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Unity Through Law: Revisiting the Constitutionalisation of Europe

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of the Bundestag and before the *Bundesverfassungsgericht* (Constitutional Court). Furthermore, even though Adenauer continued to put more trust in his political advisor, Herbert Blankenhorn, Grewe's memoranda on German foreign policy came to be increasingly influential. His proposal of summer 1954 to focus on German NATO-membership in case the European Defense Treaty was to fail (which it did) later came to be the basis for the German position.

Despite the new empirical insights contained in the main part of the study, some arguments are not convincing. What is the explanatory power of using the subtitle of a Festschrift dedicated to Grewe as heading for the main part of the dissertation? Does »in Service of Germany and the Law« really capture Grewe's approach? As the study pointedly demonstrates, Grewe used law as a means to advance the policy of West integration, just like the German opposition used the law instrumentally to question this policy. If law can be used for both ends, how can Grewe's position be described as »in service of … the law«? Moreover, at times the author's terminology can be confusing to a lawyer. For instance, Lambertz-Pollan dubs Grewe's approach to law and politics »Interessenjurisprudenz« (»interest-based jurisprudence«), because he used law to promote his political goals. In contrast, in the legal context Philipp Heck's *Interessenjurisprudenz* deals with how judges come to a decision by taking the interests of the legal community into account. Furthermore, the study would have benefited from more streamlining (the study extends to more than 700 pages). As an example, it seems that the development of the positions of the various Allied Powers could have been presented more concisely.

Nonetheless, Lambertz-Pollan's dissertation provides a detailed and insightful discussion of the political context of Grewe's actions. It becomes quite clear how the changing positions of the Allied Powers on Western Germany's role in Europe were influencing the rhetorical space open to the German delegation on the General Treaty. Also, she helps us to get a sense of the (limited) capacity of a government official to shape the broader policy direction. While Lambertz-Pollan does not rewrite the history of West German foreign policy after 1945, she adds another piece to the puzzle.

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Karin van Leeuwen

Unity Through Law: Revisiting the Constitutionalisation of Europe*

In spite of the failed attempt to provide the European Union (EU) with a formal constitution, the definition of the Union as a *de facto* constitutional construction nowadays hardly raises any doubts. That the Union, celebrating its 60th birthday this year, was not born with these constitutional features is well known, and so are the most crucial steps in the »miraculous« transformation from the common market that was set up in 1957 to the present settlement, of which the 1963–1964 landmark cases of the European Court of Justice (ECJ) are the most prominent. Yet, the why-question behind this unprecedented history has so far remained unanswered. Retelling the »constitutionalization story« by focusing on the lawyers who were most engaged in its development, Vauchez

* Antoine Vauchez, Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity, Cambridge: Cambridge University Press 2015, 264 p., ISBN 978-1-107-04236-0

offers an original and thought-provoking revision of a history that only recently appeared on the radar of legal historians.

Before historians set foot in the field, the legal dimension of European integration was almost exclusively the domain of lawyers, some of whom, accompanied by political scientists, started questioning the politics behind the »Union of law« from the 1980s onwards.[1] While this research importantly widened the constitutionalisation story to include actors such as companies, interest groups and states, the explanations it offered were inspired by the abstractions of integration theory rather than by the law and legal practices that underpinned it. Vauchez returns the focus to »law itself«, which, as a historical sociologist in the tradition of Pierre Bourdieu, he defines not as »black letter« legal texts but as a »[social world] made of specific professional conceptions ..., commonsensical ideas … and even, under certain historical circumstances, an agenda of its own« (7). Thus, Vauchez traces how »Euro-lawyers« such as legal advisers, corporate lawyers and academics formed the new field of European law through negotiation, litigation as well as academic publications (8). Once established, this field »brokered« European integration by providing its everyday engineers with the constitutional paradigm: a set of »cognitive tools« that help to make sense of the complex transnational construction and its future (9–10). Explanation for Vauchez thus means »decoding« the seemingly self-evident, *sui generis* emergence of the European legal framework into actors, narratives and their historical contexts.

Building on a wide range of sources, including reports of academic conferences, ECJ case law, commentaries and commemorative publications as well as interviews and archival files, Vauchez organises his alternative narrative into two parts. The first part focuses on the origins of the constitutional interpretation of European law in the institutions of the European Economic Community (EEC), on the development of the field itself, as well as the »Van Gend en Loos moment« that marked the transformation of this constitutional interpretation from abstraction to »trail-blazing judgement« (127). The second part, which is also split into three chapters, regards the consolidation of the constitutional paradigm, which Vauchez breaks down into three elements that he refers to as the »classic triptych of law's legitimacy in modern polities« (149): jurisprudence, code and constitution.

The narrative begins in 1957, when the interpretation of the »rather inchoate set of Treaties, Communities, institutions and policies« (17) on which the European Communities were founded as »constitutional« was far from obvious. Indeed, federalism was very much out of vogue after the failure of the European Defence Community and its political counterpart in 1954. Nonetheless, the »entrepreneurs« who sought to bring the institutions into concrete existence, such as the first president of the European Commission, the director of the Commission's Legal Service and prominent members of the European Parliament had already started to use models of constitutional law in order to »broker« their ideas on the development of the institutional framework. The ECJ hesitantly did the same, while the basic structures of the common market – in particular its competition policy – were also argued to contain features providing for »constitutional« regulation independent of the Member States (60). The development of a common competition policy was especially greeted by the small Brussels community of specialised lawyers working at law firms and branches of multinational companies.

From this Brussels community, a »space for exchange and mobilization« (73) developed in both academia and national courtrooms that was needed to provide the »formal endorsement« (80) of the constitutional interpretation – a space that soon obtained many traits of a European-law field with a common legal rationality (114). Both the field and the earlier constitutional models provided the ingredients to turn the ECJ's ruling in the Van Gend en Loos case into a »unique moment of revelation of Europe's nature (a unified legal order where EC norms have direct effect and prevail over national norms)« (116), as Vauchez shows in his detailed description of the expecta-

1 Morten Rasmussen, Rewriting the History of European Public Law: The New Contribution of Historians, in: American University International Law Review 28,5 (2013) 1187–1222.

tions and especially the reception of this decision in institutional settings, such as the Legal Service as well as (academic) conferences and reports.

Van Gend en Loos marked the emergence of a constitutional »logic« that the ECJ further developed in a set of principles, of which direct effect and supremacy were only the first steps. These core principles, and the »invented traditions« surrounding their commemoration (161), helped to consolidate the quickly expanding body of European law far beyond the European-law field and to resist the challenges of national governments and courts. In parallel, the »codification« of law into the so-called *acquis communautaire* provoked by the first round of the Community's enlargement in the 1970s structured EU law into a coherent set of decisions, regulations and principles that could soon be retrieved from a computerised system and even monitored as long as key legal phrases were standardised. Thus, the *acquis* provided the »social and cognitive basis for the authority of European law« (197). Finally, in the 1990s, the constitution itself returned to the forefront of political debate, which Vauchez explains not as much a »sudden federalist whim« of political leaders than as a »progressive depoliticization of the constitutional ›red flag‹ itself« (201), as a result of numerous conferences and publications on the EU's *de facto* constitutionalisation as well as the technical necessity to simplify and order the EU *acquis*, among other factors. In spite of the failure of the resulting constitutional treaty, Vauchez concludes, the constitutional function that law has historically been granted is »among the few objects of value that Europe can claim as its own« (231), resisting renegotiation while empowering projects aiming to strengthen European unity.

Although presenting a chronological narrative, in which he emphasises the need to understand the constitutionalisation of European law as a »contingent and conflictual historical process«, Vauchez concedes that his analysis is »not (an) historical investigation in the same way a historian would do« (6). Indeed, critical lawyers and political scientists are the primary audience of this sweeping narrative that has already found its way into various much-cited publications in the past decade as well as of the *Habilitation* of which this book is an adapted translation.[2] And indeed, (legal) historians can easily find elements to criticise, such as the teleological shape this narrative often takes and the limited use of archival sources or the rather unidimensional approach of key legal actors as being solely driven by legal conceptions and institutional ambitions rather than being politically committed to an idealistic project promising economic progress and »never again war«.

Yet, the book also opens many inspiring new roads of enquiry as well as offering the conceptual framework to connect this legal history to the political and economic developments that they helped define. Therefore, Vauchez's provocative analysis is a must-read for all (legal) historians interested in European integration as well as that of the transnational institutions it affected and the Member States.

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2 An earlier adaptation was published in French as »L'Union par le droit. L'invention d'un programme institutionnel pour l'Europe«, Paris: Presses de Sciences Po 2013.