Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome

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Abstract

This article analyses how the seeds for the development of European law from the 1960s onwards were sown in the foundational treaties. It argues that despite the fact that both European treaties embodied a conscious choice by the majority of the governments not to establish the European Communities on a constitutional basis, a small number of politicians and jurists managed nonetheless to insert the potential for the constitutional practice. Following a chronological account of each set of negotiations, the article untangles the complex ideas and decisions, which crafted both the legal shape of the treaties and the jurisdiction of the new European Court of Justice.

As judged by their litigating positions in the major cases of the 1960s, the member states of the European Communities (EC) apparently expected the European Court of Justice (ECJ) to interpret the Treaties of Rome in a strict and literal sense, using an extensive conception of national sovereignty in cases of ambiguity.[1] The Treaty of Paris (1951), which set up the European Coal and Steel Community (ECSC), and the Treaties of Rome (1957), which founded the European Economic Community (EEC) and the European Atomic Energy Community (Euratom), appeared indeed to represent a conscious choice by the national governments to avoid establishing supranational communities of a constitutional nature. This was in stark contrast to

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[1] Thus, in all the cases of doctrinal importance before the ECJ during the 1960s the member states continually opposed the ECJ's establishment of what this special issue has conceptualised as 'constitutional practice'. From a quotation of Marie-France Buffet-Tchakoff (1984) in Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001), 216.

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the failed plan for a European Political Community (EPC) in 1952–3 and to the general aspirations of the European Movement in the 1950s.[2] Crucially, the EEC treaty was generally directed at the member states, not the citizens, and the application of European law was – as in classic international law – the competence of national administrations and courts under their respective constitutional law.[3]

Nevertheless, within six short years the ECJ had established a 'constitutional practice' of European law. The Court attributed direct effect and primacy to parts of European law, creating a legal order with a structure apparently reminiscent of a federal state. In addition, the ECJ prompted national courts to use the preliminary ruling mechanism in Article 177 of the EEC Treaty to question systematically national legislation that might be in contradiction with European law. It justified these rulings by pointing to a number of potentially constitutional elements incorporated into the treaties. When taken together, the ECJ argued, these elements were proof that the contracting parties intended to create an 'original and new', supranational order.[4]

Why and how the ECJ launched the constitutional practice is a complex historical puzzle addressed by several articles in this special issue. This article will analyse one central element in this story: the paradox that European treaties,[5] apparently designed to ensure the centrality of the member states, at the same time offered sufficient legal basis for the ECJ to build its constitutional interpretation. This article will argue that a small number of politicians and jurists managed to insert the potential for the constitutional practice into the treaties despite the conscious attempt by the majority of the governments not to establish a European constitutional order. Following a chronological account of each set of negotiations, this article will help untangle the complex ideas and decisions that defined both the legal shape of the treaties and the jurisdiction of the new ECJ. Simultaneously, it will identify the states, diplomats, and legal experts who influenced, to a greater or lesser degree, the negotiations and their outcomes.

Designing the ECSC's legal structure

On 9 May 1950, the French Minister of Foreign Affairs Robert Schuman announced a plan, conceived by Jean Monnet and a few close advisers, to address Europe's post-war

[2] Antonin Cohen, 'Constitutionalism without Constitution: Transnational Elites between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s–1960s)', *Law and Social Inquiry*, 32, 1 (2007), 109–135.

[3] Gerhard Bebr, *Judicial Control of the European Communities* (London: Stevens and Sons Limited, 1962), 26–27.

[4] These included Article 189 EEC which stated that regulations had direct effect in the national legal orders, the demand for uniformity of interpretation and the mechanism of preliminary references to ensure this (Article 177) and finally, the establishment of an assembly. Aff. 26/62 *N. V. Algemene Transport – en Expeditie Onderneming van Gend & Loos* v. *Nederlandse Administratie der Belastingen* (1963), Recueil 1963, p. 0003 and Aff. 6/64 *Flaminio Costa* v. *ENEL* (1964), Recueil 1964, p. 1194.

[5] The focus here will, for reasons of space, be restricted to in-depth analyses of the negotiations of the treaties establishing the ECSC and the EEC, leaving the less significant Euratom Treaty aside for future scrutiny.

economic and political challenges. This plan was simple but ambitious and innovative. It would start a process of European federalisation by reconciling France and Germany through pooling their coal and steel production together under a supranational High Authority (HA). Ten months later, the Treaty of Paris institutionalised a new entity: the ECSC. Convinced the HA was the key to the success of their plan, the authors of the Schuman Plan naturally placed it at the very centre of the initiative. Its members would be independent personalities representing only European interests, and its decisions, based on majority voting, would bind the member states. The plan also declared, with no further explanation, that 'appropriate measures will be provided for means of appeal against the decisions of the Authority'. Herein lay the kernel for the development of the European Court of Justice.[6]

Germany, Italy and the Benelux states accepted the French invitation to negotiate on the basis of the Schuman Plan and, on 20 June 1950, an intergovernmental conference officially opened in Paris in the presence of the heads of delegation: Jean Monnet, who chaired the conference (France), Walter Hallstein (Germany), Emilio Taviani (Italy), Dirk Spierenburg (Netherlands), Maximilien Suetens (Belgium) and Albert Wehrer (Luxembourg). Institutional questions immediately monopolised their attention. On 21 June, Monnet verbally presented the main features of his plan and three days later handed over a first working document intended to serve as a starting point for the upcoming discussions.[7] This provided new information. The HA remained the central institution, charged with the responsibility of administrating the Community through various legal acts (decisions, recommendations and opinions). In response to the criticism of French socialist André Philip, who had sternly condemned the lack of democratic supervision in the new organisation, a common assembly had been added to review annually the HA's activity.[8] Finally, a multifaceted but weak appeal scheme was outlined. A member state or, in a more restricted manner, a private enterprise could request the HA to review an allegedly prejudicial decision. If it was confirmed by the HA, the litigant could then appeal to a non-permanent arbitrational court whose verdict would be binding only for the appeals based on treaty violations; in the other cases, the court would act as a mediator.[9] After the release of the working document, the conference was briefly suspended to allow the heads of delegation to consult with their governments. When the negotiations resumed on 3 July 1950, it rapidly became clear that Monnet's initial hope to fit the Schuman Plan with as light an institutional framework as possible would not be accepted.

Although the other five states accepted the principle of a supranational HA, the Benelux countries immediately challenged key aspects of the French proposal. Perceiving the HA as a potentially dictatorial entity capable of dangerously affecting

[6] Anne Boerger-De Smedt, 'La Cour de Justice dans les négociations du traité de Paris', *Journal of European Integration History*, 2 (2008), 7–34.

[7] Reiner Schulze and Thomas Hoeren, eds, *Dokumente zum Europäischen Recht. Band 2: Justiz (bis 1957)* (Springer: Berlin, Heidelberg, New York, 2000), 23–4.

[8] Interview of Etienne Hirsch by Antoine Marès, 2 July 1980. Fondation Jean Monnet pour l'Europe (FJM).

[9] Schulze and Hoeren, *Dokumente*, 23–4.

domestic economies and national interests, they sought to obtain solid political and judicial guarantees against it. First, they demanded the (re)introduction of the member state governments into the institutional scheme, for example by having the six national ministers of economic affairs compose the arbitration court.[10] On 3 July 1950, Dirk Spierenburg demanded the creation of a committee of ministers that would share the HA's decision-making powers. The intergovernmental body could either block the decisions of the supranational authority or be in charge of the appeals at first instance.[11] Political safeguards did not suffice however, so second, they demanded the establishment of a strong permanent court of justice that could be resorted to if the HA exceeded its authority or failed to act. Mostly influenced by its leader, Walter Hallstein, a professor of civil law, the German delegation thought more about the long-term political goals of the Schuman Plan and envisioned the ECSC's legal set-up from that viewpoint.[12] Hallstein and his main legal adviser, Carl F. Ophüls, imagined the emerging institutions as the embryo of a future federal organisation, structured according to the classical separation of powers doctrine. They thus championed the common assembly and pushed for a permanent court of justice. Drawing parallels with the American experience, Hallstein immediately appreciated the role that a strong permanent court could play in the European integration and highlighted it to an unenthusiastic Monnet in early July 1950.[13]

Very protective of the HA, Monnet was initially reluctant to give in to these demands for fear that additional institutions would jeopardise the success of the executive body. The heads of delegation, assisted by their legal experts, first addressed the Benelux request for a committee of ministers. Intense talks eventually led Monnet to recognise the necessity of the intergovernmental element and, by 12 July, the six delegations agreed upon the creation of a special Council of Ministers intended to harmonise the activities of the HA and the general economic policy of the member states.[14] Both the relationship between these two institutions and the issue of legal remedies remained challenging, and to facilitate the decisions at the political level, the heads of delegation entrusted a committee of jurists to resolve these questions.[15] This committee was placed under the leadership of Paul Reuter, the international law

[10] 'Plan Schuman. Considérations du Département des Affaires Économiques'. Archives Nationales de Luxembourg, 11347 (ANL). Also 'Conversations sur le Plan Schuman. [...]. 3 juillet 1950 (PS/CR5)'. FJM, AMG 3/3/17.

[11] 'Conversations sur le Plan Schuman [...]. 3 juillet 1950 (PS/CR5). FJM, AMG 3/3/17 and 'Conversations sur le Plan Schuman. [...] 5 juillet 1950'. FJM, AMG 4/1/1.

[12] As Hallstein later explained, 'the Schuman-Plan in its constitutional structure intentionally anticipates the institutions of the future all-in Federation of Europe' (Walter Hallstein, 'The Schuman-Plan and the Integration of Europe', Lecture at Georgetown University, 12 March 1952. FJM, AMG 56/2/43).

[13] Schulze and Hoeren, *Dokumente*, 55. Also 'Het Plan Schuman', 24 July 1950. Archieven van het ministerie van Buitenlandse Zaken I, 996.1 EGKS, 40 (AMBZ).

[14] 'Réunion du Comité des Chefs de délégation sur les questions institutionnelles, [...]12 juillet 1950' (PS/G1/CR2). FJM, AMG 4/1/2.

[15] 'Réunion du Comité des Chefs de délégation sur les questions institutionnelles, [...] 21 juillet 1950' (PS/G1/CR4). FJM, AMG 4/1/4.

professor and legal adviser at the Quai d'Orsay who had assisted Monnet during the Schuman Plan's conception, and was composed of H. Blankenhorn, C. F. Ophüls, H. Mosler[16] (Germany), F. Muûls (Belgium), B. Clappier, A. Gros, L. Hubert (France), E. Santoro, A. Venturini, G. De Rossi (Italy), C. Calmes (Luxembourg), M. Kohnstamm and W. Riphagen (Netherlands). Once enough progress was made within that group, Reuter recorded the first agreements on the institutional issues in a memorandum, which was adopted by the heads of delegation on 4 August 1950.[17]

The August memorandum made no clear distinction between the HA and the Community,[18] but the four-pillar institutional framework (HA, Common Assembly, Council of Ministers and Court) was now well in place. The balance of power between the Council and the HA tilted in favour of the latter, despite Spierenburg's protests.[19] The HA was to be granted all the necessary powers to attain the fundamental objectives of the Schuman Plan. In September and October, the negotiators laid out in the treaty all the rules and regulations for the HA to follow or execute very specifically. As a result, the HA enjoyed very little policy-making discretion (quasi-legislative powers) but extensive executive powers, sprawling across numerous treaty provisions.[20] The powers of the HA were moreover curbed by the Council of Ministers whose consent was compulsory when the HA acted in areas not explicitly mentioned in the treaty. In other cases, the HA was only requested to consult with the intergovernmental organ. As a whole, Monnet's original idea to put a supranational authority in charge of the new Community prevailed, but the transfer of national sovereignty to it was as limited as possible.

In the August memorandum's judicial discussion, a permanent Court of Justice, specific to the new organisation, now replaced the ad hoc arbitrational tribunal initially suggested by the French.[21] This constituted an important victory for both the Benelux countries and Germany. They all strongly supported the idea of a permanent Court but for different reasons. Eager to set up a mechanism capable of controlling the HA's discretion, the Benelux states fought for a Court protecting the member states first and foremost. They demanded that the European judiciary be allowed to review not only the legality of a decision of the HA but also its *opportunité*, or

[16] Mosler offered a detailed account of how the ECSC's institutions were shaped during the Paris negotiations in Herman Mosler 'Die Entstehung des Modells supranationaler und gewaltenteilender Staatenverbindungen in den Verhandlungen über den Schuman-Plan', in E. von Caemmerer, H.-J. Schlochauer, E. Steindorff, eds, *Probleme des Europäischen Rechts. Festschrift für Walter Hallstein zu seinem 65. Geburtstag* (Frankfurt/Main:Vittoria Klostermann, 1966), 355–86.

[17] 'Réunion du Comité des Chefs de Délégation, [. . .] 4 août 1950' (PS/G1/CR6). FJM, AMG 4/1/6, and 'Mémorandum sur les institutions' (annexe I du Rapport sur les travaux poursuivis à Paris par les délégations des 6 pays du 20 juin au 10 août 1950). ANL, 11384.

[18] This distinction was established in September by the jurists. Schulze and Hoeren, *Dokumente*, 55.

[19] 'Proposition de la délégation néerlandaise. Directives du Conseil spécial des Ministres à la Haute Autorité', 11 Sept. 1950. Politisches Archiv des Auswärtigen Amtes, Abt.2, SFSP, dos. 103 (PAAA).

[20] Bebr, *Judicial Control*, 10–11.

[21] 'Note sur les résultats des travaux du Comité des juristes à la date du 25 juillet 1950'. FJM, AMG 4/1/5bis.

economic expediency.[22] Finally, since they conceived the Court as an international court, the Benelux countries accordingly considered that only member states, not citizens, should be entitled to avail themselves of it.[23] Belgium in particular opposed the establishment of any direct links between businesses and the Court or, as a matter of fact, between businesses and the HA.[24] Meanwhile, the Germans championed a court that would not merely protect the member states against the excesses of the HA, but also act as a constitutional court. It should be accessible to private enterprises,[25] litigate conflicts of power between the Community's organs, have jurisdiction not only over the HA but also over the acts of the Council of Ministers and the Assembly, and be the only body interpreting the treaty. Moreover, the court alone would handle disputes related to the application of the treaty and the decisions of the HA in the national legal systems in order to create a uniform jurisprudence.[26]

This broad support for a permanent Court left the French with no alternative to reluctantly accepting its inception, but they maintained a firm intention strictly to limit its authority. Initially, the French had themselves recommended that a decision of the HA might be reviewed on legal and on socio-economic grounds but they rejected this second option once the Council of Ministers was added, since an ongoing dialogue between the two organs now apparently provided guarantees that the HA's action would not disturb the national economies. They feared that, if the Court was granted the right to review the economic bases of the HA's action, it would swiftly become a '*gouvernement des juges*', overruling all the major decisions of the supranational body. To prevent such a prospect, it was crucial to restrict the Court's role to merely annulling illegal decisions of the HA, without giving the judges a right to modify them in any sort of way. Besides, opening the Court to private litigants had to be very restricted.[27] The French delegation however appeared divided on the judicial issues: while Monnet and part of his legal team remained

[22] Challenging the expediency of a decision meant that a member state, although it recognised the HA had not abused its power, claimed the HA's decision would have serious socio-economic consequences and therefore requested that the judges also assess in their ruling the economic facts and circumstances in which the HA acted.

[23] See, e.g., 'Observations de la délégation des Pays-Bas (M. Riphagen) sur l'avant-projet de mémorandum', 1 Aug. 1950. FJM, AMG 5/7/4 and Schulze and Hoeren, *Dokumente*, 44.

[24] Schulze and Hoeren, *Dokumente,* 45–6.

[25] Part of the inspiration behind this revolutionary trait in international law was the Mixed Arbitral Tribunals established by the Treaties of Peace in 1919, before which private individuals could appear as parties (F. Muûls 'Plan Schuman. Note pour le C.M.C.E', 24 Aug. 1950. Archives du ministère belge des Affaires étrangères, Dos.gén. CECA 5216 (AMAE/B) and Schulze and Hoeren, *Dokumente,* 46). Hallstein was indeed familiar with the Treaty of Versailles since he wrote his juridical dissertation on its provisions with regard to insurance policies (Walter Hallstein, *Der Lebensversicherungsvertrag im Versailler Vertrag*, Marburg in Hessen: N. G. Elwert, 1926). On the Mixed Arbitral Tribunals, see Paul De Auer, 'The Competency of Mixed Arbitral Tribunals', *Transactions of the Grotius Society*, 13 (1927), xvii–xxx.

[26] Ophüls, 'Premières observations de la délégation allemande', 2 Aug. 1950. Archives Nationales de France, Commissariat général du Plan, 81 AJ 154 (ANF). Also Schulze and Hoeren, *Dokumente*, 44–7.

[27] David Bruce to States Department, 23 June 1950. National Archives and Records Administration, RG 466 McCloy Gen. Records (1949–1952) 2 and Van Helmont, 'Note sur l'entretien de M. Monnet avec M. Blaisse le 18 septembre 1950'. FJM, AMG 6/5/7.

cautious, Reuter was arguably more open to the ideas expressed by the Germans and increasingly thought of the Court in a federal perspective.[28]

Ultimately, the common denominator was that the Court would be able to annul decisions of the HA that violated the spirit and terms of the treaty. The possibility of appeals grounded on the expediency of the decision was discussed but hesitantly dismissed. It was accepted however that the HA's activity should not provoke 'fundamental and persistent disturbances' in the national economies and, in the case of such a serious situation, the Court could be called upon by a member state to annul the HA's decision. The question of opening the Court to private actors was temporarily shelved. Much work still needed to be done properly to frame the Court. Further discussion in August did not enable the delegations to resolve the two most controversial issues (grounds for appeal and potential litigants) but, by the end of the summer, Hallstein felt nonetheless confident the some of his 'constitutional court' paradigm would ultimately prevail.[29]

It became clear by the end of September that the HA would act essentially as an executive body applying the treaty rules by mean of decisions and recommendations. It was also evident that the Court would consequently be an administrative jurisdiction, ensuring that the HA did not overstep its power. In early October 1950, the time came to translate this understanding into treaty provisions. Monnet at this time recruited Maurice Lagrange, a member of the Conseil d'Etat, the prestigious French administrative court, to help in the negotiations. Considering that he had already three competent experts (Reuter, Gros and Hubert) on hand, his decision to involve another jurist with no prior knowledge of the negotiations is puzzling. It is usually thought Reuter was removed from the ECSC conference to assist in the drafting of the Pleven Plan and Lagrange was hired to replace him.[30] Monnet however had already been on the lookout for a new jurist for quite a while, possibly due to Reuter's increasing belief in the idea of a constitutional Court.[31] In late August, René Mayer, the French minister of justice and honorary member of the Conseil d'Etat, helped Monnet to come to terms with the European judiciary and arguably also influenced his decision to recruit a jurist from the Conseil d'Etat.[32] Lagrange was thus deliberately appointed to scale back the Court to resemble the French model of a simple administrative court.

[28] 'Premier avant projet. Mémorandum sur les institutions de la proposition du 9 mai', 1 Aug. 1950. ANL 11349. For Reuter's views on the 'revolutionnary' direct relation between the individuals and the ECSC's institutions, see Paul Reuter, *La Communauté européenne du charbon et de l'acier* (Paris: Librairie générale du droit et de jurisprudence, 1953), 140.

[29] 'Sitzung des Sachverständigenausschusses für den Schuman-Plan dem 24 August 1950'. PAAA/Abt.2, SFSP, 4. and 'Notizen', Hallstein to von Brentano, 8 Aug. 1950. PAAA/Abt.2, SFSP, 53.

[30] Jérôme Wilson, 'Aux origines de l'ordre juridique communautaire', in C. Franck and S. Boldrini, eds, *Une Constitution pour un projet et des valeurs* (Brussels: Bruylant, 2004), 23–7.

[31] Monnet to Mayer, 1 Sept. 1950. ANF, 363 AP 17.

[32] Note by Mayer, 25 Aug. 1950. ANF, 363 AP 17.

Whatever the reason for his hiring, Lagrange played a major role in the framing of the Court. On the basis of his own testimony,[33] he is indeed often given sole credit for designing the European Court on the model of the Conseil d'Etat. His plans, however, faced strong opposition. The other countries resisted because Lagrange's proposals ignored previous compromises and weakened the judicial protection. For instance, they left out important provisions such as the right to act in court against inaction by the HA, in cases of fundamental and persistent disturbances in the national realm, or against a sanction imposed by the HA.[34] The Germans fought back by accentuating the constitutional features of the treaty, particularly in the first of three counter-proposals in which the word 'constitution' defiantly replaced the term 'treaty'.[35] The other delegations also reacted against Lagrange's provisions out of frustration that he drew so heavily on French administrative law's notions and terminology. The Germans, whose judicial system did not include a court similar to the Conseil d'Etat, grew exasperated at Lagrange's constant reference to the French experience.[36]

Three weeks of intense negotiation eventually yielded a Court that defied easy categorisation.[37] More than an international Court, but not quite a constitutional Court either, it was mainly an administrative Court, empowered to ensure that the HA would act within the powers granted by the treaty (Article 33). In many ways, the French succeeded in modelling it on the Conseil d'Etat and in limiting the grounds for appeal so as to exclude the right for the judges to review the economic bases of the HA decisions.[38] Although there were exceptions to the latter rule, Monnet and Lagrange felt their point of view prevailed and no *gouvernement des juges* would compromise the action of the supranational authority.[39] Just as pleased was Hallstein, who considered that Germany had successfully strengthened the Court.[40] This success was, however, limited since this was certainly no constitutional Court. Despite this, a real breakthrough in international law had taken place as the Germans obtained restricted right to recourse to the European judges for private enterprises and their

[33] Interview of Maurice Lagrange by Antoine Marès, 23 Sept. 1980. FJM.

[34] F. Muûls, 'Note concernant le projet de traité relatif au charbon et à l'acier', 16 Nov. 1950. AMAE/B, Dos.gén. CECA 5216. Also Riphagen to Kohnstamm, 13 Nov. 1950. AMBZ, I, 913–1 EGKS, 38; Calmes 'Voies de recours'. ANL, 11372 and 'Compte-rendu de la réunion du 10 novembre 1950'. AMAE/B, Dos.gén. CECA 5216.

[35] Schulze and Hoeren, *Dokumente*, 80–2. It is not clear whether this document was circulated among the negotiating parties. For the two other counter-proposals, see ibid., 83–9.

[36] Schulze and Hoeren, *Dokumente,* 92.

[37] For a complete analysis of the Court's functions, see, e.g., Werner Feld, *The Court of the European Communities: New Dimension in International Adjudication* (The Hague: Martinus Nijhoff, 1966), 34–86.

[38] Paul Reuter, 'Quelques aspects institutionnels du Plan Schuman', *Revue de droit public et de la science politique en France et à l'étranger* (1951), 120 and 124.

[39] 'Note sur la compétence de la Cour de Justice (Article 33 du projet de Traité) '. 15 Jan. 1951. FJM, AMG 11/3/1.

[40] 'Protokoll über die Sitzung des Koorinierungsausschusses für den Schuman-Plan am Donnerstag, den 7. Dezember 50'. PAAA, Abt. 2, Sekretariat. . ., 5.

associations.[41] Securing this unusual feature had been no easy task however and had ultimately required a political decision.[42]

Compared to the limited institutional features outlined in the Schuman Declaration, the Treaty of Paris gave the ECSC quite a comprehensive and detailed legal form, representing a pragmatic compromise of the concerns and goals of the negotiating parties. While Monnet and his team aimed above all to ensure the central position of the HA, the Benelux countries fought to put in place political and judicial protections against the supranational executive. The treaty was essentially of administrative nature: the HA was granted broad administrative powers to apply well-defined rules, and a permanent Court was erected to ensure that the HA's decisions conformed to the treaty. In contrast, the German delegation proposed a federal approach to the legal structure of the Community. Given the limited scope of the ECSC and the disapproval of the other delegations, their influence on the outcome of the negotiations remained limited but their vision and ideas kindled, at this early phase of the European integration process, a spark that would keep growing over the following years. Also worth noticing is that all the institutional and legal questions were settled at the highest political level, and the visions of key negotiators, such as Monnet and Hallstein, were decisive for the particular legal shape of the finalised treaty. The legal experts were very closely monitored at the political level, as perhaps best illustrated by the replacement of Reuter by Lagrange.

Progress or regression? Crafting the EEC's legal system

By the mid-1950s enthusiasm for supranationalism had waned. Plans for the European Defence Community (EDC) and EPC, which were supposed to complement the ECSC and provide a constitutional and political framework for European integration, failed dismally in the French National Assembly in August 1954.[43] In addition, the actual functioning of the ECSC was, both in institutional and economic terms, considered a partial failure.[44] In May 1955, the Benelux countries took the initiative in revitalising the integration process, keeping a strict and narrow plan on economic lines. A carefully crafted memorandum proposed to the ECSC member states the creation of a general common market and, at Monnet's suggestion, various options for further sector-based integration. Deliberately avoiding the word 'supranational',

[41] Companies could not bring to the European Court another enterprise or a member state for violations of the treaty. Furthermore they could only sue against individual decisions concerning them or against general decisions involving a misuse of power affecting them: Scheingold, *The Rule of Law in European Integration* (New Haven: Yale University Press, 1965), 41.

[42] No document allows us to pinpoint when that decision was taken. The legal experts debated the issue on 7 Aug. 1950; unable to settle it, they referred it to the heads of delegation: Schulze and Hoeren, *Dokumente,* 46.

[43] Daniela Preda, *Storia di una speranza. La battaglia per la CED e la Federazione europea* (Milan: Jaca, 1990) and Richard T. Griffiths, *Europe's First Constitution. The European Political Community, 1952–1954* (London: The Federal Trust, 2000).

[44] Raymond Poidevin and Spierenburg Dirk, *Histoire de la Haute Autorité de la Communauté Européenne du Charbon et de l'Acier. Une expérience supranationale* (Brussels: Bruylant, 1993).

they remained vague and restrained on the institutional arrangements necessary for these new European ventures. Common authorities were suggested but there was no mention of a court, a council or an assembly. At the Messina conference in early June 1955, the foreign ministers of the ECSC's member states upheld this cautious attitude. The final resolution of the famous conference gave the green light to new negotiations but remained very circumspect on legal issues as everyone was fully aware of the French difficulties in this matter. The European integration process was put back on track and within two years, two new Communities, Euratom and the EEC, were founded.

Following the Messina conference, a committee of experts was appointed to study how European integration could be furthered. The experts began their work in Brussels in July 1955 under the leadership of the Belgian Foreign Minister Paul-Henri Spaak, known for his strong but pragmatic European commitment. Their task was to examine whether the unification process should be reinitiated by the creation of a general common market or by sectoral integration, and to determine which institutional arrangements would ensure the success of this new project. On the basis of answers provided by the experts to a short questionnaire,[45] Spaak's adviser, Pierre Uri, sketched an institutional framework for the common market in two documents discussed by the heads of delegation in November 1955 and February 1956.[46] Many of the institutional features presented by Uri found their way into the Spaak Report, the 135-page document that concluded the committee's work and recommended both the creation of a European common market and of a European atomic energy community.[47] Although their conclusions were very discreetly outlined in the Spaak Report, Uri and the heads of delegation had, at this stage of the negotiations, already presented key conclusions regarding the institutional system required to establish a common market. The four-pillar structure reappeared, with a Council of Ministers, a Commission, a common assembly and a court. These last two institutions were to be shared with the ECSC to avoid useless and unpopular proliferation of European institutions. If the structure remained the same as the ECSC's, the dynamic envisaged between the Commission and the Council of Ministers would be fundamentally altered as the Council of Ministers was to become the main decision-making body. An innovative formula however integrated the Commission into policy formation by empowering it with the task of submitting proposals to the Council.[48]

In Venice, in late May 1956, the six foreign ministers of the ECSC adopted the Spaak Report and decided to engage in new negotiations to establish the common market and a community of atomic energy. They mandated an intergovernmental conference, again placed under Spaak's leadership, to draft a treaty. The negotiating

[45] 'Documents de travail relatifs aux aspects institutionnels' (n°313), 7 Oct. 1955. ANL, 7708B.
[46] 'Document de travail n°6. Institutions', 8 Nov. 1955 and 'Annexe au document n°6 sur les institutions', 13 Feb. 1956. ANL 7695.
[47] Schulze and Hoeren, *Dokumente*, 354–6.
[48] 'Annexe au document n°6 sur les institutions', 13 Feb. 1956. ANL 7695.

process resumed on 26 June 1956 at the Val Duchesse castle, in the outskirts of Brussels. Four delegations were headed by the individuals already involved in the first round of negotiations: Carl F. Ophüls (Germany), Baron Snoy et d'Oppuers (Belgium), Lambert Schaus (Luxembourg), Ludovico Benvenuti (Italy). The French team was now led by Maurice Faure and the Dutch by Linthorst Homan. The work started seriously in September but was immediately slowed by France's overall hostility to the common market and supranational governance.[49] In July, on the occasion of parliamentary debates over the atomic community, the National Assembly had sent a strong signal to French Prime Minister Guy Mollet's government that it would oppose institutions similar or linked to those of the ECSC.[50] So, when in early September, the heads of delegation tackled the institutional issues, Maurice Faure, despite his own pro-European convictions, adopted a very low profile, leaving his colleagues with the unpleasant feeling that Paris only wished to create mainly technical institutions.[51] While the Benelux, Italian and part of the German delegations still wished to establish a judicial control similar to the ECSC's scheme and to share a common Court for the three Communities, the French now adamantly opposed both ideas and suggested weaker alternatives such a non-permanent court of arbitration with technical experts.[52] As weeks went on, little progress was achieved, especially after France linked her acceptance to winning six concessions concerning the social and economic nature of the transitional period to the common market.[53] These were unacceptable to the other delegations, and thus the negotiations were plunged into a crisis only solved when Mollet and Adenauer met in Paris on 6 November 1956.

In return for important concessions on the transitional period, France abandoned her opposition to the common market and loosened her stance on the institutional questions. This political bargain allowed the heads of delegation to settle unresolved issues. They accepted that a judicial body (and an assembly) would indeed complete the institutional structure, even though the French kept playing down its role and importance.[54] The relationship between the Council of Ministers and the Commission was also decided. The Spaak Report had already announced a shift in power in favour of the Council of Ministers and outlined an innovative way of linking the Commission to the decision-making process. This new formula suited all the delegations, except for the Dutch who from February 1956 onwards had consistently pleaded for the

[49] See e.g. 'Weekbericht n°7. Periode 10 t/m 13 September 1956'. AMBZ, II, 913–100, 6351.

[50] 'Déclaration de Maurice Faure faite lors de la réunion des chefs de délégation de la Conférence intergouvernementale du 26 juillet 1956', 12 Oct.1956, MAE 415/56. ANL, 7714.

[51] Schaus to Bech, 7 Sept. 1956. ANL, 7719.

[52] Note from G. Vedel, 11 Sept. 1956. FJM, ARM 16/10/5. Ludwig Erhard, the German minister of economics expressed a similar reluctance earlier in the negotiations. Hanns-Jürgen Küsters, 'Walter Hallstein and the Negotiations on the Treaties of Rome 1955–1957', in Wilfried Loth, William Wallace and Wolfgang Wessels, eds., *Walter Hallstein: The Forgotten European?* (New York: St. Martin's Press, 1998), 68–9. See also Jean-Marie Palayret, 'Les décideurs français et allemands face aux questions institutionnelles dans la négociation des traités de Rome 1955–1957' in Marie-Thérèse Bitsch, ed., *Le couple France-Allemagne et les institutions européennes* (Brussels: Bruylant, 2001), 105–50.

[53] Hanns-Jürgen Küsters, *Fondements de la Communauté économique européenne* (Luxembourg and Brussels: Labor, 1990), 190–1.

[54] See, e.g., Schulze and Hoeren, *Dokumente*, 372.

strengthening of the Commission.[55] Every other delegation clearly rejected that option.[56] All recognised that an institutional scheme too similar to the ECSC would meet the same fate as the EDC treaty in 1954. In November 1956, aware that they were fighting a losing battle, the Dutch reluctantly gave in.[57] This did not mean, however, that the solution finally accepted was purely intergovernmental in nature. Nobody but the French wanted to reduce the Commission to a mere adviser to the intergovernmental institution.[58] A compromise was painstakingly worked out between the two extremes: decision-making power rested with the Council of Ministers, deciding, as a general rule, by majority, but with many exceptions to the rule, and a critical role was secured for the Commission as it received the monopoly of legislative initiative. Moreover, the Dutch were successful at consolidating the Commission's position by demanding that its proposals could only be amended by a unanimous vote of the Council (Article 149).[59]

Once these issues cleared at the political level, the legal experts could finally start drafting the EEC treaty. By founding a Community with broader and more aspirational goals than the ECSC the treaty was more open-ended than its predecessor. While the first Community was restricted to the coal and steel industry, making it possible to include in the treaty almost all the rules to be applied by the executive authority (*traité lois*), the EEC encompassed the general economy and would be an ever-evolving project. So, instead of listing the rules, the EEC treaty established core principles, objectives and means to achieve these objectives (*traité cadre*).[60] A jurist committee, known as the *Groupe de rédaction*, had been set up by Spaak in June to ensure the legal cohesion of the treaties and to craft the general and institutional provisions. Chaired by Italian diplomat Roberto Ducci, it included former legal adviser of the HA Nicola Catalano (Italy), Yves Devadder (Belgium), Pierre Pescatore (Luxemburg), Willem Riphagen (Netherlands), Joseph Mühlenhöfer, Ernest Wohlfarth, Hans-Peter von Meibom (Germany), Georges Vedel

[55] For the first phase of the negotiation, see, e.g., Note from Riphagen to Verrijn Stuart, 5 March 1956. AMBZ, II, 913–100, 6351 or 'Verslag van de besprekingen in de kring der Hoofden van Delegatie ter Brusselse integratie – Conferentie op 7–9 Maart 1956', 10 March 1956. AMBZ, II, 913–100, 6351. For the second phase, *Pour une Communauté Politique Européenne: Travaux préparatoires (1955–1957)* (Brussels: Bibliothèque de la Fondation Paul-Henri Spaak, 1987), 61–8 and 82 (*Travaux préparatoires*).

[56] von Stempel, 'Aufzeichnung. Betr.: Brüsseler Integrationskonferenz; hier: Institutionen', 10 Nov. 1956. PAAA, Abt.2, 225–30–04, 929.

[57] 'Note pour le ministre des Affaires étrangères et le ministre des Affaires économiques', 13 Nov. 1956. AMBZ, II, 913.000, 6328 and 'De Instituten in de tweede phase van de Verdragsbesprekingen van de Conferentie te Brussel' (12 Nov. 1956). AMBZ, II, 913–100, 6328.

[58] See, e.g., 'Projet du document de travail sur l'établissement d'un marché commun présenté par la délégation française', 1ère rédaction, (May 1956), Archives du Ministère des Affaires étrangères de France, Série DE-CE, 612 and 'Weekbericht n°7. Periode 10 t/m 13 September 1956'. AMBZ, II, 913–100, 6351.

[59] 'Comentaar op het Brusselse Rapport over de gemeenschappelijk Markt', sd. AMBZ, II, 913–100, 6327.

[60] See, e.g., Maurice Lagrange, 'Le pouvoir de décision dans les Communautés européennes: théorie et réalité', *Revue Trimestrielle de Droit Européen*, 1 (1967), 1–29.

and Jean-Jacques de Bresson (France). In December 1956, Michel Gaudet, jurist at High Authority's Legal Service, and Hubert Ehring, legal expert for the ECSC Council of Ministers, joined the group as Spaak wished to associate individuals with a practical understanding of the ECSC's legal system.

In an often quoted article, Pescatore recollected the work of this committee with great delight, emphasising the large leeway given to the jurists to design the Court, as well as the 'remarkable cohesion' of the group composed, with the noticeable exception of the French delegates, of European-minded experts sharing the common aim of creating a strong legal system.[61] For him, these two factors explained not only the legal strength and cohesion of the treaty, but also the fact that the jurists were able discreetly – that is, without the political leaders fully understanding the significance of the provisions – to introduce quasi-constitutional traits into the EEC treaty that would later enable the transformation of the European legal order. Pescatore's testimony however requires some nuancing. Compared to the Paris negotiations, where the novelty of the endeavour prompted the heads of delegation closely to oversee the jurists, the experts of the *Groupe de rédaction* did indeed act more independently and settled many legal issues without direct political involvement.[62] However, some delegation leaders such as Ophüls, Snoy and even Faure shared the jurists' views and acted on relevant occasions as political shields.[63] Furthermore, the group was certainly not as homogenous as Pescatore liked to remember. Some of these jurists, such as himself, Gaudet, Catalano, Devadder or Wohlfarth (who later became the director of the Council's Legal Service) championed supranationalism while others, such as Mühlenhöfer, Ehring and even Riphagen, proved more hesitant. The French stood alone; George Vedel was, like most of his compatriots, mainly interested in Euratom and thus left it to de Bresson to defend the French position in the group, which must at times have been intimidating for someone with a limited knowledge of European law. This being said, the jurists carried just enough weight to inject a small dose of constitutionalism into the treaty's legislative and jurisdictional system through the strengthening of a number of the treaty's important provisions, namely Articles 169–171, 173, 177 and 189.

One of the key components of this strengthening was the preliminary ruling system under Article 177, introduced to solve the pressing problem of uniformity in the interpretation of Community law within the member states. Article 41 ECSC already provided a similar procedure but of much narrower scope since the Court had exclusive jurisdiction to give preliminary rulings merely on the *validity* of Community acts. Since it did not entrust the European judges with the exclusive right to

[61] Pierre Pescatore, 'Les travaux du "Groupe juridique" dans la négociation des Traités de Rome', *Studia Diplomatica*, XXXIV (1981), 158–78, here 164.

[62] This is confirmed in the interview of Riphagen by Duchêne, 18 May 1989, FJM, and in the interview of Gaudet by G. Bossuat, 10 Jan. 1998. European University Institute Interview 603, 13 (EUI INT).

[63] Faure allegedly advised Vedel not to pay too much attention to the somewhat restrictive comments made by the Quai d'Orsay about the Court. G. Vedel in *40 ans des Traités de Rome ou la capacité des Traités d'assurer les avancées de la construction européenne*, Actes du colloque de Rome 26–27 March 1997 (Brussels: Bruylant, 1999), 48.

interpret the treaty, national judiciaries could theoretically do so themselves. The fear of conflicting interpretations prompted the jurists to transform the procedure. Two options were then considered: turning the ECJ into a constitutional court or instituting a preliminary ruling system. In the first option, which was similar to the one defended by the German delegation in 1950, the Court would have exclusive jurisdiction every time that a provision of Community law was involved in litigation, ruling directly and leaving no role for the national judiciaries.[64] After a long discussion in December 1956, this option was eventually rejected since a federal legal system stood no chance of acceptance at the political level. The best possible alternative was the preliminary ruling mechanism. The national courts would apply Community law and, when confronted with a question of interpretation, would refer to the European judges.[65] Directly inspired by the Italian constitutional system, this mechanism was first proposed and put on paper by Catalano. The jurists crafted Article 177 with great care over a period of two months. Two key elements of Catalano's initial proposal were left out of the final provision: the stipulation that the ECJ's rulings would be 'binding' on national courts and the fact that the Court could also render preliminary rulings concerning the *application* of the treaty.[66] While discussing the matter, the jurists agreed that the Court ought not to interfere with the application of European law; this function would be exclusively reserved for the national courts.[67] The result was a system with the 'contours of a federal supreme court system of judicial review, but would depend completely on the co-operation of national courts in order to function'.[68] This would represent a major challenge to the future development of European law.

Article 173, which granted the judges the power to review Community acts against the treaty, revealed a mix of continuity, strengthening and weakening in comparison with its equivalent in the ECSC treaty (Article 33). The continuity and strengthening appear in the first paragraph which opened with an energetic assertion that the Court shall review the *legality* of decisions of the Council and Commission, listing the same four grounds for review and annulment as Article 33.[69] Some strengthening of the

[64] Interview of Michel Gaudet by G. Bossuat, 20 Jan.1998, p. 3–4. IUE INT 603. Interview of Gaudet by Karen Alter, 9 June 1994 (I wish here to thank Karen Alter for sharing this exclusive interview) and Mühlenhöver, 'Aufzeichnung. [. . .] Hier: Gerichtshof', 17 Dec. 1956. PAAA. Abt.2, 225–30–04, 933.

[65] Mühlenhöver, 'Aufzeichnung. [. . .] Hier: Gerichtshof', 17 Dec. 1956. PAAA. Abt.2, 225–30–04, 933.

[66] Draft of 13 Dec. 1956 in Schulze and Hoeren, *Dokumente*, 373.

[67] Mühlenhöver, 'Aufzeichnung. [. . .]. Hier: Gerichtshof', 17 Dec. 1956. PAAA. Abt.2, 225–30–04, 933. See also Michel Gaudet, 'La coopération judiciaire, instrument d'édification de l'ordre juridique communautaire', in von Caemmerer, Schlochauer, and Steindorff, eds., *Probleme des Europäischen Rechts*, 202–25.

[68] Morten Rasmussen, 'Constructing and Deconstructing "Constitutional" European Law: Some Reflections on How to Study the History of European Law', in Henning Koch, Karsten Hagel-Sørensen, Ulrich Haltern and Joseph Weiler, eds., *Europe: The New Legal Realism* (DJØF Publishing: Århus, 2010), 642–3.

[69] Pierre Pescatore, 'Rôle et chance du droit et des juges dans la construction de l'Europe', *Revue internationale de droit comparé*, 26, 1 (1974), 8.

judiciary can also be seen in the withdrawal of the prohibition for the Court to judge the economic expediency of a decision. This omission was not accidental. The ECJ's jurisprudence had demonstrated that it was indeed impossible for the judges to ignore the socio-economic circumstances that bore upon a decision.[70] The *de facto* situation simply became a *de jure* rule.[71] It could also be interpreted as recognition by the negotiators that the main reason behind this principle – the fear of the Court turning into a *gouvernement des juges* – had not materialised, making the rule obsolete. The second paragraph of Article 173 introduced a serious weakening of the Court, however, in that the new text severely restricted direct access to the Court by private parties against Community measures. This change was also intentional and resulted from the group's desire to reverse the Court's practice of widening its access to private persons.[72]

The infringement procedure under Articles 169, 170 and 171 was weakened compared to Article 88 of the ECSC treaty in that the Court could no longer levy fines.[73] A new system inspired by the European Court of Human Rights was instead implemented. The jurists agreed that not all infringement cases should be brought directly before the Court. They provided for the Commission first to deliver a reasoned opinion to a member state that has allegedly failed to fulfil a treaty obligation. If the state then still refused to comply, the Commission could call on the Court (Article 169). A similar two-step procedure was also introduced in Article 170, which permits a member state to bring another member state to Court for failure to fulfil a treaty obligation.[74] While discussing the principles of this article, the jurists agreed that only the Commission or a member state could sue a government for breaking its treaty obligations. This right was not granted to the individuals or companies because it was considered that they were adequately protected by the fact that the Commission, *ex officio*, would pursue any treaty infringement by a member state. No other mechanism was introduced in order to protect individuals against the non-application by their own member states of European law, and most certainly Article 177 was not perceived in this light.[75] This stands in sharp contrast with the ECJ's reasoning in the Van Gend en Loos ruling. Here the ECJ argued with regard to Articles 169–171 that a risk existed and 'recourse to the procedure under these articles would be ineffective (to individuals) if it were to occur after

[70] Scheingold, *The Rule of Law,* 9–40.

[71] Reuter to Stein, 'Observations', Dec. 1959. Stein Papers, Bentley Historical Library, University of Michigan, 12.

[72] Ibid.

[73] This procedure was suggested by Uri in Feb. 1956 and was presented under the paragraph outlining the powers of the Commission ('Annexe au document n°6 sur les institutions', 13 Feb. 1956. ANL 7695).

[74] This was a Dutch demand. 'Note présentée par la délégation néerlandaise', 11 Sept. 195l, MAE 269/56, in *Travaux préparatoires,* 64.

[75] This contradicts the hypothesis by Joseph Weiler that the founding states may have considered individual rights which national courts could protect. Joseph H. H. Weiler, 'Rewriting Van Gend en Loos', in Ola Wiklund, ed., *Judicial Discretion in European Perspective* (London: Kluwer Law International, 2003) 154 and 158.

the implementation of a national decision taken contrary to the provisions of the treaty'. Therefore the ECJ concluded that Article 177 ought to provide an alternative and effective supervision to protect individuals in addition to the infringement procedure.[76]

Finally, the new Article 189 offered a significant tool for the future development of Community law. Following Pescatore's lead, the jurists refined the classification of five legal acts (regulation, directive, decision, recommendation and opinion) and provided clearer definitions than those found in the ECSC treaty. The most important improvement concerned regulations, which were binding in every respect and directly applicable in all member states. By labelling the binding act 'directly applicable', the jurists created 'Community law'. This term was however unacceptable, so the jurists softened the phrasing, but Article 189 nevertheless constituted a breakthrough by giving the Community the right to legislate directly for all individuals within the member states, without going through the national authorities.[77] Directives did not have such a far-reaching effect since they merely bound the member states but left them the choice of how to implement the directive. Functioning more along the lines of classic international law, this category of acts was actually broadly used in the treaty while the regulations were reserved for issues on which precise agreement existed.

On the whole, timid progress was made during the negotiations of the Treaty of Rome to strengthen the EEC's legal nature. On the one hand, the political context subsequent to the failure of the EDC and the broad scope of the project required a consolidation of the intergovernmental traits of the treaty. The Council of Ministers became the core institution of the Community although the system could not function without the Commission. In addition, the treaty was directed at the states and not the citizens, as the discussions on Articles 169–171 demonstrates. On the other hand, new constitutional traits were introduced, traits that would prove absolutely crucial for the future development of European law. Particularly critical was the preliminary ruling mechanism, but then again the provisions under Article 177 were actually much weaker than the system envisaged by the most pro-European jurists. This sort of compromise between these two tendencies was announced at the very outset of the treaty in its preamble. Instead of referring to a future European federation as the Treaty of Paris did, it simply but significantly proclaimed the vague objective of creating 'an ever closer union among the peoples of Europe'.[78] Finally,

[76] Case 26/62 *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen* [1963] European Court Report 1.

[77] Article 189 was drafted by the *Groupe de rédaction* mid-January 1957, but the idea of binding and directly applicable regulations seems to have been suggested by the group of experts working on the common market. Joseph Van Tichelen, 'Souvenirs de la négociation du Traité de Rome', *Studia Diplomatica*, XXXIV (1981), 342. Also *Travaux préparatoires*, 150–3.

[78] Morten Rasmussen, 'From Costa *v* ENEL to the Treaties of Rome: A Brief History of a Legal Revolution', in Miguel Maduro and Loïc Azoulai, eds., *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 83.

it is worth highlighting that, compared to the Paris conference, the group of pro-European legal experts was larger and more diverse. While in 1950–1 the German jurists stood alone in their championing of federal institutions and integration through law, in 1956–7, the *Groupe de rédaction* comprised not only individuals with previous experience of European law (among them were in particular Gaudet, Catalano, Ehring and Riphagen) but also many individuals with strong pro-European ideals. Relatively homogeneous and often backed up by key political leaders, this group assumed more responsibilities in the shaping of the legal nature of the treaty than their colleagues had in 1950–1, which enabled them discreetly to introduce the crucial constitutional traits mentioned above.

Conclusion

The option of transforming the ECJ into a constitutional court, although earnestly considered at various points during the negotiations of the Paris and Rome treaties, was ultimately pushed aside. Instead, the jurists, without any master-plan in mind or even foreseeing how these provisions would play out in the future, introduced small measures towards that end wherever it seemed possible. The compromise empirically achieved between two opposing trends led to equivocal outcomes that could later be used by proponents to construe the legal order according to their views on the European integration. Because of these ambiguities, the further development of European law was left to the individuals who would apply the treaties and use the legal tools provided to advance European integration. Perhaps nowhere was this idea better expressed than in the legal report on the new treaties prepared for the Luxembourg House of Representatives, as it concluded that: 'In reality, the new Communities are more pragmatic than legal; they are based on principles, but above all on the individuals to whom they are entrusted and who, to the extent permitted by the political and economic conditions, will make of them what they want them to be.'[79] This prognosis proved to be accurate. It indeed took a particular conjuncture and the right judges to drive the legal revolution. The treaty's provisions alone could not automatically have produced this outcome by themselves, but they did ultimately make it possible.

[79] Rapport juridique de la Commission spéciale de la Chambre des députés (Adrien van Kauvenbergh). *Bulletin de Documentation du Service Information et Presse*, Luxembourg, 12 (Dec. 1957), 148.

Les négotiations sur les fondations du droit européen: l'histoire juridique des traités de Paris et de Rome

L'article analyse la façon dont les bases pour le développement du droit européen ont originellement été implantées dans les traités fondateurs. Il fait valoir que, malgré un choix délibéré de la majorité des gouvernements de ne pas établir les communautés européennes sur une base constitutionnelle, un nombre réduit de politiciens et de juristes ont néanmoins réussi à insérer dans les traités de Paris et de Rome le potentiel d'une pratique constitutionnelle. En suivant la trame chronologique des négociations, l'article démêle les idées et les décisions complexes qui ont façonné la nature juridique de chaque traité et la Cour de Justice Européenne.

Aushandeln der Grundfesten des europäischen Rechts, 1950–1957: Die Rechtsgeschichte der Pariser und der Römischen Verträge

Dieser Artikel analysiert, wie in den Gründungsverträgen der Boden für die Entwicklung des europäischen Rechts ab den 1960er Jahren bereitet wurde. Er argumentiert, obwohl beide europäischen Vertragswerke eine bewusste Entscheidung der Mehrheit der Regierungen verkörperten, die Europäische Gemeinschaft nicht auf eine Verfassungsbasis zu stellen, schaffte es eine kleine Zahl von Politikern und Juristen trotzdem, das Potenzial für die Verfassungspraxis einzuführen. Der Artikel wirft in einer chronologischen Darstellung jedes Verhandlungsabschnitts ein Schlaglicht auf die komplexen Gedanken und Entscheidungen, die sowohl die rechtliche Gestalt der Verträge als auch die Gerichtsgewalt des neuen Europäischen Gerichtshofs prägten.