'70 Years of EU Law' – The Politics of a Professional Language

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Abstract

This article is an updated version of the keynote presented at the Max Planck Institute in Heidelberg in January 2024 to discuss and celebrate '70 Years of EU Law' based on a book written by lawyers working in the Commission Legal Service. The book invites us to look backwards at the great achievements of the past. It treats law as an essential, indeed quite indispensable, tool of the integration project. The article argues that examining more carefully European Union (EU) law as a professional language might enable us to see how policy goals turn into rules that we consider binding or authoritative and that make us believe in the beneficiality of whatever is being proposed as representative of 'integration'. In addition to celebrating the role of lawyers in solving problems, we need to remain mindful of their contribution to creating problems; or defining what should be treated as a problem. Legal work is about making choices; and those choices privilege some values or interests over other values or interests. In the absence of Treaty change, it is the ingenuity of EU lawyers that has kept the integration going. And while this ingenuity has enabled the EU to respond to some very real challenges, it has also led to the capture of Treaty interpreta-

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tion by a professional elite whose biases are hidden behind an impenetrable idiomatic language. This paper makes the argument for a broader grammar of EU law that would translate the choices between priorities into political terms and stop seeing democracy as a threat to the European Union, but instead, allow subjecting its legal and policy choices to critical debate.

Keywords

EU – Legal Expertise – Commission – Transparency – Accountability – Legal Service

I. EU Law as a Professional Language

This special issue discusses and celebrates '70 Years of EU Law'. The title has the scent of a historical enterprise, and primarily invites us to look backwards at the great achievements of the past. Much historical work already exists on both law and lawyers in the Commission, demonstrating the centrality of both of them for the European project.[1] Over the 70 years, these supranational legal professionals have seen themselves as the 'institutionalized carriers of the European idea' in the face of political resistance or reluctance.[2] Their central role in EU development has not only enabled the EU to respond to some very real challenges, it has also led to the capture of Treaty interpretation by a professional elite whose biases are hidden behind

1 See e. g. Morten Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952-65', Contemporary European History 21 (2012), 375-397 (384); Jean Paul Jacqué, 'The Role of Legal Services in the Elaboration of European Legislation' in: Antoine Vauchez and Bruno de Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart Publishing 2013), 43-54; Antoine Vauchez, 'The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)', International Political Sociology 2 (2008), 128-144 (138); Antoine Vauchez, 'How to Become a Transnational Elite: Lawyers' Politics at the Genesis of the European Communities (1950-1970)' in: Hanne Petersen, Anne Lisa Kjær, Helle Krunke and Mikael Rask Madsen (eds), *Paradoxes of European Legal Integration* (Ashgate 2008), 129-145; Stephanie Lee Mudge and Antoine Vauchez, 'Building Europe on a Weak Field: Law, Economics, and Scholarly Avatars in Transnational Politics', American Journal of Sociology 118 (2012), 449-492; Karen J. Alter, 'Jurist Social Movements in Europe: The Role of Euro-Law Associations in European Integration (1953-1975)', European Union Studies Association Review (Fall 2007), 6-12.

2 Antoine Vauchez, '"Integration-Through-Law": Contribution to a Socio-History of EU Political Commonsense', EUI Working Papers RSCAS 2008/10 (2008), 16, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1260166.

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an impenetrable idiomatic language. Against such a background, this article examines EU law as a professional language. It studies its in-built preference for Europe, determined by the genetic code of an 'ever closer union among the peoples of Europe',[3] to make visible that which the ruling grammar hides and thus expose the 'politics' of legal professionalism. This is to render the contestability of its conclusions amenable to democratic scrutiny.

Carrying on the European idea and integration more generally is of course a political undertaking. In order to succeed, it has built on the institutionalisation of 'une certaine idée de l'Europe', carried forth by this group of lawyers 'doing' European law who, as Joerges and Weimer remind us,

> 'were assured not only of the centrality of law for integration, but also of the self-sufficiency of their methods and techniques. […] The fictions upon which the project was based fostered its cause: integration is a good in itself which deserves to be promoted. Its promotion "through law" and legal institutions […] is a reliable assurance of non-partisanship and practical wisdom.'[4]

Their permanence, according to Vauchez, depends on the group's 'collective ability to maintain the general view that they have no specific interests or stakes in the European integration process (invisibility)'.[5]

The key message of '70 Years of EU Law' remains loyal to this tradition. It treats law as an essential, indeed quite indispensable tool of the integration project. In this contribution, I argue that this vision is created and upheld by the careful use of the 'syntax' and 'grammar' of EU law by competent professionals in the field.[6] I use 'syntax' to refer to the stylistic structure that distinguishes a native language speaker of EU law in the most orthodox sense, who are very well represented among the Commission lawyers authoring this book. In linguistics, 'syntax' deals with the way that words are used to form phrases, clauses, and sentences. In a professional idiolect such as EU law it consists of professional terms, idioms, set phrases, truisms, and a variety of other types of linguistic units that immediately signal the speaker's competence in that professional speech. The texts collected in '70 Years of EU Law' make elegant use of a rich collection of such units, including

3 G. Federico Mancini and David T. Keeling, 'Democracy and the European Court of Justice', M. L. R. 57 (1994), 175-190 (186).

4 Christian Joerges and Maria Weimer, 'A Crisis of Executive Managerialism in the EU: No Alternative?' in: Gráinne de Búrca, Claire Kilpatrick and Joanne Scott (eds), *Critical Legal Perspectives on Global Governance: Liber Amicorum David M. Trubek* (Hart Publishing 2014), 295-322 (297).

5 Vauchez, 'How to Become a Transnational Elite' (n. 1), 130.

6 Here my approach relies on what Martti Koskenniemi used in: Martti Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Cambridge University Press 2009), 10-11.

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quotations of case law as well as frequent references to locutions such as 'EU values that are common to the Member States', 'rights of EU citizens', 'guardian of the Treaties', 'upholding the rule of law', and 'universality and indivisibility of human rights', and of course bits and pieces taken from EU legislation.

As in linguistics, syntax is a subdivision of grammar. In EU professional legal speech grammar refers to the direction of argumentation, the objective or point that the speaker wants to come across to her audience. That point is usually an invitation to think of law as the servant of integration in the best tradition of neofunctionalism. The dominant grammar of EU law enables us to combine concepts that form a part of the syntax in a way that promotes integration, while simultaneously hiding from sight political choices between different interests. This language is not only meant to impress and persuade the reader. It also makes possible the translation of contested political objectives into the apparently neutral language of law while making institutional ambitions and objectives seem credible, necessary or even legally 'true'. Examining more carefully EU law as a professional language might enable us to see how policy goals turn into rules that we consider binding or authoritative and that make us believe in the beneficiality of whatever is being proposed as representative of 'integration'.

'70 Years of EU Law' relies on the classic justification for EU integration: privileging of functional demand – or perhaps better, the insiders' understanding of those functions – as the primary driver of legal or institutional change.[7] It describes how EU law and EU lawyers have served us well. It conveys the message that they have fought tirelessly for rights for the EU citizens and vulnerable groups that the Commission has secured against difficult and hesitant governments that are driven by false political ambitions. Commission lawyers have – as the subtitles of the book helpfully suggest – 'promoted and protected EU values', 'provided rights to EU citizens' and 'improved their lives' and 'ensured fair competition in the internal market'.

I hope to focus now on issues that the Book does *not* discuss, and while doing so, also look ahead, as I believe that the future should be different from the past. Joschka Fischer was already describing the process of European integration in 2000 as 'a bureaucratic affair run by a faceless, soulless Euro-

7 For a thorough explanation of the 'law of integration', see Julio Baquero Cruz, *What's Left of the Law of Integration? Decay and Resistance in European Union Law* (Oxford University Press 2018). For a historical contextualisation of this line of thinking, see Peter L. Lindseth, 'The Critical Promise of the New History of European Law', Contemporary European History 21 (2012), 457-475 (462-465).

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cracy in Brussels – at best boring, at worst dangerous'.[8] Nearly twenty-five years later, the EU's political integration remains low, decision-making largely confidential, and political control weak. The empowerment of the technocrat has come at the expense of the disempowerment of somebody else.

The book, in its presentation of the 'reflections on the principles and foundations of EU law' of the Commission Legal Service officials,[9] makes this disempowerment visible. The political citizen is entirely absent from the book. The Section entitled 'The Treaty of Lisbon: the citizen at the heart of the democratic life of the European Union' is exactly half a page long and merely quotes a number of Treaty articles.[10] While the book for example mentions the word 'democracy' some 45 times, these mostly refer to democracy as a general value or in the context of action against the Member States breaching the rule of law. More specifically, there is nothing in the book about the rights that EU citizens hold *against* the EU Institutions. While such rights have clearly developed at the level of Treaties, in particular after the Treaty of Maastricht, they have often remained a dead letter.[11] In the syntax and grammar of EU law, which settle what can be professionally said in EU law, it seems that the rights that the citizens hold against the EU find no articulation.

In recent years, we have seen an increase in the volume of research on how technical or scientific expertise fits into the governance process of a democratic society. The question has been raised whether expert-driven policy-making with its scientific vocabularies is squeezing the life out of the democratic process.[12] In the EU context, these concerns are equally relevant also for the role of law and lawyers. The dominant ideas of legal neofunctionalism have enabled the translation of essentially political questions into legal ones. As a result, they can then be resolved in the relative autonomy by legal

8 Speech by Joschka Fischer at the Humboldt University: 'From Confederacy to Federation – Thoughts on the Finality of European Integration', (Berlin, 12 May 2000), 2 available at <https://www.cvce.eu/en/obj/speech_by_joschka_fischer_on_the_ultimate_objective_of_european_integration_berlin_12_may_2000-en-4cd02fa7-d9d0-4cd2-91c9-2746a3297773.html>, last access 18 February 2026.

9 European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 7.

10 Daniel Calleja and Clemens Ladenburger, 'The Future of European Union Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 377-388 (377-378).

11 On this, see also Päivi Leino-Sandberg, 'Disruptive Democracy: Keeping EU Citizens in a Box' in: Sascha Garben, Inge Govaere and Paul Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart Publishing 2019), 295-316.

12 Emilia Korkea-aho and Päivi Leino-Sandberg, 'Law, Legal Expertise and EU Policy-Making: Introduction' in: Emilia Korkea-aho and Päivi Leino-Sandberg (eds), *Law, Legal Expertise and EU Policy-Making* (Cambridge University Press 2022), 1-16.

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professionals according to their own professional 'language and logic'.[13] With a bit of imagination and skill, lawyers can reframe what started out as a political issue as a legal one,[14] thus effectively shortcutting the political process around it.

All this has consequences. In addition to celebrating the role of lawyers in solving problems, we need to remain mindful of their contribution to the creation of problems; or in defining what should be treated as a problem. It is important to consider how particular normative biases and preferences come to be embedded within a regime in its historical trajectory and to explore the processes by which these normative biases are sustained or changed over time.[15] In this respect, during the '70 Years of EU Law' fairly little seems to have changed.

II. Learning to Speak the Language of EU Law

I plan to use my own experience in learning how to speak, write and think like a professional in EU law, how to use its idioms and references in a way that constitutes, for EU professionals, persuasive legal speech. What does it enable to say, and what not?

I started my law studies the same year as Finland joined the EU (1995). The year before Fischer wrote about the soulless bureaucrats in Brussels, I joined the Finnish Ministry of Foreign Affairs (MFA) human rights unit. I stayed there during the first Finnish EU Presidency, which naturally involved a great deal of EU coordination; not only in Brussels, but also in Geneva, Vienna and New York. The Commission legal service people I came across at the time were in particular from the external relations team, most specifically a certain Allan Rosas.

After eighteen months I returned to academia to do my PhD – but I also began to feel a growing frustration with the academic bubble that seemed to believe that 'real world problems' could be resolved by sitting in libraries reading stuff written by other people sitting in libraries; producing one article after another that very few people would ever read and that would be likely to remain irrelevant for any action that was actually taking place. After my

13 Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', IO 47 (1993), 41-76.

14 See also David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* Princeton University Press 2016), 110-116.

15 See Andrew T.F. Lang, 'Legal Regimes and Professional Knowledges: The Internal Politics of Regime Definition' in: Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012), 113-135 (113).

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PhD I left to work for the Finnish government for another nine years to deal with 'real world problems', working primarily on EU constitutional and institutional questions, including the negotiations on the Lisbon Treaty, Fundamental Rights Agency, Passenger Name Record (PNR) Agreements and the setting up of the Banking Union. This is the time when I came across many institutional lawyers in the European Council, different Council formations, Euro group, trilogues, the Secretariat of the European Parliament, during the second Finnish Council Presidency in 2006, in the various working parties I attended, and in the context of Court litigation. These were my 'formative years' that shaped my understanding of EU law and EU lawyers, but also introduced me to the syntax and grammar of EU law.

If you ever had faith in the law providing objective, technical, or clear-cut solutions to the tricky aspects on the negotiation agenda, that faith starts to crumble quickly when watching EU lawyers in action. Legal interpretations turn out to be just that, interpretations. Some readings may be more solid than others – but among competing interpretations the one usually is chosen that enjoys the widest agreement among professionals, that accords with the structural bias of the institution. In these circles, a reading not in conformity with the expected outcome may be judged as weak for being 'too political', or for being 'too academic'.[16]

Yet, politicians often look in the direction of lawyers to ease their pain in trying to deal with intractable political conflicts. Sometimes this means translating distributive choices into the syntax and grammar of legal speech; this may enable finding support for initiatives that are politically problematic. At other times, such translation helps, as it creates a sense of legal obligation for measures that are deemed necessary but for which no one is eager to take the political responsibility. The political context is seldom irrelevant, and the law provides opportunities to serve it.

When inside the institutions, you may get to enjoy the entertainment of Council and Commission lawyers beating each other – something which is regrettably rare, but highly enjoyable when it does happen. More often, however, their lawyers seem to be on a rather consensus-driven joint mission of assigning new tasks to the EU institutions.[17] There seem to be very few problems that could not be solved by inventing a new EU agency or a new procedure led by the European Commission reigning over a new governance

16 Päivi Leino-Sandberg, *Politics of Legal Expertise in EU Policy-Making* (Cambridge University Press 2021), 43.

17 On this, see Päivi Leino-Sandberg and Panu Minkkinen, 'From Separated Powers to Consensual Executive Government in the EU' in: Christina Eckes, Päivi Leino-Sandberg and Anna W. Ghavanini (eds), *The Dynamics of Powers in the European Union* (Hart Publishing 2024), 19-36.

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exercise explained as purely technical in nature, irrespective of the depth of the political struggles it is meant to solve. Faith in European solutions knows few limits – the Commission can always come up with better solutions than Member State authorities, and its belief in those solutions is unwavering.[18]

If you work for a Member State, like I did, it will not take long before you get your government's pet political project killed by Council lawyers, sometimes with a reading you find unjustified, or even biased. You see how often a politically problematic solution may be passed owing to its translation into a legal idiom. It also makes possible the translation of contested political objectives into the apparently neutral language of law while making institutional ambitions and objectives seem credible, necessary, or even legally 'true'. One recent example of this would be the institutional call for the 'principle of solidarity' as a new general principle of EU law; thus justifying a new form of national-supranational and executive-technocratic governance taking over national legislatures' traditional reserve over budgets and each Member State's responsibility for their own finances.[19]

Political power wins, especially when it can be dressed up in credible legal argumentation. Law is flexible, and EU law perhaps particularly so. Its interpretation is not tied to any tightly-woven societal or constitutional structure. Indeed, its very point is to eliminate politics. By the use of the appropriate syntactic and grammatical moves, a persuasive conclusion can be produced that seems no longer 'political' at all. And this takes place in a bureaucratic process that outsiders know little about. When working inside these procedures, you also see how often the legal readings are produced by techniques and arguments that seem contestable and even contradictory. The use of case law is selective nearly by definition, as arguments are built on specific cases or even individual paragraphs that are carefully selected so as to support the desired conclusion, while any case law contravening can be conveniently ignored.[20]

All the situations I just mentioned are situations where professional EU legal speech and the syntax of EU law flourish. A key aspect of the latter is – in what my friend Jan Klabbers would call the 'pissing contest' – the intimate knowledge of the Court's case law (just look at any random page of '70 Years

18 This is what Majone has referred to as 'the EU political culture of total optimism' of EU elites. See Giandomenico Majone, 'The Deeper Euro-Crisis *or*: The Collapse of the EU Political Culture of Total Optimism', EUI Working Papers LAW 2015 (2015).

19 I have discussed this at length in 'Constitutional Imaginaries of Solidarity. Framing Fiscal Integration Post-NGEU' in: Ruth Weber (ed.), *The Financial Constitution of European Integration: Follow the Money?*, 161-188.

20 On this, see Peter Lindseth and Päivi Leino-Sandberg, 'Crisis, Reinterpretation, and the Rule of Law: Repurposing "Cohesion" as a General EU Spending Power', Hague Journal on the Rule of Law 16 (2024), 587-610.

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of EU Law'). The ability to throw around a mind-blowing number of Court references will quickly silence any aspiring young Member State diplomat with a fresh PhD sitting around the negotiation table, and make generalist officials feel uncomfortably that it is indeed high time to stretch one's legs. After experiencing such a pissing contest, it is easy to conclude that it is best to leave it to the EU institutional lawyers in the room to deal with such highly technical and boring issues. Moreover, EU institutional lawyers are – due to their double function as legal advisers and institutional agents before the Court – also deemed to have the competence to anticipate how the Court might be expected to react to the possible solutions on the table. Institutional lawyers know the secret arts of institutional Rules of Procedure and thus can often put their finger on the scale when it is settled who gets to decide matters, where and when. They excel in legal drafting, and generally keep the EU machinery running. This part of the 'syntax' is unknown, invisible, underappreciated, and vital for the European project.

The expertise of institutional lawyers is collective and cumulating knowledge, which is recorded in legal opinions and approved collegially. These opinions develop and refine a doctrine, to be reflected and referenced in future opinions.[21] Conceptual distinctions are stabilised in path-dependent ways. This doctrine is largely invisible outside the EU institutions. It is different from 'law in books'. Like all experts, legal experts tend to believe that their expertise is a 'special' something that cannot be acquired outside the institutional setting,[22] and they are in many ways right in arguing this. This professional legal speech involves much more than just legal skills. It also includes bureaucratic expertise of knowing the EU's inner workings. It is produced by people who are EU officials, and thus paid to look at things from the institutional perspective[23] – a perspective that they either prepossess or assume efficiently. A part of becoming a legal professional in this field is also learning those values and objectives that the leading professionals in the field represent. As Schepel argues:

> '[T]his is hardly a conspiracy theory just an assumption about people taking their professions seriously and having their worldviews determined in part by the way their professional lives are shaped and structured.'[24]

21 Jacqué (n. 1), 48.

22 Leino-Sandberg, 'Politics' (n. 16), 44.

23 For a more detailed explanation of the duties of EU officials, see Päivi Leino-Sandberg, 'Enchantment and Critical Distance in EU Legal Scholarship: What Role for Institutional Lawyers?', European Law Open 1 (2022), 231-256.

24 Harm Schepel, 'Law and European Integration: Socio-Legal Perspectives', European Union Studies Association Review 17 (2004), 1-3 (1-2).

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A part of this expertise is acquiring a linguistic competence specific to their craft: 'the possession of a specific lexicon and a set of idioms plus a grammar that allows for the making of distinctions that frame the world in a specific way'.[25] Most fundamentally, this perspective frames their vision and tends to make considerations such as democratic scrutiny or national debates appear at best a nuisance or, worse, a threat to efficient decision-making in their own institutions. I should add that this is where my own attempts to learn the language of EU law have failed. While I gained insight into the workings of the language, I never quite managed to internalise its worldview, which seemed to be in too fundamental a contrast with my own identity and (openly political) vision of what the European Union should aim to be.

What I learned, however, is that unlike suggested by Fischer, EU lawyers are not soulless zombies but fundamentally nice and committed human beings, many of whom I consider my friends and whose skills never cease to impress me. However, when I meet my friends who work in the Commission for coffee at EXKI just outside Berlaymont they will sigh deep and resignedly at my arguments, and kindly let me know they are 'too political' and 'too biased' to be considered seriously in a grown-up world. Still, I believe that it is the job of the academic to point to the blind spots and biases that are part of being an expert in a field such as 'EU law'.

III. Researching EU Law as a Professional Language

I returned to the University some ten years ago to write a book about my experiences from working with the EU Institutions. This felt like the right thing to do to preserve my own critical voice, but also to protect the values and principles that figure high among my priorities for what the EU should become. In addition to EU law in the classic sense, my book on *The Politics of Legal Expertise in EU Policy Making* (2021) builds on 'new sources of law': interviews, access to documents and information requests and court pleadings that show how court cases have been argued by the institutions – and of course, who won and who lost and with which argument.[26] I also try to describe who these legal experts are, what they do, where they come from, what motivates them, and how they see their own role in the democratic processes and the construction of Europe.

25 See Martti Koskenniemi, 'Performing Legal Expertise: Reflections on the Construction of Transnational Authority' in: Emilia Korkea-aho and Päivi Leino-Sandberg (eds), *Law, Legal Expertise and EU Policy-Making* (Cambridge University Press 2022), 19-42.

26 Leino-Sandberg, 'Politics' (n. 16).

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The specific focus of this special issue is on the Commission and its lawyers. They are not an easy topic for research. When making interviews, they are professional, competent, kind and even reasonably approachable, but they are also the only institutional lawyers who I have come across who will not allow you to record what they say.[27] So you go home from an interview with a bunch of random notes, wondering if they actually told you anything that you can use – which is of course exactly as they planned it.

'70 Years of EU Law' explains how the Legal Service is everywhere.[28] It

> 'provides independent legal advice to the Commission as a whole, in order to assist it to achieve its policy objectives. Taking the time to consider carefully all relevant elements of law and fact, and to listen to all points of view, the Legal Service strives to guide the institution as to the limits of, and opportunities provided by, the law, based on our best assessment of how the law is to be interpreted and applied.'[29]

The 'best assessment of the law' is in itself a policy objective. Any appearance of autonomy is the result of structural bias that is hidden by the appropriate syntactic moves that make the position seem legally 'true'. This was reflected in the many interviews I have conducted. Commission lawyers themselves like to emphasise the separation of the technical from the political, and the non-political nature of their own expertise, stressing their own integrity and professionalism. This is the classic way in which 'lawyers and judges will always and automatically do the most possible good through complacent inattention to the society in which they live'.[30] This reflects the

> 'liberal idea of law as the neutral arbiter of social conflict: It tells the managers of the legal system that their basic instructions are specified by a social process outside of the legal system and that they have no responsibility for that process except to solve the technical problems of devising functional responses that will help rather than hinder it. Hence, the inevitable ambiguities of legislative command, prior case law, custom, or constitutional text need never force a legal system

27 See Emilia Korkea-aho and Päivi Leino-Sandberg, 'Interviewing Lawyers: A Critical Self- Reflection on Expert Interviews as a Method of EU Legal Research', European Journal of Legal Studies 12 (2019), 17-47.

28 According to the Commission website, just during 2021 the Legal Service replied to 17.318 consultations of which 10.536 were on legislative drafts. Annual activity report 2021 – Legal Service, published in May 2022, 3, <https://commission.europa.eu/document/download/487a7f66-e435-4906-a01f-06e98f06a480_en?filename=annual-activity-report-2021-legal-service_en.pdf>, last access 18 February 2026.

29 Daniel Calleja and Tim M. Rusche, 'Introduction' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 11-28 (19).

30 Robert W. Gordon, 'Critical Legal Histories', Stanford L. Rev. 36 (1984), 57-125 (69).

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to the pain of political choice because its managers can always claim to be serving the logic of a historical process or immanent social consensus that exists beyond and prior to politics.'[31]

However, Commission lawyers are also human beings and EU officials. Both of these qualities affect their work. They are 'people with projects, projects of affiliation and disaffiliation, commitment and aversion, and with wills to power and to submission'.[32] Still, these lawyers, like their peers in the other EU institutions, seem genuinely convinced that their legal expertise is – like most expertise is believed to be – technical and 'apolitical' and 'neutral', and they defend it as 'objective' and 'unquestionable'; and justify this with reference to legal professional rules.[33] Moreover, they would very much like to keep the professional circle where the potential scrutiny of their work takes place, small.

In defending their position, they use their own distancing vocabularies.[34] They rely on carefully selected paragraphs from the Court's case law, and emphasise how 'public interest requires that the EU institutions should be able to benefit from the advice of its legal service, given in full independence';[35] how their legal advice is to be understood as 'purely internal exchanges' that should 'be as a rule protected as part of the institution's "space to think"', and justify this conclusion with reference to 'the specific dual nature of the Legal Service, as both the sword and the shield of the legality of Union acts'.[36] Their 'advice should always be 'frank, objective and comprehensive'[37] – language also repeated in '70 Years of EU Law'[38] – which is also why their legal analyses could not possibly be disclosed. This is because the Legal Service of the Commission 'has no self-standing role

31 Gordon (n. 30), 68.

32 Kennedy (n. 14), 111.

33 Leino-Sandberg, 'Politics' (n. 16), 9-13.

34 Martti Koskenniemi, 'Hegemonic Regimes' in: Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012), 305-324.

35 This was argued 'with reference to Standing case-law, see most recently, ECJ, *Hungary v. Parliament and Council*, judgement of 16 February 2022, case no. C-156/21, ECLI:EU:C:2022:97, para. 53, with further references; and ECJ, *Poland v. Parliament and Council*, case no. C-157/21, ECLI:EU:C:2022:98, para. 50, with further references'. What the Commission chooses not to mention is that in both of these cases, the Court established that the legal opinion in question was covered by legislative transparency and the claim for its confidentiality was 'refused unfounded'.

36 Decision of the European Commission Pursuant to Article 4 of the Implementing Rules to Regulation 2001/1049/EC, Brussels, 9 June 2024 C(2024) 3961 final, 16.

37 For this argument made by the Council, supported by the Commission, see e. g. ECJ, *Sweden and Turco v. Council*, judgement of 1 July 2008, case no. C-39/05 P and C-52/05 P, ECLI:EU:C:2008:374, para. 62. The Court rejects the argument in paras 62-67.

38 Calleja and Rusche (n. 29), 21.

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during the ordinary legislative procedure. […] This principle is important, because each institution has its own Legal Service, and each Legal Service has the exclusive prerogative of advising its own institution, but not the others.'[39] In any case, 'It's the College that decides', as the Commission lawyers will tell you. But of course, if anything is more confidential in the EU than Commission legal advice, it is Commission College decision-making.[40] Whatever is recorded in its public minutes is a carefully curated PR exercise. If the Commission ever decides against the advice of its lawyers, as is known to happen from time to time, we certainly will not know about it.

According to the established jurisprudence of the Court of Justice, legal advice given especially in the context of legislative procedures should, as the main rule, be publicly disclosed. Even when the institution itself feels that

> 'disclosure of a document would undermine the protection of legal advice, it is incumbent on that institution to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined. In that respect, it is for that institution to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.'[41]

These considerations are 'clearly of particular relevance where the institution is acting in its legislative capacity' as

> 'Openness in that respect contributes to strengthening democracy by enabling citizens to scrutinise **all the information which has formed the basis for a legislative act**. The possibility for citizens to find out the considerations under-

39 Decision of the European Commission Pursuant to Article 4 of the Implementing Rules to Regulation 2001/1049/EC, Brussels, 9 June 2024 C(2024) 3961 final, 16.

40 As the Commission helpfully explained in response to my recent public access request 'As for the oral procedure, the Director-General of the Legal Service serves as *jurisconsulte* of the College of Commissioners, attends the meetings of the Commission, and provides legal advice in the meetings of the Commission, when requested to do so. The detailed deliberations of the College of Commissioners, including the positions taken by the Legal Service, are not public, and the members of the College and the officials attending the meetings of the College are bound by the secret of the deliberations, in line with Article 9 of the Rules of Procedure of the Commission, which stipulates '*Meetings of the Commission shall not be public. Discussions shall be confidential*'. Decision of the European Commission pursuant to Article 4 of the implementing rules to Regulation 1049/2001/EC, Brussels, 9 June 2024 C(2024) 3961 final, 6.

41 ECJ, *Sweden and Turco* (n. 37), paras 44-45.

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pinning legislative action is a precondition for the effective exercise of their democratic rights.'[42]

'All the information' sets the threshold high. According to the Court, the Commission is to weigh its own interest against the interest of individual citizens. Given the grammar of EU law, it is not difficult to guess who wins when Commission lawyers engage in this balancing exercise. In its case law, the Court has specifically included the Commission as 'a key player in the legislative process' and established that documents produced 'upstream of the legislative procedure *sensu stricto*, which does not formally begin until a legislative proposal is submitted by the Commission' are in view of their purpose covered by the broad obligations of disclosure.[43] In these cases, Commission lawyers have raised persistent worries for 'room for manoeuvre', 'ability to reach a compromise' and 'external pressures which could hinder those delicate processes, during which an atmosphere of trust ought to prevail'. Consequently, for the Commission, the 'public interest would be better served by the possibility of completing those processes without any external pressure'.[44] The claim about external pressure created by Non-Governmental Organisations (NGOs), academics and the perils of public debate is something that I have personally challenged before the Court in respect of disclosure of institutional legal advice specifically – and won.[45] In that case, the Court reiterated that

> 'mere statements relying, in a general and abstract way, on the risk of "external pressure" do not suffice to establish that the protection of legal advice will be undermined […] mere unsupported statements regarding the possibility of "external pressure' on its legal service do not make it possible to consider that disclosure of the requested document would give rise to a real risk that is reasonably foreseeable and not purely hypothetical that the independence of that service would be undermined.'[46]

With this in mind, I would find it difficult to argue that 'all the information which has formed the basis for a legislative act' would not include various legal questions that occupy the Legal Service, such as legal analyses of what specific Treaty articles are understood to enable the institutions to do and what action they should refrain from engaging in. In my view, all of these are

42 ECJ, *Sweden and Turco* (n. 37), para. 46 [emphasis added].

43 ECJ, *ClientEarth v. Commission*, judgement of 4 September 2018, case no. C-57/16 P, ECLI:EU:C:2018:660, paras 86 and 88.

44 ECJ, *ClientEarth* (n. 43), paras 13 and 18.

45 General Court, *ClientEarth and Päivi Leino-Sandberg v. the Council*, judgement of 13 March 2024, joined cases T-682/21 and T-683/21, ECLI:EU:T:2024:165.

46 General Court, *ClientEarth* (n. 45), paras 64-65.

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fundamentally important constitutional questions that should not be regarded as confidential in a structure that claims democratic credentials. Yet, the idioms and references of EU law make such denial of disclosure persuasive for the professionals in the field, however undemocratic or hard to explain it might otherwise be.

A topical example is my request for access to legal advice to three legislative proposals[47] that later continued their life as the EU's massive COVID-19 response, the Recovery and Resilience Facility (RRF). These proposals pioneered an innovative use of cohesion policy that, as a member of the Commission Legal Service describes in an academic article, offered an indirect way to address the infamous asymmetry of the Economic and Monetary Union (EMU), which is why the process of preparing the legal groundwork for these proposals constituted a fierce area of activity for Commission lawyers for several years.[48] Yet, when requesting access to this massively important legal background work, the Legal Service consistently downplayed its own role. In fact, it insisted that its only contribution to this major constitutional transformation had consisted of correcting typing errors at the stage of interservice consultation.[49] To my insistence that there was a 'public interest in the disclosure and publicity of these matters is concerned' demonstrated by the huge increase in cohesion allocations in the EU 2021-2027 budget and the 'magnificent change in how EU citizens' money is being spent' the Commission agreed that 'the public should be informed about how public money is spent. Such information made available to citizens reinforces public control of the use to which that money is put and contributes to the best use of public funds'. However, the Commission found that 'this objective is already achieved by publishing comprehensive information on the EU budget' and the new cohesion policy, which already 'contributes to transparency in the use of public funds. No such link can be established regarding the full disclosure of the legal advice to which you are

47 I requested 'any legal advice in the possession of the European Commission relating to the "Proposal for a Regulation on the establishment of the Reform Support Programme" COM (2018) 391 final'; Reference number EASE 2023/1806; the Proposal for a Regulation of the European Parliament and of the Council on the establishment of a European Investment Stabilisation Function (EISF Proposal)" COM(2018) 387 final', Reference number EASE 2023/1807, and the Proposal for a governance framework for the budgetary instrument for convergence and competitiveness for the euro area, COM(2019) 354 final', Reference number EASE 2023/1808.

48 Leo Flynn, 'Greater Convergence, More Resilience? – Cohesion Policy and the Deepening of the Economic and Monetary Union' in: Diane Fromage and Bruno de Witte (eds), *Recent Evolutions in the Economic and Monetary Union and the European Banking Union: A Reflection*, Maastricht Law Faculty of Law Working Paper series 2019 (3), 48-60.

49 Decision of the European Commission Pursuant to Article 4 of the Implementing Rules to Regulation 1049/2001/EC, Brussels, 22 August 2023 C(2023) 5806 final.

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seeking access'.[50] In other words, as far as the legal questions are concerned, there is nothing to see; the real action is always elsewhere, and communicated at the institution's own discretion. What the Commission Legal Service advises is a matter for the Commission only, and no one else. The Emperor has spoken, the subjects be pleased.

After several appeals to the European Ombudsman, the Commission's final decision to my requests for legal advice arrived in June 2024.[51] In the end, it had suddenly discovered 13 documents containing legal advice consisting of e-mail messages and other informal correspondence within the Legal Service and between the Legal Service and the Directorates-General that were in charge of preparing the proposals. But again, distancing vocabularies were at play. All the actual legal advice could, in its view, be redacted, because it 'concern[ed] purely internal exchanges related not even to any draft versions of future proposals (and therefore not part of [any] legislative file) and thus should be as a rule protected as part of the institution's "space to think".' These arguments are factually inaccurate, given the timeline of the relevant legislative negotiations and other publicly available information.[52] The timing of the documents shows their relevance for drafting the proposals or addressing concrete legal issues that emerged in the negotiations. When downplaying the importance of its own legal work, the Commission actually contradicts itself, as it simultaneously emphasises the high relevance of these

50 Decision of the European Commission pursuant to Article 4 of the implementing rules to Regulation 1049/2001/EC, Brussels, 9 June 2024 C(2024) 3961 final, 3.

51 Decision of the European Commission pursuant to article 4 of the implementing rules to Regulation 1049/2001/EC, Brussels, 9 June C(2024) 3961 final.

52 Deepening the EMU and modernising EU public finances are key strands in the debate on the future of Europe initiated by the Commission's White Paper of 1 March 2017, <https://commission.europa.eu/document/download/b2e60d06-37c6-4943-820f-d82ec197d966_en?filename=white_paper_on_the_future_of_europe_en.pdf>, last access 18 February 2026 which specifically refers to the objective that 'a euro area fiscal stabilisation function is operational' by 2025. Two of the legislative proposals I was interested in are included in the Reflection Paper on the future of EU Finances of 28 June 2017, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017DC0358>, last access 18 February 2026; the letter of intent available at <https://wayback.archive-it.org/12090/20231103120538/https:/commission.europa.eu/system/files/2017-09/letter-of-intent-2017_en.pdf>, last access 18 February 2026; accompanying President Juncker's State of the Union Address 2017, available at <https://commission.europa.eu/strategy-and-policy/state-union/state-union-addresses-jean-claude-juncker_en>, last access 18 February 2026; and the Commission work programme for 2018, available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52017DC0650>, last access 18 February 2026. The two first proposals were approved by the Commission on 31 May 2018. The third one builds on the first two, as mandated by the December 2018 Euro Summit, available at <https://www.consilium.europa.eu/media/37563/20181214-euro-summit-statement.pdf>, last access 18 February 2026. There is little doubt that by the end of 2017 the Commission was working on concrete legislative proposals.

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opinions not only for the RRF, but also for many pending and future proposals, particularly in the context of the future [Multiannual financial framework] preparations, and 'for future programmes, and in particular for on-going discussions on defence financing'.[53] I fully agree, and would argue that this is precisely what creates such a crucial democratic interest for transparency on the matter and constitutes a strong reason to disclose the documents.[54] These are issues, which should be debated more widely before a legal fiat is allowed to settle the outcome. The European Ombudsman agreed, and found maladministration in how the Commission had handled my request.[55]

When Commission lawyers enable the EU to 'make Union economies more resilient and better prepared for the future', and 'invest in green and digital technologies', 'boost energy efficiency', 'create jobs and sustainable growth and allow the Union to make the most of the first-mover advantage in the global race to recovery',[56] they are intimately involved in high politics. What the Commission lawyers do, and how they do their determinations, has consequences for the lives of us all. This calls for a clearly higher standard of democratic scrutiny. However, the Commission is heading in the opposite direction. In December 2024 the Commission updated its Rules of Procedure to establish 'a presumption that access to opinions of the Legal Service 'undermines interests protected by Article 4(1) to (3) of Regulation (EC) No 1049/2001'. As a result, '[n]o access to those documents shall therefore be granted, unless the applicant demonstrates an overriding public interest […].'[57] My experience serves to demonstrate that the Commission is unlikely to ever find its new, inverted presumption overridden, given that it does not see any public interest in public scrutiny of its legal background work. This is among the reason why I have joined a legal challenge to the Commission

53 Decision of the European Commission Pursuant to Article 4 of the Implementing Rules to Regulation 1049/2001/EC, Brussels, 22 August 2023 C(2023) 5806 final (emphasis added).

54 The Court has already established that 'the assertion that the requested document is relevant to a 'wide range of current and future dossiers' does not constitute a detailed statement of reasons' ECJ, *Samuli Miettinen v. Council*, judgement of 18 September 2015, case no. T-395/13, para. 37.

55 European Ombudsman, Decision on how the European Commission handled a request for public access to documents concerning legal advice issued during the preparatory stages of three legislative proposals of 2 April 2025, case no. 2498/2023/SF.

56 This is language from the European Commission Proposal for a Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility of 28 May 2020, COM(2020) 408 final, 1.

57 European Commission Decision 2024/3080/EU establishing the Rules of Procedure of the Commission and amending Decision C(2000) 3614 of 5 December 2024, OJ L 2024/3080, Art. 4 para. 2(c).

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decision adopting the new rules.[58] The basic principles of democracy also apply to the Commission's own work.

IV. The Biases of a Professional Language

Even if legal opinions are difficult to access, in my previous work and research I have read many of them. More of those are by the Council Legal Service, as they are easier to get hold of, but also many by the Commission. These opinions are a useful material for examining the actual grammar of EU law; it demonstrates the rules on which kinds of arguments succeed and which fail; or how rules are interpreted and applied in certain ways instead of other prima facie plausible ways.

What my research suggests is that, contra the implication of the '70 Years' Book, the winning arguments do not simply arise out of a functionalist dynamic, or some unavoidable process that can be called 'integration', which creates specific demands and preconditions that are then translated into legal language by EU lawyers. These outcomes do not emerge from the law automatically or out of their own intrinsic force. In other words, law has not just evolved as a function of the problems it seeks to solve, with institutional lawyers simply advancing that functionalist dynamic in some kind of neutral way. This thinking is a reflection of the

> 'general functionalist method [which] is to construct (or, as is rather more common, to assume without much discussion) a typology of stages of social development and then to show how legal forms and institutions have satisfied, or failed to satisfy, the functional requirements of each stage.'[59]

In this process of 'becoming', Commission lawyers have played a deeply political role, picking, for a purpose, the winning arguments, subject to a later scrutiny by lawyers in the Council. My research on the EU's Covid-19 transformation exemplifies how institutional lawyers have promoted a contested integration agenda by carefully cherry-picking supportive legal arguments while remaining silent on other, possibly more persuasive arguments that go into the opposite direction. The legal background work and the interpretative choices backstage have had massive distributive consequences, a fundamental impact on the functioning of democracy in the EU and its future direction.[60] In this process, EU law has offered lawyers within the

58 See ECJ, *De Capitani and Others v. Commission*, case no. T-146/25.

59 Gordon (n. 30), 64.

60 In more detail, see Päivi Leino-Sandberg, 'The Secret Life of the EU Treaties: NGEU and the EU's "Living Constitution"', European Law Open 1 (2026), 1-23.

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Institution a vocabulary to make choices between values and interests. In such processes, some arguments win, some of them lose, which is the essence of politics. Together these lawyers have enjoyed, in conjunction with the Court, something close to a monopoly in establishing the 'true' meaning of a norm, which in turn has given them a key role in solving disputes and providing compromises.

As I wrote above, the grammar of EU law is strongly geared in a functional direction: everything should go 'forward', and the job of the legal experts is to write their views in such a way that this impression is strengthened.[61] Many analyses of the legal services are persuasive, others less so. The EU's many open Treaty rules and principles are often less relevant than institutional preferences and ways of operation. In the syntax of the language, expressions such as 'allocated powers', 'subsidiarity', 'proportionality' and the likes are secondary to 'efficiency' and 'an ever closer Union'. Such expressions can be bent this way or that way.[62] But though the syntactic arrangement of rules and other locutions remains indeterminate, the outcomes are still easy to predict, if one is familiar with the institutional way of solving questions. 'Solidarity' beats 'no-bailout', as solidarity speaks for more integration while no-bailout speaks for less. There will nearly always be a legal basis that can be identified for any proposal – the only question is where to find it, and how to frame that choice in a manner that is professionally persuasive. When such flexible, pro-integrationist language-use becomes business as usual, any defence of established readings starts to be perceived as political and biased, or indeed 'a reactionary attempt to oppose the trajectory of history'.[63] There is a 'hermeneutic of suspicion', a need to 'uncover hidden ideological motives behind the "wrong" legal arguments of their opponents, while affirming their own right answers allegedly innocent of ideology'.[64]

Words such as 'democracy' and 'citizen' have their formal place in the syntax of EU law. But the background conditions of EU debates and the grammar of EU law turn them into second-order issues. Just look at how applying for documents from the Commission is made so difficult that any

61 In other words, it follows the classic neofunctionalist logic as described in Burley and Mattli (n. 13), 43-44.

62 One topical example is the future use of mixed agreements, where the future involvement of national parliaments and their democratic engagement with the broad spectrum of international obligations that the EU assumes on behalf of Member States is balanced against the interest of institutional efficiency.

63 See Maria Antonia Panascì, 'Unravelling Next Generation EU as a Transformative Moment: From Market Integration to Redistribution', CML Rev. 61 (2024), 13-54 (54).

64 See Duncan Kennedy, 'The Hermeneutic of Suspicion in Contemporary American Legal Thought', Law and Critique 25 (2014), 91-140 (91).

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person in their right mind – or with a life – would conclude there is no point to try to appeal and keep track of missed deadlines when all the Commission does is, to do its best to ignore you. For the European Ombudsman, these systemic and significant delays amount to maladministration and she has urged the Commission to correct this situation as a matter of priority.[65] This speaks volumes about the rights of the 'political citizen' in the syntax of Commission legal advisers, who are largely in charge of drafting Commission responses and defending its position in Court.

Priority is on the functionalist demand to deliver results. Overall, institutional legal experts tend to have little patience for democratic concerns, and I have seldom seen one of them defend national competence.[66] The role of national parliaments is rarely highlighted in professional talk, and national constitutional courts are just the worst. All these factors are at play when lawyers select which interpretation should be seen to conquer in this or that particular instance.[67] But 'for a lawyer with a project, no existential crisis need emerge from what inevitably appears as a strategic accommodation'.[68] The background conditions explain why some of these choices, in terms of legal interpretation, seem 'good' and others 'bad'; some policies appear plausible while others seem implausible. EU law does not generate those choices – but it provides a menu of argumentation to justify whichever choice best serves a particular purpose. The choices reflect background conditions that institutions and their lawyers have come to accept in more or less unthinking terms. These choices are not random but actually predictable, if you understand the background conditions.

So it behoves us, as researchers, to bring these choices to the surface and try to subject them to critical assessment. Transparency demands it, but so too does democracy and the rule of law in the EU.[69] As legal scholars, it should be a matter of professional pride to go beyond just examining and echoing what the EU institutions and their lawyers say. Too often, EU legal scholarship includes a strong element of apology, a willingness to understand

65 European Ombudsman, Special Report of the European Ombudsman in her strategic inquiry concerning the time the European Commission takes to deal with requests for public access to documents of 18 September 2023, OI/2/2022/OAM.

66 The Council Legal Service used to be more firm in monitoring the limits of EU competence, but has, in recent years, let go.

67 One example I have written about earlier is the EU-UK TCA and how silent the procedure remained on the democratic rights of national parliaments in the approval process. See Christina Eckes and Päivi Leino-Sandberg, 'The "EU-UK Trade and Cooperation Agreement" – Exceptional Circumstances or a New Paradigm for EU External Relations?', M. L. R. 85 (2022), 164-197.

68 Koskenniemi, 'Performing Legal Expertise' (n. 25), 36.

69 Again, see Lindseth and Leino-Sandberg (n. 20).

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and justify, stemming from a strong attachment to the same integrationist worldview that the institutional lawyers share.[70]

In EU law, the standard of professional competence is often set by practitioners and members in EU institutions. Their views about what the real 'problems' are, and what are the proper ways to resolve them, become professional standard-setters. To be a professional EU lawyer is to share the grammar of functionalism, and to employ the syntactic rules set by the lawyers in the EU institutions. Moreover, due to the high confidentiality of legal work within the EU institutions and difficulties in gaining access to it, knowledge is often mediated by the insiders, which further strengthens their dominant position in the hierarchies of knowledge in the field.[71] '70 Years of EU Law' is also representative of much of the 'academic' work produced by Commission lawyers. There are no contributions that would be critical of Commission action, or raise concern about its legality; it is a story about 70-year march from one virtuous battle to another in the service of a higher goal. To be clear, I am not saying that anyone's acting in bad faith. I am merely pointing out that this is where things will inevitably land, both in terms of the general cultural ethos in the Commission Legal Service and in terms of the incentives of its individual members. The job for us researchers is to uncover what makes Commission lawyers promote certain readings at the expense of other, equally plausible readings. It is difficult to think of a situation without alternative interpretations, and a choice between them. For critical research, it is also important to demonstrate that institutional practice entails more than just the official rules and policies that the institution claims to follow.

The Commission has a job, which is to promote integration. This determines the grammar of EU law. Yet, what 'integration' means is not always obvious. Law is not only an important tool in making that definition, but from the perspective of institutional lawyers, law itself *is* integration. It creates a sense of what 'integration' really is about and what it is not. Yet, there are alternative and equally legitimate ways to think about 'integration'; in each of them choices are made between different values and interests, involving different kinds of distributional consequences. However, these choices and consequences become invisible behind a professional language with syntactic choices that make a certain way of thinking about integration as the only 'right' way to think, 'required by the Treaties' or in other ways

70 For a similar argument see Duncan Kennedy, 'The Structure of Blackstone's Commentaries', Buff. L. Rev. 28 (1979), 209-382 (217). For a critique of such structural bias in EU legal scholarship, see Leino-Sandberg, 'Enchantment and Critical Distance' (n. 23).

71 Leino-Sandberg, 'Enchantment and Critical Distance' (n. 23), 256.

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legally 'true'. This is a result of '70 Years of EU Law', which has provided us the sense of what the right or the realistic way of understanding what 'integration' is.

And let me be clear: I am not arguing that EU legal experts should or even could be 'neutral'. That would be obviously naïve. All readings of law are political, including my own. It is also normal that the meanings of legal language develop with society and its needs. I am not insisting that EU development should be frozen to some inert interpretation that somebody thinks that the Treaty-makers may have had in mind seventy years ago when they threw away their guns, stopped shooting each other and signed the first Treaty. But the world has changed, and the wishes of the European electorate should matter as well. Currently, they have little chance to affect the institutional agenda. A part of this is the extreme reluctance to open legal debates to critical and democratic scrutiny. The EU remains a sausage factory with production lines that are not attractive to observe. In this process, the job for us academics is to make sure that the integration agenda and the sausage factory that keeps reproducing it both remain subject to debate. In this discussion, this special issue makes a significant contribution in providing a critical engagement by the EU legal academia with the official narratives produced by EU institutional lawyers, highlighting the convenient omissions in the Legal Service's recollection.

V. Towards a New Professional Language

In conclusion, I would like to come back to where I started: my worry about the flip-side of the remarkable success of EU lawyers in taking forward the European idea. This is of particular importance now that it has become clear how difficult it is to advance the integration process through formal Treaty amendments. In the absence of Treaty change, it is the ingenuity of EU lawyers that has kept integration going. And while this ingenuity has enabled the EU to respond to some very real challenges, it has also led to the capture of Treaty interpretation by a professional elite whose biases are hidden behind an impenetrable idiomatic language. This theme is also touched upon by the final section of the '70 Years of EU Law', which talks about the EU Treaties as 'living instruments', and makes tribute to the 'political will of the institutions working together in order to respond to the urgent nature of [the EU's recent] challenges' and the 'evolution of the EU's institutional system through "constitutional practice"'.[72]

72 Calleja and Ladenburger (n. 10), 384.

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This is one way of looking at these developments, but there certainly are even others. With the Treaty anchor loosened, what used to be great constitutional moments have been downgraded to mere questions of reinterpretation. We see how 'bargaining takes place far away from political constituencies' as 'law relegates the world-creating and distributive aspects of institutional power to men and women whose experiences and normative expectations are geared in a particular way' but who still maintain the idea that their legal expertise is neutral.[73] I am thinking of big questions such as EU borrowing, the push for structural reforms in the Member States by using money to buy leverage into their national policies, and the rapidly widening use of conditionality and modes of EU-level planning as a means to give the Union leverage in areas where it does not have formal competence. In recent years, legal interpretations in the institutions on core choices made in the Treaties have tended to fluctuate in response to functional demands. The extent to which the EU remains a Union based on the principle of conferral, and what implications this has, should be subject of an open, constitutional debate. In these contexts, the distancing techniques of the language of EU law seem particularly out of place.[74] The institutions are moving us in the direction of a new professional language where previously held understandings about the limits of the Treaty are quickly being replaced by new 'constitutional practice' that is largely developed backstage, in the Commission and the Council.[75] It is striking that those most eagerly speaking for flexible readings of the Treaty are those who most eagerly wish to isolate the processes where such readings take place from democratic scrutiny and public participation. Exposing these underlying assumptions and key arguments is vital for a critical scrutiny of EU's future direction.

Alternative languages would exist, building on a more expansive legal grammar that would recast choices of priorities in political terms. It requires input from all of us in EU legal academia to make the insufficiency of the language of EU law spoken in the institutions to meet the democratic demands of today. Joseph Weiler once wrote, '"[d]emocracy" was not part of the original DNA of European integration. It still feels like a foreign implant'.[76] For the EU to survive for another seventy years, and also for it to

73 On the setting in relation to transnational law more broadly, see Koskenniemi, 'Performing Legal Expertise' (n. 25).

74 See Lindseth and Leino-Sandberg (n. 20).

75 Leino-Sandberg, 'The Secret Life' (n. 60), 10.

76 Joseph H.H. Weiler, '"Europe in Crisis – on Political Messianism", "Legitimacy" and the "Rule of Law"', SJLS12 (2012), 248-268 (268).

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become a less obvious choice as the punching bag for political extremists, old practices will need to change. It will need a new DNA – one which depends less on lawyers and technocrats taking a leading role in the background. We need to foreground the hard work of democracy, particularly now as the EU seeks new powers to raise and spend money. We need to stop viewing democratic processes, particularly at the national level, as mere nuisance in an otherwise expert-driven process.

Legal work is about making choices; and those choices privilege some values or interests over other values or interests. For this reason, 'the contours of responsibility of each are more complex than some general theories of moral responsibility and the pleas of some public officials would have us believe'.[77] As Duncan Kennedy writes,

> 'lawyers are often – maybe usually – more than just legal technicians. They shape deals and they make law. They invent new forms of social life, they fill gaps, resolve conflicts and ambiguities. They mold the law, through the process of legal argument, in court, in briefs, in negotiations. It won't do to say, look, I molded the law this way, and this way, and this way. I've made a lot of law. But don't hold me responsible for the actual content of the law I made. […] The trouble with this is that your activity is not neutral, and the better your legal skills, the less neutral you become. Lawyers think up new rules, ideas, arrangements and arguments. Which ones win, which ones judges and juries and legislatures adopt, is a function of who has the legal talent on their side, as well as a function of the justice of the position.'[78]

I believe it is imperative to make the pattern of legal choices visible, as well the justifications on which they are based. If legal advice is not publicly available, it is difficult to have a public debate on its quality or to contest its conclusions by putting forward alternative readings.

As researchers, we are placed between the dialectics of being either inside or outside the EU legal professional community. We also need to position ourselves in relation to continuity and change of this professional language. Commitment to the language of EU law is required to maintain influence, prestige and professionalism. At the same time, it is important to maintain one's identity and critical power as an external observer.[79] My contribution is

77 Dennis Thompson, 'Ascribing Responsibility to Advisers in Government', Ethics 93 (1983), 546-560 (560).

78 Duncan Kennedy, 'The Responsibility of Lawyers for the Justice of Their Causes', Tech L. Rev. 18 (1987), 1157-1164 (1160).

79 On this, see also Martti Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power', Humanity: An International Journal of Human Rights, Humanitarianism, and Development 1 (2010), 47-58 (55).

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aimed as an attempt to change the language 'from within' while making some of its arguments and background assumptions visible. With this, I hope to create conditions for a broader grammar of EU law that would translate the choices between priorities into political terms and stop seeing democracy as a threat to the European Union, but instead, allow subjecting its legal and policy choices to critical debate.

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