



## ARTICLES

### USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF CJEU – SECOND PART

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## TOWARDS A LEGAL HISTORY OF EUROPEAN LAW

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ABSTRACT: European law differs from other fields of law in that it has no well-established tradition for legal history. This places European law at a real disadvantage when it comes to critically reflecting upon its own tradition of great classics as well as understanding the relatively conflictual role European law plays in the EU today. This *Article* first offers a few reflections about why there is no established tradition for legal history in European law and what this means for legal scholars in the field. In a second step, the *Article* explores what kind of legal history could be developed in the field of European law. Ultimately, the *Article* concludes that legal history today generally has adopted mainstream historians' contextual and archival approach to explore the role of law in broader society. This Special Section consequently represents an important first step for legal scholars of European law to venture into the field of legal history using the recently opened historical archives of the Court of Justice of the European Union.

KEYWORDS: legal history – European law – history of European integration – law studies – politics studies – international law.

### I. INTRODUCTION

The academic field of European law has existed for more than sixty years.<sup>1</sup> During those years, the field has grown increasingly diverse and European law has become an important

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<sup>1</sup> The academic field of European law has no precise date of origin. Research in European law took place from 1951 when the Treaty of Paris was ratified and onwards. However, in the first decade it was typically scholars from the fields of international law and comparative law, who were interested in European law. It was



part of the curriculum of Law Faculties across Europe. As the European Union has grown in importance, so has the legal order that underpins it and as a result European law has acquired a distinctive international profile, as the most developed regional regime of law in existence.<sup>2</sup> However, in one respect, European law differs from other fields of law: it has no well-established tradition for legal history.<sup>3</sup> This may not be surprising considering the relative youth of the field compared to other parts of the legal discipline, but it places European law at a real disadvantage when it comes to critically reflecting upon its own tradition of great classics as well as understanding why the role of European law in the EU remains conflictual even today. This *Article* begins by offering a few reflections about why there is no established tradition for legal history in European law and what this means for legal scholars in the field. In a second step, the *Article* explores what kind of legal history could be developed in the field of European law. This is done by taking a closer look at recent developments in research on legal history of international law, a particularly fertile field at the moment, as well as the important progress that historians have made in the last decade towards producing a basic history of European law, which remains somewhat overlooked by legal scholars. Ultimately, the *Article* concludes that contemporary legal history has adopted mainstream historians' contextual and archival approach to explore the role of law in society. This Special Section consequently represents an important first step for legal scholars of European law to venture into the field of legal history using the recently opened historical archives of the Court of Justice of the European Union (CJEU).

only in the late 1950s that the first research institutions and law departments dedicated to European law were established at European universities. The first academic journals followed from 1961 onwards. It was arguably first with the breakthrough of a constitutional interpretation of European law in the two seminal judgments of *Van Gend en Loos* and *Costa v E.N.E.L.* that the new field of law acquired a clear identity that separated it from other fields of law. For recent analysis of the transnational academic field of European law: A Boerger and M Rasmussen, 'Transforming European Law. The Establishment of the Constitutional Discourse from 1950 to 1993' (2014) *EuConst* 199; R Byberg, *Academic Allies. The Key Institutional Institutions of the Academic Discipline of European Law and Their Role in the Development of the Constitutional Practice 1961-1993* (PhD dissertation University of Copenhagen 2017). Two national case studies have also been published recently on respectively Germany and France: AK Mangold, *Gemeinschaftsrecht und Detsches Recht: Die Eruropäisierung des Deutschen Rechtsordnung in Historisch-empirischer Sicht* (Mohr Siebeck 2011) and J Bailleux, *Penser L'Europe par le Droit: L'invention du Droit Communautaire en France* (Daloz 2014).

<sup>2</sup> M Goldmann, 'The Significance of the Treaties of Rome in the History of International Law' paper presented at the conference 'Treaties as travaux préparatoires' (22-23 June 2017) Max Planck Institute for European Legal History.

<sup>3</sup> With the term "well-established tradition for legal history", I mean the existence of a legal history of European law researched and taught both at Law Faculties and History Departments across Europe. At the moment, the only research institution working on the legal history of European law is the Max Planck Institute of Legal History and Legal Theory in Frankfurt [www.rg.mpg.de](http://www.rg.mpg.de). I do not argue of course that no contributions have been published on the history of European law. In fact, I have been involved in starting up such research together with a network of younger historians since 2008, and from 2013 to 2016 also directed a collective research project on the topic at the University of Copenhagen [www.europeanlaw.saxo.ku.dk](http://www.europeanlaw.saxo.ku.dk).

## II. THE LACK OF LEGAL HISTORY OF EUROPEAN LAW

The main reason why the field of European law has no tradition for legal history is obviously its relative youth compared to other parts of the legal discipline such as national constitutional law, comparative law or international law. However, a second reason has arguably been the reluctance of both the CJEU and EU law scholars to confront the extent to which the field of European law from the very beginning was permeated by pro-European and even federalist ideology. Legal scholars and practitioners established the field of European law in close cooperation with the supranational institutions of the European Community from the early 1960s onwards. The legal service of the European Commission in particular, but also the CJEU, organised, financed and facilitated the development and the transnational coordination of this new field of law<sup>4</sup> and lawyers working in the European institutions contributed with great effect and quantity to the development of legal scholarship.<sup>5</sup> Legal scholars in turn played a key role in legitimating the case law of the CJEU as the latter gradually established a constitutional legal order to underpin the future European federation that ultimately never appeared.<sup>6</sup> As a result, the field of European law was dominated by a pro-European attitude to the legal questions at stake until at least the early 1990s, and to some extent still remains so today.<sup>7</sup>

The strong ideological element in European law is by no means unique if we look at the broader legal discipline. International law provides another example of how the legal discipline can be intertwined with an ideological project. From the very start of the professionalization of the discipline in the 1870s, legal scholars and practitioners believed international law would help transform or even replace international power politics with an international rule of law.<sup>8</sup> However, as a result of the ideological bias of European law, the reception by legal scholars and practitioners of the first analyses of the history of

<sup>4</sup> M Rasmussen, 'Establishing a Constitutional Practice: The Role of the European Law Associations' in W Kaiser and JH Meyer (eds), *Societal Actors in European Integration: Polity-Building and Policy-Making 1958-1992* (Palgrave Macmillan 2013) 173; R Byberg, 'A Miscellaneous Network: The History of FIDE 1961-94' (2017) *American Journal of Legal History* 142; R Byberg, 'The History of *Common Market Law Review* 1963-1993. Carving out an Academic Space for Europe' (2017) *ELJ* 45.

<sup>5</sup> According to Schepel and Wesseling the proportion of legal writings by institutional actors went significantly beyond that of other fields of law. H Schepel and R Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) *ELJ* 164.

<sup>6</sup> A Boerger and M Rasmussen, 'Transforming European Law. The Establishment of the Constitutional Discourse from 1950 to 1993' (2014) *EuConst* 199; R Byberg, 'The History of *Common Market Law Review* 1963-1993' cit.

<sup>7</sup> For a new historical analysis of the ideological dimension of the seminal book series – *Integration Through Law* – from the European University Institute consult: R Byberg, 'The History of the Integration through Law Project. Creating the Academic Expression of a Constitutional Legal Vision for Europe' (2017) *German Law Journal* 1531.

<sup>8</sup> M Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2001).

European law, produced by a group of historians over the last decade, has been mixed. Whereas several prominent legal scholars and institutions welcomed this new input from historians,<sup>9</sup> there was also at first resistance both from the CJEU and from legal scholars,<sup>10</sup> who were less keen on any revelations of how ideology and strategies of self-empowerment of the supranational institutions had mixed with legal argument in the first half of the 1960s to produce a constitutional interpretation of European law.<sup>11</sup> As it stands, the publications by historians, despite constituting today a growing body of work with key pieces published in leading legal journals, have still to fully impact legal scholarship.<sup>12</sup>

What are the consequences of the lack of a well-established legal history of European law for legal scholarship? To answer this question, we need to briefly explore what legal scholars typically have put in the place of legal history. The historical development of European law has been the subject of relatively few analyses by legal scholars, but several of these remain major classics today and have cemented a relatively undisputed narrative about how the Treaties of Rome provided the spark for a gradual process of constitutionalisation to which the member states more or less tacitly acquiesced.<sup>13</sup> From the mid-1990s, legal scholars could even cite a new body of work from political scientists that seemingly corroborated the classical narrative of constitutionalisation,<sup>14</sup> even if they also

<sup>9</sup> See the positive responses in the editorial in *EuConst* 2014; PL Lindseth, 'The Critical Promise of the New History of European Law' (2012) *Contemporary European History* 457; F Nicola, 'Introduction: Critical Legal Histories in EU law' (2013) *AmUInt'l LRev* 1173; and F Bignami, 'Rethinking the Legal Foundations of the European Constitutional Order: The Lessons of the New Historical Research' (2013) *AmUInt'l LRev* 1311.

<sup>10</sup> The CJEU at first did not want to make its archives available to historical research. This initial attitude finally changed in December 2015 when the judicial archive was first opened to be followed in December 2020 by the opening of the administrative archive.

<sup>11</sup> This was the key finding related to the early history of European law in the 1950s and 1960s. See M Rasmussen, 'Revolutionizing European Law: A history of the Van Gen den Loos judgment' (2015) *ICON* 136; A Boerger and M Rasmussen, 'The Making of European Law: Exploring the Life and Work of Michel Gaudet' (2017) *AmJLegal Hist* 51.

<sup>12</sup> A good example of this lack of attention to the contributions of the new legal history is the recent evaluation of Joseph Weiler's seminal interpretation of the history of European law from the early 1990s, MP Maduro and M Wind (eds), *The Transformation of Europe. Twenty-Five Years On* (Cambridge University Press 2018).

<sup>13</sup> P Pescatore, *Law of Integration* (AW Sijthoff 1974); E Stein, *Lawyers, Judges and the Making of a Transnational Constitution* (1981) *AJIL* 1; JHH Weiler, 'The Transformation of Europe' (1981) *YaleLJ* 2403 and JHH Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors' (1994) *Comparative Political Studies* 510. Weiler further argued that member state governments accepted the constitutionalisation of European law, because they had an informal veto right in the legislative process after the Empty Chair Crisis of 1965-1966.

<sup>14</sup> The new generation of political scientists were very much introduced to the field by personalities such as Weiler and consequently started their work from the assumptions of the established historical narrative of European law had developed. For an example of how Weiler and the famous "Integration through Law" project inspired the new, young generation of American political scientists, see K Alter, 'On

nanced it significantly with increasingly sophisticated theoretical and empirical work.<sup>15</sup> Today, it is fair to say that the classical narrative does not stand up to closer scrutiny; the new empirical work by historians and social scientists has largely debunked its core elements.<sup>16</sup> To the extent legal scholars still use the old classics to understand the history of European law, they draw on an outdated interpretation of the historical development of the European law. And even more problematic, they reproduce the ideological bias that was an intricate part of European law scholarship in the 1970s and 1980s.

Famous authors such as Pierre Pescatore, Eric Stein and Joseph Weiler were all among the most sophisticated and brilliant scholars of the field, but they were also actors in their own right in the broader development of European law. Pescatore was a judge from 1967 to 1985 and a key defender of the constitutional case law of the CJEU. Stein and Weiler's careers were primarily as academics, but they played an important role in advising the European institutions and cementing the constitutional discourse used by the supranational institutions in academia.<sup>17</sup> So, by using their work as a replacement for a genuine legal history, legal scholars today actually rely on key actors of that same history without being fully aware that their interpretations were not only a result of academic reflection, but also deeply shaped by their concrete political, institutional and ideological position and practice at the time.<sup>18</sup>

The continued reproduction of the classical narrative in legal scholarship arguably stands in the way of new critical thinking on the role of European law in the process of European integration. Traditionally, legal scholarship has a great tradition of drawing on other disciplines, such as philosophy for example, when analysing the normative nature

Law and Policy in the European Court of Justice. An American Perspective' in H Koch, K Hagel-Sørensen, U Haltern and JHH Weiler (eds), *Europe. The New Legal Realism* (DJØF 2010) 1.

<sup>15</sup> For key contributions of the new political science literature in the 1990s: AM Burley and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) *International Organization* 41; A Stone Sweet and TL Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) *AmPolSciRev* 63; K Alter, 'Explaining National court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in JHH Weiler, AM Slaughter and A Stone Sweet (eds), *The European Court and National Courts - Doctrine and Jurisprudence. Legal Change in its Social Context* (Hart 1998) 227; K Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2001).

<sup>16</sup> For a general discussion of this consult: M Rasmussen and DS Martinsen, 'EU Constitutionalisation Revisited: Redressing a Central Assumption in European Studies' (2019) *ELJ* 1, 21-22.

<sup>17</sup> A Boerger, 'At the Cradle of Legal Scholarship on the European Union. The Life and Early Work of Eric Stein' (2014) *AmJCompL* 859; V Fritz, 'Activism on and off the bench: Pierre Pescatore and the law of integration' (2020) *CMLRev* 475; R Byberg, 'The History of the Integration through Law Project. Creating the Academic Expression of a Constitutional Legal Vision for Europe' (2017) *German Law Journal* 1531; A Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015) 212.

<sup>18</sup> This is a point that Joseph Weiler has recently acknowledged when he reflected on the impact and legacy of the Integration Through Law project at the European University Institute, in which he played such an important role. JHH Weiler, 'Epilogue' in D Augenstein (ed), *'Integration through Law' Revisited The Making of the European Polity* (Ashgate 2012) 175, 178-179.

of law.<sup>19</sup> In order to connect European law to the concrete social, economic and political realities of European integration, the systematic use of the social sciences and history is consequently crucial. The lack of a genuine legal history of European law is thus problematic for legal scholars because it makes an accurate understanding of the contested nature of European law in the EU, both in the past and in the present, difficult to achieve. A good example of this problem is the way many legal scholars today address the problems of popular legitimacy that has haunted the EU since its foundation in the early 1990s. One of several factors behind the problems of legitimacy has arguably been the impression that the EU continuously expands its competences and political power, despite the occasional outburst of popular resistance such as the rejection of the Constitutional Treaty in the French and Dutch referenda in 2005.<sup>20</sup> The drive of the CJEU, supported by the European Commission and the European Parliament, towards the constitutionalisation of European law is a key example of this tendency, and as a result the court became one of the main targets of the Brexit campaign. However, the solutions offered by legal scholars to the problems of legitimacy continue to be more 'integration through law', not less, and identify the consolidation of a European rule of law and the improvement of rights of EU citizens as the best possible solutions.<sup>21</sup>

### III. WHAT KIND OF LEGAL HISTORY FOR EUROPEAN LAW?

Having established why European law needs a legal history, let us now explore the current variety of legal history of international law as well as the emerging historical scholarship on the history of European law to illustrate the different themes treated and the alternative ways legal history are currently being written.

Around 1990, the state of the art of the history of international law since 1870 was very much in a situation similar to European law at the moment. Legal historians were at the time working on much older history, and consequently the few works that dealt with the history of modern international law had been written by legal scholars and practitioners. There is no doubt that many of these scholars produced admirable legal histories.<sup>22</sup> However, they typically had a relatively narrow focus on the doctrinal development

<sup>19</sup> A great example is K Tuori, *European Constitutionalism* (Cambridge University Press 2015).

<sup>20</sup> It is quite telling that legal scholars continued to argue that European law was of a constitutional nature, even when the electorate in the Netherlands and France rejected the Constitutional Treaty in 2005 and the Lisbon Treaty was stripped of constitutional language. See for example: S Griller, 'Is this a Constitution? Remarks on a Contested Concept' in S Griller and J Ziller (eds), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty* (Springer 2008) 21.

<sup>21</sup> See for example the Reconnect project at [www.reconnect-europe.eu](http://www.reconnect-europe.eu), which is a particularly interesting example of this type of research launched on basis of an interdisciplinary approach that includes social scientists and historians.

<sup>22</sup> For example: TA Walker, *A History of the Law of Nations* (Cambridge University Press 1899) and A Nussbaum, *A Concise History of Law of Nations* (MacMillan 1947).

of international law, and since they were also often practitioners of international law, tended to reproduce the biases of the ideological project inherent in modern international law. There were exceptions, such as the famous legal history by German diplomat and scholar, Wilhelm Grewe, who wrote a contextualized legal history in which he argued that international law could be divided in epochs according to which great power dominated the international system.<sup>23</sup> A common trait for this body of scholarship was that the authors typically used public sources, and occasionally also relied on their own experience and contacts, to produce their accounts.

It was only in the 1990s, after the Cold War ended, that a new type of legal history of international law emerged. The former Finnish diplomat and legal scholar, Martti Koskeniemi, spearheaded a movement of legal scholars centred around the *Journal of the History of International Law*, which refined the approach of legal scholars to the history of international law by drawing on sociology and the history of ideas. Koskeniemi and his associates produced a rich and varied intellectual history of international law that among many insights demonstrated how leading jurists and their doctrines had served the material and ideological interests of the Western colonial powers in the 19<sup>th</sup> and early 20<sup>th</sup> century. The peace through law ideology of international law thus had a darker side.<sup>24</sup> This new school of legal history was not without its flaws, however. By focusing on the intellectual history of jurists, it reproduced the narrow focus of former legal scholars on doctrines. An intellectual history of international law remains but a limited slice of a much broader reality that needs to be explored to understand how international law was created and what kind of impact it had. Moreover, although the best work in this new school displayed a sensitivity to context and attempted to place the legal personalities analysed in their own time, it rarely involved archival work and did not more systematically consider relevant social, economic and political contexts. The lack of systematic archival research and proper contextualization makes it impossible to check for bias,<sup>25</sup> and as a result, international jurists risk being portrayed as more important to the development of international law than they probably were.

In the 2000s, historians finally entered the fray and have since produced a large number of rich empirical explorations of core themes of the history of twentieth century international law that have fundamentally changed the field. Here we can mention but a few. A central theme in international law has been the negotiation of the most important treaties and conventions. In two new contextual and archive-based histories of respectively the

<sup>23</sup> WG Grewe, *The Epochs of International Law* (Walter De Gruyter 2000). The book was first published in German in 1984.

<sup>24</sup> Key works: M Koskeniemi, *The Gentle Civilizer of Nations* cit. and A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005). For a general overview of the field with a certain focus on the French language literature consult: JM Guieu and D Kévonian, 'Introduction' (2012) *Relations Internationales* 3.

<sup>25</sup> D Lustig, 'Governance Histories of International Law' in M Dubber and C Tomlins (eds), *Oxford Handbook of Legal History* (Oxford University Press 2018) 859.

Hague Conventions (1899 and 1907) and the Paris Peace Treaties (1919), we now have detailed empirical explorations of how these key treaties were produced and what precise political interests shaped international law.<sup>26</sup> Likewise, the legal dimension of international organisations has also been the subject of archive-based historical analysis in the last decade. These include the first studies on the legal history of the League of Nations,<sup>27</sup> the ILO<sup>28</sup> and GATT/WTO.<sup>29</sup> These studies have laid bare the extent to which the creation of a degree of autonomy of international organisations in relation to state power was based on legal techniques. A third theme explored by historians is the field of Human Rights. This work started with a reassessment of the “triumphalist” accounts of the post-war war crimes tribunals.<sup>30</sup> However, it quickly developed into a complex and still unsettled discussion of when human rights in a modern sense began to have a societal impact. Was it as Samuel Moyn famously claimed in *The Last Utopia* only in the 1970s, as human rights were embraced by the Carter administration, or did it happen earlier in the 1960s as recently argued by Steven Jensen, when former colonies appropriated human rights for their own purposes?<sup>31</sup> The new archive-based and contextual history by historians has fundamentally changed how the history of international law is now perceived and studied. In a field once dominated by a self-congratulatory reproduction of the ideology of international law and a focus on the legal doctrine as expressed in public documents, historians have ensured that international law is now analysed within a much broader social and political context.

By accident, the emerging historical research on the history of European law has followed the trend in international law. Produced by a small group of historians that came from the field of European integration history with no training in law or legal history, the

<sup>26</sup> M Abbenhuis, *The Hague Conferences and International Politics, 1898-1915* (Bloomsbury Academic 2018); M Payk, *Frieden Durch Recht? Der Aufstieg des modernen Völkerrechts und der Friedensschluss nach dem Ersten Weltkrieg* (De Gruyter 2018).

<sup>27</sup> L Lloyd, *Peace Through Law: Britain and the International Court in the 1920s* (The Boydell Press 1997) and O Spiermann, *International Legal Argument in the Permanent Court of International Justice. The Rise of the International Judiciary* (Cambridge University Press 2005); V Genin, *Incarner le droit international. Du mythe juridique au déclassement international de la Belgique (1914-1940)* (Peter Lang 2018); M Donaldson, ‘The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order’ (2018) AJIL 557 and N Wheatley, ‘New Subjects of International Law and Order’ in G Sluga and P Clavin (eds), *Internationalisms. A Twentieth-Century History* (Cambridge University Press 2018) 265.

<sup>28</sup> GF Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press 2017).

<sup>29</sup> G Marceau, *A History of Law and Lawyers in the GATT/WTO* (Cambridge University Press 2015).

<sup>30</sup> See for example A Kramer, ‘The First Wave of International War Crimes Trials: Istanbul and Leipzig’ (2006) *European Review* 441; G Simpson and KJ Heller (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press 2013); KJ Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press 2011). See also the recent and quite remarkable book by KC Priemel, *The Betrayal. The Nuremberg Trials and German Divergence* (Oxford University Press 2016).

<sup>31</sup> S Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010); S Jensen, *The Making of International Human Rights: The 1960s, Decolonization and the Reconstruction of Global Values* (Cambridge University Press 2016).



approach adopted was one of archive-based and contextual history imported from political history. The historical analyses written by this group over the last decade has consequently not been focused on doctrinal history, but instead connected the history of European law to the broader context of the process of European integration. This new historiography has demonstrated that the development of European law was part of a broader political battle inside the EC/EU over institutional reform and the political soul of the Community.<sup>32</sup> Studies have explored the role of key institutional actors such as the CJEU and the European Commission;<sup>33</sup> transnational networks;<sup>34</sup> the role of European law in academia;<sup>35</sup> and the reception of European law by Member States.<sup>36</sup> In contrast to legal scholarship and many studies from political science, this new legal history tends to subsume the importance of European law into the broader process of European integration. Having placed European law in a much broader context, it becomes clear that although European law played an important role in the process of European integration, it was never the core dynamic that has often been claimed by law and politics studies.

To conclude, the new archive-based and contextual legal history by historians demonstrates that production of international and European law never was autonomous from politics and the borderline between legal doctrine and its social context always fluctuating and fuzzy. Most legal developments are intertwined with a broader social and political context marked by constant change and contradictory influences. The prize received for doing the archival work and embracing this complexity is a much deeper understanding of the historical processes related to the creation, codification, expansion and enforcement of international and European law.

The recent developments of the historiographies on international and European law demonstrate that a broad range of themes should be explored, including the more traditional ones of intellectual and doctrinal history. However, at the same time, the archive-based and contextual approach by historians has clearly set a new standard for how to deal with primary sources and reduce bias by the means of proper contextualization. This

<sup>32</sup> M Rasmussen, 'From International Law to a Constitutional Dream? The History of European Law and the European Court of Justice, 1950 to 1993' in I de la Rasilla, Y del Moral and JE Viñuales (eds), *The Dream of International Courts: A History* (Cambridge University Press 2019) 287.

<sup>33</sup> M Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952-1965' (2012) *Contemporary European History* 375.

<sup>34</sup> *Ibid.*; R Byberg, 'A Miscellaneous Network' cit.; R Byberg 'The History of *Common Market Law Review*' cit.

<sup>35</sup> R Byberg, *Academic Allies. The Key Transnational Institutions of the Academic Discipline of European Law and Their Role in the Development of the Constitutional Practice 1961-1993* (PhD dissertation University of Copenhagen 2017).

<sup>36</sup> B Davies, *Resisting the ECJ. West Germany's Confrontation with European Law 1949-1979* (Cambridge University Press 2012); J Pedersen, *Constructive Defiance - Denmark and the Effects of European Law, 1973-1993*, (PhD dissertation Aarhus University 2016) 142-145 and A Bernier, *La France et le droit communautaire 1958-1981: histoire d'une réception et d'une coproduction* (PhD dissertation University of Copenhagen 2018).

challenges legal scholars who are typically trained to systematize, find coherence and explore functionality, instead of placing their analysis in the right temporal context. It will take a conscious effort to abandon the neat narratives of legal progress in favour of a messier, more complex, but ultimately more accurate and richer story.<sup>37</sup>

#### IV. TOWARDS A LEGAL HISTORY OF EUROPEAN LAW

With the discipline of legal history having been renewed with the methodological toolbox of mainstream historians, the opening of the historical archive of the CJEU in December 2015 is all the more important.<sup>38</sup> While historians had already begun to write the legal history of European integration based on primary sources collected in relevant archives around the CJEU, it is obvious that the opening of the archives of the Court is a game changer. This Special Section is a testimony to this fact. The *Articles* written by young legal scholars are examples of what can be achieved by exploiting the judicial part of the CJEU archives in combination with a contextual analysis of single court cases.

In terms of available archival documentation from the Court, the future looks exceptionally promising. The CJEU has just in December 2019 opened its administrative archive, which holds the promise that it will be possible to write the administrative history of the court. Moreover, the Historical Archive of the European Union in Florence has done a great job in bringing together the institutional archives of the EU relevant for its legal history, including the legal service of European Commission, as well as a rich collection of private papers of key actors.<sup>39</sup>

At the level of research institutions, we have also witnessed important progress. In 2016, The Max Planck Institute for European Legal History in Frankfurt established a new research section that works from an interdisciplinary basis, including both legal scholars and historians, on the legal history of European law.<sup>40</sup> And with the thematic issue published here, the Academy of European Law of the European University Institute has also finally taken the first step towards embracing the legal history of European law as a future research field. With historians and legal scholars working together, it is finally possible to produce the rich and thematically varied legal history that the field of European law needs.

<sup>37</sup> B Davies and F Nicola, 'Introduction to EU Law Stories: Contextual and Critical Histories in European Jurisprudence' in B Davies and F Nicola (eds), *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 1.

<sup>38</sup> The archive is accessible at the Historical Archive of the European Union in Florence.

<sup>39</sup> EUI, *Historical Archives of the European Union*, [www.eui.eu](http://www.eui.eu).

<sup>40</sup> Max Planck Institute for Legal History and Legal Theory, *Legal History of the European Union* [www.rg.mpg.de](http://www.rg.mpg.de).