

The Politics of Legal Expertise in EU Policy-Making

Legal advisers working in the institutions of the European Union exercise significant power, but very little is known about their work. Notwithstanding the handful of cases where legal matters find their way into the news, legal advice remains invisible in EU policy-making. For more than ten years Päivi Leino-Sandberg was a part of the invisible community of EU legal advisers and participated in the exercise of their power. In this book she shares her insights into how law and lawyers work in the EU institutions, what their roles are and the impact they have on EU decisions within the decision-making structure. She draws on interviews with over sixty EU lawyers and policy-makers: legal experts who interpret the Treaties within the institutions, draft legislation and defend the institutions before the EU Court. Telling the true stories behind key negotiations, this book explores the interplay and tensions between legal requirements and political ambitions.

Päivi Leino-Sandberg is Professor of Transnational European Law at the University of Helsinki and Director of its Master's Programme in Global Governance Law. She is Deputy Director of the Erik Castrén Institute of International Law and Human Rights. For over ten years she worked as a legal adviser for the Finnish government, participating in numerous EU and international negotiations and court cases.

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For Ida and Elli

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Foreword

Most institutions have important back-room figures, who are rarely in the spotlight but nonetheless shape in decisive ways how an institution acts and changes over time. These actors often escape scrutiny, either because they intentionally shun the limelight or because they conduct tasks which are difficult for the media or general public to understand. In such situations, it is particularly important for academia to bring to wider attention those who shape power in the national and transnational spheres.

This is precisely what Päivi Leino-Sandberg's new book on legal advisers in the EU does. It is the work of a part-insider – someone who has worked as a government adviser in Brussels and Luxembourg, and who therefore understands the business of legal advice from the participant's point of view. It is also, though, a book that casts an analytical and academic eye on the role that legal advice plays in shaping the EU legal order as a whole.

As Leino-Sandberg shows us, EU legal advisers are a curious species. Partly, they are shaped by the institutions for which they work and their political dealings. By looking at different types of advisers, we therefore learn something important about the EU institutions and their interrelations. They are also, however, shaped by their professional contexts; their loyalty is to the integrity of the law and the European legal community in which they are engaged. By examining legal advice, we also therefore learn something important about Europe's legal culture and the implicit norms of the legal professionals that have built the field of European law we see today.

As the book compellingly argues, this set of EU legal professionals are crucial norm-producers in the European legal order. If much of EU law is normally seen from the perspective of the cases that reach the European courts, what about those cases (a far larger number) that do not and the norms that are produced through informal compromises between legal

advisers and their political masters? Leino-Sandberg's book therefore has a strongly pluralist message. It establishes a new category of actors in the European legal space, to whom we should turn our attention and who often establish the frame within which more studied institutions act.

To do so, the book also employs an inter-disciplinary methodology. By interviewing over sixty legal advisers across a range of institutions and positions, Leino-Sandberg collects a wealth of qualitative data, bringing to life the insights (and humour!) of a group never before the subject of serious empirical study. The book is likely therefore to serve as a starting point for future scholars in history, law or sociology attempting to re-construct developments in the EU legal order in the last tumultuous decade.

While, as Leino-Sandberg concludes, EU legal advisers, are mainly a diligent and earnest group, focused on putting out day-to-day fires, they crucially constrain EU politics, re-asserting every day the centrality of law to the project of European integration. By putting at the centre of attention the often neglected, Leino-Sandberg's book makes a significant addition to EU law scholarship. We thus warmly welcome it to the *Cambridge Studies in European Law and Policy* series.

Mark Dawson
Laurence Gormley
Jo Shaw

Acknowledgements

The cover of this book will be familiar to my compatriots. It draws its inspiration from Finland's most famous political painting, realised by Edvard Isto in 1899 as a reaction against the February manifesto of Czar Nicolas II. Today, the painting hangs in the National Gallery and is reproduced in almost all Finnish history books written over the last hundred years. The original painting depicts the Russian double-headed eagle harassing the maiden of Finland in an attempt to rob her of a book bearing the title 'LEX'. The painting symbolises the struggle undertaken by Finland – at the time an autonomous Grand Duchy in the Russian Empire – to maintain its own constitutional order during the second period of Russification. I am not suggesting that the EU can be compared to Russia in the late nineteenth century but opted for the cover for the general theme that it illustrates: faith in the law constraining politics. The version on the cover of this book is by a contemporary Finnish artist, Katja Tukiainen, whose cute, strong and quick-witted girls often talk about serious matters. Here, they defend the law.

Defending the law and debating its role in today's Europe is a central theme in my book. A somewhat critical approach to the EU came naturally to me after my legal studies at the London School of Economics and Political Science. In my doctoral research under Martti Koskenniemi's supervision back in Helsinki, I continued my investigation of the relationship between law and politics. The EU has always been my primary point of interest. While I cherish the very real benefits it has brought to the people of the continent, I have never shared the instrumentalist view of EU law that is common among many EU lawyers. Much of my academic work has concerned questions of democratic governance in the EU. In that area, I see much room for improvement.

I first encountered EU legal advisers when serving the Finnish government as one myself. When preparing various EU dossiers, the opinions of the Legal Services were carefully analysed, and often also criticised as convoluted or even nonsensical. The files that appeared on my radar were those involving legal problems of some kind, and they had a formative influence on my perspective. The dynamics between the Commission and the Council Legal Services and their huge impact on negotiations could be seen in various Council bodies. I saw this legal interaction as a crucial forum in the operation and evolution of EU law, yet one which had so far never been critically assessed. In EU debates the law was often a political notion, and sometimes it appeared infinitely flexible in adapting to political will.

In my own state – perhaps partly for historical reasons – the argument that something is unconstitutional or against the Treaties always carries the day. The Finnish Parliament is closely involved in EU matters and is often concerned about the limits of EU competence. A legal adviser working for the government is often tasked with explaining whether a proposed EU measure is in accordance with the Treaties. Many times I found myself explaining that in the EU Treaties limits are fluid and determined in a highly political process, the outcome of which is often impossible to predict with certainty. When political winds blow favourably for a new step in integration, there are very few Treaty obstacles that could not be overcome with suitably innovative legal drafting.

As I care about the future of the EU, the nonchalant manner in which this broadening often takes place worries me. It seems to burden the fragile legitimacy of the EU in a manner that should be taken more seriously in the EU institutions. EU scholars often celebrate any creative interpretation that enables the broadening of EU action into previously unexplored areas. However beneficial a new step in integration might be, there are always risks and alternatives involved. For ill-wishers, a perception of the EU being careless about the limits of its competence or selective in its devotion to its Treaties is prime ammunition. The book is born out of this dilemma.

I started the project in late 2015. The manuscript was completed in November 2020, but some minor updates have been added during the process of copyediting. I am grateful to a number of colleagues and friends who helped me along the way, even though the responsibility for conclusions and errors remains mine.

First of all, I owe a big thank you to all the legal advisers who agreed to be interviewed for the purpose of the project. This book could not have been written without your help, and I hope it does justice to your work.

I am also indebted to the Academy of Finland for granting me a five-year fellowship to conduct this research. I only stayed in that position for roughly a year before taking up a chair at the University of Eastern Finland and later in Helsinki, but the year was a luxury that enabled me to embark on a rather ambitious project.

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This book is for our two cute, strong and quick-witted daughters, Ida and Elli.

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