CHAPTER 15

The Missing View from the Cathedral

European Law during and after Colonies and Empires

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15.1 INTRODUCTION

While a growing literature has emerged over the past few years on the entanglements between European law and (post)colonialism, this field of research is still in its early stages.[1] Stable bibliographies have not yet been constituted, there are still no 'usual suspects' and the research agenda and possible legal and archival materials remain in large part to be identified, particularly those from non-European sources.[2] Strikingly, European law scholars are latecomers to the study of postcolonialism. While some scholars have attempted to identify European Union (EU) law's 'darker legacies', in particular in connection to the fascist and Nazi past of some of its founders,[3] very few so far have worked on the *colonial* heritage in European law

Many thanks to Hanna Eklund for her thoughtful comments on the text.

[1] There has recently been a variety of initiatives including panels at the 2023 European Union Studies Association congress and an important conference promoted by Philipp Dann and Signe Larsen at the Humboldt Law School on *European Public Law after Empires* (3–5 May 2023) from whose discussions this paper has also benefited.

[2] Just to give one example: Megan Brown's excellent book on the relationship between Algeria and the European Communities before and after independence relies almost exclusively on European sources: M. Brown, *The Seventh Member State. Algeria, France and the European Community* (Cambridge: Harvard University Press, 2022).

[3] See C. Joerges and N. Singh Galleigh (eds.), *Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism in Europe* (London: Bloomsbury, 2003); and a recent revisitation of the project twenty years after, C. Joerges, *"Darker Legacies of Law in Europe": The Florence Project Revisited. Accomplishments, Failings, Lessons* (European University Institute, Law Working Paper, 2023). Most recently, see M. Mangenot (ed.), 'Un légiste de Vichy à la Communauté européenne. Maurice Lagrange, une biographie professionnelle' (2023) 1 *Civitas Europa* 9.

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whether in the field of European human rights,[4] or in the field of European economic law.[5] While historians of European integration projects have long insisted on the importance of colonial issues,[6] particularly in the negotiations and implementation of the founding European treaties,[7] the research agenda is only now emerging in the field of European law. It is hard to account for this 'almost complete absence of a reckoning with the legacy of empire and imperialism',[8] particularly when compared with the field of international law in which these colonial and postcolonial perspectives have long been explored.[9] One reason for this 'colonial amnesia' probably has to do with the general narrative of European integration that has long dominated EU historiography, that which saw European integration as a post-imperial project. In this account, it was not until Europe lost its position as the centre of gravity of international relations in the immediate aftermath of the Second World War, and under the effect of the collapse of empires, that a specifically *European* project, detached from European international law, became thinkable and desirable. As such, the European legal projects appear as an essential part of the decolonization process, thereby leading postcolonial

[4] W. Hommes, *Co-creating European Human Rights. How the Netherlands Received and Shaped the European Convention on Human Rights (1945–2022)*, PhD thesis, University of Amsterdam (2023).

[5] D. Caruso and J. Geneve, '*Melki* in Context. Algeria and European Legal Integration' in B. Davies and F. Nicola (eds.), *EU Law Stories* (Cambridge: Cambridge University Press, 2017), pp. 506–527; H. Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome' (2023) 34 *European Journal of International Law* 831.

[6] For an early interest in the 'collective colonialism' of the European Communities, see C. Cosgrove, 'The Common Market and Its Colonial Heritage' (1969) 4 *Journal of Contemporary History* 73; and, more recently, P. Hansen and S. Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (London: Bloomsbury, 2014).

[7] See however B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001); P. Bonino, *La France face à la Convention européenne des droits de l'homme*, PhD thesis, Cy Cergy Paris University (2016); Brown, *The Seventh Member State*.

[8] See S. Larsen, 'European Public Law after Empires' (2022) 1 *European Law Open* 6.

[9] See M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001). For a general assessment of the acquis and some limits of TWAIL (Third World Approaches to International Law) scholarship, see A. Anghie, 'Rethinking International Law. A Twail Perspective' (2023) 1 *European Journal of International Law* 7.

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scholars to focus their research almost exclusively on *national* legacies.[10] This gap may be reinforced in the case of EU law, whose claim of a *sui generis* nature entails a radical rupture with the past – departing from both national legal traditions and international law.[11] As it recognizes no predecessor, the historically dominant paradigm of EU law has tended to consider itself *immune* from the traces of colonialism which are purportedly all to be found in the Member States, seen as the carriers of colonialism.[12]

And yet, running against this *immunity thesis*, as recent scholarship has pointed out, the various European legal projects in the fields of human rights or economic law did not emerge in a historical vacuum devoid of colonies and empires. The European Convention on Human Rights (ECHR), the Treaty of Paris and the Treaty of Rome were not crafted and theorized *after*, that is, as a result of the failure of the Member States' 'colonial projection', but rather *during* empires. Four out of the six founding Member States were still colonial powers.[13] And there is more: these legal undertakings were all framed at the time of the '*late* colonial State',[14] that is under the long shadow of colonial wars but also by a variety of attempts to revamp and 'modernize' the colonial relationship in response to the increasing mobilization for independence. Among these, the striking semantic transformation of French colonialism in the post-Second World War period which moves in the context of the Constitution of the Fourth Republic (1946) from 'Empire' to 'French union', and explicitly rejects 'all systems of colonization founded upon arbitrary rule'.[15] In a context open to reformist strategies, social and legal sciences are called upon to play a new role in staging a more 'ethical' and more 'participatory'

[10] K. Nicolaïdis, B. Sèbe and G. Maas (eds.), *Echoes of Empire. Identity, Memory and Colonial Legacies* (London: Bloomsbury, 2014).

[11] On the centrality of the *sui generis* claim in the emergence of EU law, see A. Vauchez, *Brokering Europe. Euro-lawyers and the Making of a Transnational Polity* (Cambridge: Cambridge University Press, 2015).

[12] Strikingly, even the promoters of a 'historical turn' in European law scholarship, including the author of these lines, have most often neglected to fully thematize the colonial issue in their account.

[13] Eklund, 'Peoples, Inhabitants and Workers'.

[14] J. Darwin, 'What Was the Late Colonial State?' (1999) 23 *Itinerario* 73.

[15] Amélie Imbert, Presentation at the *European Public Law after Empires* conference, Humboldt Law School, May 2023 (on file with the author).

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colonial relationship.[16] The European legal projects in Strasbourg, Luxembourg or Brussels are deeply rooted in this context. While there are many domestic and international factors that account for the development of pan-European legal undertakings,[17] their intersection with colonialism and in particular the rights of the colonized in terms of freedom of circulation and human rights have rarely been explored. In fact, the connections between the two (the European colonial and the European law projects) are many: for some, particularly among the French political class, the making of the European Communities could be seen as a way of consolidating the colonial state through a Euro-African project whereby European countries would mutualize their colonies and create a third pole between the Soviet 'East' and the American 'West'; for others, particularly among national bureaucrats and diplomats, European law projects (whether in the ECHR or the Paris and Rome treaties) were seen as a potential threat to the colonial relationship and therefore needed to be negotiated with their eventual effects on colonial territories in mind. Thereby, the research agenda is not just about continuities of colonialism into European law and politics that could be identified in particular in the asymmetrical African–EU relationship and in the management of issues of migration or in the export of the rule of law;[18] it is also about 'entanglements' as definitions of 'Europe', 'European-ness', 'European law', 'European human rights', 'freedom of circulation' or 'European citizenship' were initially framed and discussed in that context.[19]

[16] On the new context for colonial expertise in the post-Second World War period, see two recent books: F. Wagner, *Colonial Internationalism and Governmentality of Empire, 1893–1982* (Cambridge: Cambridge University Press, 2022); D. Matasci, *Internationaliser l'éducation. La France, l'UNESCO et la fin des empires coloniaux en Afrique (1945–1961)* (Villeneuve d'Ascq: Presses universitaires du Septentrion, 2023); and the review by J. Vogel, 'Les experts coloniaux dans la décolonisation : une histoire très politique' (2023) 51 *Histoire Politique* 1–15.

[17] See for example M. Duranti's work pointing at the conservative and Christian-democratic rationales in the writing of the ECHR as a shield against the development of Welfare States and secularism in Europe: M. Duranti, *The Conservative Human Rights Revolution. European Identity, Transnational Politics and the Origins of the European Convention* (Oxford: Oxford University Press, 2017).

[18] See e.g. R. Kleinfeld and K. Nicolaidis 'Can a Post-Colonial Power Export the Rule of Law? Elements of a General Framework' in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2008), pp. 139–170.

[19] Caruso and Geneve, '*Melki* in context', p. 506; Eklund, 'Peoples, Inhabitants and Workers'.

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And yet while historians and lawyers are bringing increasing evidence that European law's trajectory is not *immune* from colonial issues but may also be a 'carrier of continuity', some scepticism still arises from some quarters of EU law scholarship: is this yet another 'critical' agenda adding yet another layer of infamous reputation to the European project and, most importantly, moving research away from the most pressing issues of our time? The response to such criticism is that this historical detour is not just an erudite interest in the past but a research methodology through which legal scholars can recover the sense of contingency of the trajectory taken by their field of specialization: first, by rediscovering the space of possible interpretations that was initially open for Euro-lawyers and, second, by identifying the social and political dynamics that contributed to frame what are now the taken-for-granted issues, definitions and alternatives in the field of European law.[20] In other words, we don't need to put yet another nail in the coffin of the golden legend of a pacific, democratic and liberal European legal project born out of the defeat of Nazism and out of the end of empire.[21] Rather, we need to think of this reopening of the colonial archive of the European law projects as a way to better grasp the enduring contradictions and tensions that still lie at the core of European law as it rearticulates such questions as residence, nationality, mobility and identity. Still, as in any emerging field of research, there is a risk attached to making grand but vague and rhetorical claims, and to promoting another type of monocausal explanation to substitute the previous ones. I therefore suggest adopting an analytical framework and research alleys able to assess 'continuities' and 'entanglements' between European law and (post)colonialism before tentatively trying to identify what this new research agenda could bring to the field of European law scholarship.

15.2 CONTINUITIES AND ENTANGLEMENTS: A TENTATIVE RESEARCH FRAMEWORK

While the search for continuities and transplants is a classic in the field of postcolonial studies, allowing us to look beyond the formal legal and

[20] But see I. Solanke's Chapter 16 in this volume.

[21] See Duranti, *The Conservative Human Rights Revolution*.

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political rupture introduced by formal independence, the analytical toolbox with which one can trace these (or the absence thereof) is not always equally robust, as testified to by the great variety of words that are used for this purpose: 'legacies', 'continuities', 'footprints', 'imprints', 'traces' and so forth. In dealing with these forms of transplants and entanglements between colonial issues and European law projects, one should be wary about simple, causal and linear claims of transplants or transfers moving from one context to another and looking for mere similarities or resemblances across time or space. Rather, I suggest a research agenda more centred on *processes of transfer*, reinvention, adaptation and incorporation that allow both continuities *and* discontinuities to be accounted for.[22] Such a shift in focus is particularly adapted to the law as lawyers are masters in the art of building legal arrangements that mix the old and the new, thereby continuously reinventing the legal tradition. It is well known that in legal milieux value references to the 'legal tradition' and courts tend to frame judicial decisions within the boundaries of precedents (be they *stare decisis* or *jurisprudence constante*, depending on the specifics of one's national legal culture). While lawyers do innovate, they often do so by claiming that their solution is the least innovative and the most faithful to the 'legal tradition'.[23] As such, lawyers (together with bureaucrats) are arguably key producers of continuities,[24] and therefore provide a privileged entry-point into the study of continuities between the (post)colonial contexts and European law projects. These legal 'carriers of continuity' include individual or collective biographies, forms of knowledge and professions/institutions.[25]

The first and most obvious form of continuity between these different contexts is biographical: Euro-lawyers are connected to a variety of colonial

[22] I am adapting here the analytical framework built by Wolfram Kaiser and Kiran Patel in their study of continuities between practices and experiences of international organizations and the European Communities: W. Kaiser and K. Patel, 'Continuity and Change in European Cooperation during the XXth Century' (2018) 27 *Contemporary European History* 165.

[23] On these issues, see K. McIntosh and C. Kates, *Judicial Entrepreneurship. The Role of Judges in the Marketplace of Ideas* (Westport: Greenwood Press, 1997).

[24] On colonial continuities among EU bureaucrats of the Commission's Directorate General on Cooperation, see the classic work by V. Dimier, *The Invention of a European Development Aid Bureaucracy* (London: Palgrave Macmillan, 2014).

[25] Kaiser and Patel, 'Continuity and Change'.

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experiences (previous or simultaneous) that may have shaped their world view as they contributed to shaping the course of European legal integration.[26] European law's 'founding fathers' were most often *juristes d'Etat* close to diplomatic or executive circles and seasoned actors of international relations playing a variety of representative roles outside of the '*métropole*' (successively or simultaneously) such as bureaucrat, judge, minister, politician or professor.[27] Massimo Pilotti, for example, who was the first president of the European Court of Justice (1952–1958),[28] played a critical role as the League of Nations' vice-secretary general in the Italo-Ethiopian conflict (1935), in which he proved to be extremely loyal to the interests of the Italian government.[29] Likewise, Michel Erpelding has identified a number of Euro-lawyers who came to the fields of European human rights (Arnold Struycken and Polys Modinos) and of the European Communities (Nicola Catalano and Michel Gaudet) from an experience in the 'semi-colonial context' of the mixed arbitration tribunals created in the wake of the Versailles Treaty.[30] The trajectory of Nicola Catalano, who would later become one of the most zealous advocates of a constitutional reading of EU law, is particularly telling: he spent three years in Tangier as the legal adviser of the mixed court of the international zone of Tangier (1951–1953), often presented as a 'form of federal integration' (albeit at the expense of the Sultanate), right before he joined the legal service of the High Authority.[31] Other cases

[26] On this, see V. Dimier's Chapter 10 in this volume.

[27] On the specific position of these *juristes d'Etat* in international law, see M. Koskienniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice' in *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations in the Field of International Law* (New York: United Nations, Offices of Legal Affairs, 1999), p. 495; and G. Sacriste and A. Vauchez, 'The Force of International Law. Lawyers' Diplomacy on the International Science in the 1920s' (2007) 32 *Law and Social Inquiry* 83.

[28] Later renamed Court of Justice of the European Union (CJEU).

[29] V. Fritz, *Juges et avocats généraux de la Cour de justice de l'Union européenne (1952–1972). Une approche biographique de l'histoire d'une révolution juridique* (Frankfurt: Klostermann, 2018).

[30] See M. Erpelding's contribution to this volume (Chapter 11) and his paper: 'Juristes internationalistes, juristes mixtes, *Euro-Lawyers*: l'apport de l'expérience semi-coloniale à l'émergence d'un droit supranational' (2022) *Clio@Themis*.

[31] On the biography of N. Catalano, see also T. Pavone, 'Making the European Court Work. Nicola Catalano and the Origins of European Legal Integration' in D. Gallo, R. Mastroianni and F. Nicola (eds.), *The Italian Influence on European Law: Judges and Advocates General, 1952–2000* (Oxford: Hart Publishing, 2024), pp. 33–62.

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include Michel Gaudet, member of the *Conseil d'Etat* (Council of State), legal adviser to Jean Monnet and first head of the Commission's legal service, who joined EEC institutions immediately after a three-year period as legal adviser to the French protectorate in Morocco (1946–1949). Interesting cases include not only successive positions but also the managing of *simultaneous* positions in colonial and European sites of negotiations. One prominent example is Ganshof van der Meersch, a top-ranked magistrate (*avocat général près la Cour de cassation*), who was at the turn of the 1960s a central sponsor of EU law in Belgium as founding member of the Association belge pour le droit européen (Belgian Association for European Law) (1958), author of one of the first handbooks on EU law (1961)[32] and founder of the Institut d'études européennes of the Université libre de Bruxelles (Institute for European Studies of the Free University of Brussels) (1963),[33] while at the same time a specialist of Congo law,[34] and most notably the minister in charge of 'affaires générales en Afrique et de la décolonisation du Congo' ('general African affairs and decolonization in Congo') (1960) negotiating and organizing the transition to independence.[35] For lack of a systematic prosopographical study of these first Euro-lawyers, it remains impossible to assess the extent to which the two communities of (Euro- and colonial) lawyers overlap. While the moving from one experience to another is by no means a proof of influence (*post hoc ergo propter hoc*, as Latinists would say), a consistent collective overlap of the two worlds of lawyers would certainly be indicative of possible continuities and circulations across contexts.

[32] W. J. Ganshof van der Meersch, *Le droit des Communautés européennes – Structures – Conseils, Haute autorité, commissions* (Strasbourg: Faculté internationale pour l'enseignement du droit comparé, 1961).

[33] *Miscellanea Ganshof Van Der Meersch* (Brussels: Bruylant, 1972).

[34] Cf. W. J. Ganshof van der Meersch, 'Le droit électoral au Congo belge' (Université libre de Bruxelles, XVème journée interuniversitaire d'études juridiques, Bruxelles, Bruylant, 1959), at 25; W. J. Ganshof van der Meersch, *Fin de la souveraineté belge au Congo. Documents et réflexions* (Brussels: Institut royal des relations internationales, Martinus Nyhoff, La Haye, 1963).

[35] The ECHR system also abounds with similar biographical continuities: see for instance B. F. M. van Asbeck, first Dutch judge at the European Court of Human Rights who came to Strasbourg after an experience as special adviser to the governor general of the Dutch colony of Indonesia in 1945: see W. Hommes, *Co-creating European Human Rights*, p. 34.

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Hence, the interest in considering a second driver of continuity, one that runs through *forms of knowledge* as legal categories or forms of legal reasoning, circulates across domains of law and periods of time. Here is not the place to tackle the old connections between the idea of Europe as a civilization and the colonial project. As sociologist Craig Calhoun has pointed out, before being a work of introspection, the objectification of Europe and its identity first took place through 'non-Europeans', in particular colonized countries in which the elements of 'European civilization' had to be inculcated, or through the foundation of American universities based on the exaltation of a 'European culture' (culture here referring to the study of the classics, the humanities, etc.).[36] Likewise, colonization was often perceived by the colonized as being, broadly speaking, 'European'. However, in the post-Second World War context these entanglements between the field of European studies and the colonial project have become more concrete and specific, as the search for 'modernized' forms of colonial domination and the building of new regional organizations at the level of European countries run parallel to and influence one another.[37]

One first terrain of observation to assess these forms of continuity lies in the drafting of European treaties as they display the making of foundational legal categories for Europe *under colonial constraint*. While the progressive narratives of the 'rise and rise' of post-Second World War liberal Europe most often take 'Europe' – and therefore 'Europeans' – as a fixed geographical meaning, the opening of the colonial archive points at the early and oft forgotten legal, political and bureaucratic battles surrounding the definition in terms of legal entitlements and geographical scope of implementation. A case in point is the open debate at the French Parliament about whether people from the colonized territories should be represented at the parliamentary assembly of the Council of Europe: the minister of foreign affairs, Robert Schuman, argued against such representation because 'only European problems will be raised and

[36] C. Calhoun, 'European Studies: Always Already There and Still in Formation' (2003) 1 *Comparative European Politics* 5.

[37] See for example, M. Madsen, 'From Cold War Instrument to Supreme European Court. The European Court of Human Rights at the Crossroads of International and National Law and Politics' (2008) 32 *Law and Social Inquiry* 137.

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dealt with at the Council of Europe'; Leopold Sédar Senghor, a prominent independentist leader and MP from Senegal, in sharp opposition, argued vigorously that the representatives of overseas countries and territories should be included in the European parliamentary assembly in the name of equality of political rights. This was a clear example of the opposition between an exclusionary and an emancipatory usage of the 'European' signifier.[38] In a similar vein, we might also recall the intense discussions between various French bureaucrats from, on the one side, the Ministry of Colonies and, on the other, the Ministry of Justice regarding the recognition of individual petitioning before the European Court of Human Rights (ECtHR) as well as those regarding the 'colonial exemptions'. Interestingly, the solutions eventually adopted were neither homogenous over time, nor clear-cut, but resulted in the creation of many ad hoc statutes and transitional measures. Thus the French 'overseas countries and territories' (to which Algeria, as a French *département*, did not belong) were not part of the European Coal and Steel Community (1951) nor of the failed European Defence Community project, nor of the ECHR, while the Treaty of Rome negotiators (under strong French pressure) made a point of including them, devoting a fourth part of the treaty entirely to delineating their 'special relations' and intermediate position through a series of derogations (second-rate forms of citizenship status).[39]

A second interesting terrain of observation lies in the circulation of legal categories used to define these post-national forms of relationship (*union*, *community*, *federalism*, *association*) both as they are currently used and as they circulate back and forth between the colonial and the European contexts. While projects such as the *Union française* (French Union) 1946 Constitution or later the *Communauté française* (French Community) 1958 Constitution, or even the 'Dutch–Indonesian Union', may be forgotten nowadays in light of their short-lived existence, they were essential parts of the many attempts (particularly inside Ministries of the Colonies and Foreign Affairs Ministries) to craft a 'renewed' colonial relationship. Discussions on the notion of 'colonial federalism' are

[38] P. Bonino, *La France face*, p. 19.

[39] See Eklund, 'Peoples, Inhabitants and Workers'.

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proof that these discussions did not develop along separate tracks but rather with interesting and still unexplored circulation between colonial and non-colonial (legal) sciences. A striking example of such overlap is Claude-Albert Colliard, a central figure of post-Second World War French legal academia. One of the founding figures of EU law as the author of a handbook on *Organisations européennes* (1967) and the co-founder of *Revue trimestrielle de droit européen* (1963), he had earlier been a regular contributor to the *Revue juridique et politique de l'Union française* and in 1950 to the *Mélanges* in honour of international lawyer Georges Scelle with a paper on '*fédéralisme colonial et Union française*' ('colonial federalism and the French Union') which questions the *federal* nature of the *Union française* – a system in which 'la suprématie métropolitaine se combinerait avec l'autonomie limitée des colonies' ('metropolitan supremacy would be combined with limited autonomy for the colonies').[40] Scholars have also made interesting claims regarding long continuities. Amélie Imbert, for example, has shown how the colonial legal laboratory has contributed to uncouple categories of nationality, residence, citizenship and rights, making it possible to accumulate different types of citizenship in both the 'Union citizenship' of the *Union française* and of the EU.[41]

The third and last driver of continuity lies in *legal institutions and professions* themselves which engage in a complex balancing act between facts, contexts and norms. As they have claimed over the decades to build a '*jurisprudence constante*' beyond the many *political* ruptures of their parent organization (enlargements to new Member States, 'exits' of colonies through independence, revisions of the founding treaties, etc.), both the CJEU and the ECtHR have indeed been crucial producers of continuity.[42] Marise Cremona offers a striking example in this volume through her in-depth analysis of the Opinion of Advocate General

[40] C.-A. Colliard, 'Fédéralisme colonial et Union française' in *La technique et les principes de droit public, Etudes en l'honneur de George Scelle* (Paris: LGDJ, 1950), p. 655.

[41] Amélie Imbert, Presentation at the *European Public Law after Empires* conference, Humboldt Law School, May 2023 (on file with the author).

[42] A. Vauchez, 'Keeping the Dream Alive. The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence' (2012) 4 *European Political Science Review* 51–71.

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Trabucchi in the *Bresciani* case.[43] Famously the key player in the *Van Gend en Loos* decision on direct effect, Trabucchi argued that the first Yaoundé Convention (which brought together the ex-colonies of the six founding Member States) had to be granted direct effect as the convention was a *direct concretization* of Article 136 EEC on the Treaty of Rome's association of oversees countries and territories, thereby pursuing the 'special nature' and 'privileged relationship' between the EEC and these countries.

Generally speaking, in the building of legal continuity across colonial and postcolonial situations, one needs to consider the professional *habitus* of lawyers who are particularly experienced in the production of double discourses that affirm the universality of norms while concretely organizing the exceptions that undermine their validity on the (colonial) ground – something Pierre Bourdieu used to coin as lawyers' 'pious hypocrisy',[44] which can only be accounted for through the functioning of a legal field socializing its agents to a legal *illusio* of detachment and disinterestedness. In his ongoing historical research into the making of Europe's mobility regime post-Second World War, Karim Fertikh shows this *habitus* at play as European labour lawyers frame the mobility regime of workers coming from ex-colonies in the 1960s. While accepting that the possibility of 'mobility' and 'circulation' between the European Communities and the former colonies is maintained in theory in the context of independence, he highlights the continuing forms of discrimination and exclusion through a complex reworking/rearrangement of legal notions such as residence, nationality, citizenship, rights and mobility.[45] The freedom of establishment which is granted to European companies in the former colonies in Africa is not matched by the freedom of movement of African workers – this inequality of treatment has been justified by a 'European preference', by a racialist belief that European immigrants would integrate better and by the idea that the equality of treatment would endanger the development of colonial

[43] M. Cremona's Chapter 2 in this volume. Case 87/75 *Bresciani*, EU:C:1976:18.

[44] This is of course most striking in the discourse on citizenship in the colonies: L. Blevis, 'Quelle citoyenneté pour les Algériens?' in *Histoire de l'Algérie à la période coloniale (1830–1962)* (Paris: La découverte, 2014), p. 352.

[45] K. Fertikh's Chapter 4 in this volume.

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territories.[46] Many of these postcolonial stories read like striking exercises in legal hypocrisy or at least in double discourse when formal inclusiveness (maintaining, for example, the façade of universality of human rights) goes with de facto exclusion (exclusion or inequality in the implementation) through a series of regimes of transition, special statutes and exceptions, oft displaying law as a laboratory of monstrous legal solutions.

15.3 EUROPEAN LAW REVISITED: FROM CATHEDRAL TO ARCHIPELAGO

Now that we have identified a variety of grounds and levers through which circulations across contexts and periods may happen, it may be interesting to question how this postcolonial turn of European law scholarship could potentially help us reconsider some of the classic questions in the field. I follow two possible threads here: one regarding the very narrative of European legal integration, and the other, the canonical notion of EU legal order.

Even though we are not yet at a point where a new narrative can be built, the emerging (post)colonial scholarship contributes to reposition the genesis and dynamics of post-Second World War European law projects beyond the liberal and progressive genealogy of both the ECHR and the EEC by questioning the colonial and the racial entanglements of these European projects. This line of research provides a further complexification – adding to the revisionist historiography of European law projects promoted by scholars that have contributed to re-embed the making of European human rights in (conservative, Christian-democrat, free-market) contexts and influences.[47] Under the spotlight of the chapters of this volume, European legal integration becomes less internal and Eurocentric and displays new encounters, tensions and forms of domination.

What this scholarship also brings to light is a different image of EU legal order which looks less like the 'cathedral' often praised by EU law scholars and more like a complex 'archipelago' whose legal borders and

[46] Ibid.

[47] Duranti, *The Conservative Human Rights Revolution.*

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principles appear blurred. When looked at not from 'core Europe' but from the former colonies and current peripheries, one discovers a profoundly different view of the canonical notion of EU legal order whose *borders* have been continuously discussed and (re)negotiated and whose *uniqueness* has been questioned and contested by the persistence of competing legal regimes inherited from colonial regimes. This is true when it comes to defining *who are the 'Europeans'* of EU law or of European human rights law. With the legacy of past colonial regimes, there is indeed no clear-cut and mutually exclusive relation between 'Europeans' and 'non-Europeans' but rather a whole array of *intermediate regimes* that allowed for the continuation of special (oft discriminatory) regimes for the former 'inhabitants of the overseas countries and territories' mentioned in the Treaty of Rome with a mix of legal rights, paternalism and asymmetric relations.[48] This is equally true when it comes to defining *what is the 'European' territory of the EU law* (or of the ECHR's law) whose perimeter remains a contested notion with changing legal geographies in the complex relationship between 'Europe' and the associated countries and territories. One striking example is that of the fishing rights of EU fishers in Greenlandic waters, which have been maintained even after the completion of the decolonization process (and the related exit from the EU).[49] As we explore the many *grey areas* and porous borders, we discover the extra-territoriality of EU legal order and its continuing effects through the 'overseas country and territory' status in a form of postcolonial extension of EU law. Thereby, the postcolonial outlook brings into evidence the structural tension in notions of 'Europe' and 'Europeans' which can serve at one and the same time including and excluding functions and further complexifies the relationship between the (theoretical) map and the (actual) territory of EU law.[50]

[48] See the protracted judicial case of the Moroccans formerly working for the SNCF (French train company) at the time of the colonies as studied by L. Zevounou in Chapter 5 of this volume.

[49] U. Neergaard's Chapter 13 in this volume.

[50] A. Vauchez, 'The Map and the Territory. Re-assessing EU Law's Embeddedness in European Societies' (2020) 27 *Maastricht Journal of European and Comparative Law* 133.

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