



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

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PhD Thesis

Rebekka Byberg

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The Key Transnational Institutions of the Academic Discipline
of European Law and Their Role in the Development of the
Constitutional Practice 1961-1993

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Submitted: 7 June 2017

Rebekka Byberg

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European Law and Their Role in the Development of the Constitutional
Practice 1961-1993

The Saxo Institute
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University of Copenhagen
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For my family

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For the last three years, European law has kept me busy. Not just during the day in my office at the University of Copenhagen, but also before going to sleep, while taking a run, during trips to the playground with my son, and when my husband and I had a most appreciated moment together in the hectic everyday life. Suddenly, questions on the impact of a specific journal, a newly discovered private archive, or a pending interview would pop into my head. For good and for bad, European law has been my companion around the clock.

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List of Abbreviations

AIGE - Associazione Italiana dei Giuristi Europei

AJE - Association des juristes européens

CML Rev. - *Common Market Law Review*

EC – European Communities/European Community

ECHR - European Convention of Human Rights

ECJ - European Court of Justice

ECSC - European Coal and Steel Community

EEC - European Economic Community

EU - European Union

EUI - European University Institute

FCC - German Federal Constitutional Court

FIDE - Fédération Internationale pour le Droit Européen

HAEU - Historical Archives of the European Union

ITL - Integration through Law

NVER - Nederlandse Vereniging voor Europees Recht

Polilexes - Politics of Legal Expertise in European Societies

SEA - Single European Act

WGE - Wissenschaftliche Gesellschaft für Europarecht

List of Cases

Cases in the European Court of Justice

Case 1/58, *Stork v. High Authority*, ECLI:EU:C:1959:4

Joined cases 36/58, 37/58, 38/59 and 40/59, *Präsident Rubrikohlen-Verkaufsgesellschaft and others v. ECSC High Authority*, ECLI:EU:C:1960:36

Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*, ECLI:EU:C:1963:1

Case 6/64, *Flaminio Costa v ENEL*, ECLI:EU:C:1964:66

Case 28/67, *Firma Molkerei-Zentrale Westfalen/Lippe GmbH v Hauptzollamt Paderborn*, ECLI:EU:C:1968:17

Case 13/68, *SpA Salgoil v Italian Ministry of Foreign Trade, Rome*, ECLI:EU:C:1968:54

Case 29/69 *Case 29/69 Stauder v. Ulm*, ECLI:EU:C:1969:57

Case 9-70, *Franz Grad v Finanzamt Traunstein*, ECLI:EU:C:1970:78

Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114

Case 33-70, *SpA SACE v Finance Minister of the Italian Republic*, ECLI:EU:C:1970:118

Case 41-71, *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133

Case 04/73, *Nold*, ECLI:EU:C:1974:51

Case 36-75, *Roland Rutili v Ministre de l'intérieur*, ECLI:EU:C:1975:137

Case 120/78, *Reve-Zentral AG v Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42

Case 148/78, *Criminal proceedings against Tullio Ratti*, ECLI:EU:C:1979:110

Case 44-79, *Liselotte Hauer v Land Rheinland-Pfalz*, ECLI:EU:C:1979:290

Case C-294/83, *Parti écologiste 'Les Verts' v. European Parliament*, ECLI:EU:C:1986:166

Case 152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, ECLI:EU:C:1986:84

Case 294/83, *Les Verts*, ECLI:EU:C:1986:166

Cases in the German Federal Constitutional Court

BVerfGE 37, 271 *Solange* decision 29 May 1974, 2 CMLR 540

BVerfGE 73, 339 *Solange II* decision 22 October 1986, 3 CMLR 225

BVerfGE 89, 155 2 BvR 2134, 2159/92 *Maastricht* decision 12 October 1993, CMLR 57

Cases in the French Council of State

Conseil d'Etat, *Minister of Interior v. Daniel Cohn-Bendit*, (1978), CMLR 545

Conseil d'Etat, Ass., 20 October 1989, Dalloz (1990), 136

Cases in the Italian Constitutional Court

Corte Costituzionale, *Fragd*, 232/1989, Foro italiano, I, (1990), 1855

Cases in the British House of Lords

House of Lords, *Regina v Secretary of State for Transport (Factortame II)*, 1991, 1 AC 603

List of Archives

Archive of *Common Market Law Review* (ACMLREV)

Archive of Dansk Forening for Europarets (ADFE)

Archive of FIDE (AFIDE)

Archive of Mauro Cappelletti, Historical Archives of the European Union (HAEU, MC)

Archive of Michel Waelbroeck (AMW)

Archive of Ole Lando (AOL)

Archive of the Associazione Italiana dei Giuristi Europei (AAIGE)

Archive of the Legal Service of the Commission, Brussels (ALSC)

Archive of the Nederlandse Vereniging voor Europees Recht (ANVER)

Archive of Walter Strauss, Institut für Zeitgeschichte, München (AWS)

Archive of Michel Gaudet, Fondation Jean Monnet pour l'Europe, Lausanne (AMG)

Eric Stein papers, Bentley Historical Library, Ann Arbor, Michigan (ESP)

List of Interviews

Interview with Monica Seccombe, 11 May 2013

Interview with Ole Lando, 20 November 2013 (conducted in cooperation with Jonas L. Pedersen and Morten Rasmussen)

Interview with Laurens-Jan Brinkhorst, 6 December 2013

Interview with Peter Hay, 17 March 2014

Interview with Ernst Steindorff, 20 June 2014 (conducted in cooperation with Bill Davies)

Interview with Paolo de Caterini 30 March 2016 (conducted in cooperation with Sigfrido Ramirez and Morten Rasmussen)

Interview with Claus-Dieter Ehlermann, 29 June 2016

Interview with Claus-Dieter Ehlermann, 16 September 2016 (by Sigfrido Ramirez)

Introduction

L'activité du Service juridique doit à bref délai être complétée dans trois domaines importants:

(...)

- le développement d'une action dans les milieux juridiques de la Communauté. Des efforts patients ont abouti en 1961 à la création de la Fédération des Juristes Européens; il faut maintenant un travail concerté et assurer le rayonnement de cet instrument capital de pénétration du droit communautaire dans les professions juridiques des Etats membres. D'autres efforts me mettront en mesure de proposer à brève échéance une publication juridique communautaire que les milieux intéressés vous ont déjà réclamée. Ainsi s'édifient progressivement les moyens d'une véritable politique juridique de la Commission, élément indispensable d'une implantation du droit communautaire dans la vie juridique des Etats membres à défaut de laquelle la réalisation effective du Marché Commun serait entravée.'

- Michel Gaudet, Director of the Legal Service of the European Economic Community, to Jean Rey, Commissioner, 21 January 1961¹

In the landscape of international organisations, the EU distinguishes itself remarkably by its uniquely authoritative court. From three international treaties,² the European Court of Justice (ECJ) has developed a legal order with a highly effective enforcement of European law, when compared to other international organisations. Academics engaged in studies of European law have therefore compared the ECJ to the American Supreme Court rather than the International

¹ Michel Gaudet to Jean Rey, 21 January 1961, Archive of Michel Gaudet (AMG), Fondation Jean Monnet pour l'Europe, Lausanne, Chronos 1961. Michel Gaudet was first a legal counsellor of the Legal Service of the High Authority of the European Coal and Steel Community (ECSC). From 1958 to 1967, he was the director of the Legal Service of the Commission of the European Economic Community, and from 1967-1969 he was the director of the Commission of the European Community, as the European Coal and Steel Communities, EURATOM, and the European Economic Community were merged into the European Community with a unified Legal Service in 1967. Jean Rey was commissioner in the Hallstein Commission 1958-1967 and president of the Commission 1967-1970.

² The Treaty of Paris (1951), the Treaty of EURATOM (1957), and the Treaty of the European Economic Community (1957).

Court of Justice in The Hague. The claim is that the ECJ has ‘constitutionalised’ the Treaties of the Union and built a proto-federal legal order.³

The questions of why and how the legal order of the Community developed far beyond the international law that usually governs international organisations has long been the focus of a specialised academic literature of law and politics studies. Historians have however traditionally either ignored or downplayed the legal dimension of European integration in accounts primarily concerned with its ideological, political, and economic history. Only very recently has a new strand of historical research begun to explore the history of European law on the basis of archival sources. Questioning the dominant constitutional paradigm in legal and political science literature that takes the success of the ECJ’s progressive constitutionalisation of the treaties for granted, these historians have focused on the contestation that the court’s ‘constitutional practice’ created in the Member States among legal, administrative, and political actors. According to the historians, the success of the constitutional practice in European law is far from secured.⁴

In order to analyse the historical development of the constitutional practice and the responses it has received from the Member States, the historians have thus explored how a large number of actors and institutions both at European and national level have battled over the precise nature and direction of European law. Among these actors and institutions, the emergence of an academic discipline of European law has been considered a crucial development that in the long run helped legitimise the case law of the ECJ and inform national legal, administrative, and political elites about European law. According to this literature, the ambitions for a judicial policy of the Commission, expressed by the Director of the Legal Service Michel Gaudet to the Commissioner Jean Rey in 1961, were successful. In fact, recent research has argued that the institutionalisation of the new academic discipline at the transnational level, initiated with the help of Gaudet, facilitated the promotion of the constitutional nature of European law.⁵

³ For the most prominent examples, see E. Stein, ‘Lawyers, Judges and the Making of a Transnational Constitution’, (1981), 75 *The American Journal of International Law*, 1-27; M. Cappelletti, M. Seccombe, and J. Weiler (general eds.), *Integration through Law. Europe and the American Federal Experience* (Walter de Gruyter, 1985-1988).

⁴ See, especially, M. Rasmussen, ‘Rewriting the History of European Public Law: The New Contribution of Historians’, (2013) *American University International Law Review*, 1187-1221, at 1218-1221; M. Rasmussen and B. Davies, ‘From International Law to a European Rechtsgemeinschaft: Towards a New History of European Law, 1950-1979’ in J. Laursen (ed.), *Institutions and Dynamics of the European Community, 1973-83* (Nomos/Bloomsbury, 2014), at 210. The term ‘constitutional practice’ refers to the practice of the ECJ rooted in the doctrines of direct effect and primacy that built on a constitutional reading of European law, although the ECJ avoided the contested notion ‘constitutional’ in the *Van Gend en Loos* and *Costa v ENEL* rulings.

⁵ See M. Rasmussen, ‘Constructing and Deconstructing ‘Constitutional’ European Law: Some reflections on how to study the history of European law’ in H. Koch, K. Hagel-Sørensen, U. Haltern, and J. Weiler (eds.), *Europe. The New Legal Realism: Essays in Honour of Hjalte Rasmussen* (Djøf, 2010), 639-660; A. Boerger and M. Rasmussen, ‘Transforming European Law: The Establishment of the Constitutional Discourse’, (2014) 10 *European Constitutional Law Review*, 199-225. In addition, see A. Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity*

However, these claims are preliminary in nature because the transnational institutions of the academic discipline of European law remain largely unexplored empirically.

This thesis intends to fill this gap. Based on new sources from recently opened private and institutional archives, the thesis in three articles explores the history of the key transnational institutions of the academic discipline of European law. The analysis includes a new history of the Fédération Internationale pour le Droit Européen (FIDE), mentioned by Gaudet in the citation above. Secondly, it analyses the development of the key transnational journal of the discipline: the *Common Market Law Review* (*CML Rev.*). Finally, it tells the story of how the Department of Law of the European University Institute (EUI) with the famous the Integration through Law (ITL) project helped shape the discipline of European law in the 1980s. Covering the period from 1961 to 1993, three research questions run through the thesis. Firstly, what were the social and organisational dynamics behind the key institutions of the transnational level of the academic discipline of European law and how did they develop during the period under scrutiny? Secondly, how did the academic debate on the nature of European law in the key transnational institutions develop? Finally, what role did the key transnational institutions play in the development of the constitutional practice in European law? All in all, it is the hope that the thesis will contribute with a deeper understanding of the emergence and development of the academic discipline of European law and its role for the development of a constitutional practice in European law.

The remaining introduction will firstly present a brief introductory history of European law, providing a general context to the three case studies and an introduction for the reader unfamiliar with the field. Secondly, a state of the art reviews the European integration historiography, the specialised law and politics literature that has emphasised the role of law in European integration, and new strands of sociological and historical literature with new approaches and claims on the history of European law. Thirdly, the literature that specifically evolves around the history of the discipline of European law is discussed, and a conclusion on the insights drawn from this literature follows. Fourthly, the research object, the research questions, and the methodology are presented, and finally the sources are the subjects of the last section in this introduction.

(Cambridge University Press, 2015) and A. Vauchez and S. Mudge, 'Building Europe on a Weak Field: Law, Economics and Scholarly Avatars in Transnational Politics', (2012) 118 *American Journal of Sociology*, 449-492 for new political science literature that similarly emphasises the role of the key institutions of the discipline of European law.

1 A Brief History of European Law

Compared to the law that governs most international organisations, the European Union has a legal order, which is coherent, effective, and highly influential in the national legal systems. The historical roots to this European rule of law, currently encompassing half a billion people, lie in political dreams flourishing in the years after World War II, where grand transnational movements advocated a European federation based on a constitutional legal system. In the framework of the Council of Europe (1949-1950), the European Coal and Steel Community (ECSC) negotiations (1950-1951), and in the negotiations on the European Political Community (1952-53), the European Movement and its constituent parts⁶ pushed this agenda.⁷

What materialised was the ECSC, initiated by the Schuman Declaration.⁸ Although the declaration mentioned a European federation as a distant goal, it never proved politically viable: national governments shied away from this objective in both the negotiations on the Treaty of Paris (1951) establishing the ECSC and on the Treaties of Rome (1957) establishing the European Economic Community (EEC) and the EURATOM. At the Treaty of Paris conference, only the German delegation came close to supporting a federal organisation of the ECSC based on something resembling a constitutional treaty. While accepting the French idea of a supranational European executive with independent powers in the shape of the High Authority, the other national delegations were mostly focused on developing sufficient legal and political control of this institution. In the negotiations on the Treaties of Rome, all national governments except the Dutch moved away from the notion of a supranational executive with substantial decision making powers heralded in the Treaty of Paris. Instead they gave the main legislative role to the Council of Ministers.⁹

However, the legal nature of the Treaty of Paris and the Treaties of Rome was peculiar. Formally they might have been classical international treaties, but their subject matter – the comprehensive schemes for economic integration - required the inclusion of legal techniques and tools from national administrative law and internal state law. In the part of the negotiations that dealt with legal technicalities, a number of jurists with federal aspirations had furthermore managed to insert elements strengthening the constitutional dimension of the treaties. Inspired

⁶ Among these, the European Union of Federalists, the Socialist Movement for the United States of Europe, and the Christian Democratic Nouvelles Equipes Internationales.

⁷ M. Rasmussen, 'Origins of a Legal Revolution – The Early History of the of European Court of Justice', (2008) 14, n. 2, *Journal of European Integration History*, 77-98, at 79.

⁸ The remaining part of this section relies on Boerger and Rasmussen, 'Transforming European Law', at 201-203.

⁹ A. Boerger-De Smedt, 'Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome', (2012) 21 *Contemporary European History*, 339-356.

by American federalism, the German law professor and future president of the Commission Walter Hallstein and his right hand Carl Friedrich Ophüls had succeeded in adding the right for private litigants to appeal against the decisions of the High Authority of the European institutions in the Treaty of Paris.¹⁰ In the negotiations on the Treaties of Rome, a group of jurists in the so-called ‘groupe de rédaction’, which included pro-European jurists such as Gaudet, Nicola Catalano (representing Italy and future European Court of Justice (ECJ) judge from 1958 to 1962), and Pierre Pescatore (representing Luxembourg and future ECJ judge from 1967 to 1985), in addition managed to insert a system of judicial review involving national courts that gave the ECJ exclusive competence to interpret European law.¹¹ The unusually ambitious political objectives of the ECSC and the European Communities (EC)¹², i.e. the uniting of Europe, as well as the inclusion of legal principles and doctrines drawn from state law, meant that the treaties and the legal order they instituted arguably deviated from traditional international law. The ambiguity was such that the real nature of European law was still to be decided. Could constitutionalism creep in through the backdoor?¹³

In the 1950s, the ECJ however refrained from addressing the nature of European law confronted, as it were, by national governments and national legal elites that held the view that European law was simply international law.¹⁴ In the beginning of the 1960s, the president of the first Commission of the EEC, Hallstein, however re-vitalized the dream of steering towards a European federation,¹⁵ and Gaudet openly pushed the ECJ for a constitutional reading of European law with the Commission’s backing.¹⁶ Upon these changes, the ECJ set European law apart from traditional international law when it created the doctrine of direct effect in *Van Gend en Loos*¹⁷ and the doctrine of primacy in *Costa v ENEL*¹⁸, both cases originating in preliminary references for judicial review from national courts. This meant that treaty provisions could have legal force directly in the legal orders of the Member States, where national citizens could rely

¹⁰ Article 33, ECSC Treaty, which was maintained in a more restricted form in Article 173, EEC Treaty.

¹¹ Article 177, EEC Treaty.

¹² This thesis refers to ‘the Communities’ when analysing events prior to 1967 and to ‘the Community’ after 1967 (see note 1). The abbreviation EC covers both.

¹³ For a detailed analysis of the negotiations on the Treaty of Paris and Treaties of Rome, see Boerger-De Smedt, ‘Negotiating the Foundations of European Law, 1950-57’.

¹⁴ In the monist states (the Netherlands, France, Luxembourg, and Belgium) international treaties were incorporated directly into domestic law when ratified. In the dualist states (Germany and Italy), the Parliament had to transform international treaties to internal law through legislation.

¹⁵ Vauchez, *Brokering Europe*, at 27-28.

¹⁶ M. Rasmussen, ‘Revolutionizing European law: A history of the Van Gend en Loos judgment’, (2014) 12 *I.CON*, 136-163, at 210.

¹⁷ Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*, ECLI:EU:C:1963:1.

¹⁸ Case 6/64, *Flaminio Costa v ENEL*, ECLI:EU:C:1964:66.

upon them in disputes with their governments (direct effect). In case of conflict between treaty provisions/secondary European law and national law, European law would prevail (primacy). By creating these doctrines, the ECJ launched a constitutional interpretation of the treaties that it would later expand and consolidate.¹⁹

Shortly after this ‘juridical coup’,²⁰ the federalist ambitions of the Commission, personified by its president Hallstein, suffered a defeat to the Member States, which rose to be the key protagonists of the Community system after the Empty Chair crisis in 1965.²¹ With this demise of Hallstein’s political federal project, the legal doctrines were left fatherless.

The resignation of Charles de Gaulle in 1969 and a breakthrough for European cooperation at the Summit in The Hague the same year however allowed for renewed optimism on the behalf of European political cooperation.²² Led by the French jurist Robert Lecourt from 1967-1976, and driven forward by new judges on the bench with federalist persuasions such as Pescatore, the ECJ now followed its quest to expand and consolidate the first steps taken with *Van Gen den Loos* and *Costa v ENEL*. It thus expanded in key fields such as the implied powers of the institutions, the common market, enforcement, and human rights. Turning to enforcement, the doctrines of direct effect and primacy were so cautiously formulated in 1963 and 1964 that they had a limited practical effect. The ECJ had expanded direct effect to new treaty articles in the late 1960s,²³ but the key issue was directives, which did not have direct applicability according to article 189 of the EEC Treaty in contrast to regulations and self-executing treaty articles. Instead, directives required national implementation, and the national administrations could freely choose the means. In three cases between 1970 and 1974, the ECJ however expanded the direct effect and declared that clearly defined directives were directly effective and could be called upon by individuals before national courts.²⁴ This prompted fierce resistance, especially from Britain and France. Most importantly, the French Conseil d’Etat rejected the ECJ’s reading in the *Cohn-Bendit* ruling in 1978 stating that the ECJ could not construe directives with direct effect.²⁵ The

¹⁹ Rasmussen, ‘Revolutionizing European law’, at 140 and 151-154.

²⁰ A. Sweet Stone, ‘The Juridical Coup d’Etat and the Problem of Authority’, (2007) 8 *German Law Journal*, 915–28.

²¹ M. Rasmussen and B. Davies, ‘Towards a New History of European Law’, (2012) 21, n. 3, *Contemporary European History*, 305-318, at 306-307.

²² The remaining part of the section draws heavily on Rasmussen and Davies, ‘From International Law to a European Rechtsgemeinschaft’ and M. Rasmussen, ‘The Battle of European Law Enforcement’, conference paper, Setting the Agenda for Historical Research on European Law. Actors, Institutions, Policies and Member States, December 9-11 2015, European University Institute.

²³ See, for example, Case 28/67, *Firma Molkerei-Zentrale Westfalen/Lippe GmbH v Hauptzollamt Paderborn*, ECLI:EU:C:1968:17, and case 13/68, *SpA Salgoil v Italian Ministry of Foreign Trade, Rome*, ECLI:EU:C:1968:54

²⁴ Case 9-70, *Franz Grad v Finanzamt Traunstein*, ECLI:EU:C:1970:78; Case 33-70, *SpA SACE v Finance Minister of the Italian Republic*, ECLI:EU:C:1970:118; Case 41-71, *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133.

²⁵ Conseil d’Etat, *Minister of Interior v. Daniel Cohn-Bendit*, 1978, CMLR 545.

resistance eventually led the ECJ to declare that directives could only impose obligations vertically on public bodies, but not horizontally. Directives could thus not be invoked in cases between individuals.²⁶

To an even greater extent, the ECJ's expansion of primacy met resistance. On a preliminary reference sent by the Administrative Court in Frankfurt am Main, the ECJ in 1970 ruled that it would uphold fundamental rights common to the Member States, but that European law could not be overridden by national rules, however framed.²⁷ This clashed with the re-building of the German constitutional system after World War II, where fundamental rights were written into an unchangeable part of the constitution and protected by a constitutional court. Upon the ECJ's ruling, the Administrative Court in Frankfurt am Main referred the case back to the German Federal Constitutional Court (FCC), which in 1974 famously ruled that German courts could review Community legislation in order to secure that it did not conflict with German fundamental rights, as long as (so lange) the Community did not have a comparable system of rights protection endorsed by a democratic parliament in the Community.²⁸ Having opposed the ECJ directly, the FCC provided a major blow to the integrity of ECJ and to the most radical version of its primacy doctrine. Due to backroom negotiations at the highest political level, a Joint Declaration of the Commission, Council, and Parliament in 1978 bound the European institutions to the European Convention of Human Rights (ECHR), and direct elections to the European Parliament was initiated in 1979. While the ECJ was reluctant to accede the convention, it did however rule that international conventions for the protection of human rights could supply guidelines, which should be followed in the framework of Community law.²⁹

In the 1980s, European integration gained momentum with the Single European Act (SEA) entering into force in 1986. The coming of the single market meant that the political and legal establishments in the Member States were more inclined to de facto accept the enforcement system created by the ECJ. De jure, the national supreme courts however still maintained a reservation: In 1986, the FCC stated that it would not review Community legislation as long as effective protection of fundamental rights was guaranteed at the European level, but it also

²⁶ Case 148/78, *Criminal proceedings against Tullio Ratti*, ECLI:EU:C:1979:110 and Case 152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, ECLI:EU:C:1986:84.

²⁷ Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114.

²⁸ BVerfGE 37, 271 *Solange* decision 29 May 1974, 2 CMLR 540. See, also, B. Davies, 'Pushing Back: What Happens When Member States Resist the European Court of Justice? A Multi-Modal Approach to the History of European Law', (2012) 21 *Contemporary European History*, 417-437, at 419.

²⁹ Case 44-79, *Liselotte Hauer v Land Rheinland-Pfalz*, ECLI:EU:C:1979:290; Davies, 'Pushing Back', at 421-422.

implied that it could overrule the ECJ if protection of these rights required it.³⁰ In 1989, the Italian constitutional court likewise ruled that Community law could not be applied in Italy if it infringed a fundamental, Italian principle concerning fundamental rights.³¹ The same year, the French Council of State finally accepted the primacy of European law in case of conflict between European law and national law. However, the acceptance was rooted in the argument that the EC was merely based on delegated competences from the French constitution, and not, as the ECJ's had claimed, on an autonomous and supreme European law.³² Likewise, the House of Lords finally accepted the primacy of European law in 1991, although on the basis of the European Communities Act 1972.³³ Finally, the famous *Maastricht* ruling in the FCC delivered a fatal punch to the constitutional interpretation of European law. The court held that the European Parliament could not claim democratic legitimisation as long as a unified European people lacked. The Member States were therefore the masters of the Treaties. In Germany, the constitution, the constitutional principles, and the fundamental interests of the state, was de jure above European law, the FCC stated.³⁴ In the beginning of the 1990s, the de facto accept of the European legal system in the Member States thus existed alongside a battle between the ECJ and the supreme courts in the Member States on the nature of the European legal order.

2 State of the Art of Research on the History of European law

In European integration historiography, law has generally been left aside. However, a law and politics literature has for long pointed to law as the key dynamics of the integration process. Finally, new strands of respectively sociological and historical literature have challenged key assumptions in the law and politics literature.

This review of the research literature is divided into three sections corresponding to these tendencies. Firstly, I will discuss the general historiography of European integration in brief. Secondly, the field of law and politics studies will be treated. And finally, we shall take a closer look at two new strands of sociological and historical literature with claims on the history of European law. It is in particular the latter, which has inspired this thesis.

European Integration Historiography

Concerned with the ideological, political, and economic aspects of European integration, the first

³⁰ BVerfGE 73, 339 *Solange* II decision 22 October 1986, 3 CMLR 225.

³¹ Corte Costituzionale, *Fragd*, 232/1989, Foro italiano, I, 1990, 1855.

³² Conseil d'Etat, *Ass.*, 20 October 1989, Dalloz (1990), 136.

³³ House of Lords, *Regina v Secretary of State for Transport (Factortame II)*, 1991, 1 AC 603.

³⁴ BVerfGE 89, 155 2 BvR 2134, 2159/92 *Maastricht* decision 12 October 1993, CMLR 57.

generations of historians to engage with European integration neglected law in their interpretations of the dynamics behind integration. The pioneer was Walter Lipgens, the first professor of history at the EUI (1976-1979). A dedicated federalist himself, he aimed at collecting as much evidence as possible on the early backing of European integration in the resistance movements and the European movement. Supported by the Commission, Lipgens published the material in four monumental commented volumes in the 1980s.³⁵ However, Lipgens failed in linking the massive documentation of federalist ideology to the integration process, leaving the actual dynamics behind integration unexplored, and his work did not manage to set an agenda amongst European historians. In parallel, a group of mainly diplomatic historians led by the French historian René Girault became interested in European integration in the late 1970s and early 1980s. In cooperation with the Commission, networks and historical research projects on the European integration were initiated, most importantly the Groupe de liaison des professeurs d'histoire contemporaine auprès de la Commission européenne (the Liaison Committee). The aim of this committee was to organise conferences and initiate a journal of European integration history. The latter aim did not succeed before 1995, when the *Journal of European Integration History* was launched. Following the thirty-year rule, government archives began to open up for files on European integration in the 1980s, and the historians connected to the Liaison Committee were now able to research the early integration process on the background of the national archives and a much more credible source material. Following the tradition in diplomatic history, the contributions from these historians focussed on European integration policies of the Member States as part of their foreign policies.³⁶

A historian with a quite different approach would however set the agenda in European integration historiography in the 1980s with a lasting impact. Lipgens' successor at the EUI, the British economic historian Alan Milward, promoted an intergovernmentalist approach with a focus on commercial and economic interests. He argued that integration was rational action by national politicians and civil servants in order to maintain and bolster the national welfare states. Thus, integration was a means of 'rescuing the European nation state' at an economically critical

³⁵ W. Lipgens (ed.), *Documents on the History of European Integration*, Vol. 1 (Nomos Verlag, 1985); W. Lipgens (ed.), *Documents on the History of European Integration*, Vol. 2 (Nomos Verlag, 1986); W. Lipgens and W. Loth (eds.), *Documents on the History of European Integration*, Vol. 3 (De Gruyter, 1988); W. Lipgens and W. Loth (eds.), *Documents on the History of European Integration*, Vol. 4 (De Gruyter, 1991). For a review of Lipgens and his work, see A. Varsori, 'From Normative Impetus to Professionalization' in W. Kaiser and A. Varsori (eds.), *European Union History. Themes and Debates* (Palgrave, 2010), 6-25, and K. Seidel, 'From Pioneer Work to Refinement: Publication Trends' in W. Kaiser and A. Varsori (eds.), *European Union History. Themes and Debates* (Palgrave, 2010), 26-44.

³⁶ Varsori, 'From Normative Impetus to Professionalization', at 14.

point in history, and it was driven forward by the states in a rational game of bargaining.³⁷ Milward became a major source of inspiration to other European integration historians. In edited volumes from historians connected to the Liaison Committee, such as Raymond Poidevin,³⁸ Klaus Schwabe,³⁹ and Richard Griffiths,⁴⁰ diplomatic history was now combined with the insights provided by economic historians, most importantly Milward. John Gillingham, another prominent integration historian, also followed in the footsteps of Milward by focusing on the role of national governments in his analysis of the creation of the ECSC,⁴¹ whereas he would later interpret European integration as a struggle between the state and the market as two principles of social, political, and economic organisation in an analysis bluntly promoting economic liberalism.⁴²

The influence of Milward has declined since the 2000s, as scholars have moved away from his somewhat narrow intergovernmental approach and focus on state preferences. Instead, historians have used a wider range of sources (such as private papers of individuals, social and economic actors, and interest groups) to complement national archives, and new conceptualisations of the European Community emerged that once again highlight transnational actors and ideology in European integration.⁴³ Law was however still left out as an influential factor in these historical interpretations of European integration.⁴⁴ The only exploration of the ECJ in the integration process in an academic, historical forum was thus written by the lawyer Christian Pennera.⁴⁵ Historians did not follow up until the late 2000s.

³⁷ A. Milward, *The Reconstruction of Western Europe, 1945-51* (Methuen, 1984); A. Milward, *The European Rescue of the Nation-State* (Routledge, 1992). In political science, the American scholar Andrew Moravcsik mirrored the state centric analysis of Milward in a study that merged history and political science with an aim of predicting future developments. Creating the theory of liberal intergovernmentalism, he argued that it was primarily commercial interests of the nation states that drove the integration process forward in a game of intergovernmental bargaining (A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press, 1998)). The approach by Moravcsik had similar lacks to Milward's: A simplified approach to national interest that left contestation and negotiations between the range of actors and interest groups with an interest in impacting the state preference unexplored. In addition, historians criticised Moravcsik's use of historical sources as biased in his determination to develop an overarching theory of integration. See D. Dinan, 'The Historiography of European Integration' in D. Dinan (ed.), *Origins and Evolution of the European Union* (Oxford University Press, 2014), at 369.

³⁸ R. Poidevin (ed.), *Histoire des Débuts de la Construction Européenne* (mars 1948-mai 1950) (Bruylant, 1986).

³⁹ K. Schwabe (ed.), *Die Anfänge des Schuman-Plans 1950-1951* (Bruylant, 1988).

⁴⁰ R. Griffiths (ed.), *The Netherlands and the Integration of Europe 1945-1957* (NEHA, 1990).

⁴¹ J. Gillingham, *Coal, Steel, and the Rebirth of Europe, 1945-1955* (Cambridge University Press, 1991)

⁴² J. Gillingham, *European Integration, 1950-2003: Superstate or New Market Economy* (Cambridge University Press, 2003).

⁴³ See, for instance, W. Kaiser, B. Leucht, and M. Rasmussen (eds.), *The History of the European Union: Origins of a trans- and supranational polity 1950-72* (Routledge, 2009).

⁴⁴ Moravcsik did mention the ECJ as one of the strategic political actors in European integration, but he did not carry out a detailed analysis of the role of the court. See Moravcsik, *The Choice for Europe*, at 67-68.

⁴⁵ C. Pennera, 'The Beginnings of the Court of Justice and its Role as a driving Force in European Integration', (1995) 1 *Journal of European integration History*, 111-128.

While historians neglected the importance of European law to the integration process, a very large and varied research literature had for long emphasised the role of law. Most notably, a literature labelled ‘Integration through Law’. This is not only central in this literature review; it is also a part of the source material in the case studies of the thesis. An instructive definition of ITL literature, or ‘ITL theory’, is however debatable. The legal scholar Ulrich Haltern considers ITL a fragmented movement tied together by a focus on the role of law and legal institutions in European integration.⁴⁶ This definition is often referred to in reviews of European law literature,⁴⁷ it is however also criticised. The historian Bill Davies did thus not consider Haltern’s definition of ITL instructive for the purpose of his own study of the reception of European law in Germany. Davies instead referred to the usefulness of the models proposed by Karen Alter and Joseph Weiler, who ‘look at a small number of crucial cases from the ECJ of “constitutional” importance – namely, the doctrines of direct effect and primacy and their consolidation in subsequent case law.’⁴⁸

The starting point for the ITL literature is likewise questionable. The ITL project directed by the comparative law professor Mauro Cappelletti at the EUI in the late 1970s and the 1980s is often depicted as the take off, as it provided the name that was subsequently adopted as the label for often highly theoretical literature arguing for the centrality of the ECJ and its constitutional case law in the integration process.⁴⁹ The political scientist Antoine Vauchez has however questioned this. He has portrayed Integration through Law as a theory, which points to the centrality of the ‘magical triangle’ of direct effect, supremacy, and preliminary rulings in the economic, social, and political integration, and he has traced the genesis of the theory to the 1960s, primarily the immediate aftermath of the *Van Gend en Loos* and *Costa v ENEL* rulings.⁵⁰ In opposition stands the legal scholar Matej Avbelj, who has pointed to the ‘double nature’ of ITL. He has argued that there was a clear separation between a ‘policy conception of ITL’ and the academic ITL project conceived and carried out at the EUI. He noticed the overlaps between proponents and claimed that the academic project was to some degree an activity of a critical

⁴⁶ U. Haltern, ‘Integration Durch Recht’ in H. J. Bieling and M. Lerch (eds.), *Theorien der Europäischen Integration* (VS Verlag für Socialwissenschaft, 2005), especially at 399-400

⁴⁷ See, for instance, Hauke Delfs, *Komplementäre Integration. Grundlegung und Konstitutionalisierung des Europarechts im Kontext* (Mohr Siebeck, 2015)

⁴⁸ B. Davies, *Resisting the Court of Justice. West Germany’s Confrontation with European Law, 1949-1979* (Cambridge University Press, 2012), at 20.

⁴⁹ See, for instance, U. Haltern, ‘Integration Durch Recht’, at 400.

⁵⁰ A. Vauchez, ‘Integration-Through-Law? Contribution to a socio-history of EU political commonsense’ (EUI Working Paper, 2008/10).

self-examination revealing the main underlying assumption of the policy conception. The principal orientation of the academic ITL project was nevertheless scientific rather than concerned with promoting a particular vision of European integration by instrumental reliance on law, according to Avbelj.⁵¹

In this thesis, ITL literature is defined as academic contributions making the intertwined arguments that European law has a constitutional nature and that law and the ECJ constitute the key dynamics in the European integration process. This definition resembles the definition proposed by Halter, but refines it by adding a shared assumption on the nature of European law in the ITL literature. The proposition by Davies should however be questioned, as he unintendedly mix different categories, namely the characterisation of the ITL as a theory/movement (Halter) and actual contributions to ITL literature (Alter and Weiler), when he suggests that Alter and Weiler provide for more instructive models of ITL. The mix-up illustrates the pitfalls when dealing with the concept of ITL.

In addition, the thesis follows the lead by Vauchez and argues that the theoretical arguments usually linked to the ITL literature of the 1980s and 1990s had already been promoted and developed for decades when the ITL project at the EUI was initiated.⁵²

In fact, ideas on the constitutional nature of European law had flourished from the 1950s onwards in a small group of scholars, judges, civil servants, and politicians, who opposed the prevailing view among national legal academics in the 1950s and early 1960s, namely that the ECSC and the ECJ were international organisations and should be ruled by the principles of public international law.⁵³ Influenced by Gaudet, the Legal Service argued that the ECJ should assume a constitutional role by adopting a teleological interpretative method instead of the textual approach used in international public law at the time. Representatives of the Legal Service promoted this strategy in cases before the ECJ, however without success initially.⁵⁴ In academic writings and before the ECJ, advocate-general Maurice Lagrange likewise endorsed European law as partly constitutional and closer to federal than to international law.⁵⁵ In addition, American

⁵¹ See M. Avbelj, 'The Legal Viability Of European Integration' in D. Augenstein (ed.) *'Integration through Law' Revisited. The Making of the European Polity* (Ashgate, 2012), 29-46, at 38

⁵² See the article on the ITL project in this thesis for the full development of this argument.

⁵³ Boerger and Rasmussen, 'Transforming European Law', at 206.

⁵⁴ *Ibid.*, at 204.

⁵⁵ *Ibid.* Boerger and Rasmussen refer to M. Lagrange, *Le caractère supranational des pouvoirs et leur articulation dans le cadre du Plan Schuman*, Conférence prononcée devant la Tribune du jeune barreau de Luxembourg, 23 mars 1954, (Library of the European Court of Justice 1954), at 16; M. Lagrange, 'La Cour de Justice de la Communauté européenne du Charbon et de l'Acier', *Revue du Droit et de la Science politique en France et à l'étranger* (1954), at 419; M. Lagrange, 'L'ordre juridique de la C.E.C.A. vu à travers la jurisprudence de sa Cour de Justice', *Revue du Droit et de la Science politique en France et à l'étranger* (1958), at 841.

scholars interested in European law, who were well connected in the European institutions, did not shy away from comparing the European and American legal orders and labelling the former ‘constitutional’. The pioneers were Eric Stein, a comparative law professor from the University of Michigan, and his apprentice Peter Hay, who had hinted at comparability between the Communities and the US already in the beginning of the 1960s.⁵⁶

When the ECJ followed the lead of Gaudet and proclaimed the doctrines of direct effect and primacy in the rulings of *Van Gend en Loos* and *Costa v ENEL* in 1963 and 1964, it provided full to the the constitutional claim in academic literature. According to central observers, the ECJ had now created the foundation of a European legal order with rights for citizens that could be enforced through the preliminary reference system. Hallstein and members of the European Parliament such as Fernand Dehousse specifically characterised the ‘new legal order’ (the term the ECJ had cautiously used) as constitutional.⁵⁷ In other academic writings and presentations, the constitutional claim was now combined with the argument that because the political impetus for European integration was missing in the early 1960s (the fall of the Fouchet Plan in 1961-62, the French rejection of the British application for membership in 1963 and the Empty Chair Crises in 1965) the ECJ had to carry on the integration process through law enforcement of rights. In front of the Association des juristes européens, the French academic association of European law, Lecourt for instance held a presentation entitled ‘The Role of Law in Unifying Europe’ in 1964, where he stated that the legal method to unify Europe lied in EC law’s effect of multiplying relations, associations, transactions beyond borders, as well as of triggering narrow interrelations of activities, interests, and human relationships.⁵⁸ According to the French political scientist Antoine Vauchez, this was arguably the first systematic conceptualization of the Court’s contribution to the dynamics of what would today be referred to as ITL, as it depicted the relationship between direct effect/supremacy and preliminary rulings as triggering an incremental process of integration that political leader would have to endorse.⁵⁹

In the 1960s and the 1970s, this narrative was continuously developed and promoted by judges, scholars, and EC officials. For instance in Pescatore’s book *Le droit de l’integration* from 1972, where the ECJ judge held that the ECJ could be compared to the US supreme court with its bold development of the European legal order in times of crises and stagnation in the political

⁵⁶ See, for instance, E. Stein and P. Hay, ‘New Legal Remedies of Enterprises’, (1960) 9 *American Journal of Comparative Law*, 375-424.

⁵⁷ Boerger and Rasmussen, ‘Transforming European Law’, at 211.

⁵⁸ Vauchez’ translation of R. Lecourt, ‘Le rôle du droit dans l’unification européenne’, Bulletin de l’Association des juristes européens (1964). See Vauchez, *Brokering Europe*, at 142.

⁵⁹ Vauchez, *Brokering Europe*, at 142.

institutions of the Community.⁶⁰ In Lecourt's book *L'Europe des Juges* from 1976, he made the similar claim that the ECJ had been legally innovative in order to avoid the threatening ruin of the Community caused by the egoistic pursuits of narrow national interests by the Member States.⁶¹ Taking the ideological torch from Gaudet, the director of the Legal Service from 1977-1987, Claus-Dieter Ehlermann, promoted the narrative as well, stating that the ECJ had drawn up the fundamental principles of Community law and was to be regarded as a prime factor of integration.⁶²

In the 1960 and 1970s, legal scholars did however not commonly rely on the ITL arguments. In national legal fora, the jurisprudence by the ECJ was contested, which led some judges to publicly reject the notion of a 'gouvernement des juges'.⁶³ Even in transnational academic forums of European law such as FIDE, European law's ultimate primacy over national constitutions (a central claim in the ITL literature and ECJ case law) was questioned.⁶⁴ Generally, the scholarship on European law in the nascent academic discipline of European law was doctrinal and without explicit discussions of the nature of European law or the role of law and the ECJ in European integration.⁶⁵ The literature touching on the interplay between the ECJ and the courts in the Member States was scarce and argued that the eminent legal reasoning of the ECJ had persuaded national judges to accept the jurisprudence by the ECJ and to engage in building a new European legal order by sending preliminary rulings to the ECJ.⁶⁶ Reflections on the potential social, political, or economic factors determining national reception of European law were completely left out, as were nuanced interpretations of inter-court dialogue or judicial interests in the Member States.

This doctrinal tradition changed with the impact of two grand projects comparing the American and the European legal orders in end of the 1970s and the beginning of the 1980s; the

⁶⁰ P. Pescatore, *Law of Integration* (Sijthoff, 1974).

⁶¹ R. Lecourt, *L'Europe des Juges* (Bruylant, 1976).

⁶² C.D. Ehlermann, 'Legal Status, Functioning and probable evolution of the institutions of the European Communities', (1973) 10, n. 2, *Common Market Law Review*, 195-207, at 198.

⁶³ See, for instance, A. Donner, 'The Constitutional Powers of the Court of Justice of the European Communities', (1974) 11 *Common Market Law Review*, 127-140, at 139.

⁶⁴ See, for instance, W. Harms, 'Deutscher Bericht', Kommission II (Wettbewerb), FIDE congress report 1970; E. A. Alkema, 'The judicial protection of fundamental rights in the Netherlands', FIDE congress report 1975, at II/11, at 28-29.

⁶⁵ For examples of the cautious, doctrinal approach, see the issues of the first generation of European law journals in the 1960s and 1970s (the Italian *Rivista di diritto europeo*, the French *Revue trimestrielle de droit européen*, the Dutch-British *CML Rev.*, the German *Europarecht*, the Belgian *Cahiers de droit européen*), where most writers shied away from contextual or theoretical reflections and instead provided accounts of European law on the sole basis of the jurisprudence of the ECJ.

⁶⁶ For a striking example, see F. Mancini, 'The Making of a Constitution for Europe', (1989) 26 *Common Market Law Review*, 595-614, at 605-606.

Courts and Free Markets project by Eric Stein and Terence Sandalow and the IITL project. In these projects that relied on earlier IITL writings and had the same normative Achilles heel, it was a central claim that the ECJ had constitutionalised the treaties and that the ECJ was a vehicle for driving economic and political integration forward.

Stein's analogies between the Communities and the US found pace, as he and Sandalow initiated a European-American study on the role of the judiciary in economic integration, which resulted in the Bellagio conference in 1979 and the book *Courts and Free Markets: Perspectives from the United States and Europe* in 1982.⁶⁷ A bi-product of the project was the article 'Lawyers, Judges, and the Making of a Transnational Constitution' published in *American Journal of International Law* in 1981, where Stein claimed that the ECJ had constitutionalised the 'Treaties of Rome and created a proto-federal legal order on the cue of the Legal Service of the Commission.'⁶⁸ This piece of scholarship is one of the most famous articles on European law, and it has been regarded as the take off for the constitutional paradigm. In addition, it has been seen as the beginning of European law in context, as Stein's analysed the different approaches and interests of a range of actors (the ECJ, the advocate general, the Commission and the Member States) in the *Van Gend en Loos* and *Costa v ENEL* cases.⁶⁹

However, the IITL project was in many ways the project that led to the spread of the constitutional understanding of European law, the emphasis on the ECJ as a motor of integration, and the law in context movement because of the magnitude of the project, which facilitated a transatlantic network and a scholarly environment at the EUI.⁷⁰ The basis of the project was the perception that the Community was in a state of crises due to potential lack of efficiency of the decision making process in an enlarged community, the Common Agricultural Policy, the budgetary crises, the lack of a transport policy, unemployment, inflation, a deep seated

⁶⁷ E. Stein and T. Sandalow, *Courts and Free Markets: Perspectives from the United States and Europe* (Clarendon Press, 1982). For an analysis of Stein's early scholarship, see A. Boerger, 'At the Cradle of Legal Scholarship on the European Union: The Life and Early Work of Eric Stein', (2014) 62 *American Journal of Comparative Law*, 859-892.

⁶⁸ Stein, 'Lawyers, Judges and the Making of a Transnational Constitution'.

⁶⁹ See M. Avbelj, 'The Pitfalls of (Comparative) Constitutionalism for European Integration', *Eric Stein Working Papers*, 1/2008, at 14; M. Avbelj, 'Questioning EU Constitutionalisms', (2008) 9, n. 1, *German Law Journal*, 1-26, at 4; and Boerger and Rasmussen, 'Transforming European Law', at 216.

⁷⁰ M. Cappelletti, M. Seccombe, and J. Weiler (general eds.), *Integration through Law. Europe and the American Federal Experience* (Walter de Gruyter, 1985-1988). Volume 1: M. Cappelletti, M. Seccombe, and J. Weiler (eds.), *Methods, Tools and Institutions*. Book 1: *A Political, Legal and Economic Overview*; Book 2: *Political Organs, Integration Techniques and Judicial Process*; Book 3: *Forces And Potential For A European Identity*; Volume 2: E. Rehinder and R. Stewart, *Environmental Protection Policy* (1985); Volume 3: T. Bourgoignie and D. Trubek, *Consumer Law, Common Markets And Federalism In Europe And The United States* (1987); Volume 4: R.M. Buxbaum and K.J. Hopt, *Legal Harmonisation And The Business Enterprise* (1988); Volume 5: T. Daintith and S.F. Williams, *The Legal Integration of Energy Markets* (1987).

industrial malaise, and the questionable day-to-day implementation of Community law.⁷¹ Therefore, the editors pointed to the potential of law. Thus, law was not only seen as the object of integration, but also as the instrument of integration⁷² - a conceptualisation which was based on an assumed interdependence between the legal and politico-economic systems.⁷³ Throughout the IITL publication series, the integrative effects of different sources of law (for instance regulations, directives, international agreements, and general principles of law)⁷⁴ or certain areas of law (for instance fundamental human rights⁷⁵) were evaluated on this basis in analyses covering the political, social, and economic context.

Subsequently, Joseph Weiler, the co-editor of the project, became an extremely influential scholar in European law academia, where he continued to promote the IITL arguments in his research on European legal integration in parallel with the development of the political integration. This culminated in 1991 with the publication of the article 'The Transformation of Europe' in the *Yale Law Journal*, where Weiler set out to solve the paradox of European integration scholarship (on the one hand the belief of political scientists that intergovernmentalism ruled in the Community, and on the other hand the claim of jurists that the Community was a supranational success because of the constitutionalisation of the treaties by the ECJ) by providing a theory of law and politics in European integration. He argued that the Member States had tolerated the legal transformation because a parallel strengthening of their own position had occurred with the introduction of the veto right in 1966.⁷⁶ Speculating on the reasons why national courts had cooperated with the ECJ, he put forth three arguments. Firstly, that the legitimacy of the ECJ with its senior jurists from the Member States and persuasive legal reasoning convinced national courts to endorse the ECJ's jurisprudence and cooperate. Secondly, that the gradual endorsement of the 'new constitutional construct' by the highest courts in some

⁷¹ M. Cappelletti, M. Seccombe, and J. Weiler, 'Europe and the American Federal Experience - A General Introduction', in M. Cappelletti, M. Seccombe, and J. Weiler (eds.) *Integration Through Law. Europe And The American Federal Experience*, Volume 1: *Methods, Tools And Institutions, Book 1: A Political, Legal And Economic Overview* (Walter de Gruyter, 1986), at 10-11.

⁷² *Ibid.*, at 15.

⁷³ *Ibid.*, at 4.

⁷⁴ P. Hay, R. Rotunda, and O. Lando, 'Instruments for legal integration in the European Community - Review' in M. Cappelletti, M. Seccombe, and J. Weiler (eds.) *Integration Through Law. Europe And The American Federal Experience*, Volume 1: *Methods, Tools And Institutions, Book 2: Political Organs, Integration Techniques and Judicial Process A Political, Legal And Economic Overview* (Walter de Gruyter, 1986), 113-160.

⁷⁵ J. Frowein, S. Schulhofer, and M. Shapiro, 'The Protection Of Fundamental Human Rights As A Vehicle Of Integration' in M. Cappelletti, M. Seccombe, and J. Weiler (eds.) *Integration Through Law. Europe And The American Federal Experience*, Volume 1: *Methods, Tools And Institutions, Book 2: Forces And Potential For A European Identity* (Walter de Gruyter, 1986), 231-344.

⁷⁶ J.H.H. Weiler, 'The Transformation of Europe', (1991) 100, n. 8, *Yale Law Journal*, 2403-2483. See, also, J.H.H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press, 1999).

Member States would make other high courts follow. Thirdly, that lower courts in the Member States made wide and enthusiastic use of the preliminary reference system because it empowered them in relation to the high courts. In fact, the constitutionalisation of the treaties had meant an empowerment for national courts at all levels vis-à-vis other branches of law.⁷⁷ The introduction of majority voting in the Council with the SEA was a threat to the balance between the Member States and the ECJ. In 1994, Weiler nevertheless concluded that the Member States had accepted the ‘quiet revolution’.⁷⁸ At a time when European integration was at its apogee as a framework for the new unified Europe after 1989, the writings of Weiler perfectly matched the development.

Gaining courage from the success of the constitutional narrative in academia, the ECJ and its judges openly subscribed to the constitutional reading of European law. In 1986, the ECJ thus referred to the treaties’ constitutional nature and described them as the constitutional charter of European law in the *Les Verts* ruling.⁷⁹ In academic writings, ECJ judges elaborated on this open embrace. In an article with the noticeable name ‘The Making of a Constitution for Europe’, the ECJ judge Federico Mancini quoted Stein’s article from 1981 and wrote that the main endeavour of the ECJ had been to strive for a constitutionalisation of the Treaty in order to fashion a constitutional framework for a federal-type structure in Europe. This kind of judicial activism was justified by the circumstances, namely the conditions prevailing during the ‘Gaullist revolt and dark age of stagnation that followed’. In the end, what mattered were the achievements by the Court, not the aim in the Rome Treaty, according to Mancini.⁸⁰ Academia endorsed the jurisprudence of the court, which in turn endorsed a central argument in the ITL literature.

One critical insider however offered a blow to the choir of voices praising the ECJ for its remarkable role in the integration process. A founder of European law as an academic field in Denmark and well-connected to transnational academic European law circles, Hjalte Rasmussen in 1986 published the book *On Law and Policy in the European Court of Justice*, where he argued that the ECJ had engaged in policy-making without a legal or political mandate and warned about the responses the activism of the courts could provoke from its legal, social, economic, and political environments.⁸¹ The legal community was horrified. Even academics fundamentally appreciative

⁷⁷ *Ibid.*, at 2425-2426.

⁷⁸ J.H.H. Weiler, ‘A Quiet Revolution. The European Court of Justice and its Interlocutors’, (1994) 26, n. 4, *Comparative Political Studies*, 510-534.

⁷⁹ Case 294/83, *Les Verts*, ECLI:EU:C:1986:166.

⁸⁰ F. Mancini, ‘The Making of a Constitution for Europe’, (1989) 26 *Common Market Law Review*, 595-614, at 596 and 612. Today, the self-understanding of the court still relies on the constitutional understanding of European law. (Boerger and Rasmussen, ‘Transforming European Law’, at 200)

⁸¹ H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff, 1986).

of Rasmussen's aim of contextualising European law, such as Cappelletti and Weiler, criticised Rasmussen's methodology and conclusions, for instance in Weiler's 34-page review article Rasmussen's book in the *CML Rev* (book reviews normally had a length of 2-3 pages).⁸²

Few scholars of European law joined Rasmussen in this attack on the ECJ. However, centrally placed academics once more questioned the ultimate primacy of European law. Fuelled by the *Solange II* ruling by the FCC in 1986,⁸³ the *Fragd* ruling by the Italian Constitutional Court in 1989,⁸⁴ and the general resistance in the ECJ towards being subjected to review by the European Court of Human Rights if the European Community was to accede to the European Convention of Human Rights,⁸⁵ a system with eventual ultimate safeguards on the national level was recommended by several authors. Among them Henry Schermers, the influential editor of *CML Rev*.⁸⁶

Fascinated by the development of European law and the role of the ECJ, a new generation of American political science researchers did not have the same reservations. Inspired by the writings of Weiler, most of them bought whole-hearted into the ITL arguments and followed in Weiler's large footsteps. With different interpretations, they all sought to explain the interplay between the ECJ and the Member States in the assumed constitutionalisation of the treaties.

A neorealist interpretation promoted by Geoffrey Garrett argued that the Member States controlled the integration process. As rational actors, the judges were constrained in their activism by the expected reactions from the national governments that could react through the Council of Ministers with non-compliance. Although the ECJ judges wanted to widen the scope of European law and their interpretive space, they thus understood that the power of the court rested on the continued acquiescence of the national governments, not the letter or spirit of the Treaties. The court was therefore merely one actor in the strategic game between the rational

⁸²J. Weiler, 'The Court of Justice on Trial: A Review of H. Rasmussen: On Law and Policy in the European Court of Justice', (1987) 24 *Common Market Law Review*, 555-589.

⁸³BVerfGE 73, 339 *Solange II* decision 22 October 1986, 3 CMLR 225. The FCC stated that the it would not review Community legislation as long as effective protection of fundamental rights was guaranteed at the European level, but that it could overrule the ECJ if protection of these rights required it.

⁸⁴Corte Costituzionale, *Fragd*, 232/1989, *Foro italiano*, I, 1990, 1855. The Italian Constitutional Court ruled that Community law could not be applied in Italy if it infringed a fundamental, Italian principle concerning fundamental rights.

⁸⁵Davies, 'Pushing Back', at 433. Davies documents that Hans Kutscher, the president of the ECJ from 1976 to 1980, and the ECJ provided the final nail in the coffin on the question of the accession to the European Convention of Human Rights. See, also Opinion 1/91, ECLI:EU:C:1991:490, where the ECJ held that the EU had no competence to enter into international agreements that would permit a court other than the ECJ to make binding determinations about the content or validity of EU law (see S. Douglas-Scott, 'The European Union and the Human Rights after the Lisbon Treaty', (2011) 11 *Human Rights Law Review*, 645-682, at 662).

⁸⁶See J. Frowein, 'Solange II (BVerfGE 73, 339). Constitutional complaint Firma W', (1988) 25 *Common Market Law Review*, 201-206, at 204; H. Schemers, 'The Scales in Balance: National Constitutional Court v. Court of Justice', (1990) 27 *Common Market Law Review*, 97-105, at 103.

actors of integration.⁸⁷ Garrett's interpretation and his simplification of national interests were challenged by Anne-Marie Slaughter (with the maiden name Burley) and Walter Mattli in the mid 1990s. Invoking concepts such as spill-over, they claimed that the penetration of European law into domestic law corresponded with the neo-functionalist account of European integration originally promoted by Ernst Haas, namely that the process was driven through an alliance of supranational and subnational actors pursuing their self-interests.⁸⁸ Aware of the limits, the ECJ judges used the Commission as a "political bellwether" to see how far they could go in landmark decisions, but generally, the judges wanted to increase their own prestige and power by raising the visibility, effectiveness, and scope of European law as much as possible. The subnational actors (individual litigants, lawyers, and lower national courts) saw an advantage in participating in the construction of the community system. Through this participation, judges and the subnational actors sidestepped obstructionist Member States and furthered integration through the legal system, Slaughter and Mattli argued.⁸⁹ While their interpretation was more sophisticated than Garrett's, the possibility of a critical judicial reception in the Member States was left out. National judiciaries and litigants were characterised as programmatically pro-integration, even though high courts have been immensely critical about the doctrines of direct effect and supremacy, for instance in Germany.⁹⁰

A more nuanced approach to national reception of the ECJ's jurisprudence gained prominence in the late 1990s. Alec Stone Sweet argued that importers and exporters demanded liberalization, leading to economic activity across states and inevitably to conflicts between national and European law that would be solved in inter-court dialogue between the ECJ and national courts. Sweet therefore pointed to the importance of national judicial interest in the development of the

⁸⁷ G. Garrett, 'The Politics of Legal Integration in the European Union', (1995) 49, n. 1, *International Organisation*, 171-181; G. Garrett, D.R. Keeleman, and H. Schulz, 'The European Court of Justice, National Governments and Legal Integration in the European Union', (1998) 5, n. 1, *International Organisation*, 149-176.

⁸⁸ In the 1950s and 1960s, political scientists and economics explored the new European phenomenon. Most importantly, the American political scientist Ernst Haas, who had fled Nazi Germany with his family as a child. He created the foundation for neofunctionalism as a theoretical approach to European integration by pointing to an assumed decline of the importance of the nation state and an increased impact of interest groups pressuring for integration. Haas therefore predicted spill-over from one functional area to another and an increased importance of the supranational institutions as drivers of integration. The work of Haas became the foundation of an increasing interest in European integration in social sciences, but when the integration process seemed to languish from the Empty Chair Crises in 1965 onwards, the interest decreased. See Ernst Haas, *The Uniting of Europe* (Stanford University Press, 1958).

⁸⁹ See, for instance, A.-M. Burley and W. Mattli, 'Europe before the Court: A Political Theory of Legal Integration,' (1993) 47 *International Organisation*, 41-76; W. Mattli and A.-M. Slaughter, 'The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints' in A.-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.), *The European Courts and the National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart Publishing, 1998).

⁹⁰ For a valuation of the work of Garrett, Slaughter, and Mattli, see Davies, *Resisting the Court of Justice*, at 32-36.

European law.⁹¹ It was however Karen Alter who became the main proponent of looking at national judicial interest when explaining the evolution of the European law. Alter assumed that although the ECJ transformed the European legal system, the legal basis of this process was not widely accepted in the 1960s. The acceptance was the result of a battle between proponents of the ECJ, such as ECJ judges and lower national courts, and opponents of the ECJ, such as parliamentarians. On the basis of an analysis of France and Germany, Alter in line with neo-functionalistic theory concluded that the development of the European legal system was a result of a negotiated compromise between the ECJ and the lower national courts that sent preliminary references to the ECJ in order to position themselves against the higher national courts.⁹² Alter's emphasis on contestation was new and needed. But the firmness of Alter's categories (such as the 'national lower courts', 'the high courts', the ECJ, and 'the national politicians') hindered a more detailed analysis of interests with an eye for the internal contestation inside these entities. Furthermore, Alter lacked a broader analysis of the national context with an undoubted effect on the judicial dialogue between the national courts and the ECJ.

Slaughter and Burly, Stone Sweet, and Alter underlined different aspects of the development of European law and the interplay between the ECJ, national courts, and national governments. But they all built on the ITL arguments; the constitutional nature of European law and the ECJ as a motor in the integration process. Gaining momentum because of the prominence of these scholars in political science, the ITL arguments developed into a grand theory of European integration in the 1990s and forward.

The work of Stone Sweet and Alter encouraged new researchers to develop the contextual approach further when exploring national reception. Two prominent examples are the political scientists Lisa Conant and Dorte Martinsen. In 2002, Lisa Conant argued that ECJ rulings are countered and contained by the national administrative, political, and legislative branches that interpret and implement the rulings in the national settings. In addition, she argued that the broader implications of the rulings, for instance when similar situations arise, are often ignored.⁹³ In the same vein, Dorte Martinsen has recently demonstrated how judicial-legislative interactions determine the scope and limits of European integration in the daily EU decision-making process,

⁹¹ See, for instance, A. Stone Sweet, 'Constitutional Dialogue in the European Community' in A.-M. Slaughter, A. Stone-Sweet, and J.H.H. Weiler (eds.) *The European Courts and National Courts – Doctrine and Jurisprudence: Legal Chance in its Social Context* (Hart Publishing, 1998); A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000); A. Stone Sweet, 'Path Dependence, Precedent and Judicial Power' in M. Shapiro and A. Stone Sweet (eds.), *On Law, Politics, and Judicialization* (Oxford University Press, 2002).

⁹² K. Alter, *Establishing the Supremacy of European Law* (Oxford University Press, 2001).

⁹³ L. Conant, *Justice Contained. Law and Politics in the European Union* (Cornell University Press, 2009).

and that the administrations occasionally limit the legal-political consequences of European legislation by avoiding the most inconvenient elements.⁹⁴ The indirect conclusion of both studies is that the ECJ may act as a constitutional court, but it is countered by obstinate Member States, the actions of which point to the fragility of the European legal construction. The key claim of the ITL literature that the ECJ has acted as a motor of integration thus has to be significantly modified in light of these recent studies of Member State reception.

Finally, the American legal and historical scholar Peter Lindseth delivered another blow to the normativity of the ITL literature. In a revitalizing and empirically grounded analysis, Lindseth argued that European governance represented ‘a new state in the diffusion and fragmentation of regulatory power away from the constituted bodies of representative government at the national level, to an administrative sphere that now operates both within and beyond the state’. European integration thus rested on a transfer of elements of the post-war administrative state to the European level, according to Lindseth, and constituted another state in the evolution of the European state. European constitutionalism therefore represented a deviation from the nature of European integration, Lindseth argued. Strengthening his argument, Lindseth additionally documented the efforts of national high courts to maintain a constitutional balance between national parliaments and Community institutions conceptualised as executive and administrative agencies at the European level.⁹⁵ Lindseth’s interpretation in this way challenged the normative standard interpretation of the successful constitutionalisation of European law in law and politics studies.⁹⁶

New Sociological and Historical Research Enters the Scene

In the footsteps of the increasingly critical law and politics literature, new strands of literature have engaged with the ITL literature. Firstly, a group primarily consisting of French political scientists and sociologists organised in the research network Polilexes (Politics of Legal Expertise in European Societies) has developed a distinct sociology of European law on the basis of Pierre Bourdieu’s sociological theories of law. They conceive European law as ‘field’ where formal and informal networks of jurists battled over the understanding and development of European law on the basis of an interest in positioning themselves in the European construction and self-

⁹⁴ D.S. Martinsen, *An Ever More Powerful Court. The Political Constraints on Legal Integration in the European Union* (Oxford University Press, 2015).

⁹⁵ P. Lindseth, *Power and Legitimacy. Reconciling Europe and the Nation-State* (Oxford University Press, 2010), see quote at 251.

⁹⁶ For a detailed assessment of Lindseth’s interpretation, see M. Rasmussen, ‘Review: Peter L. Lindseth, Power and Legitimacy, Reconciling Europe and the Nation- State’, (2011) 17 *Journal of European Integration History*, 138-142.

empowerment. Thus, the constitutionalisation of European law is regarded as a process of judicialisation.⁹⁷ The field of European law is furthermore theorised as ‘weak’ by Antoine Vauchez, a prominent member of Polilexes, since jurists engaged in different political, bureaucratic, economic, and judicial sites had created it, and this blurred the professional boundaries that ordinarily structured legal and judicial activity at the national level. The weak autonomy however meant that the field became a central crossroad in the overall emerging field of European power for political mediation.⁹⁸ According to Vauchez, it is thus ‘much more than law that is forged in the halls of law in Europe’.⁹⁹ The jurists engaged in the field of European law are nominated ‘legal entrepreneurs’,¹⁰⁰ ‘Euro-lawyers’,¹⁰¹ or ‘FIDE-entrepreneurs’,¹⁰² because they have shifted between different roles such as scholarly expert, politician, judge, or business adviser in the name of building Europe.¹⁰³ Following this line of argument, the Polilexes researchers claim that the narrative of the constitutionalisation of Europe as an ever-increasing process during which self-interested actors (firms, interest groups, EU institutions, etc.) strategically seized the ECJ should be reassessed. Instead, it should be seen as a result of the oft-competing dynamics of action of a whole series of entrepreneurs, networks, strategies, and mobilisations on both sides of the border between law and politics.¹⁰⁴ While the Polilexes group has, in this way, pulled the curtain on the social settings of European law, the key claims of the ITL literature, namely the constitutional nature of European law and the integrative function of law, have been accepted.

The first articles from Polilexes were primarily theoretical reflections, which cast an interesting new light on European law. Their work has since evolved into theoretically informed empirical explorations of the development of European law. The empirical analyses of Polilexes build on

⁹⁷ See, for instance, M.R. Madsen and A. Vauchez, ‘European Constitutionalism at the Cradle: Law and Lawyers in the Construction of a European Political Order (1920-1960)’ in A. Jettinghoff and H. Schepel (eds.), *Lawyers’ Circles. Lawyers and European Legal Integration*, (2005) Special Issue of *Recht der Werkelijkheid Tijdschrift voor de Sociaal-Wetenschappelijke Bestudering van het Recht*, 15-36; A. Vauchez, ‘The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)’, (2008) 2, n. 2, *International Political Sociology*, 128-144; A. 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), 1-17; J. Bailleux, *Penser l’Europe par le droit: L’invention du droit communautaire en France (1945-1990)* (Daloz, 2014); and Vauchez, *Brokering Europe*.

⁹⁸ Vauchez, *Brokering Europe*, at 91 and 103; Vauchez and Mudge, ‘Building Europe on a Weak Field’, at 451.

⁹⁹ Vauchez, *Brokering Europe*, for instance at 115.

¹⁰⁰ *Ibid.*, for instance at 124.

¹⁰¹ *Ibid.*, for instance at 99.

¹⁰² A. Vauchez, ‘The Making of the European Union’s Constitutional Foundations: The Brokering Role of Legal Entrepreneurs and Networks’ in W. Kaiser, B. Leucht, and M. Gehler (eds.) *Transnational Networks in Regional Integration. Governing Europe 1945-83* (Palgrave Macmillan, 2010), 108-128, at 120.

¹⁰³ Vauchez, *Brokering Europe*, at 99.

¹⁰⁴ Vauchez, ‘Introduction’, at 8-9.

interviews, public sources, but occasionally also on archival documentation. With few exceptions, there has however been no attempt to more systematically explore private, national, or European archives to obtain the best possible documentary basis for their analyses. In addition, there is a tendency towards analyses driven by the theoretical outlook and little focus on causality and temporal development. These factors have led to somewhat simplified conclusions. An example is Vauchez' argument that FIDE had the brokering role in the creation of the constitutional foundations of European integration.¹⁰⁵ A claim, which the historian Morten Rasmussen has been able to reject on the basis of an empirically documented analysis of FIDE.¹⁰⁶ The key exception within Polilexes is Julie Bailleux, who has produced a very thorough analysis of the emergence of European law as an academic discipline in France based on comprehensive studies of relevant French and European archives.¹⁰⁷

The second group consists of historians, among them the present author, organised in the research project 'Towards a New History of European Public Law' that has been directed by Morten Rasmussen at the University of Copenhagen from 2013-2016.¹⁰⁸ Questioning the dominant constitutional understanding of European law in legal and political science literature, this group of historians has explored the development, success, and political nature of the 'constitutional practice'. The term is preferred to the notion 'constitutionalisation', as the widely accepted claim that the ECJ actually 'constitutionalised' the treaties has been questioned by the historians on the background of the continued contestation by national elites containing the impact of the ECJ case law in the key Member States. Instead, the 'constitutional practice' refers to the practice of the ECJ rooted in the doctrines of direct effect and primacy that built on a constitutional reading of European law, although the ECJ avoided the contested notion 'constitutional' in the *Van Gend en Loos* and *Costa v ENEL* rulings.¹⁰⁹

¹⁰⁵ Vauchez, *Brokering Europe*, at 89; Vauchez, 'The Making of the European Union's Constitutional Foundations', at 111 and 123-124. In addition, see Vauchez, 'The Force of a Weak Field'; and Vauchez and Mudge, 'Building Europe on a Weak Field'.

¹⁰⁶ M. Rasmussen, 'Establishing a Constitutional Practice: The Role of the European Law Associations' in W. Kaiser and J.H. Meyer (eds.), *Societal Actors in European Integration: Polity-Building and Policy-Making 1958-1992* (Palgrave Macmillan, 2013), 173-197.

¹⁰⁷ Bailleux, *Penser l'Europe par le droit*. See page 47 for a description.

¹⁰⁸ See the homepage (<http://europeanlaw.saxo.ku.dk/>) where all members and projects can be found. For introductions to the research carried out by the group members, see the Special Issue in volume 21 of *Contemporary European History* from 2013: Towards a New History of European Law, and the Special Issue in volume 28 of *American University International Law Review* from 2013: Rewriting the History of European Public Law: The New Contribution of Historians, at 1187-1221. The thesis is written in the auspices of the 'Towards a New History of European Public Law' project.

¹⁰⁹ See, especially, Rasmussen, 'Rewriting the History of European Public Law', at 1218-1221; Rasmussen and Davies, 'From International Law to a European Rechtsgemeinschaft', at 129-130; Boerger and Rasmussen, 'Transforming European Law', at 210.

The historians share the general notion of actors battling over the understanding and development of European law with the Polilexes group. However, they have been open to a broad range of often competing theoretical approaches to the history of European law instead of working solely on basis of one theory. In addition, they aim at collecting as broad a range of archival documentation as possible. This has been done systematically by identifying archives at state and European level as well as private collections with relevance for the history of European law. Given the lack of access to the ECJ archive until 2016, this has involved collecting archival material in more than ten countries, in the European institutions, and in more than fifty private archives and collections, several of the latter identified by the project and subsequently passed to the Historical Archive of the European Union. This multi-archival approach exploring private and recently opened state and European archives has enabled the group to develop historical accounts of the battle on the constitutional practice and the social world of this battle with more nuance and better empirical foundation than previous research has been able to.

Fresh historical narratives and interpretations have emerged from this work. Members of the research group have pointed to the wide range of actors participating in the battle on the constitutional practice that go beyond the singular focus on ‘legal entrepreneurs’ or ‘FIDE entrepreneurs’. As a pioneer in this field, Rasmussen has for instance provided historical studies of the early development of European law, documented the instrumental role of Gaudet and the Legal Service in the establishment of the constitutional practice, and carried out initial analyses of transnational networks and the constitutional paradigm with the fellow historian Anne Boerger.¹¹⁰

Equally important, a number of ‘reception studies’ by members of the project, covering Germany, France, Denmark, and the Netherlands, have carved out the battle on the national reception of European law between national judges, politicians, officials, and scholars, and shown how national resistance and agency have formed the European legal system.¹¹¹ Most importantly for this thesis, Bill Davies has firstly demonstrated how the resistance by the German judiciary to the jurisprudence of the ECJ had its roots in opposition to the constitutional practice by the ECJ in broad academic and public opinion. The Solange decision by the German Federal

¹¹⁰ See for instance, M. Rasmussen, ‘The Origins of a Legal Revolution’; M. Rasmussen, ‘Establishing a Constitutional Practice of European Law. The History of the Legal Service of the European Executive, 1952-65’, (2012) 21, n. 3, *Contemporary European history*, 375-399; M. Rasmussen, ‘Constructing and Deconstructing ‘Constitutional’ European Law; and Boerger and Rasmussen, ‘Transforming European Law’.

¹¹¹ Davies, *Resisting the Court of Justice*; J.L. Pedersen, *Constructive defiance? – Denmark and the effects of European law, 1973-1993*, unpublished PhD Thesis (University of Aarhus, 2016); A. Bernier, *La France et le droit communautaire 1958-1981: histoire d’une réception et d’une co-production*; K. van Leeuwen, ‘Paving the road for ‘legal revolution’. The Dutch origins of the first preliminary references in European law (1957-1963)’, (forthcoming); K. van Leeuwen, ‘Blazing a Trail. The Netherlands and European Law, 1950-1983’, conference paper, Setting the Agenda for Historical Research on European Law. Actors, Institutions, Policies and Member States, December 9-11.

Constitutional Court in 1974 should thus be analysed in its domestic context, where a theory of ‘structural congruence’ (first promoted by the scholar Herbert Kraus) shaped the reception of European law as the winning position in a battle with constitutionalist and traditionalist narratives of the relation between German and European law. The argument in structural congruence was that the legitimacy of the European legal order should only be recognised as far as there was structural congruence between the European and the German legal order. Davies argues that the Solange decision and the inherent structural congruence position led to a leap forward in the protection of fundamental rights on the European level. The German reception history in this way enlightens the interactions between the national and the European level, and the impact these interactions had on the policy-making and the jurisprudence of the ECJ.¹¹² Thus, the term ‘reception’ does not denote passivity in the studies by the historians. Rather, it implies a dynamics between the levels, as Davies has argued.¹¹³ Secondly, Karin van Leeuwen has documented the interaction between the Dutch and the European level, where the Dutch discussions on constitutional reform in the 1950s provided an important background for the establishment of the constitutional practice by the ECJ. In addition, van Leeuwen has convincingly argued that the *Van Gend en Loos* case did not originate as a test case created by the Dutch association of European law. Instead, the case had been initiated by the company Van Gend en Loos and the tax law expert P.N. Droog, who brought in the NVER lawyers L.F.D. Ter Kuile and Hans Stibbe to reinforce his team after a preliminary reference had been sent to the ECJ.¹¹⁴ By correcting such misunderstandings,¹¹⁵ the historical analysis by van Leeuwen proves its worth and alters the historical account of European law.

Generally, the group of historians thus questions the traditional narrative of a progressive and relatively unproblematic acceptance of a constitutionalised European law. Instead, the group offers a narrative of contestation contextualised in the broader social-economic, legal, and political development of the Member States and the European institutions that highlights the need to include a wide range of actors if one is to understand the development of European law.

¹¹² Davies, ‘Pushing Back; B. Davies, ‘Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and *Solange* in its Intellectual Context’, (2015) 21 *European Law Journal*, 434-459.

¹¹³ B. Davies, ‘The German and Italian Reception of European Law Compared’, conference paper, Setting the Agenda for Historical Research on European Law. Actors, Institutions, Policies and Member States, December 9-11, at 1 (footnote 1).

¹¹⁴ K. van Leeuwen, ‘Paving the road for ‘legal revolution’; K. van Leeuwen, ‘Blazing a Trail’.

¹¹⁵ The claim that Van Gend en Loos was a test case created by the Dutch association of European law was first set forth by Vauchez (Vauchez, ‘The Making of the European Union’s Constitutional Foundations’, at 117), and subsequently overtaken by Alter (K. Alter, K. Alter, ‘Jurist Advocacy Movements in Europe: The Role of Euro-law Associations in European Integration (1953-1975)’ in Alter, *The European Court’s Political Power* (Oxford University Press, 2009), 63-91, at 73-74), and Rasmussen (Rasmussen, ‘Establishing a Constitutional Practice’. *The Role of the European Law Associations*, at 183).

Focusing merely on the ECJ and national courts is not enough. Concretely, the historians argue that a battle between legal elites shaped the early history of European law and the development of the constitutional practice. Rejecting a demand of legal recourse by national citizens as a central factor, the agency of the Legal Service of the Commission, the ECJ, and elite networks are instead seen as the driving forces. With the aggressive development of the legal order by the ECJ in the 1970s, the national responses on the background of complex Member State reception became increasingly reactive, and the battle became politicised as the ECJ had to legitimate, defend, and backtrack some of its most radical case law. Until the mid-1980s, the Member States however continued to run the Community largely in the manner they had originally intended with Member State control over decision-making, administration, and the application of European law nationally.¹¹⁶

Very recently, the German legal scholar Hauke Delfs published a monograph that delivers an in-depth analysis of the negotiations on the Treaties of Rome as a starting point for a general historical interpretation of the development of European law.¹¹⁷ In contrast to the new historiography of European law, he argues that the full DNA of IIL and the constitutionalisation of European law were already present in the Treaties of Rome. Delfs thus in his own words rejects the analysis of Anne Boerger, who has argued that the Treaties of Rome were ambiguous including clear elements of international law and state control, but also elements of constitutional law. In particular, the preliminary reference mechanism included in article 177 of the EEC Treaty.¹¹⁸ He also implicitly rejects the claim by Rasmussen that the breakthrough for the constitutional interpretation of European law was pursued by the Legal Service of the Commission and only happened with the *Van Gend en Loos* judgment.¹¹⁹ Delfs' exploration of the relation between the integration design in the Treaties of Rome and the normativity of integration offers a fascinating interpretation, and his detailed empirical exploration of the negotiations of the Treaties of Rome is extremely useful for historians and lawyers alike. However, his general interpretation is nevertheless flawed. As he himself readily acknowledges, the EEC treaty was at first negotiated with a dualist approach to international law, and only after the general breakthrough of the negotiations between France and West Germany in November

¹¹⁶ M. Rasmussen, 'Revolutionizing European law: A history of the *Van Gend en Loos* judgment', (2014), 12, n. 1, *International Journal of Constitutional Law*, 136-163, at 160-163.

¹¹⁷ H. Delfs, *Komplementäre Integration. Grundlegung und Konstitutionalisierung des Europarechts im Kontext* (Mohr Siebeck, 2015).

¹¹⁸ Boerger-De Smedt, 'Negotiating the Foundations of European Law, 1950-57'.

¹¹⁹ M. Rasmussen, 'Establishing a Constitutional Practice of European Law. The History of the Legal Service of the European Executive, 1952-65', (2012) 21, n. 3, *Contemporary European history*, 375-399.

1956 was the deeper *finalité* of integration developed. Delfs' analysis does therefore not convincingly dismantle Boerger's claim on the ambiguous nature of the treaties. Delfs furthermore abstains from considering the research on the quest of the Legal Service for establishing a constitutional interpretation of European law explored by Rasmussen, but also Julie Bailleux.¹²⁰ This leaves his arguments that the *Van Gend en Loos* judgment is merely an extrapolation of the deeper legal DNA of the Treaties of Rome questionable.

A First Conclusion on the State of the Art

While the historiography of European integration long ignored the legal dimension, a very rich and sophisticated literature of law and politics studies developed. The latter argued that law played a crucial role in the integration process and considered the ECJ to be one of the primary drivers behind it. However, this literature had an Achilles heel. When judges, civil servants from the EC institutions, and scholars argued that the treaties had been constitutionalised and that law was the main driver in the integration process, they took side in a normative battle on the direction of not just European law, but the entire Community. Despite increasingly contextual in their approaches, legal scholars and political scientists in addition failed in accounting for the scope of the battle on the direction and reception of European law.

The two new strands of literature by Polilexes and the group of historians in the "Towards a New History of European Public Law" project offer new approaches. Both strands approach the development of European law as a process of contestation between a wide range of actors and institutions and in particular the historians have questioned whether the ECJ actually managed to successfully carve out a constitution of the treaties. In this thesis, approaches by Polilexes and the historians in the "Towards a New History of European Public Law" project have been adopted. It subscribes to the main conceptualisation of the development of European law as a process of contestation, and it questions the 'constitutionalisation'. The thesis seeks inspiration in the Bourdieuan approach to this contestation promoted by Polilexes as will be further explained below. In addition, it subscribes to the research approach of the historians, thus basing the research on a systematic and comprehensive approach to archival research that seeks to contextualise and document theoretical claims and assumptions and may very well lead to diverging empirical results. In order to develop the approach of this thesis to its research object further, we will now turn to a detailed analysis of existing research on the academic discipline of European law.

¹²⁰ Bailleux, *Penser l'Europe par le droit*.

3 Literature on the Discipline of European Law and Literature on Academic Disciplines

Today, the academic field of European law is generally accepted as an independent scientific discipline with its own well-defined research object within the broader field of law. At the level of institutional manifestation, it has its own academic departments, scholarly associations, and journals dedicated specifically to European law. At the substantial level, it has accumulated specialist knowledge, as well as particular methods, terminologies, and theories applied to its research object.¹²¹ The academic field of European law thus fits the descriptive criteria that are commonly agreed for identifying a discipline well.¹²² However, this has not always been the case. When a European legal system was established as part of the new European Coal and Steel Community in 1952, it was generally considered to be part of international law by national politicians, civil servants, and academics.¹²³ It is therefore crucial to understand how European law turned into a genuine legal discipline of its own, what the driving forces behind the establishment of the new discipline were, and what role it played in the establishment of a constitutional practice in European law.

Existing literature has begun to grapple with these key questions, but it is limited. Below I will go through the this literature. Firstly, I will discuss existing research on the general history, structure, and institutional manifestation of the discipline of European law as well as the general importance of the latter to the development of the constitutional practice in European law. Secondly, I will discuss the relatively limited research on the history of the academic debates in European law focusing in particular on how the nature of European law was defined. Finally, I will review relevant literature from sociology of knowledge and science with claims on the social dynamics, substantial differentiation, and institutional manifestation of academic disciplines. These three sections are followed by reflections on the insights and shortcomings in the literature that provides a basis for developing the research object and research questions of this thesis.

The Structure, Institutions, and Role of the Discipline of European Law

European law scholars have only rarely indulged in self-reflective inquiries about their own scientific field that could provide historical insights into the historical structure, institutions, and

¹²¹ For a review of these features in the current day discipline of European law, see R.A. Wessels, 'A Legal Approach to EU Studies', in K.-E. Jorgenson, M. Pollack and B. Rosamund (eds.), *Handbook of European Union Politics* (Sage, 2006), 104-113.

¹²² See page 54-55, where this descriptive definition is presented in greater detail.

¹²³ See the analysis by Boerger and Rasmussen on the search for the nature of European in the first decade after the Paris Treaty entered into force (Boerger and Rasmussen, 'Transforming European Law', at 205-209).

role of the discipline of European law.¹²⁴ One of the few exceptions is European Law professor Bruno de Witte. De Witte argues that the ‘discipline’ of European law has been and is composed by two rather different groups of scholars: those who have been trained inside the traditions of a national legal system and those who have a transnational perspective of the discipline, either because they lack a specifically national vantage point altogether, or because they have been socialised in a transnational professional context. He mentions postgraduate programmes in Nancy, Strasbourg, Saarbrücken, and Bruges as breeding grounds of legal specialists in a relatively denationalised setting, while pointing to the EUI as the denationalised setting for specifically training future legal academics.¹²⁵ Based on a statistical analysis of European law journals in the years 1995-1996 and 2005-2006, de Witte furthermore states that EU law scholarship is fragmented along national/linguistic lines. The exception is *CML Rev.*, which has a wide range of authors.¹²⁶ In de Witte’s account, there is thus a division of the discipline into a transnational and a national level. The comparative law professor Armin Bogdandy similarly divides European law academia, only into a Europeanised level on the one hand and national subfields on the other hand. He concludes that the *CML Rev.* and the EUI are of particular significance as Europeanised forums of European law. With regard to the latter, he emphasises the importance of the ITL project as one of the most important projects in European law with a lasting significance. In addition, he argues that FIDE had not been able to create a viable structure for discussion. Bogdandy defines Europeanisation by referring to two metaphors and writes that Europeanisation could either happen along the ‘market model’, where Europeanisation of legal scholarship means building a market of legal producers and products, or along the lines of Europeanisation of national public opinions. This means a complex process of mutual fertilisation, interpenetration, the creation of European audiences for various technical fields, and the periodic building of a single public opinion caused by scandals. According to Bogdandy, the latter model seems both more plausible and more desirable, and the *CML Rev.* and the EUI are examples of institutions in this kind of Europeanised meta-structure.¹²⁷

De Witte and Bogdandy’s accounts are largely built on current day reflections or minor statistical analyses, but their accounts do provide a suggestive conceptualisation of the structure

¹²⁴ B. de Witte, 'European Union law: a unified academic discipline?' in B. de Witte and A. Vauchez (eds), *Lanyering Europe - European law as a transnational social field* (Hart Publishing, 2013), 101-116, at 101-102.

¹²⁵ *Ibid.*, at 111, 108-109.

¹²⁶ *Ibid.*, at 112

¹²⁷ A. von Bogdandy, ‘A Bird’s Eye View on the Science of European Law: Structures, Debates and Development Prospects of Basic Research on the Law of the European Union in a German Perspective’, (2000) 6, n. 3, *European Law Journal*, 208-238, at 212, 229, and 238

of the academic ‘discipline’ of European law, divided into different levels (a transnational/Europeanised level and national levels).

There are very few analyses of the history of the discipline of European law, and they have mainly been carried out not by historians, but scholars from adjacent fields. These studies offers preliminary observations with regard to the overall establishment, structure, and role of the field and identify a number of key institutions that have organised the transnational level of the discipline. Vauchez was one of the first scholars to pay attention to the role played by the emergent academic field to the development of European law. In a first theoretical contribution co-written with the sociologist Stephanie Mudge, he conceptualised the nature of the academic field. Marked by the emergence of specific European diplomas, academic chairs, and academic journals, along with an ‘imagined community’ of scholars, the field of European Studies ‘looks very much like a recognizable academic discipline’.¹²⁸ Within European studies, the transnational field of ‘European law’ was according to Vauchez and Mudge the most ‘European’ discipline. In addition, Vauchez and Mudge characterise this field as weak. Firstly, because the borders between academic and extra-academic practice, science and reform, law and politics were fuzzy. Vauchez and Mudge attribute a special role to the Commission in blurring the borders. European integration is in this way comparable to other cases of state formation regarding the centrality of ‘knowledge-bearing elites’,¹²⁹ and the ‘power-knowledge’ nexus, which the political-scholarly intersection constituted.¹³⁰ Secondly, the field was weak because it still confronted the authority of nationally based legal academia over the production and evaluation of legal scholars. With reference to de Witte’s study mentioned above, Vauchez and Mudge state that the French European law journal *Revue Trimestrielle de Droit European* and the German *Europarecht*, where the authors are primarily French and German, respectively, show that the European scholarly production remains fractioned as it is based in preformed national disciplines.¹³¹

In the recent book *Brokering Europe*, Vauchez substantiates his initial theoretical findings empirically. Here, he argues that the development of an EC judicial scene and the flourishing of transnational legal academic arenas were born as a by-product of the strategies for the institutionalisation of the Treaties of Rome, for instance promoted by Hallstein, who supported the academic efforts. The academic spaces had several functions. As it was sheltered from national legal traditions and scepticism, transnational academia provided formal endorsement a

¹²⁸ Vauchez and Mudge, ‘Building Europe on a Weak Field’, at 461

¹²⁹ *Ibid.*, at 450-53 and 467-68.

¹³⁰ *Ibid.*, at 467 and 483.

¹³¹ *Ibid.*, at 462-463.

constitutional reading of the treaties, without which the ECJ would have no credibility, and ‘theories’ of Europe were thus conceived as contributions equipping judges, civil servants, commissioners etc. with rationales for their own roles and techniques for the unification of Europe. Secondly, citing the political scientist Karen Alter, Vauchez argues that first transnational academic venues were ‘kitchen cabinets’ where decision makers could test trial balloons and garner doctrinal suggestions. Thirdly, they constituted a pool for recruitment of personnel to the European institutions. Fourthly, academics and decision-makers gave each other mutual support in maintaining an image that flattered their own role and importance.¹³²

Vauchez emphasises two academic institutions with particular roles in the academic scene of European law and in constitutional activism. Firstly, he points to FIDE. While formally the scholarly association of European law at transnational level, FIDE and the ‘FIDE entrepreneurs’ aimed to be the private army of the EC. In colloquia and journals, they furnished ‘the legal arsenal that would ensure the firepower needed for pan-European combat.’ In fact, Vauchez argues that FIDE had the brokering role that allowed political, economic, bureaucratic, and legal actors to reframe their pan-European ambitions in judicial terms, which led to the creation of the constitutional foundations of European integration, as earlier mentioned.¹³³ His conclusions on FIDE thus resembles those of Alter, who has argued that the ‘euro-law associations’ coordinated and encouraged individual actions to propel the development of European law in constitutional direction. They, in fact, made the constitutionalisation possible by creating test cases to facilitate the development of European legal doctrine, acting as the ECJ’s kitchen cabinet, and by creating an impression of momentum in favour of the ECJ’s doctrinal creations.¹³⁴

Secondly, Vauchez turns to the Department of Law of the EUI. Vauchez argues that it worked as an interdisciplinary and trans-Atlantic hub, where the paradigm of constitutionalism emerged in the early 1980s, building on the assumption that the ECJ’s jurisprudence had resulted in the creation of a de facto Constitution. The Department stood out for ‘its combination of a “contextual approach to law”, a dense web of trans-Atlantic exchanges, and an active expertise in the field of Europe’s institutional reform’. Vauchez argues that this specific identity was sealed on two occasions that went hand in hand. Firstly, the institution’s association with the debates over the Spinelli draft treaty in the early 1980s, when Joseph Weiler drafted a declaration of rights to the draft, which was to institute a European Union. This event was the first of many that

¹³² Vauchez, *Brokering Europe*, at 80 and 87-88.

¹³³ Vauchez, *Ibid.*, at 89; Vauchez, ‘The Making of the European Union’s Constitutional Foundations’, at 111 and 123-124. In addition, see Vauchez, ‘The Force of a Weak Field’; and Vauchez and Mudge, ‘Building Europe on a Weak Field’.

¹³⁴ Alter, ‘Jurist Advocacy Movements in Europe’, at 73.

positioned the EUI as a core provider of expertise over the reform of Europe, according to Vauchez. It was in this way the starting point for a new wave of constitutional activism, where law professors and legal advisors from the Community advocated for constitutional reform in the Community during the 1980s and 1990s. Secondly, the vast IIL project, which established a trans-Atlantic academic group specialised in the analysis of EC institutions with a lasting impact on European law academia.¹³⁵

Vauchez' theoretical and conceptual approach to analysing the history of the discipline of European law is highly interesting and his initial findings on the structure and organisation of transnational academic level are important, not least when he points to FIDE and the EUI/the IIL project as key institutions in the discipline at the transnational level. However, his claims on the role played by FIDE in the development of the constitutional practice and the EUI in the development of the constitutional paradigm remain mostly theoretical assumptions and are poorly substantiated by empirical material on which an analysis of the institutional and social dynamics of the institutions with a more credible claim on their role could be based.

Morten Rasmussen has also offered a preliminary interpretation of the role of the discipline of European law in the development of European law. Rasmussen offers little with regard to the structure of the discipline, but he includes FIDE, European law journals, and departments and centres of European law at both national and European level in the discipline. What he presents is rather a historical analysis of the emergence of the discipline. He argues that the 'discipline' was a child of the battle between proponents of a constitutional interpretation of European law and an international law interpretation in the late 1950s. According to Rasmussen, the emergence of an academic field of European law independent from international law came about with the foundation of FIDE in the early 1960s, and it represented an important victory for the constitutionalists. It was followed by the establishment of new university centres of European Law, and journals such as *Rivista di diritto europeo* (1961), *CML Rev.* (1963), *Cahiers de droit europeen* (1965), *Revue trimestrielle de droit europeen* (1965) and *Europarecht* (1966).¹³⁶ The large majority of new scholars in European law would promote the constitutional understanding of European law and use the jurisprudence of the ECJ as proof of their ideas. Thus, the key function of the academic field of European law was to legitimise the constitutional practice. More specifically, Rasmussen argues that the new academic discipline of European law was driven by the members of the

¹³⁵ Vauchez, *Brokering Europe*, especially at 203-204.

¹³⁶ The importance of the European law journals as pillars in the transnational academic space of European law has likewise been pointed to by Alter ('Jurist Advocacy Movements in Europe', at 70) and Vauchez and Mudge ('Building Europe on a Weak Field', at 461 and 467).

FIDE and supported and partly financed by the Legal Service of the Commission in what he describes as a ‘broad transnational alliance in favour of the constitutional practice of European law.’¹³⁷ In opposition to Vauchez and Alter, Rasmussen does however not attribute a brokering role to FIDE in the development to the constitutional practice. Criticising Alter and Vauchez’ conflation of FIDE and the national associations with the broader transnational network of European law, Rasmussen provides an analysis of the activities and institutional affiliations of FIDE primarily based on empirical material from the early 1960s. He argues that the FIDE congresses legitimised the ECJ’s case law, broke new ground in controversial fields, and functioned as ‘shop windows’ for the Legal Service of the Commission. He, however, rejects the idea of FIDE as instrumental in an alignment of the institutional actors behind the attempted constitutionalisation of European law. In analyses based on archival material, he has instead attributed this role to the Legal Service of the Commission. Up against heavy scepticism of the attempted constitutionalisation of European law in the Member States’ legal establishments, the influence of the national European law associations was furthermore limited at the national level, according to Rasmussen.¹³⁸ Overall, Rasmussen offers additional details on the early history of the discipline as well as an indication of the key role played by the Legal Service of the Commission in establishing the discipline in the 1960s. However, his account offers little in terms of conceptualising the object of study and the history of the discipline after 1970 is largely ignored, just as the parts on departments and journals are merely suggestive.

As clearly seen in the previous sections, FIDE and the EUI/ITL project have been identified as the key institutions of the discipline of European law of the transnational/Europeanised level of the discipline. In addition, the European law journals have been attributed with a special importance in establishing an academic space of European law, where the journal *CML Rev.* stands out as a genuinely Europeanised academic forum with particular significance for the discipline, as Bogdandy argues.

Of the three institutions, FIDE has been explored the most. Vauchez, Alter, and Rasmussen have all crucially contributed to the history of European law by pointing to the importance of elite networks in their analyses of FIDE. Their accounts are however marked by a primary concern with the 1960s, a general lack of access to comprehensive empirical material enlightening the actual functioning of the federation, and an abstinence from using the FIDE congress reports as source material, despite the fact that the reports are testimonies of the main activity of

¹³⁷ Rasmussen, ‘Constructing and Deconstructing ‘Constitutional’ European Law’. Rasmussen generally uses the terms ‘discipline of European law and ‘academic field of European law’ interchangeably.

¹³⁸ Rasmussen, ‘Establishing a Constitutional Practice’. The Role of the European Law Associations?.

FIDE.¹³⁹ Furthermore, they have all assumed that FIDE and the ‘euro-law associations’ constituted an ideologically cohesive network, which positioned itself in opposition to sceptical national observers of European law in the Bourdieuan battlefield of European law, without a solid empirical basis.

Beyond the limited work of Vauchez, there are no analyses focusing specifically on the role of the EUI in the academic discipline of European law. However, the IITL project has been the focus of minor analyses. A 25th year IITL jubilee anthology has thus been written, where Matej Avbelj examines the ‘double nature’ of IITL among other contributions, primarily focussing on contemporary issues of European law. Avbelj argues that there was a clear separation between a ‘policy conception of IITL’ and the academic IITL project conceived and carried out at the EUI. He notices the overlaps between proponents and claimed that the academic project was to some degree an activity of a critical self-examination revealing the main underlying assumption of the policy conception. The principal orientation of the academic IITL project was nevertheless scientific rather than concerned with promoting a particular vision of European integration by instrumental reliance on law, according to Avbelj.¹⁴⁰ However, Avbelj’s analysis is short, primarily based on academic IITL literature from 1999 and forth, and it does not explore the establishment, or the institutional and social dynamics of the project. In an epilogue in the same anthology, the co-editor of the IITL publications series Joseph Weiler furthermore states that the IITL project played ‘an appreciable role’ in a qualitative transformation of the academic and intellectual milieu of European Law not just as a published set of books, but also as an educational and scholarly milieu, and an intellectual and academic happening. He also claims that the Achilles’ heel of the academic IITL project was its normativity. Fundamental critique of the European project was therefore muted, elliptic, and concealed. Weiler attributes this to Cappelletti’s personal idealism, which made him believe in convergence of legal systems and the higher law of human rights, rather than the ‘messy and oft ugly vicissitudes of democratic politics’.¹⁴¹ This account provides

¹³⁹ Also noteworthy is the study of FIDE included in Julie Bailleux’ analysis of the development of a discipline of European law in France (see page 47). The historian Alexandre Bernier has furthermore contributed with a study on the French association of European law, where he argues that the association had a limited impact on the reception of European law in France. In addition, Bernier pointed to the decentralised character of FIDE (A. Bernier, ‘Constructing and Legitimizing. Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950–70’, (2012) 21, n. 3, *Contemporary European History*, 399-415). Finally, the legal scholar Francesca Bignami has analysed the FIDE congress in 1965 and argued that there was internal disagreement on direct effect of directives at the congress (F. Bignami, ‘Comparative Law and the Rise of the European Court of Justice,’ paper, European Union Studies Association, Boston, 3-6 March 2011).

¹⁴⁰ M. Avbelj, ‘The Legal Viability Of European Integration’ in D. Augenstein (ed.) *Integration through Law’ Revisited. The Making of the European Polity* (Ashgate, 2012), 29-46, at 38.

¹⁴¹ J. Weiler, ‘Epilogue’ in D. Augenstein (ed.) *Integration through Law’ Revisited. The Making of the European Polity* (Ashgate, 2012), 175-179.

useful information from one of the central actors of the ITL project. But Weiler does not define the normativity of the ITL, and the text does not amount to an actual history of the project with a thorough analysis of the institutional development and the scholarly content illuminating the nature of the power-knowledge nexus between academia, the Commission, and the ECJ in European law. Such an account is still missing.

Finally, the *CML Rev.* remains largely unexplored. However, there are studies of European law journals with general claims. Most importantly a study of authors in the European law journals by Harm Schepel and Rein Wesseling carried out already in 1997. It offered an interesting empirical analysis of the 'legal community' in the 'European legal field' based on a Bourdieu-inspired theoretical approach and a solid statistical methodology. By the means of a statistical analysis of the authors in European law journals, Schepel and Wesseling concluded that European legal doctrine has been written, to a relatively large degree, by the staff of administrative and judicial European institutions and to a smaller extent by academics when comparing European law journal to national public law and national economic law journals. But they also pointed to the cohesion of the homogenous legal community stemming from a 'widely shared basic mind-set, a habitus, socially constructed and maintained, that depoliticises European integration by creating an opposition between a realm of European 'law' as a rational force towards the inevitable and a realm of national 'politics' as the articulation of the illogical, irrational, and ideological.'¹⁴² The study of Schepel and Wesseling is very esteemed in validating common claims on the homogeneity of the discipline. However, as Schepel and Wesseling stated themselves, the study largely consisted of counting and very little reading. The conclusion on the mind-set in the journals was thus not empirically substantiated. Furthermore, the study remained silent on the establishment and management of the journals, as well as the role of the journals in broader development of European law. Alter has furthermore argued that the Commission played a significant role in establishing and financing the first generation of journals, and that FIDE helped to found the *CML Rev.*,¹⁴³ but the conclusions were not backed up empirically. Lastly, the efforts of Gaudet to create a journal of Community law in the beginning of the 1960s has been described by Julie Bailleux in the article 'Michel Gaudet, a law entrepreneur: the role of the Legal Service of the European executives in the invention of EC Law and of the *CML Rev.*'. Despite

¹⁴²H. Schepel and R. Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe', (1997) 3 *European Law Journal*, at 173, 178, and 186.

¹⁴³ Alter, 'Jurist Advocacy Movements in Europe', at 70.

the title of the latter, Bailleux did not say much on the actual establishment of *CML Rev.*¹⁴⁴ The establishment, management, and role of the *CML Rev.* thus remains largely unexplored.

In addition to the literature reviewed above, the discipline of European law has recently been examined with regard to its development at national sub-levels in Germany and France. The German legal scholar Anna Katharina Mangold has examined the ‘Europeanisation’ of German legal academia and the German legal education as a part of her exploration of the Europeanisation of the German legal order generally. Based on a study of 13 German law journals and the courses on European law offered at the universities of Bonn, Freiburg, and München from 1950 to 2008 she concludes that the Europeanisation took off around 1990, when the Environmental Impact Assessment, the SEA, and the German unification resulted in a rise in the public awareness on the importance of EC, a rise in academic productivity related to European law, and a rise in the importance of European law in legal education. At that time, the monopoly of genuine European law scholars was broken, and other legal scholars began to address issues of European law in a significant rise of the number of publications on European law and in education. Mangold does not examine the development of ‘Europarecht als Disziplin’ in Germany, beyond terming it a ‘closed shop’ until the 1990s, when the European law developed a stronghold in German legal academia.¹⁴⁵ She does however point out that many of the early European law scholars held offices in the European institutions and that they were convinced of the political value of the integration. In addition, she points to institutes in Hamburg, Saarbrücken, and Köln as the primary centres of Europarecht in the 1960s. The German national association of European law Wissenschaftliche Gesellschaft für Europarecht, the German journal of European law *Europarecht*, and FIDE are only briefly mentioned, and *Europarecht* are not included in Mangold’s exploration of German legal journals. Mangold thus largely ignores the elements of the German European law academia that provided the early structure of the national discipline with strong ties to the transnational level.¹⁴⁶

The political scientist Julie Bailleux takes the opposite approach, since she first and foremost studies the development of ‘L’invention du droit communautaire en France’ 1945-1990 and a French ‘discipline académique’ of European law as an interaction between the French and the transnational level.¹⁴⁷ Parts of her analysis is dedicated to Gaudet and the way he promoted a

¹⁴⁴ J. Bailleux, ‘Michel Gaudet, a law entrepreneur: the role of the Legal Service of the European executives in the invention of EC Law and of the *Common Market Law Review*’, (2013) 50 *Common Market Law Review*, 359-67

¹⁴⁵ A.-K. Mangold, *Gemeinschaftsrecht und deutsches Recht: die Europäisierung der deutschen Rechtsordnung in historisch-empirischer Sicht* (Mohr Siebeck, 2011), at 243.

¹⁴⁶ *Ibid.* at 169-300.

¹⁴⁷ Bailleux, *Penser l’Europe par le droit*, at 331-414.

constitutional vision of European law in the 1950s and 1960s, where she largely confirms the work by Morten Rasmussen, but provides important supplements. She for instance documents how scholars from the discipline of international law were not keen on endorsing a constitutional approach to European law. When the High Authority invited the most authoritative international law scholars of the time, as part of an international conference in Stresa in 1957 on the European Coal and Steel Community (ECSC), in order for them to legitimate supranationality as the foundation of a new, autonomous international law, it thus backfired: they rejected the supranationality claim and the legal system of the ECSC was defined as classic international law, although of a special kind.¹⁴⁸ Bailleux's work is, however, primarily investigating the fight between internationalists and supranationalists in France and the establishment of a French discipline of European law. Bailleux shows how the formation of a French discipline of European law took off with Pierre-Henri Teitgen's establishment of a university centre for European integration and European law with the help from the Commission in 1963 and the establishment of similar centres in the 1970s. The stiff resistance from the Gaullist government and administration meant that ECJ's jurisprudence made few inroads in France. European law was therefore marginal in legal education in France until the Single European Act. On the background of the importance of the single market in France, European law was recognised as an autonomous legal order and professors of European law successfully turned European law into an obligatory part of the education of French jurists, with the support of the Commission, Bailleux argues.¹⁴⁹

Literature on the Debates on the Nature of European Law

Now, I will turn to the scarce literature that discusses the debates on the nature of European law in the emerging discipline of European law.¹⁵⁰

There are a few note-worthy accounts of the state of scholarship in European law from 'insiders', who have provided interesting observations. The most famous was published as a review article already in 1981. Here, the American political scientist Martin Shapiro¹⁵¹ delivered an academic slap in the face to the scholar Ami Barav and the community of European law scholars, which Barav represented, as he reviewed one of Barav's articles:

¹⁴⁸ For a detailed account of the Stresa conference, see chapter three in Bailleux, *Penser l'Europe par le droit*.

¹⁴⁹ Bailleux, *Penser l'Europe par le droit*.

¹⁵⁰ In addition to the accounts reviewed in this section, the studies of the development of national sub-levels of European law academia in Germany and France by Mangold and Bailleux, as well as the general study of the reception of European law in Germany by Davies, to varying degrees include examinations of the national debates on European law (Mangold, *Gemeinschaftsrecht und deutsches Recht*; Bailleux, *Penser l'Europe par le droit*; Davies, *Resisting the European Court of Justice*).

¹⁵¹ Shapiro became engaged in European law research with the ITL project.

‘it represents a stage of constitutional scholarship out of which American constitutional law must have passed about seventy years ago (...) It is constitutional law without politics. Professor Barav presents the Community as a juristic idea; the written constitution (the treaty) as a sacred text: the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court (the ECJ) as the disembodied voice of right reason and constitutional teleology’.¹⁵²

Shapiro has been cited countless times, for instance by Weiler, who in addition referred to the ‘almost unanimous non-critical approach and tradition developed towards the Court of Justice’ in the discipline of European law.¹⁵³ Promoting a critique, which was partially directed towards his earlier academic self, Weiler argued that the role of the ECJ had been overemphasised in claims on the importance of law in the integration process. The reason for this state of affair in the discipline was firstly related to the background of the first generation of European law scholars. According to Weiler, a great many of them came from international law. In the light of the deep crisis of the international legal order prompted by the cold war, European law was a dream come true. Secondly, there was no critical tradition in the public and private law traditions of the Member States, thirdly, regarding the ECJ as the bulwark against excessive powers of the Council and the Commission was easy in a period of democratic deficit, and fourthly, there was no critical symbiosis with sister disciplines.¹⁵⁴ Weiler however also noted changes in academia contributing to a more critical environment, such as the growing interest of political scientists in European law from both Europe and the US, a growing number of European law scholars situating the ECJ in its political, social, and economic context, and the interest of national substantive law experts in European law following the expansion of the Community in the early 1990s. According to Weiler, the closed circle of Community experts therefore ceased to exist as a category.¹⁵⁵ The (hitherto) state of isolation has also been described by Jo Shaw, who in 1996 argued that ‘EC/EU legal studies’ had to a large extent been insulated from the theoretical, methodological, and contextual influences which had been felt in most other fields of legal study, for example, critical legal studies and Marxism, postmodernism, socio-legal studies, economics, social and political

¹⁵² M. Shapiro, ‘Comparative Law and Comparative Politics’, (1980) 53 *Southern California Law Review*, 537-542, at 538.

¹⁵³ J.H.H. Weiler, ‘Journey to an Unknown destination. A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration’, (1993) 31, n. 4, *Journal of Common Market Studies*, 417-446, at 432.

¹⁵⁴ *Ibid.*, at 432-433.

¹⁵⁵ *Ibid.*, at 443.

theory, or feminist theory.¹⁵⁶ Instead, as Rasmussen A. Wessels summed up in 2000, the discipline had been influenced mostly by legal positivism and traditional doctrinal approaches to its research object.¹⁵⁷

Even though the above-mentioned interpretations provide valuable initial conclusions on the development of the European law discipline, most of the authors are European law scholars themselves relying on general insider reflections and intuition instead of systematic analysis. By the end of the 2000s, there was however a small but noticeable increase in analyses of the European law scholarship and the changes occurring in the 1980s in the discipline that began to deliver analyses with more sound conclusions. The legal scholar Anthony Arnall argued that the doctrinal paradigm of the 1960s and 1970s (as described by Shapiro, Weiler, Shaw, and Wessels) was countered by the change towards contextual and critical scholarship initiated by Stein's article 'Lawyers, judges, and the making of a transnational constitution';¹⁵⁸ Weiler's article 'The Community system: the dual character of supranationalism';¹⁵⁹ the IITL project;¹⁶⁰ and Francis Snyder's book *New Directions in Community Law*.¹⁶¹ Arnall argued that this theoretical change in EU law scholarship mirrored a development in US legal studies, where formalism was rejected in the early 20th century, and he rejoiced the boldness and inventiveness of American scholarship, which he welcomed in Europe.¹⁶² The legal scholar Giuseppe Martinico elaborated on this American connection, when he pointed to the importance American scholars such as Hay, Stein, Carl Friedrich, and Robert Bowie in translating the categories and techniques of federalism into the context of the European Community.¹⁶³

The level of theoretical sophistication rose as the Slovenian legal scholar Matej Avbelj pointed to the existence of a 'constitutional narrative' in European law scholarship and provided the first attempt of a social history of this narrative. According to Avbelj, the narrative became dominant in the 1980s and 1990s, before it split into multiple constitutionalisms. He identified three evolutionary stages of the constitutional narrative. The first was the stage of constitutional terminology in the 1960s and 1970s, where Community officials, national officials, and scholars

¹⁵⁶ J. Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic?', (1996) 16, n. 2, *Oxford Journal of Legal Studies*, 231-253.

¹⁵⁷ Wessels, 'A Legal Approach to EU Studies', at 105.

¹⁵⁸ Stein, 'Lawyers, Judges and the Making of a Transnational Constitution'.

¹⁵⁹ J. Weiler, 'The Community system: the dual character of supranationalism', (1981) 1 *Yearbook of European Law*.

¹⁶⁰ Cappelletti, Seccombe, and Weiler (general eds.), *Integration through Law*.

¹⁶¹ F. Snyder, *New Directions in Community Law* (Weidenfeld and Nicholson, 1990).

¹⁶² A. Arnall, 'The Americanization of EU law Scholarship' in A. Arnall, P. Eeckhout, and T. Tridimas (eds.) *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs* (Oxford University Press, 2008), 415-431.

¹⁶³ G. Martinico, 'Reading the others: American Legal Scholars and Unfolding European Integration', (2009) 11, n. 1, *European Journal of Law Reform*, 35-49.

attributed the constitutional adjective to some of the elements of integration without relying on a coherent constitutional self-awareness. In the 1980s, the European legal order was ‘baptized as fully constitutional’ when Stein and Weiler argued that the ECJ had constitutionalised the treaties by construing them in a constitutional mode. European legal studies were from then on occupied with showing how constitutional European law was in nature. This was the stage of the classical constitutional narrative, which lasted until the early 1990s, when the Treaty of Maastricht because of the three-pillar structure, the opt-outs, and the Maastricht judgment of the FCC gave a blow to the narrative. The grand narrative therefore disintegrated into a number of constitutional narratives and the stage of EU constitutionalisms.¹⁶⁴

In 2014, the historians Anne Boerger and Morten Rasmussen delivered a refined historical study of the ‘constitutional discourse’ with a much more extensive empirical basis, compared to the limited sources used by Avbelj. They argued that the constitutional discourse could in fact be traced back to the Treaty of Paris negotiations. The discourse did however not have much impact in the first decade of European integration, which was characterised by a search for the nature of European law in academia and in the institutions of the communities. In the *Van Gend en Loos* and *Costa v ENEL* rulings in 1963 and 1964, the ECJ followed the constitutional approach proposed by the Legal Service of the Commission. The ECJ however avoided political controversial terms and simply declared a ‘new legal order’. This definition was adopted by the nascent European law academia, which mainly carried out formalist analyses of the ECJ rulings. In 1981, Stein argued that the ECJ had fashioned a constitutional framework for a federal-type structure in Europe, and this was the breakthrough of the constitutional discourse. According to Boerger and Rasmussen, Weiler built on Stein’s work at a time when the political context triggered interest in European studies and helped to transform the discourse into the prevailing paradigm. Since then, the paradigm has played a dual role, Boerger and Rasmussen argued. Firstly, it has been an academic paradigm within the field of EU law structuring teaching curricula and research agendas. Secondly, it has provided a self-understanding to the ECJ, who embraced the notion in the *Les Verts* ruling in 1986.¹⁶⁵

Finally, Vauchez delivered his analysis of the history of EU law and its underlying constitutional paradigm on the basis of claims such as ‘law has come to stand as the major unifying glue and core integrative programme that holds together Europe’s complex, disjointed and multilevel polity’, and that law has a ‘brokering capacity’ to ‘act as the operator of a symbolic

¹⁶⁴ Avbelj, ‘Questioning EU Constitutionalisms’.

¹⁶⁵ See Boerger and Rasmussen, ‘Transforming European Law’.

and practical unification of 'Europe'.¹⁶⁶ Vauchez argued that a number of 'Euro-lawyers' such as Hallstein and Gaudet promoted an institutionalisation and constitutional reading of the Treaties of Rome following their entry into force, decoupling concepts like 'judicial power', 'constitution', and 'sovereignty' from the national corpus of state knowledge. This understanding flourished in the field of European law in the 1960s and 1970s, but the paradigm of constitutionalism did not emerge until the 1980s. According to Vauchez, the epicentre was the Law Department at the EUI, which had been turned into an interdisciplinary and trans-Atlantic hub because of the ITL project. Here, the debate on the relationship between 'Constitution' and 'European Communities' was renewed as it was claimed that there was a de facto constitution of the EC.¹⁶⁷

As outsiders to the field, Boerger/Rasmussen and Vauchez enriched the academic discussion on the paradigm leading the discipline. However, their work lack transparency regarding the selection of material upon which their analyses are built. It is therefore reasonable to assume that their selection process has been led by their research ambition, namely to trace the constitutional discourse. Such a research ambition has an inherent methodological danger of misrepresenting the general debate, which is not accounted for in the analyses by Boerger/Rasmussen and Vauchez.

Literature on Academic Disciplines

Before drawing out the conclusive lines from the two previous sections of literature review, I will present relevant literature from the sociology of knowledge and science that provides a theoretical approach to exploring the social dynamics of scientific disciplines, as well as an approach to define and identify academic disciplines.

At the core of the sociological approaches to knowledge and science lies the assumption of social determinism. Beginning with the classical sociologists, such as Karl Marx and Èmile Durkheim, it has been argued that knowledge should be traced to the specific conditions and historical situations of those upholding it, as knowledge was influenced by the sociological environment that it originated in.¹⁶⁸ Drawing on Marx, the sociologist Karl Mannheim and the anthropologist Max Scheler founded a movement dedicated specifically to the study of the social

¹⁶⁶ Vauchez, *Brokering Europe*, at 5-6 and 9.

¹⁶⁷ *Ibid.*, especially at 73-74 and 204-205.

¹⁶⁸ See, for instance, K. Marx and F. Engels, *The German Ideology, Part One* (International Publishers, 1970) and E. Durkheim, *The Rules of Sociological Method* (Free Press, 1982).

determinism of knowledge and coined the notion ‘sociology of knowledge’ in the 1920s.¹⁶⁹ A particular sociology of science was however not initiated before the American sociologist Robert Merton made the foundation in the 1960s. Studying the social factors governing science as an institution, he investigated the interdependence between science as a social institution, religion, and economy in the seventeenth century from a sociological functionalist perspective, but he did not link science as an institution to actual scientific content.¹⁷⁰

In 1962, Thomas Kuhn’s historical analysis in *The Structure of Scientific Revolutions* was published. He claimed that science does not develop as a linear accumulation of ideas shaped by rational exchanges in scientific communities. Rather, science is advanced through alternating phases of normality guided by a particular scientific paradigm, functioning as a disciplinary matrix with particular scientific concepts including theories and methods, and revolutions installing a new paradigm.¹⁷¹ Upon Kuhn’s ground-breaking work, a number of directions within sociology of science that dealt specifically with scientific content and the links between social settings and content developed.¹⁷²

Of particular relevance to this thesis, Pierre Bourdieu substantiated the theoretical foundation for linking these entities with a lasting impact on the sociology of science. He argued that agents struggle for influence and position in a field defined as a network of objective relations between positions held by the agents.¹⁷³ Using their material capital (economical), cultural capital (for instance legitimate knowledge, education and competences), and social capital (family relations, networks and connections),¹⁷⁴ and driven by their habitus (the ways of understanding, judging, and acting which arose from the position as members in one or several social fields and from the particular trajectory position in the social structure), they battle on ideas and concepts framing scientific fields such as disciplines.¹⁷⁵

Calling into question an ‘irenic’ vision of the scientific world, Bourdieu specifically reflected on the scientific field as an arena of competition for the monopoly of legitimate handling of

¹⁶⁹ K. Mannheim, *Ideologie und Utopie* (Verlag von Friedrich, 1929) and M. Scheler, *Versuche zu einer Soziologie des Wissens* (Duncker und Humblot, 1924)

¹⁷⁰ See, for instance, R. Merton, *The Sociology of Science* (The University of Chicago Press, 1973)

¹⁷¹ T. Kuhn, *The Structure of Scientific Revolutions* (The University of Chicago Press, 1962)

¹⁷² For prominent examples, see B. Barnes, *Scientific Knowledge and Sociological Literature* (Routledge, 1974) and D. Bloor, *Knowledge and Social Imagery* (The University of Chicago Press, 1976).

¹⁷³ P. Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press, 1977) and P. Bourdieu and L. Wacquant, *An Invitation to Reflexive Sociology* (Chicago University of Chicago Press, 1992).

¹⁷⁴ P. Bourdieu, ‘The Forms of Capital’, in J. G. Richardson (ed.), *Handbook of Theory and Research for the Sociology of Education* (Greenwood Press, 1986), at 241-258, at 241.

¹⁷⁵ P. Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’, (1987) 38 *Hastings Law Journal*, 209-248; Bourdieu and Wacquant, *An Invitation to Reflexive Sociology*; P. Bourdieu, *The Logic of Practice* (Stanford University Press, 1990).

scientific goods, more precisely the correct ends, objects, and methods of science.¹⁷⁶ The same dynamics shapes knowledge in the juridical field, Bourdieu argued. Characterised by an on-going competition for monopoly of the right to determine the law, the legal field produces the meaning of the law in the confrontation between different agents in the field. It is not the legislator, who writes the law; it is the entire set of social agents motivated by specific interests and constraints associated with their positions within different social fields.¹⁷⁷ Drawing on theoretical reflections about the connection between ideas, knowledge production, and state formation put forward by classical sociologists, Bourdieu furthermore stated that writings devoted to the state, behind the appearance of thinking it, take part in constructing the state. Particularly, juridical writings take their full meaning not only as theoretical contributions to the knowledge of the state, but also as political strategies aimed at imposing a particular vision of the state, especially during the phase of construction and consolidation. In this way, legal knowledge production and state formation are bound together.¹⁷⁸

Since the end of the 1990s, Bourdieu's theory of practice have been used to construct sociological models and narratives of the European legal and political orders with a particular emphasis on the interaction between academic knowledge production in the area of law and European legal construction. Schepel and Wesseling initiated this approach 1997,¹⁷⁹ Alter followed,¹⁸⁰ while the Polilexes group developed a distinctive sociology of European law based on Bourdieu, where European law was conceived as a field where networks of jurists battled over the understanding and development of European law on the basis of an interest in positioning themselves in the European construction.¹⁸¹

The sociology of knowledge and science also offers theoretical accounts specifically focused on how disciplines are manifested, differentiated, and characterised. Even though this literature points to the often fragmented and heterogeneous character of disciplines as well as the existence of temporal shifts changing disciplines, there is common agreement on the basic descriptive criteria that identifies a discipline. Firstly, a discipline has a research object, which is differentiated from other research objects. Secondly, at the level of institutional manifestation, it has its own academic departments with scholars who teach and research European law, which mirrors

¹⁷⁶ P. Bourdieu, *Science of Science and Reflexivity* (Polity Press, 2004)

¹⁷⁷ P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', (1987) 38 *Hastings Law Journal*, 209-248.

¹⁷⁸ P. Bourdieu, 'Rethinking the State. Genesis and Structure of the Bureaucratic Field' (1994) 12 *Sociological Theory*, 1-18, at 2-3.

¹⁷⁹ Schepel and Wesseling, 'The Legal Community'

¹⁸⁰ Alter, 'Jurist Advocacy Movements in Europe'.

¹⁸¹ See the description at 32-34.

recognition in the organisational structure of academic institutions and enables the reproduction of the discipline from one generation to the next. In addition, disciplines have institutional manifestation in the shape of a freestanding community with scholarly associations and specialist journals providing an academic currency beyond the institutional manifestation tightly tied to universities. Thirdly, at the substantial level, it has accumulated specialist knowledge, and most disciplines have special methods, terminology, and theories applied to their particular research object.¹⁸²

In addition to these more or less concrete characteristics, the literature highlights the existence of a common identity in disciplines, comparable to the identity in tribes. One way of detecting this identity is by tracing the ‘idols’ or ‘stars’ and their ‘masterpieces, such as Albert Einstein, Max Planck, and Robert Oppenheim hanging on the walls of the physicists, while the main works of Max Weber and Emile Durkheim are visibly at display on the bookshelves of the sociologists.’¹⁸³ Esteemed literature thus plays a significant role in creating and maintaining a common discipline identity, as does the common language, for instance the specialised terminology, traditions, common customs, and practices. To be admitted to membership of a particular discipline therefore involves not only a sufficient level of technical proficiency in one’s intellectual trade, but also a proper measure of loyalty to one’s collegial group and adherence to its norms, as this literature argues.¹⁸⁴

Despite the vastness of literature promoting sociological approaches to knowledge and science, as well as the existence of a specialised literature on disciplines, very few rich academic analyses of disciplines exist, if any, as the scholars of this field state themselves.¹⁸⁵

Insights from the Literature on the Discipline of European Law and the Literature on Academic Disciplines

On the basis of the review above, a conclusion on the insights, and weaknesses, in the three strands of literature can be presented. It concerns the structural manifestation of the discipline of European law, the key institutions of the transnational level of the discipline, claims on the development of debates on the nature European law in the discipline, and the role of the academic discipline of European law in the development of the constitutional practice. These

¹⁸² See, for instance, T. Becher and P. Trowler, *Academic Tribes and Territories* (The Society for Research into Higher Education and Open University Press, 2001), at 41-51; A. Krishnan, ‘What Are Academic Disciplines? Some Observations on the Disciplinarity vs. Interdisciplinarity Debate’, Working Paper, NCRM Working Paper Series, National Centre for Research Methods, January 2008, University of Southampton, at 5, 8-10 and 27.

¹⁸³ B. Clark, *Academic Culture*, working paper no. 43, 1980, Yale Higher Education Research Group.

¹⁸⁴ Becher and Trowler, *Academic Tribes and Territories*, at 44-47.

¹⁸⁵ *Ibid.*, at 51.

insights provide a basis for the research object and research questions of this thesis, which will be developed in the next section of this introduction.

A number of conceptual terms have been invoked to describe the object of enquiry in the existing accounts. Vauchez uses the terms ‘transnational field of European law’ interchangeably with ‘European discipline’ and Rasmussen writes of a ‘discipline of European law’ as a part of a ‘broad transnational alliance’. While neither of them provide a precise definition of the terms ‘transnational’ or ‘discipline’, both link the emergence of the discipline of European law to the construction of academic chairs, departments, and centres of European law in national and transnational settings, European law journals, and FIDE. As their inclusion of institutions in national settings imply, the exact relation between transnational and national enterprises of European law poses conceptual difficulties. Rasmussen stays silent on the matter. Vauchez characterises the transitional field of European law as weak because it confronts the authority of nationally based legal academia over the production and evaluation of legal scholars, and he points to a European scholarly production based in preformed national disciplines.

The two insiders de Witte and Bogdandy have more to offer with regard to outlining the structural manifestation of the discipline of European law. De Witte argues that the ‘discipline’ of European law’ is composed by those who have been trained inside the traditions of a national legal system and those who have a transnational perspective of the discipline, either because they lack a specifically national vantage point altogether, or because they have been socialised in a transnational professional context, which de Witte equates with a denationalised context. Bogdandy divides European law academia into a Europeanised level on the one hand and national subfields on the other hand, and he describes Europeanisation as a process of mutual fertilisation and interpenetration between national structures and the periodic building of a single academic collective opinion. Finally, Mangold and Bailleux operate with a distinctive, respectively, German and French academic field or discipline of European law with Bailleux underlining the formative interactions between the transnational level and the French discipline of European law in the early years.

Drawing on the combined insights from the different authors, a characterisation of the emerging discipline of European law can be provided: A discipline of European law with institutional manifestation in the shape of academic chairs, departments, centres, journals, and associations dedicated to European law emerged from 1960s onwards in a manifestation with a transnational level and national sub-levels. Although there were formative interactions between these levels and blurry borders, a number of specifically transnational institutions were created,

and they formed the backbone of the transnational manifestation of the discipline. In this characterisation, the term ‘transnational’ along the lines of de Witte’s ‘denationalised’ has been chosen over Bogdandy’s term ‘Europeanised’, as de Witte’s use of ‘transnational’ seems the most appropriate in the light of the existing literature on the emergence of the discipline. This literature has convincingly argued that the transnational level emerged because central actors such as Gaudet aimed at and were successful in creating academic institutions of European law ideologically detached from national academic settings, not as a consequence of mutual fertilisation between national academic structures. The opening quote of this thesis emphasises this process.

Bailleux and Mangold have carried out wide-ranging studies of what are arguably the two most important national subfields of the discipline. But the institutions that are convincingly identified in the existing literature as the backbone of the transnational level (FIDE, the EUI/the ITL project, and the *CML Rev.*) have not yet been investigated on the basis of comprehensive empirical material drawn from archives. Therefore, a detailed history of the key transnational institutions of the discipline of European law is missing. This poses a serious gap in the historiography, as the literature tentatively suggests that these transnational institutions individually had a profound impact on European law. Most importantly the EUI/ITL as a trans-Atlantic hub, where the constitutional paradigm emerged in the early 1980s (Vauchez), and FIDE, which had an instrumental role in the development of the constitutional practice (Alter and Vauchez), or, at the least, provided legitimisation, broke new grounds, and functioned as shops windows for the Legal Service (Rasmussen).

In the literature covering the debates on the nature European law in the discipline, the authors generally agree: In the first decades of the 1960s and 1970s, the emerging discipline was characterised by a doctrinal methodological approach. Theoretically, the authors in the discipline agreed on the uniqueness of the European legal order, but the cautious characterisation ‘a new legal order’ was adopted. Due to the work of Stein and the ITL project, contextual approaches were adopted, and the constitutional understanding of European law became paradigmatic in the discipline in the 1980s. However, the studies providing these conclusions have methodological flaws. Most of the authors are European law scholars themselves relying on general insider reflections and intuition instead of systematic empirical analysis. Outsiders to the field (Boerger/Rasmussen and Vauchez) have written the remaining contributions, but their work lack transparency regarding the selection of material upon which their analyses are built, if any. Vauchez for instance emphasises the importance of the ITL project without any analysis of the

content in the ITL publication series. Likewise, the lack of a systematic analysis of FIDE reports poses a gap. Obviously, there is a need for exploration based on a systematic and transparent approach to the analysis of the debates within the discipline of European law, which includes the ITL publication series and FIDE reports.

Finally, the third strand of literature from sociology of knowledge and science offers a theoretical approach to exploring the social dynamics, as well as the institutional and substantial manifestation of a scientific discipline. It suggests that European law academia can be approached as a discipline, where a variety of scholars, as well as political, and judicial actors, such as judges, with different interests and strategies have participated in scientific contestation. The capital of the actors (for instance their education, their previous work experience, and their connections at national and transnational levels) and their habitus (for instance their understanding of European law and their promotion of this understanding) can be approached as decisive factors in their ability to influence social and organisation dynamics of the key institutions of transnational European law academia, the academic debate on the nature of European law in these institutions, and the institutional and substantial manifestation discipline of European law.

In addition, the literature suggests that juridical writings take their full meaning not only as theoretical contributions to the knowledge of the Community, but also as political strategies aimed at imposing a particular vision of the Community. By connecting the social organisation to the academic debate and to formation of the Community, this approach offers valuable suggestive lines of interpretation, which can help bridge the gap between institutional analysis and analysis of the debates, as this thesis attempts. Such an approach may lead to convincing answers to the question of the individual role of the key transnational institutions of the discipline of European law that may provide the basis for an interpretation of the broad role of the discipline of European law in the development of the constitutional practice. Such research would be able to confirm or dismiss the current interpretations: If the discipline provided academic legitimisation of the constitutional practice (Vauchez and Rasmussen), if it equipped judges, civil servants, commissioners etc. with rationales for their own roles and techniques for the unification of European, provided kitchen cabinets for decision-makers, was a recruitment pool of personnel to the European institutions, and maintained the image that flattered their own role and importance in coordination with decision-makers (all argued by Vauchez).

4 Research Object, Research Questions, and Methodology

Drawing on the insights and shortcomings in the existing literature on the discipline of European law and the literature from sociology of knowledge and science, I will now define my research object and develop relevant research questions. The broad research object of this thesis, as stated in the introduction, is the history of European law academia, which is conceptualised as a discipline with institutional manifestation in the shape of academic chairs, departments, centres, journals, and associations dedicated to European law. Only, the discipline has institutional manifestation at both a transnational level and national sub-levels, as insiders of the discipline have argued. In this regard, the thesis draws on the approach to the term ‘transnational’ promoted by de Witte as ‘denationalised’. At the same time, the thesis abstains from utilising a strict definition, which could become an intellectual straitjacket for an empirically grounded analysis.¹⁸⁶

The specific research object of this thesis is the key institutions of this transnational level that have been attributed with particular significance for the development of the constitutional practice in the initial existing literature. These institutions are the transnational association for European law FIDE, the *CML Rev.*, which was arguably the key journal of the transnational level of the discipline, and finally, the Department of Law of the EUI and its famous the IITL project carried out in the late 1970s and 1980s.

In order to provide analyses that may lead to new insights on these key institutions and their role, three interlinked research questions have been developed. Firstly, how did the social and organisational dynamics of the key institutions of the transnational level of the academic discipline of European law develop in the period from 1961 to 1993? Secondly, how did the academic debate on the nature of European law in the key transnational institutions develop from 1961 to 1993? In addition, answering the first two questions is the prerequisite for answering the following research question: what role did the key transnational institutions of the discipline of European law play in the development of the constitutional practice? The first two questions are rooted in the two existing trends within the literature, namely to focus on the development of institutions or to focus on the debates in the academic discipline of European law. However, the two questions will be examined in close relation to each other in order to investigate the causal links between institutional developments and the developments in the

¹⁸⁶The thesis thus draws on Patricia Clavin, who, in an introduction to a volume on transnational communities in European history, speaks against using definitions of transnationalism that would limit avenues of enquiry and generally supports defining the term transnational in relation to the particular study object (P. Clavin, ‘Introduction: Defining Transnationalism’, (2005) 14, n. 4., *Contemporary European History*, 421-439, at 433).

debate. Bridging this gap between institutional analysis and analysis of the debates is the prerequisite for providing convincing answers on the role of the institutions in building in the development of the constitutional practice.

The three questions will be examined on the basis of a methodology inspired by Bourdieu's theory of practice. The discipline of European law will be analysed as a field, where a variety of scholars, as well as political, and judicial actors, such as judges, with different interests and strategies have participated in scientific contestation. The capital of the main institutional actors (for instance their education, their previous work experience, and their connections at national and transnational levels) and their habitus (for instance their understanding of European law and their promotion of this understanding) are thus approached as decisive factors in their ability to influence social and organisation dynamics of the key institutions of transnational European law academia, as well as the academic debate on the nature of European law in these institutions. Furthermore, juridical writings have been seen not only as theoretical contributions, but also as political strategies. However, it is important to point out that the theory of practice has been used primarily as a heuristic device to sharpen the methodology, the empirical analysis, and my work with primary sources. The historical methodology used has tended to nuance theoretical assumptions into somewhat more complex historical narratives. As a result, the three articles are not structured according to a strict theoretical apparatus with the accompanying use of specific theoretical concepts, but rather they have the shape of historical narratives.¹⁸⁷

The analysis begins in 1961, when the FIDE was established. As the first creation of a genuine transnational academic institution of European law, the event marks the starting point in the development of the transnational level of the academic discipline of European law. The prehistory of FIDE (the establishment of national associations of European law in the 1950s) and the prehistory of the *CML Rev.* (Gaudet's attempt in the early 1960s to initiate a transnational journal of European law with the Ivo Samkalden, the founder of *CML Rev.*) are however also part of the analyses. On the other end of the timeline, the thesis covers the development until 1993, when the Maastricht Treaty brought about a new legal structure as it introduced the three-pillared structure of the European Union, consisting of the pre-existing Community pillar and two intergovernmental pillars, namely the Common Foreign and Security Policy (CFSP) and the Justice and Home Affairs, and a set of protocols and declarations granting some Member States exemption from the legal framework of the Community. In academia and in the Community

¹⁸⁷The exception is the term 'paradigm' used explicitly as label for a disciplinary matrix with particular scientific concepts including theories and methods, following Kuhn (Kuhn, *The Structure of Scientific Revolutions*).

institutions, these events unleashed a disruption of the constitutional paradigm, which disintegrated into a whole array of constitutional narratives.¹⁸⁸ 1993 therefore marks a turning point in the history of European law as well as the history of European law academia, and an end point in this thesis.

Before turning to the sources, it should be noted that as a collection of articles, the thesis does bear signs of three things. Firstly, that the articles have been finalised as individual pieces of scholarship at different stages of the project, along with the development of the research object and research questions drawing on the existing literature. Secondly, that the articles have been finalised in cooperation, not just with the supervisor, but additionally with the respective editors of the publishing journals, who have had different approaches to the content of the articles.¹⁸⁹ As a result, the approach with regard to the research object and the research questions differ slightly in the three articles. For instance, the article on the *CML Rev.* has a strong focus on the role of the journal in the emergence and development of the discipline of European law, not least because of the cooperation with the editor in charge, while the article on FIDE does not. In addition, the article on the *CML Rev.* has a slightly different conceptualisation of the research object, namely the ‘transnational, academic discipline of European law’, due to an early conceptualisation, as the article on the *CML Rev.* was the first article written and accepted.

5 Sources

As mentioned above, the three articles have the shape of historical narratives.¹⁹⁰ The force of narratives is that they allow for the kind of complexity, which the history of European law is generally characterised by, namely a multiplicity of levels and actors engaging with each other in the battle on how to define and promote European law and a multiplicity of causes such as personal and professional trajectories, personal and institutional interests, and ideologies.

The precondition for writing historical narratives is a comprehensive selection of primary sources. However, state and EC institutional archives usually used by European integration historians has generally had little to offer with regard to the history of the key institutions of the transnational level of the discipline of European law. Indeed, the challenge has been to locate and get access to hitherto unutilised archival material, rather than to select among available sources in

¹⁸⁸ Avbelj, ‘Questioning EU Constitutionalisms’.

¹⁸⁹ Except the article on the ITL project, which has been accepted in *German Law Journal*, but not yet been finalised in cooperation with the editor in charge.

¹⁹⁰ See, for instance, the promotion of the historical narrative by the Cold War historian J. Gaddis, ‘History, Science, and The Study of International relations’ in N. Woods (ed.), *Explaining International Relations since 1945* (Oxford University Press, 1996), 32-48.

state and EC institutional archives. A threefold approach has been utilized to identify relevant primary sources. Firstly, an effort was undertaken to collect internal archival material from the FIDE, the *CML Rev.*, and the *ITL* project in order to a comprehensive and accurate information on these institutions. Secondly, this crucial source base was supplemented with archival sources from the European Commission and relevant private papers from actors involved. In addition, the large collection of archival documentation collected by fellow members of the ‘Towards a New History of European Public Law’ group made it easier to identify sources and scraps of information, to which I was kindly granted access as a part of a common goal on sharing archives and enriching the material available to each researcher of the group.¹⁹¹ Thirdly, a number of semi-structured, open-ended interviews have been carried out with persons that had had a particular influence as key actors or as insiders with a particular knowledge on the key actors and processes due to a prominent placement in the central institutions. On two occasions, the interviews were conducted with fellow members of the ‘Towards a New History of European Public Law’ group due to a shared interest in the interviewee. In these cases, the interviews were loosely structured.¹⁹² On one occasion, Sigfrido Ramirez from the mentioned research group accepted to ask a number of questions designed by the present author in an interview with Claus-Dieter Ehlermann scheduled by Perez for September 2016.¹⁹³ The questions followed up on an interview the present author conducted with Ehlermann in June 2016. When using the Perez’ interview, a reliance on the interview already conducted could therefore lead the evaluation of the answers.

Generally, the material collected by the threefold approach has been examined with attention to genre and the particular circumstances surrounding genesis of each source. Whenever possible, critical comparison of sources have guided the valuation of the content. Especially the information gathered in interviews has systematically been evaluated on the background of other sources of information in order to avoid reliance on memories that might be selective, partial, or intentionally false.

Collecting the material on the academic debate produced in FIDE, the *CML Rev.*, and the EUI/the *ITL* project in the period 1961-1993 was less challenging. FIDE kindly granted me access to the congress reports accessible through their homepage, while all relevant issues of the *CML Rev.* and the publications in the *ITL* series are accessible at practically any university library.

¹⁹¹ Depending on permission from the archives in question.

¹⁹² Interview with Ernst Steindorff, 20 June 2014 (conducted in cooperation with Bill Davies) and interview with Paolo de Caterini 30 March 2016 (conducted in cooperation with Sigfrido Ramirez and Morten Rasmussen).

¹⁹³ Interview with Claus-Dieter Ehlermann, 16 September 2016 (by Sigfrido Ramirez).

As the material gathered in this approach was enormous, parameters of selection have been applied in order to locate the academic debate on the nature of European law. As described below, these parameters differed in each case study.

Before turning to the main body of this thesis consisting of the case studies presented in three articles, the specific research questions and sources in each case study are described.

FIDE

In resonance with the general research questions, the article on FIDE investigates the social and organisational dynamics of FIDE and the academic debate on the nature of European law at the FIDE congresses in an interlinked analysis. In addition, the possible instrumental role of FIDE in the development of the constitutional practice is explored. The analysis takes its starting point in 1961, when FIDE was established, but the prehistory of establishing national associations of European law in the 1950s is included in the article. The end point is 1994, a year selected in order for the study to fit the general time frame of the entire thesis. However, 1994 has been included due to the existence of excellent sources to the FIDE congress in Rome 1994 that have helped enlighten the development of FIDE as an organisation up till 1994. It must thus be noted that the year 1994 has not been chosen as a mark of FIDE's institutional development.

As FIDE has never had a permanent secretariat, the archives of the national associations are the main sources to FIDE-material that can enlighten the questions on the institutional and social dynamics of FIDE. Cooperation between FIDE under the Danish presidency and the FIDE-president at the time, professor of law Ulla Neergaard, on the one hand, and the present author and Morten Rasmussen on the other hand was therefore initiated with the aim of collecting sources to the history of FIDE in possible archives in the national associations. Several rounds of contact to the national associations of European law led to the collection of 12 Steering Committee meetings minutes from the period 1973 to 1993 situated in the archives of the national associations. Most minutes contain thorough reproduction of the discussions at the meetings, and they therefore pose an excellent source to FIDE as an organisation, the main activities of FIDE, namely the congresses held every second or third year, and the lack of further activities. In combination with already collected material from archives of national European law associations (the Danish, French, Italian, and Dutch associations),¹⁹⁴ the archive of the Legal Service of the Commission, a number of private archives (most importantly the private archives of the Michel Gaudet, the German ECJ judge Walter Strauss, the Belgian law professor Michel

¹⁹⁴ Collected by Morten Rasmussen, Alexandre Bernier, Sigfrido Ramirez, and Karen van Leeuwen.

Waelbroeck, and the Danish law professor Ole Lando), and interviews with the lawyer Paulo De Caterini from the Italian association of European law and Ole Lando from the Danish Association of European law, this made up an empirical foundation, which allowed for a genuine historical narrative of the organisational development of FIDE. A limitation in this material is the lack of minutes from Steering Committees before 1973. In addition, no minutes from the Bureau, which was the main decisive body in FIDE in the early 1960s, has been located in the archives of the national associations. The only accessible minutes from Bureau meetings are thus minutes from a meeting in 1962 from Eric Stein's private archive. Due to these gaps in the collected sources, writing the history of the FIDE in the 1960s has relied heavily on the archive of the Legal Service of the Commission, the relevant private archives, and literature already utilising some or all of these archives, however not comprehensively.¹⁹⁵ Nevertheless, the analysis of FIDE in the 1960s remains less empirically grounded than the analyses of the 1970s and the 1980s.

As the congresses taking place every second or third year were the main activities of FIDE, the analysis of the debate on the nature of European law taking place in FIDE has relied on the congresses reports to which FIDE kindly granted me access to through an intranet on their home page. The congress reports consist of national reports to the congress topics written by members of each member association, as well as opening speeches, general reports, and, from 1973 on onwards, community reports on the congress topics. Generally, the reports are rich and detailed accounts of the topics in relation to the national or community context, and as such, they are rich sources to the academic debate. Due to the vastness of the congress reports, which taken together forms thousands of pages, only reports that touch upon the nature of European law have been analysed, while reports dealing with substantive European law in relation to national law have not. Reports from the 1965 congress on measures to ensure the introduction of community law into the national legal systems have thus been analysed, whereas reports on international fusion of companies from the 1968 congress have not. This approach entails the risk of leaving valuable sources aside in discussions on substantial law. Therefore, reports on topics seemingly void of discussion on the nature of European law have been skimmed in order to establish their status of relevance.

¹⁹⁵ Most importantly, Morten Rasmussen and Julie Bailleux. See Rasmussen, 'Establishing a Constitutional Practice. The Role of the European Law Associations'; Bailleux, *Penser L'Europe par le Droit*.

The case study and article on FIDE has been developed on the background of this comprehensive material. The article has been accepted for publication in the *American Journal of Legal History* (forthcoming, 2017).

The Common Market Law Review

In an interlinked analysis, the article on the *CML Rev.* investigates the social and organisational dynamics of the prime journal of the transnational level of European law and the academic debate on the nature of European law in the published issues of the journal from its establishment in 1963 to 1993. On this basis, the role of the journal in the emergence and development of the discipline of European law as well as its role in the development of the constitutional practice is evaluated.

Of the first generation of European law journals that were contacted in an initial search for archival material, the *CML Rev.* was the only journal with historical records and a willingness to provide access.¹⁹⁶ The records of this journal are vast and rich and provide information on the establishment, minutes from editorial meetings, meetings between editors and publishers, meetings with the editorial boards, correspondence between the editors, as well as correspondence between editors and authors. Despite the vastness, the records are not complete and they mirror different practices by the changing editorial secretaries of the journal with regard to file archiving. There are for instance records with subscriber numbers from the 1960s and 1970s, but none from the 1980s (although the journal beyond doubt developed readership analyses in the 1980s) posing the difficulty of interpreting the development of subscriber numbers in the entire period covered.

Generally, the analysis primarily relies on the records of the journal, but the sources are supplemented by the private archive of Michel Gaudet, and interviews with two of the most prominent editors of the journal, namely Laurens-Jan Brinkhorst, who was the editorial secretary 1963-1965 and an editor 1965-1973, and Claus-Dieter Ehlermann, who was the an editor 1975-1989. With regard to the analysis of the academic debate in the journal issues, an initial process was carried out, where all articles, case law reviews, and editorial comments from 1963 to 1993 that dealt with the nature of European law were selected on the basis of the title (the articles, where the title were usually long and indicated the topic) or an initial reading (the case law

¹⁹⁶The editors of *Revue trimestrielle de Droit européen*, *Europarecht*, and *Cahier de droit Européen* have been contacted with the hope of achieving material that could be used comparatively in the case study of the *CML Rev.* *Revue trimestrielle de Droit européen* did not keep historical records, and *Europarecht* did not wish to disclose the their historical correspondence between editors and authors to third parties. *Cahier de droit Européen* did not respond. However, through the private archive of Walter Strauss, points on the history of *Europarecht* are presented.

reviews and editorial comments, where the titles were not always fully indicative of the content). Such a process was chosen as a full analysis of all the academic material in the journal would have been unachievable within the project, although the process posed the risk of leaving out central articles, where the title did not indicate its relevance to the analysis. As a second step, the chosen material was analysed with a special attention to the discussions on the nature of European law.

On this background, the article ‘The History of *Common Market Law Review*. Carving out an Academic Space for European law 1963-1994’ has been written. The article has been accepted for publication in the *European Law Journal* (forthcoming, 2017).

The Integration through Law project

Finally, the third case study explores the social and organisational dynamics of the IITL project carried out at the European University Institute, as well as the debate on the nature of European law in the auspices of the project, and concretely manifested in the IITL publication series. On this basis, the impact of the project on the discipline of European law and the development of the constitutional practice is evaluated. The study encompasses the prehistory of the project, namely the ‘New Perspectives for a Common Law of Europe’ at the EUI in 1977, which functioned as a pilot project to the IITL project, and the main years, when the project was carried out, in the late 1970s and early 1980s. In the reflections on the impact of the project, events up until 2013 (Weiler’s inauguration as president of the EUI) are included.

The study encompasses the prehistory of the project, namely the ‘New Perspectives for a Common Law of Europe’ carried out at the EUI in 1977, which functioned as a pilot project to the IITL project, and the main years, when the project was carried out, in the late 1970s and early 1980s, but the in the reflections on the impact of the project, events up until 2013 (Weiler’s inauguration as president of the EUI) are included.

After inquiries by the present author regarding the possible private papers of Mauro Cappelletti, who directed the IITL project, Cappelletti’s daughter handed over Cappelletti’s vast private papers to the Historical Archives of the European Union (the HAEU), where I could consult them by the kind cooperation of Dieter Schlenker, the director of the HAEU, before they were made publicly available.¹⁹⁷ The papers document of Cappelletti’s professional carrier, including comprehensive material on the IITL project, such a minutes from meetings, notes from informal phone calls and sessions on the project, project descriptions, courses with relation to the

¹⁹⁷I would like to thank Morten Rasmussen for his crucial assistance in this process.

ITL project at the EUI and at Stanford university, correspondence with authors in the project etc. Adding the private archive of Eric Stein, interviews with key actors in the project such as Claus Dieter Ehlermann, the American law professor Peter Hay, and the editor of the project Monica Seccombe, this made up a comprehensive material for investigating the institutional and social dynamics of the ITL project and the EUI, as well as the influence of the project on the discipline of European law and the development of the constitutional practice. The archive of the EUI at the Historical Archives of the European Union was additionally consulted, but no useful material on the ITL project was found. With regard to the analysis of the academic debate in the publication series, all bands in the series were consulted. However, the comprehensive general introduction by Cappelletti, Weiler, and Seccombe proved to be of central importance to the analysis.

On the basis of the two levels of analysis, an article with the title 'The History of the ITL Project. Creating the Academic Expression of a Constitutional Legal Vision for Europe' has been produced. The article has been accepted for publication in *German Law Journal* (forthcoming, 2017).

A Miscellaneous Network

The History of FIDE 1961-1994

There is a legendary entity in the historiography of European law.¹⁹⁸ Wrapped in grand words, it has been described as instrumental in the ‘extensive coordination’ behind the development of European law,¹⁹⁹ or even as the brokering network behind the constitutionalisation of the European legal order.²⁰⁰ This entity is Fédération internationale pour le droit européen (FIDE). It was established in 1961, in the foundational period of European law, where the European Court of Justice (ECJ) proclaimed the doctrines of direct effect²⁰¹ and primacy²⁰² in an attempt to distance European law from traditional international law and align it with constitutional law.²⁰³ Despite FIDE’s grand reputation, the literature on the federation, its functioning, and academic output is scarce, making it hard to evaluate whether its reputation is deserved.

A few scholars have carried out analyses of FIDE that have broken new ground by going beyond the predominant focus on courts, litigants, and governments in European legal historiography. Adopting an approach inspired by Bourdieu,²⁰⁴ these scholars have pointed to the contestation in the legal field and the constructed nature of political outcomes, contingent on the

¹⁹⁸ The article has been accepted for publication in *American Journal of Legal History* (forthcoming, 2017). I would like to thank Ulla Neergaard and FIDE for their effort to collect material in the archives of the national associations of European law and for granting access to this material. I would also like to thank the Danish association of European law and Ole Lando for letting me use their archives. Finally, I would like to thank Morten Rasmussen, Ulla Neergaard, Michel Waelbroeck, Claus-Dieter Ehlermann, and Haakon Ikononou for comments, which improved this article immensely.

¹⁹⁹ K. Alter, ‘Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953-1975)’ in Karen Alter, *The European Court’s Political Power* (Oxford University Press, 2009), 63-91, at 63.

²⁰⁰ A. Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press, 2015), at 88-89 and 104, and A. Vauchez, ‘The Making of the European Union’s Constitutional Foundations: The Brokering Role of Legal Entrepreneurs and Networks’ in W. Kaiser, B. Leucht, and M. Gehler (eds.) *Transnational Networks in Regional Integration. Governing Europe 1945-83* (Palgrave Macmillan, 2010), 108-128, at 120.

²⁰¹ Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*, ECLI:EU:C:1963:1.

²⁰² Case 6/64, *Flaminio Costa v ENEL*, ECLI:EU:C:1964:66.

²⁰³ Today, as in the past, the terms ‘constitutional’ and ‘constitutionalisation’ are defined in various ways. This article builds on a loose definition of a ‘constitutional’ reading, gathering the interpretations that build on the claims that European law should be constructed with tools of state constitutional law, not public international law, that the European and the national legal orders should be reduced to a single legal system, and that European law should prevail in case of a conflict between European law and national law.

²⁰⁴ The sociologist Bourdieu developed a sociological approach to law and the juridical field, where he pointed to an on-going competition for monopoly on the right to determine the law: the meaning of the law is determined in a confrontation between different agents in the field, and the authentic writer of the law is therefore not the legislator, but the entire set of social agents. These social agents are motivated by specific interests and constraints associated with their positions within various social fields. See P. Bourdieu, ‘*The Force of Law: Toward a Sociology of the Juridical Field*’, (1987) 38 *Hastings Law Journal*, 209-248; P. Bourdieu and L. Wacquant, *An Invitation to Reflexive Sociology* (Chicago University Press, 1992); and P. Bourdieu, *The Logic of Practice* (Stanford University Press, 1990).

balance of interests and power among actors in the field.²⁰⁵ The political scientist Antoine Vauchez has argued that FIDE and the ‘FIDE entrepreneurs’ aimed to be the private army of the Community and that the federation furnished ‘the legal arsenal that would ensure the firepower needed for pan-European combat’ in colloquia and journals.²⁰⁶ In the same vein, the political scientist Karen Alter has argued that the ‘euro-law associations’ coordinated and encouraged individual actions to propel the development of European law in constitutional direction, for instance by initiating test cases and acting as the ECJ’s kitchen cabinet.²⁰⁷ Criticising Alter and Vauchez’ conflation of FIDE and the national associations with the broader transnational network of European law, the historian Morten Rasmussen has provided an analysis of the activities and institutional affiliations of FIDE, primarily based on empirical material from the early 1960s. He has argued that FIDE congresses legitimised ECJ’s case law, broke new ground in controversial fields, and functioned as ‘shop windows’ for the Legal Service of the Commission, but he has rejected the idea of FIDE as instrumental in aligning the institutional actors behind the attempted constitutionalisation of European law. Instead, he has attributed this role to the Legal Service of the Commission, based on archival documentation. According to Rasmussen, the influence of the national European law associations was furthermore limited at the national level because of the heavy scepticism of the attempted constitutionalisation of European law in the Member States’ legal establishments.²⁰⁸

Alter, Vauchez, and Rasmussen have contributed immensely to the history of European law by pointing to the importance of elite networks. Their accounts are however marked by a primary concern with the 1960s, a lack of access to empirical material from FIDE’s Steering Committee, and an abstinence from using FIDE congress reports as source material, despite the fact that the reports testify to the main activities of FIDE.²⁰⁹ Furthermore, they all assume that FIDE and the

²⁰⁵ Alter, ‘Jurist Advocacy Movements in Europe’, at 64.

²⁰⁶ Vauchez, *Brokering Europe*, at 89. See also Vauchez, ‘The Making of the European Union’s Constitutional Foundations’; A. Vauchez, ‘The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)’, *International Political Sociology* 2 (2008), 128-144; and A. Vauchez and S. Lee Mudge, ‘Building Europe on a Weak Field: Law Economics, and Scholarly Avatars in Transnational Politics’, (2012) 118, n. 2, *American Journal of Sociology*, 449-492.

²⁰⁷ Alter, ‘Jurist Advocacy Movements in Europe’.

²⁰⁸ Rasmussen, ‘Establishing a Constitutional Practice: The Role of the European Law Associations’.

²⁰⁹ Also noteworthy is the study of FIDE included in the political scientist Julie Bailleux’ analysis of the development of a discipline of European law in France. In her analysis, she supported Rasmussen’s claim (2012 and 2013) that Michel Gaudet of the Legal Service informally led FIDE. She did not, however, document the actual functioning of FIDE (J. Bailleux, *Penser l’Europe par le droit: L’invention du droit communautaire en France (1945-1990)* (Daloz, 2014)). The historian Alexandre Bernier has, furthermore, contributed with a study on the French association of European law, where he argued that the association had a limited impact on the reception of European law in France. In addition, Bernier pointed to the decentralised character of FIDE (A. Bernier, ‘Constructing and Legitimizing. Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950–70’, (2012) 21, n. 3, *Contemporary European History*, 399-415). Finally, the legal scholar Francesca Bignami has analysed the FIDE congress

‘euro-law associations’ constituted an ideologically cohesive network, which positioned itself in opposition to sceptical national observers of European law in the Bourdieuan battlefield of European law.

By using the reports from the FIDE congresses, primarily consisting of national reports and community reports on the congress topics with a comparative aim from 1961 to 1994,²¹⁰ as well as new archival documentation from the federation²¹¹ and private collections, this article provides new insights on the nature, functioning, and academic output of FIDE with special attention to the debates on the nature of European law.²¹² It dispels claims by Alter and Vauchez on the instrumental role of FIDE in the making of a ‘constitutional practice’²¹³ of European law, and it corrects the assumption of Vauchez, Alter, and Rasmussen of FIDE as an ideologically coherent entity aligned with the Legal Service and the ECJ in a legal-political confrontation with sceptical national actors. Instead, the analysis shows that FIDE provided a space for contestation inside the transnational field of European law. While the FIDE congresses did constitute a setting for legal mobilisation, diffusing of knowledge on European law, and networking among judges, academics, private practice lawyers, and business representatives, these practices were subjected to the organisational and ideologically dispersed character of FIDE and changing institutional affiliations.

in 1965 and argued that there was internal disagreement on direct effect of directives at the congress (F. Bignami, ‘Comparative Law and the Rise of the European Court of Justice,’ paper, European Union Studies Association, Boston, 3-6 March 2011 – cited with the permission of the author).

²¹⁰ The results in this article are based on a systematic search for debates on the nature of European law and criticism of the ECJ’s jurisprudence in the congress reports. This study does not pretend to constitute an all-encompassing analysis of the FIDE reports, which are substantially extremely rich and constitute a vast resource.

²¹¹ As FIDE has never had a permanent secretariat, the archives of the national associations are the main sources to FIDE-material. Cooperation between FIDE under the Danish presidency and the FIDE-president at the time, Professor of law Ulla Neergaard, on the one hand, and the present author and Morten Rasmussen, on the other hand, has led to the collection of minutes from meetings in the Steering Committee of FIDE situated in the archives of the national associations (twelve minutes from 1973 to 1993). Unfortunately, there are no minutes from Steering Committees before 1973 in the archives of the national associations. In addition, the Danish professor of European law Ole Lando and the Danish association of European law have made their archives available, thus adding a valuable layer to the sources already collected, such as the archive of the French Association of European Law collected by Alexandre Bernier, and the private archive of Gaudet collected by Morten Rasmussen. The entire collection now constitutes the most complete set of sources on FIDE and the national associations of European law.

²¹² In 1993, the Maastricht Treaty diluted the legal unity of the Community by introducing two new pillars of intergovernmental cooperation, which marks an endpoint to the scope of this exploration. Due to the existence of significant sources from the FIDE congress in 1994 that describe the development of FIDE in the 1980s and 1990s, 1994 is included in the analysis.

²¹³ I prefer the term ‘constitutional practice’ to terms such as ‘constitutionalisation’, as the widely accepted claim that the ECJ actually ‘constitutionalised’ the treaties is debatable.

The Dream of Building an Academic Discipline of European law

Arguably, the actor who had the greatest influence on the nascent development of European law was Michel Gaudet, first a jurist of the Legal Service of the High Authority and from 1958 to 1969 Director of the Legal Service of the Commission. In 1962, he pushed the ECJ decisively in a constitutional direction, using a teleological approach to outline a constitutional legal order.²¹⁴ As is evident in the creation of the doctrines of direct effect and primacy in *Van Gend en Loos* and *Costa v ENEL*, the ECJ followed his advice. In the European law community, these rulings have obtained a legendary significance as the very foundation of the constitutional revolution in European law.²¹⁵

Gaudet had already championed a constitutional approach to European law in the mid-1950s, but the ECJ refrained from adopting it.²¹⁶ Realising that the fulfilment of his constitutional vision required a mobilisation of pro-European jurists beyond the few actors sharing his vision such as Walter Hallstein,²¹⁷ Pierre Pescatore,²¹⁸ and Nicola Catalano,²¹⁹ Gaudet strategically turned to academia for support.

Grounded in a Westphalian reading of international affairs that recognised states as the only subjects in international law, scholars from the discipline of international law were not, however, keen on endorsing a constitutional approach to European law.²²⁰ When the High Authority invited the most authoritative international law scholars of the time, as part of an international conference in Stresa in 1957 on the European Coal and Steel Community (ECSC), in order for them to legitimate supranationality as the foundation of a new, autonomous international law, it backfired: they rejected the supranationality claim and the legal system of the ECSC was defined as classic international law, although of a special kind.²²¹ Reacting to this failure, Gaudet envisioned the foundation of an academic discipline dedicated to European law to do the job. A constitutive element would be a transnational federation gathering national associations of European law. As an indispensable tool, not just for providing academic legitimisation, but for

²¹⁴ For a description of Gaudet's memorandum before the *Van Gend en Loos* case in 1962, see Rasmussen, 'Revolutionizing European law', at 151-153.

²¹⁵ See, for instance, J.H.H. Weiler, 'The Transformation of Europe', (1991), 100, n. 8, *Yale Law Journal*, 2403-2483, and K. Alter, *Establishing the Supremacy of European Law* (Oxford University Press, 2001).

²¹⁶ A. Boerger and M. Rasmussen, 'Transforming European Law: The Establishment of the Constitutional Discourse', (2014) 10 *European Constitutional Law Review*, at 199-225.

²¹⁷ President of the EC Commission 1958-1967.

²¹⁸ Judge at the ECJ from 1967 to 1985.

²¹⁹ Judge at the ECJ from 1958 to 1962. Gaudet, Catalano, and Pescatore had all been a part of the so-called *groupe de redaction* during the negotiation on the Treaties of Rome, during which they managed to insert a system of judicial review in the legal structure of the Communities.

²²⁰ Vauchez, *Brokering Europe*, at 77-78.

²²¹ For a detailed account of the Stresa conference, see chapter three in Bailleux, *Penser l'Europe par le droit*.

the penetration of European law in the national legal professions, the federation would have a great effect on the implementation of European law in the Member States and, thus, on realising the Common Market.²²²

The Establishment of National Associations of European law and FIDE

The seeds of FIDE were, however, planted without Gaudet's assistance. Still in the excitement following the construction of the ECSC, a French association of European law was officially founded in 1954; the Association des juristes européens (AJE). The founding father was André Philips, the influential jurist, economist, politician, and member of the European Movement, who enjoyed the support of a small circle of likeminded jurists from the Court of Appeal in Paris, such as Maurice Rolland, who co-founded the association with him along with other colleagues from the European Movement.²²³ Philips thought it important to fortify the European construction on the basis of European law. Therefore, the association aimed at organising jurists partial to the European idea, studying problems of public and private law, and providing the EC any legal aid it needed.

The federalist hope that the ECSC would develop into a political community was destroyed when the European Defence Community Treaty, along with its blueprint for a future European Political Community, was rejected in the French National Assembly in August 1954. In this atmosphere of disappointment, it was difficult to recruit new members, and until 1958 the AJE remained a modest association with few members.²²⁴ With the optimism following the establishment of the EURATOM and the European Economic Community (ECC), the AJE grew nonetheless. As most of the practitioners and politicians of the enlarged AJE shared a common experience in the French Resistance, they all believed in making law 'the cement of the European construction', remembering the 'Hitlerisation of justice'.²²⁵

In line with Gaudet's vision, Rolland hoped to transform the AJE into the French section of a Europe-wide association of European law as soon as relations were established with similar groups in the other Member States.²²⁶ To this end, the AJE brought prominent European jurists together at international conferences that successfully motivated the establishment of new

²²² In this way, Gaudet explained the motivation behind the efforts to create FIDE to Jean Rey, Commissioner in Hallstein Commission 1958-1967 and President of the Commission 1967-1970 (Gaudet to Rey, 21 January 1961, Archive of Michel Gaudet (AMG), Fondation Jean Monnet pour l'Europe, Lausanne, Chronos 1961).

²²³ Bernier, 'Constructing and Legitimizing', at 401-402.

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ This aim was written in the AJE statutes (Bailleux, *Penser l'Europe par le droit*, at 277).

national associations.²²⁷ In 1958, the Associazione Italiana dei Giuristi Europei (AIGE) was thus founded by eleven Rome-based jurists, primarily lawyers, who formally sought to establish an association similar to the AJE, under Gaudet's watch.²²⁸ The AIGE was able to attract the first president of the ECJ, the judge Massimo Pilotti (ECJ president 1952-1958), to preside over the association from its foundation.²²⁹ In Belgium, the Association Belge pour le Droit Européen was likewise established in 1958, by, among others, Walter Ganshof Van der Meersch, advocate general at the Belgian Court of Cassation and later judge in the European Court of Human Rights (1973-1986), and Louis Hendrickx, judge at the Brussels Court of Appeal.²³⁰ The creation of the Association Luxembourgeoise des Juristes Européens followed in December 1959 under the leadership of Arthur Calteux, a Conseiller at Luxembourg's Supreme Court and Vice-President of the European Union of Federalists. Pescatore, at the time an official in the Ministry of Foreign Affairs, who had played a prominent role in the negotiations of the Treaties of Rome, was among its members.²³¹ In the Netherlands, the Dutch Nederlandse Vereniging voor Europees Recht (NVER) was created 24 September 1960 by 37 jurists, primarily practitioners, including the president of the ECJ at the time Andreas Donner (President of the ECJ 1958-1964, ECJ judge 1964-1979), the former Dutch ECJ judge Jos Serrarens (ECJ judge 1952-1958), and the Director General for Competition in the European Economic Community (EEC), Pieter Verloren van Themaat (ECJ advocate general 1981-1986).²³² Most of the members knew each other from an informal working group that had existed since 1954 and was initiated by the law professors C.H.F. Polak and F.M. von Asbeck.²³³ In 1959, the group became a part of the newly established Europa Institute directed by the ubiquitous Ivo Samkalden, Dutch Minister of Justice from 1956 to 1958 for the Labour Party, Professor of international law, politician, and outspoken federalist²³⁴ with a close relationship to Gaudet.²³⁵

²²⁷ Rasmussen, 'Establishing a Constitutional Practice'. The Role of the European Law Associations', at 176.

²²⁸ Costituzione di Associazione Repubblica Italiana, 27 November 1958. Archive of the AIGE (AAIGE). Bailleux has argued that Gaudet was involved in the process, as there is a note in Gaudet's archive documenting the foundation of AIGE in precise terms (Bailleux, *Penser l'Europe par le droit*, at 277).

²²⁹ *Ibid.*

²³⁰ Bailleux, *Penser l'Europe par le droit*, at 278, and Rasmussen, 'Establishing a Constitutional Practice', at 191.

²³¹ Rasmussen, 'Establishing a Constitutional Practice', at 177.

²³² I thank Karin van Leeuwen for pointing these facts out.

²³³ K. van Leeuwen, 'Blazing a Trail. The Netherlands and European Law, 1950-1983', conference paper, Setting the Agenda for Historical Research on European Law. Actors, Institutions, Policies and Member States, December 9-11, at 14-15.

²³⁴ Interview with Laurens-Jan Brinkhorst, 6 December 2013.

²³⁵ Gaudet and Samkalden had, for instance, cooperated regarding plans for a transnational journal of European law in the beginning of the 1960s. See R. Byberg, 'The History of *Common Market Law Review* 1963-1993. Carving out an Academic Space for European law', *European Law Journal* (forthcoming, 2017).

The stumbling block was Germany. As the core of pro-European bureaucracy in Germany, the Foreign Ministry had for long pushed for the establishment of a German association of European law. It therefore prompted the German Ministry of Justice to pursue this cause.²³⁶ Accordingly, at a conference in Paris in November 1960 held by the AJE, a representative from the German Ministry of Justice, Erich Bülow, and the German Ambassador in France thus promised to establish a German association of European law, as a representative from the Legal Service reported to Gaudet.²³⁷ When the efforts appeared fruitless, Gaudet became impatient. The Belgian association was coordinating with the other four associations in planning a conference to be held in the autumn of 1961, where the European federation could be established, but a German association was a prerequisite for it to be authoritative and efficient. Therefore, Gaudet asked the President of the Commission, Walter Hallstein, to pull some strings in the German Foreign and Justice Ministries and, at a meeting in March 1961, Gaudet also discussed the matter with the German law professor Ernst Steindorff and prompted him to establish the association.²³⁸ Pressured by the Foreign and Justice Ministries as well as Gaudet, Steindorff founded the Wissenschaftliche Gesellschaft für Europarecht (WGE) with 10 fellow academics as a sub group of the German Association for Comparative Law, among them Hans-Peter Ipsen, Ernst Mestmäcker, Konrad Zweigert, and Bodo Börner, on 26 April 1961 at the Max Planck Institute for Comparative and International Private Law in Hamburg. The aims of this association were to study legal problems connected to the Common Market and to join a federation of European associations of European law once erected.²³⁹ By limiting the access to the association, the founders cultivated exclusivity: while academics who worked with European law and officials from ministries and the Community could become members upon invitation from two existing members, judges and lawyers were not welcome.²⁴⁰ The Foreign Ministry was most likely the hidden hand behind this initiative, continuing to regulate the image of the association by intervening with regard to particular individuals' membership. For example, Hans-Peter Ipsen, Professor of Law at the University of Hamburg, had a burdensome past, having joined the Nazi party in 1937 and serving as commissioner of the 'colonial' universities of

²³⁶ Letter from Hans Peter Ipsen to Walter Strauss, 30 May 1961, Archive of Walter Strauss, Institut für Zeitgeschichte, München (AWS), 328.

²³⁷ Vermerk. Betr: Organisation der Schiedsgerichtsbarkeit; hier: Tagung der Vereinigung Europäischer Juristen in Paris, Archive of the Legal Service of the Commission, Brussels (ALSC), 347.69 (y) Association des juristes européens.

²³⁸ Bailleux, *Penser l'Europe par le Droit*, at 279-280.

²³⁹ Referat IV 4, Aufzeichnung in Stichworten für Herrn Staatssekretär betr. Wissenschaftliche Gesellschaft für Europarecht, AWS, 328 and Mitgliederverzeichnis, 1 November 1964, AWS, 328.

²⁴⁰ *Ibid.*

Antwerp and Brussels.²⁴¹ Therefore, the Foreign Ministry wanted Ipsen excluded from the Steering Committee of the WGE, and they advised against him speaking in front of international colleagues, especially the Belgians, who would find his presence offending.²⁴² Taking the advice, Reimer Schmidt, a professor from the University of Hamburg, became the president of the association leading a Steering Committee consisting of law professor Bodo Börner, the University of Köln, Carl Friedrich Ophüls, the German ambassador in Brussels, and Walter Roemer, a department head at the Ministry of Justice.²⁴³

Initiated by the AJE, and in some cases with Gaudet as the midwife, six associations with different characters were now established. Most of these associations resembled professional legal societies consisting of practitioners. The WGE, which consisted of scholars, was the sole association with an exclusively academic character, only with strong links to government ministries that sought to control aspects of the association. All associations were, however, based on ideological adhesion to European integration and a belief in the promise of law in the integration process. On this basis, they were able to unite into a federation.

The Founding Congress in 1961

At a congress in Brussels during 12-14 October 1961 organised by the Belgian association in cooperation with Interuniversity Centre for Comparative Law, FIDE was finally established. Rolland became president, Louis-Edmond Pettiti, also French, became secretary-general, and Börner, Hendrickx, Samkalden, Calteux, and Carlo Bozzi were vice-presidents. Together, these seven constituted the Bureau of FIDE, which did not include actors from the ECJ, despite several current or former judges in the ECJ participating in the national associations. Moreover, a Steering Committee (the Comité Directeur) composed of 34 members oversaw the work of the bureau, which it would also appoint in the future.²⁴⁴ Lastly, there was a plan to establish a

²⁴¹ For an evaluation of Ipsen's affiliation with the Nazi regime, see C. Joerges, 'Europe as a Grossraum. Shifting Legal Conceptualisations of the Integration Project' in C. Joerges and N. S. Ghaleig (eds.), *Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Hart Publishing, 2003), 167-191, at 183, and A.K. Mangold, *Gemeinschaftsrecht und deutsches Recht: die Europäisierung der deutschen Rechtsordnung in historisch-empirischer Sicht* (Mohr Siebeck, 2011), at 250.

²⁴² Referat IV 4, Aufzeichnung in Stichworten für Herrn Staatssekretär betr. Wissenschaftliche Gesellschaft für Europarecht, AWS, 328.

²⁴³ Rasmussen, 'Establishing a Constitutional Practice', at 178.

²⁴⁴ *Ibid.*, at 178. See also the general resolution in the congress report: Rapport au Colloque international de droit européen organisé par l'Association belge pour le droit européen, Bruxelles, 12-14 October 1961 (Bryant, 1962) (hereafter FIDE congress report 1961).

permanent secretariat.²⁴⁵ These organs should ensure the aims of FIDE: firstly, to promote the objectives of the member associations, including joint events and exchange of information, secondly, to organise lawyers interested in European law, thirdly, to study the legal problems of European law, and lastly to raise awareness of these problems.²⁴⁶ Concretely, FIDE would organise a number of events, such as the founding congress, where national reports on topics chosen by the Bureau were discussed and a common resolutions adopted.²⁴⁷

The founding event paved the way for the future congresses by focussing on three topics: company mergers, anti-trust laws, and sales with promotional free gifts, which were discussed on the basis of national reports in a grand exercise in comparative law.²⁴⁸ The focus on topics in competition law reflected the ties between the FIDE and the German Commissioner for Competition, Hans von der Groeben, and his Director General Verloren van Themaat, who were formally responsible for the relation between the European law associations and the Commission.²⁴⁹ However, it principally reflected the recent publication of a draft for the future famous Regulation 17 on the application of Article 85 and 86 of the EEC Treaty, the two central articles on competition law.²⁵⁰ A general resolution was adopted on the basis of this congress about the need for awareness on European law, university courses on European law, and the establishment of chairs in European law Chairs.²⁵¹

The 182 participants came from diverse backgrounds: 35 per cent were from national courts; 18 per cent were private practice lawyers; 14 per cent were academics; 9 per cent were from the Commission; 6 per cent from national firms, 4 per cent were national officials (mostly from ministries), 3 per cent were judges or other kinds of personnel from the ECJ; and 2 per cent were from national banks.²⁵² To a large degree, the distribution of participants reflected the

²⁴⁵ *Compte-rendu de la réunion du bureau de la Fédération internationale pour le droit européen*, 13 January 1962 in Paris, Eric Stein papers, Bentley Historical Library, Ann Arbor, Michigan, Box 12 Pettiti, and Letter from Pescatore to Lando, 9 November 1971, Archive of Dansk Forening for Europaret (ADFE).

²⁴⁶ *Statuts de la FIDE*, AAIGE. These statutes were printed in 1994 in connection with the congress in Rome in 1994, but the aims most likely deviated little from the original aims. A note on the aims of FIDE written by Gaudet in the 1960s supports this interpretation (Gaudet, *Note concernant la federation internationale pour le droit europeen*, undated, ALSC, 347.96 (100) *Fédération internationale pour le Droit européen*).

²⁴⁷ Gaudet, *Note concernant la federation internationale pour le droit europeen*, undated, ALSC, 347.96 (100) *Fédération internationale pour le Droit européen*.

²⁴⁸ FIDE congress report 1961.

²⁴⁹ Rasmussen, 'Establishing a Constitutional Practice', at 178 and FIDE congress report 1961.

²⁵⁰ I thank Michel Waelbroeck for pointing this out.

²⁵¹ *Résolution Générale*, FIDE congress report 1961,

²⁵² The participant analysis is based on a participant list from the congress in the archive of Michel Waelbroeck. Apart from the above-mentioned categories, 9 per cent were students, legal counsellors at unspecified firms or institutions, other occupations, or without a title in the participant list (*Programme, Colloque international de droit Européen*, Bruxelles, 12-14 octobre 1961, Archive of Michel Waelbroeck (AMW)). In the collected material, there

institutional links of the Belgian association in charge of organising the event. The president, Hendrickx, and most the leadership of the association had a relation to Cour d'appel in Brussels, and they were, therefore, able to attract a great number of participants with a links to this particular court. Of the seven judges in the ECJ, only Andreas Donner and the President Charles Hammes were present.²⁵³

With a clear organisational structure, an appointed leadership, six national associations as the foundation, a successful first international congress, and cooperation with the Commission in development, the federation aspired to be the grand actor in the mobilisation of lawyers for a rule of law in European and the penetration of European law in the national legal professions that Gaudet envisioned. While satisfied with this progress that he and his likeminded associates had dreamt of for years, Gaudet was already planning the next steps: the federation should grow and gather more judges, practising lawyers, and professors, and then work on the program and improve its methods and organisation, in order to fulfil its role in the development of a new European legal system. Even though FIDE was formally a private federation, Gaudet pledged to do his best to help, as he wrote to his friend Eric Stein.²⁵⁴

Congresses in the 1960s

In December 1962, the Legal Service was officially charged with handling the relationship with FIDE. Gaudet had already met with Hendrickx in January 1962, when they decided that FIDE could draft reports on various aspects of European law for the Commission's internal use. In return, the Commission would fund not only the FIDE's basic running costs, but also subsidise national associations and FIDE working groups contributing to Commission reports.²⁵⁵ Not much is known about the writing of the actual reports or their use by the Commission, although it is certain that a commission to study EEC competition law was set up in early 1962. It was active for 5-6 years and functioned as a sounding board for the Commission in preparing new regulation in the field of competition law.²⁵⁶ Nevertheless, it is clear that a very close relationship and coordinated expectations between FIDE and the Legal Service developed.

At the second congress in the Hague in 1963, where Samkalden presided, FIDE dived right into the principal discussion of how to define European law by focussing on the problem of

are only participant lists for the congresses in 1961, 1973 (in Ole Lando's private archive), and 1994 (in AIGE's archive).

²⁵³ Along with the advocate generals Maurice Lagrange and Karl Roemer.

²⁵⁴ Bailleux, *Penser l'Europe par le droit*, at 282-83 (citing a letter from Gaudet to Stein 30 May 1961).

²⁵⁵ Rasmussen, 'Establishing a Constitutional Practice', at 179.

²⁵⁶ I thank Michel Waelbroeck for pointing this out. Waelbroeck was one of the members of the Commission.

directly applicable provisions in international treaties and their application in the Treaties of Rome – a topic that not only concerned Gaudet greatly, but was also a principal question in European law after the ECJ's ruling in the *Van Gend en Loos* case.²⁵⁷ This case was initiated in the Netherlands, where a much-debated constitutional reform in the 1950s had established primacy of self-executing provisions of international law. With this impetus, Dutch companies and competition experts driven by parochial, trade-oriented questions explored the possible direct effect of provisions in the EEC Treaty.²⁵⁸ Concerned with the uniform application of European law in the Member States and the development of the European legal order, the NVER had an interest in the question as well, and in 1961 the association established a working group to identify the self-executing elements of the EEC Treaty, laying the ground for the 1963 FIDE congress.²⁵⁹

From 1961 to 1963, several events advanced the development of European law. In 1962, the Dutch Supreme Court stated that the ECJ alone was competent to decide what parts of the EEC Treaty were self-executing and, consequently, had primacy over Dutch law, a case where the NVER secretary-general, C.R.C. Wijkerheld Bisdom, represented Bosch, and where two out of five judges were NVER members.²⁶⁰ Famously, in 1963 a dispute about import tax furthermore led the Dutch customs court to send a preliminary reference to the ECJ on the possible self-executing nature of article 12 in the EEC Treaty banning the Member States from creating new tariffs or increasing existing ones. This case had been initiated by the company Van Gend en Loos and the tax law expert P.N. Droog before the creation of the NVER working group, but when the preliminary reference had been sent, Droog brought in the NVER lawyers L.F.D. Ter Kuile and Hans Stibbe to reinforce his team.²⁶¹ To Gaudet and the Legal Service, the preliminary reference was a golden opportunity that allowed them to push for a constitutional and federal vision for European law by recommending the ECJ to grant direct effect and primacy to

²⁵⁷ The consequences of infringements of Community law were also discussed (Deuxième colloque international de droit Européen organisé par l'Association Néerlandaise pour le Droit Européen, La Haye 24-26 Octobre 1963 (N.V. Uitgeversmaatschappij W.E.J. Tjeenk Willink, Zwolle, 1966) (Hereafter FIDE congress report 1963)).

²⁵⁸ Van Leeuwen, 'Blazing a Trail', 6-11.

²⁵⁹ Vauchez, *Brokering Europe*, at 120. See, also, FIDE congress report 1963, at 65-90.

²⁶⁰ Rasmussen, 'Establishing a Constitutional Practice', at 182-183.

²⁶¹ I thank Karin van Leeuwen for pointing this out on the basis of her research. It corrects the misunderstanding that *Van Gend en Loos* was initiated by the NVER lawyers Ter Kuile and Stibbe as a test case to propel the development of the European legal order, a claim which was first set forth by Vauchez (Vauchez, 'The Making of the European Union's Constitutional Foundations', at 117), and subsequently overtaken by Alter (Alter, 'Jurist Advocacy Movement', at 73-74), and Rasmussen (Rasmussen, 'Establishing a Constitutional Practice', at 183).

European law²⁶² - an initiative that the ECJ partly followed by cautiously granting direct effect to treaty articles containing a negative obligation of Member States not to act.

This controversial development coincided uncannily with the topic of the FIDE congress in 1963 in that the national reports pointed to the great differences in the reception of international law, with monist states incorporating international law directly into domestic law (the Netherlands, France, Luxembourg, and Belgium), while parliament had to transform international treaties to internal law in dualist Member States (Germany and Italy). On this comparative basis, a momentous discussion among, for instance, former ECJ judge Nicola Catalano, future ECJ judge Pescatore, Ter Kuile, the Belgian legal scholar Michel Waelbroeck, Ophüls, and Ipsen led to the adoption of a resolution generally supporting direct effect and primacy of European law.²⁶³ Able to draw on the legitimisation of primacy by FIDE and other transnational actors,²⁶⁴ the ECJ established the primacy doctrine in the *Costa v ENEL* ruling a year later.

Some of the participants at the congress, such as Waelbroeck, were however very sceptical about radically distinguishing between European law and international law, as advocated by Ophüls, Ipsen, and Paul Leleux from the Legal Service, among others. To Waelbroeck, European law was part of international law, and the relationship between European law and the Member States' domestic law was not fundamentally different from the relationship between international law and domestic laws in general. He was, therefore, worried that the Commission was pursuing a political agenda.²⁶⁵

The next congress in Paris in 1965 under Rolland's presidency, which focussed on measures to introduce community law into the national legal systems and harmonise company laws, was characterised by different opinions on the scope of direct effect. The national reports on the first topic concurred that regulations took effect immediately in the national legal systems, and the rulings in *Van Gend en Loos* and *Costa v ENEL* were generally welcomed, but the majority of the speakers at the congress insisted that directives had to be transformed into domestic law by a national implementation act.²⁶⁶ At a time when the Empty Chair Crisis was clearly demonstrating a lack of political inclination towards a federal Europe, many delegates at the FIDE congress shied away from legal activism and instead relied on the wording of the treaty, where it was

²⁶² Rasmussen, 'Establishing a Constitutional Practice', at 182-183.

²⁶³ FIDE congress report 1963, at 287-288.

²⁶⁴ European law journals such as the *Common Market Law Review* provided legitimisation of the special nature of European law even before the *Costa v. ENEL* ruling. See Byberg, 'The History of *Common Market Law Review* 1963-1993.

²⁶⁵ I thank Michel Waelbroeck for pointing this out.

²⁶⁶ Bignami, 'Comparative law', at 22-23, and Troisième Colloque de droit Européen organisé par l'association des Juristes Européens. Paris les 25, 26, 27 novembre 1965 (hereafter FIDE congress report 1965).

clearly stated that regulations had direct effect, while directives were binding as to the result, but left the implementation to the national authorities.²⁶⁷ Another group rejected this literal interpretation and held that directives could produce ‘vertical’ direct effect (i.e., they could be invoked as a defence by an individual in his or her relations with the state), but not horizontal direct effect (could not be invoked in relations between individuals).²⁶⁸ In opposition to the two previous congresses, no resolution was adopted. However, a special FIDE commission, for instance with Ophüls and ECJ judge Andreas Donner, was established,²⁶⁹ and it found that directives could in fact have direct effect based on the principle of effectiveness (effet utile) of European law. Beginning with *Grad*, a series of three ECJ-cases from 1970 to 1974 dealt with the question.²⁷⁰ Before the first case, the Legal Service stated to the ECJ in an internal memorandum that the issue was extremely controversial in legal scholarship. But because of the FIDE commission report, it could also refer to a gradual shift in academic opinion, and in the three cases, the ECJ established the direct effect of directives based on the principle of effectiveness, repeating the argument from the FIDE commission report,²⁷¹ and in effect blurring the distinction between categories of legal acts in the European legal system. The national legal and political establishments in some Member States, however, countered this development vociferously. In Britain, a committee in the House of Lords reacted sharply to the ‘legal uncertainty’ created by the ECJ’s approach and proposed that the EC Council routinely should state explicitly if a directive could produce direct effect or not in new Community legislation. In France, the Conseil d’Etat openly rebelled against the ECJ’s jurisprudence in the *Cohn-Bendit* case in 1978,²⁷² where the court held that directives according to article 189 of the EEC Treaty had no direct effect. Upon this case, the Legal Service withdrew from its strategy of equating directives and regulations and began distinguishing between them; the former were only binding on states and could thus not produce horizontal direct effect for citizens. Drawing on this interpretation, the ECJ in 1979 retracted and confirmed that certain directives could produce direct effect, but

²⁶⁷ EEC Treaty, article 189.

²⁶⁸ See, for instance, the national Belgian report ‘Mécanismes juridiques assurant la mise en oeuvre de la législation communautaire par les autorités législatives ou exécutives nationales’ by C. Cambier, M. Waelbroeck, J.V. Louis, and H. Desmedt, FIDE congress report 1965.

²⁶⁹ Dumon, Rigaux, and Goffin from Belgium, Ophüls and Bulow from Germany, Labbé from France, Donner, Erades, and Ter Kuile from the Netherlands, and Lapace from Greece (Bignami, ‘Comparative law’, at 22).

²⁷⁰ Case 9-70, *Franz Grad v Finanzamt Traunstein*, ECLI:EU:C:1970:78; Case 33-70, *SpA SACE v Finance Minister of the Italian Republic*, ECLI:EU:C:1970:118; and Case 41-71, *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133.

²⁷¹ F. Bignami, ‘Comparative law’, at 23.

²⁷² Conseil d’Etat, *Minister of Interior v. Daniel Cohn-Bendit*, 1978, CMLR 545.

only for Member States, not citizens.²⁷³ Thus, the ECJ accepted the limits to the alternative enforcement system in place since the *Van Gend en Loos* ruling in 1964. This peace offering did not, however, satisfy Gaullist circles in France, who continued to fight the ECJ's stance on directives until a change in political leadership in France and the new momentum in the process of European integration with the Single European Act (SEA).²⁷⁴

Reviewing the effect of the FIDE report, the conflictual aftermath of direct effect of directives provides an interpretive framework: what might seem a story of the importance of FIDE as the academic backbone in the development of European law (because of the Commission and ECJ's reliance on the special committee's recommendation) was also a tale of backfire when the Commission and the ECJ ignored transnational academic opposition, which reflected firm national resistance, and pushed the limits of judicial creativity.

Organisationally speaking, FIDE did not develop as planned. The plans to establish a secretariat in Brussels stalled,²⁷⁵ and the leadership provided by the Bureau faded.²⁷⁶ As a consequence, FIDE had a very loose framework consisting of, firstly, of a rotating presidency that handled the administration of FIDE but was primarily engaged in planning, conducting and suggesting themes for the next congress,²⁷⁷ and, secondly, of the Steering Committee, which included varying members from the national associations, to decide all major issues, such as final decision on the congress topics. Divergent views on the committee, however, meant that the conditions for strengthening the federation organisationally or initiating new FIDE activities were poor.²⁷⁸ Apart from the congresses, practically no activities took place under the auspices of FIDE, and the federation did not develop organisationally. Much depended on the national

²⁷³ Case 148/78, *Criminal proceedings against Tullio Ratti*, ECLI:EU:C:1979:110. See, also, Case 152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, ECLI:EU:C:1986:84.

²⁷⁴ M. Rasmussen, 'The Battle of European Law Enforcement', conference paper, Setting the Agenda for Historical Research on European Law. Actors, Institutions, Policies and Member States, December 9-11 2015, European University Institute, at 8-19.

²⁷⁵ Letter from Pescatore to Lando, 9 November 1971, ADFE.

²⁷⁶ There are very few sources on the functioning of the Bureau. Minutes from a Bureau meeting in January 1962 point to the initial leadership role of the Bureau (Compte-rendu de la réunion du bureau de la Fédération internationale pour le droit européen, 13 January 1962 in Paris, ESP, Box 12 Pettiti). Subsequently, the Bureau is only mentioned a few times in the collected material, which indicates a very diminished role from the mid-1960s onwards, where the Steering Committee became the leading organ. The Bureau continued to exist, but it retained few functions, including membership approval. In 1971, it admitted English, Irish, Norwegian, and Danish associations of European law as members of FIDE, when the United Kingdom, Ireland, Norway (expectedly), and Denmark had acceded the Community planned for January 1973 (Déclaration du Bureau de la F.I.D.E. relative à l'élargissement de la Communauté européenne, September 1971, AWS, 328)

²⁷⁷ Pescatore to Lando, 9 November 1971, ADFE and Minutes, Steering Committee meetings, Archive of FIDE (AFIDE).

²⁷⁸ Minutes, Steering Committee meetings, AFIDE.

association in charge of the next congress, which suggested themes²⁷⁹ and drew on its particular ties to the Community institutions, national institutions, and business partners in preparing and financing the congress. The congresses thus came to vary greatly according to the preferences and abilities of the host association.²⁸⁰ The congress in Rome in 1968 is an example. Reflecting the close ties between the AIGE and the Italian industry,²⁸¹ the congress centred on international corporate mergers²⁸² and, unlike previous congresses, it did not attract the engagements of actors primarily interested in the nature of European law.

Congresses in the 1970s

The tie between FIDE and the Legal Service loosened considerably when Gaudet's stint as director stopped in 1969. His successor, Walter Much, did not nurture academic connections²⁸³ and had no great interest in FIDE.²⁸⁴ The ECJ was indirectly the main institutional link, then, as there were usually one or more judges or advocate generals from the ECJ present at the Steering Committee meetings.²⁸⁵ In line with a general campaign for stronger ties between the ECJ and national legal elites under Robert Lecourt's²⁸⁶ ECJ-presidency²⁸⁷, the participation of ECJ judges allowed knowledge of European law to diffuse, which might have affected national enforcement. At the same time, the interplay between elites from academia, courts, institutions, banks, and industry offered networking opportunities with potential employers or colleagues in the national settings for the ECJ judges.

Some judges, such as Pescatore²⁸⁸ and Thijmen Koopmans,²⁸⁹ were heavily engaged in FIDE with ambitions of setting an agenda. Through participation in their respective national associations, they became FIDE president when their association held the presidency, and they

²⁷⁹ These topics were often adjusted or redefined at the Steering Committee meetings (Minutes, Steering Committee meetings, AFIDE). The private archive of Walter Strauss indicates the same pattern around the Berlin congress in 1970. See the discussion on themes for the FIDE congress in Berlin 1970 (in Niederschrift über die Mitgliederversammlung der Wissenschaftlichen Gesellschaft für Europarecht – Geschäftssitzung der Fachgruppe für Europarecht der Gesellschaft für Rechtsvergleichung am 29. September 1967 um 15.30 Uhr in Berlin, AWS, 328), and compare with the actual topics (FIDE congress report 1970).

²⁸⁰ Minutes, Steering Committee meetings, AFIDE.

²⁸¹ This relation is, for instance, detectable in the overview of Italians in the participant list from the FIDE congress in 1961 (Programme, Colloque international de droit Européen, Bruxelles, 12-14 octobre 1961, AMW).

²⁸² Quatrième colloque de droit européen, Roma, 1968.

²⁸³ Interview with Claus-Dieter Ehlermann, 29 June, 2016.

²⁸⁴ The available material leaves no trace of an interest in FIDE by Much. This supports Ehlermann's observation.

²⁸⁵ At least at the meetings to which there are minutes in the collected sources.

²⁸⁶ ECJ judge 1962-1967 and ECJ President 1967-1976

²⁸⁷ Prominent national judges were for instance invited to dinner in Luxembourg as a part of the recruitment campaign, which should mobilise national judges in the enforcement of European law (Invitation lists, kindly made accessible by Karen Alter).

²⁸⁸ ECJ judge 1967-1985.

²⁸⁹ ECJ judge 1979-1990.

enjoyed considerable esteem and authority at the Steering Committee meetings. Other ECJ judges were far less committed, and ECJ judges primarily participated in the Steering Committee meetings when their national association held the FIDE-presidency. Compared to legal scholars and lawyers such as Börner from WGE, Leon Goffin from the Belgian Association, and Paul François Ryziger and Lise Funck-Brentano from the AJE, who engaged in the Steering Committee for decades, the individual participation of ECJ judges was sporadic for most²⁹⁰ and it did not constitute a long-term strategic involvement in FIDE by the ECJ.²⁹¹

A rift between promoters of a radical interpretation of European law and more moderate voices marked the congresses in the 1970s, as it had in relation to the question of direct effect of directives. This was apparent, for instance, at the congress in Berlin in 1970, which was organised by the WGE with Börner as FIDE president. The theme, ‘Cooperation between the legal order of the Community and the national legal order in the sector of agriculture, competition, and regarding energy’, touched substantial law, but the question of whether the fundamental rights in national constitutions could potentially limit the primacy of European law lurked ominously under the surface. The status of fundamental rights aroused strong feelings and had been on the agenda in the German legal establishment ever since the establishment of the ECSC, but especially since the creation of the primacy doctrine in *Costa v ENEL*. Since the Community itself had no robust rights regime comparable to the European Convention of Human Rights (ECHR) or national constitutions, and since the ECJ had refused to be bound by national constitutional traditions,²⁹² the European legal order clashed with the strong tradition of inviolable rights protection that had been cultivated in Germany following the Second World War. In the late 1960s, a debate about a potentially necessary structural congruence between the European and German legal orders regarding fundamental rights gained prominence in relation the standing disagreement between constitutionalists and those who equated European law with traditional international law.²⁹³ In the *Stauder v. Ulm* ruling in 1969, the ECJ had tried to satisfy the advocates of the German position by stating that the general principles of Community law, which it had a

²⁹⁰ Minutes, Steering Committee meetings, AFIDE.

²⁹¹ *Ibid.*

²⁹² See Case 1/58, *Stork v. High Authority*, ECLI:EU:C:1959:4, and Joined cases 36-58, 37-58, 38-59 and 40-59, *Präsident Rubrikohlen-Verkaufsgesellschaft and others v. ECSC High Authority*, ECLI:EU:C:1960:36.

²⁹³ The argument was that the legitimacy of the European legal order should only be recognised as far as there was structural congruence between the European and the German legal order. See B. Davies, ‘Pushing Back: What Happens When Member States Resist the European Court of Justice? A Multi-Modal Approach to the History of European Law’, (2012) 21 *Contemporary European History*, 417-437, at 418-419, and 423. See also, B. Davies, ‘Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and *Solange* in its Intellectual Context’, (2015) 21 *European Law Journal*, 434-459.

duty to protect, included the safeguard of individual fundamental rights.²⁹⁴ The German Minister of Justice, Gerhard Jahn, responded in the FIDE congress report from 1970. While recognising the steps taken by the ECJ, he posed the central dilemma between ‘Gemeinschaftsrecht nur nach massgabe der nationalen Grundrechte’ (‘Community law according to the standard of national fundamental laws’) and ‘Grundrechte nur nach Massgabe des Gemeinschaftsrecht’ (‘fundamental laws according to the standard of Community law’) and argued that the basic rights tradition should not be disregarded.²⁹⁵ Furthermore, the German reporter on competition, Professor of law Wolfgang Harms from the University of Kiel, disagreed that *Stauder v. Ulm* had solved the issue. Promoting the structural congruence position, Harms argued in strong terms that European law was limited by national fundamental rights until the protection of fundamental rights at the Community level had been implemented.²⁹⁶ Generally, the topic had been discussed lively at the congress without reaching agreement, as a report by Ganshof Van der Meersch testified.²⁹⁷ Three months later, the progressive ‘1967 ECJ’ led by Lecourt²⁹⁸ however stated that while the ECJ was inspired by the constitutional traditions common to the Member States in its protection of fundamental rights, primacy of European law was unbound even by basic principles in national constitutions in the case *Internationale Handelsgesellschaft*.²⁹⁹ The ECJ thus went against views of prominent German actors and an undecided legal community, which was mirrored at the FIDE 1970 congress. A landmark reaction followed four years later from the German Federal Constitutional Court (FCC): in the so-called *Solange I* ruling in 1974,³⁰⁰ the FCC ruled that German courts could review Community legislation in order to secure that it did not conflict with German fundamental rights, as long as the Community did not have codified fundamental rights. Having opposed the ECJ directly, the FCC in this way provided a major blow to the integrity of ECJ and to the most radical version of its primacy doctrine.

²⁹⁴ Case 29/69 *Stauder v. Ulm*, ECLI:EU:C:1969:57.

²⁹⁵ G. Jahn, ‘Eröffnungsansprache’, *Gemeinschaftsrecht und Nationale Rechte. Das Zusammenwirken der Europäischen Rechtsordnung mit den nationale Rechtsordnungen. V. Internationaler Kongress für Europarecht vom 23.-26. September 1970 in Berlin veranstaltet von der Fédération Internationale pour de Droit Européen*, E/I, 4-5 (Carl Heymanns Verlag, 1971) (hereafter FIDE congress report 1970). See also the German national report on Agriculture by P.O. Schmitz, a senior civil servant from the German Ministry of Food, Agriculture, and Forestry.

²⁹⁶ See W. Harms, ‘Deutscher Bericht’, Kommission II (Wettbewerb), FIDE congress report 1970, especially at II/3 13.

²⁹⁷ W. Ganshof Van der Meersch, ‘Rapport sur les travaux de la Commission ‘Agriculture’ du Congrès’, FIDE congress report 1970, at I/8, 2-3.

²⁹⁸ For an analysis of the ‘1967 ECJ’, see B. Davies and M. Rasmussen, ‘From International Law to a European Rechtsgemeinschaft: Towards a New History of European Law, 1950-1979’ in J. Laursen (ed.), *Institutions and Dynamics of the European Community, 1973-83* (Nomos/Bloomsbury, 2014).

²⁹⁹ Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114. The occasion was a preliminary reference sent by the Administrative Court in Frankfurt am Main.

³⁰⁰ BVerfGE 37, 271 *Solange* decision 29 May 1974, 2 CMLR 540.

Three years later in Luxembourg, the FIDE congress was void of such criticism reflecting the influence the ECJ had on this particular event, which was practically an ECJ-congress. The congress was co-financed by the Commission, the Luxemburg government, and the Internationale Universität für vergleichende Wissenschaften in Luxembourg, and it took place at the Court of Justice.³⁰¹ Of the 318 participants, six ECJ judges and two advocate generals participated, such as the ECJ president Lecourt, who gave one of the opening speeches, the ECJ judge and President of the Dutch association of European law Andreas Donner³⁰², who headed a commission, Hans Kutscher³⁰³, the advocate generals Karl Roemer³⁰⁴ and Jean-Pierre Warner,³⁰⁵ and, most importantly, Pescatore, who presided over the congress.³⁰⁶ As a federalist and a believer in the constitutional nature of European law,³⁰⁷ Pescatore was in the habit of using various vehicles for promoting his views both on the bench and in academia. He has therefore been described as ‘the most influential jurist the Court can boast’, and as the ECJ’s ‘stormtrooper in terms as supranationalism’.³⁰⁸ Pescatore doubtlessly regarded viewed FIDE as a vehicle.³⁰⁹ When the Community, and FIDE enlarged, the topic was the general status of European case law after twenty years of experience with Community law, treated in three subtopics: the general problems of integration, the creation of an European economic order, and thirdly, free movement within the Community and social questions.³¹⁰ The national reports described different approaches and varying practices towards integration in the Member States, but the general reports, the opening speeches, and the Community reports (a new feature) generally

³⁰¹ Participant list, Congrès F.I.D.E. Programme définitive, VIe Congrès international de droit européen (Luxembourg 24-26 1973), Archive of Ole Lando (AOL).

³⁰² ECJ president 1958-1964 and ECJ judge 1964-1979.

³⁰³ ECJ judge 1970-1976 and ECJ president 1976-1980.

³⁰⁴ ECJ advocate general 1953-1973.

³⁰⁵ ECJ advocate general 1973-1981.

³⁰⁶ Participant list, Congrès F.I.D.E. Programme définitive, VIe Congrès international de droit européen (Luxembourg 24-26 1973), Archive of Ole Lando (AOL). All in all, 16 persons from the ECJ participated (5 per cent). Besides, the interest of judges and lawyers from national courts in attending FIDE congresses had fallen, while the interest among academics had risen. Academics (27 per cent), private practice lawyers (23 per cent), and national officials (12 per cent) constituted the most heavily represented participant occupations, whereas only 9 per cent came from national courts. In addition, there were participants from the Commission (9 per cent), national firms (2 per cent), as well as politicians (3 per cent), and unknown/others (11 per cent).

³⁰⁷ V. Fritz, ‘Pierre Pescatore: an activist of European integration through law (1919 – 2010)’, conference paper, Setting the Agenda for Historical Research on European Law. Actors, Institutions, Policies and Member States, December 9-11 2015, European University Institute, at 1, 8, and 10.

³⁰⁸ Fritz quoting Pescatore’s co-judges in the ECJ Federico Mancini and Josse Mertens de Wilmars’ référendaire Ivan Verougstraete. *Ibid.*, at 10.

³⁰⁹ Pescatore was one of the most active judges contributing with reports to seven congresses. See FIDE reports from Hague 1963, Paris 1965, Berlin 1970, Luxembourg 1975, London 1980, and Paris 1986.

³¹⁰ *La jurisprudence Européenne après vingt ans d’expérience communautaire. Vie Congrès international de droit européen du 24 au 26 Mai 1973 à Luxembourg* (Carl Heymanns Verlag, 1976) (hereafter FIDE congress report 1973).

supported the ECJ as an organ with decisive influence on the integration process.³¹¹ In particular, this was expressed in Lecourt and Pescatore's contributions. Referring to their previous work and constituting early narratives of integration-through-law,³¹² they pointed to the centrality of law in the Community and the ability of law and judges to drive economic integration forward, but rejected the accusation of the ECJ acting as a 'gouvernement du juges'.³¹³ Pescatore, however, emphasised that the development of the European legal order by the ECJ had happened in cooperation with national judges referring questions to the ECJ using the preliminary reference system. In this way, the principles of direct effect, primacy, protection of human rights, and respect for the international commitments of the Community had been established by the ECJ.³¹⁴

Feeding right into the central principle debate of the 1970s, the topic of the next congress (Brussels, 1975, presided by Léon Goffin) was the individual and European law, with fundamental rights as one of the three subtopics.³¹⁵ As described earlier, the question of fundamental rights in connection to the primacy of European had been a heated issue in the field for years, but the recent *Solange* ruling reinvigorated it. The congress thus provided Pescatore with the chance to criticise the German Constitutional Court's ruling. With rhetorical elegance, Pescatore claimed that the *Solange* ruling had been criticised heavily in the legal establishment.³¹⁶ He then described how the ECJ through the *Stauder*, *Internationale Handelsgesellschaft*, and *Nold* cases had developed a system of protection of fundamental rights at the Community level by drawing inspiration from the constitutional traditions in the Member States and the international obligations signed by the Member States, such as the ECHR. In his conclusion, he argued that the cause of human rights was 'provincialisme juridique' and a way to challenge European

³¹¹ See, for instance, J. Boulouis, 'Rapport général', FIDE congress report 1973.

³¹² In the words of Vauchez, Lecourt had already in 1964 delivered a presentation that was arguably the first systematic conceptualization of the Court's contribution to the dynamics of what would today be referred to as 'integration through-law' in front of AJE. (Vauchez, *Brokering Europe*, at 142). In the 1960s and the 1970s, this narrative was continuously developed and promoted, for instance in Pescatore's book 'Le droit de l'intégration' from 1972. The Integration through Law narrative had its academic breakthrough with the Integration through Law project directed by Mauro Cappelletti and carried out at the European University Institute in the end of the 1970s and beginning of the 1980s (see R. Byberg, 'The History of the Integration through Law Project. Creating the Academic Expression of a Constitutional Legal Vision for Europe', *German Law Journal* (forthcoming, 2017)). This article on the ITL project by the present author is based on the archive of the director of the project, Mauro Cappelletti.

³¹³ R. Lecourt, 'Allocution inaugurale' and P. Pescatore, 'Rôle et chance du droit et des juges dans la construction de l'Europe', FIDE congress report 1973.

³¹⁴ Pescatore, 'Rôle et chance du droit et des juges dans la construction de l'Europe', at 18-19

³¹⁵ The other two subtopics were first, Community and Member States economic policies and the rights of companies, and second, citizen participation in the decision-making at a Community level.

³¹⁶ However, Pescatore only provided references to work of the pro-integrationists Hans-Peter Ipsen and Meinhard Hilf. (P. Pescatore, 'Rapport communautaire, La protection des droits fondamentaux par le pouvoir judiciaire' in *Die Einzelperson und das Europäische Recht*. FIDE VI (FIDE, 1975) (hereafter FIDE congress report 1975), at page II/2, 29.

integration. The defence of democracy and human rights was thus simply a thin veil for nationalism, according to Pescatore.³¹⁷ While the general rapporteur C.A. Colliard from the Université de Paris I and the Belgian Minister of Justice H. Vanderpoorten supported Pescatore's standpoint,³¹⁸ other voices were critical. Evert Alkema, a legal scholar from Groningen University, presented a report written by a working party of the NVER with the Professor of European law Henry Schermers as chairman. The report found that the ECJ's abstinence from recognising the ECHR as binding on the EC had opened up for reactions like the FCC's in *Solange*, which granted national fundamental rights absolute precedence over secondary Community law, and the authors did not find the ECJ's reserved attitude encouraging.³¹⁹ In a very indirect fashion, the German reporters on fundamental rights likewise commented on *Solange*: their 107 pages on the national legal protection of fundamental rights was an effusive appraisal of the German system. The protection of human freedom in Germany should be the model of rights protection in the Community, so the reporters recommended, without mentioning the *Solange* ruling at all.³²⁰

At the Copenhagen congress in 1978, which dealt with equal treatment of public and private undertakings and due process in the administrative procedure, the debate about rights and primacy was left aside, but otherwise the topic remained a theme at FIDE congresses throughout the 1970s. In this respect, the congresses reflected the gap between radical and moderate interpretations of European law, which existed inside the transnational field of European law, and they exhibited the critique that would later initiate an approximation towards the ECHR at the European level in order to satisfy the FCC and the legal establishment in Germany: in a 1977 Joint Declaration, the political institutions of the EC bound themselves to the principles of the ECHR, and in the *Rutili* (1975)³²¹ and *Hauer*³²² (1979) cases, the ECJ cited individual articles of the ECHR.³²³ On the basis of this development, the FCC made peace with *Solange* II in 1986, when it in stated that the it would not review Community legislation as long as effective

³¹⁷ *Ibid.*, at II/3, 27.

³¹⁸ Colliard stated that the lack of fundamental rights in the Treaty posed a number of problems, but these should not be exaggerated. On a personal level, he admired the approach of the ECJ (C.A. Colliard, 'Rapport général', FIDE congress report 1975, at II/1, 2). Vanderpoorten found it comforting that the ECJ would take the common constitutional traditions of the Member States in account in safeguarding the rights of the individual (H. Vanderpoorten, Allocation d'ouverture, FIDE congress report 1975, at I/3, 2).

³¹⁹ E. A. Alkema, 'The judicial protection of fundamental rights in the Netherlands', FIDE congress report 1975, at II/11, 28-29.

³²⁰ E. Werner-Fuss and R. Arnold, 'Der Gerichtliche Schütz der Grundrechte', FIDE congress report 1975, at II/6, 84-85.

³²¹ Case 36-75, *Roland Rutili v Ministre de l'intérieur*, ECLI:EU:C:1975:137.

³²² Case 44-79, *Liselotte Hauer v Land Rheinland-Pfalz*, ECLI:EU:C:1979:290.

³²³ Davies, 'Pushing Back', at 457.

protection of fundamental rights was guaranteed at the European level, but that it could overrule the ECJ if protection of these rights required it.³²⁴

Congresses 1980-1994

Whereas the Community had struggled under difficult global economic and monetary conditions in the 1970s and had fought to maintain its *raison d'être*, the 1980s were characterised by action towards the completion of the Common Market with the SEA in 1986 and renewed optimism. The initiative did not only come from the Community institutions themselves, but also from big business leaders. Discontent with the lack of actual free trade, they championed the removal of non-tariff barriers.³²⁵

In-house council from big businesses, such as St. Gobain, Olivetti, Philips, and Eni S.p.A, as well as big national banks had always been present at FIDE congresses, but from the late 1970s onwards, banks and companies increasingly contributed financially to the congresses, along with the Community institutions,³²⁶ which discussed issues related to free trade throughout the 1980s and in the early 1990s. This partly reflected the general development of the Community; partly the organisers needed such issues to attract corporate sponsors to finance the congresses.³²⁷ In addition, principles of European law were explored – such as the principles of equal treatment in economic law (The Hague in 1984 along with the topic of Europe and the media) and the principles of subsidiarity (Rome 1994 along with the topics of social politics in the Community and the implications of deregulation and privatisation in competition law), while the basic nature of European law was generally left aside. When the congresses did touch upon the subject, as at the 1986 Paris congress that focussed on general principles common to the laws of the Member States as a source of Community law (along with community aids, national aids, and antidumping measures, as well as the freedom to provide services and the right of establishment, in particular regarding insurance companies and banks), it did not stir much debate.

³²⁴ BVerfGE 73, 339 *Solange II* decision 22 October 1986, 3 CMLR 225.

³²⁵ For an analysis of the business leaders' impact, see M. Cowles, 'Setting the Agenda for a New Europe: The ERT and EC 1992', (1995) 33 *Journal of Common Market Studies*, 501-526.

³²⁶ For instance, in 1978 in Copenhagen, five Danish Banks, five foundations, and a private company thus supported the congress (8e Congrès International pour le Droit Européen, Copenhagen, June 22-24 1978). In Dublin in 1982, Irish banks and 'commercial organisations' had contributed with 3.000 pounds out of a total income of 26.800 pounds. In addition, the Commission provided a grant (Minutes, Steering Committee meeting, 24 June Dublin, AFIDE). In Paris 1986, Banque de France, Barclays Bank, Crédit Agricole, Fédération Française des Sociétés d'Assurances, and the Foreign Ministry sponsored the congress. (FIDE, Rapports, 12e Congrès, Paris, 1986). The ECJ furthermore provided translators to some congresses (see, for instance, Minutes, Steering Committee meeting, 8 November 1991, AFIDE).

³²⁷ At a Steering Committee meeting in 1984, when the topics for the 1986 Paris congress were discussed, Paul-François Ryziger from the AJE explicitly pointed out that FIDE needed economic topics to attract sponsors. (Minutes, Steering Committee meeting, 19 September 1984, AFIDE).

In 1987, the efforts to advance the Community bore fruit, when the SEA entered into force. This leap forward was central at the congresses, where topics such as public procurement, fiscal harmonisation, the control of market concentration, free movement of persons, deregulation, and privatisation were on the programme in the early 1990s.

By now, the number of participants was more than doubled since the first congress. In Rome in 1994, 468 participated compared to 182 in 1961.³²⁸ Bearing the interval and the progress of the EC in mind (as well as its appeal to a much broader scope of people), the number of participants in Rome was, however, not overwhelming. The congresses were still exclusive parties, not least due to high congress fees.³²⁹

A rising proportion of the participants were from the Courts in Luxembourg, following the pattern of the 1970s. In 1994, 79 of the participants (17 per cent) came from the Court of First Instance³³⁰ and the ECJ,³³¹ making it the second largest group at the congress (24 per cent were academics and 16 per cent were private practice lawyers).³³² Obviously, the events were a great chance for judges to network with academics, lawyers, politicians, and representatives from banks and other corporations. FIDE was also a space for informal discussions and initiatives about the development of European law. If such an informal activity was to have a considerable effect, the participation of national judges was a prerequisite, but from 1961 to 1994 the number and proportion of national court lawyers and judges at the FIDE congresses had decreased sharply: from 63 (35 per cent) in 1961, to 28 (9 per cent) in 1973, and only 6 (1 per cent) in 1994. The actors, who were indispensable in the actual constitutionalisation of European law, namely those who could secure national legal recognition of the case law and principles of the ECJ in their own courtrooms, were practically absent at the congress in the beginning of the 1990s. The head of the Legal Service, Claus-Dieter Ehlermann, participated only at a few congresses. Like Gaudet, he pursued synchronisation between academia and practice with great energy,³³³ but he did not

³²⁸ List of Participants, XVI Congres international de la FIDE, Rome, 12-15 Octobre 1994, AAIGE.

³²⁹ A. von Bogdandy, 'A Bird's Eye View on the Science of European Law: Structures, Debates and Development Prospects of Basic Research on the Law of the European Union in a German Perspective, (2000) 6, n. 3, *European Law Journal*, 208-238, at p. 212.

³³⁰ The Court of First Instance was established in 1989 and ruled on certain categories of cases in the first instance. In 2009, the name was changed to the General Court with the entry into force of the Lisbon Treaty.

³³¹ Of the 79, 17 judges from the Court of first Instance (including the president José Luis Da Cruz Vilaça) and 10 judges from the ECJ (including the president Gil Carlos Rodriguez Iglesias) participated (List of Participants, XVI Congres international de la FIDE, Rome, 12-15 Octobre 1994, AAIGE).

³³² List of Participants, XVI Congres international de la FIDE, Rome, 12-15 Octobre 1994, AAIGE.

³³³ Ehlermann was the director of the Legal Service 1977-1987 and during these years, he was for instance an editor of *Common Market Law Review* (1975-1989) and heavily engaged in the Integration through Law project in the late 1970s and early 1980s. See the two forthcoming articles by the present author: 'The History of *Common Market Law Review* 1963-1993' (*European Law Journal*, forthcoming, 2017) and 'The History of the Integration through Law

attribute much importance to FIDE congresses operationally or politically. Ehlermann considered other academic channels, such as meetings with the editors of European law journals, much more valuable.³³⁴

A coherent and long-term strategic plan for FIDE might have enhanced the political impact of the federation, but the loose framework with rotating presidencies, including the commensurate rotating right to propose topics for the congresses, hindered such planning. The majority of the members in the Steering Committee rejected the idea of creating a permanent secretariat or administration, which could have been a first step in a long-term strategic direction: when Bernhard van Walle de Ghelke from the Belgian association proposed revisiting the original idea of establishing a permanent secretariat in 1992, it was immediately rejected.³³⁵ The creation of homepage to modestly modernise the institution would not occur until years later, providing members of the national associations the opportunity to download reports from the congresses. Beyond this exclusive group, reports from congresses were hard to access.³³⁶

National Associations

Even though FIDE was emanated from the national associations, their activities were not coordinated transnationally. To a large extent, the national associations were independent cells

Project. Creating an Academic Expression of a Constitutional Vision for Europe' (*German Law Journal*, forthcoming, 2017).

³³⁴ Interview with Claus-Dieter Ehlermann, 29 June 2016 and interview with Claus-Dieter Ehlermann by Sigfrido Ramirez 16 September 2016 (carried out in cooperation with the present author). In another interview, Ernst Steindorff, the founder of the WGE, reinforced Ehlermann's view. As he did not consider FIDE and the congresses very relevant, he had already stopped attending the congresses in 1960s (Interview with Ernst Steindorff, 20 June 2014). A document in the archive of the Legal Service, which Morten Rasmussen referenced in arguing that had become an important 'shop-window' for Community law (Rasmussen, 'Establishing a Constitutional Practice', at 180), seems to contradict the interviews. In the document, George Close, a Briton formerly employed in the British Ministry of Transport with close ties to the British committee organising the FIDE congress in 1980 in London, attempted to persuade the President of the Commission, Roy Jenkins, to provide a grant to the congress by giving a flattering impression of the importance of FIDE as a 'shop-window for the Legal Service' that diffused knowledge, formulated policy, and was good for public relations. The importance of the document concerning the general tie between the Legal Service and FIDE should, however, be evaluated in context. First of all, Close was invited to join the committee by an old friend of his, professor of European law John Mitchell – the Legal Service did not seek the cooperation. Secondly, the document and Close's flattery was an attempt to secure financial support to the FIDE congress in 1980 that Close had already promised his allies in the organising committee, but which the Secretariat General of the Commission would not grant as a result of a general stop to congress subsidies. The document thus represents a tie between a particular member of the Legal Service and the British association of European law and the pickle he had put himself in by promising a grant in advance, but not a general tie between the Legal Service in the 1970s and FIDE (Letter from Mitchell to Close, 8 February 1978, and Close, Note for the attention of Mr. G. Avery, Chef de Cabinet adjoint. Cabinet of the President in ALSC, 347.96 (100) Fédération internationale pour le droit Européen).

³³⁵ Minutes, Steering Committee meeting, 24-25 September 1992, AFIDE.

³³⁶ In the 1960s and 1970s, the FIDE reports had been published by publishing houses such as Bruylant and Carl Heymans Verlag as formal contributions to the printed academic debate, but from 1978 the national associations usually published the reports themselves in pamphlet bands, indicating a less ambitious aim with the reports beyond the congresses.

with limited knowledge of their counterparts' activities in the other Member States.³³⁷ Moreover, the various associations' characters differed greatly, as the history of the AJE, WGE, and AIGE shows. The AJE built up an organisational structure, expanded its membership base, published a bulletin several times a year, and continuously held conferences and seminars on European law in the 1960s, 1970s, and 1980s, which indeed played a role in legitimising European law in certain legal environments in France. However, the euro-sceptic Gaullist fifth regime and the long-lasting hostility of the French Conseil d'Etat in the 1960s limited the general impact of the AJE. In the mid-1970s, the Cour de Cassation accepted the primacy of European law, but in the 1980s the so-called Aurillac amendment in the French National Assembly recommended French courts to refuse the application of European law in France,³³⁸ and only in 1989 did the Conseil d'Etat accept the primacy of European law, though on the basis of French constitutional law rather than the ECJ's claim of ultimate authority over national constitutions.³³⁹ In Germany, the WGE with its academic character also built up a firm organisation with a solid power base in the German administrative and political elite. The association for instance received financial support from German ministries.³⁴⁰ Nonetheless, it was difficult for the constitutive elements of a German academic discipline of European law to progress in the first decades against legal scholars sceptical of the 'special' nature of European law and an unreceptive German judiciary, which had been excluded from the WGE. The journal *Europarecht* dedicated to European law is a good example. It was established in 1965 by the WGE, but in the 1960s and 1970s, the journal was far from self-sustaining and in danger of having to close.³⁴¹ The AIGE in Italy was very vulnerable organisationally, and the association was practically dormant already in the 1960s,³⁴² with a lack of corresponding representation in FIDE.³⁴³ In the mid-1970s, new forces revitalised the undertaking with recurrent seminars and European law courses,³⁴⁴ but with limited reach. Not

³³⁷ Actors from national associations repeatedly suggested circulating information on the activities of the national associations transnationally, but seemingly without effect. See Lord Wilberforce, 'Opening Speech by the Rt. Hon. Lord Wilberforce', FIDE congress report 1980 and Minutes, Steering Committee meeting, 24-25 September 1992, AFIDE.

³³⁸ The amendment was rejected in the Senate, but it exhibited the French resistance towards European law by the Gaullists.

³³⁹ See, generally, Bernier, 'Constructing and Legitimizing'.

³⁴⁰ Letter from Börner to C.H. Beck'sche Verlagsbuchhandlung, 12 February 1973, AWS, 237.

³⁴¹ Letter from C.H. Beck'sche Verlagsbuchhandlung to WGE, 25 July 1972, AWS, 237.

³⁴² Interview with Paolo de Caterini 30 March 2016.

³⁴³ See, for instance, minutes, Steering Committee meeting 10 April 1973, AFIDE.

³⁴⁴ As documented in the archive of the AIGE.

until the late 1980s and 1990s, when the impact of the SEA kicked in at the national level, did European law expand as an academic field in the Member States.³⁴⁵

At the European level, the associations possibly had a greater impact. The request for a preliminary reference to the ECJ in the landmark case *Cassis de Dijon*³⁴⁶ might originate in a conversation at a WGE-meeting between a member of the Commission and the lawyer Gert Meier,³⁴⁷ and such processes were generally discussed informally in either national associations or FIDE settings.³⁴⁸ As the history of the *Van Gend en Loos* case has, however, revealed, historical scrutiny of specific cases remains necessary when estimating the role of the European law associations in presumed test cases.

Conclusion

Adding empirical detail to the history of FIDE during 1961-94 reveals its variegated character. FIDE provided an important transnational setting for legal mobilisation, diffusing of knowledge on European law, and networking among judges, academics, private practice lawyers, and in-house corporate lawyers. However, neither organisationally nor ideologically did FIDE and the 'Euro-law associations' constitute a cohesive network in the ideological confrontation with sceptical national actors; FIDE was it-self an arena of contestation.

The narrative behind this conclusion shows phases marked by shifting institutional links, but contestation was a part of FIDE congresses from the outset. In the 1960s, close tie to the agenda-setting Legal Service put the nature of European law on the programme of several FIDE congresses, and direct effect and primacy were endorsed by FIDE. There are, however, no indications that FIDE was instrumental in the alignment of the actors with respect to the attempted constitutionalisation of the treaties by the ECJ in 1963 and 1964,³⁴⁹ and the disagreement on the potential direct effect of directives in 1965 in Paris revealed the ideological clashes in FIDE. The leadership of the Bureau and the Legal Service waned in the 1970s, and the federation became looser, with much depending on the national association in charge of organising the next congress, its preferences regarding topics, and its institutional and commercial links. In line with the general campaign for stronger ties between the ECJ and

³⁴⁵ See, on the German case, chapter three in A.K. Mangold, *Gemeinschaftsrecht and deutsches Recht: die Europäisierung der deutschen Rechtsordnung in historisch-empirischer Sicht* (Mohr Siebeck, 2011).

³⁴⁶ Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42.

³⁴⁷ Alter, 'Jurist Advocacy Movement', at 75.

³⁴⁸ I thank Michel Waelbroeck for pointing this out.

³⁴⁹ This argument has already been put forth by Morten Rasmussen (Rasmussen, 'Establishing a Constitutional Practice', at 179-180). The present analysis supports Rasmussen's argument.

national legal elites under Robert Lecourt's ECJ-presidency, the ECJ implicitly became the main institutional link of FIDE as ECJ judges increasingly became involved in their national association and national FIDE-presidencies. Most particularly Pescatore, who promoted an 'Integration through Law' narrative situating law in general, and the ECJ particularly, as a driver of economic integration. In addition, Pescatore defended the ECJ's path in the heated 1970s debate on fundamental rights, which aroused strong and divergent feelings at the FIDE congresses. Following the general development of the Community and the stronger affiliations with banks and companies, which began to contribute to the congresses financially, FIDE congresses primarily centred on free trade topics in the 1980s. The political, operational capacity of FIDE became more limited, and whereas the congresses still offered a remarkable setting for networking, national judges were absent. As crucial actors in the enforcement of Community Law in the Member States, the lack of judges negatively affected FIDE at the national level.

On the background of this narrative, a Bourdieuan approach toward exploring the history of European law can be evaluated. Indeed, the approach has indicated contestation in the legal field, but when applied without access to archival material or a thorough analysis of the output produced in the scholarly field, a Bourdieuan approach may lead to questionable concepts such as 'FIDE-entrepreneurs', incorrect assumptions on test cases, and misleading postulations about FIDE and the 'euro-law associations' constituting an ideologically cohesive transnational network in opposition to sceptical national observers of European law. When applied to vast archival material, the Bourdieuan approach is, however, a valuable tool conceptualising the academic field of European law as a complex battlefield with fluid alliances transgressing the borders between the national and transnational levels.

The History of the *Common Market Law Review* 1963-1993

Carving out an Academic Space for European law

Introduction

‘I imagine you as a missionary preaching the Gospel in far way countries. But it must be a satisfactory feeling to know that there are more and more converts.’³⁵⁰ So wrote Laurens-Jan Brinkhorst, professor of European Law at Groningen University and an editor of the *Common Market Law Review* (*CML Rev.*), to John Mitchell, professor of law at Edinburgh University and a member of the Editorial Board of the journal, in 1971.³⁵¹ Along with a range of scholars, actors from the European Community (EC),³⁵² and judges from the European Court of Justice (ECJ), Brinkhorst and Mitchell were in the process of establishing a transnational academic discipline dedicated exclusively to European law, which was highly relevant to Britons, as the Community would include Britain if the enlargement negotiations succeeded. The ideological starting point was the recent judgements of the ECJ in *Van Gend en Loos* (1963)³⁵³ and *Costa v ENEL* (1964)³⁵⁴, where the ECJ – pushed by the head of the Legal Service of the Commission Michel Gaudet – had used a teleological method to define European law as a new, special legal order, in reality providing a constitutional interpretation of the Treaties of Rome.³⁵⁵ To the Commission and Gaudet, the establishment of a new legal discipline that could nurture the development of European law and differentiate it from international law was considered absolutely crucial in order to provide legitimacy to the new jurisprudence of the ECJ.

Despite the fundamental importance of the development of an academic discipline of European law, the exploration of the transnational history of the discipline is limited.³⁵⁶ Only

³⁵⁰ The article has been accepted for publication in *European Law Journal* (forthcoming, 2017). I would like to thank Morten Rasmussen, the members of the research group ‘Towards a New History of European Public Law’, Claus-Dieter Ehlermann, and Haakon Ikononou for valuable comments on this article.

³⁵¹ Letter from Brinkhorst to Mitchell, 17 September 1971, Archive of *Common Market Law Review* (hereafter, ACMLREV).

³⁵² The European Coal and Steel Community, EURATOM, and the European Economic Community were merged into the European Community in 1967. This article will therefore refer to ‘the Communities’ when analysing events prior to 1967, and to ‘the Community’ after 1967. The term ‘Community law’ was however used already in the *CML Rev.* the beginning of the 1960s.

³⁵³ Case 26/62, *Van Gend en Loos*, ECLI:EU:C:1963:1.

³⁵⁴ Case 6/64, *Flaminio Costa v ENEL*, ECLI:EU:C:1964:66.

³⁵⁵ Today as in the past, the terms ‘constitutional’ and ‘constitutionalisation’ are defined in various ways. This article builds on a loose definition of a ‘constitutional’ reading, gathering the interpretations which built on the claims that European law should be constructed with tools of state constitutional law, not public international law, that the European and the national legal orders should be reduced to a single legal system, and that European law should prevail in case of a conflict between European law and national law.

³⁵⁶ In contrast, the two most important cases of how EU law academia was formed nationally, in France and Germany, have been examined recently. See A.-K. Mangold, *Gemeinschaftsrecht und deutsches Recht: die Europäisierung der*

recently have studies come out by the political scientist Antoine Vauchez and the historians Morten Rasmussen and Anne Boerger. The conclusions of these first pioneering efforts concur: while the first steps towards academic research on European law had been taken in several Member States already in the 1950s, it was the hope that a comprehensive transnational academic organisation would provide a decisive impetus to the development of European law. Steps were thus taken to establish a proper transnational academic field of European law from the early 1960s onwards, partly by law professors who were often ideologically supportive of European integration, and partly by the supranational institutions of the European Communities, especially the Legal Service. The latter hoped that a transnational academic discipline of European law would underpin the development of European law generally and promote European law as constitutional in particular. When established, the discipline functioned as a power-knowledge nexus with blurry lines between academia and the Community institutions, and it played a key role in legitimising the jurisprudence of the ECJ as a ‘new legal order’. The notion was in reality synonymous with the constitutional approach of the Legal Service, but the ECJ had chosen a label that was politically less contentious, and academia followed.³⁵⁷

Interesting as these conclusions are, they are only backed by a few in depth empirical studies. Thus, several articles have explored the role of the Fédération Internationale pour le Droit Européen (FIDE) in organising the discipline in the 1960s,³⁵⁸ and one contribution has argued that the Law Department at the European University Institute (EUI) emerged as a sort of think tank in European law from the 1980s onwards.³⁵⁹ This leaves several key features of the transnational history of the academic field of European law completely unexplored.

Academic journals arguably play a central role in carving out scholarly fields, disciplines, and communities of scholars, as they define areas of knowledge and central theories to conceptualise

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 (1945-1990)* (Daloz, 2014).

³⁵⁷ A. Vauchez and S. Mudge, ‘Building Europe on a Weak Field: Law, Economics and Scholarly Avatars in Transnational Politics’, (2012) 118 *American Journal of Sociology*, 449-492; A. Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press, 2015); M. Rasmussen, ‘Constructing and Deconstructing ‘Constitutional’ European Law: Some reflections on how to study the history of European law’ in H. Koch, K. Hagel-Sørensen, U. Haltern, and J. Weiler (eds.), *Europe. The New Legal Realism: Essays in Honour of Hjalte Rasmussen* (Djøf, 2010), 639-660; and A. Boerger and M. Rasmussen, ‘Transforming European Law: The Establishment of the Constitutional Discourse’, (2014) 10 *European Constitutional Law Review*, 199-225.

³⁵⁸ M. Rasmussen, ‘Establishing a Constitutional Practice: The Role of the European Law Associations’ in W. Kaiser and J. Meyer (eds.), *Societal Actors in European Integration: Polity-Building and Policy-Making 1958-1992* (Palgrave Macmillan, 2013), 173-197. See, also, K. Alter, ‘Jurist Advocacy Movements in Europe: The Role of Euro-law Associations in European Integration (1953-1975)’ in K. Alter, *The European Court’s Political Power* (Oxford University Press, 2009), 63-91; Vauchez and Mudge, *Building Europe on a Weak Field*; and Bailleux, *Penser l'Europe par le droit*.

³⁵⁹ Vauchez, *Brokering Europe*, at 204-205.

the knowledge,³⁶⁰ but we know precious little about the role of European law journals in the building of the discipline. The political scientist Karen Alter has argued that the Commission played a significant role in establishing and financing the first generation of journals, and that FIDE helped to found the *CML Rev.*³⁶¹ The close relation between the journals and the European institutions has also been explored elsewhere. In a pioneering article from 1997, the legal scholars Harm Schepel and Rein Wesseling analysed who the authors of contributions to a wide selection of academic journals of European law from 1963 to 1995 were. What emerged was that the staff of administrative and judicial European institutions played a very significant role in the writing of the legal doctrine, when compared to national public law and national economic law journals.³⁶² The analysis furthermore hinted at an increase in Community institution writing in the 1980s, and a reclaiming of the field by academics at the particular expense of Commission officials after 1991, but according to Schepel and Wesseling, the authors of Europe generally rallied ‘as one around the Court in its patient creation of a genuine supreme European legal order’.³⁶³ As the study was primarily based on counting, it could not provide conclusions on the establishment and the institutional development of the journals, nor say much about the content.

In order to address these central questions, this study will analyse the history of one of the most prominent European law journals today and arguable the most important journal to the establishment of the academic field of European law, namely the *CML Rev.* from 1963 to 1993. Two dimensions will be addressed. Firstly, the article will explore the editorial organisation, affiliations with community institutions, and commercial development of the journal. Secondly, the conclusions of a systematic analysis of the content of the journal will be presented, focusing specifically on the debates on the nature of European law. The source material is the hitherto unexplored archive of *CML Rev.*,³⁶⁴ a number of private archives, interviews with key figures, and the articles, case law reviews, and editorial comments in the journal from 1963 to 1993.³⁶⁵ On the basis of the study, existing interpretations of the transnational, academic discipline of European

³⁶⁰ D. Frau-Meigs, ‘Academic Journals and Publications: Mapping the Territories’, (2003) 98 *Revue Française d’Études*, 116-136, at 116.

³⁶¹ Alter, ‘Jurist Advocacy Movements in Europe’, at 70.

³⁶² H. Schepel and R. Wesseling, ‘The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe’, (1997) 3 *European Law Journal*, 165-188, at 173, 178, and 186.

³⁶³ *Ibid.*, at 186. A similar but much minor analysis covering three French journals from 1998 to 2004 have been carried out by Francis Snyder. See, F. Snyder, ‘Legal Scholarship and Legal Culture in the European Union’ in Fabrice Picod (ed.), *Doctrines et Droit De L’union Européenne. Collection de l’Union Européenne – Colloques* (Bruylant, 2005).

³⁶⁴ The archive for instance provides material on the establishment, minutes from meetings, and correspondence with authors.

³⁶⁵ 1993 is the end point of the analysis, as the Maastricht Treaty brought about a new legal structure. Therefore, the articles about the Maastricht Treaty in the *CML Rev.* have not been included in the content analysis. Furthermore, the study only entails initial reflections on the impact of *CML Rev.*

law will be enriched, nuanced, and in some instances corrected.

Gaudet's Failed Plans of a Journal Dedicated to European Law

The Treaty of Paris (1951) and the Treaties of Rome (1957) were ambiguous when it came to defining the nature of European law. Formally, the treaties were classical international treaties, but their objectives required legal techniques and tools that went beyond traditional international law. To legal scholars, the nature of European law consequently remained to be decided when the treaties went into effect, but most of the scholars favoured the view that the Communities were merely international organisations based on classical international law although of an unusual kind. In the 1950s and 1960s, a small group of federalists however promoted the political understanding that European law should be interpreted as an autonomous discipline of law detached from international law, and that the ECJ should assume a constitutional role in order to achieve a truly united Europe. Among others, this group consisted of Walter Hallstein,³⁶⁶ Pierre Pescatore,³⁶⁷ and Michel Gaudet. The latter was first a jurist of the Legal Service of the High Authority and from 1958 to 1969 the director of the Legal Service of the Commission. He promoted a breach with the international law understanding of European law in order to replace it with a constitutional approach already from the mid-1950s. In his opinion, the ECJ should adopt a teleological interpretative method in order to create a constitutional rule of law instead of the narrower textual approach traditionally used in international law. This logic was presented in a memorandum that Gaudet wrote in 1962, after the *Van Gend en Loos* preliminary ruling exploring the direct effect of article 12 of the Rome Treaties had reached his office in the Legal Service. Gaudet outlined three solutions in the memorandum. The first was based on public international law, and this meant that national courts would decide which European norms had immediate effect. The second traditional solution was based on the notion that treaty articles were addressed to Member States and thus not enforceable by national courts. As Gaudet was not satisfied with any of these traditional approaches, he used a teleological approach to suggest the outline of an original legal order drawing on elements from the European Economic Community Treaty, which the Legal Service had earlier labelled constitutional elements. In this legal order, clearly formulated treaty provisions should have direct effect in the Member States, if the ECJ interpreted them as such in preliminary rulings, in order to ensure a uniform interpretation, and legal norms should have supremacy vis-à-vis prior and antecedent national

³⁶⁶ President of the European Commission from 1958 to 1967.

³⁶⁷ Judge at the ECJ from 1967 to 1985.

law. The Commission and President Hallstein adopted the third solution, which was presented to the ECJ. In *Van Gend en Loos* in 1963 and *Costa v ENEL* in 1964, the ECJ followed Gaudet's main argument although in a cautious version.³⁶⁸

Gaudet was full of initiatives, and he wanted to promote his legal vision for Europe by establishing an autonomous academic and professional discipline of European law detached from international law, which could endorse the claim of a constitutional nature of European law. One part of this strategy was to encourage the foundation of national European law associations and its transnational counterpart, FIDE (established in 1961), where Gaudet and the Legal Service would provide the informal leadership in the 1960s in an attempt to secure the backing of the constitutional practice.³⁶⁹ Another central part was to create a journal dedicated entirely to European law, which should be available in all the community languages as well as English,³⁷⁰ and this aim was in 1962 pursued in cooperation with the likeminded Ivo Samkalden,³⁷¹ a Dutch professor of international law and an outspoken federalist in the midst of erecting European law as a scholarly field in the Netherlands.³⁷² Journals dedicated to European law already existed in some of the Member States, but they did not fulfil the need for information, either because of the editorial conception of the journals, or because they only targeted practitioners. The information gap for researchers and practitioners, which existed according to Gaudet, posed 'des dangers sérieux' for the practitioners.³⁷³ The journal however never materialised, as the Executives of the Communities considered the undertaking to be too expensive.³⁷⁴

Even though Gaudet's plan failed, it is important as a prelude of the *CML Rev.* pointing to the view Gaudet had of his own role as a necessary initiator of academic enterprises and to the relation between Gaudet and Samkalden. Additionally, it is significant that the proposed journal should be available in English, which was natural bearing the anticipated accession of Britain to the Common Market in mind. But it would also encourage a dialogue between European

³⁶⁸ This section is based on M. Rasmussen, 'Revolutionizing European law: A history of the *Van Gend en Loos* judgment', (2014) 12 *I.CON*, 136-163, at 140 and 151-154.

³⁶⁹ Rasmussen, 'Establishing a Constitutional Practice', at 180.

³⁷⁰ Gaudet's effort has been described by Julie Bailleux in the article 'Michel Gaudet a Law Entrepreneur: the Role of the Legal Service of the European Executives in the Invention of EC Law and of the Common Market Law Review', (2013) 50 *Common Market Law Review*, 359-67.

³⁷¹ Gaudet to Stein, 20 March 1961. Archive of Michel Gaudet, Fondation Jean Monnet pour l'Europe, Lausanne (AMG), Chronos 1961.

³⁷² Interview with Laurens-Jan Brinkhorst, 6 December 2013.

³⁷³ 'Rapport sur la création d'une publication périodique concernant le droit des Communautés européennes' by Michel Combarrous and Michel Gaudet, 15 May 1962. AMG, Chronos 1962.

³⁷⁴ Bailleux, 'Michel Gaudet, a Law Entrepreneur', at 366.

scholars, who lacked an understanding of federal institutions,³⁷⁵ and their American colleagues, to whom it was natural to interpret the nascent European system in the light of the American constitutional rule of law.³⁷⁶ Thus, an English version of the journal fitted perfectly with Gaudet's vision of a constitutional rule of law in Europe.

The Establishment of the *Common Market Law Review*

One might assume that the establishment of the *CML Rev.* arose directly from Gaudet's failure in the sense that he simply pursued the creation of a European law journal elsewhere. The actual history is however another with regard to the *CML Rev.*, as the journal came to life in a process initiated by Samkalden in parallel to Gaudet's attempt.

Samkalden had been Minister of Justice in the Netherlands 1956-58 for the Labour Party, and from 1960 he was the director of the Europa Institute at Leiden University. Established in 1957, it was the first academic institution in the Netherlands focusing on European integration.³⁷⁷ In addition, he was the president of the Dutch association of European law, *Nederlandse Vereniging voor Europees Recht* (hereafter, NVER), and part of the leadership of FIDE.³⁷⁸ In the network of professors trying to promote European law as a new kind of law demanding its own institutes and its own journals, he was at the very avant-garde.

Already in 1961, Samkalden and two colleagues considered to create a journal in English called 'Leyden Law Review'. This journal was outlined as an international law journal, where half of the content should focus on European law, and the journal was meant to have a publisher in Britain as well as in the Netherlands.³⁷⁹ As the project evolved, Samkalden took charge of the initiative and tried to make European law the sole subject of the journal, which should target a readership of professors, teachers, and postgraduate students, but also business lawyers, judges, barristers, government offices, and different kinds of libraries.³⁸⁰ The British publisher at Stevens and Sons/Sweet and Maxwell doubted whether there was a market for the outlined journal in England or on the continent, and in the publisher's opinion, commercial law of the common

³⁷⁵ In a correspondence with the prominent American Wall Street lawyer Donald Swatland, Gaudet complained about the lack of understanding of the nature of federal institutions and the opposition to a 'gouvernement du juges' in Europe. See Rasmussen, 'Constructing and Deconstructing 'Constitutional' European Law', at 640.

³⁷⁶ For an early analysis of the European legal system in the light of the American constitutional rule of law, see, E. Stein and P. Hay, 'New Legal Remedies of Enterprises in the European Economic Community', (1960) 9 *American Journal of Comparative Law*, 375-424.

³⁷⁷ J. Hollander, 'The Dutch Debate on European Integration', (2001) 17 *Journal of European Integration History*, 197-218, at 204.

³⁷⁸ Rasmussen, 'Establishing a Constitutional Practice', 177-78.

³⁷⁹ Letter from De Flines to Rijksuniversiteit te Leiden, Juridische Faculteit, 22 December 1961, ACMLREV and Letter from De Flines to Samkalden, Szirmai, and Drion, 22 January 1962, ACMLREV.

³⁸⁰ Memorandum on the 'Common Market Law Review', 25 April 1962, ACMLREV.

market countries should be the core of the review.³⁸¹ But Samkalden convinced him of the potential market for a European law journal, and the journal thus became a parallel enterprise to Gaudet's plan.

On the other side of the pond, scholars at the British Institute of International and Comparative Law (hereafter The British Institute) had become interested in European law in the anticipation of Britain joining the Communities in 1963. Encouraged by Gaudet, cooperation with the Europa Institute in Leiden was initiated with a yearly Leiden/London meeting,³⁸² and by October 1962 it was furthermore agreed that Samkalden's journal should be a joint venture between the Europa Institute in Leiden and the British Institute, the latter represented by its Director Norman Marsh and the legal scholar Dennis Thompson.³⁸³ Samkalden and Thompson should be the two editors of the journal, Laurens-Jan Brinkhorst, staff member of the Europa Institute in Leiden,³⁸⁴ would become secretary to the editors,³⁸⁵ and an editorial board to help develop and guide the journal was established. The persons in the board were mainly professors of civil or international law or judges, and several had a connection to the national associations of European law and the Bureau of FIDE.³⁸⁶ Finally, the journal would have a British and a Dutch publisher (Stevens and Sons/Sweet and Maxwell in London and Sijthoff in Leiden), who would cover the expenses of the journal.³⁸⁷ What remained in order to provide the journal with the right appearance was a name indicating the specificity of European law as a new kind of law, and Samkalden and Thompson suggested that the journal should be called 'European Law Review'. However, the British publisher preferred the name 'Common Market Law Review', apparently because it was believed that the words 'common market' had a psychological attraction for

³⁸¹ Letter from Burke to De Flines, 2 May 1962, ACMLREV.

³⁸² Bailleux, 'Michel Gaudet, a Law Entrepreneur', at 367. The Leiden/London meetings still take place.

³⁸³ Memorandum on 'Common Market Law Review', 25 April 1962, ACMLREV and Letter from March to Samkalden, 12 October 1962, ACMLREV.

³⁸⁴ Brinkhorst became the director of the Europa Institute in 1965 and was a professor of European law in Groningen 1967-1973 before assuming a number of political positions, such as undersecretary of foreign affairs (1973-1977), member of the European Parliament (1994-1999), minister of agriculture, nature, and fisheries (1999-2002), minister of economic affairs (2003-2006), and deputy prime minister (2005-2006).

³⁸⁵ Letter from Samkalden to Allsop, 8 October 1962, ACMLREV.

³⁸⁶ See the first issue of the *CML Rev.* Among the most significant were Nicola Catalano (former ECJ judge, part of the Bureau of FIDE, president of Associazione Italiana Giuristi Europei, on the Editorial Board of the *CML Rev.* 1963-1971), Lord Justice Diplock (English law lord, on the Editorial Board of the *CML Rev.* 1963-1971) and Ernst Steindorff (professor of civil law and international private law, initiator of the German Association of European law, part of the Bureau of FIDE, joined the Editorial Board of the *CML Rev.* in 1963, and he is still a member of the Advisory Board, which is the continuation of the Editorial Board (the name was changed in 1972)). All Member States except Luxembourg were represented in the board, as was Britain. From 1968, the ECJ judge Pierre Pescatore represented Luxembourg.

³⁸⁷ Memorandum of Agreement, 24 June 1964, ACMLREV.

English businessmen.³⁸⁸ In the end, he had his way. The publishers had agreed to publish the review at their own expense,³⁸⁹ and they needed a title with commercial attraction.

With professors of civil and international law as initiators, editors, and board members the enterprise reflected that the study of European law had resided in other areas in the 1950s and the beginning of the 1960s. When FIDE, a couple of research institutes dedicated to European law, and the first European law journals were established, this began to change. It is however noteworthy that the journal was created without direct influence of the Commission, regarding content and finances, and that both editors, as well as most of the members of the editorial board, were university scholars. Additionally, the national associations of European law and FIDE were not involved in the creation of the journal, although Samkalden, Catalano, and Steindorff were individual members of national associations.

There is no doubt that Samkalden was heavily inspired by the dialogue he had with Gaudet on the latter's attempt to establish a European law journal, and that he shared Gaudet's vision of an autonomous academic and professional discipline of European law detached from international law, which could spur European law in a federal direction. But the *CML Rev.* was established as a traditional academic-commercial enterprise.

The Foundational Years and the Search for the Nature of European law in Academia (1963-74) *A Editorial Organisation, Community Affiliations, and Commercial Development*

In the foundational years, almost all editors of the *CML Rev.* were academics,³⁹⁰ but faced with the challenge of finding authors to write on European law among the few persons with expertise,³⁹¹ the editors turned not only to their personal contacts in academia, but also to connections inside the institutions of the Communities. When Samkalden became the Dutch minister of justice again in 1965 and therefore stopped as an editor, the ECJ judge Andreas Donner³⁹² was appointed to the Editorial Board, and he promised to give active assistance to

³⁸⁸ Letter from Samkalden to Allsop, 8 October 1962, ACMLREV.

³⁸⁹ Memorandum of Agreement between publishers and editors, November 1965, ACMLREV.

³⁹⁰ The first editors were Samkalden 1963-1965; Thompson, member of the British Institute, 1963-1968; Laurens-Jan Brinkhorst 1965-1973; Dr. Kenneth Simmonds, director of the British Institute, 1968-1991; Herman Maas, director of the Europa Institute in Leiden, 1968-1974; and J. M. Bowyer, barrister, 1972-1974. The responsibilities of running the journal was split between Leiden and London as originally intended, but the secretariat of the journal was located at the Europa Institute in Leiden – except for a short period around 1973-1974.

³⁹¹ In fact, the journal did not receive a high percentage of unsolicited articles before the 1990s (Minutes, meeting of the Editors, 24 November 1988, ACMLREV and Minutes, meeting between editors, Advisory Board, and publishers, 26 June 1992, ACMLREV).

³⁹² Andreas Matthias Donner was the president of the ECJ 1958-1964, and judge at the ECJ 1964-1979. He was on the Editorial Board of the *CML Rev.* 1965-1971.

Thompson and the new editor Brinkhorst in the light of Samkalden's departure.³⁹³ Apart from the usual tasks carried out by board members, such as notifying the editors of interesting national case law and giving advice on the general line of the journal,³⁹⁴ Donner identified and proposed authors for specific tasks.³⁹⁵ Other key actors from the institutions were equally active as Editorial Board members, especially Gaudet and the ECJ judge Pierre Pescatore.³⁹⁶ A small circle of central actors from the Communities thus cooperated with the editors on developing the journal in a nascent field, which consisted of a limited number of persons with academic or practical knowledge on European law.

This circle was also active as editorial board members in the other academic journals dedicated to European law, which were established around the same time. *Rivista di diritto europeo* was established in 1961 with a 'Comitato Scientifico' where Pescatore and Donner were on board,³⁹⁷ *Cahiers de droit européen* was established in 1965 with a 'Comité Scientific' with, among others, Pescatore and Gaudet,³⁹⁸ and *Revue trimestrielle de droit européen* was established in 1966, and it had a 'Comité de Patronage' with Donner and Gaudet.³⁹⁹ Only *Europarecht* established in 1966 had no involvement of Pescatore, Donner, and Gaudet, since only German members sat on the board. Whereas the *CML Rev.* had joint editorship between a Dutch and a British editor and a broad readership orientation towards the United Kingdom and the US as well as the continent, most of these other 'first generation' European law journals had a narrow national or language based regional orientation,⁴⁰⁰ and the contact between the editors of the journals was furthermore very limited in the first years. This shows an emerging academic field of European law segregated in national or regional sections following traditional academic patterns, but it suggests a close affiliation between the institutions of the Communities and all of the sections of the academic field in this period.

In this field, the *CML Rev.* had a special status. It served as a preliminary model to the other

³⁹³ Minutes, meeting between editors, Advisory Board, and publishers, 30 November 1965, ACMLREV.

³⁹⁴ Minutes, meeting between editors, Advisory Board, and publishers, 19 June 1964, ACMLREV.

³⁹⁵ See, for instance, Letter from Scheltema to Stein, 19 October 1965, ACMLREV.

³⁹⁶ Pierre Pescatore was judge at the ECJ 1967–1985, and professor of law at the University of Liege afterwards. He was on the Editorial/Advisory board of the *CML Rev.* 1968-2010.

³⁹⁷ Pescatore entered in 1964, Samkalden in 1964, and Donner in 1969.

³⁹⁸ Pescatore entered in 1966, Samkalden in 1966, and Gaudet in 1968.

³⁹⁹ Both entered in 1966.

⁴⁰⁰ *Rivista di diritto europeo* was led entirely by Italians, and Italians wrote practically all contributions, *Revue trimestrielle de droit européen* had a board of 'Principaux Collaborateurs' with French members only, and French or Belgian authors primarily wrote the content, the editors of *Europarecht* were German scholars, the board consisted of Germans, and Germans mainly wrote the content. Only *Cahiers de droit européen* had a profile, which somewhat resembled the profile of the *CML Rev.*

journals,⁴⁰¹ and with its transnational character it became the successful counterpart to Gaudet's failed plan. Published in English, it not only underlined the close economic and political connection between the Netherlands and Great Britain as well as the anticipation of Great Britain joining the Communities, but also the expectancy that British and American authors and readers would embrace the journal. A readership analysis from 1965 proved this expectancy right: the journal had built up a readership base of about 1000 paying subscribers (libraries, law schools, research centres, law firms, corporations, governments, and individuals), where 25 per cent were from Great Britain and 23 per cent from the US. The rest were primarily from the European continent, especially the Netherlands, Belgium, and Germany.⁴⁰² The profile of the journal was however contested by the British publisher at Steven and Sons/Sweet and Maxwell in the beginning of the 1970s. The publisher recognised the high academic standard of the review, but in light of the negotiations of Great Britain's access to the Common Market, the publisher addressed the lack of profit from the review because of its academic character⁴⁰³ and took initiative to change the *CML Rev.* into a practice-oriented journal. A 'down-to-earth' market of practising lawyers and businessmen in Britain would be the target audience.⁴⁰⁴ The editors were not interested in changing the academic and international focus of the journal, and the Dutch publisher at Sijthoff wished to continue publishing the *CML Rev.* as it was. Accordingly, it was decided that the British publisher would withdraw in 1974.⁴⁰⁵ Now, the editorial activities became concentrated in the Netherlands,⁴⁰⁶ but the cooperation with the British Institute continued, Kenneth Simmonds stayed as an editor, and the character of the journal remained academic. The publishers and the expected development of the market had thus put pressure on the profile of the journal, but the dedication of the editors to keep the journal purely academic had saved it

⁴⁰¹ Letter from Rabe to Brinkhorst, 18 July 1966, ACMLREV. Hans-Jürgen Rabe, editor of *Europarecht* wrote to Brinkhorst that they studied the *CML Rev.* thoroughly, and that the *CML Rev.* served as a model to *Europarecht* in some aspects. Unfortunately, Rabe did not elaborate in the letter, and the contact between *Europarecht* and the *CML Rev.* was very limited. It is however reasonable to assume that the *CML Rev.* was a source of inspiration to the founders and editors of *Cahiers de droit européen* also, since the profile of this journal resembled the *CML Rev.*'s.

⁴⁰² Minutes, meeting of the Editors, 30 November 1965, ACMLREV.

⁴⁰³ According to the British publisher, the financial situation of the review had improved because of an increase in price, but only to the extent of giving the publishers a small contribution to their overheads. (Note written by Peter Allshop, 30 June 1971, ACMLREV).

⁴⁰⁴ Letter from Allshop to the editors, 30 June 1971, ACMLREV.

⁴⁰⁵ The Dutch publishers generally had a different stance toward the financial circumstances of the *CML Rev.* than the British publishers. Even though the journal was partly financed by the Europa Institute in Leiden from the end of the 1970s and onwards, Sijthoff and Martinus Nijhoff (which bought Sijthoff in 1982) considered the journal a success. They did not believe that other journals of the same quality as the *CML Rev.* had more subscribers. (Minutes, meeting between editors, Advisory Board, and publishers, 12 June 1970, ACMLREV, Provisional decisions reached on 16 June 1981 between the publisher, O'Keeffe, and Barants, ACMLREV, and Meeting between editors, Advisory Board, and publishers, 5 December 1982, ACMLREV).

⁴⁰⁶ Minutes, meeting of the Editors, 8 November 1974, ACMLREV.

from a fundamental reorientation. The journal continued as an academic lighthouse with a special status and a global market in the emerging transnational field of European law.

B *The Content (1963-74)*

In light of the reliance on representatives of the Communities by the editors in directory matters, it is no surprise that judges and jurists from the Commission wrote 24 per cent of the articles, whereas legal scholars wrote about 53 per cent, and 10 per cent were authored by private practice lawyers.⁴⁰⁷ The greatest amount of these articles focused on competition law, while a lesser part focused on the relationship between European law and national law, agriculture, and international relations with third countries or organisations.⁴⁰⁸ The content of the journal thus reflected the state of the European Economic Community, which in the period was primarily about removing trade barriers and restrictions in order to create a customs union, finding common ground in third country relations, and setting up the Common Agricultural Policy.

Most articles were doctrinal pieces attempting to clarify the latest ECJ rulings without explicit theoretical or contextual considerations, but implicitly, they contained a new theoretical approach to Community law. In a limited number of significant articles and editorials commenting on controversial rulings of the ECJ that constituted the backbone in ECJ's proclamation of a new legal order, this approach was at display. As if carefully orchestrated, the first issue of the *CML Rev.* was in fact published only a few months after the ruling in the *Van Gend en Loos* case, where the court proclaimed that article 12 of the Rome Treaty produced direct effect, thus establishing the direct effect doctrine. As is well known, the Luxembourg judges affirmed that the Communities constituted a 'new legal order of international law', which was autonomous vis-à-vis national legal orders (famously on the basis of the 'the spirit, general scheme, and wording of the treaty').⁴⁰⁹ The editors Samkalden and Thompson provided an enthusiastic support of the ruling in the first editorial, where they stated that the European Economic Community had a 'special character' and that 'unique' methods had to be employed in order to meet the political objective of the Treaty. Thus, the editorial anticipated the definition of European law as 'special and original',⁴¹⁰ as proclaimed in the ECJ's ruling in *Costa v ENEL*, where the primacy doctrine was established, affirming that in contrast with ordinary international treaties, the EEC treaty had created its own legal system, which was an integral part of the legal system of the Member States.

⁴⁰⁷ This is based on Schepel and Wesseling's analysis of the authors in the *CML Rev.* from 1963 to 1995. Unfortunately, their analysis did not provide numbers for sub-periods, but only aggregations on 1963-1995.

⁴⁰⁸ Finally, a few articles centred on transport, taxes, and social policy.

⁴⁰⁹ The first issue of the *CML Rev.* was published in June 1963.

⁴¹⁰ 'Editorial Comments', (1963-1964) 1 *Common Market Law Review*, 4-7, at 4-5.

Domestic legal provisions could not override law stemming from the treaty.⁴¹¹ The editorial was supplemented by an introductory message, where Gaudet called for a new legal thinking beyond national traditions in order to promote the aim of the Treaty,⁴¹² and the very first article was written by Donner, who championed the view that the preliminary ruling procedure should ensure uniformity of the interpretation of EEC law by courts and obviate the difficulty encountered in international law, namely that the various local courts diverged in their interpretation of uniform regulations.⁴¹³

In the following years, the debate on how to categorise European law flourished in the *CML Rev.* Among university scholars, the opinions were divided. Some explicitly interpreted the nature of European law as constitutional,⁴¹⁴ and others labelled it international law and stated that in case of a conflict between Community law and subsequent national law, the latter would prevail.⁴¹⁵ Authors from the institutions of the Communities generally aimed at showing how ‘special’ or ‘different’ the European legal order was compared to ordinary international law,⁴¹⁶ and this view became the most common in the *CML Rev.* from 1970 onwards with only few arguing beyond, such as Pescatore stating that Community law resided in federalism of an international type.⁴¹⁷ Thus, the debate on categorisation petered out, and the articles began to evolve around peculiarities of the legal order, as the ECJ developed its doctrines. While the empty chair crises in 1965-66 was a clear sign that the Communities was not about to turn into a federation, the ECJ continued to strengthen the European legal order, especially by giving direct effect to decisions and directives. In the *CML Rev.*, this development received special attention. The editors

⁴¹¹ Case 6/64, *Flaminio Costa v ENEL*, ECLI:EU:C:1964:66.

⁴¹² M. Gaudet, ‘Introductory Message’, (1963-64) 1 *Common Market Law Review*, 1-3, at 1-2

⁴¹³ A. Donner, ‘National law and the case Law of the Court of Justice of the European Communities’, (1963-1964) 1, *Common Market Law Review*, 8-16, at 11. Donner concluded that the full federal form where the ECJ would prevail under domestic courts had not been achieved yet, since the ECJ had not taken a stance on a number on priority of EC law over national law (see page 14).

⁴¹⁴ See, for instance, V. Mackinnon, ‘Experience in Common Law Countries of the Constitutional Problems Encountered in Regulating Economic Activity’, (1963-1964) 1 *Common Market Law Review*, 183-201 and J. Mashaw, ‘Ensuring the Observance of Law in the Interpretation and Application of the EEC Treaty: The Role and Functioning of the Renvoi d'Interpretation under Article 177’ (part 1 and 2), (1970) 7 *Common Market Law Review*, 258-285 and 423-453.

⁴¹⁵ A. Martin, ‘The Accession of the United Kingdom to the European Communities: Jurisdictional Problems’, (1968-1969) 6 *Common Market Law Review*, 7-49, at 14-15, 17, and 22-23. See, also, P. Van Dijk, ‘The Implementation and Application of the Law of the European Communities within the Legal Order of the Netherlands’, (1968-1969) 6 *Common Market Law Review*, 283-308, at 283 and 288-289.

⁴¹⁶ See, for instance, N. Catalano, ‘The Italian Constitutional Courts and the European Communities’, (1963-1964) *Common Market Law Review*, 318-326; R.-M. Chevallier, ‘Methods and Reasoning of the European in its Interpretation of Community Law’, (1964-65) 2 *Common Market Law Review*, 21-35; and M. Gaudet, ‘Challenge of the Changing Institutions’, (1965-1966) 3 *Common Market Law Review*, 143-157.

⁴¹⁷ P. Pescatore, ‘International Law and Community Law - A Comparative Analysis’, (1970) 7 *Common Market Law Review*, 167-183.

described the preliminary ruling in *Grad* (where direct effect of decisions was established)⁴¹⁸ as a major breakthrough and concluded that the ECJ had torn down another legal barrier, which separated the legal system of the Community from those of the Member States by ‘preferring a progressive, teleological interpretation to an historical one’. By assuming that the Court’s reasoning would apply to directives as well,⁴¹⁹ they flagged the ideological cohesion between the journal and the ECJ: when the editorial was published in the January 1971, the ECJ had already ruled on the issue in the *SACE* case 17 December 1970, where it granted direct effect to directives.⁴²⁰ When this ruling was commented in *CML Rev.*, Brinkhorst praised the ‘dynamic-progressive’ interpretation of the ECJ on direct effect of directives arguing that a historic-textual interpretation would leave no room for legal development.⁴²¹

The ECJ’s doctrines and its proclamation of a special legal order had thus been accepted by European law scholars. Along with the small circle of central Community actors, they constituted a tight power-knowledge nexus, which promoted an understanding in line with Gaudet’s constitutional vision, although more cautious notions were used.

The Phase of Ehlermann, Countering National Criticism (1974-83)

A Editorial Organisation, Community Affiliations, and Commercial Development

In the mid 1970s, there was a shift in the editorial team, as new group of editors took over.⁴²² Most importantly, Claus-Dieter Ehlermann, the new director of the Legal Service of the Commission, joined the team and became a very active and highly regarded editor.⁴²³

Ehlermann had an academic background as a doctorate student and assistant at the University of Heidelberg (1954-59), but he had spent most of his carrier in the Community, as an employee of the Legal Service of the Commission since 1961. In his academic writings, he had promoted a constitutional interpretation of the treaties⁴²⁴ and the ECJ as a key factor of integration,⁴²⁵ and he

⁴¹⁸ Case 9/70, *Grad v Finanzamt*, ECLI:EU:C:1970:78.

⁴¹⁹ ‘Editorial Comments’, (1971) 8 *Common Market Law Review*, 1-4, at 3.

⁴²⁰ Case 33/70, *SACE*, ECLI:EU:C:1970:118.

⁴²¹ L.-J. Brinkhorst, ‘S.A.C.E. v. Ministry of Finance of the Italian Republic. Case 33/70. Decision of December 17, 1970.1 Preliminary ruling on request of the District Court of Brescia, Italy’ (1971) 8 *Common Market Law Review*, 384–392, at 392.

⁴²² The new editors were Paul Kapteyn, the new director of the Europa Institute in Leiden, 1975-1978; Claus-Dieter Ehlermann, director of the Legal Service of the Commission, 1975-1989; Jan A. Winter, Professor of European law in Leiden, 1973-2009; and Henry Schermers, Professor of institutional international law in Leiden an later the director of the Europa Institute, 1978-1993.

⁴²³ Ehlermann became the director of the Legal Service of the European Commission in 1977. In 1987, he became special adviser for Institutional Questions of Commission President Jacques Delors, and 1990-1995 he was the director-general for the Directorate-General for Competition.

⁴²⁴ Vauchez, *Brokering Europe*, at 218.

⁴²⁵ See, for instance, C.-D. Ehlermann, ‘Legal Status, Functioning and Probable Evolution of the Institutions of the

was a prime caretaker of the ideological heritage of Gaudet in the Commission. His aim was synchronisation between academia and practice, and he wanted to make it known to the academic readers what the Commission was doing.⁴²⁶ Therefore, he for instance asked staff from the Commission to write on specific topics⁴²⁷ or act as national correspondents,⁴²⁸ and he distributed analyses of ECJ judgements drafted in the Legal Service, initially directed to the members of the Commission, to the secretary of the *CML Rev.* for further distribution in the auspices of the journal.⁴²⁹ Ehlermann was engaged in other European law journals as well and participated in meetings between the executive editors of the journals, which took place regularly from the late 1970s and onwards.⁴³⁰ At these meetings, which were held in the Commission, coordination with the Legal Service took place. Ehlermann would inform the editors of the topics, which the Legal Service was concerned with, and encourage them to deal with these topics in the journals.⁴³¹

This involvement and support to the development of European law as an academic field was not a formal task of Ehlermann's. But as Gaudet, he chose to pursue interaction with academia with the interests of the Commission in mind.⁴³² Sometimes these interests were in opposition to the jurisprudence of the ECJ, as an episode in 1983 highlights. Mr. Lester, a specialist in human rights and a member of the British Counsel had expressed a strong criticism of the ECJ, as it appeared to him that the ECJ's judgements, particularly in the field of sex discrimination, were diplomatic compromises, which were not clear and tended to avoid fundamental issues, such as reliance upon directives in relations between private parties. Ehlermann felt that this should be expressed in public, particularly since it seemed to influence the attitude of British courts vis-à-vis the preliminary reference procedure, and he therefore suggested that an editorial comment in the

European Communities', (1973) 10 *Common Market Law Review*, 195-207, at 198.

⁴²⁶ Interview with Claus-Dieter Ehlermann, 29 June 2016. In this regard, he also followed the footsteps of Gaudet. The directors of the Legal Service between Gaudet and Ehlermann, Walter Much (1969-1975) and Giancarlo Olmi (1975-1977) did however not engage with European law academia.

⁴²⁷ Along with national jurists, which the Legal Service or the Directorate-Generals already used as collaborators.

⁴²⁸ Letter from Ehlermann to Chrisham, 23 February 1976, ACMLREV and Minutes, meeting of the Editors, 23 September 1989, ACMLREV.

⁴²⁹ See for instance 'Jurisprudence sur la 'condictio indebiti' by Gerhard Bebr, 8 July 1980, ACMLREV and 'Note pour messieurs les membres de la Commission' by S Fabro, Agent de la Commission, ACMLREV.

⁴³⁰ There was no formal coordination between the European law journals before 1970, and regular meetings did not take place before the end of the 1970s. At these meetings, European law issues were discussed, colloquiums were organised, and coordination with the Legal Service took place (Minutes, meeting of the Editors, 6 December 1979, ACMLREV).

⁴³¹ Minutes, meeting of the Editors, 6 December 1979, ACMLREV.

⁴³² Interview with Claus-Dieter Ehlermann, 29 June 2016. Despite the strong affiliation with the Commission, there is only one example of a *CML Rev.* activity supported financially by the Commission. This was a colloquium on European law in 1979, to which the editors received 2700 British pounds from the Commission. (Minutes, meeting of the Editors, 30 April 1979, ACMLREV).

CML Rev. should take up the issue.⁴³³ As the procedure was an essential component of the European legal system, Ehlermann tried to use his editorship to promote Lester's stance in order to hinder an undermining of the European legal system, even though this constituted a severe criticism of the ECJ. This points to the strengthened closeness between the *CML Rev.* and the Commission, which Ehlermann's editorship constituted, and that this closeness was potentially at the expense of the ECJ in the power-knowledge nexus between academia, the Commission, and the ECJ.

The *CML Rev.* had been the only English-language European law journal in the 1960s, but in the 1970s, this changed. *Henry Schermers, who was a professor of institutional international law and the director of the institute at the time, founded Legal Issues of Economic Integration in 1974 at the Europa Institute at the University of Amsterdam.* The journal was however not a direct competitor, as the articles were primarily based on student papers in the first years, and as it had a more practical orientation than the *CML Rev.* In 1975, Sweet and Maxwell launched the journal *European Law Review*, aiming at embracing British practising lawyers and jurists in the administration, upon the split with the *CML Rev.* The birth of this journal did give rise to occasional considerations by the editors on staying differentiated, but to the editors' minds, the two journals had an entirely different nature. As the editors stated at a meeting in 1982, the purpose of the *European Law Review* was to keep readers informed, whereas the *CML Rev.* concentrated on the basic legal aspects of European Law.⁴³⁴ The *CML Rev.* did however not gain the rise in the number of subscribers after the accession of Great Britain, which could reasonably be expected. In 1965, the number of subscribers was about 1000, whereas the number was 1109 in 1975 and 1154 in 1979,⁴³⁵ and most likely, this limited rise was due to the creation of *European Law Review* and its ability to appeal to British practitioners. But the *CML Rev.* kept its position as the primary academic journal of European law.

B The Content (1974-83)

Most of the articles in the *CML Rev.* continued to focus on competition law, the relationship between Community law and national law, and international relations with third countries or organisations. The change of editors did thus not lead to grand changes concerning the topics;

⁴³³ Letter from Ehlermann to Schermers, 4 October 1983, ACMLREV. Although Henry Schermers, the managing editor, agreed with Ehlermann that the critique should be put forward in the *CML Rev.*, Lester's specific points never found its way to the journal (Letter from Schermers to Ehlermann, 17 October 1983, ACMLREV).

⁴³⁴ Minutes, meeting between editors, Advisory Board, and publishers, 11 November 1982, ACMLREV.

⁴³⁵ Minutes, meeting between editors, Advisory Board, and publishers, 30 November 1965, ACMLREV, Readership analysis 1975, and Minutes, meeting between editors, Advisory Board, and publishers, 27 June 1980, ACMLREV.

neither did it change the general outlook or doctrinal style of the journal. The debate on the nature of European law however changed. Whereas the authors primarily searched for a label to put on European law in the first period, the debate now evolved around national criticism of the ECJ's jurisprudence, to which the *CML Rev.* generally delivered counterattacks. National academics critically arguing that the ECJ acted as a constitutional court was contradicted. Most strongly in an article in 1974, where Donner stated that the ECJ and the interpretation of the treaties by 'nine old men' should not be confused with the activities in constitutional courts.⁴³⁶ If someone wanted to consider the Treaties as the Community constitution and see the Court as exercising a substantial constitutional power in handling those documents in a respectfully intelligent manner, this was only fine, as long as no one spoke of quasi-legislation or about government by judges.⁴³⁷ This was a response to quite common accusations of the ECJ acting as a 'government by judges' among national legal scholars in the 1970s, who linked the ECJ with judicial activism.⁴³⁸ Donner's article was symptomatic of a desire in the European law community to put a lid on these accusations of the ECJ going beyond its mandate. In very strong language, EC representatives and scholars commented rulings or procedures from national courts that did not comply with the ECJ's doctrines in the *CML Rev.* When Italian courts used the *lex posterior* principle or refrained from sending preliminary references, the jurist in the Legal Service Cesare Maestripieri for instance described it as heresies.⁴³⁹ Courts countering the ECJ's jurisprudence on direct effect of directives were likewise criticised heavily – especially the *Cohn-Bendit* ruling⁴⁴⁰ by the French Council of State in 1978.⁴⁴¹

In the period, the ECJ's development of the primacy doctrine and the national responses created a lot of academic fuzz. The aggressive '1967 ECJ' (led by the French Robert Lecourt from 1967 to 1976)⁴⁴² ruled that primacy of European law was unbound even by basic principles

⁴³⁶ A. Donner, 'The Constitutional Powers of the Court of Justice of the European Communities', (1974) 11 *Common Market Law Review*, 127-140, at 129-130.

⁴³⁷ *Ibid.*, at 140.

⁴³⁸ For instance the critical debate in Germany. See B. Davies, *Resisting the ECJ: Germany's Confrontation with European Law, 1949-1979* (Cambridge University Press, 2012).

⁴³⁹ C. Maestripieri, 'National Case Law', (1975) 12 *Common Market Law Review*, 431-442, at 441. See, also G. Bebr, 'A Critical Review of Recent Case Law of National Courts', (1974) 11 *Common Market Law Review*, 408-431; and J. Forman and T. Stevens, 'The Attitude of British Courts to Community Law, the First Three Years', (1976) 13 *Common Market Law Review*, 388-414.

⁴⁴⁰ Conseil d'Etat, *Minister of Interior v. Daniel Cohn-Bendit*, 1978, CMLR 545.

⁴⁴¹ See J. Kapteyn, 'Conseil d'Etat (Assemblée), Decision of 22 December 1978, Cohn-Bendit', (1975) 16 *Common Market Law Review*, 701-707. See also, G. Bebr, 'The Rambling Ghost of 'Cohn-Bendit': *Acte Clair* and the Court of Justice', (1983) 20 *Common Market Law Review*, 439-472.

⁴⁴² For an analysis of the '1967 ECJ', see M. Rasmussen and B. Davies, 'From International Law to a European Rechtsgemeinschaft: Towards a New History of European Law, 1950-1979' in J. Laursen (ed.), *Institutions and Dynamics of the European Community, 1973-83* (Nomos/Bloomsbury, 2014), 97-130.

in national constitutions in *Internationale Handelsgesellschaft* in 1970⁴⁴³. Since the Community itself had no robust rights regime and as Germany and Italy had developed strong traditions of inviolable rights protection after the years with totalitarian regimes,⁴⁴⁴ this ruling provoked a strong German reaction: in the so-called *Solange I* ruling in 1974⁴⁴⁵ the German Federal Constitutional Court (FCC) ruled that German fundamental rights were supreme as long as the Community did not have codified fundamental rights, and that German courts could review Community legislation in order to secure that it did not conflict with German fundamental rights. In anticipation of the FCC's ruling, the very productive jurist from the Legal Service Gerhard Bebr stated in the *CML Rev.* that it would have disastrous effects, if the FCC should follow the administrative tribunal in Frankfurt that referred the case to the FCC.⁴⁴⁶ In the same vein, the legal scholars Christoph Bail and Hagen Lichtenberg concluded that the ruling by the FCC was jeopardising the legal system of the Community.⁴⁴⁷ Other scholars were more ambiguous in their statements in *CML Rev.*,⁴⁴⁸ which reflected the broad discussion of supremacy in the national legal fields at the time, especially in Germany,⁴⁴⁹ but the aggressive claim of the ECJ on ultimate primacy was generally welcomed in the *CML Rev.*, and national courts who resisted were scolded. There was thus agreement on the need for a transnational academic bulwark against national academics and courts with the wrong 'beliefs', which could endanger the legal order built by the ECJ.

⁴⁴³ Case 11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114.

⁴⁴⁴ B. Davies, 'Pushing Back: What Happens When Member States Resist the European Court of Justice? A Multi-Modal Approach to the History of European Law', (2012) 21 *Contemporary European History*, 417-437, at 418-419. The ECJ had only promised to protect the inspiration it could draw on rights from 'the constitutional traditions common to the Member States'. See Case 29/69, *Stauder*, ECLI:EU:C:1969:57 and Case 04/73 *Nold*, ECLI:EU:C:1974:51.

⁴⁴⁵ BVerfGE 37, 271 *Solange* decision of 29 May 1974, 2 CMLR 540.

⁴⁴⁶ G. Bebr, 'Community Regulations and National Law (Critical Comments on Recent Decisions of National Courts)' (1973) 10 *Common Market Law Review*, 87-101, at 98.

⁴⁴⁷ C. Bail and H. Lichtenberg, 'German Case Law (The Application of Community Law in Germany; Bundesverfassungsgerecht)', (1975) 12 *Common Market Law Review*, 275-307, at 307.

⁴⁴⁸ See, for instance, M. Zuleeg, 'Fundamental Rights and the Law of the European Communities', (1971) 8 *Common Market Law Review*, 446-474. Zuleeg, who generally appreciated the ECJ's steps towards the development of the European legal order based on fundamental rights, stated that the national courts still had the ultimate control regarding protection of fundamental rights, since the courts had to obey their national constitutions limiting the scope of domestic applicability of Community Law.

⁴⁴⁹ For an analysis of the German *Solange* debate, see Davies, *Resisting the ECJ*, and B. Davies, 'Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and *Solange* in its Intellectual Context', (2015) 21 *European Law Journal*, 434-459.

A Break with the Commission and the Breakthrough of the Constitutional Paradigm (1983-93)
A Editorial Organisation, Community Affiliations, and Commercial Development

Ehlermann, Winter, Schermers, and Simmonds continued as editors in the 1980s.⁴⁵⁰ After a transition from the University of Amsterdam to the University of Leiden, Henry Schermers, the founder of *Legal Issues of Economic Integration*, became the director of the Europa Institute in Leiden and the managing editor of the *CML Rev.* in 1978. He had a close relationship with Ehlermann, and during Schermers' time, David O'Keeffe, the legal secretary to the ECJ Judge O'Higgins, became an editor in 1985.⁴⁵¹ O'Keeffe had been the secretary of the *CML Rev.* and a lecturer at the Europe Institute in Leiden in the early 1980's and was consequently familiar with the enterprise and the other editors. In 1985, he was invited to become an editor, as his position at the ECJ would enable him to provide a more up-to-date case law section in the journal.⁴⁵² However, he would also serve as the link between the ECJ and the *CML Rev.* in other ways, as he could report when the judges were displeased with articles. In 1990, he wrote to the associate editor Alison McDonnell⁴⁵³ that a specific article had been 'severely criticised by persons at the court', and that 'we should be more careful about our screening...'.⁴⁵⁴ Through O'Keeffe, the ECJ thus had a voice in the board of editors of the *CML Rev.*, but the fact that the judges in the ECJ had to raise their voice in the first place reveals that the *CML Rev.* was not automatically in sync with the interests of the judges.

Ehlermann stopped as an editor of the *CML Rev.* in 1990, but continued to be affiliated with the journal as a member of the Advisory Board. At the same time, the editors began to consider that the close connection to the Commission should be used carefully. At a meeting between the editors Roth, Schermers, Slot, and Winter (with Timmermans and O'Keeffe absent) concerns were raised that Commission jurists were not always as critical as might be hoped, and it was agreed that the editors should be careful to encourage people from the Commission to write for the *CML Rev.*⁴⁵⁵ European law academia had obviously reached a stage of professional maturity, where the link to the Community institutions had to be evaluated.

The transnational landscape of European law academia changed significantly in the period, as did the theoretical approach to European law. When the European University Institute (EUI)

⁴⁵⁰ The only editors to join in the 1980s were Fried J. W. Löwenstein (1984-1987) and David O'Keeffe (1985-2003).

⁴⁵¹ Minutes, meeting of the Editors, 26 March 1985, ACMLREV.

⁴⁵² Letter from Curtin to Simmonds, 2 April 1985, ACMLREV.

⁴⁵³ Alison McDonnell became an associate editor of the *CML Rev.* in 1990.

⁴⁵⁴ Letter from O'Keeffe to McDonnell, 5 July 1990, ACMLREV.

⁴⁵⁵ Minutes, meeting of the Editors, 26 June 1992, ACMLREV.

was erected in 1976, the field was provided with its first transnational research unit, and the Law Department of this unit developed into the most significant forum of European law. Not least because of the gigantic research project ‘Integration through Law’ (ITL) directed by the comparative law professor Mauro Cappelletti and his young apprentice Joseph Weiler in close coordination with Ehlermann from 1978 and onwards and published 1985-1988.⁴⁵⁶ Along with Eric Stein’s comparative studies of the European legal order,⁴⁵⁷ the ITL project launched a contextual and comparative approach to European law infused with a constitutional understanding of European law based on a comparison with American constitutional law, which came to shape not only the EUI, but the entire transnational discipline of European law in the 1980s. One concrete result of this change was the foundation of *European Law Journal* at the EUI by, among others, Weiler and Francis Snyder (editor-in-chief of the new journal) in 1995, which aimed at expressing and developing the study and understanding of European law in its social, cultural, political, and economic contexts.⁴⁵⁸ On the theoretical level, a result of great importance was the consolidation of the constitutional narrative as a proper paradigm in European law academia.⁴⁵⁹ In light of the Single European Act (SEA) in 1986, the constitutional understanding of European law promoted by Cappelletti and Stein made sense not only as an argument of law, but as an argument about the nature of the Community,⁴⁶⁰ and European law scholars increasingly based their studies on the explicit constitutional approach to European law. The ECJ itself referred to the treaties’ constitutional nature and described them as the constitutional charter of European law in the *Les Verts* ruling in 1986,⁴⁶¹ thus formally subscribing to the notion. Finally, the emergence of critical stance to the ECJ and its jurisprudence was interlinked with the contextual and comparative approach. Hjalte Rasmussen, who claimed that the ECJ was activist in his 1986 monograph *On Law and Policy in the European Court of Justice*, initiated this development.⁴⁶²

These changes in the field posed a challenge to the existing European law journals such as the *CML Rev.* with its traditional and doctrinal style. The European law journals had been the constituting elements of the discipline of European law, forming a foundation of the

⁴⁵⁶ M. Cappelletti, M. Seccombe, and J. Weiler (eds.), *Integration through Law. Europe and the American federal experience* (Walter de Gruyter, 1985-88).

⁴⁵⁷ See T. Sandalow and E. Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe*, (Clarendon Press, 1982) and E. Stein, ‘Lawyers, Judges and the Making of a Transnational Constitution’, (1981) 75 *American Journal of International Law*, 1-27.

⁴⁵⁸ F. Snyder, ‘Editorial’, (1995) 1 *European Law Journal*, 1-4, at 1.

⁴⁵⁹ For an initial history of the ‘discourse’, see Boerger and Rasmussen, ‘Transforming European Law’.

⁴⁶⁰ *Ibid*, at 222.

⁴⁶¹ Case 294/83, *Les Verts*, ECLI:EU:C:1986:166.

⁴⁶² H. Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff, 1986).

development of an independent academic space, and the implicit theoretical approach of the *CML Rev.* building on a constitutional interpretation of European law had been immensely successful in the field – even Sweet and Maxwell’s practitioner’s journal, *European Law Review*, slowly adapted to this approach. But in the 1980s, ambitious academic projects propelled the discipline forward with their explicit constitutional interpretation, contextualisation, and critical stance.⁴⁶³

B *The Content (1983-93)*

In the period, the most popular topics in the journal were still competition law and the relationship between Community law and national law. The SEA was unsurprisingly given vast attention in the journal in the mid 1980s, as was the political cooperation and developments towards the European union in the beginning of the 1990s. Furthermore, the debate on how to perceive the nature of European law was revitalised in the *CML Rev.* in the 1980s. In 1983, Eric Stein wrote a status report on the European Community in the journal, where he recaptured his now famous claim from 1981 that the European legal order had ‘inchoate, quasi-federal features’, comparable to the legal order of the United States, and could be regarded as a system of constitutional law.⁴⁶⁴ Whereas most writers promoting European law as constitutional in the *CML Rev.* had used a teleological approach in the previous decades, Stein pointed to this approach and presented his own claim as a scientific and contextual analysis of actors and interests, where he concluded that the stature of the ECJ had increased beyond the expectation of the founding fathers of the Community.⁴⁶⁵ Throughout the 1980s, this explicit constitutional understanding of European law was repeated in different forms in the *CML Rev.* by a number of community actors⁴⁶⁶, law students⁴⁶⁷, and by Joseph Weiler, who had become one of most prominent Community law scholars by the time.⁴⁶⁸ In 1989, Federico Mancini, judge at the ECJ, subscribed to Stein’s claim in an article with the noticeable name ‘The Making of a Constitution

⁴⁶³ Unfortunately, the archive of the *CML Rev.* does not entail information on subscriber numbers in the 1980s. Thus, it is not possible to provide an empirically based hypothesis on how the development of the discipline affected the level of subscribers.

⁴⁶⁴ E. Stein, ‘The European Community in 1983: A less Perfect Union’, (1983) 20 *Common Market Law Review*, 641-656, at 643.

⁴⁶⁵ *Ibid.*, at 653.

⁴⁶⁶ See, for instance, R. Bieber, ‘The Settlement of Institutional Conflict on the Basis of Article 4 of the EEC Treaty’, (1984) 21 *Common Market Law Review*, 505-523 and G. Bebr, ‘The Reinforcement of the Constitutional Review of Community Acts under Article 177 EEC Treaty’, (1988) 25 *Common Market Law Review*, 667-691.

⁴⁶⁷ Russel, M.D., ‘An Overview of European Community Protection of Human Rights, with Some Special References to the U.K.’, (1990) 27 *Common Market Law Review*, 761-790.

⁴⁶⁸ J.P. Jacque, and J.H.H. Weiler, ‘On the Road to European Union - A New Judicial Architecture: An Agenda for the Intergovernmental Conference’, (1990) 27 *Common Market Law Review*, 185-207.

for Europe', elaborating in public on the ECJ's open embrace of the constitutional law definition in 1986.⁴⁶⁹ Mancini quoted Stein's article from 1981 and wrote that the main endeavour of the ECJ had been to strive for a constitutionalisation of the Treaty in order to fashion a constitutional framework for a federal-type structure in Europe.⁴⁷⁰ In Mancini's account, this kind of judicial activism was justified by the circumstances, namely the conditions prevailing during the 'Gaullist revolt and dark age of stagnation that followed', and in the end, what mattered was the achievements by the Court, not the aim in the Rome Treaty.⁴⁷¹

The explicit constitutional understanding of European law had clearly become paradigmatic in the field, and very few authors promoted counter-narratives.⁴⁷² However, the editors of *CML REV.*, especially Schermers, did however not feel a need to label European law 'constitutional', or the ECJ a constitutional court. Echoing the ECJ in the 1960s, Schermers throughout the 1980s promoted the understanding that the ECJ had created a 'separate legal order'. The deficiencies of international law did not apply to this order, as the ECJ, and not the governments of the Member States, controlled it, and as those who were affected by it could invoke it.⁴⁷³ But, Schermers was not a promoter of unconditional primacy of the ECJ, as the revitalised discussion on primacy in late 1980s shows. This discussion was fuelled by the *Solange II* ruling by the FCC in 1986,⁴⁷⁴ the ruling in *Fragd* by the Italian Constitutional Court in 1989,⁴⁷⁵ and the general resistance in the ECJ towards being subjected to review by the European Court of Human Rights, if the European Community was to accede to the European Convention of Human Rights.⁴⁷⁶ This led several authors in the *CML Rev.* to recommend a system with eventual ultimate

⁴⁶⁹ F. Mancini, 'The Making of a Constitution for Europe', (1989) 26 *Common Market Law Review*, 595-614.

⁴⁷⁰ *Ibid.*, at 596.

⁴⁷¹ *Ibid.*, at 596 and 612.

⁴⁷² A noteworthy exception is Koen Lenaerts, at the time professor of European law and private international law at the University of Leuven, ECJ judge 2003-2015, and president of the ECJ since 2015, who insisted that the European Communities were institutions of public international law, because of their creation by treaty. The fact that the content - as interpreted according to object and purpose - could appear to be the functional equivalent of a constitution, was irrelevant in that respect (K. Lenaerts, 'Application of Community Law in Belgium', (1986) 23 *Common Market Law Review*, 253-286, at 254).

⁴⁷³ H. Schermers, 'The Direct Application of Treaties with Third States: Note concerning the Polydor and Pabst Cases', (1982) 29 *Common Market Law Review*, 563-569, at 565; 'Editorial Comments: EC-EFTA Court?', (1989) 26 *Common Market Law Review*, 341-344, at 342; and H. Schermers, 'The European Communities Bound by Fundamental Human Rights', (1990) 30 *Common Market Law Review*, 249-258, at 256 and 258.

⁴⁷⁴ BVerfGE 73, 339 *Solange II* decision 22 October 1986, 3 CMLR 225. The FCC stated that it would not review Community legislation as long as effective protection of fundamental rights was guaranteed at the European level, but that it could overrule the ECJ if protection of these rights required it.

⁴⁷⁵ Corte Costituzionale, *Fragd*, 232/1989, Foro italiano, I, 1990, 1855. The Italian Constitutional Court ruled that Community law could not be applied in Italy if it infringed a fundamental, Italian principle concerning fundamental rights.

⁴⁷⁶ Davies, 'Pushing Back', at 433. Davies documents that Hans Kutscher, the president of the ECJ from 1976 to 1980, and the ECJ provided the final nail in the coffin of the question the accession to the European Convention of Human Rights. See, also Opinion 1/91, ECLI:EU:C:1991:490, where the ECJ held that the EU had no competence

safeguards in extreme situations on the national level⁴⁷⁷ or in the European Court of Human Rights, as pointed out by Schermers, who additionally argued that:

‘When the Community was young and vulnerable and not yet generally accepted we fought for the powers of the Court of Justice. Uniformity of Community law, even the creation of Community law as a legal system required unrestricted authority of the Community Court. But has the situation not changed? Now that the Court of Justice has authority and a substantial amount of power, are there no reasons which may justify some control over it?’⁴⁷⁸

This critical perspective on one of the most radical claims of the ECJ was accompanied by other kinds of criticism of the ECJ in the *CML Rev.* varying from minor critique of technical legal matters in specific cases, the legal reasoning, and specific rulings, to the power of the Court in general.⁴⁷⁹ Whereas criticism of the ECJ had been common in national legal circles since the establishment of the Court, it was new in the European law journals, and this reflected a genuine change in European law academia and a development towards professional maturity in the form of rising independence from the ECJ and its interpretation of European law. An episode in 1992 illustrates this. As the editors asked Weiler for an advice on a very critical article considered for publication in *CML Rev.*, he wrote back: ‘Since, on the whole, there is far too little criticism of the European Court of Justice I think for this reason alone it is worth publishing their piece.’⁴⁸⁰ At the beginning of the 1990s, European law academia did thus not automatically bow in the dust for the Community institutions. The quote by Schermers is revealing in this regard – the European law scholars had protected the ECJ and its attempt to build a legal order during the 1960s and 1970s because of the vulnerability of the project. In the 1980s, the ECJ had manifested the legal order and its own power; thus, the time was ripe for criticism and control of the mighty ECJ.

to enter into international agreements that would permit a court other than the ECJ to make binding determinations about the content or validity of EU law (see S. Douglas-Scott, ‘The European Union and the Human Rights after the Lisbon Treaty’, (2011) 11 *Human Rights Law Review*, 645-682, at 662).

⁴⁷⁷ J. Frowein, ‘Solange II (BVerfGE 73, 339). Constitutional complaint Firma W’, (1988) 25 *Common Market Law Review*, 201-206, at 204.

⁴⁷⁸ H. Schermers, ‘The Scales in Balance: National Constitutional Court v. Court of Justice’, (1990) 27 *Common Market Law Review*, 97-105, at 103.

⁴⁷⁹ Hjalte Rasmussen’s famous claim that the ECJ was activist in his 1986 book was first rejected in a review by Weiler. Normally, book reviews had a length of 2-3 pages, but Rasmussen’s book was granted a review consisting of a 34-page review article, where Weiler rejected Rasmussen’s methodology and basic assumptions (J. Weiler, ‘The Court of Justice on Trial: A Review of H. Rasmussen: On Law and Policy in the European Court of Justice’, (1987) 24 *Common Market Law Review*, 555-589).

⁴⁸⁰ Letter from Weiler to McDonnell, 9 March 1992, ACMLREV.

Conclusion

The *CML Rev.* in many respects became the journal, which Gaudet had dreamt of in the beginning of the 1960s, but failed to create. The journal was established as a traditional academic-commercial enterprise, but the tight power-knowledge nexus between a small circle of central Community actors and the academic editors shaped the journal more than the commercial interests of the publishers. With a fervent ideological dedication to their cause, the team of editors of the *CML Rev.* and their contacts in the Commission and the ECJ orchestrated legitimisation of ECJ's jurisprudence and academic endorsement of European law as a new, special kind of law in line with the constitutional vision of Gaudet, although more cautious notions were used. This was central in carving out a transnational academic space for European law.

During Ehlermann's editorship, which quite naturally led to closer ties to the Commission, national academics or national courts that did not comply with the jurisprudence of the ECJ were met with massive criticism in the journal. The counterattacks reflected the agreement in European law academia on the need for a transnational bulwark against criticism from the Member States, which contested the development of European law, but they also reflected Ehlermann's political use of his editorship. With the interests of the Commission in mind, he used his position in the journal to push for national compliance. But interestingly, he also occasionally tried to use the journal and its potential ability to express academic criticism of the ECJ as a strategic tool vis-à-vis the court.

In the 1980s, Gaudet's hopes for a constitutional understanding of European law were fulfilled in academia with the breakthrough of the constitutional paradigm. While the *CML Rev.* had always implicitly promoted this understanding, the impetus for the breakthrough of the paradigm with its explicit use of terms such as 'constitutional', 'constitutionalisation', and 'federal' came from ambitious academic projects, namely the ITL and Eric Stein's Bellagio project. Despite the contextual and critical approaches used in these projects, the constitutional understanding of European law was embraced whole-heartedly by the main actors, who thus merged legal vision and academic representation. The effect on the transnational discipline of European law was enormous, also on the *CML Rev.*, where many authors bought into the understanding. Schermers however kept defining European law as a separate legal order, and he encouraged some control of the ECJ in the shape of an ultimate safeguard in the ECHR. Additionally, the self-awareness grew, and by the by the 1990s, the editors became careful in encouraging representatives from the Commission to write for the *CML Rev.* The journal had reached a stage of professional

maturity, which required a level of independence from the Community institutions.

Despite the impact of the journal, its status now changed. In the previous decades, the *CML Rev.* had been an academic lighthouse with a fundamental importance for the creation of a scholarly field of European law. Now, other forces drove the field forward.

This analysis substantiates the claim of Vauchez and Boerger/Rasmussen on the historical origin and function of the transnational discipline of European law and the significant role of actors from the Community institutions. Indeed, the *CML Rev.* was established and managed in coordination between academia and the Community institutions, and to a large extent the journal legitimised the jurisprudence of the ECJ and differentiated European law from international law, even though the FIDE and the Commission did not finance or help to found the enterprise, as claimed by Alter. At the same time, the historical analysis provides important contributions to understanding the correlation between the institutional development of European law and the scholarly battle on how to receive it. Drawing on substantial and hitherto unexplored archival material, the analysis crystallises three phases in the development of the discipline. In the foundational phase, the constitutional vision was promoted and reinforced by the nascent European law academia consisting of academics and actors, which were sequentially or simultaneously scholars, politicians, and employed in national or European institutions. Treading cautiously, labels such as ‘new’ and ‘special’ were used to denote European law, but in substance both the ECJ’s jurisprudence and the academic interpretations resembled Gaudet’s constitutional vision. In the second phase, this vision and its legal implications in the ECJ’s jurisprudence were defended in the fight with national courts and academia opposing the attempted constitutionalisation. Finally, coinciding with the breakthrough of the constitutional paradigm, the discipline matured in the third phase. The tight power-knowledge nexus between the discipline and the Community institutions loosened, when scholars developed a critical stance as a part of a professional development. Key figures in transnational academia now rejected the most radical claims of the ECJ on the ultimate authority in the European legal system by recommending a system with eventual ultimate safeguards in extreme situations on the national level or in the ECHR. The reflection on the matter by Schermers suggests an acknowledgement in the transnational field of European law at the time: the young Turks had fought hard for the realisation of a European legal system freed from the conceived deficiency of international law. Perhaps too hard?

The History of the Integration through Law Project

Creating the Academic Expression of a Constitutional Legal Vision for Europe

Introduction

Every scholar of the European Union (EU) knows the seven green voluminous books with the title *Integration through Law* (ITL) printed with white letters on the back.⁴⁸¹ Based on a gigantic research project directed by the world-famous professor of comparative law Mauro Cappelletti, these books were the launching pad for the ITL theory arguing that law and the European Court of Justice (ECJ) constituted the key dynamics in the European integration process and that European law had a constitutional nature. The publication of the books from 1985 to 88⁴⁸² coincided with the establishment of the Internal Market following the Single European Act (SEA), which made the ITL theory seem to perfectly match the new development of the Community. As a result, a topic as arcane and inaccessible as European law became popular in the booming field of EU studies, where an entire generation subscribed to the ITL theory as a guiding research hypothesis in the 1990s and 2000s. The ITL's key proponent, Joseph Weiler, became an academic superstar, and the Law Department of the European University Institute (EUI), where the ITL project had been conducted by Mauro Cappelletti, evolved into a think tank of the Community. No wonder that the 25th jubilee of ITL publications was celebrated with an anthology edited and written primarily by former EUI PhD students, who reproduced or relied on the ITL theory and concluded that the significance of the ITL project for European studies is enduring.⁴⁸³

While the mother ship of ITL scholarship has received a historical celebration, a proper analysis of the ITL project's history is still missing. This is an important gap in the recent

⁴⁸¹ The article has been accepted for publication in *German Law Journal* (forthcoming, 2017). I would like to thank Morten Rasmussen, Joseph Weiler, Claus-Dieter Ehlermann, Monica Seccombe, Peter Hay, Matej Avbelj, Stefan Vogenauer, Mark Pollack, Marise Cremona, Robert Schuetze, and my research group 'Towards a New History' of European Public Law for comments, which improved this article significantly.

⁴⁸² M. Cappelletti, M. Seccombe, and J. Weiler (general eds), *Integration through Law. Europe and the American Federal Experience* (Walter de Gruyter, 1985-1988). Volume 1: M. Cappelletti, M. Seccombe, and J. Weiler (eds.), *Methods, Tools and Institutions*. Book 1: *A Political, Legal and Economic Overview*; Book 2: *Political Organs, Integration Techniques and Judicial Process*; Book 3: *Forces And Potential For A European Identity*; Volume 2: E. Rehbinder and R. Stewart, *Environmental Protection Policy* (1985); Volume 3: T. Bourgoignie and D. Trubek, *Consumer Law, Common Markets And Federalism In Europe And The United States* (1987); Volume 4: R.M. Buxbaum and K.J. Hopt, *Legal Harmonisation And The Business Enterprise* (1988); Volume 5: T. Daintith and S.F. Williams, *The Legal Integration of Energy Markets* (1987).

⁴⁸³ See, for instance, D. Augenstein and M. Dawson, 'Introduction: What Law for What Polity? 'Integration through Law' in the European Union Revisited' in D. Augenstein (ed.) *'Integration through Law' Revisited. The Making of the European Polity* (Ashgate, 2012), 1-10.

historical research tracing and exploring the development of European law,⁴⁸⁴ which offers potential for reassessing questions about the origins, evolution, and contemporary implications of the EU's legal structures⁴⁸⁵ with a special focus on the constitutional practice.⁴⁸⁶

With these aims in mind, this article provides the first historical analysis of the IIL project. Primarily based on the hitherto unexplored private archive of Cappelletti,⁴⁸⁷ it illuminates the origins of the IIL theory, the synergy between the development of the IIL project and the EUI Law Department, the collaboration between Cappelletti and key actors from the Community institutions, and it provides initial reflections on the impact of the project. The central question is whether the IIL project is an academic legitimisation of controversial claims promoted in the 1950s-1970s by jurists from the Community institutions, such as Michel Gaudet, the director of the Legal Service of the Commission of the EEC from 1958 to 1969, Walter Hallstein, president of the Commission from 1958-1967, and Pierre Pescatore, ECJ judge from 1967-1985. These jurists dreamt of a European federation, but as the political impetus was missing, they promoted ideas on the constitutional nature of the European legal order and the integrating potential of law in order to build a 'Community of law'.⁴⁸⁸

Excellent researchers have already provided initial answers to the central question. Matej Avbelj pointed to the 'double nature' of IIL and argued that there was a clear separation between a 'policy conception of IIL' and the academic IIL project conceived and carried out at the EUI. He noticed the overlaps between proponents and claimed that the academic project was to some

⁴⁸⁴ The historiography of European integration has ignored the role of law, but recently a network of historians has begun researching European law. In the auspices of the University of Copenhagen, the collective research project 'Towards a New History of European Public Law' directed by Associate Professor Morten Rasmussen has provided new historical insights on the jurisprudence of the ECJ, the role of the EC institutions, the reception of European law in the Member States, and European law academia. The present author is a part of this network of historians and has been a part of the collective research project, which was formally concluded in 2016.

⁴⁸⁵ B. Davies, *Why EU Legal History Matters-A Historian's Response*, (2013) 28, n. 5., *American University International Law Review*, 1337-1355, at 1355.

⁴⁸⁶ This term 'constitutional practice' is preferred to the notion 'constitutionalisation', as the widely accepted claim that the ECJ actually 'constitutionalised' the treaties is questioned on the background of the continued contestation by national elites containing the impact of the ECJ case law in the key Member States. The 'constitutional practice' refers to the practice of the ECJ rooted in the doctrines of direct effect and primacy that built on a constitutional reading of European law, although the ECJ avoided the contested notion 'constitutional' in the *Van Gend en Loos* and *Costa v ENEL* rulings. (See, especially, M. Rasmussen, 'Rewriting the History of European Public Law: The New Contribution of Historians', (2013) *American University International Law Review*, 1187-1221, at 1218-1221; M. Rasmussen and B. Davies, 'From International Law to a European Rechtsgemeinschaft: Towards a New History of European Law, 1950-1979' in J. Laursen (ed.), *Institutions and Dynamics of the European Community, 1973-83* (Nomos/Bloomsbury, 2014) at 129-130; A. Boerger and M. Rasmussen, 'Transforming European Law: The Establishment of the Constitutional Discourse', (2014) 10 *European Constitutional Law Review*, 199-225, at 210)

⁴⁸⁷ The archive has recently been transferred to the Historical Archives of the European Union (HAEU), where files up until 1983 will be made accessible. I would like to thank Dieter Schlenker, director of the HAEU, for cooperation regarding access to the archive.

⁴⁸⁸ See, for instance, W. Hallstein, 'La Communauté européenne, nouvel ordre juridique' in *Les Documents De La Communauté Européenne* 27, 5 (Communautés européennes. Service de presse et d'information, 1964).

degree an activity of a critical self-examination revealing the main underlying assumption of the policy conception. The principal orientation of the academic ITL project was nevertheless scientific rather than concerned with promoting a particular vision of European integration by instrumental reliance on law, according to Avbelj.⁴⁸⁹

A recent strand of sociological and historical research on the constitutional paradigm constitutes an opposition to Avbelj's claim. The political scientist Antoine Vauchez and the historians Anne Boerger and Morten Rasmussen have pointed to the political and ideological motivation behind both the creation of the constitutional discourse by Community jurists as well as the academic constitutional reading of European law. In somewhat parallel analyses, they trace the origins of the constitutional discourse to Hallstein and Gaudet, but they emphasise different actors with regard to the academic breakthrough of the constitutional paradigm. Vauchez describes the Law Department of the EUI as the epicentre of the new paradigm of constitutionalism,⁴⁹⁰ whereas Boerger and Rasmussen underline the importance of Eric Stein in the academic breakthrough.⁴⁹¹ According to Boerger and Rasmussen, Weiler built on Stein's work and transformed the discourse into the prevailing paradigm.⁴⁹²

Additionally, in an epilogue in the 25th ITL jubilee anthology Weiler stated that the ITL project played 'an appreciable role' in a qualitative transformation of the academic and intellectual milieu of European Law not just as a published set of books, but also as an educational and scholarly milieu, and an intellectual and academic happening. But he also stated that the Achilles' heel of the academic ITL project was its normativity. Fundamental critique of the European project was therefore muted, elliptic, concealed. Weiler attributed this to Cappelletti's personal idealism, which made him believe in convergence of legal systems and the higher law of human rights, rather than the 'messy and oft ugly vicissitudes of democratic politics'.⁴⁹³

Regarding the central question in this article, the value of the existing literature is limited for different reasons. Avbelj's analysis is short and primarily based on academic ITL literature from 1999 and forth. Vauchez and Boerger/Rasmussen rely on an impressive amount of different

⁴⁸⁹ M. Avbelj, 'The Legal Viability Of European Integration' in D. Augenstein (ed.) *'Integration through Law' Revisited. The Making of the European Polity* (Ashgate, 2012), 29-46, at 38.

⁴⁹⁰ A. Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press, 2015), at 201-4.

⁴⁹¹ See Boerger and Rasmussen, 'Transforming European Law'. Vauchez has furthermore emphasised Robert Lecourt, Hallstein, and Pescatore as the original promoters of the idea of the primary role of law in the integration process, an aspect that is missing in the account of Boerger and Rasmussen. (A. Vauchez, *Brokering Europe* and A. Vauchez, 'Integration-Through-Law'. Contribution to a socio-history of eu political commonsense' (EUI Working Paper, 2008/10).

⁴⁹² Boerger and Rasmussen, 'Transforming European Law', at 220.

⁴⁹³ J. Weiler, 'Epilogue' in D. Augenstein (ed.) *'Integration through Law' Revisited. The Making of the European Polity* (Ashgate, 2012), 175-179.

empirical sources, but the IITL project is only treated superficially. The estimation by Weiler is useful information from one of the central actors of the IITL project, but he does not define the normativity of the IITL. He simply states that integration was considered good. All in all, the existing literature falls short of delivering a thorough answer to the question on the relation between the community jurists' policy argument on the constitutional nature of European law and the primary role of law in the integration process and the IITL project. Understanding this relation is central to illuminating the nature of the power-knowledge nexus between academia, the Commission, and the ECJ in European law.

Mauro Cappelletti and his Quest for Justice

Cappelletti's story is a remarkable one. The scholarly quest for justice and effective rights, which according to his associates was at the core of his research,⁴⁹⁴ had its roots in personal experiences of his early life. Born in 1927 in Trento, Cappelletti was still a boy at the outbreak of the Second World War, but he nevertheless left home to join the partisans of 'Justice and Liberty' and their fight against fascism, acting as a messenger. In the mountains around Trento, he met a leader of the resistance, the law professor Piero Calamandrei, who would have an enormous influence on Cappelletti's life. Calamandrei was a scholar of civil procedure, who had a profound belief in courts and written constitutions as a bulwark against infringements of the rights of the people.⁴⁹⁵ When Calamandrei was appointed rector of the University of Florence in 1943, Cappelletti followed him and began studying law and philosophy.⁴⁹⁶ In the academic life to follow, Cappelletti would remain devoted to the core learning of Calamandrei on the ability of constitutions and constitutional courts to protect rights, and he would share the passion for the common law tradition.⁴⁹⁷

After his graduation, Cappelletti practiced law, conducted post-doctoral studies on judicial protection of civil rights in Freiburg,⁴⁹⁸ and held a professorship in civil procedure at the

⁴⁹⁴ J. Weiler, 'A Self-interview: Remembering Mauro Cappelletti – 10 Years To His Death' (<http://www.eui.eu/Documents/DepartmentsCentres/Law/Conferences/HeritageCappelletti/WeilerASelfInterview.pdf>) and interview with Monica Seccombe, 11 May 2013.

⁴⁹⁵ G. Calabresi, 'Introductory Remarks to Mauro Cappelletti, Repudiating Montesquieu? The Expansion and Legitimacy of 'Constitutional Justice'', (1985) 35, n. 1, *Catholic University Law Review*, 1-32, at 1-2 and E. Grande, 'Development of Comparative Law in Italy' in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook Of Comparative Law* (Oxford University Press, 2006), 108-125, at 112.

⁴⁹⁶ EUI Activities Report, Second Academic Year 1977-78, 13, Historical Archives of the European Union, Archive of Mauro Cappelletti (HAEU, MC)

⁴⁹⁷ See, for instance, K. Economides, 'Remembering Mauro Cappelletti' (<http://www.eui.eu/Documents/DepartmentsCentres/Law/Conferences/HeritageCappelletti/Cappelletti-EUIRev-KE.pdf>) and Grande, 'Development of Comparative Law in Italy', at 112.

⁴⁹⁸ Curriculum Vitae (with list of principal publications), HAEU, MC.

University of Macerata (1957-62), before he in 1962 came back to assume a professorship at the University of Florence, where he founded the Institute of Comparative Law.⁴⁹⁹ Here, he led a group of reformist comparativists in Italy, who insisted that comparative law had a mission to improve society through policy-making and suggesting solutions to transforming the society, in opposition to comparative legal scholars pursuing ‘pure knowledge’.⁵⁰⁰ It quickly became a magnet for young scholars of comparative law from all over the world. Drawn by the scholarly and personal reputation of Cappelletti, these scholars met and worked with Cappelletti’s approach to law.⁵⁰¹

Cappelletti’s contempt for scholars pursuing pure knowledge was shared with a close American associate of Cappelletti’s. In 1962 in Florence, Cappelletti met John Merryman from the University of Stanford, and Cappelletti described it as a ‘magic encounter’,⁵⁰² where they discovered a common eagerness to fight anti-realistic legal scholarship. Cappelletti’s approach to legal studies was in this way given legitimacy by Merryman, who was ‘imbued with American realism’⁵⁰³ and represented the movement towards interdisciplinary, contextual studies, which developed in the US in the 1960s.⁵⁰⁴ Through Merryman, Cappelletti developed a close tie to the American legal scholarly milieu, which culminated when Cappelletti took a professorship at Stanford in 1970, while keeping his chair in Florence.⁵⁰⁵ In the US, Cappelletti’s interest in the constitutional law of the US (especially regarding human rights protection and the role of the Supreme Court) was deepened.⁵⁰⁶ In terms of theory and method, Cappelletti was no doubt inspired by his American colleagues at Stanford⁵⁰⁷ when conducting interdisciplinary studies and insisting that rules, processes, and institutions should be seen in their societal and political context.⁵⁰⁸ These preferences were clear in Cappelletti’s first major international research project, namely the Access To Justice project initiated in 1973. It was a world survey of requirements for access to justice and the institutions, standards, and techniques to meet these requirements. Lawyers, sociologists, anthropologists, economists, and policymakers from five continents

⁴⁹⁹ EUI Activities Report, Second Academic Year 1977-78, at 13, HAEU, MC.

⁵⁰⁰ Grande, ‘Development of Comparative Law in Italy’, at 117.

⁵⁰¹ N. Trocker, ‘Mauro Cappelletti’, in M. Storme (ed.), *In Honorem Mauro Cappelletti (1927-2004): Tribute To An International Procedural Lawyer* (Kluwer Law International, 2005), at 14.

⁵⁰² M. Cappelletti, ‘In Honour of John Henry Merryman’, (1987) 39 *Stanford Law Review*, 1079-1101, at 1079.

⁵⁰³ *Ibid.*, at 1080.

⁵⁰⁴ For a description of the turn in American legal scholarship, see A. Arnull, ‘The Americanization of EU Law Scholarship’, in A. Arnull et al. (eds.), *Continuity and Change In EU Law: Essays In the Honour of Sir Francis Jacobs* (Oxford University Press, 2008), 415-431.

⁵⁰⁵ Curriculum Vitae, HAEU, MC.

⁵⁰⁶ Interview with Monica Seccombe, 11 May 2013.

⁵⁰⁷ Cappelletti also had institutional affiliations with Harvard (visiting professorship in 1969) and Berkeley (visiting professorship in 1970).

⁵⁰⁸ See Trocker, ‘Mauro Cappelletti’.

collaborated with national reports, which Cappelletti synthesised. In Cappelletti's own words, it was an attempt to understand the social dimension of the current epoch, and it was an outspoken aim to impact policy makers.⁵⁰⁹ A few years later at the EUI, Cappelletti would initiate a new grand research project on access to justice within the transnational dimension – the ITL project.⁵¹⁰

EUI and New Perspectives for a Common Law of Europe

Max Kohnstamm, former Secretary-General in the European Coal and Steel Community and Vice-Chairman of the Monnet Committee, had just been appointed principal of the future EUI in Florence, when he received a letter from Cappelletti.⁵¹¹ The two men were not acquainted, but Cappelletti wanted to inform Kohnstamm how pleased he was with the appointment, as Cappelletti admired Kohnstamm's enthusiasm and tenacity in his endeavours for a new United Europe. Cappelletti moreover had a firm belief in the EUI as a frontrunner in a badly needed 'Europeanization' of the national universities. He quoted a lecture of Kohnstamm, where he had stated that the states were not forever 'condemned to remain' as they were in the past; that there was a possibility 'of gradually changing men's minds and their behaviour'. Cappelletti shared these sentiments.⁵¹²

When the EUI was inaugurated in the northern hills of Florence, one of the professors to join the Law Department⁵¹³ was Cappelletti.⁵¹⁴ At the time, the Access to Justice project was coming

⁵⁰⁹ See M. Cappelletti (general ed.), *Access to Justice*, volume 1-4 (Giuffrè Editore/Alphen aan den Rijn, 1978).

⁵¹⁰ Cappelletti's life's work can be summarised as a quest for justice and a mission to improve society in three dimensions; the constitutional dimension; the social dimension; and the transnational dimension. These dimensions corresponded to three enduring projects of Cappelletti's; Judicial Review in the Contemporary World, Access to Justice, and the ITL project. In Weiler's word, these projects were all about furthering the cause of justice in an unjust world, as law in some ways was a religion to Cappelletti since he believed in its redeeming power (Weiler, 'A Self-interview: Remembering Mauro Cappelletti – 10 Years To His Death').

⁵¹¹ In 1948, the idea of a European University was put forth at the Congress of Europe in The Hague. For the next 22 years, a number of negotiations on establishing such a university took place, but questions on the seat, the opposition between a supranational Europe and 'Europe des patries', and the accession of third countries among other questions blocked an agreement. In 1972, a convention for the establishment of a European University Institute in Florence was finally signed by Belgium, France, Italy, Luxembourg, the Netherlands, and Germany. In institutional terms, it was an intergovernmental cooperation outside but in orbit around the Communities, and it was far more modest than some of the visions for a European university imagined as a part of the Communities. The main object was to 'contribute, by its activities in the fields of higher education and research, to the development of the cultural and scientific heritage of Europe... pursued through teaching and research at the highest university level.' The organs to make this come true were the High Council with representatives from the Member States and the Academic Council consisting of professors and researcher representatives. For a detailed review of the long and winding prehistory of the European University Institute, see J.-M. Palayret, *A University For Europe. Prehistory Of The European University Institute Of Florence (1948-1976)*, (European University Institute, 1996).

⁵¹² Letter from Cappelletti to Kohnstamm, 20 November 1973, HAEU, MC.

⁵¹³ As today, the EUI consisted of four departments: History and Civilisation, Economics, Law, and Political and Social Sciences.

⁵¹⁴ Cappelletti kept his chairs at the University of Florence and Stanford University.

to an end, and Cappelletti gained an interest in European law, which was partly a natural progression based on his love of comparative law, partly an attempt to explore the potential ability of the new phenomenon to make rights effective.⁵¹⁵ He began the exploration by organising the colloquium ‘New Perspectives for a Common Law of Europe’ (16-10 May 1977) – in many ways a pilot of the ITL project.⁵¹⁶ It gathered a group of primarily comparativists from Europe and the US to discuss the historical foundations, present components, and future developments of a common law of Europe in a wide sense.⁵¹⁷ Among these people were prominent European law scholars, for instance Ole Lando, Danish professor of international private law and comparative law, Thijmen Koopmans, Dutch professor of constitutional law and comparative law and future judge at the ECJ (1979-1990), and J.D.B. Mitchell, British professor of constitutional law. Dimitrios J. Evrigenis, Greek judge at the European Court of Human Rights, contributed with a chapter, whereas Pescatore represented the ECJ. Pescatore expressed his keen interest in the project from the very outset and participated in the colloquium.⁵¹⁸ From the US, Merryman from Stanford and Guido Calabresi from Yale University participated.

The project rested on two main assumptions. Firstly, the assumption that a trend towards a *jus commune* of the peoples of Europe had recently been re-born. In Cappelletti’s historical perspective, the distinct legal systems of the western European nations ‘from Iceland to Cyprus’ represented an irrational, suicidal division in a world demanding larger and larger open areas of personal, cultural, commercial, and labour exchanges. Harmonisation, coordination, and interdependence were conceived as objective needs of the modern world. Secondly, the assumption that the legislators were overloaded and unable to satisfy the demands for legislating, revising, and updating legislation of modern, democratic welfare-oriented states. Therefore, Cappelletti and the participants pointed to law and judicial activism as an instrument for change, which was needed in all Western states in Europe, but the need was even more accentuated at the Community level. The concrete answer to this need was the ECJ, which resembled the US Supreme Court more than a supreme court of the Continental ‘ordre judiciaire’. Indeed, the *Costa*

⁵¹⁵ Interview with Monica Seccombe, 11 May 2013.

⁵¹⁶ The project turned into the first opening volume of the EUI Publications Series. In the foreword, Max Kohnstamm stated that a search for the common basis on which to find legal provisions applicable to the European nations was clearly a part of the tasks entrusted to the Institute (M. Kohnstamm, ‘Foreword’, in M. Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (European University Institute, 1978), at V.

⁵¹⁷ To Cappelletti, Community law was only ‘the tip of the iceberg’ of European common law. At this time, he granted the European Court of Human Rights a profound importance as the Council of Europe united all but one of the twenty-one Western European nations (the exception was Finland), and as the philosophy of human rights was the most valuable heritage of Europe’s political thoughts (M. Cappelletti, ‘Introduction’ in M. Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (European University Institute, 1978), at 2-3).

⁵¹⁸ Letter from Pescatore to Cappelletti, 9 August 1976, HAEU, MC.

v ENEL ruling of the ECJ might prove to be no less important than the *Marbury v. Madison* doctrine by the US Supreme Court in 1803 according to Cappelletti. In the colloquium, the democratic dangers of judicial activism and courts rushing in where parliaments feared to tread were discussed. However, the general feeling was that activism was necessary, as reported by Cappelletti. Koopmans for instance stated that courts rushing in was a better alternative than violence and widespread disobedience following dissatisfaction with the political processes. This meant that courts could not stay aloof from political issues.⁵¹⁹

The ‘New Perspectives for a Common Law of Europe’ project anticipated the IITL project in several ways. Particularly in placing emphasis on the role of law and courts as lawmakers because of an overburdened or paralysed legislative, especially at the Community level. This resonated with a narrative of European law, which was promoted by ECJ judges and jurists from the Commission at the time around the ECJ’s *Van Gend en Loos*⁵²⁰ and *Costa v ENEL*⁵²¹ rulings. Actors such Gaudet, Hallstein, and Robert Lecourt (ECJ judge 1962-1967 and ECJ President 1967-76) promoted the idea that because the political impetus for European integration was missing at the time (the fall of the Fouchet Plan in 1961-62, the French rejection of the British application for membership in 1963 and the Empty Chair Crises in 1965) the ECJ had to carry on the integration process through law.⁵²² In front of the Association des juristes européens, the French academic association of European law, Lecourt for instance held a presentation entitled ‘The Role of Law in Unifying Europe’, where he stated that:

‘The legal method to unify Europe lies in the fact that EC law has the effect of multiplying relations, associations, transactions beyond borders, as well as of triggering narrow interrelations of activities, interests, and human relationships. The resulting interpenetration of populations cements in concreto a lively Europe thereby

⁵¹⁹ Cappelletti, ‘Introduction’, at 19-20, and T. Koopmans, ‘Legislature and Judiciary - Present Trends’, M. Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (European University Institute, 1978), at 234-35. Koopmans and Cappelletti stayed in touch after the colloquium. Upon taking office in Luxembourg, Koopmans for instance wrote to Cappelletti that he was more and more convinced of the importance of comparative public law for the evolution of European law, and that he remained devoted to what he saw as Cappelletti’s cause (Letter from Koopmans to Cappelletti, 29 May 1976, HAEU, MC)

⁵²⁰ Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*, ECLI:EU:C:1963:1.

⁵²¹ Case 6/64, *Flaminio Costa v ENEL*, ECLI:EU:C:1964:66.

⁵²² Vauchez, *Brokering Europe*, at 129.

irreversible. Thereby, this process will necessarily call for a political coronation required by the very needs of the population ruled by this unique body of law.⁵²³

In the words of Vauchez, this was ‘arguably the first systematic conceptualization of the Court’s contribution to the dynamics of what would today be referred to as ‘integration through-law’.⁵²⁴ Similar conceptualisations by a range of ECJ judges and the Legal Service of the Commission were published in a number of legal journals and newspapers⁵²⁵, and Hallstein defined Europe as a ‘European Community of Law’.⁵²⁶ In the 1960s and the 1970s, this narrative was continuously developed and promoted. For instance in Pescatore’s book ‘Le droit de l’integration’ from 1972 and in Lecourt’s book *L’Europe des Juges* from 1976. This early ITL narrative was however not commonly accepted. In national legal fora, the jurisprudence by the ECJ was contested, which led some judges to publicly reject the notion of a ‘gouvernement des juges’,⁵²⁷ and the scholarship on European law at the transnational level of the nascent discipline of European law was generally doctrinal and without explicit discussions of the role of law and the ECJ in European integration. In such an academic milieu, Cappelletti’s colloquium bore the seeds to bold and eloquent scholarship comparing the legal systems across the Atlantic and emphasising the role of the ECJ in the integration process, thus anticipating the ITL project.

The First Framing of the ITL Project

After the colloquium, Cappelletti wanted to frame a worthy successor to the Access to Justice project, and he therefore wrote to Sanford Jaffe from the Ford Foundation, which had funded Access To Justice, with an idea for a project about the needs and trends of rapprochement among the legal systems in Europe. This project should focus on instruments, institutions, and doctrines with American federalism as a model. Cappelletti had no doubt that Jaffe would be able to see the importance of ‘fresh, interdisciplinary, policy-oriented research’ in the area, and he furthermore wrote that ‘there is no need for articulating the interest of the U.S. generally, and of cultural and political policy-making leaders such as the Ford Foundation, in particular, in this type

⁵²³ Vauchez’ translation of R. Lecourt, ‘Le rôle du droit dans l’unification européenne’, *Bulletin de l’Association des juristes européens* (1964). See Vauchez, *Brokering Europe*, at 142.

⁵²⁴ Vauchez, *Brokering Europe*, at 142.

⁵²⁵ See Vauchez, ‘Integration-Through-Law’.

⁵²⁶ Vauchez, *Brokering Europe*, at 138.

⁵²⁷ See, for instance, A. Donner, ‘The Constitutional Powers of the Court of Justice of the European Communities’, (1974) 11 *Common Market Law Review*, 127-140, at 139.

of project.⁵²⁸ At the same time, Lando wrote to Cappelletti with a concrete proposal. Lando had argued in favour of the development of a European Uniform Commercial Code at the colloquium, an idea originally proposed to him by Winfried Hauschild, head of division in the Directorate General for the Internal Market and industrial affairs of the Commission, in 1974.⁵²⁹ Lando would like Cappelletti to be a part of the project,⁵³⁰ and a meeting between Hauschild, Lando, and Cappelletti was arranged in Florence in the fall of 1977, when Lando was at the EUI as a visiting professor. Here, Cappelletti and Lando now decided to merge their research aims, and the collected project was discussed with Hauschild.⁵³¹

In a draft from December 1977, the framing of this project was called ‘The Emergence of a New Common Law of Europe: Some Basic Developments and Instruments for Integration, Considered in the Light of the US Federal Experience’. The introduction stated that there was tremendous scepticism about the social and political potential of the European Communities, as the political institutions – the Commission and the European Parliament - had been unable or unwilling to push ahead towards unity. But the courts and the political effects of rapid increase in European trade showed another picture. Consequently, a study of the role of the courts and the increasing economic demands for a uniform commercial code would reveal a long-term trend towards integration – especially when placed in the light of the American Federal experience. The study would therefore examine basic developments, tools, and potential for European integration.⁵³² Cappelletti would direct the project from the EUI, while Lando would coordinate the uniform commercial code part. The plan was a three-year research project with an international board of advisors, a range of different contributors, and involvement of community agencies, as the project had direct and practical community interest. It was also mentioned that the Commission had already shown considerable interest in the project.⁵³³

In 1978, Cappelletti and Lando split up their research aims, as Lando’s effort to develop a European Uniform Commercial Code was turned into a research project in its own right. This

⁵²⁸ Letter from Cappelletti to Jaffe, 8 September 1977, Eric Stein Papers, Bentley Historical Library, Ann Arbor, Michigan, Box 30. The Ford Foundation funded numerous academic projects on the EC, and the ties between prominent officials the EC institutions and the foundation were many. An empirical study of the role of the Ford Foundation in European integration is however still missing.

⁵²⁹ O. Lando, ‘Eight Principles Of European Contract Law’, in R. Cranston (ed.), *Making Commercial Law. Essays In Honour Of Roy Goode* (Oxford University Press, 1997), at 103-4.

⁵³⁰ Letter from Lando to Cappelletti, 10 August 1977, HAEU, MC.

⁵³¹ In February 1978, Cappelletti described to Fernand Braun from the Commission how Hauschild had been ‘most instrumental in the preparation stages of the project (Letter from Cappelletti to Braun, 22 February 1978, HAEU, MC).

⁵³² M. Cappelletti, *The Emergence of a New Common Law of Europe: Some Basic Developments and Instruments for Integration, Considered in the Light of the US Federal Experience*, 1 December 1977, HAEU, MC

⁵³³ *Ibid.*

was among other things a matter of finances. At that point, the Ford Foundation had declared that they would fund parts of the project, but not a European commercial code.⁵³⁴ The early collaboration with Lando was however of great importance to the development of the ITL project, because it linked prominent officials from the Commission, with whom Cappelletti had only had superficial contact, to the ITL project.⁵³⁵

Weiler

Another vital event was the hiring of Weiler. Weiler was an Israeli born in South Africa, who had studied in Sussex and Cambridge, where he developed a research interest in the legal aspects of the Community. In 1978, the 27-year-old Weiler therefore wrote to Cappelletti and asked if there was a possibility of integration his work in Cappelletti's project.⁵³⁶ On the basis of the high quality of an article on European Competition law published in the *European Law Review*, which Weiler had written with a student friend,⁵³⁷ Cappelletti in October 1978 employed Weiler as an assistant of the ITL project, which he would work on while writing his doctoral thesis on European Integration from both a legal and political point of view.⁵³⁸ It was from the outset clear to Cappelletti and his colleagues that Weiler was an extraordinary talented young scholar, and this evaluation was shared by some of Cappelletti's main collaborators in the ITL project. The director of the Legal Service of the Commission, Claus-Dieter Ehlermann, found the essay 'The Community System: The Dual Character of Supranationalism'⁵³⁹ by Weiler remarkable.⁵⁴⁰ Pescatore wrote that it was 'the best written ever on this problem. A remarkable balance in analysis of legal and political factors in their interaction. A new, profound and highly realistic explanation of the community structure transcending both former scientific discussion and current political phraseology.'⁵⁴¹ In Weiler's word, Cappelletti and he developed a 'Rabbi-Pupil' relationship,⁵⁴² and Weiler were given large tasks in the ITL project. In fact, Weiler became the actual leader of the project, once the conceptual frame had been developed and the topics and

⁵³⁴ Letter from Cappelletti to Lando, 24 February 1978, HAEU, MC. Eventually, Lando's project would evolve into The European Principles Of Contract Law, Known As The Lando Principles. See O. Lando, U. Beale, and The Commission Of European Contract Law (eds.), *The Principles Of European Contract Law* (Dordrecht, 1995).

⁵³⁵ Furthermore, Lando ended up co-authoring the chapter 'Conflict of Laws as a Technique for Legal Integration' in the ITL publication series with Peter Hay and Ronald Rotunda in volume 1, book 2.

⁵³⁶ Letter from Weiler to Cappelletti, 5 March 1978, HAEU, MC.

⁵³⁷ Note from Hand to David, Daalder and Cappelletti, undated, HAEU, MC

⁵³⁸ J. Weiler, *Supranational Law And The Supranational System: Legal Structure And Political Process In The European Community* (European University Institute, 1982).

⁵³⁹ J. Weiler, 'The Community System: The Dual Character of Supranationalism', (1981) 1 *Yearbook of European Law*.

⁵⁴⁰ Letter from Ehlermann to Cappelletti, 13 July 1981, HAEU, MC.

⁵⁴¹ Telex from Pescatore to Daintith, 26 May 1982, HAEU, MC.

⁵⁴² Weiler, 'A Self-interview: Remembering Mauro Cappelletti – 10 Years To His Death'.

authors found. Furthermore, it was sometimes the pupil who taught the rabbi, as Weiler gained a much more profound knowledge of European law than Cappelletti had, and when Cappelletti had to teach a course on European law at Stanford in 1982, it was thus Weiler who prepped Cappelletti on the peculiarities of European law.⁵⁴³ The IIL originated in Cappelletti's mastery of comparative law and his normative approach to Europe, but it was to a large extent the product of the understanding of the European legal order that Weiler developed during the completion of the project.

US Collaborators and Bellagio

To use the American legal system to illuminate or develop the European system was not new. In fact Hallstein had championed a European constitutional rule of law inspired by American Federalism in the Treaty of Paris negotiations in 1950,⁵⁴⁴ and the Legal Service of the High Authority had promoted a similar interpretation already from the mid 1950s and forth. In the beginning of the 1960s, the Legal Service of the Commission and its director Gaudet in addition tried to establish an independent academic discipline of European law with transnational institutions in order to support this new interpretation. Most European scholars however regarded the European Coal and Steel Community and the European Economic Community as international organisations ruled by principles of public international law.⁵⁴⁵ When the ECJ followed the lead of the Legal Service in the *Van Gend en Loos* and *Costa v ENEL* rulings, it conceptualised European law as a 'new legal order' in order to avoid political controversy, and this vague notion was adopted by the nascent academic field of European law.⁵⁴⁶

The American scholars interested in European law did however not shy away from comparisons and the term 'constitutional'. The pioneers were the comparative law professor from the University of Michigan Eric Stein and his apprentice Peter Hay, who had hinted at comparability between the Communities and the US already in the beginning of the 1960s.⁵⁴⁷ Both were ex-pats that had gained a new homeland in the US, which they were very impressed by. According to Hay, they developed an unconscious motivation to make Europe like the US, which influenced their writings on the nascent European legal system.⁵⁴⁸ Additionally, Stein had a

⁵⁴³ Common Market I-VII Fall 1982, HAEU, MC.

⁵⁴⁴ Boerger and Rasmussen, 'Transforming European Law', at 203.

⁵⁴⁵ *Ibid.*, at 206.

⁵⁴⁶ *Ibid.*, at 223,

⁵⁴⁷ See, for instance, E. Stein and P. Hay, 'New Legal Remedies of Enterprises', (1960) 9 *American Journal of Comparative Law*, 375-424.

⁵⁴⁸ Interview with Peter Hay, 17 March 2014.

number of collaborators and friends in the European institutions with an influence on his writings, such as Gaudet.⁵⁴⁹ In the following years, the American interest in European law grew. As enterprises increasingly needed lawyers with skills in European law, it became fashionable for students and scholars to engage in European law, as it made them more marketable.⁵⁵⁰ To these Americans, the logic of the *Van Gend en Loos* and *Costa v ENEL* rulings seemed natural in the light of American legal history.⁵⁵¹

As a comparativist with an outspoken belief in a converging world and in rights upheld by strong legal orders, it was likewise obvious to Cappelletti to conduct a survey comparing the European and the American legal system.⁵⁵² Seemingly by coincidence, Cappelletti developed the IITL project simultaneously with Stein working on his grand European-American study on the role of the judiciary in economic integration, which resulted in the Bellagio conference in 1979 and the book *Courts and Free Markets: Perspectives from the United States and Europe* published in 1982.⁵⁵³ Cappelletti knew Stein, but a description of Stein's project had been sent to other contacts at the EUI in 1976 at a time when Cappelletti was at Stanford, and Cappelletti did therefore not hear about the project until the fall of 1977.⁵⁵⁴ But he participated in the Bellagio conference along with the political scientist Martin Shapiro from Berkeley University, who had now been included in the IITL project as the principle contact in the US.⁵⁵⁵ Cappelletti had initially pondered on some kind of coordination between Stein and himself on their projects given the similarity in content and focus,⁵⁵⁶ but apart from Stein contributing to IITL with a chapter on European foreign policy, coordination did not take place.

⁵⁴⁹ Boerger and Rasmussen, 'Transforming European Law', at 216-17,

⁵⁵⁰ Interview with Peter Hay, 17 March 2014.

⁵⁵¹ *Ibid.*

⁵⁵² While the comparison was generally well conceived among those, who Cappelletti sought advise from, a few scholars found this path to be a mistake. Henry Schermers noted that the American experience would be of little use to the emergence of a European higher law, because the European supreme courts considered themselves sovereign, as could be seen in the *Cohn-Bendit* case. Although other supreme courts accepted the principle of EC law supremacy, Schermers was not at all sure that these courts would grant priority to community law in case of real conflict (Letter from Schermers to Cappelletti, 7 May 1979, HAEU, MC). Ivo Samkalden also warned Cappelletti that the title might indicate that Europe was aiming towards a federation, and this would be a dangerous and unrealistic impression for political reasons. (Summary of main points, planning meeting, 19 October 1979, HAEU, MC).

⁵⁵³ E. Stein and T. Sandalow, *Courts and Free Markets: Perspectives from the United States and Europe* (Clarendon Press, 1982).

⁵⁵⁴ Letter from Cappelletti to Stein, 19 September 1977, HAEU, MC.

⁵⁵⁵ Letter from Cappelletti to Shapiro, 11 April 1979, HAEU, MC.

⁵⁵⁶ Memorandum from Cappelletti to Kohnstamm, 16 July 1979, HAEU, MC.

Collaboration with the Community Institutions

From the very beginning, jurists from the Commission had a key role to play in the ITL project. Hauschild was as previously mentioned the first to be involved. Soon after, Cappelletti, Lando, and Hauschild had a meeting with Ehlermann, the newly appointed director of the Legal Service.⁵⁵⁷ Ehlermann had an academic background as a PhD and assistant at the University of Heidelberg (1954-59), which had given him sensitivity for questions of constitutional law, but he had entered the Legal Service of the Commission already in 1961 and had thus spent most of his career in the Community.⁵⁵⁸ He did nevertheless not shy away from academic writing, where he championed a constitutional interpretation of the treaties⁵⁵⁹ and promoted the ECJ as a prime factor of integration.⁵⁶⁰ Lando knew him already, but it was a new acquaintance for Cappelletti – one that would develop into a close professional relation.

Ehlermann immediately took an interest and promoted the project in the Commission. Especially Michel Carpentier, the director-general of the Environment and Consumer Protection Service, found the project exiting.⁵⁶¹ Ehlermann and Carpentier thus engaged a number of jurists in the Commission to participate in the ITL project, and on Ehlermann's initiative, a meeting gathering potential contributors and partners to discuss the project took place at the EUI in June 1978 with the presence of Cappelletti, Lando, Hauschild, Ehlermann, Carpentier, Scheuer, and Krämer from the Carpentier's service, Mr. Loerke (chief advisor, Secretariat-General, The Commission), Klaus Hopt from the University of Tübingen, Yves Mèny from the University of Rennes, and representatives from the EUI, for instance Professor Hand from the Law Department.⁵⁶² The heavy representation by the Commission became a continuous feature of the ITL project meetings, and at these meetings Ehlermann and Carpentier would specify their interests. Ehlermann was for instance particularly concerned with the inclusion of the early American experience of transforming a confederation into a federation and the subsequent rise of federal power, as well as studies of other federal experiences.⁵⁶³ Carpentier underlined that the parts dealing with parallel legislation and access to justice at the supranational level had his main

⁵⁵⁷ Letter from Lando to Ehlermann, 22 November 1977, HAEU, MC.

⁵⁵⁸ Interview with Claus-Dieter Ehlermann, 29 June 2016

⁵⁵⁹ Vauchez, *Brokering Europe*, at 218.

⁵⁶⁰ C.-D. Ehlermann, 'Legal Status, Functioning and Probable Evolution of the Institutions of the European Communities', (1973) 10 *Common Market Law Review*, 195-207, at 198.

⁵⁶¹ Notes from telephone conversation with Carpentier, 7 February 1978, HAEU, MC.

⁵⁶² Letter from Cappelletti to Kohnstamm, 19 May 1978, HAEU, MC.

⁵⁶³ Letter from Ehlermann to Cappelletti, 12 July 1979, HAEU, MC.

interest, as they were of paramount importance the evolution of environment and consumer protection policies.⁵⁶⁴

Ehlermann and Carpentier assigned a number of their civil servants to participate in the project as informants, and some of them became closely related to the project acting as co-authors.⁵⁶⁵ The co-writers could however not figure as authors. As Carpentier stated it in a letter to Cappelletti, it was difficult for them to be mentioned, as they were officials of the Community.⁵⁶⁶

In addition, Ehlermann provided suggestions on potential authors, which Cappelletti followed,⁵⁶⁷ and Cappelletti often discussed his choice of academics with Ehlermann.⁵⁶⁸ Finally, Ehlermann figured as an author of the chapter 'Political Organs and the Decision-Making Process in the United States and the European Community' with Weiler and Samuel Krislov, professor of political science from the Brandeis University in Massachusetts. Ehlermann did however not do any of the writing. Shapiro described the arrangement regarding the chapter in the following way to Krislov:

'The head of the Commission's legal staff is Claus-Dieter Ehlermann, a German in his 40's who I just can't say enough about. He is an extremely open, articulate political administrator, fully at home in the academic and bureaucratic worlds and oriented completely to real policy and political questions rather than the European style of abstract legal analysis. He and his people are too busy to actually write papers for this volume. But he has agreed to an arrangement under which he would serve an informant, editor, and reviser of a paper and most importantly as a contact man through whom interviews with the major people at both the Commission and the Council could be arranged.'⁵⁶⁹

⁵⁶⁴ Letter from Carpentier to Cappelletti, 26 June 1979, HAEU, MC.

⁵⁶⁵ Jean Amphoux from the Legal Service worked with Bryan Garth on writing a chapter about migrant workers (Cappelletti to Amphoux, 12 March, 1981, HAEU, MC); David Lawrence from Carpentier's service collaborated with Eckard Rehbinder and Richard Stewart from Berkeley University on volume two on environmental protection policy; Ludwig Krämer from the same service collaborated with David Trubek and Thierry Bourgoignie on producing volume three on Consumer Law, Common Markets and (Letter from Carpentier to Cappelletti, 22 July 1980, HAEU, MC) In fact, Krämer had been the one to suggest Thierry Bourgoignie. (Telephone Conversation with Krämer, 12 November 1979, HAEU, MC).

⁵⁶⁶ Letter from Carpentier to Cappelletti, 22 July 1980, HAEU, MC.

⁵⁶⁷ For instance Jochen Frowein, the German member of the European Commission of Human Rights, for a chapter on human rights Pro-memorium (Telephone conversation between Cappelletti and Ehlermann, 12 November 1979, HAEU, MC). Frowein ended up writing the chapter on human rights with Stephen Schulhofer and Shapiro, as well as a chapter on the federal experience in Germany and Switzerland.

⁵⁶⁸ Pro-memorium - telephone conversation between Cappelletti and Ehlermann, 12 November 1979, HAEU, MC

⁵⁶⁹ Letter from Shapiro to Krislov, 22 August 1979, HAEU, MC.

This letter beautifully sums up Ehlermann's tasks in the project and the admiration the other contributors had for him. Not least Cappelletti, who regarded Ehlermann as a 'truly marvellous' colleague⁵⁷⁰ and valued Ehlermann's visits at the EUI highly.⁵⁷¹

Judges from the ECJ had a role to play in the project as well, especially Pierre Pescatore, who was a primary source of inspiration to Cappelletti. In April 1979, Cappelletti thus wrote the following to Pescatore: 'Part I of the project is, I believe, very much inspired by the activities and role of the European Court of Justice, and most particularly by the philosophy of integration of which you have been the leading advocate and representative'.⁵⁷² Therefore, Pescatore participated in project meetings and came to the EUI as a visiting professor. Josse Mertens De Wilmars, the president of the ECJ (1980-84), was also very sympathetic to the aim of the project and visited the EUI a number of times. He thus confided to Cappelletti that he had always thought that the Europeans could profit from the American experience.⁵⁷³ Donner, who had recently stepped down as an ECJ Judge, however confessed that the American experience offered as many lessons to avoid as to imitate in his opinion.⁵⁷⁴

Finally, Hans Glaesner from the Legal Service of the Council and Roland Bieber, legal adviser in the Parliament, both acted as consultants in the project and provided Cappelletti with Council and Parliament perspectives.⁵⁷⁵

The EC institutions were thus heavily represented and took part in all aspects of developing and writing the ITL project. Why did Cappelletti want this degree of involvement by the institutions in an academic project? In a letter to de Wilmars, Cappelletti stated that he had been at pains to ensure a degree of involvement of 'practitioners' in preparing the studies, because they were the best to appreciate existing problem areas in practice, and because the project should hopefully be of use to the practitioners. It was for instance Cappelletti's opinion that the

⁵⁷⁰ Letter from Cappelletti to Ehlermann, undated, HAEU, MC.

⁵⁷¹ Ehlermann visited in relation to meetings about the project, but he was also officially a visiting professor at the EUI in February 1982 giving a seminar on the tension between the Commission and other community organs (Letter from Cappelletti to Ehlermann, undated, HAEU, MC).

⁵⁷² Letter from Cappelletti to Pescatore, 11 April 1979, HAEU, MC.

⁵⁷³ Letter from Mertens de Wilmars to Cappelletti, 11 Aug 1981, HAEU, MC. Mertens de Wilmars visited the EUI in February 1982 and gave lectures on the jurisprudence of the ECJ and the relationship between community law and national law (Letter from Cappelletti to Mertens de Wilmars, 11 February 1982, HAEU, MC).

⁵⁷⁴ Letter from Donner to Cappelletti, 6 February, 1980, HAEU, MC. In the correspondence between Cappelletti and Donner, an enlightening exchange of views on the role of the judge took place. Cappelletti had sent Donner a draft of his article 'Interpreter or Law-Maker'. Donner did not think that the law-profession as a whole had an interest in stressing the law-making consequences of their activities. The result of political interference was a decided lowering of the quality of the people nominated as judges. This was a tendency, which Donner for instance saw in the German Constitutional Court (Letter from Donner to Cappelletti, 4 March 1980, HAEU, MC).

⁵⁷⁵ See, for instance, Letter from Glaesner to Hand, 26 June 1979, HAEU, MC and Letter from Bieber to Cappelletti, 12 December 1981. Bieber was at the EUI as a visiting professor in 1982.

consumer and environment service had already learnt a great deal from the Americans involved.⁵⁷⁶ This points to Cappelletti's policy-orientation. The project should be of value to actual practitioners, which Ehlermann and Carpentier could ensure. Ehlermann, on the other side, had a mutual interest in the interaction. In fact, pursuing synchronisation between academia and practice was one of his guiding principles as director of the Legal Service.⁵⁷⁷ Ehlermann and Pescatore were furthermore some of the pioneers promoting a constitutional nature of European law and law's primary role in the integration process, and these ideas coincided with Cappelletti's views on the role of law in modern society. In the ITL project, this shared normative vision found an academic expression in the comparison between the European and American legal systems, which even the president of the ECJ supported.

The Three Levels of the Project

Around 1980, the final form of the project was set and most of the topics and authors were in place. The project was divided in two parts. Part one was a study of access to justice problems in a transnational dimension under the headline 'Methods, Tools, and Institutions for Legal Integration' dealing with principles, institutions, processes, and techniques. Part two was a number of studies of substantive topics and areas in which integrational developments were crucial or especially needed.⁵⁷⁸ The chapters were primarily to be authored by teams of 2-3 people consisting of both Europeans and Americans, in a mix of legal scholars, political scientists, and economists.⁵⁷⁹

Beyond this research to be published in a publication series (the first level), the project had two other levels. The second level was a superstructure for seminars and research student activities,⁵⁸⁰ encompassing practically the entire Law Department of the EUI. Most of the professors were engaged in the project,⁵⁸¹ and many of the involved external researchers came to the EUI as visiting professors and gave seminars on European law. Additionally, the students from the Law Department researched on topics connected to the project.

The third level was related activities in the field of integration, such as setting up conferences and initiating meetings on European law. In 1982, Cappelletti and Weiler for instance became

⁵⁷⁶ Letter from Cappelletti to Mertens de Wilmars, 2 July 1981, HAEU, MC.

⁵⁷⁷ Interview with Claus-Dieter Ehlermann, 29 June 2016.

⁵⁷⁸ Letter from Cappelletti to Daintith, 6 August 1980, HAEU, MC.

⁵⁷⁹ Memorandum from Cappelletti to Kohnstamm and Buzzonetti, 2 June 1980, HAEU, MC.

⁵⁸⁰ Seventh Report of Activities, Academic Year 1982-83, HAEU, MC.

⁵⁸¹ Professor Terence Daintith, Professor Klaus Hopt, Professor Yves Mény, and Professor Jacques Pelkmans were all involved in the project. (Memorandum from Cappelletti to Kohnstamm and Buzzonetti, 2 June 1980, HAEU, MC).

directly involved with the treaty revision project of the Institutional Committee of the European Parliament, which aimed at establishing a European union. The resolution motions of the committee were sent in confidentiality to Cappelletti and Weiler, before the resolutions should be discussed in plenary, in order to receive academic backing for the entire initiative within the framework of the ITL project.⁵⁸² This led to brainstorming sessions at the EUI in 1982 on the problems and possible solutions in establishing a union attended by a range of professors, politicians and civil servants, for instance Ehlermann (listed under ‘Academic Team’).⁵⁸³ Concretely, this connection resulted in Weiler, Roland Bieber, and Jean-Paul Jacqué drafting the declaration of rights that became a part of the Spinelli Draft Treaty, which was adopted by the European Parliament in February 1984.⁵⁸⁴

Overall, the ITL project ended up being much more than a number of publications. It created a scholarly environment of law professors, students, jurists from the EC institutions, and ECJ judges, and in the auspices of the project, collaboration with politicians and jurists from the Community on reform proposals for Europe was established.

The Academic Output

The ITL publication series was impressive, when De Gruyter published it in 1985 and forth. Part One was a volume of three books still entitled ‘Methods, Tools, and Institutions for Legal Integration’. Part two was five further volumes dealing with the substantive topics of environmental protection policy, consumer protection policy, energy policy, corporate law and capital market harmonisation, and regional policy.⁵⁸⁵

The direct line to Cappelletti’s previous projects is easily recognised. In the foreword, Cappelletti thus described how the era was of tremendously accelerated movement and change, where convergence was indispensable for productive and peaceful coexistence. Divergence in basic human approaches would make societies unmanageable and coexistence impossible – it would result in chaos. Thus, Cappelletti saw a need to which European integration could be the

⁵⁸² Note from Cappelletti and Weiler to Maihofer, 21 June 1982, HAEU, MC.

⁵⁸³ Brainstorming Exercise, Meeting 21-22 October 1982, HAEU, MC.

⁵⁸⁴ The Draft Treaty was described as representing ‘a structural innovation’ in the final pages of Cappelletti, Seccombe, and Weiler’s general introduction in the ITL publication series, however without mentioning of the involvement of Weiler. See M. Cappelletti, M. Seccombe, and J. Weiler, ‘Europe and the American Federal Experience – A General Introduction’, in M. Cappelletti, M. Seccombe, and J. Weiler (eds.) *Integration Through Law. Europe And The American Federal Experience*, Volume 1: *Methods, Tools And Institutions, Book 1: A Political, Legal And Economic Overview* (Walter de Gruyter, 1986), 3-70, at 67.

⁵⁸⁵ In this section, I analyse the main objectives and assumptions of the project, especially regarding the way the nature of European law and the role of law in the integration process was conceived. A detailed analysis of the different parts lies outside the scope of this paper.

answer.⁵⁸⁶ In the general introduction, written by Cappelletti, Weiler, and Monica Seccombe⁵⁸⁷, the Community was however described as in a state of crises due to potential lack of efficiency of the decision making process in an enlarged community, the Common Agricultural Policy, the budgetary crises, the lack of a transport policy, unemployment, inflation, a deep seated industrial malaise, and the questionable day-to-day implementation of Community law.⁵⁸⁸ Therefore, the editors pointed to the potential of law. Thus, law was not only seen as the object of integration, but also as the instrument of integration⁵⁸⁹ - a conceptualisation which was based on an assumed interdependence between the legal and politico-economic systems.⁵⁹⁰ The entire publication series was infused with this understanding, for instance the chapter ‘Instruments for legal integration in the European Community - Review’ by Peter Hay, law professor at the University of Illinois, Ronald Rotunda, also law professor at the University of Illinois, and Lando, which was a traditional review of the sources of Community law (for instance regulations, directives, international agreements, and general principles of law) as well as an analysis of the expected integrating effect of the different sources of law.⁵⁹¹ Another example is the chapter ‘The protection of Fundamental Human Rights as a Vehicle of Integration’ by Jochen Frowein, Stephen Schulhofer, and Martin Shapiro, where the authors advance the thesis that protection of human rights can have an integrating effect.⁵⁹² A similar stance characterised the studies in the substantive volumes. In volume two, the authors Eckard Reh binder and Richard Stewart for instance reviewed the legal means to achieve full integration in the area of environmental policy.⁵⁹³

The essentialist basis for seeing law as a strong instrument of integration was the claim that the nature of European law was constitutional; an assumption, which rested on the comparison with

⁵⁸⁶ M. Cappelletti, ‘Foreword’, in M. Cappelletti, M. Seccombe, and J. Weiler (eds.) *Integration Through Law. Europe And The American Federal Experience*, Volume 1: *Methods, Tools And Institutions, Book 1: A Political, Legal And Economic Overview* (Walter de Gruyter, 1986), V-XIX.

⁵⁸⁷ Monica Seccombe was Cappelletti’s research assistant and an editor of the ITL publication series.

⁵⁸⁸ Cappelletti, Seccombe, and Weiler, ‘Europe and the American Federal Experience – A General Introduction’, at 10-11.

⁵⁸⁹ *Ibid.*, at 15.

⁵⁹⁰ *Ibid.*, at 4.

⁵⁹¹ P. Hay, R. Rotunda, and O. Lando, ‘Instruments for legal integration in the European Community - Review’ in M. Cappelletti, M. Seccombe, and J. Weiler (eds.) *Integration Through Law. Europe And The American Federal Experience*, Volume 1: *Methods, Tools And Institutions, Book 2: Political Organs, Integration Techniques and Judicial Process A Political, Legal And Economic Overview* (Walter de Gruyter, 1986), 113-160.

⁵⁹² J. Frowein, S. Schulhofer, and M. Shapiro, ‘The Protection Of Fundamental Human Rights As A Vehicle Of Integration’ in M. Cappelletti, M. Seccombe, and J. Weiler (eds.) *Integration Through Law. Europe And The American Federal Experience*, Volume 1: *Methods, Tools And Institutions, Book 2: Forces And Potential For A European Identity* (Walter de Gruyter, 1986), 231-344.

⁵⁹³ M. Cappelletti, M. Seccombe, and J. Weiler (eds.) *Integration Through Law. Europe And The American Federal Experience*, Volume 2: E. Reh binder and R. Stewart, *Environmental Protection Policy* (Walter de Gruyter, 1985), 616

the American legal system. Although the editors underlined the differences between the EC and the US in the general introduction, they argued that the EC resembled a federal state on the legal level because of the legal doctrines of direct effect, supremacy, and pre-emption. These doctrines had, in the words of the editors, come so close to emulate full-fledged federal systems that it was common to refer to the Community legal order as being ‘quasi-federal’.⁵⁹⁴ The ECJ had been fashioning no less than a ‘federal’ constitution of the EC, and the constitutional jurisprudence seemed to chart a strong converging trend with the American federal experience and indeed with the experience of other federal states, while in the decision-making process, the EC was closer to the United Nations than the United States.⁵⁹⁵ This was an understanding, which was shared by the other authors in the project, although they were often cautious in their choice of words. In the chapter ‘Federalism and European Integration: A Commentary’ by the law professor Donald Kommers from the University of Notre Dame in Indiana, it was for instance stated that the EC contained the seeds of both aggregation and disaggregation, but that Europe had begun to create the adequate institutional structures and relationships on which the success of a federal experiment depends. For instance a federal ‘constitution’ or treaty, direct applicability, and supremacy. While Kommers estimated that the EC was a confederation, he believed that it could be a federation ‘tomorrow’.⁵⁹⁶ In Ehlermann, Weiler, and Krislov’s chapter on political organs and decision making, they stated that legal developments in the EC had exhibited trends following those evolved in more sophisticated federal systems.⁵⁹⁷ Giorgio Gaja, Hay, and Rotunda underlined the same point, when they wrote that the ECJ had exercised extensive federal jurisdiction.⁵⁹⁸ In this way, the constitutional interpretation of European law that had formed the foundation for the ECJ’s constitutional practice was not only brought out in the open, it was provided with trans-Atlantic academic legitimacy.

All in all, the contributions in the TTL publication series all underlined the centrality of law in the integration process and the constitutional nature of European law. This was conceptualised in

⁵⁹⁴ Cappelletti, Seccombe, and Weiler, ‘Europe and the American Federal Experience – A General Introduction’, at 12 and 30.

⁵⁹⁵ *Ibid.*, at 29.

⁵⁹⁶ D. Kommers, ‘Federalism and European Integration: A Conclusion’ in M. Cappelletti, M. Seccombe, and J. Weiler (eds.) *Integration Through Law. Europe And The American Federal Experience*, Volume 1: *Methods, Tools And Institutions, Book 1: A Political, Legal And Economic Overview* (Walter de Gruyter, 1986), 603-616, at 616.

⁵⁹⁷ C.-D. Ehlermann, J. Weiler, and S. Krislov, ‘The Political Organs and the Decision Making Process in the United States and The European Community’ in M. Cappelletti, M. Seccombe, and J. Weiler (eds.) *Integration through Law. Europe And The American Federal Experience*, Volume 1: *Methods, Tools And Institutions, Book 2: Forces And Potential For A European Identity* (Walter de Gruyter, 1986), 3-112, at 3.

⁵⁹⁸ G. Gaja, P. Hay, and R. Rotunda, ‘Instruments for Legal Integration in the European Communities’ in M. Cappelletti, M. Seccombe, and J. Weiler (eds.) *Integration Through Law. Europe And The American Federal Experience*, Volume 1: *Methods, Tools And Institutions, Book 2: Forces And Potential For A European Identity* (Walter de Gruyter, 1986), 113-160, at 113.

the new and forceful notion ‘Integration through Law’, treated explicitly in the general introduction by Cappelletti, Weiler, and Secombe and highlighted in the main title.⁵⁹⁹

Impact

In 1981,⁶⁰⁰ Shapiro famously summed up the European scholarly production in a review of an article of Ami Barav:

‘(...) it represents a stage of constitutional scholarship out of which American constitutional law must have passed about seventy years ago (...) It is constitutional law without politics. Professor Barav presents the Community as a juristic idea; the written constitution (the treaty) as a sacred text: the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court (the ECJ) as the disembodied voice of right reason and constitutional teleology.’⁶⁰¹

Shapiro had a point. At the time, European law scholarship was characterised by formalism and a lack of theoretical aspirations. This milieu was transformed in the 1980s, and the IIL project was a huge factor in the transformation as it affected the milieu through impact channels related to the three-level superstructure of the project.

The first channel was the publication series. In the reviews, it was already clear that the series had the potential of becoming a classic because of its new conceptions and approaches. George A. Bermann, professor of law from Columbia University, for instance wrote the following in *Fordham International Law Review* in 1987: ‘Clearly, Volume One of Integration Through Law is a monumental work in terms of its conception, its approaches, and its achievements. The proof will be that no serious scholarship in general aspects of European or comparative legal integration can safely be undertaken without prior recourse to the insights given expression in these three books.’⁶⁰² In a review in *Common Market Law Review*, Koen Lenaerts, professor of

⁵⁹⁹ It is unclear in the archive of Cappelletti exactly who and when the notion ‘integration through law’ was created, but most likely, it was not coined until the general introduction by Cappelletti, Weiler, and Secombe was written, thus late in the project process.

⁶⁰⁰ This section is a first attempt of writing an impact history of the IIL project. It thus provides initial reflections.

⁶⁰¹ M. Shapiro, ‘Comparative Law and Comparative Politics’, (1980) 53 *Southern California Law Review*, 537-542, at 538.

⁶⁰² G.A. Bermann, ‘Book review. Integration through Law: Europe and the American Federal Experience’, (1987) 11, n. 1, *Fordham International Law Review*, 232-254, at 253.

European law at the University of Leuven⁶⁰³, in the same vein stated that ‘The original and essentially empirical content of most contributions, relying on the wealth of an interdisciplinary reflection (law, political and economic science), has resulted in the creation of a gold mine of ideas, perspectives and data.’⁶⁰⁴

The second impact channel was the Law Department of the EUI, where numerous research students and researchers linked to the project were shaped by the ITL theory and the contextual, comparative approach of Cappelletti. It was inevitable that these students and researchers would carry the ITL theory and the EUI approach with them to positions in the national settings and the Community institutions and thus spread the theory and approach of the ITL project. The main figure to proceed along the path laid forth by the ITL project was Weiler himself, as it was not just the personality of Cappelletti, but also the academic and personal skills of Weiler, which contributed immensely to the popularisation of the ITL theory. In 1985, when the project had ended, Weiler went to Michigan to become a colleague of Stein, where he stayed until joining the Harvard Law School Faculty in 1992. In the US, Weiler developed the ITL theory further culminating in the famous article ‘The Transformation of Europe’ in *Yale Law Journal* in 1991. The time was marked by the optimism following the SEA, which made American political scientists, such as Anne-Marie Slaughter, Walter Mattli, Alex Sweet-Stone, and Karen Alter keen on studying Europe. They read the work of Weiler, became fascinated with the role of the ECJ and adopted the ITL theory. Eventually, the assumptions of the constitutional nature of European law and law’s centrality in the integration process would become the standard interpretations not only in European law scholarship,⁶⁰⁵ but also in European studies in general, where ITL became a guiding research hypothesis and a self-explicatory super-theory.⁶⁰⁶ On this basis, Weiler became the superstar of European law.

⁶⁰³ Koen has furthermore been the President of the ECJ since October 2015.

⁶⁰⁴ K. Lenaerts, ‘Book Reviews: M. Cappelletti, M. Seccombe and J. Weiler (Gen. Eds.), *Integration through Law: Europe and the American Federal Experience*,’ (1987) 24, n. 2, *Common Market Law Review*, 310-321, at 310. Lenaerts did however also find a general lack of coherence in the ITL publication series. A critique which was also brought forth in a review by Edward McWhinney, Professor of international law at the Simon Fraser University, Vancouver (E. McWhinney, ‘Book review. *Integration through Law: Europe and the American Federal Experience*’, volume 1-2, (1987) 81, n. 4, *American Journal of International Law*, 806-808.

⁶⁰⁵ There are countless examples, but see, for instance, the these illuminating sentences by the Dutch legal scholar and former jurist at the ECJ Kamiel Mortenmanns: ‘The European community is for a large part the creation of law. It was with good cause that a large international research project on European integration was given the title *Integration Through Law*.’ (K. Mortelmanns, ‘Community Law: More Than a Functional Area of Law, Less Than a Legal System’, (1996) 23, n. 1, *Legal Issue of European Integration*, 23-20, at 23)

⁶⁰⁶ The notion ‘Integration through Law’ is seldom defined by the authors, who subscribe to the theory and use the notion in their work. See, for instance, K. Alter, *Establishing the Supremacy of European Law* (Oxford University Press, 2001).

Finally, the third impact channel was the activities in the field of integration related to the ITL project, as the collaboration Cappelletti initiated between the EUI and the Community subsequently branched out and established the EUI as an EU think tank. In 1984, the European Policy Unit (the forerunner of the Robert Schuman Centre founded in 1994) was created, where activities similar to Weiler's drafting of the declaration of rights for the Spinelli Draft Treaty would take place. According to Vauchez, EUI professors were since engaged in different reform initiatives such as the Herman Constitution (1994), the Convention on the Future of Europe (2002-3) and the draft Lisbon Treaty, which all aimed at reinforcing the constitutional character of the treaties with a range of solutions from the simple constitutional codification of the existing treaty articles to a constitutional treaty.⁶⁰⁷ One of the EUI professors involved in the reform proposals was Ehlermann, who joined the EUI as a professor of EC law in 1995 and thus made the tight bond and shared understanding of European law in the EUI and the Commission official.

When estimating the collected impact the ITL project had through the three impact channels, Weiler's view that the ITL played 'an appreciable role' in a qualitative transformation of the academic and intellectual milieu of European Law not just as a published set of books, but also as an educational and scholarly milieu, and an intellectual and academic happening⁶⁰⁸ is certainly justified. The ITL project provided the European law academia with a theory that gathered the transnational level of the discipline, EU studies with a court-centred grand interpretation, and the EUI and Community institutions with a common understanding in their collaboration. The EUI remained the locus of the ITL theory, not just because of the impact the ITL project had on the research environment of the EUI, but also because Weiler never really left the EUI. In 1990, he established the Academy of European Law, which provided summer courses on European law and human rights law at the EUI, and in 1995, he was one of the founding editors of the *European Law Journal* with the subtitle 'Review of European law in context', which was based at the EUI. In 2013, he became the president of the EUI.⁶⁰⁹

⁶⁰⁷ Vauchez, *Brokering Europe*, at 204-206.

⁶⁰⁸ Weiler, 'Epilogue', at 175.

⁶⁰⁹ After the millennium, Weiler's interpretation the European legal order however changed significantly with the promotion of his theory of 'constitutional tolerance', where he contrasted European constitutionalism with American or other federal forms of constitutionalism. See, for instance, J. Weiler, 'Federalism Without Constitutionalism: Europe's Sonderweg' in K. Nicolaidis and R. Howse (eds.), *The Federal Vision: Legitimacy And Levels Of Governance In The United States And The European Union* (Oxford University Press, 2001), 54-72.

Conclusion

The history of the ITL project unfolded in this article provides clarity on the nature of the power-knowledge nexus in European law, as it pulls the curtain on the close collaboration between academia and the Community institutions in the ITL project. Jurists from the Commission, the ECJ, the Council, and the Parliament were thus massively represented in the project as informants, consultants, authors, and visiting professors at the EUI. The cooperation between Cappelletti and the ubiquitous Ehlermann, who functioned as a main collaborator of Cappelletti's, as well as the relation to Pescatore, who's philosophy of integration was a main source of inspiration, is especially noteworthy. It demonstrates that the ITL was an academic expression of a constitutional vision, which had flourished in the Commission and the ECJ for decades, but had never been truly adopted in transnational level of the emerging academic discipline of European law, where the scholars subscribed to the careful characterisation of the ECJ in the *Van Gend en Loos* and *Costa v ENEL* rulings declaring a 'new legal order'. As a comparativist, Cappelletti was an outsider in this field, but his comparative approach to European law and his strong belief in courts and constitutions would transform the discipline of European law. His normative interpretation of European law was present already in the New Perspectives for a Common Law of Europe project, but it was the ITL project, which had the impact. The high standard, daring theoretical conceptualisations, and original approach in the publication series, the scholarly milieu of students and researchers engaged in the ITL project at the EUI, the rise of Weiler, and the continued collaboration between the EUI and the Community institutions made the ITL theory the leading narrative in the entire field of European law. The constitutional nature of the ECJ's practice had been brought out into the open, endorsed with academic legitimisation and linked to an instrumental approach to law.

On the basis of this history, Avbelj's thesis on a difference between a policy conception of ITL and an academic project of ITL should be re-evaluated, as it presents a picture of a separation between academia, Community institutions, and the conceptualisations of European law, which they produce, that is not representative. The findings in this article instead support the claims of Vauchez and Boerger/Rasmussen, who have traced the roots of the constitutional paradigm in the practice and writings of Hallstein and Gaudet and linked it to Stein/the EUI. But it also nuances their histories of the constitutional paradigm by providing a very important piece in the puzzle, which has so far been neglected. This article shows Stein and Cappelletti's efforts as parallel, as Stein and Cappelletti initiated their large comparative, transatlantic studies of the Community and the American Federation infused with a constitutional understanding of

European law and notions of its centrality around the same time, but it argues that the ITL project had an unparalleled impact. Not least because of the very concrete legacy of the ITL project, namely the notion 'Integration through Law', which has proved to be an extremely powerful concept providing a field of scholars, law professors, civil servants from the Community institutions, and ECJ judges with a flattering self-image and a *raison d'être* expressed in three little words.

Conclusion

This thesis conclusion begins with restating the findings of the individual articles on the key transnational institutes of the academic discipline of European law. Then follows a section that synthesises the conclusions of the individual articles into an overall history of the transnational level of the discipline of European law. The third section centres on what we have learned from the first two sections in comparison to the existing research. Finally, the fourth section reflects on the contribution of historians in the field of European law and knowledge and science studies.

FIDE

The article on FIDE analyses the social and organisational dynamics of the federation and the academic debate on the nature of European law taking place at the FIDE congresses that constituted the main activities of the federation. This intertwined analysis provides the foundation for evaluating the role of FIDE in the development of the constitutional practice.

FIDE was founded in 1961 after national associations of European law had been established from 1954 onwards, often with Gaudet as the midwife. Most of these associations resembled professional legal societies consisting of both practitioners and academics. The German association, which consisted of scholars, was the sole association with an exclusively academic character, though with strong links to government ministries that sought to control aspects of the association. All associations were, however, based on ideological adherence to European integration and a belief in the promise of law as a motor in the integration process. On this basis, they were able to unite into a federation.

In the 1960s, close ties to the agenda-setting Legal Service put the nature of European law on the programme of several FIDE congresses, and direct effect and primacy were endorsed by FIDE. The disagreement on the potential direct effect of directives in 1965 in Paris, however, revealed ideological clashes. In the 1970s, the leadership of the Bureau and the Legal Service waned, partly because the federation had never managed to establish a permanent secretariat in the 1960s. The organisation of the federation became looser, with much depending on the national association in charge of organising the next congress, its preferences regarding topics, and its institutional and commercial links. In line with the general campaign for stronger ties between the ECJ and national legal elites under Robert Lecourt's ECJ-presidency, the ECJ implicitly became the main institutional interlocutor of FIDE as ECJ judges increasingly became involved in their national association and national FIDE-presidencies. Most particularly

Pescatore, who promoted an ‘Integration through Law’ narrative portraying law, and the ECJ particularly, as a driver of economic integration. In addition, Pescatore defended the ECJ’s path in the heated 1970s debate on fundamental rights, which aroused strong and divergent feelings at the FIDE congresses. Following the general development of the Community and the stronger affiliations with banks and companies, which began to contribute to the congresses financially, FIDE congresses primarily centred on free trade topics in the 1980s. The political, operational capacity of FIDE became more limited, and national judges were absent. As crucial actors in the enforcement of Community Law in the Member States, the lack of judges negatively affected FIDE at the national level.

Despite the variegated character of FIDE, its congresses provided a remarkable setting for networking, legal mobilisation, diffusing of knowledge on European law, and networking among judges, academics, private practice lawyers, and in-house corporate lawyers. In addition, the conferences offered a possibility for providing controversial legal developments with academic endorsement, such as the endorsement of direct effect and primacy in 1963. Hereby, the central jurisprudence in the creation of the constitutional practice was academically legitimised. However, there is no evidence that FIDE should have assumed an instrumental role in the creation of this practice, neither in aligning the central actors, nor in creating test cases. In fact, FIDE quickly became an arena of contestation, as the documentation of the discussions on direct effect of directives and fundamental rights display clearly. Neither organisationally nor ideologically did FIDE and the ‘Euro-law associations’ constitute a cohesive network in the ideological confrontation with sceptical national actors; FIDE was it-self an arena of contestation.

The Common Market Law Review

The article on the *CML Rev.* documents the social and organisational dynamics of the journal, the academic debate on the nature of European law in the journal issues from 1963-1993, and it provides an interpretation of *CML Rev.*’s role in the emergence and development of the discipline of European law as well as of its role in the development of the constitutional practice.

The *CML Rev.* was established as a traditional academic-commercial enterprise. However, its founder Ivo Samkalden was heavily inspired by the dialogue he had with Michel Gaudet on the latter’s attempt to establish a European law journal, and he shared Gaudet’s vision of an autonomous academic and professional discipline of European law detached from international law, which could spur European law in a federal direction. In addition, the tight power-

knowledge nexus between a small circle of central Community actors and the academic editors shaped the journal more than the commercial interests of the publishers. With a fervent ideological dedication to their cause, the team of editors of the *CML Rev.* and their contacts in the Commission and the ECJ orchestrated legitimisation of ECJ's jurisprudence. The doctrines of direct effect, primacy, and European law as a new, special kind of law in line with the constitutional vision of Gaudet were academically endorsed, although more cautious notions were used.

During Ehlermann's editorship, which led to closer ties to the Commission, national academics or national courts that did not comply with the jurisprudence of the ECJ were met with massive criticism in the journal. The *CML Rev.* thus constituted a bulwark against criticism from the Member States, which contested the development of the constitutional practice. This reflected Ehlermann's political use of his editorship, which was guided by the interests of the Commission. But interestingly, he also occasionally tried to use the journal and its potential ability to express academic criticism of the ECJ as a strategic tool vis-à-vis the court, if it could benefit the interests of the Commission.

In the 1980s, Gaudet's hopes for a constitutional understanding of European law were fulfilled in academia with the breakthrough of the constitutional paradigm. While the *CML Rev.* had always implicitly promoted this understanding, the impetus for the breakthrough of the paradigm with its explicit use of terms such as 'constitutional', 'constitutionalisation', and 'federal' came from ambitious academic projects, namely the ITL and Eric Stein's Bellagio project. Despite the contextual and critical approaches used in these projects, the constitutional understanding of European law was embraced whole-heartedly by the main actors, who thus merged legal vision and academic representation. The effect on the transnational discipline of European law was enormous, also on the *CML Rev.*, where many authors bought into this understanding. The editor Henry Schermers however kept defining European law as a separate legal order, and he encouraged some control of the ECJ in the shape of an ultimate safeguard in the ECHR. Additionally, the self-awareness grew, and by the by the 1990s, the editors became careful in encouraging representatives from the Commission to write for the *CML Rev.* The journal had reached a stage of professional maturity, which required a level of independence from the Community institutions.

Despite the impact of the journal, its status now changed. In the previous decades, the *CML Rev.* had been an academic lighthouse with a fundamental importance for the creation of a scholarly field of European law. Now, other forces drove the field forward.

The Integration through Law project

The final article of the thesis documents the social and organisational dynamics of the ITL project carried out at the EUI, and its contribution to the academic interpretation of the nature of European law and the role of law in the integration process. On this basis, the importance of the project in the broader field of European law is evaluated.

The article provides clarity on the nature of the power-knowledge nexus in European law, as it pulls the curtain on the close collaboration between academia and the Community institutions. As a comparativist, Mauro Cappelletti was an outsider in this field of European law, but his comparative approach to European law and his strong belief in courts and constitutions would transform the discipline of European law in close cooperation with collaborators from the EC institutions. In parallel to Eric Stein, he initiated a large comparative, transatlantic study of the Community and the American Federation, where jurists from the Commission, the ECJ, the Council, and the Parliament were massively represented as informants, consultants, authors, and visiting professors at the EUI. Most noteworthy, the ubiquitous Ehlermann, who functioned as a main collaborator of Cappelletti's, and Pescatore, who's philosophy of integration was a main source of inspiration. The central claim in the ITL publication series was that law was the object and instrument of integration, based on an assumed interdependence between the legal and politico-economic systems and on the assumption that the nature of European law was constitutional. Thus, the ITL was an academic expression of a constitutional vision, which had flourished in the Commission and the ECJ for decades, but had never been truly adopted in the emerging academic discipline of European law, where the scholars subscribed to the careful characterisation of the ECJ in the *Van Gend en Loos* and *Costa v ENEL* rulings declaring a 'new legal order'. The high standard, daring theoretical conceptualisations, and original approach in the publication series, the scholarly milieu of students and researchers engaged in the ITL project at the EUI, the rise of Weiler, and the continued collaboration between the EUI and the Community institutions now made the ITL theory a leading narrative in the entire field of European law. Not least because of the very concrete legacy of the ITL project, namely the notion 'Integration through Law', which has proved to be an extremely powerful concept providing a field of scholars, law professors, civil servants from the Community institutions, and ECJ judges with a flattering self-image and a *raison d'être* expressed in three words.

The History of the Transnational Level of the Discipline of European Law

Taken together, the three case studies do not just document the individual histories of the key academic institutions at the transnational level of the discipline of European law. Because of their central importance, they also make it possible to empirically trace the development of the transnational level of the discipline and assess its role in the development of the constitutional practice of European law.

The academic discipline of European law was built and developed through a circular attribution of legal ideas, legitimacy, and self-image between the ECJ, the Commission, and academia – most particularly so at the transnational level. Developed primarily by the EC institutions, the particularity of European law, the initial cautious notion of ‘a new legal order’, and the constitutional understanding of European law also became the research object, the core term, and the eventual theoretical paradigm of the academic discipline as a part of a process that differentiated European law from other fields of law. When established, the discipline endorsed the jurisprudence of the ECJ, promoted the constitutional vision of European law, and provided the entire legal field with a flattering image when the IIL narrative gained prominence in European law and beyond.

The first initiatives towards the professional organisation of a new field of law and differentiation vis-à-vis well established legal fields, such as international law, came from France. Here a small legal circle of federalists established a national association of European law, the AJE, with the ambition to organise jurists in all the six Member States of the ECSC. However, membership progress suffered from the political defeats in the 1950s; the defeat of federalist visions for Europe in the negotiations on the Treaty of Paris and the Treaties of Rome, as well as the fall of the European Defence Community Treaty and its inherent blueprint for a future European Political Community in 1954. Until 1958, the AJE therefore did not live up to its own ambition and remained a modest French association.

In 1957, it furthermore backfired when the High Authority invited the most authoritative international law scholars of the time, as part of an international conference in Stresa in 1957 on the European Coal and Steel Community (ECSC) in order for them to legitimate supranationality as the foundation of a new, autonomous international law. Contrary to Gaudet’s intention, they rejected the supranationality claim and the legal system of the ECSC was defined as classic international law, although of a special kind.

This lack of political and scholarly support for a European political federation and a European constitutional legal order in the 1950s was the very impetus behind the intensification of efforts

both at national and transnational level to institutionalise professional and academic support for a differentiation of European law, which would lead to the emergence of an academic discipline of European law. In all Member States of the EC, national associations of European law were created from 1958 to 1961, often with Gaudet as the midwife. To Gaudet, transnational academic institutions of European law would however be indispensable for providing academic legitimisation to a constitutional interpretation of European law and for the penetration of European law in the Member States. He therefore cooperated with the AJE on their initial aim of creating a transnational federation gathering the national associations of European law, and he initiated the creation of a European law journal with clear transnational aims. FIDE was successfully created in 1961, and while Gaudet's transnational journal of European law failed to materialise, a similar journal was created by his ideological companion and close associate Ivo Samkalden in a cooperation between Leiden University and the British Institute of Comparative Law in 1963. The journal 'Common Market Law Review' was a part of the wave of first generation of European law journals, but its genuine transnational character made it special. In comparison, most other European law journals had a narrow national or language based regional orientation and stronger ties to the emerging national fields. While the close affiliation between the institutions of the Communities and these journals suggests that most of the first generation law journals served the purpose of legitimating European law in tight coordination with the EC institutions, the *CML Rev.* thus had a special character and a particular status in the field.

With the creation of FIDE, which from its establishment held congresses where European law topics were discussed in grand comparative law exercises, and the establishment of the *CML Rev.*, the backbone of a transnational level of a discipline of European law emerged. Simultaneously, a number of initiatives at the national level, such as the foundation of university centres dedicated to European law contributed to the emergence of national sub-levels of the discipline, however slowly and fragmented.

In 1963 and 1964, the ECJ took the lead from Gaudet and created the foundation of a constitutional practice with the doctrines of direct effect and primacy. Cautiously, it only proclaimed the existence of a 'new legal order', which provided the new academic institutions with the core notion in their initial scientific terminology and an extraordinary legal development to account for. As most clearly seen in *CML Rev.*, this was done with a doctrinal methodology, relying heavily on the ECJ's jurisprudence, and an extraordinary dose of ideological dedication. While the Empty Chair crises in 1965-66 was a clear sign that the Communities was not about to turn into a federation, the *CML Rev.* supported the contrasting development the ECJ's

development of its constitutional practice, for example when the court controversially expanded the doctrine of direct effect to certain types of decisions and directives. This unquestioned academic support by authors and editors was central in discipline building and in carving out a transnational academic space for European law. Taking the level of editorial engagement from judges and EC civil servant into consideration, the unquestioned support was however not surprising. Academics and practitioners worked closely together under the academic cover.

The same engagement from leading characters of the EC institutions characterised FIDE, which endorsed direct effect and primacy at its congresses in the mid-1960s. However, ideological clashes in the mid-1960s, for instance on direct effect of directives at the congress in Paris, also exhibited the miscellaneous character of FIDE. FIDE did not develop into a coherent organisational unity, which would unconditionally back up the legal visions of the federalists. Nor was it instrumental in establishing the constitutional practice in the 1963 and 1964. Half embedded in the national sub-levels of the discipline, FIDE could not completely escape the frequent criticism of the ECJ's jurisprudence from national legal scholars and elites.

In 1970, the activist '1967 ECJ' inaugurated a phase of contestation when it developed the constitutional practice by ruling that primacy of European law was unbound even by basic principles such as fundamental rights in national constitutions. This generated resistance from national legal establishments that challenged the transnational level of the discipline with critique of the constitutional practice. The *CML Rev.* acted as a true devotee of the ECJ and generally counter-attacked national academics or national courts that did not comply with the jurisprudence of the ECJ. In FIDE, however, the criticism from national legal elites was expressed directly at the congresses. Although the ties between the ECJ and FIDE were strengthened in the 1970s, the heated debate on fundamental rights aroused strong and diverging feelings at the congresses in the 1970s. These events increasingly represented an ideological clash between promoters of the constitutional practice with an approach glorifying the ECJ (such as Pescatore) and promoters of a constitutional balance between the European and national legal orders. The leadership of FIDE by the Bureau and the Legal Service furthermore faded in this period, as the Bureau stopped steering the federation, and as the new director of the Legal Service of the Commission, Walter Much, did not engage in European law academia. Now, the federation deteriorated into a looser framework, where much depended on the national association in charge of organising the next congress, its preferences regarding topics, and its institutional and commercial links. Measured against the unconditional support delivered in the European law journals, FIDE was no longer a central organisational tenet of the transnational

level of the discipline. When Claus Ehlermann stepped up as Director the Legal Service in 1977, the European law journals seemed the primary point of influence for the Commission with regard to European law academia. Ehlermann therefore engaged with great commitment and became an appreciated editor of the *CML Rev.*

While the *CML Rev.* implicitly delivered a firm academic backing for the constitutional interpretation of European law, European law scholars were cautious in their choice of words, following the ECJ. A full-blown constitutional paradigm did thus not emerge in the field until a third cornerstone of the transnational level of the discipline was established with the EUI in 1976 and the signature undertaking of the Law Department in the late 1970s and 1980s; the ITL project, which was initiated and managed in coordination with representatives from the Community institutions, most importantly Ehlermann. Along with Stein's Bellagio project, Cappelletti's ITL project whole-heartedly embraced the constitutional understanding of European law, thus merging legal vision and academic representation. With the seal of approval by the scholarly 'stars' Stein, Cappelletti, and Weiler, the scholarly milieu of students and researchers at the EUI as carriers, and the momentum in the EC with the SEA as tailwind, Gaudet's original hope for a constitutional understanding of European law was fulfilled in academia with the bloom of the constitutional paradigm.

In the 1980s, grand academic projects thus drove the field forward and set the agenda at the transnational level of the discipline, while the journals and FIDE dragged behind as trendsetters. The explicit theoretical approach of the grand projects was now generally adopted, as documented in the study on the *CML Rev.* This unified not just the transnational level of the discipline, which now had a strong theory as a scientific foundation and a common identity, but the entire transnational field of European law, which rejoiced in exalting law to the position of the very engine of the integration process. Simultaneously, the self-awareness in the transnational level of the discipline grew, and by the 1990s, the discipline reached a stage of professional maturity, which required a level of independence from the Community institutions and allowed critical reflections on the jurisprudence of the ECJ. The constitutional understanding however remained paradigmatic.

What's New?

With this thesis, a coherent history of the transnational level of the discipline of European law, which accounts for its emergence and development over time based on the history of the three key institutions, has been provided for the first time. On the basis of the existing interpretations'

identification of the existence, structure, and key institutions of the discipline, it has explored the three key institutions of the transnational level based on newly available archival material and a systematic and transparent approach to an analysis of the academic debate. Beyond providing three individual studies of these institutions that have far more detail than hitherto seen, it has thus also delivered a nuanced and comprehensible understanding of the transnational level of the discipline with new insights about the driving forces and central developments shaping the institutionalisation, academic debate, and role of the transnational level of the discipline.

As the framework of this thesis has however been development on the basis of insights from the existing literature, we shall now discuss in detail, how the thesis enriches this literature along the lines of the research questions. It begins with an interlinked look at the first two research questions.

How Did the Social and Organisational Dynamics as well as the Academic Debates of the Key Institutions Develop?

In relation to the existing literature, combining archive-based research with analysis of the academic debates with an eye on temporal development has proved fruitful. The articles of the thesis are thus able to support, nuance, and, at times, reject existing interpretations.

This study of FIDE supports the existing claims on the federation as agenda setting for networking, legal mobilisation, and the initial tight connection between the Legal Service and the federation, which led to endorsement of direct effect and primacy. In addition, the study backs up Rasmussen's claim that FIDE did not have an instrumental role in the development of the constitutional practice as suggested by Alter and Vauchez. However, the study documents that conclusions on the FIDE acting as the ECJ's kitchen cabinet (Alter) or as shop windows for the Legal Service or the Commission are misleading for the period after 1970. Exploring for the first time the history of the organisation systematically in 1970s and 1980s, the study shows that FIDE and the national associations of European law did not constitute an ideologically cohesive network in opposition to sceptical national observers, as assumed by Vauchez, Alter, and Rasmussen. Furthermore, the study documents how central community actors regarded the political, operational capacity of FIDE as limited in the late 1970s and 1980s.

The study of the *CML Rev.* delivers a ground-breaking study of a scientific journal's history based on a precious set of primary sources: the internal archive of the journal that has never been used before. Both in history, European law, and knowledge and science studies, an intertwined

analysis of the institutional development based on an internal archive and the academic content in a journal is unique.

A number of claims have been disconfirmed with the study, from Alter's claim on financing to Bailleux' claim with regard to the establishment of the journal. First and foremost, the study however documents how European legal scholarship was not just to a large degree written by staff from the administrative and judicial institutions (Schepel and Wesseling), it was also institutionally built and editorially run with the support of this staff.

At the same time, the historical analysis provides a contribution to the analysis of the scholarly battle on the nature of European law. The study of the *CML Rev.* generally supports the analysis by Boerger and Rasmussen by documenting the reliance on the term 'new legal order' and the doctrinal approach, as well as arguing that the constitutional understanding of European law became paradigmatic and the scholars of the discipline increasingly engaged with contextual approaches in the 1980s (Weiler, Arnulf, Shaw, Wessels, Martinico, Avbelj, Boerger/Rasmussen. At the same time, it highlights the 1970s as a phase, where the *CML Rev.* was primarily dedicated to defending the constitutional practice in the fight with national courts and academia opposing this. In addition, it documents the maturation of the *CML Rev.* in the 1980s and points to a loosening of the tight power-knowledge nexus between the discipline and the Community institutions, when key figures in transnational academia now rejected the most radical claims of the ECJ on the ultimate authority in the European legal system by recommending a system with eventual ultimate safeguards in extreme situations on the national level or in the ECHR.

As the study of the *CML Rev.*, the study of the IITL project is ground-breaking in delivering the history of an academic research project based on the internal documentation. This has provided new knowledge on the organisation and central actors of the IITL project that in part substantiates existing claims and in part brings out new characteristics of the project.

The study of IITL project enhances the claim of Vauchez and Boerger/Rasmussen on the connection between the promotion of European law as constitutional in the Communities and the academic constitutional paradigm. Thus, it rejects Avbelj's thesis on a difference between a policy conception of IITL and an academic project of IITL. It does so by documenting the history of the IITL project and the tight links between academia and the Community institutions in framing the project and writing the IITL publication series. Not least in arguing that Pescatore and Ehlermann were main collaborators of the director of the project. In addition, the often forgotten pilot project of IITL, namely the New Perspectives for a Common Law of Europe, the personal character and idealistic legal visions of Cappelletti, and the IITL as project as Weiler's

early springboard to his academic career and future stardom have been brought into the history of European law academia from oblivion. Finally, it provides an assessment of the impact of the project, which indicates that the project was even more significant in turning the constitutional understanding of European law into a paradigm in the discipline than hitherto assumed, because of the high academic standard, daring theoretical conceptualisations, original approach, the scholarly milieu at the EUI, the subsequent rise of Weiler, and the continued collaboration between the EUI and the Community institutions. While this generally supports Vauchez' interpretation of the importance of the project, the argument is developed on the background of a comprehensive empirical analysis with more persuasion and nuance. Contrary to Vauchez' account, this analysis has for instance shown that the engagement of the EUI professors in plans for institutional reform was not initiated in parallel to the IITL project – it was rooted in the IITL project.

Together, the answers to the first two research questions allow for a nuanced interpretation of how the transnational level of the discipline emerged and developed, which empirically substantiates the initial general claims by Vauchez and Rasmussen. In fact, it accentuates these claims by documenting the concrete engagement of judges and European civil servants in the management of FIDE, the *CML Rev.*, and the IITL project. An example is the heavy involvement of Ehlermann in the *CML Rev.*, in European law journals in general, and his decisive role in the IITL project. Ehlermann's commitment in European law academia in the 1970s and 1980s is thus comparable to Gaudet's in the 1960s, and he should be regarded a most central figure of the transnational level of the discipline in the 1970s and onwards.

The interpretation in addition supplements existing accounts by emphasising how the development of transnational European law academia resembled discipline building, only at the transnational level. Firstly, European law as a research object became institutionally manifested with the creation of a transnational federation of European law, a genuinely transnational journal of European law, and a transnational research unit that increasingly became dedicated to the study of European law because of the all-encompassing magnitude of the IITL project. Secondly, a shared common terminology, a shared theoretical approach in the 1980s, and finally, a tendency towards disciplinary maturity in the 1990s developed. In addition, the role of the IITL project in providing a common identity and academic 'stars' strengthens this conceptualisation of the transnational level of the discipline.

Finally, the FIDE case study once more emphasises the limits of the existing interpretations and the need for a refined understanding of European law academia taking differences in the field into considerations. Not all transnational academic institutions were automatically defending the jurisprudence of the ECJ by producing legal arsenal needed for pan-European combat (Vauchez). Instead, FIDE was itself an arena of contestation displaying the academic field of European law as complex battlefield with fluid alliances transgressing the borders between the national and transnational levels. Arguably, a topic ripe for study is the patterns of contestation between national legal elites and the promoters of the core ideology of the transnational field, which the study of FIDE provides an initial account of.

What Role did the key Transnational Institutions of the Discipline of European Law Play in the Development of the Constitutional Practice?

This question does not lend itself to clarification easily, neither in the existing literature, nor in the case studies of this thesis. Vauchez and Rasmussen argue that the discipline of European law provided legitimisation to the constitutional practice, and Vauchez furthermore argues that the discipline equipped judges, civil servants, commissioners etc. with rationales for their own roles and techniques for the unification of European, provided kitchen cabinets for decision-makers, was a recruitment pool of personnel to the European institutions, and maintained the image that flattered the role of academics and importance in coordination with decision-makers. The empirical basis of these claims is however weak, which is understandable as explicit considerations on the matter from the actors establishing and managing the academic institutions at the transnational level are rare, and since the judges in the ECJ developed the constitutional practice in rulings without direct reference to academic opinion.

The answers delivered in this thesis documents the existing claim that the academic institutions provided legitimisation to the ECJ's development of the constitutional practice. However, it does so with better empirical grounded arguments. It documents how the *CML Rev.* systematically supplied academic legitimacy to the ECJ's constitutional practice by faithfully praising the court's jurisprudence in ideological cohesion with the court, until the late 1980s, when safeguards at the national levels that would potentially restrict the primacy of European law was promoted by central actors such as Henry Schermers. The documentation of the heavy involvement of judges and civil servants from the EC institutions, most importantly the engagement of Ehlermann, furthermore emphasises the role of the journal as a tool for spurring recognition and use of European legal vehicles in the Member States, which could enhance the European legal order.

With regard to the IITL project, it supports the initial claims of Vauchez in arguing that the IITL project provided the constitutional practice with its grand theoretical wrapping, which functioned as an academic seal of approval with strong normative undertones, provided the community of scholars of European law at the transnational level with a common identity. By revealing the level of Community representation in the project, where Ehlermann and Pescatore were central in shaping and developing the project, and by analysing the content of the IITL publication series, these claims have been supported empirically in a more convincing way that documents the shared constitutional ideology and common interest in elevating the ECJ to a driver of integration.

The above stated arguments can be supported by a banal but persuasive reflection: the heavy participation of judges and civil servants in establishing, developing, and managing the discipline speaks for itself. They must have estimated that the efforts were worthwhile and that academic support of the constitutional practice would have an impact among sceptical legal scholars and judges in national legal circles, as Gaudet hoped in 1961 and Ehlermann in the 1970s and 1980s. As the most important contribution of this thesis to the question of role, these efforts have been documented to a greater extent than before, and they clearly point to the importance of academia in the new field of European law. To judges and civil servants, academic institutions of European law were not isolated ivory towers; they were ‘academic allies’ in the contestation on the development and national enforcement of European law.

At the same time, the study of FIDE emphasises transnational academia as a setting, which did display dissatisfaction with the development of the constitutional practice at times. This might have had a restrictive impact on the radical development of the constitutional practice. Most noticeably, this goes for the dissatisfaction with the lack of protection of fundamental rights voiced by German and Dutch scholars at the FIDE congresses in the 1970s. While this critique was forcefully put forth in the national legal debates, the elevation of this discussion to the transnational level might have effected the majority of the judges in the ECJ towards binding itself to articles of the ECHR.

Painted on the broad canvas of the general history of European integration, the role the transnational institutions of the discipline of European law was minor. They did thus not, initially, play the role, which Gaudet forecasted in the opening quote of this thesis. Firstly, national resistance towards the constitutional practice characterised the 1960s and 1970s, and while national disciplines of European law took actual shape in 1980s with the momentum created by the SEA, new research points to the containment of European law in national arenas,

where ECJ judgements are even ignored at times. Secondly, the federal idea behind the promotion of European constitutional law in the institutions and in the transnational, academic discipline of European law did not enjoy success in the EC, where the Council dominated from the Empty Chairs Crisis and onwards. Even though the SEA was a significant step towards a true common market and economic unification, the Maastricht Treaty in 1993 once more tore down the federal dream with its consolidation of intergovernmental cooperation in two out of three pillars in the new structure of the European Union.

The Contribution of Historians

In documenting the history of the key institutions of the transnational level of the discipline of European law, this thesis exhibits the value of historians engaging in the study of European law alongside legal scholars and political scientist. It proves that historians are able to challenge strong lived myths by analysing central institutions and legal debates on the basis of archival material.

Utilising the Bourdieuan approach on the background of empirical material has in addition shown the value of the historians' methodology, as it draws attention to the battles on the interpretation of European law inside the transnational field, which has primarily been depicted as ideologically cohesive. Despite a general strongly felt commitment to European integration by the actors in the transnational field, this field was an arena of debate and occasional opposition to the ECJ's constitutional practice, which allowed for fluid alliances transgressing the borders between national and transnational arenas.

Finally, this thesis has provided empirically documented analyses of the emergence and development of academic institutions, which are rare in the literature on knowledge and science. In this way, it is an example of a historians' contribution to this particular field.

Abstract

With the establishment of a transnational, academic discipline of European law as the entry point, this doctoral thesis explores the role of academia in the creation of a constitutional legal practice in the European Community from 1961 to 1993. It consists of three case studies exploring cornerstones of the discipline, namely the transnational federation gathering the national associations of European law: *Fédération Internationale pour le Droit Européen*, the European law journal *CML Rev.*, and the ITL project, carried out at the European University Institute by Mauro Cappelletti in the late 1970s and the 1980s.

Fleshing out the history of these cornerstones makes it possible to reflect on the nature and the function of the discipline. Established and led by a number of academics, highly placed civil servants, and judges, the transnational discipline of European law constituted a power-knowledge network. By endorsing the jurisprudence of the ECJ and providing the constitutional ideology of the entire field of European law, academia was a main actor in the legal development along with the Commission and the European Court of Justice. It was however neither instrumental in the creation of the constitutional practice, nor did it constitute an entirely coherent field in an ideological opposition to sceptical national academic fields. Instead, the transnational, academic discipline of European law was in itself an arena of momentarily contestation and occasional opposition to the ECJ.

Abstract in Danish

Med udgangspunkt i etableringen af en transnational, akademisk disciplin for Europaret undersøger denne afhandling det akademiske felts rolle i skabelsen af en forfatnings-retspraksis i det europæiske samarbejde fra 1961 til 1993. Afhandlingen består hovedsagligt af tre case studier om hjørnesten i disciplinen, nemlig den transnationale føderation for de nationale foreninger for Europaret, Fédération Internationale pour le Droit Européen, Europarettidsskriftet *CML Rev.*, og projektet Integration through Law, der blev udført på European University Institute af Mauro Cappelletti sidst i 1970'erne og i 1980'erne.

Den empiriske historie i de tre case studier gør det muligt at reflektere om den transnational disciplins natur og funktion: Disciplinen blev etableret og ledet af en række akademikere, højt placerede funktionærer og dommere, og den udgjorde således et magt-viden netværk. Sammen med Kommissionen og EF-Domstolen var disciplinen en central aktør i den juridiske udvikling, eftersom den legitimerede domstolens retspraksis og leverede konstitutionel ideologi til hele feltet omkring europaret. Disciplinen var dog ikke instrumentel i skabelsen af en forfatnings retspraksis, og den udgjorde ikke et sammenhængende felt i ideologisk opposition til skeptiske nationale, akademiske felter. I stedet udgjorde disciplinen en arena, hvor der momentvis var opgør og opposition mod EF-Domstolen.

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