


BOOK REVIEW

The Politics of Legal Expertise in EU Policy-Making

by Päivi LEINO-SANDBERG, Cambridge: Cambridge University Press, 2021, 307 pp.

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The European Union (EU) is a “community of law”.¹ EU law has a prominent role in the narrative of European integration, an idea that has long occupied legal scholars.² Yet the picture of EU law includes more than the Treaties, the regulations and directives and even the rulings of the Court of Justice. Lawyers within the Institutions are an often-overlooked part of the picture. “EU law is a living organism”,³ says Päivi Leino-Sandberg, and “its meaning depends largely on the work of lawyers within its confines”.⁴

EU law is, granted, a set of rules and procedures, but what counts as law is largely “defined through professional discourse among EU legal advisers”.⁵ Legislative lawyers are no less than “the law within the political process”.⁶ EU law and the lawyers inside the Institutions have a symbiotic relationship that this book tries to disentangle, for the author makes a comprehensive effort to bring into focus, and into context, what the Legal Services within the EU do. Indeed, EU law and the EU integration process overall cannot be fully understood without awareness of the work of legal advisers of the Institutions.

Gathering the information on what EU legal advisers do is a daunting task, especially if done from the outside. Much of what the Legal Services do never ends up in a document, and even when it does, these memos are not publicly accessible, to the frustration of the researcher. Leino-Sandberg criticises this, although she recognises that confidentiality is oftentimes necessary for the performance of their role.⁷ This tension between the transparency and frankness of legal advice is just one of the many delicate balances flagged

¹ The expression “community of law” was popularised by the first Commission President, Walter Hallstein, in 1962, and later picked up by the European Court of Justice (ECJ) in its seminal case C-294/83 *Les Verts v Parliament* [EU:C:1988:94].

² M Cappelletti, M Seccombe and JHH Weiler, *Integration through Law: Europe and the American Federal Experience* (Berlin, De Gruyter 1986) p 3, constitutes the centre of gravity of these scholarly debates, albeit under the assumption that integration is fundamentally a political process and that law is but one of the many instruments used to achieve it.

³ P Leino-Sandberg, *The Politics of Legal Expertise in EU Policy-Making* (Cambridge, Cambridge University Press 2021) p 14.

⁴ *ibid.*, 5.

⁵ *ibid.*

⁶ *ibid.*, 6.

⁷ *ibid.*, 124.

in the book, and indeed it is one of the elements explaining how the Legal Services fulfil their mission.

In terms of methodology, given the limited sources, the author had to converse with legal advisers and with those who work with them. These interviews appear throughout the book and expose, sometimes in brutal terms, the vivacity and the challenges of a legislative lawyer's role. Stories that occasionally have made it to the press illustrate the relevance of Legal Services, whether they want it to or not, at critical moments.

Despite what the title might suggest, the book is not (only) about the politicisation of legal advice in the European Institutions, but rather it is also about the interplay of politics and the (reading of the) law in the EU with the Legal Services on centre stage, an interplay that explains to a large extent the creation of EU law.

The reading of the book casts several interesting perspectives on this interplay; I would highlight three.

Firstly, EU law is different from national law in many respects that matter for the main line of the book.

On the one hand, the EU legal architecture is very flexible and dynamic.⁸ EU law has been singularly open to teleological interpretations that have enabled European integration⁹ and have paved the way to what the author calls “constitutional changes without constitutional changes”.¹⁰ Certainly, this puts legal advisers in the powerful position of enablers of political processes, sometimes with historic proportions, and the book provides illustrative examples of this, such as the NextGeneration EU proposal, a masterpiece of legal engineering overcoming the “EU cannot issue debt to finance its expenditure” mantra.¹¹

On the other hand, the EU legal foundations are very fragile.¹² Rules and processes matter and legitimise the EU's actions vis-à-vis Member States. *Ex ante* constitutional control within the EU is remarkably thin,¹³ and though one can ultimately rely on control by the Court of Justice, few decisions ultimately reach the Court. Therefore, legal advisers, with their experience litigating at the EU Courts, are the true cognoscenti of the case law, those who can best assess the risk of a dubious action passing the threshold of tolerance of the court. Their assessments, stemming from the internalisation of the case law, are often the last checks on whether or not to take a daring decision. In this context, Legal Services represent a source of legitimacy and authority that is difficult to overstate. Examples of this abound in the book but, in particular, the Council Legal Service being portrayed sometimes as the bulwark of the hesitant and sometimes as the facilitator of the bold conveys the idea superbly.

Secondly, the work sheds light on this little-known profession, portraying these discreet actors of EU integration as skilful navigators of conflicting goals and motivations. Legal advisers have a concurrent loyalty to the integrity of the law, to the EU and to their respective Institution. They must operate, simultaneously, as watchdogs of the law, as legal engineers who channel political will going forward and, ultimately, as staunch defenders in court of decisions that they might have battled against internally. These multiple hats reinforce their authority, but the balance between the dynamism of the political impulse and the permanence of the Union's rules and procedures is delicate. Their credibility stems

⁸ *ibid*, 3

⁹ P Pescatore, “Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de Justice” in *Miscellanea W.J. Ganshof van der Meersch*, vol. 2 (Brussels, Bruylant 1972) p 325.

¹⁰ P Leino-Sandberg, “New Generation EU: A Constitutional Change without Constitutional Change” (*Reconnect*, 13 January 2021) <<https://reconnect-europe.eu/blog/new-generation-eu-a-constitutional-change-without-constitutional-change/>> (last accessed 1 April 2022).

¹¹ Leino-Sandberg, *supra*, note 3, 291.

¹² *ibid*, 9.

¹³ *ibid*, 297.

from their deep knowledge of the law, but if they double down, taking an excessively legalistic approach, their authority evaporates.¹⁴ As the author underscores, what happens to EU lawyers affects the nature of the EU as a community of law.¹⁵

Finally, the book is structured around each of the three Legal Services' peculiarities. This conveys the idea that not only does each Institution have a particular interest, but each Legal Service also pursues its respective Institution's interest differently. Thus, the Commission's Legal Service would be the most independent and the advocate for integration, the Council's Legal Service would be the most politicised and deferential to Member States' concerns and Parliament's Legal Service would be the most informal. The attempt at categorisation is understandable, but I think that the power of informal legal advice is highly contingent on the circumstances, something that one cannot fully grasp through the broad categories that Leino-Sandberg outlines. By and large, once the legal advisers are sitting at the negotiation table, their authority depends primarily on their expertise regarding the question, their credibility vis-à-vis their relevant political authority and the leverage of their Institution in the file in question. Be that as it may, all legal advisers, while potential adversaries in court and in trilogues, have a respectful understanding of their roles and a deep sense of common purpose in their work.¹⁶

To conclude, what emerges from this book is an uncharted perspective on how EU law is brought alive through the work of its legal advisers. While the intricacies of their role might appear enigmatic, the book has the merit of making them accessible to the public. The protagonists of the narrative can rest assured after reading this work that, despite the challenges of their job, what they do matters.

Disclaimer

The opinions expressed in this article are exclusively the author's and do not represent the position of Parliament.

¹⁴ *ibid*, 246.

¹⁵ *ibid*, 193.

¹⁶ *ibid*, 42.