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DIALOGUE AND DEBATE: SYMPOSIUM ON NEW INTERDISCIPLINARY PERSPECTIVES IN EU LAW

Political, not (just) legal judgement: studying EU institutional balance

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Abstract

This article presents two related arguments. First, the limits of doctrinal analysis cut deeper than many EU lawyers realise. Most would probably accept that legal doctrine does not determine every legal dispute, but lawyers studying EU institutional balance often still assume that it can be deduced from the positive law what is good institutional practice. This paper argues instead that the allocation of EU institutional authority cannot be determined by the exercise of legal judgement, but instead requires the exercise of political judgement on the relative merits of different institutions. Second, this means that political and normative discourses and disciplines cannot be assumed to fall outside the domain of legal scholarship. What we need instead is a distinctive kind of legal scholarship that interweaves doctrinal analysis with normative political theory, broadly conceived. I will argue that political theory, in addition to evaluative value, has adjudicative value, provided that our theories are sensitive to the EU's social and political setting and the constraints this setting imposes on what is realistically feasible.

Keywords: EU law; methodology; doctrinal method; institutional balance; political judgement; political theory

1. Introduction

The increasingly voluminous body of literature exploring methodologies for the study of EU law and the methodological richness with which EU lawyers have come to approach their discipline shows that EU legal scholarship has in recent decades undergone a profound methodological turn.[1] Legal scholars progressively use the tools and techniques from neighbouring disciplines – the social sciences, history, economics, philosophy, and so forth – mostly without compromising what arguably remains the most valuable tool in their toolkit: the doctrinal method. Exactly as one would expect, and hope, they use 'non-doctrinal research methods as a complement, rather than an alternative, to the doctrinal method'.[2]

But when should extra-legal methods complement the legal method? The answer may seem evident, namely: the doctrinal method adopts an internal perspective on the law, so it cannot be used to answer non-legal questions such as the following: How well do domestic actors comply

[1]M Bartl and JC Lawrence (eds), *The Politics of European Legal Research: Behind the Method* (Edward Elgar Publishing 2022); M Rask Madsen, F Nicola and A Vauchez (eds), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022); R van Gestel, H-W Micklitz and EL Rubin, *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017).

[2]B de Witte, 'Legal Methods for the Study of EU Institutional Practice' 18 (2022) European Constitutional Law Review 637, 640. See similarly, C Eckes, 'A Timid Defence of Legal Formalism' in *The Politics of European Legal Research* (n 1): 192.

with the decisions of EU institutions? Does EU law enjoy democratic legitimacy? How influential is the Court of Justice of the European Union (CJEU)? Doctrinal analysis may have a part to play in answering such questions but clearly cannot answer them in full. Moreover, doctrinal analysis may lead to a skewed understanding of the EU legal order if the studied cases are not representative of the larger class of decided cases, ie, if the method is not complemented by more systematic quantitative studies of all decided cases.[3] For example, while more expansionist CJEU rulings have created an image of an activist court, more systematic studies have recently shown that most judgements are steeped in judicial deference.[4] It is vital, as these examples show, that legal scholars understand the limits of the doctrinal method and use non-doctrinal methods to overcome these limitations.

In this article, I want to draw attention to another, seemingly less obvious limit of the doctrinal method, one that EU lawyers have found more difficult to accept. Many of us are steeped in a culture that values legal doctrine above almost everything else, and trained to think that any legal dispute must, by virtue of the very nature of law, be met with a legal judgement. Yet as I will explain, legal disputes over the allocation of authority between EU institutions can only be resolved by the exercise of political judgement. Bruno de Witte hinted at this recently when he argued that,

> a positivist approach is appropriate for the study of EU law, provided that a sufficiently broad view is taken of what constitutes a legally relevant practice. I will argue that legal positivism and its corollary, the doctrinal legal method, should not be narrowly limited to the study and exposition of written legal norms, but should also include the study of institutional practices that are not, or only partially, based on legal norms. The reason for this is that positive EU law cannot properly be understood (and described) without knowledge of key institutional practices; the 'black letter' of EU law remains a dead letter without reflecting in its analysis the various practices which EU institutions develop in shaping and implementing the formal legal norms. These practices are not legal norms themselves, but they are not unlawful either.[5]

His analysis is correct but only goes some way to appreciating the limits of doctrinal analysis. A fuller appreciation, I will argue, recognises not only that we need to understand key institutional practices to understand the positive law, or at least its application, but also, secondly, that lawyers cannot usually deduce from the positive law what is good institutional practice. This requires them to render political judgements about the relative merits of different institutions. It requires them, in other words, to accept that the doctrinal method is insufficient for answering many legal questions.

Is this pushing against an open door? Am I making an argument so obvious that it should not be made again? To some, no doubt. The point that doctrine does not determine every dispute is hardly controversial, and given some thought, the point that doctrine is not determinative of the allocation of EU institutional authority might seem evident too. And yet, as I will illustrate in section 2, EU legal scholarship dealing with questions of institutional balance frequently misses this point: it assumes that institutional balance is a question of legal judgement, to be resolved through doctrinal analysis. For this reason, I think it is worthwhile restating what might be

[3]O Brook, 'Politics of Coding: On Systematic Content Analysis of Legal Text' in *The Politics of European Legal Research* (n 1), 109.

[4]See, for example, J Zglinski, *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (Oxford University Press 2020); E Ní Chaoimh, *The Legislative Priority Rule and the EU Internal Market for Goods: A Constitutional Approach* (Oxford University Press 2022).

[5]De Witte (n 2) 638.

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obvious to some, simply because it isn't obvious enough to many legal scholars studying EU institutional balance.

This article proceeds as follows. Section 2 briefly revisits the merits of the doctrinal method, emphasising the central role it has to play in the study of EU law and governance, before assessing some of its limitations, especially in relation to the resolution of legal disputes. These limitations will be illustrated using the issue of EU institutional balance, and more specifically the relationship between the EU legislature and judiciary, as the central case study. Many disputes the CJEU is asked to decide nowadays involve questions about the relative authority of the legislature versus the judiciary. I will explain that these questions, and hence the disputes themselves, require legal officials to exert political judgement. The next two sections discuss how this challenge can be met by exploring the evaluative and adjudicative value of political and constitutional theory and its methodologies for legal scholarship. In section 3, I argue that for our theories to have such value, they must be sensitive to the EU political setting and the constraints this setting imposes on what is realistically feasible. The aim of theoretical reflection must be to identify what should be in view of what is or could be. Finally, I argue in section 4 that the evaluative insights that can be drawn from theoretical disciplines can help guide the political judgements that may be needed in the resolution of legal disputes.

2. The doctrinal method: merits and shortcomings

The aims and tools of the doctrinal method have been described so extensively by others that I limit myself to briefly restating some of their accounts. The doctrinal method offers an internal perspective on the law. Lawyers use it, as Oliver Wendell Holmes Jr. famously observed over a century ago, 'to make known the content of the law; that is, to work upon it from within'.[6] The method thus in the first place allows us to describe and systematise the existing law, exposing the norms of EU law in a given area and organising them into a coherent set of legal concepts by studying how they interact and apply within the EU legal order.[7] However, the doctrinal method is valuable not only because it enables us to answer descriptive questions about what the law is and how it works; it can also be employed to provide an assessment of the law as is. It serves both expository and evaluative ends.[8] Or rather, it serves prescriptive and justificatory ends in addition to its descriptive end. Used prescriptively, the doctrinal method enables the search for legal and political solutions that offer the best fit with the existing system. That is, it can be used to prescribe how our legal and political institutions could and should act. Relatedly, the doctrinal method can also be used to assess the justification of legal decisions by reference to the legal system. Legal decisions are not law if they do not fit the existing system.[9] This, in a nutshell, is what doctrinal analysis allows.

The doctrinal method can easily fall victim to its own success. It is so ingrained in our approach to law, so internalised in our way of doing and thinking, that its significance for legal research and our responsibilities as legal scholars can easily be forgotten. Doctrinalism and related terms like formalism and legalism have taken on pejorative connotations, to describe vices as simplistic legal reasoning and the idolisation of the law. EU legal scholarship no doubt suffers from these vices too, but not because of doctrinal analysis as such (though maybe because of excessive reliance on it). An important element of what is (EU) law will be forgotten if its legalistic and formalistic side

[6]Or W Holmes Jr., 'The Common Law', page 219. Available at: <https://www.gutenberg.org/files/2449/2449-h/2449-h.htm>.

[7]JSmits, 'What Is Legal Doctrine?' in *Rethinking Legal Scholarship* (n 1), 207; De Witte (n 2) 637; A von Bogdandy, 'The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe' 7 (2009) International Journal of Constitutional Law 364.

[8]T Hervey, R Cryer and B Sokhi-Bulley, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 9; De Witte (n 2) 639.

[9]Smits (n 7).

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is not accepted.[10] Legal norms seek to restrict the choices of decision-makers, and it is the job of lawyers to identify the rules guiding and restraining decision-making. This requires a sound understanding of the law; indeed, it requires us to engage in doctrinal reasoning, which gives us the language to communicate with fellow lawyers and convince legal authorities of our views. It also allows us to impart legal knowledge to and train future generations of judges, lawyers and scholars. It does not seem far-fetched, therefore, to claim that mastery of doctrine gives us legitimacy as legal professionals – the capital to be seen as experts in our field.[11]

The doctrinal method is key not just to legal scholars but also to scholars from other disciplines interested in legal institutions. It is noteworthy, I think, that while EU law scholarship increasingly relies on social science methods, political scientists and sociologists remain, as Julien Bois and Mark Dawson note, 'focused on the actors impacted or involved in the legal process, giving little importance to the normative structure of the EU legal order'.[12] That is, they study institutional behaviour without taking seriously the law as an independent explanatory factor for what they observe. It may sell to say that judicial behaviour is a result of public opinion or judges' desire for self-empowerment,[13] but often a straightforward legal explanation exists for the choices they make. Plausible theories of judicialisation are thus those that take seriously existing legal constraints and do not point to political or socio-economic explanations for judicial behaviour before the law has been excluded as an alternative explanation.[14] This requires social scientists to engage seriously with legal research as well as the methodology on which legal reasoning rests.

That said, while doctrinal analysis is an important part of the work of scholars interested in EU law and legal institutions, it need not be the be-all and end-all of our scholarship. Not all questions lawyers want to have answered are answerable from a doctrinal perspective, be they expository or evaluative. What is EU law's impact on the regulation of labour relations? How much discretion does the CJEU enjoy in relation to national governments? Answering these questions requires a sound understanding of the norms of EU law involved, but they cannot be fully answered without the use of appropriate social science tools. Similarly, while the doctrinal method can serve evaluative tasks, it cannot serve any evaluative task, namely not those requiring an external viewpoint on the law. Should the CJEU afford national governments a greater margin of discretion? Should EU law strike a different balance between the internal market and the welfare state? Answering such questions would require using the proper methods of legal or political theory, perhaps in combination with those of the political sciences. It would not make sense to try answering these questions through a meticulous exposition of the Treaties.

The limits of doctrinal analysis, however, cut a little deeper. To illustrate this, take the allocation of authority between the EU legislature and judiciary.[15] How should the CJEU exercise its powers vis-à-vis the legislature? When should it afford deference to its choices and when, on the contrary, should it invalidate these through judicial review? Doctrinal analysis can shed some light on these questions. First, an exploration of the provisions laid down in the Treaties would allow us to identify the powers of EU institutions. We will learn that the European Parliament and Council jointly exercise legislative functions (Arts 14(1) and 16(1) TEU), and as we leaf further through the

[10]F Schauer, 'Formalism' 97 (1988) The Yale Law Journal 509. For applications of Schauer's insights to EU law, see: J Lindeboom, 'Formalism in Competition Law' 18 (2022) Journal of Competition Law & Economics 832.

[11]P Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' 38 (1987) The Hastings Law Journal 805.

[12]J Bois and M Dawson, 'Towards a Legally Plausible Theory of Judicialization in the European Union' 45 (2023) Journal of European Integration 823, 824.

[13]See, for instance, M Blauberger et al, 'ECJ Judges Read the Morning Papers. Explaining the Turnaround of European Citizenship Jurisprudence' 25 (2018) Journal of European Public Policy 1422.

[14]Bois and Dawson (n 12).

[15]I explore the relationship between the EU legislative and judicial branches in detail in M van den Brink, *Legislative Authority and Interpretation in the European Union* (Oxford University Press, 2024). This section draws on the first chapter of the book.

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Treaties, we discover what powers the CJEU enjoys. It has the task to 'ensure that in the interpretation and application of the Treaties the law is observed' (Art 19(1) TEU), which may require it to invalidate legislation for 'infringement of the Treaties or of any rule of law relating to their application' (Art 263 TFEU). A doctrinal analysis of EU institutional power will also establish that all institutions must 'practice mutual sincere cooperation' (Art 13(2) TEU): ie, they must collaborate in the furtherance of supranational integration. Second, the doctrinal method may be of use in determining how the institutions must behave toward one another. Thomas Horsley has used the method to such prescriptive and evaluative ends, using the Treaties 'as the principal touchstones for assessing the internal constitutionality, and hence legitimacy, of all Union institutional activity'.[16] His work shows the value of doctrinal reasoning in studying the relationship between EU legislative and judicial authority.

Yet the doctrinal method hardly allows us to establish what this relationship ought to be. By 'ought to be', I mean ought to be not in the sense of abstract normative theory but in the sense of the resolution of day-to-day legal disputes. The Treaties vastly underdetermine the allocation of legislative versus judicial authority. How much leeway must the legislature have in enacting provisions regulating (say) the internal market or fundamental rights? When must its decisions be struck down for violating the Treaties? What, in other words, should be the balance of legislation versus case law? These are the kind of questions underlying many of the disputes that appear before EU and national courts, and which the Treaties do not answer, no matter how often and closely we study them. Quite the contrary, as Martin Loughlin has argued, many legal disputes 'invariably entail claims about the relative authority of case law versus legislation, of legislative will versus constitutional principles, of constitutional principles versus judicial precedents. These conflicts ... cannot be resolved by legal method; they require the exercise of *political judgment*.'[17] EU lawyers who take the doctrinal path to find answers to these questions will therefore sooner rather than later get hopelessly lost.

However, EU lawyers interested in the allocation of institutional authority often still fail to recognise that not much can be said about the relative authority of EU institutions based on legal judgement alone. When this happens, it is typically assumed that the EU's institutional balance can be derived from EU primary law, and especially from the hierarchical relationship between primary law and secondary legislation. To illustrate this, let us have a closer look at three monographs,[18] published in the last two years.[19]

The view that the EU legislature's relationship with the judiciary can be determined by primary law clearly underpins *Ní* Chaoim's study of the exercise of judicial deference to secondary legislation in the internal market for goods. She offers an impressive analysis of the free movement of goods case law, showing how much self-restraint the CJEU exercises with respect to legislation, but her study falls short when it comes to the question of when deference is justified. She argues, for instance, that the CJEU must 'consistently interpret EU product legislation or, where necessary, review it directly by reference to primary law'.[20] Likewise, she claims that 'secondary rules cannot be relied upon to impose or maintain conditions contrary to the Treaty but must, where possible, be interpreted consistently with primary law'.[21] Such statements are correct but of

[16]T Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and Its Limits* (Cambridge University Press 2018).

[17]M Loughlin, *Political Jurisprudence* (Oxford University Press 2017) 6.

[18]For a more extensive discussion of two of those books, see M van den Brink, 'Institutional Choice in the Internal Market: A Review Essay' 87 (2024) Modern Law Review 1031.

[19]See, for additional examples, D Edward, 'Guest Editorial: Will There Be Honey Still for Tea?' 43 (2006) Common Market Law Review 623; N Rennuy, 'The Emergence of a Parallel System of Social Security Coordination' 50 (2013) Common Market Law Review 1221, 1243; S Garben, 'Sky-High Controversy and High-Flying Claims? The Sturgeon Case Law in Light of Judicial Activism, Euroscepticism and Eurolegalism' 50 (2013) Common Market Law Review 15, 34.

[20]Ní Chaoimh (n 4) 32.

[21]Ibid., 83.

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little consequence. Secondary law can evidently not be used to amend primary law, but as contested provisions of primary law are usually highly ambiguous, this finding does not get us far. The relevant question is, instead, which institution gets to interpret such ambiguous provisions. Should that be the legislature or the judiciary? How much discretion must the legislature enjoy in that respect and when is it legitimate for the Court to strike down legislation using its power of judicial review? The answers to such questions cannot be found in primary law.

A similar problem besets Vėlyvytė's attempt to define how the principle of institutional balance ought to guide the Court's attitude toward legislation. She considers whether the Court should exercise self-restraint toward legislation but rejects this 'restrictive approach' as unsuitable 'for defining the limits of judicial action at the EU level' for the following reason:

> Given the breadth of the Court's mandate under Art 19 TEU and the breadth of the legislative mandate under the functionally broad legal bases, a degree of overlap between the powers of the two institutions is both inevitable and constitutionally justified. After all, the Court, as the interpreter of the Treaties, lays down the principles that guide the EU legislature in the adoption of legislative acts.[22]

Vėlyvytė rightly appreciates the broad mandate of the legislature and judiciary under the Treaties, but she also assumes that the Treaties define how their mandates must be exercised. This, however, is left open by the Treaties; it is within the Court's mandate to exercise self-restraint when its decisions would otherwise conflict with those of the legislature. Indeed, the institutional balance between the EU legislature and judiciary cannot be derived from primary law.

The third example concerns Spieker's attempt to redefine the institutional balance between the legislature and judiciary. He distinguishes between provisions of primary law that give expression to a value protected by Article 2 TEU and other provisions of primary law and argues that this distinction would allow the Court to retain 'strict scrutiny of provisions that give expression to an Article 2 TEU value [and] relax the constraints imposed on the EU legislature' by other provisions.[23] He acknowledges that 'there are arguments from legitimacy and from capacity in favour of the EU legislature',[24] but he does not pursue this thought and instead presents his recalibration exercise as a purely legal exercise,[25] which, he suggests, flows from the hierarchy that Article 2 TEU imposes on the Treaty framework. Yet this argument is questionable, partly because it tries to regulate the relationship between EU institutions on the basis of legal rather than political considerations. Even if Article 2 TEU did draw a clear division between 'constitutional' and 'non-constitutional' provisions of primary law,[26] it would still not establish how strictly (or loosely) these provisions constrain the legislature. Spieker argues that the Court should have exclusive authority over 'genuinely constitutional standards' such as fundamental rights and subject legislation affecting such standards to 'strict scrutiny'.[27] Yet the legislature does, as a matter of fact, exercise considerable interpretative authority over Article 2 TEU values, such as fundamental rights, and even if such values have higher moral status than the provisions of the EU's economic constitution, it does not follow that review of these values should be strict. How strictly judicial review must be exercised depends on who, the judiciary or the legislature, is better at protecting and promoting EU values, which in turn depends on their relative institutional legitimacy and capacity to make the complex and controversial decisions involved in articulating

[22]V Velyvyte, *Judicial Authority in EU Internal Market Law: Implications for the Balance of Competences and Powers* (Hart Publishing 2022) 189–90.

[23]LD Spieker, *EU Values before the Court of Justice: Foundations, Potential, Risks* (Oxford University Press 2023) 125.

[24]Ibid., 131.

[25]Ibid., 6–7.

[26]One reason to doubt this is that the principles governing the EU's division of competences are, one would think, 'genuine' constitutional values, even if they are not protected under Article 2 TEU.

[27]Spieker (n 23) 137–40.

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them. These are political decisions that cannot be settled by reference to Article 2 TEU, nor by any other provision of primary law.

These examples illustrate that the institutional balance between the EU legislature and judiciary cannot be settled by imposing a hierarchical legal framework on it, nor can it be resolved by doctrinal analysis. The same is true for the allocation of EU authority more generally. How searching must the EU judiciary be in reviewing EU administrative decisions and the scientific evidence on which they are based? How much deference must it afford to the complex economic choices made by EU monetary institutions? In respect to such questions, attempts to induce standards of appropriate institutional behaviour from the Treaty framework 'inevitably fail'.[28] In fairness, by comparison to scholarship on the allocation of EU legislative-judicial authority, the academic debate on the review of EU monetary and administrative institutions seems to be more aware of the political choices the CJEU faces. The key questions in these debates have been whether the EU judiciary, having regard to its legitimacy and expertise, is well suited to review monetary and administrative decisions, and what is, consequently, the appropriate standard by which to exercise judicial review.[29]

It is important to clearly spell out the claim that legal officials must exercise political judgements when asked to decide on the EU's institutional balance. It should not be confused with the legal realist claim that legal officials cannot keep their political beliefs at bay when applying the positive law. Rather, the point is that the relative authority of EU institutions and, relatedly, EU legal sources can be resolved only by the exercise of political judgement. My claim is also not a repudiation of positivist legal thought. De Witte, as we saw earlier, defends a positivist approach, along with its corollary, the doctrinal method, as appropriate for the study of EU law. Without wishing to contribute to the debate on the nature of law, legal positivists are not committed to such 'positivistic adjudication'.[30] They acknowledge that judges have a responsibility to apply non-legal considerations when disputes cannot be resolved by the application of legal norms alone. They are aware, that is, of the limits of doctrinal legal reasoning. EU lawyers should be too. Doctrinal analysis alone is insufficient to decide disputes that concern disagreements about the allocation of political authority. Finally, my claim is not that the doctrinal method should be abolished or that legal reasoning can be reduced to political reasoning. Indeed, my claim is not that legal judgement is ultimately political judgement, but that a significant number of legal judgments rest on, and cannot be made without, some kind of political judgment. The challenge, therefore, is to integrate the positivist with the political in a way to better understand, critique, and inform the political choices underlying EU constitutional principles and practices.[31]

3. What should be in light of what could be

The question, then, is how to exercise the requisite political judgement as a complement to the doctrinal method when it comes to resolving legal disputes involving questions of EU institutional balance. This depends on the issue at hand. Broadly speaking, we are here dealing with the

[28]This criticism was levelled at the literature on EMU accountability. M Dawson and A Maricut-Akbik, 'Procedural vs Substantive Accountability in EMU Governance: Between Payoffs and Trade-Offs' 28 (2020) Journal of European Public Policy 1707, 1709.

[29]M Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review' 15 (2019) German Law Journal 265; M Dawson, A Maricut-Akbik and A Bobić, 'Reconciling Independence and Accountability at the European Central Bank: The False Promise of Proceduralism' 23 (2017) European Law Journal 118. For an excellent discussion of the review of the administrative process, M Morvillo and M Weimer, 'Who Shapes the CJEU Regulatory Jurisprudence? On the Epistemic Power of Economic Actors and Ways to Counter It' 1 (2022) European Law Open 510.

[30]See clearly, J Gardner, 'Legal Positivism: 5½ Myths' 46 (2001) The American Journal of Jurisprudence 199, 211–214.

[31]M Gordon, 'A Positivist and Political Approach to Public Law' in D Kyritsis and S Lakin (eds), *The Methodology of Constitutional Theory* (Hart 2022), 233.

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question of comparative institutional choice,[32] which involves more specific questions about the relative institutional legitimacy and capacity of the institutional alternatives.[33] But which academic disciplines to inquire into depends on what institutional qualities we are interested in specifically. For example, if we think that decisions should ideally be taken by the EU institution that is all things equal most likely to generate its intended legal and social effects domestically, the insights from the EU compliance literature seem relevant.[34] If we think they should be taken by the institution that can reliably be trusted to make the best decisions, we want to compare the decision-making process of different institutions to see how they are structured and what kind of people are involved.[35] And lawyers interested in what is probably the most important political value underlying disputes over the allocation of EU authority, namely political legitimacy, should engage with questions of normative theory.[36]

I want to dwell on this last point, the complementary value of political and constitutional theory for EU law and legal scholarship. It might be evident that these academic disciplines can have *evaluative value*. After all, normative theory, when applied to the EU, is essentially concerned with the question of what the EU *should* do: through what institutions and by what practices it should govern the affairs between and within the member states, how it should treat migrants at its borders, what principles should underpin institutional reform, and so forth. These are all evaluative questions that can allow us to shed light on existing legal principles and practices. I will also argue, however, that political and constitutional theory can have *adjudicative value*. There are enough legal scholars who still like to uphold the belief that an impenetrable wall exists or is to be erected between the disciplines of law and normative political theory, broadly conceived, and that the questions asked by these disciplines belong to different domains. However, since the resolution of legal disputes depends on normative political considerations concerning the institutional legitimacy and capacity of EU and national institutions, the questions that underlie the adjudicative process are very much alike those asked in political theory. As I shall argue in the next section, the insights of political theory may be brought to bear on adjudicative questions within EU law.

First, however, I want to specify in more detail how political theory can be employed in a way that it may generate useful, that is, legally relevant insights. There are, roughly speaking, two ways in which to apply it to contemporary legal and political questions. The first is to approach such questions in a highly moralised or idealised fashion, with the aim to find ideal solutions to problems or questions unburdened by the political situation in which a certain normative principle is invoked. This would amount to a kind of utopian theorising that is unrestrained by existing social and political facts, such as the existence of national communities with associated feelings of belonging and solidarity. While this might be a valuable way of approaching such questions, the insights of ideal theory are less likely to be relevant for lawyers, who are most likely more interested in the here and now. Another way is to adopt a (more) realist approach to political theory that is attentive to the social and political context as it exists and the constraints it imposes

[32]N K Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1997).

[33]J King, *Judging Social Rights* (Cambridge University Press 2012) 130. See also I Venzke and J Mendes, 'The Idea of Relative Authority in European and International Law' 16 (2018) International Journal of Constitutional Law 75.

[34]Though the compliance literature is not comparatively institutional in nature. For an interesting exception, studying EU legislative and judicial authority in terms of compliance, SK Schmidt, 'Beyond Compliance: The Europeanization of Member States through Negative Integration and Legal Uncertainty' 10 (2008) Journal of Comparative Policy Analysis: Research and Practice 299, 304.

[35]Psychological research on group-based decision-making might then be of interest. See, for example, H Landemore, *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many* (Princeton University Press 2017).

[36]See, for example, van den Brink (n 15) Chapter II.

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on what is realistically feasible. The aim then is to identify what should be in light of what is or could be.[37]

Much of the more interesting constitutional theory on the European Union is realist in the proper sense of the term. It eschews moral idealism and takes seriously what Neil Walker called the difficulty of 'translating' the normative concepts of constitutionalism from domestic statal settings to the EU context and other transnational settings more generally.[38] Turkuler Isiksel, for example, has proposed a methodology she calls 'reflexive readjustment', which should allow constitutional concepts to be adapted to new settings without them losing the normative qualities that make constitutionalism valuable.[39] She has used it to both describe and better understand the unique constitutional features of the EU and to identify and address normative shortcomings of its constitutional structure. Numerous other scholars have followed the same path, liberating constitutionalism from its national straitjacket by reinterpreting constitutional concepts in a way that allows us to better understand and evaluate the constitutional processes and practices taking place within the EU.[40]

The main difficulty in translating constitutional theories and concepts still is what Jo Shaw and Antje Wiener so aptly called the 'touch of stateness'.[41] As they saw it, 'stateness is the implicit reference of most work on the condition of "deficits", including deficits of democracy, legitimacy, accountability, equality, and security', which they claim 'begs the normative response to overcome the deficit'.[42] It also remains, argues Filipe Brito Bastos, the implicit reference of most EU administrative law scholarship, which is judged 'against the standard of the value choices commonly made by national administrative laws'.[43] The problem, according to Walker, is that this touch 'is apt to compromise our understanding of non-state or post-state entities or processes'.[44] It is equally apt to compromise our evaluation of post-state processes and principles.

It is likely, of course, that certain concepts lend themselves to literal translation: ie, that their analytical or evaluative meaning is preserved without reflexive readjustment. The concept of the rule of law might be a case in point. It is conceivable that rule of law principles such as predictability, clarity, and coherence must take on the same meaning in post-national settings as in domestic contexts. Yet even with respect to such an everyday concept as 'legality' it has been argued that the 'classic conceptual link between administrative legality and democracy is difficult to sustain under EU constitutional law'[45] (though, arguably, the understanding of democracy here is itself affected by a touch of stateness).[46]

Other concepts, by contrast, lose much of their normative content if they are not adequately translated. Accountability might be one example of a concept requiring careful readjustment. Mark Dawson and Adina Maricut-Akbik have argued that reform proposals to make the EU's monetary institutions more accountable should neither apply national accountability standards directly nor apply *sui generis* European accountability standards. Accountability standards derived from national settings cannot be easily realised in the EU institutional setting, while European

[37]R Jubb, 'Realism' in A Blau (ed), *Methods in Analytical Political Theory* (Cambridge University Press 2017) 112; D Schmidtz, 'Realistic Idealism', ibid., 131.

[38]N Walker, 'Postnational Constitutionalism and the Problem of Translation' in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press 2001), 27.

[39]T Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism beyond the State* (Oxford University Press 2016) 24–5.

[40]See, eg, J Shaw, 'Process and Constitutional Discourse in the European Union' 27 (2000) Journal of Law and Society 4.

[41]J Shaw and A Wiener, 'The Paradox of the "European Polity"' in M Green Cowles and M Smith (eds), *The State of the European Union: Risks, Reforms, Renewals, and Revival* (Oxford University Press 2000) 65.

[42]Ibid.

[43]F Brito Bastos, 'Doctrinal Methodology in EU Administrative Law: Confronting the "Touch of Stateness"' 22 (2021) German Law Journal 593, 594.

[44]Walker (n 38) 29.

[45]Brito Bastos (n 43) 621.

[46]See the discussion on translating the concept of democracy below.

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accountability standards derived from the EU Treaties easily let monetary institutions off the hook. The solution, in their view, is to ask what accountability is good for and then study how the goods of accountability can be realised in the EU institutional structure.[47] Their solution, in other words, is to readjust general accountability standards to make them suitable for the EU.

Another, and perhaps even better example of a debate affected by the touch of stateness is the debate about the EU's democratic legitimacy. It has been argued that the concept of democracy is untranslatable, because the EU would be bound to lack democratic legitimacy because of the absence of a collective European demos and a sufficiently developed transnational public sphere.[48] Others have argued that it has been mistranslated because the EU political process violates the standard conditions for democratic legitimacy: political equality and majority rule.[49] This would be because the representation of EU citizens in the European Parliament is degressively proportionate, overrepresenting citizens of less populous member states compared to citizens of any other member state (Article 14(2) TEU), and because the Council decides by qualified majority (Article 16(4) TEU). In other words, the EU would lack democratic legitimacy either by its very nature or because of its institutional design.

Such arguments forget that the EU political process is designed to fit the EU's unique political situation. The EU does not treat its citizens as political equals *because* it has no unified demos and no integrated public sphere.[50] It adopts degressive proportionality and qualified majority voting for this reason, namely, to ensure that the national peoples can exercise shared and equal control over its political process. This is justified because EU citizens are still largely divided along national lines. Doing so does not weaken the EU's democratic legitimacy, but rather strengthens it. It ensures that all national peoples – including those of smaller member states – have a substantial voice in the political process and can have their interests recognised. This arrangement may be second best from the viewpoint of ideal theory, but it is the ideal solution given the EU's particular political situation.

An adequate translation of the concept of democracy to the EU setting not only improves our appreciation for the EU's institutional design. It can also have considerable implications for how we evaluate the relative authority between EU institutions. If the EU political process is undemocratic, any power the judiciary exercises over this process will be easier to justify. It would mean, for instance, that the judicial review of legislation will not be vulnerable to the well-known objection of democratic legitimacy.[51] It might even mean that the EU's legitimacy would be strengthened if political decisions get taken by the judiciary.[52] If, on the other hand, a correct translation of the concept of democracy shows the opposite, namely that the EU would enjoy a more acceptable level of democratic self-government when it exerts its authority through the legislative process, one would probably reach a different conclusion: it should then ideally be the legislature who defines the content of EU law and for the CJEU to exercise deference in the interpretation of legislation.[53] It would then also be desirable for the administrative branch to be subject to the authority of the legislative branch.[54] Clearly, much is staked on the correct interpretation of normative theories and constitutional concepts in the EU context.

[47]Dawson and Maricut-Akbik (n 28).

[48]BVerfGE 123, 267 *Lisbon Decision*, paras 273–95. See also, FW Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999); JHH Weiler, 'Europe in Crisis – On "Political Messianism", "Legitimacy" and the "Rule of Law"' (2012) Singapore Journal of Legal Studies 248, 254.

[49]Dimitry Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal' (2011) 08/10 Jean Monnet Working Paper n 63.

[50]van den Brink (n 15) Chapter II.

[51]For similar views see, A Arnull, 'Judicial Review in the European Union' in D Chalmers and A Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 379; J Öberg, 'The Rise of the Procedural Paradigm: Judicial Review of EU Legislation in Vertical Competence Disputes' 13 (2017) European Constitutional Law Review 248, 259.

[52]F de Witte, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law' 50 (2013) Common Market Law Review 1545, 1555–6.

[53]van den Brink (n 15) Chapter III.

[54]This may sound evident, but it is less so if the concept of democracy is not adequately translated. See, Brito Bastos (n 43) 621.

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4. The adjudicative value of political theory

These findings carry over to the adjudicative process. As I explained in section 2, not every legal dispute can be resolved by doctrinal reasoning alone. This may be self-evident, but many lawyers do not accept that extra-legal considerations or, more specifically, normative theoretical judgements have a role to play in the legal process. According to Von Bogdandy, 'it is as essential that, in pluralistic societies, the legal principles keep their distance from philosophical and ideological discourses in order to remain potential projection screens for similar, but factually divergent constructs. Philosophical considerations are inappropriate in court judgments'.[55] Moreover, even those who believe that 'the autonomy of legal scholarship is not necessarily compromised by complementing robust legal analysis with the analysis of neighbouring disciplines' may argue that 'from the point of view of a doctrinal approach … the role of extralegal perspectives can only be instrumental and subordinate'.[56] They may find, that is, that 'the main difference between [law and … scholarship], on the one hand, and traditional legal scholarship, on the other, is that they ask different research questions'.[57] The argument of "law and … scholarship" 'may still be normative, but it remains outside the realm of legal analysis'.[58]

Yet my analysis suggests that political theory can – and indeed may – at some point enter the realm of legal analysis and inform the political judgements needed to render legal judgement. No bright line can be drawn between the disciplines of law and political theory. Nor should we try to erect one, aiming for the unachievable ideal of doctrinal purity at the expense of transparency and informed legal judgement. To see how blurred the boundary between both disciplines is, let us return to the question of the proper relationship between the EU legislature and judiciary. This relationship cannot be inferred from the Treaties or any other norm of primary law, and so the question is by what standards and principles to determine, instead, whether secondary legislation should be applied. The question is essentially, therefore, what policy issues should be left to legislation because the legislature has more expertise and legitimacy to decide these issues and when, instead, matters are best settled by the judiciary. The CJEU itself seems to recognise, at least implicitly,[59] that this is a political question pertaining to its legitimacy vis-à-vis the legislative process. For example, it allows the legislature 'broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations',[60] but not when legislation encroaches on fundamental rights; then the legislature's 'discretion may prove to be limited'.[61]

But how do we, lawyers, evaluate these choices and how can judges decide what are the proper standards by which to review legislation, given that these choices cannot be made from within the law? There is a gigantic literature from domestic constitutional and political theory on the proper role of the legislative and judicial branches, on the justification of judicial review, on the virtues of judicial deference, and so forth. This is not the place to examine this literature. Instead, what I am interested in is why *we* lawyers should not try to learn from *them*, from theorists and their normative debates, and use the evaluative yardsticks that their scholarship provides in our own work, as academic scholars but also as practicing lawyers. The questions theorists ask are very similar to those the Court must answer in disputes about the appropriate relationship of legislation

[55]See, for example, A Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' 16 (2010) European Law Journal 95, 98.

[56]Brito Bastos (n 43) 617.

[57]M Hesselink, 'A European Legal Method? On European Private Law and Scientific Method' 15 (2009) European Law Journal 28.

[58]Ibid., 30.

[59]I say implicitly because it sometimes tries to justify its attitude toward legislation in purely legal terms. See, for a clear example, Joined cases C-402/07 and C-432/07, *Sturgeon*, ECLI:EU:C:2009:716, paras 47–8.

[60]Case C-58/08 *Vodafone and others v Secretary of State*, ECLI:EU:C:2010:321, para 52; Case C-380/03 *Germany v Parliament and Council*, ECLI:EU:C:2006:772, para 145.

[61]Joined Cased, C-293/12 and C-594/12, *Digital Rights Ireland and Others*, EU:C:2014:238, para 47.

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and case law, though they may think at a more abstract level or focus on other legal settings than the EU legal order. Controversial questions of translation therefore seem inevitable, and a uniquely correct answer may not be available. But what alternatives do we have but to rely as best as we can on the insights of such extra-legal disciplines when the law does not answer the legal questions we are supposed to answer? Engage in uninformed reasoning? Present our answers as if they are directly derived from the law, nurturing the antiquated idea of 'constitutional law without politics'.[62] Or will we be transparent about the kind of political decisions that are – and must be – made in resolving legal disputes, and accept that, by taking the insights of other disciplines into account, we can come 'to more informed and more balanced judgment'?[63]

The same goes for the debate on the accountability of economic and monetary governance, touched upon earlier. Dawson and Maricut-Akbik liberally draw on normative political theory in their examination of the point of accountability, by which they seek to yield better yardsticks for how EU monetary institutions should be held accountable for their decisions, including, if not especially, by the EU Court of Justice. To anyone who believes that there is no place for philosophical considerations in the judicial process, the question is what disciplines and methodologies to rely on instead to make well-informed legal judgments. It cannot be the discipline of law and the legal method. Therefore, since political theory already provides evaluative yardsticks to critically examine the political choices that adjudication entails, it seems inconsistent to stop here and not take the small additional step of letting these yardsticks help orient the resolution of legal disputes. Their resolution entails the exercise of political and moral judgement, so why not cut across the disciplinary boundaries of law and political theory to benefit from the latter's insights? Often, the CJEU must answer questions not dissimilar to those asked by political theorists. Thus, being explicit about the adjudicative value of political theory need not change how adjudication unfolds. It could simply facilitate reflection on the political choices that underlie legal adjudication and how these choices can be best exercised within the particular EU context.

I do not think that my observations are limited to the issue of EU institutional balance. Space constraints prevent me from going into detail, but let me give one example to illustrate this: the legality of headscarf bans at work, a contentious issue that the CJEU has struggled with mightily in recent years.[64] EU anti-discrimination law does not provide a clear-cut answer as to whether such bans are lawful. It protects religion and belief from direct and indirect discrimination alongside other personal characteristics such as disability and age, with the justificatory burden being higher for direct than indirect discrimination, but this knowledge alone is not enough to determine when headscarf bans are lawful. The CJEU also needed to reflect on questions such as the following: How protection-worthy are religious beliefs and practices? What weight should be given to the distinction between direct and indirect discrimination? How high is the justificatory burden for policies that inflict harm on religious minorities? To answer these questions, it had to identify the moral wrongs that the law seeks to remedy. In other words, it had to answer questions not unlike those asked by theorists of discrimination law.[65] The understanding they have developed of the

[62]M Shapiro, 'Comparative Law and Comparative Politics' 53 (1980) Southern California Law Review 537, 538.

[63]Hesselink (n 57) 32.

[64]Case C-157/15 *Achbita*, ECLI:EU:C:2017:203; Case C-188/15 *Bougnaoui*, ECLI:EU:C:2017:204; Joined Cases C-804/18 and Case C-341/19, *IX v Wabe* and *MH Müller Handels*, ECLI:EU:C:2021:594; Case C-344/20, L.F. v SCRL, ECLI:EU:C:2022:774. For criticism, M van den Brink, 'The Protected Grounds of Religion and Belief: Lessons for EU Non-Discrimination Law' 24 (2023) German Law Journal 855; JHH Weiler, 'Je Suis Achbita!' 15 (2017) International Journal of Constitutional Law 879; S Hennette-Vauchez, 'Equality and the Market: The Unhappy Fate of Religious Discrimination in Europe' 13 (2017) European Constitutional Law Review 744.

[65]For this point, G Letsas, 'The Irrelevance of Religion to Law' in C Laborde and A Bardon (eds), *Religion in Liberal Political Philosophy* (First edition, Oxford University Press 2017) 44; C Laborde, *Liberalism's Religion* (Harvard University Press 2017) 64. See also, M van den Brink, 'When Can Religious Employers Discriminate? The Scope of the Religious Ethos Exemption in EU Law' 1 (2022) European Law Open 89.

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above questions could enrich the legal debate and hence the resolution of disputes that require reflection on the deeper justificatory rationale for the enactment of anti-discrimination norms. It would be a shame, in my view, not to use these insights when these could improve our own, as a complement to the doctrinal method when the latter is unable to furnish the necessary answers to legal questions.

5. Conclusion

I have explained that, because EU law vastly underdetermines the proper allocation of EU institutional authority, the doctrinal method cannot be used to conclusively answer legal disputes whose resolution depends on how authority gets allocated. In addition, I have advocated using the insights and methods of political and constitutional theory as a complement to the doctrinal method in such disputes. When correctly translated to the EU setting, political theory can have both evaluative and adjudicative value. Incorporating the insights of political theory into adjudicative process should not significantly change how disputes will be decided. The CJEU already makes political judgements in the decisions it takes, so it would mainly allow it to be more transparent about the political choices involved and to reach more informed judgements.

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