has tried to make a start with the task of tracing these developments.

37 The quote is from the submission by Orgalime.
38 The quote is from the submission by the Law Society.
39 See the European Parliament Resolution on the Action Plan, (2003) OJ C 76/96 (Calling for ‘users of the law such as judges, lawyers, notaries, undertakings and consumers, to be involved’ in the elaboration of the Common Frame of Reference and noting that ‘the Commission has not hitherto taken much notice of such groups.’) and the Council resolution on the Action plan, (2003) OJ C 246/1 (Calling on the Commission to take account of ‘the practical needs of economic operators and consumers and the established structures and legal cultures in Member States.’)
1. Introduction

This article presents the first findings of a socio-legal study on European Legal Cultures that is centred around the Trento Project, which concerns research on the Common Core of European Private Law. It is part of the Research Programme on the Europeanisation of Private Law of the Amsterdam Institute for Private Law at the University of Amsterdam. Because the study is at an early stage, this article is mainly focussed on the gathering and analysing of social and cultural data that may describe the Trento Project and its surroundings. Further research will consist of the participatory observation that began in 2003.

The first findings are based upon a contemporary type of literature survey, as they result first and foremost from researching the information on the internet. The information that has been studied includes (references to) scientific publications but also to non-scientific resource material such as mission statements, flyers, mailing lists, commercials, etc. Ordinary research would have gathered the latter type of material by going into the field. By use of the internet one can acquire both materials, i.e. scientific and non-scientific, and systematic and rough empirical material, at the same time.

The methodology of ‘googling’ has advantages and disadvantages similar to browsing in libraries. As to the online scientific literature, I have analysed the references up to the point where they were only referring to and amongst themselves. I included the literature on and from the Trento Project that is not on the net. This means that the outcome gives quite a complete picture. I used the same method of analysis for the other empirical data. Here I had help from the hyperlinks on the websites I visited. The outcome of this search along the links came to its natural end in the same way, namely at the point where the links are linking to and amongst themselves. These first findings demonstrate how far one can get using the internet as a methodological tool.

The questions I had in mind were, firstly: what is the Trento Project and how is it executed by its participants? I took the perspective of private law lawyers as social actors. Secondly: why do these private law lawyers want to be involved in a project like the Trento Project? As I pointed out before, this study is a preliminary one and will be continued. I welcome every comment. My e-mail address is a.t.m.schreiner@uva.nl.
2. About the Trento Group

Reading the title The Common Core of Trento, one really should notice the ‘r’ in ‘Common Core’ or else one might mix up the Trento research group with other projects that inquire into the possibilities for having a common code – with the ‘d’ – for all of Europe, such as the Study Group on a European Civil Code (SGECC), also known as the Von Bar or simply The Study Group.¹ Regarding its purposes, one could position the Study Group very much towards the right end of a scale that runs from ‘no code at all’, via ‘soft law’ (principles) to ‘hard law’ (statutes). After all, it considers itself the true successor of the Lando Commission, which formulated the Principles of European Contract Law (PECL), pushing the work of that commission further.² At the far right, of the scale one will not find the European Commission as a key player within the legislative power of Europe, as might have been expected, but the Academy of European Private Lawyers, also known as the Gandolfi Group, which is actually writing a European Contract Code, book by book.³ The European Commission can be placed at the very middle with soft and hard law on its right, as it does not consider these options to be realistic for the moment.⁴ It concentrates its attention, therefore, on a Common Frame of References.⁵

¹ See www.sgecc.net/ and further the contribution of Harm Schepel in this Special Issue.
² See www.sgecc.net/media/download/stellungnahme_kommission_5_final1.pdf. The work of the research groups on private law is sometimes restricted to contract law, since contract law is seen as more neutral and therefore more successful from a harmonisation or unification point of view. This is a point of view that has been criticised extensively by the Critical Legal Studies movement, which is represented by the name and work of Duncan Kennedy. See for instance D. Kennedy, “The Political Stakes in “Merely Technical” Issues of Contract Law” (2002) 10(1) European Review of Private Law/Revue européenne de droit privé/Europäische Zeitschrift für Privatrecht 7-28.
⁴ In 2001, the EU Commission issued a Communication On European Contract Law for consulting the legal world and other stakeholders to be given their opinions on a few options. After having studied the responses, the Commission presented an Action Plan 2003 that estimates the chances for a common soft or hard code of law for the moment. See http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/actionplan_en.htm.
The Trento Group, with its search for the common core of European private law, however, may not be found on the scale of legislation purposes. It deals with how things are — common and different — in the national legal systems. In doing so, this group might be considered to be ‘prior to’ the projects that find themselves on that scale, or to be ‘at the bottom’ of those enterprises, while the Acquis Group — in order to complete the picture — is ‘after’ or ‘on top’ of these enterprises since that research group deals with the existing but fragmented European forms of legislation, such as EU treaties, EU directives, and harmonised national law, in order to establish the Principles of the Existing EC Private Law.6

On its website the Trento Group distinguishes itself explicitly from a project such as the Study Group: “The common feature of the two kinds of enterprises is the use of comparative methods, but this common methodology serves diverging purposes, and consequently produces different results.”7 This distinction does not imply that the SGECC and the Trento Project do not share a reasonable number of participants, chairpersons or organisers.

A comparison of the list of professors in The Study Group, who participate as members of its Coordinating Group and/or as advisors to one or more of its Working Teams, with the list of participants of the Trento Project shows that out of the 62 people, 19 are also active participants of the Trento Project, while another 16 SGECC professors have attended the annual meeting at least one time (4 of them as an invited speaker).8 One can be sure that there are names from the list of participants of one of the many other groups ‘on European Private Law’ that will also emerge from the Trento list.

A German metasite established by the Institute of International and Foreign Private Law of the University of Köln counts 11 different groups.9 In the mean-

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6 See www.acquis-group.org/about.html.
7 See www.jus.unitn.it/dsg/common-core/approach.html.
8 Both lists were consulted on their respective websites visited on 2004-07-25. The list of the SGECC professors is an update of 2003. See www.sgecc.net/index.php?subsite=subsite_3&id=17. The Trento List of Participants consists of all those people who have been a participant at least once. It is an accumulative list of 619 different names updated 2004-07-08. See http://www.jus.unitn.it/scripts/dsg/commoncore.idc. (The site counts 624, but 5 names have been listed twice.)
9 See Wissenschaftliche Arbeitsgruppen und Einrichtungen zum Europäischen Privatrecht on www.ipr.uni-koeln.de/eurstpriv/arbeitengruppen.htm updated 2004-04-30 and a recent association of European contract lawyers, SECOLA (see www.secola.org/). It also lists one German university centre, CEP (see www.uni-muenster.de/Jura.cep/index.html), while such centres do exist at other universities, and/or in other Member States, and/or even larger ones, e.g. European Centre of Tort and Insurance Law http://www.eclil.org/. Close to my own situation, I could mention the Amsterdam Institute for Private law with a research programme on the Europeanisation of Private law, see http://www.jur.uva.nl/aip/object.cfm?objectid=6A90093A-3786-453D-AF977FDFD74EE7259, and the broader Dutch/Belgian or
time a new group (very much interrelated) can be added to this list, the Study Group on Social Justice in European Private Law or the Social Justice Group. The installation years, the working periods, and the first and/or main outcomes may reflect the actuality and the intensiveness of these working groups or institutions as well as the importance of Europe. See Table 1.

The first organisation on the list, Unidroit, which came into existence within the context of the League of Nations, needed almost forty years to produce the The Hague Uniform Laws on International Sale of Goods, and another twenty years for the UN Convention on International Sales of Goods (CIGS). The fact that Europe had experienced World War I, then gone through the experience of World War II, is of course highly relevant here, since the war slowed down the work of this organisation for international integration but paradoxically also speeded it up. Later, in the eighties of the twentieth century, Unidroit began its work on the Principles for International Commercial Contracts: it took almost fifteen years for the first edition, plus another ten years for the second. In this respect Unidroit measures up to the Lando Commission, which spent thirteen years developing the Principles on European Contract Law. From then on, all the working groups needed less and less time according to the year that they were set up. There is one exception, namely the Storme Group on Civil Procedure Law. Despite the early year of its establishment the group needed only seven years, while the others had been working ten or more years at that time.

organisation and research programme of the Ius Commune, see www.rechten.unimaas.nl/ozic as well as www.law.kuleuven.ac.be/casebook/index.htm. See also www.martinebers.net/Acquis/VI.htm (visited 2004-08-05), which shows 9 groups, 12 institutes, and 2 research networks considering Unidroit as an institute and the Working Group on Uniform Terminology for European Private Law as a research network. In table 1 I confine myself to groups since this study is on the Trento group.


This might have been caused by the commitment that the group probably felt towards the EC Commission, which was behind the formation of the group.\textsuperscript{13} From the early nineties onwards it becomes clear that the later a scholarly group had formed itself the faster the outcomes would come.

\textit{Table 1. Groups, Projects, and Teams on European Private Law: Year of Establishment and Year(s) of the Main Outcomes}

\begin{tabular}{ll}
\hline
• 1987 Working Group on the Approximation of Civil Procedure Law (Storme Group) & (1994) \\
• 1992 Academy of European Private Lawyers (Gandolfi Group) & (2002) \\
• 1993 European Group on Tort Law (Tilburg Group) & (2003) \\
• 1994 Trento Project & (2003) \\
• 1998 SGECC, Lando’s successor\textsuperscript{14} & \\
- 1999 The Project Group on a Restatement of European Insurance Contract Law (Innsbruck Group) & \\
- The Salzburg Working Team on Transfer of Movable Property & (2002) \\
- The Dutch Working Team on Sales, Services, and Longterm Contracts & (2003 – 2003) \\
- The Osnabrück Working Team on Extra-Contractual Obligations (Von Bar Group) & (2003 – 2003) \\
• 2001 Commission on European Family Law & (2003) \\
• 2002 Working Group on Uniform Terminology for European Private Law & \\
• 2002 Acquis Group & \\
\hline
\end{tabular}

The shortening of the working period might have been caused by the fact that the later groups could have built upon the experiences of the earlier groups. The existence of multiple memberships of participants from those research projects, which surely facilitates such exchanges, has been mentioned before. Furthermore, the extensive and intensive use of the internet, email, in short all digital modes, has speeded up the scholarly work.\textsuperscript{15} Another reason might have been the appearance of the 2001 Communication of the European Commission, by which the legal world was asked to give their opinion on the subject of

\textsuperscript{13} See www.ipr.uni-koeln.de/eurprivr/arbeitsgruppen.htm#Storme-Gruppe.

\textsuperscript{14} The Edinburgh Working Team on Trust Law and The Nancy Working Team on Financial Services were announced.

\textsuperscript{15} I thank Professor Katharina Boele-Woelki, who speaks from her experience as member of the Organising Committee of the Commission on European Family Law, for mentioning this reason.
European Contract law.\textsuperscript{16} This Communication came as a surprise even for most of the scholars who were active in the research groups.\textsuperscript{17} The responses, however, came in time and within two years the next outcome of the Commission was there, the 2003 Action Plan, followed by the 2004 Call for Expression of Interest – A network of stakeholder experts on the Common Frame of Reference.\textsuperscript{18}

These general remarks on the actuality and intensity of those working groups, based on the overview given in Table 1, left aside the differences in workload, number of participants, scholarly degree, subject, money, and publishers, which will all affect a particular date of outcome.

3. About the Money

Apart from Unidroit, which is financed by the annual contributions from its Member States, most of the research money has been raised from funds within the regional and national financing research systems, and from the ordinary financial resources of the universities.\textsuperscript{19}

From 1997 onwards the European financial funds play an important role.\textsuperscript{20} It is interesting to note that there is a change in financing policies from the funding of static social institutions to the financing of dynamic social networks. The former funding allocated money to positions, functions and offices in order to establish a research institute. The latter type of financing supports a network of researchers that within itself allocates money to what is considered a proper contribution to the research network, which is connected by digital devices.\textsuperscript{21}

\textsuperscript{16} See note 4.
\textsuperscript{18} See note 4 and 5.
\textsuperscript{19} Meetings in Trento had been sponsored in the past by MIUR – Ministero dell’Istruzione dell’Università e della Ricerca (Research Project: \textit{Il nucleo comune del diritto privato europeo} – M. Bussani, editor; and Research Project: \textit{Il nucleo comune del diritto privato nell’Europa “allargata”} – M. Bussani, editor); Associazione R.B. Schlesinger per lo studio del Diritto Europeo (Trento); Centro Studi di Diritto Comparato (Trieste); I.S.A.I.D.A.T. – Istituto Subalpino per l’Analisi e l’Insegnamento del Diritto degli Scambi Internazionali (Torino); Fondazione Cassa di Risparmio di Trento e Rovereto; Dipartimento di Scienze Giuridiche dell’Università degli Studi di Trento; Consiglio Nazionale delle Ricerche di Roma Provincia Autonoma di Trento; Istituto Trentino di Cultura; Comune di Trento; Casa Editrice or Editores Cedam (Padova), G. Giappichelli (Torino), and A. Giuffrè (Milano). As for the publications, other funds are acting as sponsors as well. See for the regional approach and promotion in Italy Robert D. Putnam, \textit{Making Democracy Work. Civic Traditions in Modern Italy}. Princeton University Press (1993) 97.
\textsuperscript{20} Until then, some funds were being raised, by the CEFL for instance, from the Grotius Programme Civil (1996-2000), see http://europa.eu.int/comm/justice_home/project/grotius_civil_en.htm.
\textsuperscript{21} The change in financing policies does not imply that the application form has changed into one that is more transparent. The digital information and application
In November 1997 the Research Network on “Common Principles of European Private Law” – established between the universities of Münster, Barcelona, Berlin, Lyon, Nijmegen, Oxford, and Torino – was recognised by the European Commission as a Training and Mobility of Researchers Programme Network. This TMR Programme was part of the Fifth EU Framework Programme (FP5) that provided its networks with funds for the period 1998-2002 (lasting until 2006). Consequently, the TRM Network on Common Principles of European Private Law was able to finance international gatherings, support young researchers (stipendia), and contribute to the publication of results. It also, still under the FP5, formed the Working Group on Uniform Terminology for European Private Law in 2002. The University of Berlin is no longer mentioned on the list, instead one will find the University of Warszawski amongst the seven linked universities.

EU funding has become even more important since the explicit appearance in 2001 of the EU Commission in the field of European Private Law. The money is now linked to the development of a Common Frame of Reference. The Acquis Group, therefore, which came into existence in 2002, applied – on behalf of other groups as well – for the Sixth EU Framework Programme (FP6), which has been launched for the period of 2002-2006. In case of approval, one third of 90 % of the money will go to the Acquis Group, two thirds to the SGECC, and 10 % will go to other groups. Trento is probably among the groups that are eligible for that 10 % (of approximately € 5 mln).

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24 Some of the money went to the Trento Project, see Bussani & Mattei (2000: xii).
26 I will continue to use the original city names instead of those being used by English native speakers, such as Trent, Cologne, Turin, or Warsaw since I considered it to be in line with the use of what I have called Trentenglish, see The Common Core Of Trento – a semiotic analysis of a research project on European Private law (forthcoming).
28 See Hesselink, op. cit. note 10 note 145; op. cit. note 17, 688-689, and the information from the interviews I had with key players.
4. About the Trento Project

The full name of the Trento Project is the “Common Core of European Private Law Project”. It started in 1994. Mauro Bussani and Ugo Mattei took the initiative and invited 35 people to come to their then home university: the University of Trento (Università degli studi di Trento) at the Law Faculty at the Department of Jurisprudence (Dipartimento di Scienze Giuridiche Facoltà di Giurisprudenza).

In 2004, on its 10th anniversary, 141 people registered for the meeting, which traditionally consists of a 3 day programme. The first day consists of an open session with invited speakers. The entire second day is for small group working sessions, organised along three main areas: Tort, Contract, and Property. The third and final day is again for a plenary session. One can expect another invited speaker (or two), the reports of the three committee chairs of the themes just mentioned, who by the way have a long time commitment (see Table 2), and last but not least a general discussion.

Table 2. Main Themes, Committee Chairs as mentioned on the annual programme flyers over the first ten years

<table>
<thead>
<tr>
<th>Theme</th>
<th>Chair</th>
<th>Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tort</td>
<td>Mathias Reimann, Michigan</td>
<td>1995-2002</td>
</tr>
<tr>
<td></td>
<td>Franz Werro, Fribourg</td>
<td>2003-2004</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Simon Whittaker, Oxford</td>
<td>1995-97</td>
</tr>
<tr>
<td></td>
<td>Martijn Hesselink, Amsterdam</td>
<td>2003</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property</td>
<td>Antonio Gambaro, Milano</td>
<td>1995-2004</td>
</tr>
</tbody>
</table>

The general idea of the Common Core Project is that a case recently decided upon in one of the European Member States is discussed by legal experts from the other states. These experts will do so from the perspective of what their courts would have decided, in order to let the others learn about their legal system, the particular approach and application, and the social, cultural and economic circumstances. So the aim for each small group is to find as many different participants as there are legal systems. The European ideal type of small group might be a group of 15 active participants responding to a questionnaire consisting of 15 cases, that is, up until 2003. From 2004 onwards, 10 must be added to each number because of the enlargement of the European Union with 10 new Member States.

The Trento Project, however, made up its own Trento ideal type of small group. On the one hand, it has already set the number of cases that forms the

30 One might recognise the legal formants as developed by Rudolpho Sacco. I will come to that later.
questionnaire: “For the (...) need to reach sufficient detail without overwhelming ourselves and the future readers with an excessive number of data, the number of issues in the questionnaire, although slightly variable, should not be more than 15, maximum 20.” The use of the word ‘issues’ instead of ‘cases’ shows that the drafters of the questionnaire reconstruct and redevelop issues from cases as well as from doctrinal and practical importance. In doing so, the questionnaires turn out to be more like a student exam than a litigation dossier.32

Table 3. Nationalities according to the affiliations of the Active Participants (incl. Chairpersons and Editors) as listed on Trento’s website visited 2004-08-1033

<table>
<thead>
<tr>
<th>European Union up until 2004</th>
<th>European Union from 2004 on</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>Cyprus</td>
</tr>
<tr>
<td>Germany</td>
<td>Malta</td>
</tr>
<tr>
<td>France</td>
<td>Estonia</td>
</tr>
<tr>
<td>Italy</td>
<td>Latvia</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Lithuania</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>Poland</td>
</tr>
<tr>
<td>Denmark</td>
<td>Hungary</td>
</tr>
<tr>
<td>Ireland</td>
<td>Slovenia</td>
</tr>
<tr>
<td>UK (incl Scotland 9)</td>
<td>Slovakia</td>
</tr>
<tr>
<td></td>
<td>Czech Republic</td>
</tr>
<tr>
<td></td>
<td>European – Non-European Union</td>
</tr>
<tr>
<td></td>
<td>Switzerland</td>
</tr>
<tr>
<td></td>
<td>Norway</td>
</tr>
<tr>
<td></td>
<td>Non-European</td>
</tr>
<tr>
<td></td>
<td>Russia</td>
</tr>
<tr>
<td></td>
<td>Canada</td>
</tr>
<tr>
<td></td>
<td>USA</td>
</tr>
<tr>
<td></td>
<td>Israel</td>
</tr>
</tbody>
</table>

With regard to the participants, on the other hand, the exact number of Member States is not necessarily the best. As the website puts it “… we assume that for the purpose of comparative scholarship the internal lawyer is not necessarily the best reporter on his or her own system. He or she may control a larger number of information about the system than a foreign lawyer, and it is out of the question that committed nationals of all Member States are a big asset of our project. The point is, however, that nationals may be less well equipped in detecting the hidden data and the rhetorical attitude – because they may be misled by automatic assumptions.” Hence the Trento Project recruited comparative

32 See www.jus.unitn.it/dsg/common-core/questionnaires.html.
33 I only counted the nationality extensions of the email addresses, since the list does not make it clear if the active participant is a reporter for his or her home country or for the country where he or she has a position.
law scholars who may be considered experts in other legal systems besides their own. That is why one will find active participants from parts of the world other than those that form the European Union. See Table 3.

Besides these explicit interlegal expertises, the other national legal, doctrinal, or practical expertises within the project will also become interlegal in due course.

All this adds up to a subgroup\textsuperscript{34} such as the one on Strict Liability, with two editors, who are Law Professors and Directors of an Institute of European Law or European Legal Studies from Switzerland and Louisiana, and 20 participants: 8 Law Professors (2 from Austria, 1 from England, Finland, France, Greece, Portugal, and The Netherlands), 3 other university legal scholars (Denmark, Greece, Scotland), 1 Doctoral Candidate (Switzerland), 3 Comparative Law Professors (1 from Germany, 2 from Italy), 1 Canon Law Professor (Spain), 1 Professor of Economics (Germany), 1 Judge (Denmark), and 2 Lawyers (Germany, Spain).

The 2004 meeting programme consisted of 10 out of an initial total of 14 small groups, recognisable by their number of participants in Table 4. Some of these small groups have only ten or even less active participants, while other groups have numbers in the high twenties and even thirty participants.

The fact that some groups have only just begun drafting a questionnaire, while others are already discussing or evaluating the national reports, is responsible for these differences in numbers of participants. Table 4 shows five more items without the number of participants. These groups do not meet anymore, since the work has been done, is waiting for publication or has been published.\textsuperscript{35}

Over the period of time the number of active participants fluctuates, because people have to withdraw due to other occupations or because people have been actively recruited in order to complete the picture.

5. About the Picture

It is a picture of a ‘map’ of European private law that is the intended outcome of the common core project. Under the heading Legal Cartography, Mattei and Bussani describe this goal of the project:

“Stating it in very simple terms, we are seeking to unearth the common core of the bulk of European private law, i.e., of what is already common, if anything, among the different legal systems of European Union


\textsuperscript{35} There is one exception: the working group on Information as Property (S. van Erp, Maastricht). This group stopped working after having drafted the questionnaire, since there were not enough reporters. With the new group on Boundaries of Information Property, however, the theme will still be on the agenda of Trento’s meetings.
member states. (...) Such a common core must be revealed in order to obtain at least the main lines of a reliable geographical map of the law of Europe.”

Table 4. Small Groups, their theme, represented by their outcome and editor(s) as mentioned in the year 2004, their numbers in 2004 compared with the numbers of 2003 between brackets

<table>
<thead>
<tr>
<th>Theme</th>
<th>Editor(s)</th>
<th>Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pure Economic Loss</td>
<td>Vernon Palmer (Tulane), Mauro Bussani (Trento)</td>
<td>(20)</td>
</tr>
<tr>
<td>Strict Liability</td>
<td>Franz Werro (Freiburg Ch.), Vernon Palmer (Tulane)</td>
<td>(20) 22</td>
</tr>
<tr>
<td>Complex Liability</td>
<td>P.G. Monateri (Torino)</td>
<td>(15)</td>
</tr>
<tr>
<td>Environmental Liability and Ecological Damage</td>
<td></td>
<td>(21)</td>
</tr>
<tr>
<td>Personal Injury Compensation</td>
<td></td>
<td>(18)</td>
</tr>
<tr>
<td>Personality Rights</td>
<td></td>
<td>(22)</td>
</tr>
<tr>
<td>Private Remedies in Competition Law</td>
<td></td>
<td>(26)</td>
</tr>
<tr>
<td>On Tort published:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Good Faith</td>
<td>Reinhard Zimmermann (Regensburg), Simon Whittaker (Oxford)</td>
<td></td>
</tr>
<tr>
<td>Causa and Consideration/Enforceability</td>
<td>James Gordley (Berkeley)</td>
<td></td>
</tr>
<tr>
<td>Mistake, Fraud, and Misrepresentation</td>
<td>Jacques Ghestin-Ruth Sefton Green (Paris I)</td>
<td>(14)</td>
</tr>
<tr>
<td>Pre-Contractual Liability</td>
<td>John Cartwright (Oxford)</td>
<td>(24)</td>
</tr>
<tr>
<td>Martijn Hesselink (Amsterdam)</td>
<td></td>
<td>(22)</td>
</tr>
<tr>
<td>Unexpected Circumstances</td>
<td></td>
<td>(22)</td>
</tr>
<tr>
<td>On Property announced:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Security Rights in Movable Assets</td>
<td>Mathias Storme (Leuven), Eva-Maria Kieninger (Würzburg)</td>
<td>(25)</td>
</tr>
<tr>
<td>Information as Property</td>
<td>Sjef van Erp (Maastricht)</td>
<td></td>
</tr>
<tr>
<td>Property on the Environment</td>
<td>Barbara Pozzo (Milano)</td>
<td></td>
</tr>
<tr>
<td>just started or in progress</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trust</td>
<td></td>
<td>(23)</td>
</tr>
<tr>
<td>Time-limited Interest in Land</td>
<td></td>
<td>(10)</td>
</tr>
<tr>
<td>Mortgages</td>
<td>NEW</td>
<td>10</td>
</tr>
<tr>
<td>Boundaries to Information Property</td>
<td>NEW</td>
<td>3</td>
</tr>
</tbody>
</table>

36 See www.jus.unitn.it/dsg/common-core/approach.html.
37 It might be of interest to list the small groups that failed to gather a proper amount of responses, or that failed to establish a questionnaire, such as the newly announced group Modern Securities Holding in 2003, which is no longer on the list of 2004. I hope to get access to the information in the near future.
This map may serve the European legislators for future plans like a Common Frame of Reference or it may help the transnational lawyers to broaden their clientele, but its utilisation is not what the initiators think that the project should take responsibility for. They emphasise that the use of the map is ‘of no concern to the cartographers who are drafting it’.  

The mapping project is inspired by the work of Rudolf Schlesinger (1909-1996), who published Formation of Contract: A study of the Common Core of Legal Systems. Schlesinger could avail himself of the legal training and experience in two different legal cultures. He was born in Germany. There he started his legal career as an in-house solicitor of a private bank and helped numerous fellow Jews liquidate their assets to transfer their property. In 1938, shortly after the Kristallnacht, he escaped the country for the United States, the homeland of his father. He received a second law degree from the Columbia Law School and practised law for several years. From 1948 until his retirement, he taught comparative law at the Cornell Law School. It is Schlesinger’s common core methodology, known as the Cornell Project, with which the Trento Project complies.

In comparing existing legal systems the active participants of Trento do not hang onto the differences that are due to, and cultivated within, the independent, autonomous and separately developed legal systems. Instead they compare the very outcomes of the legal systems as applied to particular cases or problems: the legal rule that has emerged. In essence, or at the core, the right answers might not differentiate as much as the legal systems do.

Trento includes the refinements by Rodolfo Sacco to the common core methodology. Sacco had suggested dissecting the legal rule into formative elements that he named ‘legal formants’. The ruling or the operative rule is, after all, formed along many competing considerations, influences, experiences,

38 Id.
42 With the approval of Schlesinger see http://www.jus.unitn.it/dsg/common-core/meeting_10_project.html. R. Sacco, ‘Legal Formants: A dynamic Approach to Comparative Law’ (1991) 39 American Journal of Comparative Law, 1-34 (Part I); 343-401 (Part II). See also Kennedy, op. cit. note 40, 169-170
43 Id.
skills, doctrinal insights, and interpretative practices. These competing legal formants are omnipresent, independent of whether the emphasis lies on statute law, case law or legal doctrine. Subsequently, when the actual operative rule is described or evaluated within the legal context, it reveals its formants on that level as well. Last but not least, the actual legal rule may find formative elements that stem from the political, social, economic, or cultural context. The Trento Project therefore asks its active participants to distinguish three levels when they report on the questionnaires: the operative rule, the descriptive formants, and the meta-legal formants.

After having described who the people are and how they are organised (see the paragraph About the Trento Project) and after having described what they are doing (see the paragraph About the Picture), I will now turn to the question why they are doing what they do and describe some motives for participating in the scholarly projects on European Private Law in general. These motives are confined to those that have been expressed in the literature. To conclude this contribution I will list the outcomes of the project and in doing so I will add a list of selected literature on the project.

6. About the Motives

One of the motives of the participants of the Trento Project is to build a common culture. This motive is even laid down as a goal, second to legal cartography. What is intended is not a single hegemonic legal culture, but a culture of exchanging cultural differences and similarities in order to get acquainted with one others’ legal system and culture. From a sociological point of view this goal is very interesting as it points not only to a social network among private law experts, but also to important developments in legal education and to the changes of the research and study programmes of many Law Faculties and Schools in Europe. With this aim of building a common culture, the Trento Project claims a position alongside the European Casebook Project and the Students Exchange Programmes. Its focus, however, is solely on scholars and it takes the opportunity to emphasise its non-hegemonic approach:

“The development of a common work methodology is in itself an educational enterprise to those who are participating in it. Hence, it may facilitate sophisticated technical communication among professional lawyers already formed in their own legal tradition rather than having as a target

44 See the Appendix 1- Instructions about How To Answer The Questionnaires on www.jus.unitn.it/dsg/common-core/approach.html#5.
45 See under Goals – Building a Common Culture on www.jus.unitn.it/dsg/common-core/approach.html.
46 It is an interesting field of inquiry for legal anthropologists. I hope to be able to research this further in the near future.
the creation of prospective common European lawyers. Besides, it focuses on all European legal systems, de-emphasizing (…) the ones that are or could be considered leading or paradigmatic.”

Motives for legal scholars to participate in a project like the Trento project have been discussed by Wilhelmsson. He puts forward motives of ‘self-interest of legal scholarship’: it ‘strengthens the position of legal science within the academic community as a whole’ and ‘improves its status within the legal community.’ Wilhelmsson thinks in terms of the indispensability of legal scholarship in the harmonisation projects. Hesselink, however, puts it in terms of political motives. Scholars “who specialise in European private law would gain power in comparison with their colleagues who specialise in national private law.”

The motives that related to academic projects and legal doctrine may naturally be complemented with those that stem from ‘euro-scepticism’ or ‘euro-optimism’, from right or left wing political thinking, or from rather common motives such as the wish to visit lovely countries and nice cities. Since the Trento Project appears to be somewhat aloof when it comes to taking a stand in the debates on Europe, one might even come to the conclusion that it is indeed the lovely and welcoming meeting place of Trento itself that is the real reason for giving such priority to the mapping of European Private Law and the building of a common culture by bringing people to Northern Italy each year.

47 Id., note 43.
48 T. Wilhelmsson, ‘Private Law in the EU: Harmonised or Fragmented Europeanisation?’ (2002) 10(1) European Review of Private Law, 77-94. Thomas Wilhelmsson is law professor at the University of Helsinki. He participates in the Lando Commission and the Acquis Group from the groups that are listed here in Table 1. See www.jus.uio.no/lm/eu.principles.lando.commission/doc#4 (visited 2004-10-03) and www.acquis-group.org/about.html#Members (visited 2004-10-03).
49 Id., 83.
50 Id., 84.
51 Hesselink, op. cit., see note 17. Martijn Hesselink is law professor at the University of Amsterdam. He participates in The Study Group, The Trento Project and the Social Justice Group from the groups that are here listed in Table 1. Besides these three groups, he himself mentions also his participation in the Ius Commune Casebook series, a project that is mentioned in note 14. See Id., 683 note 18.
52 Id., 682.
7. About the Outcomes and the Literature

Six volumes have been published. Another four have been announced:

2000

2001

2003

2004

2004

2005


Volumes in progress
Pozzo, Barbara (ed.), Property on Environment.
Graziadei, Michele & Lionel Smith (eds), Trusts.
Cartwright, John & Martijn Hesselink (eds), Pre-contractual Liability.
Moellers, Thomas & Andreas Heinemann (eds), Remedies in Competition Law.
Additionally, reports of the meetings, the publication of the presentations on the general meetings are:

Reports
15-17 July 1999 2000/1 European Review of Private Law 249-251

Speakers
With the contributions of speakers from the first 5 plenary sessions of the General Meeting in Trento. (Ulrich Drobnig, Melvin A. Eisenberg, James R. Gordley, Arthur Hartkamp, Ewoud Hondius, Christian Joerges, Hein Kötz, Martin Shapiro) reprinted in 2002; Foreword Rodolfo Sacco.

56 See www.jus.unitn.it/dsg/common-core/books.html (visited 2004-10-08). See also www.jus.unitn.it/dsg/common-core/approach.html#5 (visited 2004-06-15), which included two titles, which have been removed:
- Information as property: (S. van Erp, Maastricht); for the reason, see note 35.
- Complex Liability: P.G. Monateri (Torino).
LEGAL EXPORT
Western Legal Experts go East

The Dutch CILC Organisation and Legal Reconstruction in Central and Eastern Europe

Alex Jettinghoff

1. Introduction

The collapse of the Soviet regime at the end of the 1980s triggered one of the most ambitious waves of legal reconstruction to date. All over the former Soviet bloc new regimes began projects of state reconstruction. New constitutions were proposed to accommodate democracy and the rule of law, and private law codes had to be adapted to the demands of a market economy. The desire of several Central and Eastern European countries to enter into relations with the Common Market and eventually to join the European Union as members, added to the complexity of these reconstructions. These reconstructions have been partly grafted onto foreign standards, and implemented with foreign expert support. The processes resulting in the selection of a particular standard or example are called processes of ‘selective imitation’ here. Because they will probably result in a considerable transformation of legal institutions in these countries, the study of these processes of selective imitation is important. As will be explained below, processes of selective imitation can be rather unpredictable in their outcome.

While all this is more or less happening at the present time, a comprehensive assessment will have to wait. This contribution will be limited to the exploration of the ‘supply side’, one part of the dynamics of the mobilisation of Western expertise in this context. The focus will be exclusively on the West to East traffic, more particularly as coordinated by one Dutch non-governmental organisation involved in the mobilisation of legal expertise, the Center for I-

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1 I have to thank one of the editors of the Journal for comments and a suggestion concerning the title. I am also indebted to Eric Vincken, senior project manager of CILC, for his cooperation and comment on an earlier draft. The category ‘Central and Eastern Europe’ is intentionally vague, because the definition of where Europe ends is still undecided. It includes at least the EU category of CEECs (Central and Eastern European Countries): Bulgaria, the Czech Republic, Slovakia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovenia. History will teach whether or not CIS countries will eventually be included. The CIS countries are the former Republics of the Soviet Union: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

ternational Legal Cooperation (CILC). The first objective of this contribution is to sketch the way this organisation mobilises legal expertise for Central and Eastern Europe. Secondly, this paper tries to probe the role of these legal experts. The central question here is whether the legal experts are restricted to executing assignments when decisions on the ‘demand side’ are made, or have room to influence the process of selective imitation? A last issue is the result of these reconstructions: will legal reconstructions produce more legal uniformity in the European region – possibly even pave the way for legal unification?

The next sections of this paper will deal briefly with the theoretical relevance of the topic considered here (section 2) and the history of the political developments that constituted the conditions under which these efforts of legal reconstruction were made in the various transition countries (section 3); then the activities of CILC will be sketched (section 4); the room for entrepreneurial activities for legal experts will be explored in sections 5, 6 and 7; section 8 will be devoted to some speculations concerning the effects of the legal reconstructions in the transition countries; the last section will summarise the findings.

2. Legal Experts and Political Transformation

This paper applies the historical sociological perspective that considers the transformation of legal institutions and state-formation as co-constitutive processes.\(^3\) This approach takes a critical stance towards deterministic theories of political transformation. To be sure, the history of political centralisation in Europe can to some extent be explained by the logic of state formation, as analysed in the work of Tilly.\(^4\) The outcomes of the dynamics of state making (primarily wars and domestic power struggles) are, however, considered as decidedly unpredictable and contingent. There is then a further consequence, that is particularly interesting here:

“…the outcome of a given confrontation would affect a further question – which particular military, fiscal and administrative arrangements would serve as a model for other states, and thus bias their political development toward one kind or another of political development. Many of the uniformities and similarities which one can observe in the political development of states, and which society-centred accounts treat as evidence of some systemic logic at work – be it evolutionary logic of differentiation, or that of capitalist expansion and bourgeois dominance

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Legal institutions (such as court procedures and law codes) are among those frequently involved in these processes of selective imitation. For centuries jurists have played an important role in the diffusion of legal institutions around the globe. That is: as experts. According to legal historians, the scope of their influence has usually been restricted by two conditions. The first is that they have seldom been in the position to make the final decision. Secondly, professional considerations of legal quality have usually taken a backseat compared to political considerations. In politici the quality of a legal institution has often been inferred from the fact that the country that was chosen as a legal benchmark had a prominent political and/or economic position in the international arena at that particular moment. These limits on influence are, however, not iron laws. As will be documented here, legal experts do sometimes have substantial influence.

The sources for this contribution have been partly obtained by the cooperation of CILC. They supplied me with several project proposals and other documents. Public material could be found on the CILC site on the internet. The director and several project managers were also interviewed. Additionally, interviews with some civil servants and legal experts were helpful in informing this contribution.

3. Political Ramifications of Legal Reconstruction in Central and Eastern Europe

That the Iron Curtain would fall and that countries such as Poland, the Czech and Slovak Republics and Hungary – let alone the Baltic states – would become member states of the European Community, seemed inconceivable only twenty years ago. Nevertheless, in the period between 1990 and 2004 these great transformations became a fact. The sudden and unexpected regime change in the USSR resulted in the formal independence of former satellites and even of former constitutive parts of the Soviet Union. Various new republics opted for a

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5 G. Poggi, op. cit., 100.
8 I am indebted to director Kees Kouwenaar and his project managers for their time and co-operation. Also the information provided by former CILC-director Jan van Olden was very helpful.
9 I would also like to extend my gratitude to Sjouke Kuipers and Nico Verhey (Dutch Ministry of Justice), Sjef van Erp and Jan Smits (University of Maastricht) and Paul Meijknecht (Counsel at the Dutch Embassy in Brussels) for their time and help.
change in the direction of a Western model of parliamentary democracy and market economy. In these countries, frantic efforts were made to adapt to the newly won independence and to create conditions favourable to a market economy. Anticipation of possible EU membership also helped to make adaptations seem more urgent. The reconstruction of the national legal framework (e.g. the constitution, legal codes) and the legal infrastructure (e.g. the organization, staffing and training of the courts, the bar, the bailiffs, the police and the law schools) have been the main objectives of these efforts in many countries in Central and Eastern Europe.

The progress of this political and legal reconstruction has followed a complex trajectory. Some of these complications are worth mentioning here. First, the efforts of reconstruction started in various Central and Eastern European countries well before the collapse of the USSR. Already in the 1970s countries such as Poland, Hungary and Romania introduced legal change to accommodate elements of 'unplanned economy'. Old private law traditions were revived and new legal fashions from the West were introduced.10

Furthermore, these early departures from the forced uniformity of the Soviet models showed the tendency to result in a growing diversity of national legal cultures. The introduction, however, of parts of the EU acquis in most of the CEECs constituted a harmonising force working in the opposite direction. Cooperation among the CIS countries also appears to have had a similar effect. These opposing tendencies constituted an element of tension in the new directions of reorientation. In particular the supranational implications of joining the Common Market and the European Union appeared irreconcilably at odds with the newly won and highly valued national sovereignty.

Third, various Western forces have offered their assistance in these reconstructive projects. American and international organisations seem to have been among the early players. The European Commission has made considerable funds available to assist aspiring Member States, but individual Western countries have also been eager to deepen the bilateral relations with transition countries by offering 'technical assistance'. This competition must have been a bewildering experience for the countries that were the object of these initiatives. It appears that legal expertise has been on offer from various directions.11 This contribution is only a case-study of the way this expertise has been mobilised by one Dutch organisation and perforce cannot capture the full variety of possible suppliers of legal cooperation in the 'host countries'.

Finally, on the subject of the Eastern enlargement, the pace of the progress of accession of candidate Member States among the transition countries has been contingent on the interplay of various considerations. After the initial enthusiasm about the end of the Cold War and the prospect of peaceful international relations and new economic opportunities, the realities of reconstruction dampened the expectations of quick solutions. Some EU member states began to entertain second thoughts about the EU candidacy of these nations. Regular reports about the implementation of Copenhagen criteria stressed the long road still to go between good intentions and hard facts. This attitude elicited a good deal of disappointment on the other side, already struggling with giving up part of the cherished national sovereignty. Additionally, it was considered imperative to wait with enlargement until the EMU plans had been implemented. Finally, it had become evident that plans had to be made to prepare the constitution and organisation of the EU for the influx of such a large number of new members. The terrorist attacks of 9-11-2001 added considerations of European ‘stability’ to strengthen the resolve for enlargement. In this new light, even a loosening of the initial strictness in the fulfilment of the Copenhagen criteria became a lesser evil.

This complex environment proved to be a golden opportunity for CILC, not only to continue its work, but even to expand it in new directions.

4. CILC: Presentation of Self

The Center for International Legal Cooperation (CILC) is the successor of the Council for Legal Cooperation between the Netherlands and Indonesia. This earlier organisation provided assistance and expertise for the improvement of various elements of the legal system of Indonesia. In 1992 the Indonesian government pulled the plug on all development projects that involved Dutch organisations. This was in reaction to critical comments coming from Dutch officials on the human rights conditions in Indonesia. At this crucial junction for the organisation, the developments in Central and Eastern Europe were considered as opening a potential new field for legal assistance projects, in addition to the management of projects in developing countries other than Indonesia. The decision to take this road may have saved the organisation.

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13 See for the regular reports: http://europa.eu.int/comm/enlargement
4.1 Mission, Funding and Organisation of Projects

The CILC organisation is based in Leiden, the place where since the 19th century adat law and later Indonesian law have been a special topic of study and teaching at the Law Faculty of the University of Leiden. CILC states as its mission that it wants to help create a ‘functioning, reliable legal system’ in developing and ‘transition’ countries, because it regards them as a “critical precondition for the political, economic and social well-being of a country’s population”. CILC considers the Netherlands as a favourable base for its activities because of its prominent tradition of international law, the result of its longstanding position as a trading nation and because it has recently adopted a modernised set of civil and administrative legal codes. CILC derives its funds from an array of ‘donors’, the most important of which are the European Commission, the United Nations Development Programme and the Dutch Government (Ministry of Foreign Affairs). The turnover of CILC is around € 2 million in recent years. The projects that CILC organises “cover many different aspects of legal and judicial reform; they focus on drafting or implementing national legislation, upgrading law schools, establishing or supporting Judicial Training Centres, promoting judicial independence and educating the public about law and access to justice”.

All projects are organised and executed in close cooperation with ‘stakeholders’ in the countries concerned, and are said to be based on a good understanding of the intricacies of their culture. This is considered as an essential condition for the success of a project. Projects are under the direction of CILC project managers, who are in charge of the planning of the project, and on location during the preparation and the execution of the project. They speak various languages that are relevant for the project.

4.2 CILC Projects in Transition Countries

The last wave of EU enlargement has resulted in numerous projects for CILC. Of the 16 projects listed in 2004 as contracted and running, 7 projects concerned the prospective Member States (in Estonia, Czech Republic and Lithuania).

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15 See footnote 1.
16 Ibid., at 2.
17 Interestingly, in this context references have been made to ‘law and development’ literature. Cf. the farewell speech of former director J. van Olden, Legal Development Cooperation: Transplanting or Transforming Legal Systems?, CILC annual report 2002.
Various other projects had been ‘successfully concluded’, prominent among them a large project involving all aspiring member states, executed in co-operation with sister organisations in Germany and the United Kingdom.

An internal document, obtained from CILC, allows a more precise picture of the recent deployment of CILC experts. As the figure below shows, the emphasis of CILC projects is clearly on the CIS states, especially as far as the funds involved are concerned. This emphasis can possibly be explained as a consequence of the overtures of a delegation of CILC experts to Russia in the early 1990s, that proved to be an opening for CILC projects to all the former republics of the Soviet Union. This story will be told in the proper context in section 6. An experienced expert related that the character of projects transformed with the problems at hand. The first wave of projects concerned legislation, when institutions had to be adapted and accession criteria had to be met. The emphasis then shifted to implementation and the training of judges, when local lawyers had to get accustomed to their new institutions. Finally, projects became more concerned with evaluation and fine-tuning.

Figure: Division of CILC projects and funds over various areas (sum total over the years 2000-2001-2002)

<table>
<thead>
<tr>
<th></th>
<th>CEECs</th>
<th>CIS states</th>
<th>Developing Countries</th>
<th>Rest</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>% of projects</td>
<td>21</td>
<td>36</td>
<td>32</td>
<td>11</td>
<td>100</td>
</tr>
<tr>
<td>% of € turnover</td>
<td>28</td>
<td>51</td>
<td>20</td>
<td>1</td>
<td>100</td>
</tr>
</tbody>
</table>

4.3 The CILC Network of Legal Experts

CILC maintains a database of legal experts. The recruitment of suitable candidates involves the process of consulting the “Dutch and international legal community”. It appears that legal experts are recruited by project managers. The recruiting method is said to be informal and referential. Experts can also be selected from the list of those who have signed in on the CILC website. Who are the selected experts?

CILC reports a network of 40 ‘key experts’. Of this group 8 have a foreign residence (Germany, France, France, Moldova, Armenia and Indonesia), the others are employed in the Netherlands. 8 of the 40 experts are women. The occupational background is predominantly academic. Of the 40 experts, 21 have a position at a University (mostly in the Law Faculty), 11 have a position

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19 CILC project list (2004), 2-18.
20 Source: interview 7-6-2004.
21 Source: interview 14-6-2004.
in the judiciary, 2 are attorneys and 6 are employed by other institutions (Min-
istries, accountancy, banking).

Some fields of legal expertise are represented in this network. The presence
of a strong delegation of legislative experts on the list reveals the importance
of legislative projects. Among the experts enlisted are respectively the former
head and head of the Governmental Commissions for the New Dutch Civil
Code and the Dutch General Administrative Code.\textsuperscript{22} Also enlisted are some
present and former legislative experts from the Dutch Ministry of Justice.\textsuperscript{23} The
importance of training and implementation projects is reflected in the enlisting
of two former managers of the Dutch Training Centre for the Judiciary.\textsuperscript{24} Some
judges are also enlisted, but it seems that judges are recruited more on an ad
hoc basis for individual projects.\textsuperscript{25} A selection of comparative lawyers may be
included to straddle both interests.\textsuperscript{26}

5. The Institutional Setting of CILC

The fact that the CILC is a non-governmental organisation might suggest that it
has considerable latitude in initiating projects to fulfil its mission. This seems to
be only true in a negative sense: it can decide not to take on projects. To obtain
attractive projects and to execute them, CILC is largely dependent on the Dutch
government. This is so primarily for the simple reason that the contracting out
of projects happens on the basis of government-to-government agreements.
Furthermore, a substantial part of the CILC projects is directly funded by the
Dutch government. CILC data allow a brief sketch of the financial sources for
its projects.

5.1 Funding

A substantial part of the funding for CILC projects comes from EU sources.\textsuperscript{27}
Over the years 2000-2002 the turnover of CILC amounted to roughly € 6.5
million for the three years together. Almost half (48\%) of the turnover of CILC
in these years was funded by the EU. The second largest donor was the Dutch
Ministry of Foreign Affairs with approximately 25\%. At present, the Ministry
has two funds that appear in the CILC data. One is earmarked for ‘international
coop-eration’ and another earmarked for ‘societal transformation’. This last
fund (Matra) specifically aims at supporting transition countries in their recon-
structive efforts. The remainder of the funds came from the United Nations
Development Programme (UNDP) with almost 10\%, the European Bank for

\textsuperscript{22} Snijders and Scheltema.
\textsuperscript{23} Allewijn, Meijknecht, Neleman and Verhey.
\textsuperscript{24} Broekhoven and Jansen.
\textsuperscript{25} Mijnssen and Maan.
\textsuperscript{26} Feldbrugge, Hondius and Van Erp.
\textsuperscript{27} Source: data provided by CILC.
Reconstruction and Development (EBDR) with almost 5%, the Dutch Ministry of Justice with almost 2% and the balance from unidentified donors (10%). Of these donors only the EU funds and the Matra funds exclusively target transition countries. How does the distribution of these funds work?

5.2 Institutional Setting

Decisions about international legal assistance projects tend to belong to the domain of foreign politics. They are decided between national governments or between national governments and supra-national institutions. Since an important section of CILC funding comes from the EU, we will look for an illustration at an example of such a procedure that allocates EU funds.

In the period 2000-2003, a substantial part of the CILC turnover came from EU funds. Half of this came from an EU funding programme called ‘Phare’. Since the early 1990s, the EU has made available exponentially expanding funds to help aspiring candidate countries make the transition to a market economy. The ‘Phare programme’ has been one of the important funding programmes for this purpose. The funds were initially distributed by the Commission, but this resulted in bureaucratic and long drawn-out procedures, to the effect that funds remained unused. The inevitable conclusion was that the organisation of the programme had to be revised. The procedure has become more decentralised and (until recently) ran as described below.

The European Commission awarded the Candidate Countries a particular quota under the so-called Phare Twinning programme. These funds were then located within the national finance ministries of the transition countries. A Central Finance and Contracting Unit (interdepartmental unit) was made responsible there for the allocation the funds. Ministerial departments were invited to propose projects for funding, and then the suggested projects were prioritised by the Unit in collaboration with a local delegation of the European Commission. After priorities had been established, project descriptions (‘terms of reference’) were made and lists of the projects were made available to all Member States. In the Member States, various ministerial departments tried to locate appropriate and available capacity, either within the ministries or in organisations such as CILC. If capacity was found, a project proposal (tender offer) was submitted to the Candidate Country that had published the project description.

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28 This amounted to € 1.3 million; this sum – substantial in terms of the CILC budget – is tiny compared to the volume of the funds the Commission allocated to Phare: for the period 2000-2006 (€ 1.5 billion).
29 ‘Phare’ stands for: ‘Poland and Hungary Aid for Economic Restructuring’. Although initially targeted at two countries, the programme was quickly extended to all CEECs.
If awarded, the organisation that made the project proposal could effectively start working on the project. This procedure shows that organisations such as CILC operate within a network of governmental organisations that allows it little autonomy in selecting projects. This is also acknowledged by CILC in its mission-statement, where it makes explicit that CILC projects “reflect the policies and priorities of the donor organisations”.

6. Legal Experts as Operators

A consequence of the situation as described above is that important decisions concerning projects (funding, developing the proposal, eventual acceptance) are made in this configuration of CILC (sometimes in cooperation with sister-organisations) and its governmental counterparts. Inside CILC the project managers are the ones involved in designing, preparing and implementing the projects. They also play an important role in the recruitment of the legal experts for projects. This suggests that there appears to be little room for entrepreneurialism on the part of the legal experts sent out on their missions.

Interviewed experts tend to confirm this, but with some qualifications. In the first place, experts sometimes become involved in the elaboration of the content of a project. This work is done in discussions with experts from the host countries, resulting in experts travelling to the host country and/or to the Netherlands. Secondly, advance arrangements do not always exclude surprises, as one expert related:

“Often things are organised well by the CILC people, in advance, who brief us on the topics that will be discussed. Then, when you sit there, it becomes clear that the discussion is about something completely different. […] It is an important [for this work] that you are able to improvise. That you can say, on the basis of what you know: this is a good answer.”

But these activities seem hardly to qualify as entrepreneurialism. A similar conclusion can be drawn from the story of another expert about his involvement in a project in Estonia. The project concerned the implementation of Administrative Law reform. In the period 1999-2001 the Estonian government completed (with the assistance of German experts) and approved a re-codification of its administrative law, in order to accommodate it to the new role of government in a market economy and to new demands of the acquis communautaire. The structure of administrative courts was also reorganised. This was, however, mainly abstract legislation, and implementation proved to be the next problem. Ordinary civil servants, most of them not lawyers, had great difficulty applying the abstract

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32 Interview 7-6-2004.
33 Interview 27-8-2004 and project proposal obtained from CILC.
Western Legal Experts go East

rules to daily practice. It was suggested that a handbook for local authorities would improve the situation considerably and eventually the Estonian Ministry of Justice submitted a proposal for co-operation with the Netherlands, because it was familiar with its experience with the implementation of a new General Administrative Law Act. It approached the Dutch Ministry of Economic Affairs for this project in the hope to qualify for funding under a Dutch Pre-Accession Programme (Matra), a fund of the Dutch government for projects directly related to fulfilling accession criteria. But the proposal was turned down. Then the Dutch Ministry of Justice stepped in, because it knew about the proposal and strongly supported it. The Ministry of Justice contacted CILC to develop the project. The project was to be managed by Eric Vincken, an experienced project manager from CILC and to be executed by Nico Verhey, co-ordinating senior counsel at the legislative department of the Ministry of Justice. The proposed results of the project were specified. They involved inter alia instruction of the writers of the Handbook for civil servants on how to write such a book to make it effective and the presentation of the final version of the handbook at a Final Conference that was to mark the completion of the project. The proposal was approved and executed by the CILC organisation. The involvement of the legal expert (Verhey) in the project concerned a project formulation mission (to Estonia) in September 2002, which served to sound out the implementation problems, in meetings with civil servants, advocates and law professors. In early 2003, he welcomed the 5 prospective writers of the Handbook (the new generation of the legislative experts at the Estonian Ministry of Justice) at the Hague at the Dutch Ministry of Justice. He had composed, with some colleagues with expertise, a week-long instruction programme on how to write an administrative law handbook. Finally, he delivered a lecture at the Final Conference in Tallin in 2004.

7. Some Influential Pioneers

There are, however, some individuals on the CILC list of experts who appear to have had influence beyond the operation of projects. They seem to have played a crucial part in eliciting demand from transition countries for Dutch legal expert assistance, thus influencing the co-operative agenda of the Foreign Office and the direction of the activities of CILC. There are two examples that may serve as illustrations: Ferdinand Feldbrugge, currently professor emeritus of Soviet Law and Russian Studies at Leiden University, and Paul Meijknecht, currently counsellor of the Permanent Mission of the Kingdom of the Netherlands to the EU in Brussels.

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34 Verhey mentioned that the oldest participant was 29 years old.
7.1 Ferdinand Feldbrugge and the CIS states

Feldbrugge has devoted his academic career to the study of Eastern European law and especially Soviet law. During military service he was recruited for counterintelligence and trained in the Russian language. In 1959 he defended his doctoral thesis on Soviet law (Intent and guilt in Soviet law). In 1968 he became professor of Soviet law at the University of Leiden (as successor to Professor Zolt Szirmai who founded the Institute for East European Law in 1953). He started the periodical Review of Socialist Law in 1973 and headed the Institute of East European Law and Russian Studies there until his retirement in 1998. He published several books on Soviet law and became the editor of a series of publications of the Institute (Law in Eastern Europe). In 1974 he was the co-founder of the International Council for Soviet and East European Studies. These activities made him an important node in an international network of experts on Soviet and East European law.

So far his activities and contacts with Soviet lawyers were purely academic. Around 1990 this changed. Feldbrugge states that he “felt the challenge to do something”. That opportunity came when he visited Moscow in 1993, in the company of some Dutch colleagues. During the discussion with Russian officials concerning possible topics for legal co-operation Feldbrugge stressed the prospects of co-operation on the Civil Code: “The Netherlands was the only Western country to have recently introduced a new Civil Code, so we had something to offer.” Later, the Inter-parliamentary Assembly of CIS states, meeting in St. Petersburg the same year, decided to extend the co-operation to all former Republics of the Soviet Union (except the Baltic states). The plan was made to draft a model Civil Code that the Republics could use while drafting their own national Civil Code.

The Dutch contribution took the shape of discussions with the members of the Russian Civil Code team. Feldbrugge has professed to be an opponent of code-imposition, primarily for practical reasons: “It never works. They have to have their hands on the wheel of co-operation. In our line of work it is good to take as unassuming an approach as possible. […]” That is why he is not in favour of wholesale adoption of foreign law books as some foreign organisations have been inclined to suggest. “Take the American Uniform Commercial Code. It works fine, but it is completely derived from the American legal system, which is utterly different from the Russian legal system and therefore completely unsuitable for export.” He also stressed the importance of including

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36 He became such a renowned Soviet expert that he was appointed Sovietologist-in-residence at NATO in Brussels during the perestroika years 1987-1989.

37 Quotes are from: Focus Newsletter, (1998/no. 4).
someone in the assistance team with thorough knowledge of the Russian legal system, to avoid frustrating misunderstandings.

The model Civil Code was completed in 1996 and the various national Civil Codes have been adopted.

7.2 Paul Meijknecht and Poland

Early on, during his studies (in the early 1960’s) at the Leiden Law Faculty, Meijknecht developed an interest in Soviet Law. He attended the optional course in Soviet Law of professor Szirmai and started to study the Russian language. While still a student, he drove on a motorcycle to Poland for a holiday. He decided then that he wanted to know more about these Eastern countries and succeeded to stay for a year on an exchange programme, not in the Soviet Union (there were no exchange programmes with the Soviet Union at the time) but in Poland. Relations with Poland deepened when he married a Polish girl.

After a short stint as an attorney, Meijknecht became lecturer at the Free University in Amsterdam. There he continued his academic contacts in Poland, particularly with the University of Warsaw, by organising exchange of staff and students. In 1979 he completed his doctoral thesis on planned contracts, comparing Dutch with Polish and E.C. constructions. After completing his thesis he entered the service of the Dutch Ministry of Justice, Legislative Department, and became involved in the fields of International Civil Law and International Civil Procedure. He kept a relation with academia going as a part-time professor of Civil Procedure at the University of Utrecht, which also allowed him to keep up relations with Polish academics.

The collapse of the Soviet Union initiated overtures in Dutch governmental circles to establish relations with transition countries and assist them in their efforts to adapt to the rigors of a market economy. The Dutch Ministry of Justice was one of the Departments that developed initiatives. Meijknecht became involved in the accession of Poland to the Treaty of Lugano, which is concerned with the acknowledgement of international legal claims of non-members of the EU. Poland could only enter as a party to the treaty on invitation and the Netherlands helped provide such invitation. In 1996 Meijknecht was sent on secondment by the Ministry of Justice to Brussels to work in a technical assistance department of what is now DG Enlargement. In 1999 he was seconded to the Polish Ministry of Justice in Warsaw as a consultant to the Commission in charge of the modernisation of the Civil Code. He stayed there for four years. He advised on topics within his expertise (such as international private law and procedure) and invited Dutch experts on other subjects (such as bankruptcy law) for a visit to Warsaw. Meijknecht also highlighted the new Dutch Civil

Code. A small fund granted by the Dutch Ministry of Justice allowed him to organise the translation of this Code into Polish.

Initially, the idea of the Polish Commission in charge of the modernisation of the Polish Civil Code (with a considerable participation of law professors) was to adapt particular elements of the Code of 1965. This would make a complete re-codification unnecessary. But in 2002 a new president of the Commission was appointed, who was a proponent of complete re-codification. Meijknecht seized the opportunity to indicate that the Dutch government was willing to assist in the realisation of these new plans. In the mean time the Polish experts had acknowledged the modernity of the Dutch Civil Code and accordingly the Polish government decided to accept the offer and use the Dutch Code as a model for the new Polish Code. Meijknecht will serve as the *trait d’union* between Dutch and Polish experts and the CILC will facilitate the activities of the Dutch experts in Poland.

### 7.3 Foreign and Domestic Influence

These accounts suggest that the efforts of Feldbrugge and Meijknecht have been crucial to the selection of Dutch expertise by Russia and Poland for the modernisation of their Civil Codes. In other words, they have been influential in the creation of a demand for Dutch legal expertise in the CIS countries and in Poland – and ‘demand’ is the factor that is decisive for the EU and EU Member States for the funding of projects of legal cooperation. Thus they probably have also influenced the agenda of Dutch foreign assistance policy.

Feldbrugge seems also to have influenced the direction of the CILC legal cooperation programme at the crucial moment in 1992-1993 when the work for the Indonesian government was reduced to a trickle. The demand from the former Russian Republics would grow into a substantial part of CILC projects funded by the Dutch Foreign Office. The acknowledgement of the modernity of Dutch Civil Law and Administrative Law in various transition countries, later elicited new demand. In the Eastern enlargement trajectory, aspiring EU Member States did often turn to Dutch expertise to meet the Copenhagen criteria and to implement the *acquis*.

But what effects have these efforts had in the transition countries? The data reviewed so far are one-sided and thus incomplete. In particular, the accounts of participants from the transition countries have to be regarded as indispensable complements to reconstruct these histories. Nevertheless, some speculations can be reasonably made.

### 8. Adapting Legal Cultures

An interesting element in the account of Meijknecht is that he stresses the importance of the legal qualities of the Dutch Civil Code, as an argument on the Polish side to opt for Dutch input. This would be at odds with the legal historical notion mentioned earlier, stating that not arguments of legal quality but con-
considerations of political expediency have usually decided the choice of what legal institutions to copy from whom.

At least part of the position of the historians may, nevertheless, still be vindicated. The influence of reasons of state should not be underestimated. A goal of legal assistance for older EU Member States may be the establishment and deepening of political relations in order to expand economic relations. Apparently, legal assistance projects are a means to these ends. One can, however, safely assume that the transition countries (and especially the CEECs) have at least the same interest in establishing and deepening political and economic relations with Western European countries as the other way around. If the legal assistance relations are instrumental in this, there is no reason to exclude one country in favour of another. Common sense would demand that requests for legal assistance are distributed without too much discrimination by the transition countries.

That may raise a question among legal historians and comparative lawyers: what will be the result of all this multilateral advice? Will they leave any recognisable traces of for example French, German or Dutch legal models? It is entirely possible that the host countries have established legal assistance relations with most Western countries and do not design their institutions to any particular model but out of an amalgam of existing Western models and their own heritage. That would mean that Dutch influence for example will not leave many traces in the results of the reconstruction efforts. Further, such an approach to legal reconstruction by the transition countries might add to the diversity of the legal landscape in Europe.

From a pragmatic point of view such a development might not constitute a problem, as long as the necessary institutional adaptations are installed and work. As far as the ‘law in the books’ is concerned, positive results are reported. The new Member States in particular appear to have succeeded in bringing their contract law in line with EU directives. The influence of civil law codes that have been adapted to European legal requirements may have contributed to this result. This report confirms the presumption that legislative adaptations have resulted in considerable legal diversity among the New Member States. Reich even contends that this tendency “imposes a warning against too much uniformity and may discourage those who are optimistically promoting a ‘European Civil Code’.”

However, as socio-legal wisdom holds, real changes depend largely on ‘law in action’. As can be inferred from various CILC projects, there is still an enormous task ahead of teaching judges and administrators how to work with the new legislation. Western legal working methods are completely alien to the older generation of judges and administrators of the communist era; new gen-

39 N. Reich, *Transformation of Contract Law and Civil Justice in New EU Member Countries*. Paper presented at a conference of the Network for Europe-research (November 24, 2004), at the University of Stockholm; with thanks to Jan Smits for the reference.
40 Ibid., 58.
erations have to be instructed in them. This may require considerably more effort than adapting the ‘law in the books’ to Western standards.

9. In Conclusion

CILC can be characterised as an NGO that facilitates – mainly with public funds – the development and implementation of projects of legal-technical assistance to countries that express an interest in such assistance. It is embedded in a network of national and supra-national public organisations (the European Commission, The Dutch Ministries of Foreign Affairs and Justice, and similar Ministries of host countries). CILC depends for its assignments largely on the funds that these public organisations make available and on whatever projects their interaction produce. For the availability of experts CILC relies mainly on the co-operation of the Dutch Judiciary Council and the Law Faculties of the Dutch Universities. The organisations in this network are all committed to the supply of legal expertise, but not necessarily for the same reasons. The European Commission hopes to further the integration of new Member States into the EU and support the other transition countries, especially those bordering on the EU, to build their new governments and economies. The Dutch government will consider legal assistance projects as a valuable instrument to strike up or deepen existing relations with interesting counterparts. Furthermore, security at EU borders may provide a case for projects aiming at ‘strengthening the rule of law’. The CILC projects can be instrumental to all these designs.

This role of CILC does not leave much room for personal initiatives to the Dutch legal experts. A first impression is that most project activities by CILC experts concern the implementation of a project defined by others in a country selected by others in this organisational network. Some legal experts on the CILC list seem, however, to have had considerable influence beyond the execution of CILC projects. Their activities have played a crucial role in the selection of the Dutch civil code (and possibly the General Administrative Law Act) as a source of inspiration for re-codification by the decision-makers in these countries. As a consequence of this demand they appear to have influenced the agenda of the CILC and the Foreign Office. They were the right people at the right time. The influence of these pioneers is due to their life-long interest in and study of the legal order of Eastern European countries – prior to their involvement in CILC projects – and to their initiatives, when the window of opportunity opened for such initiatives to be welcomed. These requirements make such pioneers a rare breed, although one can expect to find several of them in any EU country. This kind of expert qualifies for special research interest, particularly because they may be among the actors responsible for the element of contingency in this whole process of legal reconstruction.

In conclusion, there is the question of the effects of these efforts in the Central and Eastern European countries. It is too early for definite answers, but it is obvious that they will depend on what one expects from the legal assistance efforts. As an instrument of foreign politics they appear to be very valuable,
because these projects are considered as constructive and neutral instruments to cement political and economic relations between states. Furthermore, it seems too early and the collected evidence too scanty to come to definite conclusions concerning the effects of these projects in terms of European legal integration. One tends, however, to speculate. When we confine ourselves to the CEECs, indications point in opposing directions. On the one hand, these countries work on harmonisation in terms of a market economy, acquis and the ‘rule of law’. If effective, this may result in more institutional homogeneity. That does not mean, however, more legal uniformity. On the contrary, legal reconstruction seems to breed national diversity when these countries compose their legal reconstruction on a variety of models of the older Member States and make their own selections and additions.
LEGAL HISTORY
Lawyers as Political Entrepreneurs?

A Historical Perspective on the Contribution of Lawyers to Legal Integration in Europe

Peter van den Berg

1. Introduction

At least since the birth of the republic of Rome, law and ‘lawyers’ have been of great importance in European societies. The purpose of this paper is to shed some light on their role, especially in relation to the process of state formation. It will, however, not cover the last two millennia completely. It will start with a paragraph on the growing importance of law and lawyers since the 11th century, followed by a section containing a short overview of the various contributions of lawyers to the process of state formation until 1800. Subsequently, this essay will focus on a specific contribution of lawyers to the early modern European state: their part in the unification of private law. Two processes of legal unification will be described, based on the English and the French historical developments respectively. In the last paragraph some concluding remarks on the significance of the past contribution of lawyers to legal integration for the development of the European Union will be made. These remarks should be regarded as being of a tentative nature.

2. The Growing Importance of Law and Lawyers since the 11th Century

In the thirteenth century the English cleric and judge Henry Bracton (1210-1268) found it appropriate to state in his famous book on the laws of England that ‘in rege qui recte regit necessario sunt duo haec, arma videlicet et leges’.1 “In a well governed kingdom”, Bracton wrote, “two things are indispensable: arms and laws.” It is significant that equal value was attributed to ‘laws’ as to arms. We have to realize that for a large part of the early Middle Ages aggressive force was the dominant factor in life and that therefore weapons were of primordial importance to any ruler who wanted to enforce his will. In France, and elsewhere in Europe, feud was a very common way of coping with conflicts and violent self-help was ubiquitous.2 From the ninth century onwards Carolingian and Merovingian kings tried to establish peace in their country, using the

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concept of law and justice, but their means of enforcing it turned out to be too shallow. The failure of the Carolingian kings did not mean that the whole concept of justice was lost, though. Like an Emmenthal cheese, there were pockets of justice, provided by monasteries, towns and other local entities, such as seigniorial courts. In England the problems were less grave and better dealt with. But on the whole there was a lot of violence in Europe: it was intrinsic to feudal aggrandizement.

Only from the eleventh century onwards were kings able to successfully build their states. Kings managed to a certain extent to suppress violence in a process that could be called the spread of organized peace. This happened in close collaboration with the Church, where the idea of the peace of God had become very popular. Again, law was an important means. Conflicts tended to be increasingly solved with recourse to law. It is no coincidence that from 1159 to 1303 every pope was a lawyer. In the beginning, this way of dealing with conflicts probably resembled more a process of negotiation than our procedure according to rules. Harding recently argued that justice was not only an essential feature of the state as we know it. In a way it preceded it, since the development of a functioning legal system created the state. Significantly, the word ‘state’ originally referred to a well-ordered state of affairs in a kingdom. In England, too, kings were rather successful in this respect, although violence was always just around the corner. In the twelfth and thirteenth centuries, therefore, law could be said to be of equal importance to weapons. The earlier quotation from Bracton illustrates precisely that. With the ascendance of law as a fundamental corollary of the state, lawyers became an important force in society. It is the purpose of this essay to describe in more detail the way they fulfilled this role.

We have, however, to address a preliminary question first: whom should we regard as ‘lawyers’? This analysis will include anyone who had undergone a substantial training in law, either at a university of some sort or in a more practical environment, such as a court. We probably could also designate them as ‘jurists’. Of course some scholars have limited their study to the role of university-trained lawyers, and for good reasons. Especially on the continent, at least in France and Germany, many legal practitioners had a university degree in law. Furthermore, the influence of canon law and Roman law since the 11th century is nowadays considered to be of exceptional importance to the development of continental law. Since universities were an important vehicle of this influence, the so-called reception, a focus on the ‘Gelehrte Juristen’, the

3 Ibid., 43.
4 Ibid., 67.
‘learned jurists’, is only logical. Literature on these ‘Gelehrte Juristen’ is abundant. Lieberich conducted extensive investigations into the university background of the members of the council of the Duke of Bavaria.\(^8\) It is not necessary to limit the kind of research to secular legal advisers, since particularly in the later Middle Ages many of the recruited jurists belonged to the clergy, and were trained in canon law.\(^9\) Sporadically, a focus on university trained lawyers can also be encountered in England, for example in the study by Levack of civil lawyers, since for them a doctorate in civil law was a prerequisite.\(^10\) But in England such a limitation is less justified, since for most lawyers a university degree was not required. They were educated at the Inns of Court and Chancery, in an environment of practitioners. One should not, however, exaggerate the difference with the two universities that existed at that time, Oxford and Cambridge. The law school represented by the Inns of Court made use of an elaborate system of lecturing and was regarded by many as ‘the third university of England’.\(^11\)

This does not cover the whole ground. Many young men went to university without getting a degree; many got legal training at a court without a formal examination. It is not easy to draw a line here: should they be regarded as ‘jurists’?\(^12\) It is difficult to say. The important thing is to admit that history does not really like the sharp divisions we scholars tend to construct, so for the purpose of this paper we had better include them as well. Another caveat, regarding the content of legal education, might be appropriate. Whether a lawyer went to an Inn of Court or to a university, the education he received was most likely of a broad nature, including history, diplomacy and languages.\(^13\) We should not necessarily think of legal education as we know it today, at least on the continent: a rather juridical-technical training.

With this broad definition of ‘lawyers’ we also avoid focusing on a group with a specific occupation.\(^14\) Karpik devoted his studies to the collective action of the French avocats and paid attention to their contribution to the process of

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\(^12\) This question is also addressed by J.H. Baker, ‘The English legal profession, 1450-1550’ in: W. Prest, op. cit., 16-41.

\(^13\) Ibid., 18.

\(^14\) The same broad definition is used by W.J. Bouwsma, ‘Lawyers and early modern culture’; (1973) 78 The American historical review, 303-327 (305).
state formation. Bell and Landon investigated the political role of those who were, or had been, involved in private litigation as barristers. Dawson devoted himself to the study of the role of judges as ‘the oracles of the law’. This is of course perfectly legitimate, since these scholars are specifically interested in the importance of members of those professions. The purpose here is to sketch a more general picture of the role of jurists, regardless of whether they had pursued an academic career, had been civil servants or had been active in yet another profession.

Let me now turn to the main question: in what ways did lawyers contribute to the formation of states by means of law? The scope of this paper of course does not allow me to answer this question extensively. What I will do is first give an impression of the various roles lawyers played in this process between 1100 and 1800, and then focus on their contribution to the introduction of a uniform (private) law in two European states: England and France.

3. Lawyers and their Contribution to the Process of State Formation: An Overview

The contribution of lawyers to states as we know them today is manifold. Karpik argues that in France lawyers were instrumental in the first phase of the process of state formation. In the late Middle Ages kings tried to foster their legitimacy, particularly in their struggle with the powerful nobility. Advocates, and more generally jurists either lay or clerical, proved very useful: they became important members of the king’s council. Legal training was especially important since court procedures tended to displace feuds. Conflicts between higher ranking persons were increasingly settled by law, instead of by force. The same is probably true of early Norman England, where the king became instrumental in solving disputes between his lords. From his council, the courts in Westminster Hall originated, giving opportunity to the judges to develop the common law. In Germany this process of ‘juridification’ of the king’s advisory councils can also be discerned, albeit somewhat later. In a sixteenth-century

Lawyers as Political Entrepreneurs?

book on the recruitment of counselors, rulers were advised to use lawyers: ‘Fürsten müssen der Juristerei brauchen, gleich wie das Schwert’. The German kings and other rulers, secular as well as clerical, followed this advice and started to employ Gelehrte Räte, which of course furthered the reception of Roman law. But the role of the lawyers at the highest level should not be overestimated. One has to realize that they were used by the king against a feudal nobility. They did not become leading politicians themselves. Jurists certainly occupied important positions and obtained the high social status that went with those positions, but they did not make the final political decisions. Most of the lawyers, as well as a considerable number of the other counselors, were for obvious reasons recruited from an intermediate social layer and consequently there must have been a considerable social gap between them and the nobility, which was difficult to overcome.

This is probably also the reason why their prominent role proved to be temporary. After some time, the policy of the French kings was successful and the lawyers became dispensable, at least with regard to the high offices. From the sixteenth century onwards, the king increasingly relied for those offices on the now pacified nobility, which was much better suited to the culture of the king’s court. This seems to be true for Germany as well. Moreover, Stolleis shows that at least in the sixteenth and seventeenth centuries rulers were advised to use counselors of a more generalist educational background, with among other things a profound historical knowledge. To be sure, law and lawyers were still necessary to the political councils of Germany, but their contribution was more legal-technical, instead of politically directing.

At another level, lawyers were also of crucial importance in the process that brought about the change from a violence-ridden society to a more peaceful one. ‘Good justice’, which meant just rules and correct, rational procedures,

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became essential to the state, but it had yet to be invented. Since the state did not have the means to pay for the great number of experts necessary to provide this, the role of lawyers in litigation was vital. Procedures were adversarial, which implied that on both sides of conflict, whether of a private or public nature, private lawyers dominated. So even in procedures of a criminal nature, the state was rather passive, leaving it to the lawyers of both sides to argue their case. Lawyers had to provide the actual content of ‘justice’. As with their recruitment to high office, their dominant role at the level of court procedures also diminished as a result of its success, at least on the Continent. The moment law and procedures were sufficiently developed, the state changed the rules of the game. Trials became increasingly inquisitional, which meant that the influence of avocats diminished.

For a while, the French avocats acquiesced in the loss of their access to higher positions and focused on private litigation. Avocats, and lawyers in general, were still of crucial importance to the state. Although we nowadays might tend to regard their role as merely ‘technical’, providing justice and solving conflicts remains a legitimizing factor even today. Moreover, many lawyers became civil servants in the slowly burgeoning bureaucracies. In seventeenth-century France the Crown became increasingly dependant on legally trained administrators, the so-called intendants. The same is mutatis mutandis true for Germany and England.

The lawyers were, however, not ready to remain politically silent forever. In the seventeenth century, the kings started to strengthen their position on the basis of a theory of absolutism. In reaction, lawyers assumed the role of an opposing force. Lawyers were of eminent importance in the struggle between king and parliament that dominated politics in seventeenth-century England. They were instrumental in ensuring that the lawful powers of the Crown remained within the limits set by parliament and the common law as they interpreted it. But it should be mentioned that not all lawyers sided with the opposition to the Crown. Many presented a case for the king on the basis of the same common law, as did, for example, Francis Bacon (1561-1626), Lord Chancellor from 1618 to 1621. Moreover, it has been argued that the crisis that eventually led to the acceptance of the Bill of Rights in 1689 was initiated by members of the nobility. Lawyers stepped forward later and played a particularly important role in formulating and passing the claim of rights. Even in respect to this claim, they were divided; some lawyers opposed such a project altogether. In eighteenth-century France, they also contributed substantially to the struggle

27 Ibid., 26.
28 Ibid., 36-58.
between king and the *parlements*, claiming to represent ‘the public’.\(^{33}\) Eventually, they constituted a political elite that took leadership of the Third Estate during the first stages of the French Revolution.\(^{34}\)

Last but not least, lawyers proved to be instrumental in the legal integration within the various states. Once lawyers had played successfully played their role as advisors, as providers of law and as solvers of conflicts, other demands were made. It was argued that conflicts should not only be solved peacefully according to laws, but also that these laws should be uniform in order to ensure coherence within a state. It is to the contribution of lawyers in this respect that I will now turn.

4. Two Processes of Legal Integration: England and France

In the various European countries different processes of legal integration can be discerned. Two of them are, however, of particular interest, since they represent two opposing ways of dealing with the problem of legal diversity. In England legal integration was brought about by judges at an early stage. It was achieved in the course of the twelfth century by means of a central court in Westminster which dealt with the administration of justice. No use was therefore made of a codification, and legal writings hardly played any role. In France, on the other hand, the legal profession had to deal with diversity of law for many centuries. Legal unity was only brought about at the beginning of the nineteenth century. Unlike in the English example, it was attained at one stroke by way of a codification. It is true that at the same time a central court was introduced. The most important task of this court was, however, not to realize legal unity, but to safeguard the already uniform provisions of the code. Notwithstanding considerable differences the development in most other Western European countries resembled the French example.

4.1 The English Example

*England and Wales*

In 1066, when William the Conqueror crossed the Channel and started to rule as king of England, the situation as to the law probably resembled, to a greater or lesser extent, the one on the continent. Local customary law prevailed and was applied by local judges in procedures that were mainly oral. The result was diversity of law, since each region had its own customs. But politically the situation in England was rather different from the continental one. As conquerors, the Norman kings were powerful rulers and their policies were not hampered by a constitutionally protected autonomy of the various regions. The result was extraordinary: England became the first European state to enjoy monetary uni-

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\(^{33}\) Karpik (1999), *op. cit.*, 59.

\(^{34}\) Bell (1994), *op. cit.*, viii.
ty, an absence of internal tolls and even a sense of national togetherness. In the course of the twelfth and thirteenth centuries, the institutions of William and his successors were also able to change the diversity of law. The royal courts in Westminster Hall proved to be of fundamental importance in this process. In the beginning, the competence of these courts was limited. They only dealt with important conflicts, for example where the king was involved, or where taxes were the issue, or where important members of the nobility were litigants. As it turned out, these courts were providing fairly good justice. The judges were professionals; procedure was written and according to modern canonic and Roman measures. As a result, litigants sought in ever greater numbers to obtain justice from these courts, bypassing local judges. Consequently, local customary law had become obsolete in England a century before Bracton wrote his treatise. By then, royal common law already provided England with ‘a body of national law unique in Europe’.

I would like to emphasize three aspects of this specific process of attaining legal integration. Firstly, it was as far as we know not preceded by any formal decision. Complete legal unity was almost certainly not the aim when the courts in Westminster came into existence. It should be noted that at first the competence of these judges was limited to important disputes between the great and wealthy. Many of the cases before these judges had a fiscal dimension. Secondly, it was brought about by judges who were not politicians, but men who spent most of their time on the administration of the nascent common law. Nor were these judges university trained men. Universities did not even exist at the early stages of the common law. When in the twelfth and thirteenth centuries Roman law was rediscovered and taught at the then new universities of Oxford and Cambridge, these judges might have gathered some knowledge of Roman law, but basically they remained professionals who were trained in practice. Thirdly, the success of this process was due to the weakness of customary law at that time. Local customs did not amount to a corpus of modern law that was suited to deal with the complexities of an ever more dynamic society. It was not written, nor were its procedures up to the rational standards that were raised by the examples of the developing canon law and the newly discovered Roman law. It was not an elaborated system, with the result that it did not sufficiently

37 The supremacy of the royal courts must be kept in perspective, though, as Brooks (1981), 42, argues. There were at least until the seventeenth century many other courts administering their specific laws, among which were the ecclesiastical courts.
38 Baker (1990), op. cit., 149, Dawson (1968), op. cit, 2.
39 Dawson (1968), op. cit., 22.
40 Ibid., 33.
cover areas of modern life. In short, it was not a sound legal system that was able to resist the justice of the king’s courts.

The formal theory on the sources of the law was in accordance with the newly established central power. From the thirteenth century onwards, the authority of the central government, king and parliament to regulate matters of law by means of statutes was not disputed. This constitutes a major difference with the situation in France, as will be shown shortly. Although, however, it seems that during the reign of Edward I the statutory instrument was extensively used, in the end most of the law was to be made by judges. The scanty use of statutes in early modern England could be explained by the fact that another institution of central government, the courts in Westminster, already provided uniform law.

The reliance on the law made by the central courts might also account for the way in which Welsh law was integrated in the English common law. After the conquest of Wales in 1283, the English rulers were again confronted with legal diversity in their realm. Yet the local customs of Wales were not abolished. An attempt was made to codify some principles of English law and put these into force in Wales by means of statute, but these did not apply in all of Wales. Furthermore, the Westminster courts did not receive formal jurisdiction in the newly acquired territories. As a result Welsh customs continued for a while. In the end, however, English law as provided by the royal courts in Westminster proved to be very influential. This resulted in the disuse of local Welsh customs and after some time legal unity was arrived at in practice. Only in 1536 were they formally – and posthumously – abrogated. Again, it was the weakness of the local customary legal system that enabled the development of a unified law.

Scotland

It is illuminating to compare this success story with the situation which resulted from the union between England and Scotland in the seventeenth and eighteenth centuries. After the Union of 1604, which was a personal union, the new King James VI/I was confronted with legal diversity within his state, since England and Scotland had different legal systems. Not long after his ascendance to the throne of England, the King suggested to the House of Commons that legal unification of England and Scotland be brought immediately by means of a codification. It was clear that this radical plan was initiated for

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42 Baker (1990), op. cit., 37.
43 Ibid., 37. Until 1830, however, there was no unified jurisdiction. A special set of courts, the ‘Great Sessions’, operated alongside the English courts.
political reasons: it was closely linked to the wish of the King to establish a lasting union between the two kingdoms. Not surprisingly, there was much opposition to the attempts to realize legal unity. The Scottish Parliament, for example, severely limited the competence of its members of the commission charged with the negotiations on a treaty between England and Scotland. Some politicians and writers, both English and Scottish, pointed out that the attempt to realize complete legal unity was not only unnecessary, but also dangerous. Even those who were convinced that unification of the laws of England and Scotland was imperative in order to strengthen the union did not necessarily support the idea of an immediate codification. In particular, some English advocates of legal unity expected that this unity would gradually emerge, in accordance with the previous example of the integration of Welsh law into English law. By 1608, it had become clear that as a result of the political opposition on the one hand and of the vision of attaining legal union gradually on the other, nothing would come of the plans of James VI/I.

The gradual integration of Scottish law into English law did not, however, occur. On the contrary, in the seventeenth century Scottish law seems to have developed into a more or less complete legal system in its own right, with much resemblance to the family of civil law. Instrumental in this respect were the writings of Sir James Dalrymple of Stair, whose Institutions (1681) is often said to have ‘marked the creation of Scots law as we have since known it’. In view of the continued legal diversity it is probably not surprising that the project for a legal union between the two countries was revived in the 1650s, after the defeat of the Scots by Oliver Cromwell, and again in 1664 and 1670, but nothing of these projects materialized. A final effort at attaining legal unity was made in 1707, when the separate kingdoms of England and Scotland were by treaty

46 This view was expounded by T. Craig, a Scottish member of the commission who had studied civil law in France, and by F. Bacon, one of the English members of the commission. Ibid., 21-28.
51 Levack (1975), op. cit., 112-114.
united into one Kingdom of Great Britain. Although a union of English and Scots law was on the mind of at least some politicians in circles of government, Articles 18 and 19 of Union specifically reserved to Scotland the laws and judicatures concerning private rights, which were not to be subject to incorporation.

The treaty seemed to imply a different way of arriving at legal unity. According to it, the new kingdom would know only one Parliament, the Parliament of Great Britain. Sixteen Scottish peers were to sit and vote in the House of Lords of this Parliament. It was clear that this House of Lords was to continue to exercise an appellate jurisdiction over English superior courts. Its position vis-à-vis the Scottish judicature was less clear. As in England, the abolished Scottish Parliament used to have jurisdiction over Scottish courts. The Articles of Union did not, however, provide for a court to replace it. Soon after the start of the Union on 1 May 1707, it became evident that the House of Lords of the new, British parliament was to deal with appeals from the (Scottish) Court of Session as well, and that these appeals were to be handled according to Scottish law. As McLean argues, most of the commissioners were aware of the fact that this would happen. The English members did not object because they were mostly in favor of legal union. Why did the Scottish members not insist on a provision in the Treaty of Union that would have prevented this from happening? After all, they were warned by contemporary writers against the ‘danger of Scots law becoming English law “by the secret and certain operation of time”’. Moreover, among the thirty-one Scottish commissioners were nine eminent lawyers, whose influence on the Articles of the treaty affecting the laws and judicatures of Scotland would have been decisive. As McLean shows, the answer to this question is that they feared the alternative: the introduction of a new, Scottish based appellate court that would be under the influence of the Crown. They preferred the House of Lords, which they thought would receive few cases from Scotland because of the physical distance. Consequently, the erosion of Scottish law was regarded as unlikely.

In a way they were to be proved wrong. Scottish law has been strongly influenced by English law and – to a much lesser extent – vice versa. According to Evans-Jones, some judges in the House of Lords clearly saw the practi-
cality of relying sometimes on the traditions of both Scotland and England for the formation of one law for Britain. The strategy to bring about complete legal union by means of a single Supreme Court, however, failed up to the present: the two legal systems are still quite distinct today. The failure to achieve legal unity might very well have resulted from the fact that around 1700, Scottish law had already become an elaborated legal system which was able to successfully resist a takeover by English common law. After the departure of the Parliament in 1707, Scottish legal institutions such as the Court of Session and the Faculty of Advocates became the public and political forum of the nation, not unlike the parlements in eighteenth-century France. The eighteenth century has even been called by some the 'golden age of Scots law', in which it was able to develop in harmony with the ius commune of continental Europe. The establishment of a new Scottish Parliament in 1999 with its own legislative competences might in the future add to the distinctiveness of Scots law. The example of the legal history of Great Britain seems to lead to the conclusion that the English process is successful only when it is applied to a relatively weak legal system.

4.2 France

The kings of France were not as powerful as the Norman kings. Feudal disintegration had been more profound than in England. The French kings were to a certain extent constitutionally bound to respect the autonomy of the various regions. It is true that after the kings had reestablished themselves, they enjoyed an increasing political authority. At the end of the thirteenth century, there even developed out of the Curia Regis a central court, the Parlement de Paris. The exact constitutional position of the king was, however, constantly debated in the centuries to come. The king might have had the power and the opportunity to change at least partly the local coutumes, but for one reason or another he did not fully exploit their initial weakness. On the contrary, the king chose to order the description of the local customs in order to provide sound justice. From the fifteenth century onwards, therefore, local governmental bodies were


63 Ibid., 137.

64 Dawson (1968), op. cit., 267 and 273-277.

65 Ibid., 269 and 347.
working together with representatives of the king on a written text of the coutumes. Since the king offered to approve the result and to make the publication official by authorizing it, he was able to realize considerable harmonization. In particular, the Canon law doctrine that customs which were contrary to principles of justice, the so-called ‘unreasonable customs’, could be changed was of great help. In the long run, however, the result was a fundamental legal diversity that was rather difficult to change. Whatever the precise status of local customs in the thirteenth and fourteenth centuries, from the fifteenth century onwards they became increasingly regarded as a part of the constitutionally guaranteed autonomy of the various provinces. This was especially true for customs regulating matters of private law. The provincial parlements that were created since the middle of the fifteenth century were quick to assume their role as guardians of this ‘privilege’. It is true that in the seventeenth century royal ordonnances provided some legislation at a national level, but their scope was rather limited. Furthermore, these ordonnances did not automatically prevail over the local customary law, at least not in the seventeenth and eighteenth centuries. Consequently, it would take about three centuries before the diversity of law in France was replaced by legal unity. In this cumbersome process three phases can be discerned. In the first phase, which started in the sixteenth century, the so-called coutumiers took the lead. In the course of time, another type of lawyer contributed much to the development of a droit commun: the systematizer. In the final phase the accomplishments of the preceding centuries were transformed by the codifiers and put into the Code civil of 1804.

**Coutumiers**

Immediately after the homologation or authentication of the local coutumes, a process that was successfully completed somewhere in the early sixteenth century, commentators started to interpret them. There were many of these coutumiers, since there were many different clusters of customary law. Some of them are quite famous, for example Charles Du Moulin (1500-1566). Du Moulin had studied law at the University of Poitiers, and spent most of his profes-
sional days as a barrister in Paris. Others are hardly known even to legal historians, for example Joseph Boucheul (1639-1706), who was an avocat at the court of Dorat, a town in the Haut Limousin. I will now describe the way these two coutumiers operated.

It is important to realize that a specific local customary legal system constituted the core of their writings. The Coutumier general of Boucheul, published in 1727, was in fact a comment on the approximately 200 articles of the customs of Poitou in a numerical order. Boucheul started by giving the text of an article and subsequently elaborated on it very extensively. He sometimes needed more than 30 pages to comment on just one article. One of the reasons that it took him so many pages was that he also described in detail the matter at hand according to the law of the other regions of France, as well as according to Roman law. Obviously, the local customs were interpreted not just on the basis of the text and of the practice of the local courts. Coutumes of other regions and their application by the competent courts, as well as Roman law, were also considered relevant in this respect. The same is true of Du Moulin, whose commentary on the Coutume de Paris, parts of which were published from 1539 onwards, bears witness to a profound knowledge of the coutumes of the various regions of France. It was really a work of comparative law: Du Moulin did not fail to mention in what respect the other coutumes were different from the Coutume de Paris.

In this context it is crucial to emphasize that both Du Moulin and Boucheul were in the first place practitioners, although they had studied law at a university in their early days. In France, universities were not important with regard to the practice of law anyway, partly due to the fact that only Roman law and canon law was taught. The first chair in French law was established as late as 1679. Consequently, the law schools had already been in decline for a long time. Furthermore, it is clear that they wrote their books for a market that mainly consisted of practitioners, that is avocats and judges. So obviously, there was an urgent practical need for books of this kind.

The practical relevance of this kind of book can only be understood when one realizes that even with the homologation of the local customs, customary law was still deficient. It was not yet the modern legal system needed to cope with the complexities of a modernizing society. One just has to look at the order of Boucheul’s commentary to find out that it was not ‘a system’ at all. Many legal questions, therefore, could simply not be answered on the basis of local customary law alone. This deficiency was reflected in the then existing theory of sources of law. Although the regional customs were regarded as the primary source of law, partly due to the constitutional state of affairs, secondary

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71 Dawson (1968), op. cit., 342-345.
72 Ibid., 340.
73 Ibid., 273.
sources were also admitted in the provincial courts. It became accepted that in the case of uncertainty or lacunae, recourse should be made to the customary law of neighboring regions. If an acceptable solution was still not available, Roman law was regarded as having persuasive authority. It can be concluded that notwithstanding their authorization by the king, local coutumes were still relatively weak. They seem to have been, in more modern terms, somewhere between hard law and soft law.  

Provisions of the customary law of other regions and of Roman law were also acceptable, on account of their intrinsic value.

**Droit Commun Français**

It is not difficult to understand why this situation led to coutumes générales and eventually to something that could be called a ‘droit commun français’. There was a strong practical need for the discipline known today as comparative law. Moreover, one of the essential stages in the process of comparing various law systems is, according to Zweigert and Kötz, the development of general legal concepts suited to encompass and describe both systems. Lawyers who tried to systematize the material provided by the coutumiers made an important contribution to the development of these concepts. To be sure, coutumiers kept on writing and publishing their books until the end of the Ancien Régime and they certainly tried to put matters in some order, but they had company from lawyers who wrote more systemized treatises on the droit commun français. The generalized coutumes were now put in a rather systemized order, sometimes using the divisions provided for by Roman law. In this way, general rules of law were developed that fitted into a legal system. Let me just mention two famous authors R.-J. Pothier (1699-1772), who had studied law at the university of Orléans, and F. Bourjon (+1751), avocat at the Parlement of Paris from 1710. Pothier, who started working as a judge but became professor of law in 1750, wrote a commentary on the Coutumes d’Orléans in 1740. Although a specific customary legal system was taken as a point of reference, it is interesting to note that Pothier started with a scholarly, lengthy exposé on each title on

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77 A second edition was published in 1760.
the basis of Roman law, the writings of Du Moulin and the Coutumes of various regions. The text of the provisions of the coutumes that were placed behind this introduction seem to have been hardly more than an appendix.\textsuperscript{78} Bourjon was even more radical. In 1747 he published a book with the significant title: \textit{Le droit commun de la France, et la coutume de Paris réduits en principes}. It was arranged in a strict order, dividing the legal material into books, titles, sections and paragraphs. Although it paid a lot of attention to the Coutume de Paris, it did not reflect a specific legal system that was applied by courts somewhere in France. This approach might have somewhat limited the immediate practical relevance of the book. Bourjon at least felt obliged to answer in the introduction the prospective objection that his book would be of scientific relevance only, especially interesting to legal scholars. It was nevertheless a commercial success: a third edition was published in 1773. The finest hour of these two more scholarly legal studies was, however, still to come. Precisely because of the less practical, more abstract nature of their works these two authors were extensively used by the codifiers, with the somewhat paradoxical result that they exerted the greatest influence on the French civil code of 1804, still in force today.\textsuperscript{79}

\textit{Codification}

It should be made clear from the outset that although some kind of droit commun français had been developed over the course of time, France did not enjoy legal unity at the eve of the French Revolution. Firstly, local customary law was still constitutionally protected and consequently the formal status of the droit commun, but also of the royal ordonnances, was relatively weak.\textsuperscript{80} Secondly, the droit commun had only substantial authority in northern France, in the pays de droit coutumiers. In the southern pays de droit écrit another legal system reigned, more influenced by Roman law. To put an end to this double diversity, a rather radical break was needed that would change the constitutional state of affairs. It became clear that such an upheaval was fundamentally a political matter. As it turned out, it even took a revolution to bring about the necessary changes. One of the most important credos of the revolutionaries of 1789 became the necessity of a unitary state and therefore politicians were adamant in their plea for a uniform law.\textsuperscript{81} In the course of the revolution, legal unity was increasingly considered to be a matter of raison d’état. The obvious instrument

\textsuperscript{78} In a later edition of his Coutumes d’Orléans (= Oeuvres de Pothier I) Paris (1817) title 10 (containing some 26 paragraphs) covers 19 pages, whereas Pothier needed 87 pages for the preceding introduction.


\textsuperscript{80} Dawson (1940), \textit{op. cit.}, 790-795.

to bring about legal unity was a codification such as the *Code civil*. An important feature of that codification was and still is its exclusive force. With the introduction of this civil code all other sources of law, whether customary law or Roman law, were abolished. From that moment statutes, the written rules authorized by the government, reigned supreme. Thus codification became a central element of the process of state formation. Not surprisingly, the idea gained the support of leading politicians such as Sieyès and Napoléon, neither of whom were lawyers. Codification finally became feasible.

The decision to codify French law was therefore clearly a political one, based on arguments derived from the *raison d’état*. Only after that decision was made, did lawyers come to the fore again. Although a lot of work had been done in the previous centuries, their task was far from easy. They not only had to forge into a single whole the diverse customs of the various regions of France, but they also were confronted with a division between the *pays de droit coutumiers* in northern France, and the *pays de droit écrit* in southern France, where Roman law had been more influential. In the end, four great lawyers managed to produce a draft of a codex that in 1804 became the civil code. All four of them were practitioners. J.-E.-M. Portalis (1745-1807), J. de Maleville (1741-1824), F.D. Tronchet (1726-1806) and F.J.J. Bigot de Préameneu (1747-1825) had all spent most of their time as avocats. The role of university scholars was again very limited, which is consistent with the – already noted – relative unimportance of universities for legal practice.

The role of universities was to change dramatically after the introduction of the civil code, however. We have to realize that the professionals that had to apply the law, judges and avocats, were still thinking in terms of old law. Of course, the legislator tried to bully them into focusing on the provisions of the code, but he was only partly successful in this respect. It has been established that judges continued to apply the law as they knew it for at least some decades. This is where the universities, established by Napoléon, became important. At the universities law was increasingly taught in strict accordance with the new civil code. Some scholars realized that they were cutting themselves off

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from ‘law’ in the broader sense of ‘justice’, and they sometimes deplored that, but they nevertheless felt obliged to teach law on the sole basis of the *code civil*. They became adherents of what has been called the ‘school of exegesis’.\(^\text{84}\)

This proved to be instrumental for the success of the French civil code.

### 5. Law, Lawyers and the European ‘State’

Now it is time to assess the significance of the contribution of lawyers to legal integration for the development of the European Union (EU). It has become quite clear that at least since the time Bracton wrote his treatise, arms and laws were of equal importance to the developing states of Europe. The EU seems to take a somewhat different route. It obviously lacks ‘weapons’: it has neither an army, nor a police force to speak of. It should not surprise us, therefore, if laws, and consequently lawyers, play a more significant role in the formation of this union than in the earlier cases of state formation. Profound descriptions of this – probably predominant – role of law in the EU can of course be found by the other contributors to this volume. I will only point to some possible parallels between the historical function of law and lawyers and the present use of law and lawyers in the context of the EU. Again, most attention will be devoted to the role of lawyers in the unification of private law.

#### 5.1 Lawyers and the European State: An Overview

At least three possible parallels deserve some attention in this paragraph. Firstly, it was fundamental to the development of the early European states that they were able to present themselves as providers of better justice. These new states were not only increasingly successful in enforcing legal decisions, but they also emphasized the higher, more reasonable nature of their justice. This development was of course detrimental to local entities. Local courts and customary law were slowly but surely dismantled. The nascent European state could also use this strategy and try to directly win the hearts and minds of the European people. It is not difficult to notice the efforts to incorporate the European Convention on Human Rights and the consequent case law into the system of the European Union. It started with the application of these human rights on the basis of Article 6 (2) EU.\(^\text{85}\) The next step was the proclamation of the Charter of Fundamental Rights of the European Union in December 2000.\(^\text{86}\) The final stage should be the adoption of the European Constitution, which would effectively integrate these human rights within the treaty system of the Euro-

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86 Publ. EC 2000/C 364/01.
All this could have the effect that the EU morally surpasses the member States. Obviously this would be detrimental to the moral authority of the member States as supreme providers of justice. Such a strategy of course gives a rather political dimension to the role of lawyers in both the European Court of Human Rights and the European Court of Justice (ECJ). The contribution of Solanke to this volume, describing the efforts of lawyers of a network of NGOs to combat racial discrimination, seems to provide us with a fine example of the importance of the concept of justice for the emerging European State. As Solanke points out, it is rather significant that these lawyers have chosen to target the European Commission in an effort to bring about a so-called Race-Directive. It is less surprising that their efforts were quickly supported by another European institution: the European Parliament.

The attention devoted to consumer protection and product liability by institutions of the European Union should perhaps also be seen in the perspective of a Union as a provider of justice. This might be true as well for the vast amounts of environmental legislation, mentioned in Stout’s contribution to this volume. The European Union is proving its existence with an enormous amount of legislation, on an ever-increasing number of fields. These efforts of the Union are necessarily reflected by the employment of many lawyers. It is obvious that they are of great importance in the European bureaucracy. Stout clearly shows that these lawyers in European employment have accelerated this development, at least in the field of the environment. They tend to create work for themselves, resulting in even more legislation. ‘I legislate, therefore I am’ seems to have become the credo.

Secondly, in periods of major constitutional change such as the English seventeenth century, lawyers clearly gained tremendously in political relevancy. Especially in the ‘Aufbaufase eines neuen Staates’, that is in a state under construction, they were instrumental in answering political questions in a quasi-legal context. The constitutional uncertainty resulting from the developing European state has again pushed lawyers to the fore. The role of lawyers is of course instrumental where vital documents are prepared, such as treaties. Undoubtedly, their influence on the wording of the recent proposal for a new European constitution has been great. Moreover, they become even more important when such treaties come into force. Then, they will have to discuss and decide many legal questions of a clearly political nature. What is the precise content of the legislative and other competences that have been attributed by the consecutive treaties to the European institutions? What exactly is the status

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of regulations and directives? How detailed are they allowed to be and what are the consequences for the (concurrent) competences of the member States? There is no doubt that the lawyers of the ECJ are of primordial importance in this respect. At least some decisions of this Court cannot be regarded as merely legal-technical. I only have to mention the well-known case Van Gend and Loos, in which the Court decided that, with the treaty of Rome, a new legal order had been created, surpassing the various national legal orders of the member States. Schepel and Wesseling have argued that these judicial policies are embedded in a rather homogeneous community of writers on European law. Interestingly, this kind of ‘judicial activism’ is sometimes defended by stating that to ensure individuals ‘a maximum of judicial protection’ belongs to the ‘core of any judicial activity’. Governments of member States are now fully aware of the importance of the decisions of the ECJ and participating in them has become a preferred means to influence the direction of case law, as is recently shown by the research of Granger.

A third historical parallel could be discerned in the context of the opposition to the development of the EU into a true state. Lawyers might assume an important role here, as they did in the seventeenth and eighteenth centuries against the emerging royal absolutism. For a long time, most national lawyers have been rather indifferent to the constitutional developments that have accompanied the growth of the European Union. It seems that only the proposal for a European Constitution has been able to incite a more fundamental discussion. This could also result in a more profound opposition, questioning the legal basis of a supposed transfer of sovereignty from the member States to the Union. Lawyers and particularly judges in the national courts are of vital im-

91 Case 26/62, NV Algemene Transport en Expeditie Onderneming van Gend en Loos v Nederlandse administratie der belastingen, [1963] ECR 1. As G. Davies, Nationality discrimination and free movement law, Groningen (2002), 161, rightly remarks, this case shows that the Court ‘considers it has competence-competence to go as far in interpretation as it wishes’.
portance in this respect, since the implementation of European law is ultimately in their hands. Alter argues that they have by and large been supportive of ECJ policies. It has also been suggested, however, that some national courts are showing signs of resistance, for example in the context of Art. 234 (=177 old) EC. This provision obliges the highest national court to have questions relating to the construction of the Treaty answered by the ECJ. As Urban argues, the European Court has for obvious reasons tried to limit the discretionary freedom of national courts in this respect. National courts were not to become ‘full players’ with regard to the interpretation of the Treaty. But as Blaurock points out, the German Bundesgerichtshof has since the 1980s been trying to avoid putting prejudicial questions to the European Court. Resistance within the German judiciary to the supremacy of the ECJ also became manifest in 1994, in a much discussed decision of the Bundesverfassungsgericht. In that ruling, the German Constitutional Court denied that the ECJ could legitimately be held to have competence over its own competence.

5.2 Lawyers and the Unification of European Private Law

Since in this paper the focus has been on the contribution of lawyers to legal integration by means of a uniform (private) law, let me dedicate some final remarks to this issue. I have described two processes in which lawyers acted as providers of uniform law, an English and a French process. What is the relevance of these processes for the development of a unified European private law?

The English Scenario

The English scenario would require a central European court, for example the ECJ, which would increasingly be involved in matters of private law. Not many writers have proposed this scenario as a probable way of arriving at a unified European private law, with perhaps the exception of Van Gerven. Of course, the idea of a central European Court with competence in matters of private law has been put forward, but usually as a necessary complement to that other way

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of achieving legal unity: codification. Lando, the well-known chairman of the commission that brought about the general rules of Contract Law (the so-called PECL), even explicitly refers to the failure of realizing legal unity between England and Scotland to stress the importance of a codification. Riedl, however, seems to hope that the European judiciary will play such a major role in bringing about the Europeanization of private law, using the PECL as formulated by the Lando commission. Whether this is a viable option is rather questionable. The historical example of England shows that this scenario is particularly successful when the legal systems that have to be replaced are relatively weak. Only 'soft' local English and Welsh legal systems gave way to the law of the Westminster courts. Already in the seventeenth century, the Scottish legal system proved to be too developed to be swept away by such a method. The various legal systems of the member states of the EU are much more developed than the Scottish system at that time. Moreover, they are supported by powerful institutions such as national courts and bar associations, and often even codified. Finally, it should be emphasized that the European Court does not have the political backing it would need to assume a greater competence over conflicts of a private law nature.

The French Scenario

The French scenario of unifying private law is more complicated and therefore its application to Europe needs more attention here. Essentially, it should consist of two elements. The first requirement would be the development of a European droit commun by means of an extensive use of the methods of comparative law. Secondly, when such a droit commun has been more or less realized, a European codification would be needed.

Ideally, this European droit commun should be developed by writers who are closely linked to legal practice, as happened in France. They should use the legal material of the various member States, as well as the European rules which have an impact on private law. They should preferably have been barristers or judges for many years. One of the reasons why this is important is that according to this scenario the newly developing droit commun should be applied by national courts. In the last decade or two, this approach has been in some form or another on the minds of many lawyers, especially those with a background of comparative law or legal history. Famous academics, such as

104 I only mention here: H. Kötz, ‘Comparative legal research and its function in the development of harmonized law. The European perspective’, in: N. Jareborg (ed.),
Lawyers as Political Entrepreneurs?

Zimmermann, who rightly points to the relevance of Roman law for a *ius commune*, and Coing are among them. Some writers also acknowledge the essential role of the national judges in this process. A lot of work has already been carried out on the drafting of a European private law by lawyers, as the contribution of Schreiner to this volume clearly shows. I have already mentioned the PECL of the Lando commission. In 1994 the Trento Project was started, directed by Bussani and Mattei and designed to develop a common core of European private law. Van Gerven, in cooperation with many others, launched in 1994 a project of casebooks for a common law of Europe. The Study Group on a Civil Code, also called The Von Bar-group after its chairman, commenced its work in 1999. There is also a “European Group on tort law”, with its headquarters in Tilburg. This so-called Tilburg Group has already

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published several volumes on ‘principles of European tort law’.\textsuperscript{111} It is hardly surprising that the EU has financially supported some of these groups.

I am not sure whether these pioneers are really following the footsteps of Dumoulin and the other coutumiers. For a start, their point of departure seems to show some important differences from the situation in which their predecessors found themselves in Ancien Régime France. The national systems of today are not deficient in the way the French customary legal systems were. The law of the member states is written, systematized and covers most areas of life in a very detailed manner. Moreover, it is taught and applied by firmly established national institutions, such as universities and courts. In short, the national law systems consist, unlike the French customary law systems of the seventeenth and eighteenth centuries, of hard law. After all, that is the reason why Finnish law does not have any formal authority in the courts of Spain.

Some writers argue that the development of a uniform private law should result from competition of legal rules. Smits, for example, expresses the hope that national courts will receive legal rules of foreign countries or parts of the developing droit commun on the basis of their persuasive authority, because these rules provide ‘better law’\textsuperscript{112} However, unlike the legal systems of early modern France, the demand for ‘better law’ is likely to be limited in modern legal systems due to the fact that they are intrinsically well suited to coping with new legal challenges. As a result of this different point of departure, it is questionable whether national judges will apply the developing European droit commun. The remarks of Niglia on the application by judges of directives in the field of private law do not appear to be very promising.\textsuperscript{113} He states that as a result of judicial disregard of the directives national courts have preserved the traditional body of legal precepts. The conclusions reached by Lee in his contribution to this volume seem to confirm this. He argues that the institutions of the EU are now highly developed and consequently are able to contribute significantly to legal integration, in accordance with the theory of neofunctionalism. He also clearly states, however, that especially in the field of private law directives have become the object of national resistance. Directives run the risk of suffering the same fate as the royal ordonnances in seventeenth and eighteenth-century France. The resulting lack of penetration of EU law into the private law systems of the member States proves that the nation states have re-

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\textsuperscript{112} J.M. Smits, The good Samaritan in European private law, Deventer: Kluwer (2000), 40. He realizes that this method might not lead to complete legal unity, but that is acceptable in his view.
tained considerable sovereignty. Law firms obviously realize this since they still emphasize representation on a national level.

The lack of immediate relevance for legal practice is in some ways reflected in the work as well as the background of most of the pioneers. Their writings usually do not comment on other legal systems from the perspective of their own, as in the French scenario. Most of them have left out this phase and have moved on directly to formulating general principles. Furthermore, the pioneers have concentrated on specific fields of law, especially contract law. Neither are these deviations from the French scenario surprising from a practical point of view. Firstly, there is no obvious demand for extensive legal literature on a comparative basis in the national legal practices. More importantly, the national legal systems of today are so elaborate that an endeavor according to the original process would require an immense effort. The Dutch civil code consists of at least 2,000 provisions, which would all need to be commented upon on the basis of the provisions of twenty odd other national legal systems. I do not dare to imagine the number of pages needed for a complete description of and comparative comment on Article 6: 162 of the Dutch civil code, which covers tort. In France, admittedly, a dominant role was attributed to the coutume de Paris and this made things a little less complicated. But it would be hard to determine which national legal system should play the same part in the European droit commun.

As to their background, most of the pioneers are not practitioners, as was the case in the French scenario. As also observed by Schreiner, the majority of participants working on the projects concerned with European law are academics. This could be a result of the lack of demand in practical circles for legal products on a comparative footing, but some writers also have more or less attributed the task of developing a European common law to scholars. Of course, some scholars realize the importance of a tight connection between comparative legal writing and legal practice. It is, however, questionable whether this connection can be established in view of the hard national legal systems. It has been suggested that legal education might have to play a considerable part in this respect. Some law schools have already started with a curriculum that is for the most part based on courses of comparative law, despite the fact that this could put in danger the collaboration between legal writing and legal practice. Academic lawyers, who in an attempt to reach for the heights of comparative law pay too little serious attention to the law of the state in which they work, jeopardize the relevance of academic law for legal prac-

This is illustrated by the fate of legal education at the French universities during the Ancien Régime. These law schools focused almost exclusively on Roman law and created thereby a yawning gap between theory and practice, which contributed greatly to their decline. The American experience is interesting in this respect. Friedman and Teubner have argued that national law schools teaching law on the basis of a national curriculum only developed in the United States as a response to the mobility of lawyers across state lines.

Let us suppose that the approach of these pioneers will be as successful as the French scenario and lead to a European droit commun comparable to its French counterpart. Even then a European code would be required, since a codification constituted the second indispensable element of the French scenario. In 1800, the efforts of the coutumiers had not resulted in a uniform French private law. Not only was the force of the droit commun mainly limited to the northern pays de droit coutumiers, the South of France being submitted to rules of private law that were heavily influenced by Roman law. But even within the northern territories, the legal diversity resulting from the prevalence of local customary law was still considerable. The droit commun was only a subsidiary source of law, albeit with great authority. The development of a European ius commune will at best result in such a situation. The civil code systems might to some extent have grown together, but there still will remain considerable differences. Furthermore a more clear-cut division with the Common law system might remain. To realize further legal unity in Europe a codification would be required.

The idea of a European codification of private law has of course attracted the attention of many lawyers and indeed some support as well. Significantly, some advocates of a European civil code can be found among those already working on the development of a European droit commun. Lando fears that such an unwritten droit commun will not lead to legal unity within a reasonable time. He is convinced that only a codification of, for example, the PCEL can provide that unity.

Mattei of the Trento Project recently insisted on an immediate codification, because in his view unification through ‘soft law’ will

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lead to the loss of the values of the European social model of capitalism.\textsuperscript{120} It is hardly surprising that lawyers have also considerably contributed to the opposition to the idea of a European Code.\textsuperscript{121} Moreover, they have tackled the issue of a legal basis for a European civil code, in particular whether the authority of the EU institutions allows such an endeavor at the moment.\textsuperscript{122}

Notwithstanding, however, the obviously important role of lawyers in the debate on the possibility of a European civil code, as well as in the preparations thereof, I would like to emphasize that the ultimate decision will not be theirs. As in the French process, such a decision involves the very constitution of the future European state, whether it be predominantly unitary or not. Since this is an issue of a profoundly political nature, I would posit that it will be decided by politicians, as in France at the end of the eighteenth century. Some politicians in the European arena have already addressed the issue, as the decisions of the European Parliament and the communication of the European Commission show.\textsuperscript{123} Given the considerable sovereignty retained by the member States, however, it is highly unlikely that a uniform codification of private law will be decided upon at a European level in the near future.

6. Epilogue

In this paper I have addressed the various contributions of lawyers to the process of state formation. I have attempted to describe the role of these lawyers independently of an evaluation of the various processes of state formation itself. Such an evaluation has not been the issue here, not even of the process of state formation at a European level, as we are witnessing in our time. Whatever the verdict over these processes, it has become clear from my description that the contribution of lawyers to these processes has been considerable. They not only did their share on a more or less technical level, but occasionally were very influential on an intermediate, more political level. Especially in periods of constitutional uncertainty and change, they were able to come to the fore, as is illustrated by the avocats in medieval France, the English judges who forged the common law and recently the judges of the European Court of Justice. Notwithstanding, however, the fact that these lawyers could therefore – particularly when operating on this intermediate level – be regarded as ‘political en-

\textsuperscript{120} Mattei (2002), \textit{op. cit.}, passim.
trepreneurs’, it should be noted that their role was usually not politically decisive. As is also shown by the history of legal integration in France, more often than not major political decisions are made by politicians without legal training.
About the Authors

PETER VAN DEN BERG graduated in law and in history from the University of Groningen. He is currently a Senior Lecturer in the Department of Legal Method and History of that University. His research interest is in the interaction between law and the formation of states. His publications are on the (European) codification of private law (Hanse Law School Cahier 2 (2001)), citizenship (The Legal History Review (2003) 71) and the European constitution (forthcoming). He gives courses in legal method and in comparative law.
E-mail address: p.a.j.van.den.berg@rechten.rug.nl.

ALEX JETTINGHOFF is Lecturer at the Law Faculty, University Maastricht. His main research interests are: contractual relations in business, litigation, lawyers and legal transformation, law and state formation. Recent publications include ‘Total War and 20th century legal change’, in: N. Roos & P. van Koppen (eds), Rationality, information and progress in law and psychology, Maastricht University Press (2000); and ‘State formation and legal change’, in: D. Nelken & J. Feest, Adapting legal cultures, Oxford, Hart (2001). He is currently moving to the Law Faculty of the Radboud University Nijmegen and may be contacted on: a.jettinghoff@planet.nl.

ROBERT LEE is Professor of Law at Cardiff Law School and Co-Director of the Economic and Social Research Council’s Research Centre on Business Relationships, Accountability, Sustainability and Society (BRASS) which is based at Cardiff University – see www.brass.cardiff.ac.uk. He has a wide interest in regulation but particularly in relation to health and environment, and is editor of Environmental Law Monthly and Environment Editor of the Journal of Business Law. Recent books include: Compendium of Summaries of Judicial Decisions in Environment Related Cases UNEP, Nairobi (2005); Economics, Ethics and the Environment, with Julian Boswall (eds) Cavendish (2002); Human Fertilisation and Embryology: Regulating the Reproductive Revolution, with Derek Morgan, Blackstone Press (2001). He may be contacted on: Leerg@cardiff.ac.uk.

MIKAEL RASK MADSEN is a Doctoral Researcher at l’École des Hautes Études en Sciences Sociales, Centre de la Sociologie Européenne, Paris, France. He holds a law degree from the University of Copenhagen, a LL.M. from IISL, Oñati and a D.E.A in sociology from l’École des Hautes Études en Sciences Sociales. His current research focuses on the interaction of law and politics and the emergence of a European legal space in the area of human rights. He has previously been engaged in research on the democratisation of Guatemala and the role played by international law.
E-mail: mikael.madsen@wanado.fr.
HARM SCHEPEL is Senior Lecturer at Kent Law School, Co-director of the Kent Centre of European and Comparative Law and Deputy Director of the Brussels School of International Studies, University of Kent. He has a longstanding interest in sociological approaches to European legal integration. His recent work has focused on the role of self-regulatory regimes in legal arrangements for market integration: much of that work is reflected in The Constitution of Private Governance (Oxford: Hart Publishing, 2005).
E-mail: H.J.C.Schepel@kent.ac.uk.

AGNES SCHREINER is Lecturer at the Law Faculty, University of Amsterdam, studied law and lectures several themes of General Jurisprudence. She has specialized in a series of subjects associated with law in various ways: media, arts (including rituals) and sciences. See for instance her dissertation Roem van het recht (The Fame of Law) (1990 reprinted 2004), The Ritual Manifesto (Webedition 2003), and The Semiotics of Digital Law (2004). In the context of the Amsterdam Institute of Private Law that studies the Europeanisation of Private Law, she is doing research into the legal cultures of Europe. European Star Laws (2003) is one of her most recent publications.
E-mail: a.t.m.schreiner@uva.nl.

IYIOLA SOLANKE is Lecturer at the University of East Anglia Law School where she teaches European Law and Discrimination Law. Her research interests include the use of social theory to understand the evolution of law, and European integration. She is writing on the evolution of anti-racial discrimination law in England, Germany and the European Union (forthcoming, 2007).
E-mail: I.Solanke@uea.ac.uk.

MARK STOUT is Research Assistant at the Law Faculty of the University Maastricht. Previously he was a civil servant (at The intervention board for Agricultural Products) from 1990-1992, and subsequently taught at the Rheinland-Westphälische Technische Hochschule, Aachen (Germany) in the European studies programme. He is currently engaged in research on the European Commission and the enlargement.
E-mail: mark.stout@metajur.unimaas.nl.

ANTOINE VAUCHEZ (PhD European University Institute) is a full-time researcher in political science at the Centre National de la Recherche Scientifique (CNRS) and teaches in various universities (Sciences Po Paris, Université Paris II, Université d’Amiens). He recently published L’institution judiciaire remotivée. Le processus d’institutionnalisation d’une nouvelle justice en Italie: 1964-2002, coll. Droit et société, LGDJ, 2004. His current interests focus on the sociology of transnational legal fields and their relationship with the building and legitimation of international institutions, with a specific interest in the European Union. On the matter, he coordinated a special dossier of Critique internationale (march 2005) entitled “Les juristes et la construction d’un ordre politique européen”. E-mail: vauchez@hotmail.com.
In this special Issue we explore the role of lawyers in European legal integration. There are various justifications for this attention. Some are of a theoretical nature, others more practical. One particular practical development triggered the initiative for this issue. This development is a movement among civil lawyers, discussing the possibility of a European Civil Code. On the one hand, for continental lawyers codification is a very ‘normal’ notion. The history of codification is one of the master narratives of the civil law profession. Legal codes have become almost self-evident institutional furniture in the nation State in continental Europe and many other States all over the world, and lawyers have played a central role in their construction and diffusion. So the association of political centralisation in the EU with codification seems only natural. On the other hand however, the suggestion of codification appears a little farfetched, considering the history of European integration. Usually codification implies exclusivity of legislative authority and that would be a step far beyond where the present Member States have so far been prepared to go.

What is particularly striking in these initiatives is their entrepreneurial quality. Apparently, in line with the standard set by the European Court of Justice, we have here another group of lawyers looking for an opportunity to advance a centralist legal innovation at the European level. This development makes one wonder whether there is more of this going on in Europe than can be readily observed by the outsider. Therefore, we have meant this issue to be an exploration of some departments in the ‘European legal field’, where enterprising lawyers have been, are or might be furthering European legal integration. We are curious about the motivation and methods of initiatives in that direction. A further issue is what opportunities they exploit and how they deal with the obstacles encountered in the process. Finally, the likely results of the described efforts will be considered.

Contributors to this Issue

Peter van den Berg, University of Groningen, the Netherlands
Alex Jettinghoff, University Maastricht, the Netherlands
Robert Lee, Cardiff University, United Kingdom
Mikael Rask Madsen, Centre de la Sociologie Européenne, France
Harm Schepel, University of Kent, United Kingdom
Iyiola Solanke, University of East Anglia, United Kingdom
Agnes Schreiner, University of Amsterdam, the Netherlands
Mark Stout, University Maastricht, the Netherlands
Antoine Vauchez, Centre National de la Recherche Scientifique, France