



Rethinking European legal integration: legal text from a bottom-up perspective and the functioning of European law, 1957–2000

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Abstract

The article promotes a new methodological approach to examining the development of European law that significantly advances our understanding of European legal integration. Building on interdisciplinary debates on European law between historians, lawyers, and political and social scientists, the article argues for analysing European law by approaching a legal text from a bottom-up perspective. Our understanding of legal text includes all texts that jurists consider as legal and use in judicialised conflicts.

Examining how a range of actors have used legal text to shape conflicts instead of taking ‘integration’ (or lack thereof) as the ontological lens yields important new insights into the functioning of European law over time. The case studies in this special issue trialling our methodological approach show that, first, certain areas of European law come into view including non-discrimination, the environment, and human rights. Second, social actors in the Member States and beyond were from the beginning involved in co-creating these areas of law, which indicates that European legal integration has always been more than an elite-driven project. Third, actors have mobilised European law for various reasons, often not tied to ‘Europe’. They have used European law to translate a range of political issues into legal questions. Finally, legal knowledge and expertise – and lawyers – have been central to European integration even if this is not reduced to an understanding of the binary relationship between European institutions and the Member States.

Keywords: European law; history; bottom-up approach; legal text; European integration

1. Introduction

This special issue aims to rethink the notion of European legal integration which traditionally assumes a binary view of law created by European institutions and European nation states. The contributions to this issue seek to move beyond this understanding of integration by abandoning integration (or lack thereof) as the ontological lens. Instead, we advance an approach focusing on social action from the perspective of individual actors, showing how integration is deeply intertwined with personal experience, grievances, and a range of other motivations. This approach is informed by interdisciplinary debates on European law between historians, lawyers, and political and social scientists and proposes to analyse European law by examining a legal text from a bottom-up and actor-focused perspective. Our understanding of legal text includes all texts that jurists consider as legal and use in judicialised conflicts.

The introduction to this special issue develops our approach to examining the functioning of European law in political and social context in several steps. The second section discusses how different academic disciplines have examined the development of European law from non-doctrinal perspectives. First, it highlights the innovative contributions of the ‘New History of European Law’ and Bourdieu-inspired approaches in both enhancing our understanding of the role of politics in the functioning of European law and introducing new groups of actors into the study of European law. The third section introduces the recent ‘turn towards society’ in research on European law and European integration, which is important for our approach by examining a wider range of social actors and their engagement with European law. The fourth section will draw on the insights of the interdisciplinary debate between lawyers and historians on the contextual turn in the history of international law. This is to further broaden the basis for our new approach to examining the functioning of European law away from a binary perspective of European law as being created by European institutions and Member States only. Against this backdrop, the fifth section will develop our new approach focusing on examining a legal text from a bottom-up and actor-focused perspective. The sixth and final section introduces the contributions to this special issue chronologically trialling this novel methodological approach and highlights how they advance our understanding of the functioning of European law, 1957–2000. This introduction therefore makes a methodological argument about how to examine the development of European law as well as a substantial argument about European law.

2. The state of the art in research on European law in historical perspective

The field of research on the history of European law was initially shaped by lawyers and political scientists generating a narrative of the constitutionalisation of the Treaty establishing the European Economic Community (EEC).¹ Historians only started taking an interest in the jurisprudence of the ECJ from the late 2000s – reflecting a broader trend towards increased interest in international law dating back to the 1990s. There were different reasons why historians of European integration – like European law, a relatively young field of academic enquiry² – did not focus on the Court and its case law including: lack of access to the archives of the Court; the background and training of earlier generations of European integration historians in economic and diplomatic history; a reluctance to engage with legal history, perceived as niche, dry, and the domain of lawyers; and a lack of institutionalisation of legal history in history departments.³ The portrayal of historians as ‘laggards’ in research on European legal history only holds true, however, when adopting a rather narrow focus on the Court and its jurisprudence.⁴

If we accept a broader understanding of the history of European law beyond the exclusive focus on the ECJ and its case law, an interest in European law within the history of European integration can be traced back to the institutionalisation of this sub-field of research from the 1980s. In fact, archive-based research first focused on the treaty negotiations leading to the

¹M Rasmussen, ‘Towards a Legal History of European law’ 6 (2) (2021) *European Papers* 923–32, 926–7.

²B Leucht, K Seidel, and L Warloutzet, ‘Interpretations of European Integration History and Introduction to Research Tools’, in B Leucht, K Seidel and L Warloutzet (eds) *Reinventing Europe: The History of the European Union, from 1945 to the Present* (Bloomsbury 2023) 353–72.

³A Albors-Llorens, C Barnard, and B Leucht, ‘Introduction: Why revisit Cassis de Dijon’ in A Albors-Llorens, C Barnard, and B Leucht (eds), *Cassis de Dijon: Forty Years On* (Hart 2021) 1–20, 12–13; for an assessment of the potential and limitations of the *dossiers de procédure*, opened for research in 2015, see A Vauchez, ‘The Map and the Territory: Re-assessing EU Law’s Embeddedness in European Societies’ 27 (2) (2020) *Maastricht Journal of European and Comparative Law* 133–6, 135; F Nicola, ‘Waiting for the Barbarians: Inside the Archives of the European Court of Justice’ in C Kilpatrick and J Scott (eds) *New Legal Approaches to Studying the Court of Justice: Revisiting Law in Context* (Oxford University Press 2020).

⁴P Lindseth, ‘The Critical Promise of the New History of European Law’ 21 (3) (2012) *Contemporary European History* 457–75, 457.

foundations for the European Coal and Steel Community, and then the EEC and Euratom.⁵ Publications were based on examining the governmental archives of Member States, and they focused on the politics and diplomacy of the treaty negotiations and the treaties. The focus of this early scholarship was therefore on interstate bargaining and the dynamics at play at the various conferences rather than on the rules and norms introduced in the founding treaties. The exceptions to this general trend in approaching the negotiations were works with a specific interest in the organisation of Western Europe's economies following the end of World War II, for example, dealing with the role of the antitrust provisions in the development of Western Europe's coal and steel market from 1952.⁶

From the early 2000s, historians began revisiting the origins of European integration,⁷ the interstate negotiations and the drafting of specific rules of the founding treaties from a transnational perspective.⁸ Transnational approaches have been enhancing the research focus on formal political institutions by progressively including non-governmental perspectives and corresponding archival sources, most importantly, the private papers of key actors, into the analysis. At the same time, historians with an interest in supranational institutions and policies began exploring the archives of European institutions focusing on the European Commission.⁹ Crucially, the trans- and supranational turn in European integration history was accompanied by an interest in cross-disciplinary learning and interdisciplinary cooperation.¹⁰ For example, historians used research on policy and expert networks to examine the formation and impact of transnational networks including addressing the crucial question of how certain (legal) ideas were translated into treaty provisions and policies.¹¹

A. The new history of European law

In the framework of this broader reorientation of European integration history, Bill Davies and Morten Rasmussen called for a 'New History of European Law', understood as an archive-based and historical contextual approach to examining the case law of the Court as an institution and its case law.¹² The *first* building block of the New History of European Law was Davies' ground-breaking PhD dissertation on the reception of European Community (EC) law in West Germany.¹³ Inspired

⁵For the most important references, see B Leucht, 'The Formation of the European Coal and Steel Community, the European Economic Community and Euratom, 1945–58', in Leucht et al (n 2) 7–25.

⁶J Gillingham, *Coal, Steel, and the Rebirth of Europe, 1945–55. The Germans and the French from Ruhr Conflict to Economic Community* (Cambridge University Press 1991); T Witschke, *Gefahr für den Wettbewerb? Die Fusionskontrolle der Europäischen Gemeinschaft für Kohle und Stahl und die «Rekonzentration» der Ruhrstahlindustrie 1950–1963* (Akademie Verlag 2009).

⁷W Kaiser, *Christian Democracy and the Origins of European Union* (Cambridge University Press 2007).

⁸B Leucht, 'Transatlantic Policy Networks in the Creation of the first European Anti-Trust Law: Mediating between American Anti-Trust and German Ordo-Liberalism', in W Kaiser, B Leucht, and M Rasmussen (eds), *The History of the European Union: Origins of a Supranational Polity 1950–72* (Routledge 2009) 56–73; and B Leucht, 'Expertise and the creation of a constitutional order for core Europe: Transatlantic policy networks in the Schuman Plan negotiations', in W Kaiser, B Leucht, and M Gehler (eds), *Transnational Networks in Regional Integration: Governing Europe 1945–83* (Palgrave Macmillan 2010) 18–37.

⁹P Ludlow, 'The Making of the CAP: Towards a Historical Analysis of the EU's First Major Policy' 14 (3) (2005) *Contemporary European History* 347–71; A-C Lauring Knudsen, *Farmers on Welfare: The Making of Europe's Common Agricultural Policy* (Cornell University Press 2009); K Seidel, *The Process of Politics in Europe: The Rise of European Elites and Supranational Institutions* (I. B. Tauris 2010).

¹⁰Kaiser, Leucht, and Rasmussen (n 8).

¹¹Kaiser, Leucht, Gehler (n 8).

¹²See the special issue of *Contemporary European History* 21 (3) (2012); for its reception, see Rasmussen (n 1).

¹³B Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949–1979* (Cambridge University Press 2012).

by political scientists' reception studies of European law,¹⁴ the work accentuated the importance of the wider legal and non-legal discourse in accounting for the meaning given to EC law in Germany. The *second* building block was a collective project on the development of a 'constitutional practice' in European law before the Maastricht Treaty on EU initiated and led by Rasmussen. The collective project challenged lawyers' positivist and descriptive understandings of EU constitutional law by highlighting the politics of the production of law. Adopting an archive-based and contextual approach, the project traced the 'constitutional practice' developed by the Court and pro-integrationist lawyers and European institutions and universities.¹⁵ A *third* building block of the New History of European Law extended the archive-based and contextual analyses of what the Court called 'the new legal order' to 'Europe's economic constitution'.¹⁶ This work focused on the *Cassis de Dijon* judgement and the doctrine of mutual recognition bringing into view the material dimension of EC market integration. *Fourth*, Vera Fritz pioneered a collective biography of the first generation of judges of the ECJ.¹⁷

B. Bourdieu-inspired approaches to the history of European law

Another interdisciplinary research direction shares with the New History of European Law an emphasis on empirical research on European law, while basing it on a more explicitly formulated theoretical foundation drawn from the works of Pierre Bourdieu.¹⁸ With an intellectual inheritance from the works of Yves Dezalay and Bryant Garth,¹⁹ this strand applied core concepts of Bourdieusian sociology such as 'field', 'capital' and 'habitus', and has found increasing application in scholarship of European law. Most notable are Antoine Vauchez' study on the processes whereby some actors managed to place law as the foundation for European integration in the EC²⁰ and Mikael Rask Madsen's work on the genesis of European human rights law.²¹ We now have a better understanding of how European law has been shaped by judges, lawyers, legal advisors in European institutions and others with an interest in building Europe, interests that sometimes went back even to the interwar period.²² The study of European law as the product of a European legal field, a semi-autonomous social space in which a network of actors '[compete] for the authoritative manipulation and interpretation of European law'²³ has provided a theoretical

¹⁴K Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2001).

¹⁵M Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65' 21 (3) (2012) *Contemporary European History* 375–97; B Davies and M Rasmussen (eds), *The History of European Union Law. Constitutional Practice, 1950 to 1993* (forthcoming January 2026).

¹⁶B Leucht, 'The Policy Origins of the European Economic Constitution' 24 (2–3) (2018) *European Law Journal* 191–205; B Leucht, 'The European Commission and the *Cassis de Dijon* Decision', in Albors-Llorens et al (n 3) 69–93.

¹⁷V Fritz, *Juges et avocats généraux de la Cour de Justice de l'Union européenne (1952–1972)* (Klostermann 2018).

¹⁸Notably P Bourdieu, 'La force du droit. Éléments pour une sociologie du champ juridique' 64 (1986) *Actes de la Recherche en Sciences Sociales* 3–19.

¹⁹In this development, Y Dezalay and BG Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996); Y Dezalay and BG Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (University of Chicago Press 2002). See also Y Dezalay and M R Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' 8 (1) (2012) *Annual Review of Law and Social Science* 433–52.

²⁰A Vauchez, *L'Union Par Le Droit: L'invention d'un Programme Institutionnel Pour l'Europe* (Presses de la Fondation nationale des sciences politiques 2013). See also A Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015).

²¹M R Madsen, *La genèse de l'Europe des droits de l'homme: enjeux juridiques et stratégies d'état (France, Grande-Bretagne et pays scandinaves, 1945–1970)* (Presses universitaires de Strasbourg 2010).

²²A Cohen, 'Constitutionalism Without Constitution: Transnational Elites Between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s–1960s)' 32 (1) (2007) *Law & Social Inquiry* 109–35.

²³A Vauchez, 'Introduction. Euro-Lawyering, Transnational Social Fields and European Polity-Building' in A Vauchez and B de Witte (eds), *Lawyering Europe. European Law as a Transnational Social Field* (Hart Publishing 2013), 9.

framework which can capture the production and content of doctrinal law as well as the specific rationalities motivating the actors who write, interpret, and enforce this law.²⁴ For reasons of academic inheritance, this line of research has been predominantly explored within a French research environment or by scholars with connections thereto.

This approach of historical sociology has also been applied to domains beyond the question of constitutionality and the foundations of European law. Lola Avril has shown the central role that lawyers, in particular from large American law firms in Brussels, have played in the development of European law,²⁵ for example in judicialising competition law.²⁶ Moving the focus to the Member States, Julie Bailleux describes in great detail how the early reception of Community law played out in France, and how, for a long time, the connections between European and national law rested on few gatekeepers.²⁷ More recently, Magnus Esmark has argued that the reception of European law in Denmark has been shaped primarily by symbolic power struggles on the national legal field rather than logics of European integration,²⁸ and that these processes have been linked to preceding regional legal harmonisation among the Nordic countries.²⁹ This work is important for introducing a geographical and legal space beyond the EC Member States into analysing European legal integration.

The interdisciplinary drive of historical and sociologically inspired works – with ‘interdisciplinary’ understood as an interest in learning from different disciplinary approaches to examining European law over time – also stimulated the publication of several collective, interdisciplinary volumes revisiting the ECJ’s landmark cases through contextual approaches.³⁰

Overall, historical and sociologically inspired approaches to the development of European law have enhanced our understanding of the role of politics in the functioning of European law. Bourdieu-inspired research has opened new avenues to include different actors as well as networks. The works discussed here have highlighted the merit of non-doctrinal approaches to studying European law, even if these findings have not always made inroads into more normatively oriented legal scholarship,³¹ indicating that there are still gains to be made in this direction. Here, Frank Schorkopf’s recent ‘constitutional history’ of the EU is worth highlighting in building on the projects discussed here while extending the focus of analysis beyond the ECJ, its case law, and the reception of the case law.³² Schorkopf’s history of the EU’s political order is written from a distinct legal perspective, evident, for example, when concepts such as the ‘community of law’³³ are discussed. Ultimately, however, his work is closer to a conventional political history of European integration than other interdisciplinary works discussed here.

²⁴A Cohen, ‘Bourdieu Hits Brussels: The Genesis and Structure of the European Field of Power’ 5 (2011) *International Political Sociology* 335–9.

²⁵L Avril, ‘Le Costume Sous La Robe: Les Avocats En Professionnels Multi-Cartes de l’Etat Régulateur Européen: Genèse, Consolidation, Contestations (1957–2019)’ (DPhil thesis, University of Paris 1 2019).

²⁶L Avril, ‘Lobbying and Advocacy: Brussels’ Competition Lawyers as Brokers in European Public Policies’ 54 (2018) *Czech Sociological Review* 859–79.

²⁷J Bailleux, *Penser l’Europe Par Le Droit: L’invention Du Droit Communautaire En France* (Daloz 2014).

²⁸M Esmark, ‘Without Verona Walls. The Production of Danish European Union Law 1973–2020’ (PhD thesis, Københavns Universitet 2022).

²⁹M Esmark, ‘The Triangular Relationship between Danish, Nordic and European Law’ (2024) 3 *European Law Open* 1–35, <<https://doi.org/10.1017/elo.2024.8>>.

³⁰M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU: the Classics of EU law revisited on the 50th Anniversary of the Rome Treaty* (Oxford University Press 2010); B Davies and F Nicola, *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017); Albors-Llorens et al (n 3). Cf. for another collection, in which legal scholars and historians co-authored chapters on key questions in the development of EU Competition Law and Policy, K Patel and H Schweitzer (eds), *The Historical Foundations of EU Competition Law* (Oxford University Press 2013).

³¹This is discussed, for example, by Rasmussen (n 1).

³²F Schorkopf, *Die unentschiedene Macht. Verfassungsgeschichte der Europäischen Union, 1948–2007* (Vandenhoeck & Ruprecht 2023).

³³*Ibid.*, 191–206.

Existing research has largely focused on elite actors such as legal experts, politicians, and diplomats moving between national and European spaces, but has overlooked how social actors have contributed to the creation of European law. Scholarship has also approached the development of European law from a binary perspective pitching ‘the national’ against and vis-à-vis ‘the European’, while excluding local and regional social spaces which do not fit neatly into this approach. In connection with the systemic logic of the treaties, this tendency in scholarship has served to reproduce doctrinal assumptions about the functioning of European law rather than explore and challenge them on empirical grounds. In the same vein, ‘integration’ has been used broadly as an analytical concept to describe the social processes examined, while not reflecting sufficiently critically on its clear programmatic content.

Against this backdrop, we argue that it is time to take the next step in rethinking European legal integration. We propose to move from highlighting the political contestations and policy origins of European law and studying its reception in several Member States to developing an interdisciplinary ‘bottom-up approach’³⁴ to examining the functioning of European law. The following section will show how the ‘turn towards society’ in recent scholarship forms an important basis for this new approach to European law.

3. The ‘turn towards society’ in research on European law and European integration

In recent years, scholarship on European law has responded to broader changes in European governance based on the diminishing popular legitimacy of European law and European integration.³⁵ We describe the move from focusing on the politics of European law to focusing on society’s engagement with European law as ‘a turn towards society’. In *European Law Open*, Floris de Witte has suggested that ‘perhaps, there is a growing realisation in EU studies in general that the authority and legitimacy of the EU depends, more and more, on how it is experienced by its citizens’.³⁶ Similarly, Antoine Vauchez has emphasised the desirability to start drawing the ‘geographical and social map of EU law’s embeddedness in European societies’.³⁷ These statements show that the turn towards society – and the turn towards the *experiences* of European law – have been accompanied by an increasing interest in the spatial and temporal dimension of European law. There are some recent trends in the literature, which can be introduced within this emerging agenda on European law.

One important development is manifested in several works by political scientists and lawyers focusing on litigation as a means to begin drawing up the map of EU law’s embeddedness, hence turning the view away from the finished product, case law, and towards the preceding social action.³⁸ Lawyers have also shown a wider interest in empirical research on European law and the

³⁴‘Bottom up’ approaches have a trajectory in US legal history, being coined by ‘Critical Legal Studies’ and research on ‘law and society’. But this scholarship has not made many inroads into European law. For more see, eg, G. Fisher, ‘Historian in the Cellar’, in R Gordon, and M Horwitz (eds), *Law, Society, and History. Themes in the Legal Sociology and Legal History of Lawrence M. Friedman* (Cambridge University Press 2011) 273–92; and L Friedman, ‘Taking Law and Society Seriously’ 74 (2) (1999) *Chicago-Kent Law Review* 529–42.

³⁵See, eg, R Coman, A Crespy and V Schmidt (eds) *Governance and Politics in the Post-Crisis European Union* (Cambridge University Press 2020).

³⁶F de Witte, ‘Here be Dragons: Legal geography and EU law’ 1 (1) (2022) *European Law Open* 113–25, 113.

³⁷Vauchez, *The Map and the Territory* (n 3) 135. The emphasis on law’s embeddedness is also reflected in the title of A Vauchez, M R Madsen and F Nicola, *Researching the European Court of Justice. From Methodological Shifts to EU Law’s Embeddedness* (Cambridge University Press 2022). For a critical perspective on the concept of ‘embeddedness’, see, R Cotterrell, ‘Rethinking ‘Embeddedness’: Law, Economy, Community’ 40 (1) (2013) *Journal of Law and Society* 49–67.

³⁸See, for a summary of these works, Vauchez, *The map and the territory* (n 3) 135–6. For a survey on the literature on reception, see, eg, L Conant, A Hofmann, D Soennecken and L Vanhala, ‘Mobilizing European Law’ 25 (9) (2018) *Journal of European Public Policy* 1376–89.

ECJ.³⁹ A case in point is Jan Zgliniski's work on the common market demonstrating that litigation relating to the free movement of goods has been decreasing from the mid-1980s already.⁴⁰ From a historical perspective, Mala Loth has written the first archive-based thesis highlighting the role of lawyers, their clients, and the ECJ in developing a European social policy (focusing on equal pay and social security), during a period usually discussed by historians under the heading of 'the shock of the global in the 1970s' and the following 'neoliberal turn'.⁴¹ The work significantly developed the New History of European Law by pioneering a bottom up approach to European law and thus performs a key function for developing the new approach in this special issue. Furthermore, it focuses on social policy showing the potential of examining certain areas of policy and law, tightly connected to societal concerns, when addressing our research interest in society's experiences of European law.

Similarly oriented towards a perception of European law beyond institutional logics, Loïc Azoulay has introduced the notion of 'European society through law',⁴² a call that resonates with our research agenda of approaching the functioning of European law from a societal perspective. Armin von Bogdandy, in turn, has promoted a normative approach and has argued for the use of Article 2 of the Treaty on European Union to reconstruct European public law and develop a European society.⁴³

Recent and ongoing legal and historical scholarship has also confirmed the potential of focusing on specific areas of policy and law. Loth's historical work highlights the potential of focusing on social issues and policy to bring into view actors engaging with law beyond institutions. Azoulay has called for exploring migration and religion as two of the most salient issues in European societies today.⁴⁴ Two collaborative historical projects⁴⁵ have highlighted the merit of focusing on agriculture (the EC common agricultural policy)⁴⁶ and the environment and consumption (EC environmental and consumer policies) for examining the history of European law from the bottom up, ie, by including a wider spectrum of actors beyond elites and those trained in, and practicing, the law.⁴⁷ The contributions to this special issue confirm the importance

³⁹On the wider empirical turn in scholarship of international law, see J Holtermann and M R Madsen, 'Toleration, Synthesis or Replacement? The 'Empirical Turn' and its Consequences for the Science of International Law' 29 (4) (2016) *Leiden Journal of International Law* 1001–19.

⁴⁰J Zgliniski, 'The End of Negative Market Integration: 60 years of Free Movement of Goods Litigation in the EU (1961–2020)' 31 (3) (2024) *Journal of European Public Policy* 1–24, <<https://doi.org/10.1080/13501763.2022.2161603>>.

⁴¹M Loth, 'Last Stop Luxembourg Lawyers' Dynamism and the European Court of Justice's Contribution to Social Equity, c. 1970–1990' (DPhil thesis, University of Oslo 2020); M Loth, 'Zur falschen Zeit am falschen Ort: Die Verhandlung des Rechts auf gleiche Bezahlung vor dem Europäischen Gerichtshof (1971–1984)' 35 (2) (2024) *L'Homme. European Journal for Feminist History* 17–33, and M Loth, 'Working on Principles: Changing Concepts of 'Labour' before the European Court of Justice, 1972–1988' (2025) *Contemporary European History* 1–21. <<https://doi.org/10.1017/S0960777325000141>>.

⁴²L Azoulay, 'The Law of European Society' 59 (2022) *Common Market Law Review* 203–14, 210–12. For a historian's classic, see H Kaelble, *Auf dem Weg zu einer europäischen Gesellschaft: Eine Sozialgeschichte Westeuropas, 1880–1980* (C.H. Beck 1987).

⁴³A von Bogdandy, *Strukturwandel des öffentlichen Rechts. Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp 2022).

⁴⁴Azoulay (n 42). Similarly, for the lacuna regarding third status nationals, A Menéndez, 'The Triumph of EU Law in Context' (Verfassungsblog 22 March 2024) <<https://verfassungsblog.de/the-triumph-of-eu-law-in-context/>> accessed 13 August 2024.

⁴⁵See B Leucht, L van de Grift, K van Zon, and M Conway (eds) 'Towards a Social History of European Integration' Special Issue 32 (3) (2025) *European Review of History*; P Müller and C von Hohenberg (eds), *Euroscepticism and Europeanisation: Varieties of Resistance to European Integration*, Special Issue 22 (3) (2024) *Journal of Modern European History*; see also the programmatic article, P Müller, 'Zweifel, Ablehnung, Widerstand. Euroskepsis in kritischer Betrachtung' 31 (1) (2022) *Mittelweg* 36, 3–16.

⁴⁶A Carbone, 'Mediterranean Farmers and Alternative Europes: Resistance, Europeanisation and CAP Reforms in Italy and France (mid-1970s to mid-1980s)' 22 (3) (2024) *Journal of Modern European History* 351–70; K Geronymaki, 'Farmers and the European Common Agricultural Policy in the Delta of the River Po: Stories from the Ente Delta Padano, 1962–73' Special Issue 32 (3) (2025) *European Review of History* 305–22.

⁴⁷Contributions to *European Review of History* (n 45).

of specific areas of law other than constitutional law for a bottom-up approach, as section 6 introducing these articles will show.

This outline of the ‘turn towards society’ forms the basis for the new approach to European law we are developing in this introduction to the special issue. To broaden the basis for our new approach beyond the field of European law, we will also draw on the debate on the relationship between history and law in the neighbouring field of the history of international law. The next section will therefore show that arguments about the notion of ‘context’ can further enhance our approach to examine the functioning of European law beyond ‘integration’.

4. Beyond *sui generis*: the ‘contextual turn’ in the history of international law

While it is accepted that historians and legal scholars focus on texts in their research,⁴⁸ the question of *how* to write legal history has been contested by both disciplines. For this special issue, we briefly turn to the longer-standing debate in the history of international law. Until recently, the interdisciplinary debates in the fields of the history of European law and the history of international law have developed independently from each other.⁴⁹

As a response to the ‘linguistic turn’, international law moved towards history around the turn of the millennium.⁵⁰ Since then, works on how law and politics play out in international fora from intergovernmental associations to judicial courts have grown exponentially. These historical accounts are often less interested in the law itself but more in what they call ‘the context’ assuming that the process of making and interpreting law is primarily determined by its social setting.⁵¹ Lawyers have reacted with some reservations to historians’ interest. Particularly, contextualist perspectives on the history of international law have met with criticism from legal scholars.⁵²

The debate reached a preliminary peak in 2011 when legal scholar Anne Orford sharply rejected what she called a strict historical-contextual approach that she identified with the Cambridge School of intellectual history, notably with Quentin Skinner’s work. Rather than following Skinner’s admonition that any ideas, legal or other, needed to be placed into temporal and spatial backgrounds to be correctly understood, Orford called for radical anachronism, ie, a reading of history – as well as past texts – in the light of present-day concerns.⁵³

⁴⁸For more on law as a ‘textual discipline’, see the seminal work of B Latour, *La fabrique du droit. Une ethnographie du Conseil d’État* (La Découverte 2002). For a call for a ‘material turn’, see eg, D Ricardo Quiroga-Villamarín, ‘Beyond Texts? Towards a Material Turn in the Theory and History of International Law’ 23 (2021) *Journal of the History of International Law* 466–500; T Johnson, ‘Legal History and The Material Turn’, in M Dubber, and C Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press 2018) 497–514.

⁴⁹Rasmussen (n 1) and see the new project at the Max Planck Institute for Legal History and Legal Theory by Michel Erpelding. For the narrative of ‘*sui generis*’ in European law, see S Rehling Larsen, ‘European Public Law after Empires’ 1 (1) (2022) *European Law Open* 6–25, 10, <<https://doi.org/10.1017/elo.2021.8>> and J Odermatt, ‘Unidentified Legal Object: Conceptualising the European Union in International Law’ (2) (2018) *Connecticut Journal of International Law* 215–46, 226–32.

⁵⁰D Kennedy, ‘International History and the Nineteenth Century: History of an Illusion’ 65 (3–4) (1996) *Nordic Journal of International Law* 385–420; M Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001); For an excellent overview of the debate see M Payk and K C Priemel, ‘Introduction: Thinking Law, Talking Law, Doing Law: How lawyers Craft(ed) the International Order’, in M Payk and KC Priemel (eds), *Crafting the International Order. Practitioners and Practices of International law since c.1800* (Oxford University Press 2012) 1–20, 9.

⁵¹*Ibid.*

⁵²For an overview, see, eg, A Fitzmaurice, ‘Context in the History of International Law’ 20 (1) (2018) *Journal of the History of International Law* 5–30.

⁵³For a recollection of the debate, see especially chapter 3 in A Orford, *International Law and the Politics of History* (Cambridge University Press 2021); and for the ‘original’, see A Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press 2011).

Likeminded voices added that strict contextualism was invariably subjective and therefore reflected the individual historian's way of thinking, nothing more.⁵⁴ Historians disagreed with Orford, not least for what they considered a misrepresentation of the meaning of context and her argument's focus on intellectual history, while crucially overlooking other historical approaches.⁵⁵ Jurists have also taken issue with her resolute claims, arguing that Orford largely presents older notions of a genuine legal perspective and methodology that would allegedly offer theoretical, empirical, and political advantages over historians' less stringent approach precisely because lawyers working historically still remain lawyers.⁵⁶

These debates received a lot of attention, but they are not necessarily representative of interdisciplinary relations. For all their differences, historians and legal scholars today by and large agree that the history of international law transcends doctrinal history, and that a rich arsenal of sources should supplement treaties, doctrines, and judicial decisions.⁵⁷ They also share the conviction that (nation-)state-centred perspectives are to be overcome, and they step out of traditional political history's shadow by taking on new perspectives, as the notion of the 'legal imagination'⁵⁸ shows. Historians for their part have been reminded of the 'complexities'⁵⁹ and technicalities of law, as well as the need to properly understand the legal profession.

The debate on the meaning of context in international law provides important insights into how 'text' can be put into 'context' historically, for example, by studying 'practices' of law in their historical contexts and to reflect on EU history writing⁶⁰ as well as, ultimately, learning more about the functioning of European law. In the history of European law, Bill Davies and Fernanda Nicola have examined text – understood as the case law of the ECJ – in context. They have shifted the approach from a doctrinal to a historical and critical understanding of how the 'EU legal consciousness' has evolved over time. However, the book neglects the broader social embeddedness of law, and follows the underlying assumption that the promoted, but restricted approach to 'context' leads to the 'discovery' of the EU legal consciousness.⁶¹ We want to go further, as the next section will explain.

5. Text, context, and the functioning of European law

We are proposing to start with a specific legal text to study how some actors have used it to shape conflicts and relations. First, we define 'legal text' to include all texts that jurists would consider as legal and use in judicialized conflicts. In his classic article on the legal field, Bourdieu discusses legal text from the perspective of the practice of its interpretation (by juridical actors) and remarks on the rhetoric of juridical language (impersonality, neutrality, universality) that is manifested in rules and procedures; laws, rules and regulations; and judicial decisions.⁶² Starting from this broad

⁵⁴For example, see V Vadi, 'International Law and Its Histories: Methodological Risks and Opportunities' 58 (2017) *Harvard International Law Journal* 311–52, 336.

⁵⁵See, eg, L Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics' 21 (1) (2019) *Journal of the History of International Law* 7–40; M Rasmussen, 'History and International Law: A Reappraisal of a Difficult Relationship' 36 (2) (2022) *Temple International & Comparative Law Journal* 37–52.

⁵⁶A Kemmerer, "We do not need to always look to Westphalia . . ." A Conversation with Martti Koskenniemi and Anne Orford' 17 (2015) *Journal of the History of International Law* 1–14, 12.

⁵⁷See, eg, U Özsu, *Formalizing Displacement: International Law and Population Transfers* (Oxford University Press 2014); G Renard Painter, 'A letter from the Haudenosaunee Confederacy to King George V: Writing and Reading Jurisdictions in International Legal History' 5 (1) (2017) *London Review of International Law* 7–48.

⁵⁸M Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (Cambridge University Press 2021).

⁵⁹Rasmussen (n 55) 51.

⁶⁰Rasmussen, (n 1) 924.

⁶¹Davies and Nicola (n 30). For a recent call for critical methodology in EU law, see, eg, P Neuvonen, 'A Way of Critique: What can EU law Scholars learn from Critical theory' 1 (2022) *European Law Open* 60–88.

⁶²Bourdieu (n 18).

understanding, we include legislative proposals, laws or the reports or decisions by regional, national, or European courts; in short, any text which can be mobilised in an argument about the law and/or which represents the settling of a conflict about what is the authoritative interpretation of the law. Importantly, this broad conceptualisation of legal text allows us to develop existing research on European law that has focused on the ECJ and its case law, with the partial exception of historical research on the interstate negotiations on the EC founding treaties and the origins of policies discussed above.

Second, taking legal texts as a starting point allows us to follow various actors and the different issues of contestation at the core of these legal texts to study the creation, mobilisation, reception, and (non-)application of European law in a broad range of social spheres. The focus on the individual or collective experience and grievance, on the one hand, and the specific context around any legal text, on the other, highlights the co-creation of law by a range of social actors not usually considered in existing research on the history of European law, which has been restricted to legal and political elites. This approach also represents a move away from the binary understanding of European law as being produced between European institutions and Member States and therefore contributes to rethinking hitherto analytical approaches of the functioning of European law.

Third, in line with the proposed bottom-up approach and our understanding of text, we also adopt a broad understanding of 'European law'. This includes not only EC/EU law, but also, eg, the European Convention on Human Rights, legal acts implementing EC/EU law in the Member States, and national law enacted to meet the overall objectives of European integration.⁶³ For the purposes of this special issue a broad conceptualisation of European law has at least two benefits. The first is that it goes beyond a narrow focus on EC/EU law. In spatial and geographical terms, the history of European law has not only influenced societies in the Member States, but also in the European Economic Area countries Norway, Iceland and Liechtenstein as well as Switzerland, for example, all of which have long trajectories of societal engagement with European law.⁶⁴ The other benefit of a broad conceptualisation of European law including the European Convention on Human Rights and the European Court of Human Rights (ECtHR) is the emphasis placed on courts and judges. While we are not restricting our attempt to capture the functioning of European law from a broad actor base to these social spaces alone, the focus on legal conflict as a social interaction and communicative practice⁶⁵ fits well with our interest in examining the functioning of law from a societal perspective. Legal texts serve as a basis for social action and mobilisation.

Based on these definitions of text and its uses and a broad understanding of European law, the contributions to this special issue address several important questions including first the question of the drivers, ie, *who* engages with European law, why and to what purpose? Second, the contributions examine *when* actors mobilise European law. What are the specific local or regional or transnational contexts that serve as the basis for actors' engagement with European law? What do we learn about the role of the Member States in these instances? Third, *how* do actors mobilise European law and which channels do they use? Actors operate within negotiation settings, but they also have different opportunities to engage with European institutions including the European Parliament (EP), which receives both petitions by citizens and written questions by its members. Fourth, the articles probe *how* and *to what extent* actors transform their social, political, or economical grievances into judicialized conflicts at the European level including the EC/EU and other judicial fora such as the European Court for Human Rights, to also address which understandings of 'European law' actors hold.

⁶³Von Bogdandy (n 43) 58–62.

⁶⁴G Baur, 'Mutual Recognition and EFTA', in Albors-Llorens et al (n 3) 194–215; L Rye, *Norge i Europa* (Fagbokforlaget 2019); C Archer, *Norway outside the European Union. Norway and European integration from 1994 to 2004* (Routledge 2005).

⁶⁵Von Bogdandy (n 43) 19.

Despite its potential to significantly enhance our understanding of the functioning of European law, our approach also has methodological caveats. Once we develop a bottom-up perspective, the knowledge we produce about ‘European integration’ is fragmented. While fragmentation is necessary to question and overcome the notion of ‘integration’,⁶⁶ it comes with the risk of losing the overall narrative, leading to an ensemble of stories.⁶⁷ Work developed on our new approach does also not allow us to arrive at conclusions regarding the varying degrees of the ‘reception’ or European law, as previous work has done, eg, by Bill Davies and Morten Rasmussen on the constitutional battle. The impact of fragmentation can be mitigated somewhat, however, by combining fragments or stories. For example, jointly, the contributions by Karin van Leeuwen/Koen van Zon and Wiebe Hommes offer new insights into the functioning of European law in the Netherlands, going beyond the individual contributions of their articles (which will be introduced below).

Furthermore, by starting from a legal text, ie, when something has already been turned into a question of law, we exclude any initiatives challenging existing law or advocating new law that did not materialise as a legal text. This is an inherent challenge when studying law, because by studying what is classified as law, we are dependent on the object of our observation already being classified as law by someone else. This means that we are including in our research the methods of exclusion from the law that the legal system itself performs, hence contributing to the reproduction of this exclusionary mechanism. To fully address this challenge, it would be necessary to transgress more radically the borders of what is called ‘law’ and move beyond our starting point of the legal text.⁶⁸

6. The functioning of European law from 1957 to 2000: an initial assessment

This section introduces the contributions to the special journal issue by highlighting how they advance our understanding of the functioning of European law from 1957 to 2000. All contributions including this introduction are the result of collaborative and intense discussions over the past two years, with two workshops convened in Oslo in November 2023 and April 2024. Just as much as the individual contributions are the result of each author’s research and hard labour, we consider the special issue a collective product that reflects not just the sum of everyone’s argument, but a critical and supportive discussion culture that we created together during these workshops. We hope that for the reader, the process also reflects in the collectiveness of the final publication.

Lola Avril’s article focuses on the struggle over the interpretation of Article 55 of the EEC Treaty and the 1977 directive regarding the freedom to provide services for lawyers. Based on archives, interviews, and case law analysis, Avril shows how the different national trajectories of legal professions shaped their actions during the negotiations, 1957–77. The work challenges binary views of European institutions on the one side and national structures on the other and demonstrates that the directive reflected different and changing interests of bar associations, the development of the Court’s case law and tensions between ambitions to Europeanise the national professions or to create a European one.

A bottom-up movement – that of an action group for military conscripts – is also at the start of Wiebe Hommes’ re-examination of the activation of the European Convention of Human Rights in the *Engel* case. On the basis of extensive research in Dutch archival records and an interview with the key, pro-European academic, Evert Alkema, Hommes links the history of rebellious

⁶⁶The issue of fragmentation is also discussed in van de Grift and Leucht, Introduction, Special Issue 32 (3) (2025) *European Review of History* 283–304 (n 45).

⁶⁷P Burke, *History and Social Theory* (Polity 2005) 179–82.

⁶⁸For a good discussion of this general issue, see W L F Felstiner, R L Abel and A Sarat, ‘The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .’ 15 (1980) *Law and Society Review* 631–54.

conscripts of the 1968 generation including Cornelis Engel, the conscript behind the case, to Dutch academia and the diplomatic establishment. The article shows the importance of local, grass-roots interests in shaping the European-wide struggle over the border between human rights as a *political* question, to be negotiated in the Council of Europe, versus a *legal* question, to be settled in the ECtHR. By engaging with this case, Hommes' article also underlines the inclusive approach to European law taken by the special issue.

Starting from the 'post-Seveso directives' – enacted by the EC following the industrial accident at the small chemical manufacturing plant outside of Milan in 1976 – Karin van Leeuwen and Koen van Zon explore the response of Dutch and Italian social movements to environmental disasters and their impact on how the EC started to develop environmental law as an area of community regulation until 2000. Based on archival research, the authors show how social movements pushed infringement proceedings from below to advance their objectives without however having any inherent European agenda. The analysis provides evidence for the involvement of local political and social movements inspiring academics and politicians and ultimately, the European Commission and the Court, resulting in a long and complex chain of production of the legal text we have come to know as the Seveso directives.

Mala Loth's article starts with the observation that the two *Marshall* cases have been coined as landmark judgements for gender equality in legal discourse. Yet, from a historical point of view, the cases of Helen Marshall invite to make a broader claim of how to approach landmark cases in the history of European law from below. Based on published as well as archival documents, the article follows Helen Marshall's legal journey from 1978 until 1993. The article shows that Marshall was a 'legal entrepreneur' of her own cause and thereby an expression of the British zeitgeist in a broader context of European law.

Magnus Esmark's article starts from a 'buy-Danish' clause in the tender materials for a major Danish infrastructure project in 1989. Esmark shows how this apparently blatant misapplication of EC law was a meaningful result of social structures in the Danish legal field during the late 1980s. The drama around the clause provides a case for raising a broader discussion about how we understand 'errors' or the 'misapplication' of law – approaches that are inherently prescriptive and ascribe an ontological primacy to EC/EU law, even *before* studying how it functions in the Member States. The article suggests a theoretical framework to reconceptualise so-called 'errors' of law as meaningful social action within their given social contexts, drawing on the notion of *allodoxia* borrowed from Bourdieu's study of cultural taste.

Together, the contributions to this special issue allow for articulating several conclusions and observations regarding the usefulness of the promoted approach for the functioning of European law. *First*, our bottom-up, actor-focused approach promoting a specific use of legal text in examining the functioning of European law over time brings into view certain areas of European law: non-discrimination, the environment, and human rights. 'The constitution', in contrast, does not play a role in the contributions to this special issue – in marked difference from what we know about the 'reception' of EC/EU law focusing on the ECJ's landmark cases. From a bottom-up perspective it is not surprising that actors beyond legal elites do not mobilise constitutional law as the first language for expressing their perceived grievances, which feeds into our next observation.

Second, our approach also shows how these areas of law were, from the beginning, *co-created* by social actors in the Member States and beyond. Karin van Leeuwen and Koen van Zon write activists from the Italian women's movement as well as Dutch jurists into the development of environmental law, just as Wiebe Hommes contextualises the *Engel* case with contemporary political anti-war movements. This observation suggests that a broader understanding of 'European integration' allows us to regard this process as something other than an elite-driven project. This finding also casts serious doubt on the usefulness of the binary relationship between European institutions and the 'Member States', implicit in the term 'European integration', for understanding the functioning of European law.

Third, the contributions to this special issue show that actors mobilised European law for a range of reasons, not necessarily tied to ‘Europe’. Mala Loth demonstrates that social actors were not always *for* or *against* European integration. She describes that when looking from below, the *Marshall* case was first and foremost about money and the advancement of the cause of women; the protagonist Helen Marshall was not necessarily acting ‘pro-European’. This is specifically noteworthy given that Marshall was a British woman in Europe. A similar argument about a lack of interest in ‘Europe’ and ‘European law’ can be made for Wiebe Hommes’ conscripts. The lawyers and bar associations in Lola Avril’s study, in turn, were oriented towards protecting and/or expanding their legal market but appear to have had no ideological preferences in the opening of the market to legal services. In Magnus Esmark’s article, French contractor Bouygues wanted to earn money from building a bridge and did not even discover the conflict with EC law before the European Commission became involved. Mobilising European law draws attention to the border between law and politics. Wiebe Hommes shows a struggle over classifying human rights as politics or law, and Magnus Esmark demonstrates how Danish lawyers could completely misunderstand whether their preference would be accepted as political or judged as legal. In Karin van Leeuwen and Koen van Zon’s article, we follow closely how a political claim is transformed – through members of the EP – to a legal question.

Fourth, our approach also confirms the centrality of legal knowledge and expertise – and lawyers – in ‘European integration’. The transformation of political preferences into legal claims are facilitated by some sort of professionals, but not always lawyers. MEP’s help the Italian women’s movement in Karin van Leeuwen and Koen van Zon’s article, and academics play a key role in their and Wiebe Hommes’ articles. In Magnus Esmark’s article, even the major French contractor Bouygues does not turn its claim into one of European law before the Commission discovers the buy-Danish clause. Lola Avril engages with the lawyers themselves and their role in the regulation of the profession and shows how even bar associations could be overtaken by an incoming case from the ECJ.

In closing, we argue that our promoted approach – the focus on legal text combined with a bottom-up and actor-focused perspective – has the potential to generate further important insights about how European law functions in society; or, considering the caveats regarding fragmentation entailed in the new approach, in different European societies (in the plural). Rather than put a final stop behind this introduction and the contributions to the special issue, we would hope that our thoughts resonate with an interdisciplinary community interested in advancing the study of European law between 1957 and 2000 can form the basis for further methodological discussion and empirical exploration.

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