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When Scholarship Matters: Theory-Building and Theory Effects in the EU Polity Context

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Abstract:
I welcome Jan Komarek's project to engage in a history of "European Constitutional Imaginaries" as seen through EU law landmark theories and most prominent authors. Some malicious minds would think of it as yet another avatar of the "scholastic bias" that structurally incites us scholars to transform our professional anxieties (what is my/our scholarship worth for?) into full-fledged research question (do ideas matter?)... Others could see it as a vain exercise in nostalgia, as EU law researchers return to a golden age, that of the late 1980s, in which EU law was indeed able to frame professional identities and capture political imaginaries way beyond the academic circles. I would rather take it as part of the "critical turn" that has come along the sense of désoeuvrement so pervasive among EU lawyers ever since the constitutional project failed to gather popular support. A détour to the history of the discipline can indeed be a powerful methodological device to strengthen our reflexive gaze and, maybe, start again rolling up the immense boulder of theoretically connecting Europe, the European Union and the Law. I would argue however that the success of such endeavour is conditioned by our capacity to provide a renewed analytical framework able to compare past theoretical undertakings not only from an "internal" point of view (in terms of legal ideas) but also from an "external" point of view (in terms of social and political relevance) and -most importantly- account for the tensions and contradictions between the two. I take the very notions of "utopia", "imaginaries" and "ideology" introduced by the project IMAGINE, that all refer to the capacity of legal ideas to capture political expectations and strategies, as strong incentives to move in that direction. In this paper, I suggest to examine theories of European law along two (partly conflicting) dimensions -their scientific robustness and their social relevance- and apply this simple conceptual toolbox to three historical constellations of European law theory.

KEYWORDS: European constitutional imaginaries, social constructivism and EU legal scholarship, sociology of knowledge

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When Scholarship Matters

Theory-Building and Theory Effects in the EU Polity Context

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Introduction

I welcome Jan Komarek's project to engage in a history of "European Constitutional Imaginaries" as seen through EU law landmark theories and most prominent authors. Some malicious minds would think of it as yet another avatar of the "scholastic bias" that structurally incites us scholars to transform our professional anxieties (what is my/our scholarship worth for?) into full-fledged research question (do ideas matter?)... Others could see it as a vain exercise in nostalgia, as EU law researchers return to a golden age, that of the late 1980s, in which EU law was indeed able to frame professional identities and capture political imaginaries way beyond the academic circles. I would rather take it as part of the "critical turn" that has come along the sense of *désoeuvrement* so pervasive among EU

lawyers ever since the constitutional project failed to gather popular support.[1] A *détour* to the history of the discipline can indeed be a powerful methodological device to strengthen our reflexive gaze and, maybe, start again rolling up the immense boulder of theoretically connecting Europe, the European Union and the Law.[2] I would argue however that the success of such endeavour is conditioned by our capacity to provide a renewed analytical framework able to *compare* past theoretical undertakings not only from an "internal" point of view (in terms of legal ideas) but also from an "external" point of view (in terms of social and political relevance) and -most importantly- account for the tensions and contradictions between the two. I take the very notions of "utopia", "imaginaries" and "ideology" introduced by Komárek's project, that all refer to the capacity of legal ideas to capture political expectations and strategies, as strong incentives to move in that direction. In this article, I suggest to examine theories of European law[3] along two (partly conflicting) dimensions -their scientific robustness and their social relevance- and apply this simple analytical toolbox to three historical constellations of European law theory.

Scientific Authority and the Professional Contest over EU government

Since social constructivism entered the field of European studies, it has become generally accepted that "ideas matter".[4] The period when EU scholars exclusively focused on the "interests" – their up-grading, their conflicting can be now considered to be remote. Entire chapters in handbooks present this cognitivist turn in European studies where communicative and discursive practices are viewed as constitutive of the consciousness and social identity of the various Euro-implicated actors : "European identity", the "European-ness" of this or that professional group –just as any other social norm and collective identity- can not be taken as a given but is the outcome of a circular process in which actors and ideas, agency and structure co-produce each other.

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[1] Loïc Azoulai, "Solitude, désoeuvrement et conscience critique. Les ressorts d'une recomposition des études juridiques européennes", *Politique européenne*, n°4, 2015, p. 82-98.

[2] In this direction, see Armin von Bogdandy, « European Law Beyond 'Ever Closer Union'. Repositioning the Concept, its Thrust, and the ECJ's Comparative Methodology", *European Law Journal*, 22, 2016, p. 591-538.

[3] For the sake of this paper, I have chosen a rather loose definition of "theory" as a more or less systematized set of methodologies, basic assumptions, concepts, and causal relations used to study social phenomena.

[4] See in particular: Thomas Diez, 'Speaking Europe': the politics of integration discourse, *Journal of European Public Policy* 6(4), pp. 598-613, 1999.

Strikingly however, this research agenda has very rarely considered specifically scholars' ideas. Probably because the constructivist claim for the role of 'ideas' and cognitive schemes is too broad and undifferentiated, it does not seem to be able to account for the distinct role of scholarship (and of scholars) in EU processes.[5] Thereby we fail to grasp that, in European political systems where the structuration of academic fields goes hand in hand with that of State-building,[6] scholarly theories constitute an essential lever for the building of political imaginaries and legitimacies.[7] In that sense, academic debates are more than just abstract speculations or just about providing "findings" and "results" as a positivist approach might have it. They offer cognitive tools to whoever intends to decipher and make sense of otherwise complex and dispersed polities. They convey more or less explicitly models of organization that, if implemented, have social, professional and political ramifications. And, last, as they construct benchmarks and rationales against which the dynamics of EU politics (its legal order, its policies…) can be *assessed*, academic theories provide normative standpoints (about conceptions of legitimacy, utopia and ideology). In sum, social sciences' theories implicitly locate the ability and responsibility for "rational guidance" in particular institutions, and therefore in particular social groups. As scholars debate over the foundations, pillars and engines of European integration, they implicitly but continuously assess the relative position of the various institutions (Commission, Member States, Parliament, etc…), blends of professionals (lawyers, economists, high civil servants, etc…) and the value of their respective credentials (legal, political, economic, etc…) within EU government.

As a result, scholarly debates can hardly be detached from the various conflicting professional and social claims of those who participate in them. Building and imposing theories and paradigms on Europe/Europeanization can be regarded as an essential lever for a number of "jurisdictional claims"

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[5] See however recent special issues in the *Journal of European Integration* (37, 2, 2015) entitled "The Sociology of Knowledge Meets European Integration" and in the *Revue française de science politique* : "Pour une socio-histoire de l'Archive européenne" (1, 2019).

[6] Andrew Abbott, Linked ecologies: States and Universities as Environments for Profession, *Sociological Theory*, 23(3), 2005, p.245-273.

[7] For a classic formalization of this argument : Ernst Kantorowicz, Kinship under the Impact of Scientific Jurisprudence. In Clagett et alii, eds., *Twelth Century Europe and the Foundations of Modern Society*, Madison: University of Madison.

in the sense given by Andrew Abbott to this term (the attempt to cognitively control or maintain control over the professional handling of specific social issues of problems).[8] In this line of research, theory-building is also one of the many professional strategies (along with organizational, financial tools) through which specific professionals (economists, lawyers, etc…) aim at establishing and maintaining their "jurisdiction" over specific "social problems" and keeping their competitors and challengers out of the business (consultancies in various EC policy domains, appointments to specific positions within the bureaucratic and political arenas, etc…) and symbolic profits related with the handling of these "social problems". On the whole, studying the scholarly debates triggered by the European construction goes way beyond the mere study of ideas floating around in Brussels or elsewhere; it also implies to follow the related professional claims as well as the related conceptions of legitimacy within the EU polity.[9]

2- Between the "Real" and the "Right". Studying Theoretical Entrepreneurship

To enter such a large and complex *problématique,* I suggest to follow theory-building in the making and trace the socio-historical process through which theories are formulated, stretched, criticized, revised, etc. Methodologically speaking, this implies that I will not engage in the evaluation of their explanatory power but will rather consider the multi-faceted process through which they have been forged and maintained *as* powerful explanatory devices to account for the European project. In other words, instead of trying to assess how heuristic and explicative they may be, my intention here is to craft an analytical framework able to assess how specific paradigms have been endowed with a capacity of accounting for what is going on within Europe while at the same time structuring its political and professional identities and imaginaries. The various sorts of academic and non-academic debates over the scientificity and the political relevance of the various theories of European integration, forgotten/defeated theorizations just as established/successful ones, will make up the variegated empirical material for this work.

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[8] Andrew Abbott, Linked ecologies, art. cit.

[9] In its classic terms, the notion of legitimacy includes both categories of understanding *and* normative worldviews and imaginaries as refered to by Jan Komarek in the introductory article.

In this process of theory-building,[10] I argue that two elements are of particular importance while at the same time in permanent tension with one another. The first element is the *social and political relevance* of the theory and the second its *robustness*.

By social and political relevance, I refer to the more or less dense network of institutions and professional groups that have adopted it as both their compass and credo. The focus here is on the theory's capacity to raise the interest and, even better, to enroll/enlist non-academic publics (political parties, civil servants, administrative departments, pressure groups, journalists, etc…). The point is essential: first of all, because the best way *in* academia is often for a wannabe-theory to leave academic circles and convince *non-academic* actors of its usefulness. The financial and organizational support coming from non-academic audiences (whether foundations, think tanks, political parties, etc.) provides theoretical bids with a social platform and ultimately contribute to ratify the theory's claim for relevance. Without these external validations, the theory might well end up being considered (often by academics themselves) as excessively abstract and arcane. In the case of legal theories, publics can be of at least two different sorts: legal professionals themselves from lawyers to judges but also the legal services of EU institutions, consultants, in-house lawyers, etc. ; and a broader set of audiences coming from political, bureaucratic and economic fields. The enrollment of audiences can take a variety of more or less institutionalized forms, from mere verbal acknowledgment of the relevance of the theory to being a new social and cognitive of professional identities, policy instruments, and institutional functionalities. In this last case, the theory serves as blueprint for action orienting actors' perceptions, strategies, and imaginaries.

The ability in reaching external audiences and in acquiring new membership has its shortcomings however as it triggers a dynamic in which the disciplinary control over the theory is endangered by its very success. As a matter of fact, when successful, a theory is not just diffused but it is necessarily translated –that is to say reshaped and revised- for the sake of its users, in the relation

[10] I have argued elsewhere that it is equally important to study the role of *methodological* entrepreneurs shaping the techniques of data production and collection defined alongside doctrinal bids : on Eur-lex as a technical equipment of the "*Sui generis* legal order" paradigm, see A. Vauchez, "Methodological Europeanism at the Cradle: Eur-lex, the Acquis and the Making of Europe's Cognitive Equipment", *Journal of European Integration*, 37(2), 2015.

to sector-specific idiosyncracies and context. Hereby, its overall appeal -that is the fact it be used *and* "misused" by a variety of heterogeneous, if not conflicting, publics (political leaders, segments of EC bureaucracy, interest groups, etc…) may undermine the capacity of its academic founders/authors to maintain control over the meaning and the implications of the theory. As the theory is torn in all sorts of directions by non-academic actors for the sake of their social and professional undertakings, its capacity to fit in the scientific canon of autonomy is put at risk. As noted by Sartori many years ago,[11] "concept stretching" is a danger for effective and cumulative theory building. This in turn contributes to trigger academics to criticize the theory as been too encompassing, too fuzzy and in the end, useless to account for social reality. If successful, these challenges to the theory's scientific value in turn undermine its authoritativeness as they weaken its claim of objectivity. The "governance" paradigm could easily fit in that category as the success of that academic concept among policy-makers of all sorts has been so wide and so diverse in its usages that its academic promoters have soon lost control over its specific content and sometimes even repudiated the very concept they had contributed to forge.[12] On the whole then, success among of extra-academic audiences is a not sufficient criteria to account for the authoritativeness of a specific theory that might well end up being just a kind of buzz-word carrying as many meanings as there are users.

This explains the importance of the second variable : the *robustness* of the theory. By this, I refer to its capacity to appear as a constitutive of a body of disciplinary knowledge whose mastering and authoritative handling requires special expertise. Among the various elements that contribute to scientific robustness, one is more "internal" to the theory itself and relates to its proximity to disciplinary "models of scientificity". In the case of law, for example, this refers to the capacity of the theory to describe social reality on purely legal grounds i.e. to be self-sufficient:[13] without

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[11] Giovanni Sartori, "Concept Misformation in Comparative Politics", *American Political Science Review*, 64(4), 1970, p. 1033-53.

[12] Didier Georgakakis, Marine de Lassale, dir., *La 'nouvelle gouvernance européenne'. Genèses et usages politiques d'un Livre blanc*, Strasbourg, Presses universitaires de Strasbourg, 2008.

[13] Pierre Bourdieu, "The Force of Law : Toward a Sociology of the Juridical Field", *Hastings Law Review* 38, 1987, p. 805-53.

engaging here in the debate over the scientificity of legal knowledge (or its different forms),[14] I would argue that ultimately *robustness* in legal theory connects to canons of legal autonomy (in particular vis-à-vis the chains of political or bureaucratic command) - whether it is grounded on a judicial or a scholarly figure as last instance *apolitical* interpreters of the authentic meaning and scope of law.

The following table tries to sketch, in an ideal-typical manner, this tension between relevance and robustness. The line reports the range and the variety of non-academic actors enrolled (relevance). The column refers to the "robustness" of the paradigm as defined here-above. As ideal-types, the four situations outlined by this two-by-two table are not to be understood as mirroring reality, but rather as stylizations of specific constellations or, to put it differently, as theoretical fictions that provide a compass to identify dynamics and tensions in concrete empirical situations. When a specific theory does not manage to raise interest beyond academic circles and remains controversial, its authoritativeness is closed to null. This is of course the cruel destiny of most academic production which looks like "trial balloons" in search for both relevance and scientific validation… The "paradigm" constellation refers to the Kuhnian situation (1962) where a specific academic discipline reaches a consensus over one theory (in terms of basic assumptions, key concepts, and methodology) which is however still unable to appeal to non-academic publics. The third constellation is the one where a theory still has a controversial status within academia but has found ways to be used and mobilized by actors coming from a variety of policy areas, with different if not conflicting interests. Used and misused in non-academic setting, the academic promoters tend to lose control over concepts that become mere "buzz words". The situation is the one that I coin as a "theory effect" situation in which a specific theory is accepted both as the scientific canon within the academic community (*European studies*) and as an unescapable blueprint for stakeholders' (legal, bureaucratic or political) action and identities.

Scholarly Theories Between the "Right" and the "Real"

[14] I am grateful to Jan Komarek for his engagement and advices on this.

Relevance (Number and Diversity of Audiences) **Robustness** (Proximity to Disciplinary Autonomy Canons)	–	+
–	"Trial Balloons" Ex. *Uniform Law of Europe (1950s)*	"Buzz words" Ex. *European governance (2000s)*
+	"Paradigms" Ex. *European Constitutionalism* (2000s)	"Theory Effect" Ex. *Sui generis* Legal Order (1960-80s)

This analytical framework provides lenses to study and compare legal theory-building in the context of EU polity. Authoritativeness lies at one and the same time in the theory's ability to provide with an integrated and realistic description of the connections between Europe/Europeanization and the Law while at the same been adopted as a critical device by all sorts of political and bureaucratic actors wishing to participate authoritatively in the European affairs and policies. I do not wish, nor can I imagine, to write here a whole history of the relationship between legal science and the European constructions. Rather, I intend to test the heuristic capacity of this analytical framework in three

critical historical constellations that exemplify different ways through which legal scholars have formalized the law of Europe and connected to European audiences. The first one refers to the foundational period of the European project up, between post-WWII and the mid-1960s whereby comparative "Europe" meant a variety of European organizations (Council of Europe, ECSC, OECD, etc.) and law was called upon to provide a legal theory of harmonization allowing to foster the approximation of national legislations. The second one points at the critical juncture of the *Van Gend en Loos* and *Costa* decisions when a more robust scientific paradigm (the "*Sui generis* legal order") made its way through the emerging field of EU law and raised the interest of a variety of EC-implicated actors, particularly within the European Commission and the European Court of Justice. The last one refers to Euro-constitutionalist theory, to which Weiler gave a critical contribution, which emerged in the late 1990s in a context where the traditional prevalence of "*Sui generis* legal order" was being increasingly challenged both within and outside the realm of EU law. Each of one them differ in the scope, *locus* and *raison d'être* given to European law, thereby providing different definitions of the European-ness of the law in Europe. While they managed to capture Europe's constitutional imaginary only for a moment, none of them fully disappeared. Theories may lose some momentum or be superseded by other more robust or most relevant theoretical bids, but they are still part of Europe's archive knowledge from which later scholars may actually draw new proposals and assemblage connecting Europe and the law.[15]

Constellation 1. Theorizing the Uniform Law of Europe (late 1950s)

In the early days of the European Communities, the idea of a process of Europeanization driven by ECJ case-law didn't receive a lot a traction. The first functionalists' scholars –Haas, Lindberg, etc…- had not cast a specific role for law in the spill-over processes they were theorizing.[16] Even Stuart Scheingold –a functionalist of strict obedience (he had been a student of Haas) and one of the very first political scientists to study the European Court of Justice- had remained quite

[15] Francisco Roa Bastos, Antoine Vauchez, « Savoirs et pouvoirs dans le gouvernement de l'Europe. Pour une sociohistoire de l'archive européenne », *Revue française de science politique*, 2019, p. 7-24.

[16] Grainne de Burca, Rethinking Law in Neofunctionalist Theory, *Journal of European Public Policy*, 12(2), 2005, p. 310-326.

skeptical about the capacity of the Court to trigger the integration process.[17] Strikingly, legal scholars were not primarily interested in the ECJ's integrative potential. As a matter of fact, most of the legal thinking relating to the Coal and Steel Community or to the European Communities was embedded in the comparative law community of scholars that had developed at the periphery of international organizations (particularly the more technical ones), ever since the first inter-governmental conference on the codification of private law in 1893, a community which had grown substantively around the League of Nations and its many codification committees.[18] A dense transnational network had developed in the inter-war period with a number of active transnational academic arenas such as learned societies (*Association internationale de droit comparé, Société internationale de legislation compare* et their respective national antennas), academic journals (*Revue internationale de droit comparé*) and specialized institutes (the *Académie internationale de droit comparé* created in Strasbourg in the post-WWII period and, most of all, *Unidroit,* the international organization created by League of Nations to foster the harmonization of private international law standards.

This body of knowledge pointed at the fact that any progress towards the production of a *loi uniforme* (Uniform Law) for Europe required to use the same *scientific* techniques and procedures that comparative lawyers had crafted in the context of IO's expert working groups to harmonize law. This theory of Europe's legal harmonization was not actually limited to the European Communities but extended to all European organizations as they engaged in setting common legal standards across the continent: teaching and textbooks would not actually differentiate at the time and consider "*Organisations européennes*" as a specific class of organizations that deserved ad hoc coverage and theorization.[19]

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[17] In his view, the ECJ could contribute to "specify to *who*, the *what*, the *how* and to some extent the *why* of the emerging Community system", but remained essentially a "background presence" in an essentially politically-driven process. Stuart Scheingold insisted particularly on the many out-of-court-settlements (12 out of the 47 cases which had brought to the Court at the time of his research): Stuart Scheingold, *The Rule of Law in European Integration*. New Haven: Yale University Press, 1965, p. 298.

[18] In the late 1920s, the League of Nations and the Pan-american organization had put much emphasis in the objective of forging a regional and international codes : see Guillaume Sacriste, Antoine Vauchez, The Force of International Law. Lawyers' Diplomacy in the 1920s International Science, *Law and Social Inquiry*, 32(1), 2007, p. 83-108.

[19] Up until the late 1960s, French law school curriculum included a class on "Organisations européennes" ; this prompted the publication of a large number of homonym text-books: see Julie Bailleux, *Penser l'Europe par le droit*, Dalloz, 2014.

Truly enough, with the creation of both the Council of Europe (and its committees of codification) in 1948 and the biannual inter-governmental conference on codification (the so-called The Hague Conferences on Private International Law) in 1956, it seemed that the harmonization paradigm had found a new momentum in Europe. In particular, many comparative legal scholars got enthusiastic about the fact that the EEC would provide social and political relevance for a "a discipline which had been considered, wrongly so, as merely an occupation for theorists and professors only". Comparative law now had the opportunity to become "l'outil de l'oeuvre grandiose de la formation d'un droit adapté à l'immense communauté des six pays de l'Europe occidentale".[20] Others envisioned the possibility for European states to finally "recover this unity which was a reality before the separation and isolation of European states".[21] A whole literature developed in the early years of the EEC on the various possible methods for unifying EC law. As a matter of fact, *Unidroit* itself engaged in the debate publishing a whole report on the best approximation strategy (hierarchy of priorities, tools, calendar, etc…) for the Common Market just a couple of weeks after the Rome treaties had been signed.[22]

The paradigm had many supporters outside of the legal academia. If one considers the many articles of the Rome treaties referring to the "harmonization", "approximation", or "unification" of national legislations, it seems clear that such a paradigm was integral the EEC project from the very beginning[23]. EC officials themselves were deeply convinced that legal harmonization was the main legal channel that had to be followed. The first president of the ECJ, Massimo Pilotti, a judge with a strong experience of international settings, had himself been the president of *Unidroit* in the post-war

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[20] *F. Dumon, "La formation de la règle de droit dans les communautés européennes",* Revue internationale de droit comparé*, 12(1), 1960, p. 75-107.*

[21] J. Barman, "Les Communautés européennes et le rapprochement des droits, *Revue internationale de droit comparé*, 1960, 1(1), p. 9-60.

[22] See Unidroit, *Forty Years of Service in the cause of unification of law (1926-1966)*, Rome, Palazzo Aldobrandini, 1966.

[23] See the many articles in the Rome treaty that refer to the : « rapprochement des législations nationales » (art. 3, 100-102 et 117), « l'harmonisation des dispositions législatives » (art. 99, 112), la coordination (art. 56, 57) ou « une collaboration étroite… relative au droit » (art. 118), etc…

period.[24] The Court itself actually repeatedly insisted on the relevance of comparative methodology in order to identify "un ensemble de principes communément partagés par les droits nationaux" sur la base de ce que "fait ressortir une étude de droit compare du droit de tous les autres Etats membres" (*Algera c/ Assemblée commune de la CECA* case, 12 July 1957). The president of the EEC Commission, himself a reknown professor of private international law and an early follower of the comparative methodology, actively promoted this most promising path of European integration.[25] His stance is considered so enthusiastic that some of comparativists even criticized his "very general and ambitious conception of harmonization" that "confuses the EEC competences and his own project for Europe".[26] Harmonization blossomed at the time particularly in the context of the DG Market and DG Comp. As a matter of fact, the building of a common legal statute for all European companies was initially considered as important as the launching of EC anti-trust regulation.[27] Pushed by the Direction B ("Harmonisation of legislations", directed by a Belgium lawyer Jean Dieu) of that DG, a questionary had been submitted to business actors on the opportunity of such an initiative. Simultaneously, various legal organizations mobilized for such an agenda: gathering representatives of the various European bars, comparative law professors and officials from the Commission, the Paris bar association organized an important European congress in 1960 on the theme[28] while the *Fédération internationale pour le droit européen* (FIDE), the pan-European lawyers' association, opened up in first congress in Brussels in 1961 with a round-table calling for the identification of a "fonds commun de solutions (quant à la fusion des sociétés des pays européens) qui apparaissent

[24] Massimo Pilotti, Les méthodes de l'unification, In *Actes du Congrès international de droit privé (1950)*, Rome : Unidroit, 1951.

[25] Walter Hallstein, "Angleichung des Privat und Prozessrechts in der Europaïschen Wirtschafts gemeinschaft", *Rabels Zeitschrift fur Auslandisches und internationales Privatrecht*, 1964, p. 211-231

[26] René Rodière, "Les législations européennes dans le cadre de la CEE", *Revue trimestrielle de droit européen*, 1965, n°3, pp. 336-357.

[27] Laurent Warlouzet, *Quelle Europe économique pour la France ? La France et le marché commun (1956-1969)*, PhD in history, Paris IV University, 2007.

[28] *Le Figaro*, 17 juin 1960.

comme necessaires et indispensables pour donner dans chacun des six pays membres un minimum de protection aux créanciers et aux associés".[29]

Yet, although the paradigm could rely on a strong support from both the academic community and a number of officials with EC institutions, its scientific robustness was undermined by the fact that it did not provide a "pure model of law" i.e. a body of knowledge enforceable before independent judges. Its development was indeed heavily dependent on the good will of political actors to enact what the legal experts had constructed. The fact that the Commission and the Council were seen as key institutions for implementing such an ambitious program while the Court of Luxembourg was regarded as of secondary importance, if not entirely 'incompetent' (in the legal sense of the term),[30] weakened the model as it was constantly dependant on the currents of the political agenda. As a matter of fact, the outcome of the many initiatives launched in the domains of economic and commercial law (bankruptcies, mergers of companies, European statute for companies, etc…) were very modest and permanently mortgaged by the political crisis of 1962-1966 period in Brussels. Many lawyers acknowledged that, in such a context, this paradigm of legal integration had become irrealistic as it implied a strong political will that was lacking at the time. Among others, ECJ judge Robert Lecourt assessed on several occasions the failure of 'general harmonisation not only of a considerable part of the economic, social and fiscal legislation of Member States, but also of the private law that is used as a transactional framework' had been substituted by 'minimalist conception of the rapprochement of legislations'.[31] By the time of *Van Gend en Loos*, the concept of Europe's Uniform Law had already reached a deadlock.

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[29] On the first FIDE Congress of 1961, see Rebekka Byberg, "A Miscellaneous Network: The History of FIDE 1961-94", *American Journal of Legal History*, 57(2), 2017, p. 142–165. Following such a call, the Commission set a committee of experts under the presidency of Prof. Berthold Goldman, himself a prominent member of the comparative law community.

[30] At the time, Jean-Louis Roper, a Belgian judge and member of the Commission on international law of the International Association of Judges (UIM) even suggested to create a second Court which 'by its composition would be the emanation of the supreme courts of the various Member States : Jean-Louis Ropers, "De la nécessité d'une juridiction communautaire de droit privé", *Bulletin de l'Association des juristes européens*, n°10, 1962, p. 7-9.

[31] Roger Lecourt, Roger-Michel Chevallier, "Comment progresse le rapprochement des législations européennes?", *Recuiel Dalloz*, 1965, p. 147.

Constellation 2 : Unearthing the Community's *Sui Generis* Legal Order (1963-1965)

In a couple of years however, a new paradigm took over and, in a strikingly quick manner, imposed itself both as the academic credo of EC-implicated legal scholars and as a possible compass for legal professions as well as EC institutions. As I have studied elsewhere in full detail the progressive building of the theory, I will mostly point here at the specific balance between "relevance" and "robustness" that emerged in this context. As is well known, the theory contends that European treaties have established a Sui generis legal order, different from both national and international ones, with direct effect and supremacy. Contrarily to the Harmonization theory, the model could claim to be more scientifically robust in that it was both autonomous and relied (almost…) exclusively on legal actions and actors for its implementation. The EC treaties had purportedly set up a sort of "magic triangle" connecting the autonomous (and prevalent) EU legal order to a procedural instrument connecting its implementation to a court. Taken individually, any of these notions was merely a legal principle utterly incapable of founding of viable legal order. Taken together, it is say, they form an self-sufficient legal theory of the European Communities: no supremacy with direct effect opposable to and by individuals; no direct effect with preliminary rulings ensuring that a uniform interpretation of Euro-law; and, loop to the loop, no preliminary references to the ECJ without an incentive to engage in that procedure, namely the direct effect and the supremacy of the treaties and of EC law in general.

In a context in which the Harmonization integration path was proving to be irrealistic, the "*Sui generis* Legal order" theory gave EC legal scholars the opportunity to assert scientifically both their "specificity" vis-à-vis the classic comparativists models and their relevance vis-à-vis EC-implicated actors. The flourishing of publications and conferences on the relationship between EC law and national law and on national judicial decisions on EC law indicated that progress in EC law would be now expected from the "judicial" realm (the relationship ECJ-national courts) rather than from the "legislative" one (the Commission and the Council). A swift reorientation of academic debates can actually be traced from *legislation* towards the analysis of this *case law*, from the policies of the Commission to the jurisprudence of the Court. The paradigm could claim to resemble the most achieved pure legal system as its promoters forcefully argued that individuals did not 'have to worry

anymore that the recognition of their rights be paralyzed by the high political spheres'.[32] As it relied on a procedure that did not depend on the good will of the Member States or of the Commission (preliminary rulings) but on a Court, the European Communities were rooted on a solid ground.

As the hopes for a rapid development of Europe's supranational pole had been dashed in the context of the 'empty chair' crisis, the "Sui generis legal order" started to be of interest to a variety of groups and institutions from the Parliament to the European Commission embraced the emerging paradigm engaging in an overall redefinition of Europe in legal terms. The fact the 'empty chair' had not altered the dynamics of intra-European exchanges, which continued to expand swiftly, was considered as a confirmation of the fact that ECJ case-law had become the real *locus* of integration. The many lawyers among the first generation of European office holders (Fernand Dehousse, Walter Hallstein, Carl Ophuls, Jean Rey, Ivo Samkalden, Paul-Henri Spaak, or Pierre-Henri Teitgen, etc.) proved critical in raising awareness and interest of non-academic audience beyond professional associations, learned societies and legal journals. This blurriness of the borders between law and politics is essential to understand how these gentlemen-politicians of law were able to seize the new course of the ECJ to re-direct their own pan-European investments into the promotion of the "*Sui generis* Legal order" paradigm.

On the whole, this new disciplinary bid managed to be regarded in a few months a new political common sense of Europe heralded it was by of the major players of EC politics. At the same however, the model reached a scientific robustness that had no equivalent as far as international or transnational law was concerned: not only did the model approximate that of "pure law" but also the community legal community tended to unify around this new paradigm.[33] In a very characteristic *effet de théorie*,[34] the convergence of these diversely implicated Euro-lawyers (involved in various bureaucratic, political, judicial arenas) around the "*Sui generis* legal order" paradigm, offered a unitary cognitive and normative platform for their variegated set of experiences or practices (as one

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[32] Fernand-Charles Jeantet, "Commentaire de l'arrêt Van Gend en Loos", *La semaine juridique*, 1963, p. 1377.

[33] As pointed by Stéphane de la Rosa : "à l'autonomie du droit communautaire a correspondu la constitution d'une théorie parfaite des sources du droit Communautaire" : Stephane de la Rosa, *La méthode ouverte de coordination dans le système juridique communautaire*, Bruxelles: Bruylant, 2007.

[34] Pierre Bourdieu, *Ce que parler veut dire*, Paris, Fayard, 1982.

joint contribution to the grand project of building of European rule of law). In few years, the paradigm got deeply entrenched in Europe's standard operating procedures. At the Court, the tentative formula of the early years had turned into a codified and polished number of legal formula ("ordre juridique propre", etc), performative statements ("la Communauté est une source de droit" ; "la Communauté est un ordre juridique" ; "les Etats ont créé une entité juridique autonome qui s'impose à leurs ressortissants et à eux-mêmes", "le droit communautaire diffère du droit international public", etc…) and already-made "*attendus*" and blocks of argumentation that could be articulated differently, but that formed the basic grammar of EC law with which anyone (lawyers or judges) willing to argue persuasively has to cope with : direct effect, institutional balance, European legal order, etc… Beyond jurisprudence, policy instruments, and policies through which the doctrine was been objectified, it was also put at the very core of the institutions: it was the very social and cognitive basis of the notion of *méthode communautaire* which formalized a new division of institutional labor inn which the supranational pole of the European Communities (in particular the Court and the Commission) played a key role. Just as the legal definition of Europe was well established and widely accepted among Euro-implicated actors, law established itself as a generalist or transversal disciplinary knowledge deemed capable of providing lenses to describe and assess the currents of EC polity. The apparently benign words of the director of legal service of the European Commission, Claus-Dieter Ehlerman at the time: "the Community is above all a Community with the power to make law", somehow summarized the centrality of that theory to the very definition of the European project as a whole.

Constellation 3. The Constitution/Constitutionalization Moment (late 1990s-early 2000s)

The third constellation can be situated in the late 1990s in a profoundly different intellectual and political context. The decade had indeed constituted a moment of great challenge and turmoil for EU lawyers' professional jurisdiction as the "*Sui generis* legal order" theory was meeting with increasing criticisms that pointed at its all-encompassing and formalistic understanding of EU polity. Truly enough, the field of "European studies" had undergone considerable changes ever since the *Van Gen den Loos-Costa* theory of EC law had initially been forged. EU scholarship had not only

considerably grown over the years but also diversified, moving from the small "boutique"[35] atmosphere "tinted by legalism, and in particular legal positivism"[36] to a broad tournament of social sciences structured around powerful transnational academic networks (see e.g. the UACES, ECPR, etc.) and universities (European University Institute). As political science became an increasingly strong competitor in the field of theories of European integration,[37] a lively intra-academic (and notably inter-disciplinary) conversation developed around concepts and causal mechanisms.

The political science challenge was all the more important that the legal-only narrative seemed ill-equipped to grasp the new dynamics of European integration. The Maastricht treaty questioned the ability of the unitary paradigm of EU law to account for a multi-speed Europe or for its pillarization between more supranational (Single Market) or inter-governmental (UEM) poles. Worse: the choice of a two-track negotiation, one for the political union, the other one for the economic and monetary union somehow sealed the marginality of Euro-lawyers in what would later become to most dynamic integration path, that of the eurozone government.[38] Later, the rise of the Open Method of Coordination (OMC), from the Amsterdam treaty onwards, would confirm –if not the obsolescence- at least the decline of the classic *méthode communautaire* for which the "*Sui generis* legal order" had been so central.[39] The rise of "governance" as the Commission's overarching concept came as a last blow. It is not hard to see that the notion has a profound anti-legal twist, contradicting ideas of binding-ness (direct effect), hierarchy (supremacy) and uniformity (preliminary rulings) that had been at the core of the "*Sui generis* legal order" theory. Each one of these concepts was now contested and criticized as being ill-adapted to the current necessities of European integration (Joerges, 2007).

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[35] John Keeler, "Mapping the EU Studies : The Evolution from Boutique to Boom Field 1960-2000", *Journal of Common Market Studies*, 43(3), 2005, p. 551-582.

[36] K. Kaiser, "L'Europe des savants : European Integration and Social Sciences", *Journal of Common Market Studies*, 4(4), 1965, p. 37.

[37] The creation of *Journal of European Public Policy* –arguably the dominant academic journal in the field of European studies- in 1994 can be taken as a chronological milestone in this regard.

[38] Guillaume Sacriste, Antoine Vauchez, "The Euro-ization of Europe", Hennette, Piketty, Sacriste, Vauchez, eds., *How to Democratize Europe*, Cambridge, Harvard University Press.

[39] Renaud Dehousse, "La méthode communautaire a-t-elle encore un avenir ?", *Mélanges Jean-Victor Louis*, vol. I, Bruxelles, 2003, p. 95-107

The renewal of EU constitutional discourse in-between the mid-1990s-mid-2000s can be understood in relation to this specific intellectual and political moment in which EU law's overarching position in EU studies was increasingly contested by other disciplines (political science and economics), and EU law's political appeal was undermined by the ubiquitous rise of the "governance" paradigm at the Commission and the progressive reorientation of Europe's integration dynamics around the Economic and Monetary Union. Interestingly enough, its main entrepreneurs had been trained in the "Florence integration project" at the EUI, also labeled the "Integration-through-law" project. Promoted by Mauro Cappelletti an EUI-based Italian professor in comparative law (he chaired the department at the time) with an strong anchorage in US academia (he was simultaneously a part-time law professor at Stanford), the project brought together an inter-disciplinary group of scholars. As a matter of fact, the more than 20 scholars mobilized in the 8 volumes of the series *Integration through Law: Europe and the American Federal Experience* made up a group of "contextualists" from both the United States and Europe.[40] Beyond the diversity of its production, this group was essential in providing a new synthesis able to go beyond the apories of the "doctrinalists" while addressing the a-legal biases of political science.

The *Transformation of Europe* and later articles by Joseph Weiler are certainly all milestones in this attempt to shape a new scholarly synthesis hybridizing law and political science. As he continuously mixed his theorizations on Europe's "*Sui generis* legal order" and ECJ's constitutionalizing efforts with considerations taken from other disciplines particularly political science and political theory, he epitomized the new EC scholar with strong interdisciplinary background particularly skilled for persuasively arguing in the field of "European studies".

- [40] Among the many contributors to the project: Joseph Weiler and Monica Seccombe as co-organizers, figures of the US law-and-society movement (Lawrence Friedamn, Bryant Garth, Martin Shapiro, David and Louise Trubek), European legal scholars (Bruno de Witte, Yves Mény, Gunther Teubner, Michel Waelbroeck): Cappelletti, Stinchcombe, Weiler, *Integration Through Law. Europe and the American Federal Experience*, New York, 1985.

The new theoretical bid that emerged under the umbrella of "constitutionalism" profoundly renewed the scholarly debate on the relationships between the European Union and the Law. In the liberal context of the years, it attempted to generalize the European Community case by detaching the notion of "Constitution" from its national anchorage and providing a flurry of new concepts, whether "beyond the state", "non statal", "multi-level", thereby opening the way to similar formalizations in the field of WTO, ECHR, etc. Yet, one of the most interesting feature of this new avatar of EU constitutional discourse, is the hybridization of (American) political science and law-in-context legal scholarship: , thereby providing a counter-offer to the challenge raised by the rise of political science in the field of European studies. Interestingly, constitutionalism was defined as both a legal fact (due to ECJ continuous constitutionalizing efforts at the time) and a sociological process (due to the constitutionalization dynamics that brought together a variety of economic and social interests -as described at the time by Alec Stone or Anne-Marie Slaughter); something already accomplished and yet continually being enacted. As a matter, in one of his most elaborated article on the subject-matter, would about the "Constitution/constitutionalization", eventually concluding with irony: "Eureka! Social Science Discovers Constitutionalism (and Constitutional Lawyers Discover Social Science...)".[41] In few years, this theoretical synthesis became the new scholarly paradigm with hinges in both political science and EU law.

It is not the place here to go through the whole political trajectory of this paradigm : how it came to raise interest in a variety of political, legal and bureaucratic quarters in Brussels and Luxembourg, and how it ultimately failed to garner popular support. The history of this constitutional momentum has been already told many times. With the hindsight, however, it can be read as a form of counter-mobilization on the part of EU law and lawyers in a context of rising intellectual and political challenges to their definitional power over the European project. The large variety of political, bureaucratic and civil society groups that had rallied at the time under the overarching umbrella of the "European Constitution" were indeed the ones whose interests and identities had been defined alongside EU Law paradigms (*acquis/méthode communautaire*) and shared a similar ambitious supranational project for the European Union. Fifteen years into the financial crisis and the rise of the eurozone government, the constitutional frenzy that took over the EU at the time seems

[41] Joseph Weiler, "European Constitutionalism and its Discontents", *Northwestern Journal for International Law and Businness*, 1997. – please complete the refence (volume, page numbers).

more like a parenthesis in a longer and deeper process whereby EU law's intellectual and political leadership over European integration has progressively dismantled. Since the 2005 referenda which marked a sudden halt in the process, the constitutional genie has been back in its academic bottle… Yet, the history of the European projects teaches us that it is hard to think a political union without dwelling at some point into the constitutional grammar.

Concluding remarks

On the whole then, theory does matter indeed … but not only when it is able to convince its academic discipline (robustness) but also to reach out to wider political and professional contexts (relevance). In particular, its capacity to capture political imaginaries and shape utopia does not connect to its intrinsic characteristic but rather to its being in tune with specific expectations on the part of social, legal and political actors. In that sense, any theoretical bid to re-connect Europe and the law should "forget nostalgia" for EU Law golden years and start from a comprehensive assessment of the political and intellectual *zeitgeist*. As grand unificatory projects forcing European countries into an ever closer and more supranational union has failed, the theoretical challenge has moved more towards providing a common analytical frame to think altogether diversity and interdependence in the European context. New theoretetical paths have open in the recent years in the field of European studies that all try to account for the transnational interdependence and horizontal mutual dependence that result from six decades of Europeanization. All of them cut away from the grand unificatory paradigm of "integration" and try to define a notion of European-ness that would not be exclusively centered on the European Union but also around the dense web of transnational relations in which European politics, law and business are now embedded. This is the case in the field of history with Kiran Patel's proposal to "provincialize the European Union"[42] by resituating it back into the dense network of post-WWII European bilateral and transnational cooperations in which the EU is embedded.[43] Political theorist Kalypso Nikolaidis has turned this renewed understanding of the

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[42] Kiran Patel, "Provincializing the European Union. Cooperation and Integration in an Historical Perspective", *Contemporary European History*, 22(4), 2013, p. 649-673.

[43] Proposals such as the treaty for the democratization of Europe (T-Dem) draw from similar assumptions and assessments when it comes to define the institutional set-up (a transnational Parliament) that would be most adapted to the democratic challenges raised by a European economic government increasingly intrusive in national fiscal, economic and social policies : on this discussion, see Stéphanie Hennette, Thomas Piketty, Guillaume Sacriste, Antoine Vauchez, eds., *How to Democratize Europe*, Cambridge, Harvard University Press, 2019.

European-ness of Europe into a normative theory of European demoi-cracy as a polity of multiple polities built on principles of transnational non-domination and transnational mutual recognition.[44] More recently, Armin von Bogdandy in an important presentation at the FIDE annual congress, prolonged this reflection into the field of law.[45] As he retrieved the old notion of "European law" (and contested its mere equation with EU law), he offered to reorient the academic gaze towards the "complex of interdependent legal orders" that make up Europe' transnational legal space. As Bogdandy invites us to "emancipate European Unity from integration", he opens the floor for a legal science of Europe's interdependences able to generate common principles (and maybe new imaginaries) and to draft European law, somehow positioning itself in the continuation of the long academic tradition of comparative law that we discussed in Constellation 1. It is certainly hard to anticipate the reception of such proposals in the political and academic fields. Yet, on the grounds of the analytical framework tested here, one can certainly identify a strong potential of relevance : both in the legal field, where the Court of Justice has develops a deep-seated reflection of "common constitutional traditions" (and both European courts has open comparative law units) and in the political one, as the protection of the "rule of law" and the idea of "mutual dependence" across member has made its way into the European Commission's reflection on the rule of law and article 7.

[44] Kalypso Nicolaïdis, "European Demoicracy and its Crisis", *Journal of Common Market Studies*, Vol. 51, Issue 2, pp. 351-369, 2013.

[45] Armin von Bogdandy, "European Law Beyond 'Ever Closer Union'", art. cit.

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