EU Constitutional Theory as a Play

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1. Introduction

While there are many (text)books on EU constitutional law today,[1] one can agree with Neil Walker (himself a distinguished constitutional theorist) that 'theoretical exploration of the law and constitution of the EU is arguably less developed, less articulate, and less engaged within a common framework of debate than might be expected of a matter of such innovative significance'.[2] In this chapter I would like to ask whether a constitutional theory of the EU is even possible, and if so, how we shall understand it.

Most readers will probably think that they know what constitutional theory is "when they see it" – similarly to one justice of the United States Supreme Court, who claimed to recognize pornography without much reasoning.[3] However, it may be interesting to probe into the definition – as the process of articulating it, provided below, can be more important than the definition itself.

There are many questions implicit in such exercise, first and foremost: how to define what counts as a work in *constitutional theory* of the EU, rather than its constitutional *doctrine* or *political* theory? These are far from easy questions, and answering them is important for at least one reason. It relates to the authority of constitutional *theory* as a scholarly discipline distinctive from constitutional *doctrine*. An international relations scholar once noted that

> [w]hatever it might precisely mean, the notion of 'theory' participates in a semantic and conceptual network populated by other typical commonplaces of the European Enlightenment, such as "science" and "reason". To "have a theory," or to "theorize" a phenomenon, is to claim *something of a privileged epistemic status*, reflected in the conventional *scholarly hierarchy* between theorists and those who merely labor among the empirical weeds; theory both orders empirical observations and somehow supervenes on them.[4]

According to this view, "doing theory" means something more exalted than "merely" engaging in a doctrinal analysis. The latter seemingly amounts to 'labouring among the empirical weeds' of EU constitutional law, no matter how sophisticated such exercise can be. However, what precisely "theory" is and how its authority relates to that of science? As will be seen, this

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[1] Surely risking criticism by some colleagues for omitting their (favourite) one, I would mention particularly the textbook by Koen Lenaerts, the first edition of which was published in 1999 – as one of the first bearing such title (not an innocent choice, as I will explain in this chapter too): Koen Lenaerts K, Piet Van Nuffel PV and Robert Bray, *Constitutional Law of the European Union* (Sweet & Maxwell 1999).

[2] Neil Walker, 'Legal and Constitutional Theory of the European Union' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* 3rd Edition (Oxford University Press 2021), 90-122, 90.

[3] Paul Gewirtz, 'On "I Know It When I See It"' (1996) 105 *Yale Law Journal* 1023-1047, referring to Justice Potter Stewart's concurring opinion in *Jacobellis v Ohio* 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[4] Patrick Thaddeus Jackson, 'What is Theory?' in *Oxford Research Encyclopaedia of International Studies* (OUP 2010, online edition of 11 January 2018, http://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-361 (accessed 19 January 2023), emphasis added.

question was once hotly debated among some of the greatest minds of European legal thought and there is much to learn from them.[5]

If theory (as opposed to doctrine) has a different kind of authority than doctrine, we perhaps want to know which published works count as such. Some choices may turn controversial – unless explained and reflected on. To give two examples: in a survey among EU legal scholars, inquiring which constitutional theories of the EU they deem influential in the field,[6] some respondents wondered what made Kalypso Nicolaïdes a "constitutional" (rather than "political") theorist. On the other hand, one can also ask whether the writings by Koen Lenaerts – a judge at the EU courts since 1990 – count as contributions to the theory of EU constitutional law (rather than its doctrine). Many respondents however commented on Lenaerts' influence in making the EU constitutional – something that theory should take account of.

The following therefore provides an 'exercise of analytical clarification'[7] – something that usually gets skipped by those who write on EU constitutional theory. Section 2 presents several possible ways of distinguishing theory from doctrine. It suggests that theory's detachment and weak normativity can be the features one can use to separate it from doctrine. The problems of such distinctions are however shown before we move in section 3 to the other issue: whether constitutional theory can be meaningfully distinguished from political theory. Section 4 then discusses what an anti-foundationalist take on the distinction can be and what are the consequences of relying on pragmatic conventions rather than some "objective" criteria. Based on this argument, Section 5 uses Oakeshott's distinction between work and play to suggest that theory is the latter. Indeed, theorists engage in play, while doctrinalists work.

2. What is constitutional theory – as opposed to doctrine?

(a) The problem stated

In the article, entitled tellingly 'Against Constitutional Theory', Richard Posner (a judge at the US Court of Appeal and a prolific author as well) defines the object of his critique as 'the effort to develop a generally accepted theory to guide the interpretation of the Constitution of the United States'.[8] One should not be surprised that many constitutional theorists agreed with Posner and were against *such kind* of "theory", reduced to providing useful knowledge for legal practice - which then rejects it, because it considers it useless.[9]

The problem is that for some people, anybody outside the world of practice is a theorist. To borrow once again from the American debate, Barry Friedman remarked that 'constitutional theory is simply what used to be called constitutional law scholarship, but in a world in which

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[5] I would like to thank to Alexander Somek for pressing me to learn more about Hans Kelsen and the whole Weimar debate of 1920s.

[6] See Jan Komárek: 'Whose ideas matter? Studying the origins of European constitutional imaginaries' *IMAGINE Working Paper* No. 21, *iCourts Working Paper Series* No. 300, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4220889 (accessed 26 January 2023).

[7] I borrow this expression from Mattias Kumm, 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called' (2006) 54 A*merican Journal of Comparative Law* Issue suppl.1, 505–530, 530 - one of the very first pieces on EU constitutional theory I read.

[8] (1998) 73 *NYU Law Review* 1-22, 1.

[9] For a good reply to such conceited view from the bench see Marc O. DeGirolami and Kevin C. Walsh, 'Judge Posner, Judge Wilkinson, and Judicial Critique of Constitutional Theory' (2014) 90 *Notre Dame Law Review* 633-690.

being a "theorist" apparently is important, constitutional scholars have become constitutional theorists'.[10] Again, it seems that in certain contexts being a theorist "is important"; however, how do we identify one? Besides the above tongue-in-cheek observation Friedman offers a more sophisticated definition:

> The primary difference between constitutional law scholarship and constitutional theory (if there is a difference) is that constitutional theory deals with the deeper principles and ideas underlying constitutional law itself. By this definition, constitutional law scholarship [as opposed to theory] would be directed more at doctrinal issues'.[11]

But to write the theory of constitutional law rather than its doctrine, how "deep" must one dive? Is, for example, the article 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust'[12] "deep" enough? Or shall we rather say, because it was written by the President of the Court of Justice Koen Lenaerts and published in the *Common Market Law Review*, that it is a very sophisticated piece of doctrinal scholarship? We can also doubt about the "generality" of theory – as the doctrine of general principles of EU law is what its title suggests: general.

Rather than depth or generality we may perhaps consider two other features of a theoretical, as opposed to doctrinal writing.

First, constitutional theory's *detachment* from every-day practice and concrete political and legal struggles. Scholars of course strive for the recognition of their theories and in that sense, they participate in very real contests as well,[13] but these occur, mostly, at conferences and in academic journals.[14] Constitutional theory can be "detached" in that it deals with general concepts not tied to a particular legal system, whereas constitutional doctrine is concerned with legal norms of a particular constitutional system. Theory provides insights into what the rule of law, democracy or freedom of expression means, but that meaning is, well, theoretical and general. Constitutional doctrine, on the other hand, examines Article 6 TEU or Article 11 of the Charter. The latter's interpretations are certainly informed by theoretical views, but never fully determined by them: doctrinal scholars must always refer to the existing legal provision to make their argument matter internally – "in law". Constitutional theory's detachment also means that while a constitutional amendment or a decision by the constitutional court can make the whole doctrine obsolete, the insights of theory can survive such vicissitudes.

The second feature of constitutional theory may consist in its *weak normativity*. Whatever a theorist says on the rule of law does not directly determine the outcomes of cases or governmental practice. One can subscribe to the habermasian discursive theory of law and democracy, but in itself the theory (and its application to a particular institutional context, such as the EU) is not sufficient to guide courts and political institutions when e.g. the limits of the

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[10] Barry Friedman, 'The Cycles of Constitutional Theory' (2004) 67 *Law and Contemporary Problems* 149-174, 149, fn. 1. F

[11] Ibid.

[12] (2017) 54 *Common Market Law Review* 805–840.

[13] The success of one's theory of the rule of law can be for that person's life more important (getting a tenure) than the state of the rule of law in her country (as long as there is a place one can get tenure at). Sometimes it even seems that the worse the rule of law does somewhere, the better for some scholars (writing most of the time from other places, to be sure).

[14] I leave for another occasion the question whether this can also happen on blogs or even Twitter.

principle of primacy are being defined by both the Court of Justice and national constitutional courts.[15] However, once the interpretation of that concept builds on concrete legal provisions and judicial decisions by relevant courts and is published in a journal which aims at legal and political practice, its normativity is much stronger – even in a jurisdiction which does not recognize legal doctrine as a "source of law".[16]

However, we can ask similarly as we did in case of constitutional theory supposed "depth": how detached one needs to be for this criterion to apply, especially if we talk about constitutional theory *of the EU* rather than a general constitutional theory? And are the contributions by someone like Joseph Weiler or Miguel Maduro only "weakly normative", especially as some people seem to believe that constitutional pluralism – a theory developed (among others) by the latter is 'prone to abuse by autocrats and their captured courts' in the EU and seemingly co-responsible for the erosion of the authority of EU law in the member states?[17] The criteria offered as alternatives to depth are therefore no less problematic. As will be seen, I do not offer them as some firm foundations, but rather to ground a debate on the nature of such definitions that I address in section 4.

(b) Constitutional theory as a detached and external reflection of law?

Being "detached" can be understood as staying "outside". Constitutional theorists would thus adopt what is sometimes referred to as the "external perspective on law" - similarly to what e.g. the sociology of law or its philosophy does. Is constitutional theory "external" in this sense? Let us first examine what the distinction between internal and external perspective means.[18]

Legal doctrine answers the question of "what the law is" from the internal perspective of law – and finds the relevant material in the recognized "sources of law" using "accepted legal methods". Its contributions – depending on the status of the legal doctrine in the given legal system – develop law "from within" in a similar way as courts' jurisprudence (the preferred term in the continental European legal culture to the Anglo-American "case law") or even legislative provisions themselves. Legal doctrine can be quite narrow-focused (such as articles or whole books concerning few or only one provision of the constitution – for example the freedom of expression) or systemizing a whole field (such as a treatise on judicial protection in the given legal system).

Being "inside" also means to be enclosed in the "hermeneutic circle": all answers need to be provided from within the system, inside its boundaries. In other words, even if it was true that judges' personal politics influenced how they decide cases, until "personal politics" becomes "the source of law", it is not a sort of material interesting for the internal – doctrinal perspective.

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[15] See on this question, inspired by Habermas, see Jan Komárek, 'National Constitutional Courts in the European Constitutional Democracy' (2014) 12 *International Journal of Constitutional Law* 525-544.

[16] Jan Komárek, 'The Place of Constitutional Courts in the EU' (2013) 9 *European Constitutional Law Review* 420-450 was an attempt to provide doctrinal basis to the argument made in Komárek, n 15 (still awaiting success, though).

[17] R. Daniel Kelemen, Piet Eeckhout, Federico Fabbrini, Laurent Pech, and Renáta Uitz, 'National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order' *Verfassungsblog* 26 May 2020 https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/ (25 February 2023).

[18] On the internal/external distinction (in the Anglo-American context only, however), see Charles L. Barzun, 'Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship' (2015) 101 *Virginia Law Review* 1203-1288.

Importantly, this does not mean that "doctrinalists" were not aware of such "external" questions or constraints on judges (and other legal decision-makers). To the contrary, very often doctrinal scholars are at the same time practitioners and know very well how to mould a particular argument to "fit" the judge's preferences. They only do not take it as part of their job to include such insights in a *doctrinal* analysis of law. Such information can be provided in "practical manuals" for their colleagues (e.g. inside law firms to share knowledge of how to best approach a certain case assigned to a particular judge).[19] Such manuals are quite different from law treatises or commentaries, which usually leave such information outside their scope.

External perspectives on law are not interested in providing knowledge of law in (solely) law's terms. Whereas the internal perspective assumes (despite the practical knowledge to the contrary) that *all* answers are provided by law, externalists take legal norms as one of the many factors. Sometimes it even seems that reputation or power (and not the law) are the only things judges are interested in. They can therefore provide a more accurate picture of "what the law is" in the proverbial "real world", meaning how the case would be decided – but their insights can affect the internal perspective only indirectly.

Each perspective pursues a different kind of knowledge. The internal – doctrinal perspective examines constitutional law from the point of view of a participant in the legal system and speaks the language of that legal system. External perspectives, despite studying the same object - constitutional law - provide knowledge *in their own terms* (political preferences, judicial ideology, reputation or power) that are foreign to the law itself.

The difference between the two approaches (and the importance of both) can be nicely illustrated by The Supreme Court Forecasting Project conducted some time ago at the Columbia University.[20] Legal scholars "competed" against a statistical model developed by political scientists in making predictions concerning the outcome of disputes before the Supreme Court in a given term. As reported by the authors of the experiment: 'The basic result is that the statistical model did better than the legal experts in forecasting the outcomes of the Term's cases: The model predicted 75% of the Court's affirm/reverse results correctly, while the experts collectively got 59.1% right'.[21] As can be seen, statistics and prediction is the language that political science speaks to law in this analysis.

One should not conclude, however, that law professors are useless (at least not because they did worse than the model). One does not convince the Supreme Court with reference to the statistics ("according to my model you are supposed to decide thus"), but through legal (doctrinal) argument. Law professors are experts in construing it. Examining how they do it is a worthy scholarly pursuit, albeit quite different from what political scientists understand as "science".[22] And such scholarly pursuit is conducted in a different language: legal dogmatics.[23]

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[19] See Martijn W. Hesselink, Martijn W. Hesselink, *The New European Legal Culture* (Kluwer 2001), 18 fn. 37.
[20] Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin, Kevin M. Quinn, 'The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking' (2004) 104 *Columbia Law Review* 1150-1210.
[21] Ibid, 1150.
[22] Here I sidestep the rich debate on whether legal doctrine is a true "science". See Benoît Frydman, 'L'évolution des normes de scientificité en droit' in Tony Andréani and Hélène Desbrousses (eds), *Objet des sciences sociales et normes de scientificité* (Harmattan 1997), 91-109.
[23] Another reason to keep professors doing their job is a belief that they contribute to "justice" or more pragmatically, to making law more effective. On a perceived difference between the two systems (Europe and the

Law is not insulated from external (sometimes critical) perspectives (in other words, law is reflexive). One such example concerns what Suzanna Sherry called foundational facts': 'judges' generalized and invisible intuitions about how the world works'.[24] If such facts change – for example thanks to the research done by law and society scholars, legal doctrine (that is, the internal perspective of law) can change as well. The idea of a 'reasonable consumer' that underlay the early case law of the Court of Justice – with significant consequences for the division of powers between the EU and its member states - would be such 'foundational fact'.[25] One can believe that the Court's turn to a more realistic understanding of consumer behaviour was motivated by the empirical evidence (that is, by external perspective on its case law).[26] However, such empirical evidence cannot be found in the text of the judgment and scholars can only guess whether it was the determinative factor in the Court's decision especially it decided to proceed without the opinion of the advocate general in the case.

The "porousness" of the boundary between the external and internal perspective of law can however mean that the distinction between theory and doctrine cannot be based on this difference. We shall discuss this issue in the following section.

(c) There is no theory without legal normativity – and there is no detached "outside"

The hermeneutic circle of the internal perspective is not completely closed and the participants in the "internal" discourse of law must rely on knowledge that comes from without. This then means that even those who want to stay outside the law – those who would want to produce a "true" science of law exert normative force on the object of their study.

This can be nicely illustrated on the notion of the "sources of law" or "accepted legal methods" that provide (or are supposed to provide) the very boundaries between "internal" and "external" perspectives. Both are inevitably defined by legal (and constitutional) theory. Even if the legislature (or the constitutional court) wanted to define them, it will be legal and constitutional theory providing background concepts, such as what is "settled case law" or the very concept of legislation (and its different kinds – original and delegated, for example). Doctrinal lawyers only rarely reflect on these concepts and take them as "givens" – until they become controversial such as when the normative power of judicial decisions – "case law" - outweighs the ideology of a legal system that derives its legitimacy from the prescription that "judges do not make law".[27]

As Kaarlo Tuori argues, however, the external perspective cannot remain isolated from the internal one either. All scholarship that deals with law suffers from 'imposed normativity', as Tuori calls this phenomenon. It can never remain "purely descriptive" and stay outside the field of its inquiry.[28] It appears as if the hermeneutic circle exerted gravitational force like a black hole. Tuori then considers even fields like philosophy or social theory to be subjected to this

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United States) see Alexander Somek, 'Two times two temperaments of legal scholarship and the question of commodification' (2022) 1 *European Law Open* 627 – 634. See also Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (HUP 2005).

[24] Suzanna Sherry, 'Foundational Facts and Doctrinal Change' (2011) *University of Illinois Law Review* 145-186, 145.

[25] Court of Justice, judgment of 20 February 1979, *Rewe-Zentral (Cassis de Dijon)* (120/78, EU:C:1979:42).

[26] See Hanna Schebesta and Kai Purnhagen, 'The Behaviour of the Average Consumer: A little less normativity and a little more reality in Court's case law? Reflections on Teekanne' (2016) 14 *European Law Review* 595-___.

[27] See Jan Komárek, 'Judicial Lawmaking and Precedent in Supreme Courts' *LSE Law, Society and Economy Working Papers* 4/2011, https://eprints.lse.ac.uk/38468/1/WPS2011-04_Komarek.pdf.

[28] Kaarlo Tuori, *Critical Legal Positivism* (Ashgate 2002), 285-293.

force. In his view, '[t]he reconstructions of legal philosophy include normative choices, which have potential normative effects' for law.[29] So again, we would be dependent, in the end, how the authors characterize their contributions: if they wish them to be deemed theoretical, they call them a theory and send them to a journal or law review that is so oriented (and vice versa).

It relates to the question whether someone who wants to produce a "pure" theory of law can remain at such level of abstraction that her contributions are free of normative choices made in a particular legal system. This is how Kelsen introduced his 'pure theory of law' in 1934:

> More than twenty years ago I undertook to develop a pure theory of law, that is a legal theory purified of all political ideology and every element of the natural sciences, a theory conscious, so to speak, of the autonomy of the object of its enquiry and thereby conscious of its own unique character. Jurisprudence had almost completely been reduced—openly or covertly—to deliberations of legal policy, and my aim from the very beginning was to raise it to the level of a genuine science, a human science. The idea was to develop those tendencies of jurisprudence that focus solely on cognition of the law rather than on the shaping of it, and to bring the results of this cognition as close as possible to the highest values of all science: objectivity and exactitude.[30]

The "purity" of Kelsen's theory consisted in its separation from all other disciplines so that a purely legal cognition can be created. Kelsen's theory would therefore be the only one truly "inside" the closed hermeneutic circle.

Moreover, for Kelsen the theory of a particular legal system – be it the Republic of Austria whose constitution Kelsen helped to draft,[31] or the European Union – would be a misnomer. Pure theory is not concerned with a concrete legal order, but with systems of norms which derive their validity from the basic norm, which needs to be presupposed so that the whole system has some grounding. At the same time, Kelsen clearly believed that it is the purity of his theory that provides it with scientific authority with which he could then intervene in public debates, most famously in his polemic against Carl Schmitt on who should be the guardian of the (Weimar) Constitution.[32]

Kelsen was attacked by constitutional scholars of all political and philosophical convictions, who agued that such sanitized view of constitutional theory (and the tasks of legal science) amounts to 'either an abdication from politics or an unwitting capitulation to its vicissitudes'.[33]

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[29] Ibid, 291. Tuori expresses his argument slightly differently, due to the layered structure of law he presents in this book (and follows in all that he published later). I believe, however, that replacing the complex structure of law by my expression 'for law' following the quote is appropriate.

[30] Bonnie Litschewski Paulson and Stanley L. Paulson, *Introduction to the Problems of Legal Theory* (Clarendon Press 1992), translation of Hans Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematic* [1934], 1. For a discussion how in fact was Kelsen's theory formulated in response to very pressing political issues surrounding Kelsen see David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Clarendon Press 1997), chapter 3. On the implicit politics of his "pure theory" see Julius Cohen, 'The Political Element in Legal Theory: A Look at Kelsen's Pure Theory' (1978) 88 *Yale Law Journal* 1-38.

[31] See Georg Schmitz, 'The Constitutional Court of the Republic of Austria 1918–1920' (2003) 16 *Ratio Juris* 240-265.

[32] The polemic, was translated and provided with commentary by Lars Vinx: *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (CUP 2015).

[33] John McCormick, 'Legal Theory and the Weimar Crisis of Law and Social Change' in Peter E. Gordon and John P. McCormick (eds), *Weimar Thought: A Contested Legacy* (Princeton University Press 2013), 55-72, 56. It

Kelsen took it as a sign of success: 'In a word, the Pure Theory of Law has been suspected of every single political persuasion there is. Noting could attest better to its purity'.[34] Purity, however, can simply mean the lack of relevance and it is an open question whether it was this aspect of his theory (and overall approach to legal theory and philosophy) that made Kelsen influential, especially given his rather views (today certainly outdated) of what constitutes "scientific knowledge".[35]

Even today some legal philosophers believe that it is possible to isolate a general theory of (any) law from a theoretical study of a particular legal system: that we can distinguish between a 'wholesale' and 'retail' account of law;[36] that there is a genus of law, composed of its particular instantiations – artefacts.[37] These philosophers, in all their modesty, claim to be interested in the former and to leave the 'artefacts' to others.

However, it seems highly unlikely that the only reason for the difference between Kelsen's and Hart's legal positivism is that the former was influenced by (neo)Kantian philosophy and the latter by John Austin's linguistic philosophy.[38] There must be something else playing the role *as well*: that the former is concerned with the "system" whereas the latter with "officials" (which means most of the time judges).[39] The "something else" refers to the background assumptions each theorist had made about some key aspects of a legal system: for example what the legitimate "sources of law" are in each of them.

One is tempted to turn the following observation made by John Maynard Keynes on account of the relevance of economic theory in formulating economic policies on its head and argue for the unavoidable influence of practice on theoretical reflections. Keynes once observed that '[p]ractical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist'.[40] Similarly the philosophers, who believe themselves to be quite exempt from any influences of the practical world, are usually the

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is also interesting to note that in the context of the famous Weimar "Methodenstreite", Kelsen was on outlier, not fitting any of the categories one can employ to classify the participants. See Christoph Möllers, 'Der Methodenstreit als Politischer Generationenkonflikt: Ein Angebot zur Deutung der Weimarer Staatsrechtslehre' (2004) 43 *Der Staat* 399-423, 418-419.

[34] Kelsen, n 30, 3.

[35] In 'Legal formalism and the pure theory of law', published in English in Arthur J. Jacobson and Bernhard Schlink (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press 2000), 76-83, [1929], Kelsen writes at 77: 'Only the formal is objective; the more formal a methodology, the more objective it can become. And the more objectively a problem is formulated in all the depths of the issue, the more formally it must be grounded' and claims, quite forcefully, that 'Those who do not understand this do not know what is essential to scientific knowledge'. On the development of what is understood as "scientific knowledge" see Pierre Bourdieu (Richard Nice transl), *Science of Science and Reflexivity* (University of Chicago Press 2004).

[36] According to Jeremy Waldron, 'Normative (or Ethical) Positivism' in Jules L. Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'the Concept of Law'* (OUP 2001) 411-433, 415 'the phrase "the account of what law is" is ambiguous. It could mean the wholesale account of what law, the institution, is (as opposed to other methods of governance); or it could mean the retail account of what the law on some particular subject is in a particular jurisdiction'.

[37] John Gardner, 'The legality of Law' (2004) 17 *Ratio Juris* 168-181

[38] On the former see Stanley L. Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law' (1992) 12 *Oxford Journal of Legal Studies* 311-332. John Austin's influence on HLA Hart is colourfully described in Nicola Lacey, *A Life of H. L.A. Hart: The Nightmare and the Noble Dream* (OUP 2004), 133-148.

[39] Similar contrasts can be made even within Anglo-American jurisprudence: see Richard A. Posner, *Law and Legal Theory in England and America* (Clarendon Press 1997), especially 'Lecture One: Hart versus Dworkin, Europe versus America'.

[40] John Maynard Keynes, *The General Theory of Employment, Interest and Money* (Harcourt Brace Jovanovich 1953), 383.

"slaves" of some legal system and its ideology. They may call Ronald Dworkin 'a theoretically ambitious lawyer' (rather than a "philosopher"),[41] but the difference between them and Dworkin can be in the degree to which each made the background assumptions about the genus of law (law in general) explicit, tying them to a particular legal culture, that is to the law's artefacts.

3. Constitutional and political (political) theory

There is another problem with defining clearly constitutional theory, which we have not considered yet: how to distinguish constitutional and political theory? Besides Kalypso Nicolaïdes there are numerous scholars other than lawyers, which nevertheless are (or should be) read by the latter for their contributions to the study of the legal nature of the EU and its constitution (if it has one): Richard Bellamy,[42] Chris Bickerton,[43] Turkuler Isiksel,[44] not to mention Jürgen Habermas[45] or Fritz Scharpf[46] – and many others.

The problem may appear irresolvable especially after Jeremy Waldron called for the production of 'political political theory'. In a series of essays Waldron argued that even if the discipline's

> main preoccupation remains with justice, liberty, security, and equality, we still need to complement that work with an understanding of the mechanisms through which these ideals - these ends of life - will be pursued. This is what I mean by *political* political theory - theory addressing itself to politics and to the way our political institutions house and frame our disagreements about social ideals and orchestrate what is done about what ever aims we can settle on.[47]

The essays included in the volume *Political Political Theory* concern topics such as judicial review, separation of powers, rule of law and, constitutionalism (although on that Waldron offers a sceptical view). Most of them were first published in law reviews or peer review law journals and if we take a closer look at them, they draw on the existing constitutional arrangements, mostly from the United States and United Kingdom.

One possibility would be to say that Waldron actually contributed to constitutional rather than political theory, and for some reason added another word 'political' before the latter. It is possible that a colleague of Waldron would consider this set of essays to be a contribution by a 'theoretically ambitious lawyer' rather than a political theorist or philosopher.

Martin Loughlin suggested that the two disciplines can be separated in the following way:

> Constitutional theory does not involve an inquiry into ideal forms, since otherwise it would be completely absorbed into political philosophy. If constitutional theory

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[41] Gardner, n 37, 173.
[42] Richard Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (CUP 2019).
[43] Christopher J. Bickerton, *European Integration: From Nation-States to Member States* (OUP 2012).
[44] Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism beyond the State* (OUP 2016).
[45] Among so many others, Jürgen Habermas (Ciaran Cronin transl.), *The Crisis of the European Union: A Response* (Polity 2012).
[46] Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999).
[47] Jeremy Waldron, *Political Political Theory: Essays on Institutions* (HUP 2016), 6.

> is to form a distinct inquiry, it must aim to identify the character of *actually existing constitutional arrangements*.[48]

But if this is the way to keep *constitutional* theory separate from *political* theory, the price is that it is impossible to distinguish the former from constitutional *doctrine*. We are back to ground zero. The Americans, with whom we began our discussion, can in the end be right: all theory is practice and all the above can be considered as a useless exercise in lexicography. However, I would still like to put my inquiry into the nature of constitutional theory of the EU on some grounds – possibly somewhat surprising ones, which will also allow us to see the significance of that exercise. The grounds will be pragmatic and somewhat paradoxically (since we seek to put our inquiry onto some "firmer" foundations) anti-foundationalist.

4. Anti-foundationalism and disciplinary borders

The preceding discussion may suggest one thing: that the distinction between constitutional theory and doctrine, or constitutional and political theory is merely a matter of convention and professional practices in the respective fields. There are certain standards for a scholarly piece to be assessed as a contribution to theory rather than doctrine (depth, generality, detachment from practice or weak normativity are certainly among them), but very often it will depend on the expertise of an editorial board in a journal whether it accepts a piece and the board's perceptions of what the journal's readership is. One can find fairly theoretical pieces in *European Constitutional Law Review*,[49] which seems to lean towards the doctrinal side as well as rather doctrinal analyses in journals that have theory in their name.[50]

Despite some important consequences of drawing the lines among these disciplines it may not be possible to make them with any certainty or objectivity. This, however, should not be seen as a sign of intellectual failure of the present author. It results from the nature of 'the sciences of man',[51] regardless of how much scholars want to make the object of their inquiry 'objective' and independent from them and the participants in the scientific inquiry. Whereas it can be claimed (not without controversy, though) that "nature" exists independently of humans, constitutions (and legal systems) result from human action. The porous border between the internal and external perspective discussed above is simply a result of this, meaning that to draw the line between theory and practice – or between the theoretical study of a constitution and its doctrine will depend on the conventions of professional practices.

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[48] Martin Loughlin, 'Constitutional Theory: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 183-202, 186. If escaping normativity would be a concern for the theorist, Loughlin rejects (implicitly) such possibility by showing how Rawls' theory of political liberalism can in fact delimit the range of possible solutions to political problems (and one may add, the possibility to see certain issues as political problems) – and how political liberalism amounts to 'a civil religion', or, one may say, ideology. Louglin, 187-191.

[49] See e.g. Joana Mendes, 'The Foundations of EU Administrative Law as a Scholarly Field: Functional Comparison, Normativism and Integration' (2022) 18 *European Constitutional Law Review* 706-736.

[50] See Agustín José Menéndez, 'The Sinews of Peace: Rights to Solidarity in the Charter of Fundamental Rights of the European Union' (2003) 16 *Ratio Juris* 374-398. The full title of the journal is 'Ratio Juris. An international journal of jurisprudence and philosophy of law'. By labelling it a 'rather doctrinal' I do mean to suggest less sophistication here, but the kind of analysis that depends on the concrete wording of particular legal provisions (in this this case the EU Charter).

[51] Charles Taylor, 'Interpretation and the Sciences of Man' in Ibid, *Philosophical Papers 2: Volume 2: Philosophy and the Human Sciences* (CUP 1985), 15-57 [1971].

If this is something difficult to accept for legal scholars (who thereby feel that the "scientificity" of their endeavours can be undermined), there have been several ways how to productively study this phenomenon.

One is anti-foundationalist philosophy connected with the work of literary theorist Stanley Fish (who however, by some conventions, could be called a legal theorist as well).[52] Anti-foundationalism, according to Fish,

> teaches that questions of fact, truth, correctness, validity, and clarity can neither be posed nor answered in reference to some extracontextual, ahistorical, nonsituational reality, or rule, or law, or value; rather, antifoundationalism asserts, all of these matters are intelligible and debatable only within the precincts of the contexts or situations or paradigms or communities that give them their local and changeable shape.[53]

Michael Robertson has recently used insights from his study of Stanley Fish to provide 'More Reasons Why Jurisprudence Is Not Legal Philosophy'.[54] It contributed to the debate initiated by Roger Cotterrell with his worry that the distinction between jurisprudence and legal philosophy had been increasingly blurred, or better put that the concerns and methods of the latter push out what had always been the central preoccupation of jurisprudence: to inform 'the *prudentia* of the jurist, centred on the craft-skills (and, one might hope, wisdom) involved in making sense of the complexity of law as ideal, practice and experience in its time and place'.[55] Robertson points to the fact that what would be identified as jurisprudence (and not legal philosophy) depends on the practices of each discipline: no objective criterion that is independent from the conventions existing among the 'community of interpreters' (another term made famous by Fish) is accessible to humans, who are always situated and embedded in their local practices and fields.

While insightful when describing the inaccessibility of some objective epistemological foundations for a theory independent from those who participate in it, Fish is almost silent when it comes to explaining some key components of this insight. Most importantly, he does not say much about how the 'community of interpreters' is defined, how one can become the member of it and most importantly, what the power relations both inside such community and with those who are kept outside are. He seems to enjoy the position of someone who tells others that their thinking does not really matter outside their local theories and disciplines, but he does not inquire inside the practices, especially to understand what it is that matters to their participants. In his analysis of the arguments about the pragmatic nature of legal interpretation made by some theorists, Fish concludes: 'All I have to recommend is the game, which, since it doesn't need my recommendations, will proceed on its way undeterred and unimproved by anything I have

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[52] The online edition of *Encyclopaedia Britannica* introduces Fish as a 'literary critic' (entry of 15 April 2022, https://www.britannica.com/biography/Stanley-Fish). According to the Wikipedia, he is 'an American literary theorist, legal scholar, author and public intellectual' (https://en.wikipedia.org/wiki/Stanley_Fish. Accessed on 3 March 2023). An indispensable guide to Stanley Fish's work is Michal Robertson, *Stanley Fish on philosophy, politics and law: How Fish works* (CUP 2014).

[53] Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke UP 1989), 344. On Fish's anti-foundationalism see Robertson, n 52, 16-47.

[54] (2017) 30 *Ratio Juris* 403-406.

[55] Roger Cotterrell, 'Why Jurisprudence Is Not Legal Philosophy' (2014) 5 *Jurisprudence* 41-55.

to say'.[56] Fish stays outside the controversy just to make the point that it is a game for the participants, but not him.

The recent call to establish a new research agenda for the science of international law can be read as an attempt to examine these questions.[57] Holtermann and Madsen invoke Pierre Bourdieu's claim that a 'rigorous science of law is distinguished from what is normally called jurisprudence in that the former takes the latter as its object of study'[58] and argue for an approach to the study of law that 'sees the alleged external and internal dimensions of law as two integrated dimensions of the same empirical object of study'.[59] They thus suggest to study law using three tools developed in the bourdieusian sociology: a field, habitus, and finally, symbolic power.[60]

The internal and external perspective gets integrated from "the outside", where the "rigorous scientist" is supposed to stay and 'strictly observe and explain the behaviour of legal officials by reference to their belief in such reasons'.[61] Contrary to what I described above as the 'imposed normativity' of scholarship that deals with law, they believe that their analysis can remain untouched by their own internal perspectives on law (and their beliefs about what law is and should be).

But we can leave this 'family quarrel' aside,[62] as indeed, bourdieusian sociology may help us understand why certain analyses of EU constitutional law – while external, can penetrate the inside of EU constitutionalism and others not. The early work of Koen Lenaerts or Joseph Weiler – the key figures who established the 'constitutional imaginary' for Europe[63] can be the example of the former, while the contributions by historians or political scientists (at least so far) are not.[64] Their claim that 'that the EU has not been successfully constitutionalised'[65] can be "true" as a matter of historical record or in terms of how "constitutionalism" is understood in political science. However, so long as the Court of Justice treats the EU legal order as such and national highest courts and other legal actors ("the community of *relevant* interpreters") mostly accept it, historians account remains outside EU law.

Bourdieusian insights can also help us understand that a "true" constitutional theory of the EU could be developed only with the establishment of research institutions autonomous (if only relatively) from the state and its conceptions of constitutionalism. Antoine Vauchez therefore rightly observed that what

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[56] Stanley Fish, 'Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin', Chapter 13 in Ibid, *There's No Such Thing as Free Speech: And It's a Good Thing, Too* (OUP 1994), 230.
[57] See Jakob v.H. Holtermann and Mikael Rask Madsen, 'European New Legal Realism and International Law: How to Make International Law Intelligible' (2015) 28 *Leiden Journal of International Law* 211–230.
[58] Pierre Bourdieu (Richard Terdiman transl), 'The Force of Law: Toward a Sociology of the Juridical Field', (1987) 38 *Hastings Law Journal* 805-853, 814.
[59] Holtermann/Madsen, n 57, 223.
[60] Ibid, 223-227.
[61] Ibid, 219-220.
[62] See Frank Michelman, 'Family Quarrel' in Michel Rosenfeld and Andrew Arato (eds), *Habermas on Law and Democracy: Critical Exchange* (University of California Press 1998), 308-322 – not for the definition of the concept but as an example how it can be used in the scholarly debate.
[63] On this concept see Jan Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (OUP 2023).
[64] See especially Morten Rasmussen and Dorte Sindbjerg Martinsen, 'EU constitutionalisation revisited: Redressing a central assumption in European studies' (2019) 25 European Law Journal 251-272.
[65] Ibid, 272.

> we can conveniently place under the banner of 'the constitutionalization of Europe' flourished most particularly in the hills of Fiesole between Badia Fiesolana and the Villa Schifanoia, the home of the law department of the European University Institute (EUI) since its creation in 1976.[66]

It is not surprising that the already mentioned contribution by Neil Walker mapped theories of EU constitutionalism by their distance from the state-based model, confirming Martin Loughlin's observation that constitutional theory 'must aim to identify the character of actually existing constitutional arrangements'.[67] There must be a legal order that the community of interpreters conceives as "constitutional", together with institutional and material conditions in place for a separate discipline to emerge. Contributions by authors who deny the "constitutional quality" of the EU legal order – labelling it as 'administrative'[68] or 'international'[69] can be seen as parts of the interpretive struggle.

5. Constitutional theory as play: to understand and not to change (or serve) the world

The foregoing text suggested that defining "constitutional theory of the EU" is a matter of practice and that we can possibly best understand the stakes in the definition if we take pragmatic, anti-foundationalist approach to it. This leaves the question how the present author understands "constitutional theory".

I would suggest making the distinction based on the difference between work and play made by the British philosopher Michael Oakeshott.[70] I use it despite the clear risk that it will confirm the suspicion of practitioners and doctrinally oriented scholars: that they engage in real work, while theorists only play.

Oakeshott reflected on the distinction between work and play when thinking about humanity and its relationship to the material world – the nature.[71] Work is concerned with satisfying basic human needs and wants.[72] Written at the dawn of the consumer society, Oakeshott observed that '[a] creature composed entirely of wants, who understands the world merely as the means of satisfying those wants and whose satisfactions generate new wants endlessly, is a creature of unavoidable anxieties'.[73] Therefore the need for "play", understood broadly as 'an activity which, because it is not directed to the satisfaction of wants, entails an attitude to the world which is not concerned to use it, to get something out of it, or to make something of it, and offers satisfactions which are not at the same time frustrations'.[74] Play includes other human

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[66] Antoine Vauchez, *Brokering Europe: Euro-lawyers and the making of a transnational polity* (CUP 2015), 202. The home has moved to Villa Salviati in August 2016.
[67] See n 48.
[68] See especially Peter L. Lindsth, 'The Perils of 'As If ' European Constitutionalism' (2016) 22 *European Law Journal* 696-718.
[69] Bruno de Witte, 'The EU as an international legal experiment' in JHH Weiler and G de Búrca, *The Worlds of European Constitutionalism* (CUP 2011), 19-56.
[70] Michael Oakeshott, 'Work and Play' in Luke O'Sullivan (ed.), *What is History? And other essays* (Imprint Academic, 2004), 303-314.
[71] See on this question Pierre Charbonnier (Andrew Brown transl.), *Affluence and Freedom: An Environmental History of Political Ideas* (Polity Press, 2021).
[72] Oakeshott also distinguished between "needs" – concerning 'bare existence' and "wants", which are unique to humans due to their intelligence: 'to be 'intelligent', here, means to be a creature not merely of needs which must be satisfied, but of wants which are imagined, chosen and pursued'. Oakeshott, n 70, ___.
[73] Ibid, ___.
[74] Ibid, ___.

activities besides games or sports. The key is that play-like activities are not instrumental. Poetic imagination (arts), but also science therefore belong to this category.

Oakeshott acknowledges that 'scientific discoveries are often eligible to be used for the exploitation of the resources of the world for the satisfaction of human wants' However, '"science" itself is a great intellectual adventure of understanding and explaining which is free from the necessity of providing useful knowledge'.[75]

I suspect that to Oakeshott, the notion of "applied sciences" would be the same misnomer as "professors in practice", which the LSE, Oakeshott's home institution, started to appoint decades after he retired. This confuses work and play, or practice and theory, and needs to be e rejected, since

> [i]nstead of regarding 'work' and 'play' as two great and diverse experiences of the world, each offering us what the other lacks, we are often encouraged to regard all that I have called 'play', either as a holiday designed to make us 'work' better when it is over, or merely as 'work' of another sort.[76]

We may observe here that Oakeshott's views get rather close to those of Kelsen briefly discussed above. As he further notes when writing about political theory, for him '"Theorizing" is not validating or "proving" a conclusion reached, it is a procedure of discovery or enquiry. It is, briefly, the urge to inhabit a more intelligible or a less mysterious world'.[77]

Oakeshott's and Kelsen's views defend research practices that are hard to find in today's academia, which needs to justify its existence in terms of its impact in and on the society or even by its contribution to the economic growth of the whole nation. Nevertheless, I would try to apply them when seeking to define what is a theory of EU constitutional law. I take theory as an attempt *to understand* better rather than *to achieve* something through research. Constitutional theory is therefore an attempt to understand the existing constitutional arrangements rather than a practice of establishing and maintaining them through academic writing – which is valuable in its own terms – as legal doctrine.[78]

This does not mean that contributions to constitutional theory cannot "change the world". However, I believe there is a difference between researching something with the primary ambition to do this on the one hand and aiming at "understanding" on the other, even if the understanding thus achieved concerns colleagues in the Ivory Tower – or, to put it in more generous terms, other members of the same interpretive community.

In this sense Kelsen's ambition can be saved, even if his pure theory can never be as pure as he wanted it to be. Kelsen argued that

> if scholarship of law and the state does not limit itself scrupulously to cognizing the reality of these objects—that is, to capturing them conceptually, analyzing their structures, elucidating existing relations; if it arrogates to itself, as scholarship, a

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[75] Ibid, ___.
[76] Ibid, ___.
[77] Michael Oakeshott, 'What is political theory?' in O'Sullivan n 70, 391-402, 392.
[78] Another important task still remain: what are the boundaries of legal doctrine as a scholarly enterprise and when it transgresses into 'scholactivism'. On this question see Jan Komárek, 'Freedom and Power of European Constitutional Scholarship' (2021) 17 *European Constitutional Law Review* 422-441.

> creative and normative influence on the object given to its cognition, then what is merely the expression of a subjective interest presents itself as cloaked in the authority of scholarship, that is, equipped with the value of objective knowledge. Scholarship becomes a mere ideology of politics. It is one of the characteristic signs of our times that there are scholars who find the questionable courage to make a virtue of this necessity, denying the professional ethos of all scholarly work, abandoning the ideal of objective knowledge free of subjective interests—that is, free of political tendencies—and defending the right of methodological syncretism by proclaiming the inseparable link between legal scholarship and politics.

The boundaries between science and politics are not objectively given, as Kelsen believed, but are constituted by those who participate in them. It is therefore upon the scholars who want to produce understanding rather than changing the world, to be more pronounced about that aim and not to try to justify their activity externally – even if it is true that there is no more useful thing as a good theory… That could be, not 'Kelsen light', but possibly "Kelsen enlightened".[79]

[79] Referring to Alexander Somek, 'Europe's Political Constitution', manuscript on file with the author, who thus labelled the approach taken in Komárek, n 78.