3

Research Method(s) in EU Law

Some Critical Reflections and an Untold Story

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3.1 INTRODUCTION

The (told) story of EU law scholarship is one of metamorphosis and methodological conflicts: from a doctrinally centred area of legal scholarship, it has moved towards empirical-driven approaches which have emerged since the 1980s, becoming popular in the 1990s.[1] A competition between methods for the study of the law, including EU law, has accordingly erupted and is currently reshaping the field.[2] But is this the full story? Let us start from the beginning.

Under the influence of European continental scholarship, EU law scholarship is traditionally deemed to be born 'doctrinal', meaning that it focused on the wording of the Treaties and the judgments of the Court of Justice of the EU.[3] The latter was the centre of the attention of EU law researchers as the source of the ultimate interpretation of EU law.[4] However, since the late 1990s a metamorphosis has taken

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1 Gijs van Dijck, Shahar Sverdlov, and Gabriela Buck, 'Empirical Legal Research in Europe: Prevalence, Obstacles, and Interventions' (2018) 11 *Erasmus Law Review* 105.

2 See Davies, Chapter 4 in this volume. On the competition between empirical and doctrinal methods in legal research see Rob Van Gestel and Hans-Wolfgang Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' (2011) 5 EUI Working Paper, especially the literature listed at pages 1 and 2, https://cadmus.eui.eu/bitstream/handle/1814/16825/LAW_2011_05.pdf?sequence=1&isAllowed=y; Douglas W. Vick, 'Interdisciplinarity and the Discipline of Law Journal of Law and Society' (2004) 31(2) *Journal of Law and Society* 163 and the literature cited therein; Gareth Davies, 'The Relationship between Empirical Legal Studies and Doctrinal Legal Research' (2020) 13 *Erasmus Law Review* 3; van Dijck et al. (n 1).

3 It should be noted that in EU law empirical studies, the wording of the law, and of judgments is also analysed but through different methodologies. See Urska Šadl, 'The Force of EU Case Law: An Empirical Study of Precedential Constraint' iCourts Working Paper Series 279(68) In Legal Knowledge and Information Systems: JURIX 2015: The Twenty-Eighth Annual Conference 71.

4 See currently Articles 19 TEU and 267 TFEU.

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place. In addition to doctrinal studies of EU law, empirical explorations of EU law have started emerging.[5] Under the aegis of American[6] and Scandinavian[7] realist schools' offspring, as well as the (competing) claims to academic audience from political scientists,[8] legal scholars have increasingly acknowledged the limits of doctrinal research methods, including in the field of EU law.[9] As a result, a new wave of research questions and evidence has enriched the doctrinal studies of EU law. Through the empirical turn in EU law scholarship, authors have provided useful evidence to complement and sometimes recalibrate claims advanced by EU law scholars.[10]

Thus, the competition between methods and approaches to the study of EU law has started; its first effect being that the value of EU law-in-the-books has been

[5] See Daniel R. Kelemen, 'Environmental Policy in the European Union: The Struggle between Court, Commission and Council' in Brigitte Unger and Frans van Waarden (eds.), *Convergence or Diversity: Internationalisation and Economic Policy Response* (Aldershot 1995) 306; Alec Stone Sweet and James A. Caporaso, 'From Free Trade to Supranational Polity: The European Court and Integration' in Wayne Sandholtz and Alec Stone Sweet (eds.), *European Integration and Supranational Governance* (Oxford University Press 1998) 92; Karen Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in Anne-Marie Slaughter, Alec Stone Sweet, and Joseph H.H. Weiler (eds.), *The European Courts and National Courts* (Hart 1998) 225. More recently, see Urška Šadl and Henrik Palmer Olsen, 'Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts' (2017) 30 *Leiden Journal of International Law* 327; Jan Zglinski, *Europe's Passive Virtues* (Oxford University Press 2020); Monika Glavina, 'To Refer or Not to Refer, That Is the (Preliminary) Question: Exploring Factors Which Influence the Participation of National Judges in the Preliminary Ruling Procedure' (2020) 16(1) *Croatian Yearbook of European Law & Policy* 25.

[6] Arthur Dyevre, 'Unifying the Field of Comparative Judicial Politics' (2010) 2(2) *European Political Science Review* 297.

[7] Svein Eng, 'Lost in the System or Lost in Translation? The Exchanges between Hart and Ross' (2011) 24(2) *Ratio Juris* 194; Jakob v. H. Holtermann 'Getting Real or Staying Positive: Legal Realism(s), Legal Positivism and the Prospects of Naturalism in Jurisprudence' (2015) 29(4) *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law* 535; Alf Ross and Henrik P. Olsen, 'The 25th Anniversary of the Pure Theory of Law' (2011) 31(2) *Oxford Journal of Legal Studies* 243.

[8] See among others Dyevre (n 6); Tobias Nowak and Monika Glavina, 'National Courts as Regulatory Agencies and the Application of EU Law' (2021) 43(6) *Journal of European Integration* 739; R. Daniel Kelemen and Tommaso Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union' (2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3994918; José Real-Dato and Luca Verzichelli, 'In Search of Relevance: European Political Scientists and the Public Sphere in Critical Times' (2022) 21 *European Political Science* 1.

[9] Recently, see Giulia Gentile, Monika Glavina, and Tobias Nowak, 'The Application of EU Law from the National Judge's Perspective: A Plea for an Interdisciplinary Approach' in Rossana Deplano, Giulia Gentile, Luigi Lonardo, and Tobias Nowak, *Interdisciplinary Research Methods in EU Law: A Handbook* (Edward Elgar 2024) 225; Filipe Brito Bastos, 'Doctrinal Methodology in EU Administrative Law: Confronting the "Touch of Stateness"' (2021) 22 *German Law Journal* 593.

[10] For instance, see Zglinski, Chapter 1 in this volume.

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re-assessed. An external observer to this 'battle' could argue that EU law doctrinal studies have suffered a blow, and in academic circles their importance appears to have diminished. Moreover, because of the breadth of research questions and methodological approaches, empirical EU law scholars have often claimed a higher epistemological comprehensiveness of their methods compared to doctrinal EU legal scholars.[11]

Currently, EU law scholars are standing at a crossroads. Should they choose to engage in the doctrinal analysis of EU case law and legislation, or should they rather employ methodologies venturing beyond the interpretation of the wording of the Treaties and of the Court of Justice's judgments? How much 'pure EU law' should be considered in EU legal scholarship while also striving to capture the reality of EU law? Vice versa, how much quantitative evidence is needed to effectively analyse the implications and application of EU law, without disregarding the role of the Treaties and EU case law in moulding the EU legal order?

Such dilemmas are the result of the (perceived) antagonism between doctrinal and empirical studies.[12] A constructive solution would be to advocate for harnessing the synergies between the two methodologies.[13] In this chapter, I would like to advance some critical reflections on research methods and their synergies in EU law, and an untold story on the evolution of EU law scholarship. The critical reflections and the untold story advance novel perspectives both on the role of empirical methods in the study of EU law, as well as the doctrinal approaches to researching EU legislation and jurisprudence. They help us rethink the discussion on methodological synergies in this field of law.

First, the critical reflections: while EU law scholars should acknowledge the gains of empirical legal methods, the epistemological benefits that these bring do not always make them the most appropriate method to study law, including EU law. Empirical methods, especially those including a numerical component, advance a 'computational' view of the law that can fail to capture crucial unquantifiable complexities, especially in legal reasoning, in the EU legal order.[14] Second, the untold story: even traditional doctrinal work on EU law tends to have an empirical component. This is because doctrinal legal scholarship on EU law has, from its very inception, focused on the practices of EU institutions, especially the Court of

[11] See literature in n 1.

[12] At times, the criticisms towards one or the other approach have been significant (and not consistently well mannered). See Dimitri Kochenov, 'Book Review: Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law' (*EU Law Live* 2022), https://eulawlive.com/library/europes-passive-virtues-deference-to-national-authorities-in-eu-free-movement-law/.

[13] See Šadl and Palmer Olsen (n 5), Gentile et al. (n 9).

[14] In adopting empirical methods, EU legal scholars may promote an understanding of EU law that can be reduced to quantitative elements over a more nuanced conceptualisation which relies on values that are contextual and hard (if not impossible) to quantify, see Section 3.3.

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Justice: in so doing, it has revealed the importance of the law-in-action paradigm. The chapter concludes that EU law researchers should embrace methodological modesty, since the boundaries between methods may not be as clear-cut as one would think, especially in this field of law.

The discussion proceeds as follows. Section 3.2 discusses the complexity surrounding the study of EU law and what roles research methods play. Section 3.3 offers critical reflections by unpacking the promises (and the perils) of methodological synergies between empirical and doctrinal methods in EU law research. Section 3.4 introduces the untold story of the empirical underpinnings of EU law doctrinal scholarship, followed by concluding remarks.

3.2 COMPLEXITY AND METHODS IN EU LAW

EU law has been a complex subject of study from the start. There are several reasons for this that are linked to the governance and constitutional architecture of the EU, which is different from a nation state legal order. First, the EU functions through the legal instruments and practices of a multitude of institutions and bodies, such as the European Commission, the European Parliament, the Council of Ministers, and the European Central Bank. Jointly, they all shape the EU as we know it through the measures, provided with more or less binding effects, that they negotiate and adopt.[15] These institutions and bodies are often subject to procedural rules governing their actions and conducts; they must also comply with the EU Treaties and the EU Charter, as well as international law obligations.[16] It is the Court of Justice of the EU to act as final interpreter of EU law and thus determine what EU law *is*.

Second, another layer of complexity surrounding the study of EU law stems from the web of actors belonging to various levels of governance that are not of EU origin. This includes, among others, individuals, national administrations, national courts, as well as international bodies and organisations. Because of the dependence of EU law on national legal orders, the EU administrative apparatus often relies on national law and implementing measures. For instance, under the principle of procedural autonomy, Member States have remained historically free to adopt procedural rules; these rules are also to be used for the enforcement of EU law claims before national courts.[17] This web of actors can either contribute to or undermine the effective application and enforcement of EU law.[18] As an example,

[15] See the discussion on EU law by Oana Stefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* (Kluwer Law International 2013).

[16] See Case C-8/15 to C-10/15 *Ledra Advertising Ltd* ECLI:EU:C:2016:701, para 67, see also Article 3 TFEU.

[17] Case C-33/76 *Rewe* ECLI:EU:C:1976:188.

[18] Giulia Gentile, 'One, No One, One Hundred Thousand: The Multi-faceted Effectiveness of EU Law' (2023) 34(3) *European Review of Public Law* 125.

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the division of labour between the Court of Justice and the national courts[19] was envisaged to ensure smooth co-operation between the two levels of jurisdictions, but can also complicate the interactions between the EU and the Member States.[20]

Third, and as a result, the complexity of EU governance has exacerbated an impression of opacity. The diversity of institutional actors and processes has pushed researchers to broaden the toolkit for studying EU law in order to cut across that veil of opacity. This opacity has also been conducive for and provided a shield behind which contestation could flourish, including among anti-EU factions and movements such as the 'Leave' campaign in the UK.[21] The EU bureaucratic machinery has been criticised for being impenetrable to the public, both administratively[22] and judicially.[23] Moreover, following the advancement of political integration and the EU enlargement, EU law and its meaning has been increasingly contested.[24] Hence, the very richness of the EU, marked by the presence of various legal orders and their traditions, which are able to influence and contribute towards the moulding of EU law concepts, has also been its weakness.

Since the creation of the European Communities, EU legal scholarship has focused on the EU case law and Treaties. This was by no measure surprising. Because of the 'constitutional' role of the Court of Justice, scholars have focused on its judgments since the very establishment of the European Communities.[25]

[19] See Article 19 TEU and Article 267 TFEU.

[20] The presence of such a plethora of actors has been acknowledged in the literature and has led to the advancement of several empirical studies that have looked at the dynamics of the enforcement of EU law within the national legal orders of the Member States. See, among others, the work of Glavina (n 5), and Karin Leijon and Monika Glavina, 'Why Passive? Exploring National Judges' Motives for Not Requesting Preliminary Rulings' (2022) 29(2) *Maastricht Journal of European and Comparative Law* 263; Nowak and Glavina (n 8).

[21] See Antoine Mortiaux, 'Arguments for Brexit: Rhetorical Analysis and Comparison of the Communication of Key Actors in the Leave Campaign' (2018) PhD thesis, Faculté de philosophie, arts et lettres, Université catholique de Louvain, http://hdl.handle.net/2078.1/thesis:16619.

[22] Päivi Leino-Sandberg, 'Transparency as a Critical Research Agenda' in Maarten Hillebrandt, Päivi Leino-Sandberg, and Ida Koivisto (eds.), *(In)visible European Government Critical Approaches to Transparency as an Ideal and a Practice* (Routledge 2023) 17; P. Leino-Sandberg, 'Transparency and Trilogues: Real Legislative Work for Grown-Ups?' (2023) 14(2) *European Journal of Risk Regulation* 271.

[23] Alberto Alemanno and Oana Stefan, 'Openness at the Court of Justice of the European Union: Toppling a Taboo' (2014) 51(1) *Common Market Law Review*, 97.

[24] See, among others, Marta Lasek-Markey, 'Poland's Constitutional Tribunal on the Status of EU Law: The Polish Government Got All the Answers It Needed from a Court It Controls', (*European Law Blog*, 21 October 2021), https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/; Floris De Witte, 'Interdependence and Contestation in European Integration' (2018) 3(2) *European Papers* 475.

[25] See the literature initiated by Pierre Pescatore, *Le droit de l'integration: emergence d'un phenomene nouveau dans les relations internationales selon l'experience des Communautes européennes* (Sijthoff 1972).

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The faith in the law and the proliferation of international law contributed towards the centrality of the law in the EU constitutional architecture, making the latter an exemplary organisation for its focus on the compliance with the law.[26] The centrality of the law has been imprinted into the DNA of EU law scholarship by EU law researchers and political scientists[27] alike. Yet, such an attention to the law-in-the-books was increasingly deemed insufficient for capturing the complexity outlined above. For instance, why do certain Member States decide not to implement EU directives? Or why do national courts refer (or not) to the Court of Justice? To answer these questions, a doctrinal approach can only take us so far.

This more critical awareness of the EU complex functioning has contributed to the development of empirical studies in EU law, in addition to the well-settled EU doctrinal legal scholarship. The empirical turn in EU law studies is unsurprising: the scholarly analysis of *only* EU legal principles may not necessarily grasp the variety of factors and variables contributing towards the functioning of the EU and its laws.[28] By contrast, empirical studies can reveal the context in which the law – including EU law – is created and operationalised, thus unearthing the forces and dynamics underpinning the evolution of legal systems and their rules. In other words, empirical studies can better identify the *causes*, *reasons*, and *effects* of the developments of (EU) law.

Scholars engaging in empirical research on EU law have extensively discussed the limits of doctrinal studies in the area of EU law; their long list of criticisms cannot be exhaustively treated within the space of this chapter.[29] As a consequence, the analysis of EU law as 'law-in-action', or through a realist lens, was deemed more appropriate to understand and explain the functioning of the EU by a growing number of EU law scholars. Empirical studies in EU law have thus proliferated and asserted their pivotal role in the exploration and understanding of the EU and its laws.

[26] In the aftermath of the Second World War, Kelsenian theory had colonised most of Europe and shaped constitutional orders, including that of the EU. See Ines Weyland, 'The Application of Kelsen's Theory of the Legal System to European Community Law: The Supremacy Puzzle Resolved' (2002) 21(1) *Law and Philosophy* 1.

[27] See Susanne K. Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford University Press 2018); Fritz Scharpf, 'The Asymmetry of European Integration, Or Why the EU Cannot Be a "Social Market Economy"' (2010) 8(2) *Socio-Economic Review* 211.

[28] See Urska Šadl and Henrik Palmer Olsen, 'Empirical Studies of Webs of International Case Law: A New Research Agenda' (2015) iCourts Working Paper Series, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2671678; Juan A. Mayoral, Urszula Jaremba, and Tobias Nowak, 'Creating EU Law Judges: The Role of Generational Differences, Legal Education and Career Paths in National Judges: Assessment Regarding EU Law Knowledge' (2014) 21(8) *Journal of European Public Policy* 1120; Tommaso Pavone and R. Daniel Kelemen, 'The Evolving Judicial Politics of the European Integration: The European Court of Justice and National Courts Revisited' (2019) 25 *European Law Journal* 352; Glavina (n 5).

[29] See Gentile et al. (n 9); Šadl and Palmer Olsen (n 5, 2017 and n 28, 2015).

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Taking as examples the research questions outlined above, the use of quantitative methods (e.g., statistics) combined with qualitative methods (e.g., interviews with authorities and courts) has helped identify the causes of non-compliance with EU law and the ways in which national courts engage with the preliminary ruling procedure.[30] Such approaches have also helped with tracing the effects of EU law in relation to the implementation of EU directives in the Member States.[31]

Empirical studies have further highlighted important questions on the legitimacy and the effectiveness of EU law. The presence of various actors with diverse interests and agendas in the EU has inevitably engendered a higher level of contestation. Empirical studies have offered a platform for voicing some of the waves of contestation discussed above and have articulated these criticisms in useful reflections for the EU and its institutions. For instance, authors have embarked on empirical journeys exploring the application of EU law to shed light on actors and dynamics that were not central in doctrinal scholarship which, as mentioned, tends to focus on the Court of Justice of the EU.[32] Another group of legal researchers have used quantitative methods to rethink the impact of EU law and its procedures not only on EU governance,[33] but also on the Member States.[34] The empirical turn in EU law has, in these ways, demonstrated its value by shedding light on some of the untold aspects of the *functioning of EU law*. The creation of journals such as the *Journal of Common Market Studies* are examples of the advancement of empirical works in the field of EU law in addition to topics pertaining to political science. Yet, the progression of empirical studies has also underpinned antagonism between doctrinal and empirical legal studies in this field.

Supported by several leading publication outlets in the field, EU law doctrinal studies have indeed continued to flourish.[35] Doctrinal approaches have remained

[30] See Dyevre, Chapter 14 in this volume.

[31] See, e.g., Robert Zbiral, Sebastiaan Prince, and Hurbet Smekal, 'Differentiation through Flexibility in Implementation: Strategic and Substantive Uses of Discretion in EU Directives' (2022) 24(1) *European Union Politics* 102.

[32] On the valuable insights of ethnographic research and surveys, see Mark de Werd, 'Dynamics at Play in the EU Preliminary Ruling Procedure' (2015) 1 *Maastricht Journal of European and Comparative Law* 149.

[33] Andriani Kalintiri, 'Article 47 of the Charter of Fundamental Rights in EU Competition Enforcement: A Quantitative and Qualitative Assessment' in Matteo Bonelli, Mariolina Eliantonio, and Giulia Gentile (eds.), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1* (Hart 2022) 231; Giulia Gentile and Luigi Lonardo, 'Appeals in the Field of EU Sanctions before the European Court of Justice after Lisbon: A Quantitative Study' in Rossana Deplano, Giulia Gentile, and Luigi Lonardo (eds.), *Pluralising International Legal Scholarship* (Edward Elgar 2019) 127; Takis Tridimas and Gabriel Gari, 'Winners and Losers in Luxembourg: A Statistical Analysis of Judicial Review before the ECJ and the CFI (2001–2005)' (2010) 2 *European Law Review* 131; Giulia Gentile, 'The Power of Procedure: Fundamental Rights in the Action for Annulment before EU Courts' in Melanie Fink (ed.), *Redressing Fundamental Rights Violations by the EU: The Promise of the 'Complete System of Remedies'* (Cambridge University Press 2024) 13.

[34] Zglinski (n 5).

[35] See *Common Market Law Review*.

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crucial in assessing the *interpretation* of EU law. They have provided a systematisation of the EU case law and have contributed towards the shared understanding of EU law among legal scholars of different traditions. As a matter of fact, both the EU Treaties and the EU case law are still an essential source for the rules and the protections afforded by EU law. Notwithstanding the various forms of contestation advanced towards the limits of doctrinal works on EU law, the written text of the Treaties and of the Court of Justice's jurisprudence constitute the first pit stop in the study and understanding of the EU.

Calls for a revitalised doctrinal approach to EU legal studies[36] are one of the topics investigated in this edited volume, with the view to identifying the epistemological gains of such a synergetic methodology. A combination of empirical and doctrinal methods can bring further benefits to the study of EU law, it may be logically argued. However, as EU law researchers we encounter several problems with this way of thinking. By embracing the view that doctrinal studies of EU law should be revitalised through empirical methods, EU law scholars may believe that they found the most comprehensive method to unearth the 'truth' about the functioning of the EU and its laws. True, empirical methods can enhance transparency and reduce the opacity of EU law. Nonetheless, EU law scholars employing both empirical and doctrinal methods will not obtain a perfect recipe for studying EU law.

While methodologies drawn from political science and adjacent disciplines enrich the study of EU law,[37] could they risk discounting the role of the Treaties and of the EU case law in shaping the EU? What is more, the advancement of empirical methods brings to the fore the tension between traditional and techno-friendly views of the law. Namely, the push towards datafied EU law that ensues quantitative research dominating empirical legal scholarship raises concerns around the kind of EU law that scholars are advocating for – a form of quantitative, 'computational' EU law. In other words, the method followed by scholars is also conducive to a specific view of the law. Such conceptions of the law are irreconcilable with the incommensurability of the law,[38] including EU law. These reflections are particularly relevant and topical in light of the advancement of artificial intelligence in the legal field. The following section unpacks and illustrates these claims.

3.3 REVITALISING DOCTRINAL EU LEGAL SCHOLARSHIP THROUGH EMPIRICAL STUDIES?

The combination of empirical and doctrinal methods for EU law seems to undoubtedly bring benefits. And, certainly, this is the case from an epistemological perspective. But some caveats are necessary.

[36] Davies (n 2, 2020).

[37] See the discussion in Gentile et al. (n 9) at 226 and ff.

[38] For a discussion on the concept of incommensurability, see Matthew Adler 'Law and Incommensurability: Introduction' (1998) 146(5) *University of Pennsylvania Law Review* 1169.

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First, we should recall that methods tend to mirror their object of study.[39] For instance, the empirical method applies to natural sciences and was conceived to observe phenomena that are replicable and drawn from the natural and physical world. Accordingly, features of natural and physical phenomena that are introduced in the empirical methods are replicability, verifiability, a certain degree of precision, and objectivity.[40] Ultimately, empirical research allows the discovery of theories on the natural and physical world. This method has been applied to other disciplines such as social sciences, thereby supporting researchers in their endeavour to draw correlations and connections between various dynamics.[41]

By contrast, the doctrinal method developed in legal scholarship reflects the specific features of law. The latter distinguishes itself from other disciplines because of its authority in society, able to bind individuals' behaviours;[42] its functions, linked to the solution of disputes but also the creation of entitlements and protections;[43] and to its systemic and reactive nature, being the means through which society can consolidate rules but also mobilise to achieve change.[44] Law is also influenced by space, being location-bound and shaped by the interpretations of institutions and legal professionals. The outcome of doctrinal legal research focuses on better understanding the implications of the law, as well as systematising and criticising the law. All in all, the law is the product of human experience, is capable of shaping prospective conduct through the interpretation of words and concepts, and is imbued with values developed by humans.

Second, another corollary is that objects and methods cannot be entirely disentangled, in the sense that the research questions and approaches developed within methods carry some of the features of their field of application. It follows that combining methods and objects that are not traditionally paired engenders some conceptual gains (but also some losses). This phenomenon can be defined as methodological hybridity.

By applying these observations to the law, we will notice that using purely empirical methods in legal research, including on EU law, would appear as mismatching the features of the law, and almost taking away the gains of doctrinal research. This remark does not intend to suggest that empirical scholars advocate for

[39] For a discussion, see CR Kothari, *Research Methodology: Methods and Techniques* (New Age International Publishers 2004) 1 et seq.

[40] See C.I. Lewis, 'The Given Element in Empirical Knowledge' (1952) 61(2) *Philosophical Review* 168; Jeremy Freese and David Peterson, 'The Emergence of Statistical Objectivity: Changing Ideas of Epistemic Vice and Virtue in Science' (2018) 36(3) *Sociological Theory* 289.

[41] See, e.g., Rebecca B. Morton, *Methods and Models: A Guide to the Empirical Analysis of Formal Models in Political Science* (Cambridge University Press 1999).

[42] Joseph Raz, 'Authority, Law and Morality' in Kenneth Einar Himma (ed.), *Law and Morality* (Routledge 2017) 261.

[43] David Howarth, *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar 2013) 14.

[44] Mathieu Deflem, 'The Legal Theory of Jürgen Habermas' in Reza Banakar and Max Travers (eds.), *Law and Social Theory* (Hart 2nd edn. 2013) 70.

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a pure empirical methodology as the most appropriate approach to the study of EU law. At the same time, the challenges around the use of the most appropriate balance between research methods when studying the law, including EU law, deserve examination.

For instance, quantifying aspects of judgments or surveys and interviews on lived experiences can provide insights on quantitative and qualitative aspects of EU law enforcement, but do not necessarily contribute towards critical reflections on the law and legal reasoning, or capture the nuances of legal traditions. Statistical data by itself does not reveal the *qualitative* aspects of how the law is interpreted, nor necessarily and consistently engage with distinctive questions of authority, functions, and the systemic nature of the law.

By contrast, methodological synergies drawing from various disciplines, in this case, science and law, can be less controversial than methodological hybridity. Methodological synergies differ from methodological hybridity because they seek to employ jointly empirical and doctrinal legal methods, rather than pure empirical approaches to legal questions.

Drawing on the work of Zglinski, it becomes evident that quantitative empirical methods can clarify the extent of the impact of principles of EU law. His book *Europe's Passive Virtues* illustrates that the Court of Justice is cautious in exercising deference to national courts in the internal market. My work on the impact of fundamental rights in the action for annulment before the EU judicature has also benefitted from quantitative insights.[45] By counting the instances of annulment of EU measures based on fundamental rights violations, I have reached the conclusion that, while only a small percentage of annulment actions leads to (total or partial) annulment of EU law on fundamental rights grounds, fundamental rights constitute nonetheless the most successful ground for annulling EU measures. Between December 2009 and December 2022, 64 per cent of the successful annulment actions before the General Court included pleas based on fundamental rights. Accordingly, it may be argued that quantitative and qualitative evidence drawn from empirical methods can help with studying EU law, but only if connected with doctrinal insights.

This seems to be the happy ending to our story. However, some words of caution are in order. First, intrinsic problems of empirical legal methods are 'measurement' and 'co-existence': how much interpretation of the law is necessary, and how much empiricism is needed? A practical example can help illustrate this point. A scholar interested in conducting empirical legal research on the effective protection of fundamental rights through the preliminary ruling procedure may identify and analyse several numerical parameters, such as the references to fundamental rights in the Court of Justice's decisions, or numerical evidence on the instances of incompatibility of EU or national measures with EU fundamental rights. A lower or higher number of references or of EU and national measures incompatible with

[45] Gentile (n 33).

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EU law may reveal a significant presence of arguments based on fundamental rights, but would not say much about the effective protection of fundamental rights through that procedure.

At this point, doctrinal methods become crucial: the researcher should read and study the judgments under a 'black letter approach'[46] to unpack how the Court of Justice deals with legal questions concerning fundamental rights. When digging into the case law and writing up the findings, the researcher will inevitably decide to focus on selected judgments and fundamental rights in order to build their argument. While shedding light on selected aspects of the EU case law, such analysis is by nature subjective and partial, and may also fail to capture the *effective* protection of fundamental rights through the preliminary ruling procedure. This is because it is for national courts to implement EU judgments, thus bearing the duty of applying EU law – and its effectiveness. Does this mean that the scholarly analysis conducted until that point is insufficient or unsatisfactory to advance a compelling and reliable argument? Should another layer of empirical or doctrinal analysis be added? When would the research question be satisfactorily answered?

On the basis of this scenario, it becomes evident that the perfect 'recipe' for research methodology synergies may not exist, after all; rather, it would be for each researcher to reflect on how much of both methods to use. However, the 'volatility' of methods and approaches for each research question and individual scholar's preferences indicates a significant degree of subjectivity (which may be at odds with the aspiration of accuracy and replicability of empirical methods), while also inevitably leaving some aspects of a research issue under-explored. The pursuit of truth and full accuracy through research methods should be recalibrated, and the limitations of the various scholarly explorations and relevant methodological approaches should be carefully acknowledged.

Second, going beyond the question of methods combination, the fact remains that there is an innate tension between the questions and objects of empirical and doctrinal methods that may subvert the nature of EU law. Considering my own work and experience with empirical legal methods on the impact of fundamental rights in the action for annulment, it is certainly important to reflect on the numbers of cases brought before the EU judicature. For instance, in my chapter 'The Power of Fundamental Rights' (see fn. 33), I have observed that the limited number of successful actions for annulment involving fundamental rights claims could be a reflection of the limitations on standing for individuals under Article 263 TFEU. This may certainly be part of the story.

Yet, a number can only give us evidence of a fact (i.e., the limited number of successful annulments involving EU fundamental rights), and not necessarily its

[46] See Mike McConville and Wing Hong Chui, 'Introduction and Overview' in Mike McConville and Wing Hong Chui (eds.), *Research Methods for Law* (Edinburgh Press 2nd edn. 2018) 1.

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causes. Traditionally, when faced with empirical evidence, scholars (including in the EU law field) engage in speculations on possible causes of certain legal events or dynamics. The accuracy of those speculations is nonetheless open to contestation. Considering again my own work, and the limitations of empirical doctrinal methods, the importance of fundamental rights in the EU constitutional architecture remains, notwithstanding the underwhelming presence of those entitlements in the action for annulment. In other words, the numerical evidence has given a quantitative dimension to a problem – that of the challenges for individuals in accessing the direct jurisdiction of the EU judicature – but in this sense, the addition of empirical evidence may be only partially useful to understand EU law and its functioning.

Similarly, looking at Glavina's work, surveys and interviews on why national judges do not engage with EU law are once again useful sources of reflections on how to better ensure compliance with Article 267 TFEU; but they cannot measure the soundness of judges' reasoning when deciding to decline a referral to the Court of Justice under Article 267 TFEU. In essence, one may argue that empirical evidence somehow misses the point of (EU) law studies insofar as it can essentially quantify numerical aspects. True, empirical methods can help test theories and concepts developed in EU law and the relevant scholarship, while providing insights on the application of EU law and connected quantitative aspects. Yet, by itself, empirical data on the numerical aspects of the law does not disclose much about how (EU) law functions and the reasons underpinning its functioning.

Building on the intrinsic limitations of empirical methods, there is also another more controversial aspect of doctrinal empirical methods to consider in this context. Discussing the complementarity between doctrinal and empirical methods, Šadl and Olsen wrote in 2017:[47]

> Quantitative methods set objective benchmarks from which legal scholarship can, when required, criticize the practice of international courts for a *lack of coherence of legal reasoning*, for unjustified breaks with established case law, or *for deviations from precedent which exceed judicial powers and competences*; yet, such methods also provide a necessary means of critically evaluating the research practice of the discipline itself. These are methods through which normative questions of judicial *legitimacy, continuity, and legal certainty can be discussed from the same vantage point*. They also represent one way of rendering future debates concerning the methodology of international law and the method of international courts significantly more productive. Law remains an argumentative practice, which can be analyzed empirically without compromising its normative core.

This passage raises interesting points regarding the synergies between doctrinal and empirical research, especially with reference to international courts. However, it also advances some controversial issues about the nature of law. The excerpt above

[47] Šadl and Palmer Olsen (n 5).

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suggests that law can be measured against objective criteria. While this is of course true to a certain extent, this line of argumentation could hint at a computational dimension of the law. Computational law draws from the idea that the law can be transformed in mathematical relationship and representations, and thus be subject to algorithmic power. The literature is currently exploring whether law is and should be at all computable under the aegis of artificial intelligence.[48] However this view presents several drawbacks from the angle of 'human law'.[49] Suffice to say here that there is academic consensus that computable law would be deprived of features that are crucial to the essence of law – open-endedness, contestability, and the result of human experiences and thinking.[50] This observation in no way seeks to assimilate empirical research with computational law as a programmatic agenda.

Yet, the areas of convergence between empirical method and computational law are evident and should not be underestimated – law would be increasingly analysed and treated as a mathematical science rather than as *law*. The establishment of computational law may have its advantages, but also significant drawbacks from the perspective of the individual, unique legal cases that may be lost under the rule of big data. From a research perspective, empirical methods and a view of the law as computational present significant limitations failing to match the complexity of EU law and its qualitative features, including, for instance, coherence and rationality of legal reasoning.

Let us consider a possible empirical legal research project in the field of EU law: an empirical exploration of the justifications used by the Court of Justice to find whether a measure complies with proportionality. At least two challenges undermine the usefulness of empirical methods and an understanding of the law as computational. First, the measurement of this empirical evidence will entail the main challenge of the inconsistencies of wording used by the Court of Justice in its judgments. The multilingual and transnational group of judges sitting at the Luxembourg Court will inevitably infuse variations of language and concepts drawn from legal traditions in the decisions – in my view, one of the strengths and reasons of richness of the EU legal order. These nuances may run counter to an effective use of quantitative approaches. Second, the political weight given by the Court to specific justifications to find or not compliance is hardly measurable in light of the unique context in which cases surface. It follows that the current degree of subjectivity of the readings of EU law and case law is an aspect that cannot (and perhaps should not) be eliminated from EU law (and EU legal scholarship) under the aegis of computational law and empirical methods.

[48] Mireille Hildebrant, 'The Future of Computational Law in the Context of the Rule of Law' (2024) 2(2) *Journal of Cross-disciplinary Research in Computational Law* 1.

[49] For a discussion, see Giulia Gentile, 'Human Law, Human Lawyers and the Emerging AI Faith' (2024) 3(3) *LSE Public Policy Review* 1.

[50] For an in-depth discussion on these themes, see Mireille Hildebrandt, 'Law as Computation in the Era of Artificial Legal Intelligence: Speaking Law to the Power of Statistics' (2018) 68 *Toronto Law Journal* 12.

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This section has illustrated some of the reasons why EU legal scholars should approach with caution the methodological synergies between empirical and doctrinal methods. In so doing, this section of the chapter has delivered on its promise to advance some critical reflections. The following paragraphs will instead recount the 'untold story' of EU law scholarship – one in which the line between doctrinal and empirical has in reality been blurred since the beginnings of EU law as a scholarly subject. This under-explored account will help us rethink the methodological competition as well as the nature of EU doctrinal scholarship.

3.4 EU LAW SCHOLARS AS EMPIRICAL SCHOLARS

One of the peculiarities of EU law scholarship is that it grew alongside the EU legal order. EU law scholarship was de facto an influence on the development of EU law. Citations of academic works by Advocates General are one piece of evidence of the dialogue between academia and the Court of Justice. Because of the need to comment and analyse, while contributing towards the development of EU law, the observation of the conduct of EU institutions from EU law academics – with the Court of Justice of the EU being the *primus inter pares* – has been historically part of the study of EU law. It should be acknowledged that the way in which courts behave is intrinsically enshrined in relevant judgments and legal reasoning. Hence, by studying the way in which courts, and particularly the EU Court of Justice, reason and argue their decisions, legal scholars are ultimately engaging in (empirical) observations concerning judicial behaviour. Judicial behaviour is typically understood as the study of 'the choices judges make and the consequences of their choices for society'.[51] This includes, among others, analysing whether factors such as ideology, gender, and class influence court rulings, and how external factors constrain the actions of judges.[52] Because of the combined necessity to study and construct EU law, EU law scholarship is prone to empirical observation.

This foundation of EU law scholarship has survived until today. However, the 'original' empirical approach distinguishes itself from the more modern one which has emerged since the 1990s in terms of procedure and data. Namely, the empirical elements of the modern 'empirical EU law research' are clearer methodological approaches and the use of a certain amount of data. By contrast, the 'original' EU legal scholarship did not systematically articulate the methods (i.e., procedure) or the data used in the analysis. One could argue that the difference is in the prominence and space given to methodological and data consideration.

Notwithstanding these differences, the empirical component of EU legal scholarship cannot be denied. This becomes evident when reading one of the very first

[51] Lee Epstein and Nicholas W. Waterbury, 'Judicial Behaviour' in William Thompson (ed.), *Oxford Research Encyclopedia of Politics* (Oxford University Press 2020) 1.

[52] See Cheruvu, Chapter 13 in this volume.

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pieces that appeared in the *Common Market Law Review* in 1963.[53] The piece reported below analyses the seminal judgment in *van Gend en Loos*,[54] which established the principle of direct effect of EU law. The entire paper is imbued with observations about the way in which the Court reasoned and decided the case. For instance:

> In reply to the observations of the Netherlands and Belgian Governments who contested the competence of the Court on a number of grounds, the Court remarked that it had not been requested 'to give a ruling on the applicability of the Treaty according to the principles of Netherlands national law', which is left to the national judge. The request was merely for an interpretation of the 'intention of Article 12 . . . seen within Community law as a whole and from the point of view of its applicability in respect of private parties'. In other words, it is only on this point that the Court is to put its interpretation of Community law before the national judge. It cannot prescribe how the latter should apply the Community law defined by this interpretation, in his own national legal order. This is why the Court was able to find the Belgian argument against its competence without foundation in law.

The analysis of *van Gend en Loos* is clearly geared towards the observation of the behaviour of the Court of Justice as manifested through judicial reasoning. In this passage, the author explores the Court of Justice's approach to judicial interpretation and the politics with national courts. He does so by noticing that the Court of Justice has confined its role to the interpretation of Community law, and thus by excluding national law from its jurisdiction. The author observed that the Court of Justice framed the question as exclusively concerning Community law, and considered the contextual elements of the judicial interactions between courts to assess the correctness of the decision. However, in that judgment, the Court could have declined jurisdiction and indicated that the referred question was not purely about Community law. As a matter of fact, the preliminary ruling request concerned the interaction between national and Community law. The referring court, considering EU law as a form of international law, asked how it had to deal with conflicts between Community law and subsequent measures of national law. The Court could have also deemed the question inadmissible, as it was influenced by the Dutch approach to the application of international law. The choice of the Court of Justice in *van Gend en Loos* has had far-reaching implications and has laid the foundation of the EU legal order as we know it. And later in the same piece:

> This ruling and the late date at which it comes to the knowledge of interested jurists, demonstrates the need for a documentation at Community level of national,

[53] 'Preliminary ruling given at the request of the Tariff Commission (Amsterdam). Article 12 of the E.E.C. Treaty has direct effect and creates rights in favour of those affected by it. Case 26/62. Judgment', (1963) 1 *Common Market Law Review* 88.

[54] Case C-26/62 *Van Gend en Loos* ECLI:EU:C:1963:1.

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> judicial and administrative decisions which are of immediate interest in the application of Community law. The initiative to start this documentation had already been taken within the Community some considerable time ago. The Community itself has a duty in this respect to co-ordinate the decisions taken in the Member-States, and it is hoped that as a matter of urgency an official documentation service will be started without further delay.

This latter quotation demonstrates the awareness of the author concerning the role of institutions other than the Court of Justice of the EU in shaping the EU legal order. It is an invitation to documentation, to ensure that Community law knowledge reaches the general public. With this excerpt, the scholar has embedded considerations on the effectiveness of Community law from an empirical perspective: because of the absence of a mechanism to document the Community's jurisprudence, legal operators in the Member States lagged behind in terms of compliance with the Treaties and relevant jurisprudence. This paragraph strengthens a view of then Community law as law-to-be-put-in-action. Fast-forwarding to 2015, Alan Dashwood wrote:[55]

> There was a moment, in *Marshall (No. 1)*,[4] when the Court of Justice might have made a clear choice between the objectives, opting either to maximise the effectiveness of Directives at the price of significantly eroding their particularity, or to accept that they are capable of having only a very limited measure of direct effect. Instead, the Court has sought to maintain a rather uncomfortable balance between the two objectives (though one that leans towards effectiveness), which is hard to justify in an intellectually coherent way. It is also an unstable balance, because there has been an occasional further lurch in the direction of the effectiveness objective. Thus, just when it seemed that reasonable clarity, if not perfect rationality, may have been achieved by the decision of the Grand Chamber in *Pfeiffer*, the judgment in the *Mangold* case[5] has brought fresh uncertainty … The Court of Justice summarily dismissed that objection, which the United Kingdom had raised in *Marshall (No. 1)*, on the ground that such an outcome could easily be avoided if Member States would only implement Directives properly.[30] That is, with respect, a poor answer, because it assumes that the incorrect implementation of Directives is always a matter of bad faith. In reality, as the Court itself has acknowledged,[31] Directives may sometimes be imperfectly transposed through an honest misunderstanding.

The extracts consider the outcome of the *Marshall (No. 1)*[56] case and its adverse implications. They are yet another example of the attention paid by Dashwood towards the judicial behaviour of the Court of Justice. These passages identify and criticise the underpinnings of the Court of Justice's decision in that case, by submitting that the Court sought to 'punish' Member States incompliant with EU

[55] Alan Dashwood, 'From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity?' (2007) 9 *Cambridge Yearbook of European Legal Studies* 81.

[56] Case C-152/84 *Marshall* v. *Southampton and South West Hampshire Area Health Authority* ECLI:EU:C:1986:84.

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law by introducing a broad notion of state and thereby expanding the instances in which direct effect of directives could be invoked. In so doing, Dashwood has identified the external empirical factors (i.e., non-compliance of Member States with directives) and the 'internal assumptions' of the Court (i.e., intention to 'punish' Member States not having transposed directives) leading to the judgment in *Marshall (No. 1)*. He also criticised the effects of the same decisions due to the uncertainty it engendered. The blend of (one may argue, untested) empirical and legal considerations are evident in this work. Many other authors pursuing similar lines of enquiry would deserve attention for the purposes of this paper. Suffice it to mention the work of scholars such as Tridimas,[57] Arnull,[58] and Spaventa[59] as instances of (empirical) observation of the judicial behaviour of the Court of Justice of the EU.

This untold story sheds light on a less traditional, mainstream way of theorising about EU (doctrinal) legal scholarship. A clear-cut distinction between doctrinal and empirical methods, especially in EU law, seems to be misplaced for several reasons. Beyond the necessity to study the EU legal order while building it, there is also the undeniable component of the lived experiences enshrined in the law by legal professionals, be they judges, lawyers, or academics. Particularly in EU law, the lived experiences of academics, who may have differing degrees of international experiences or background, inform their views on EU law and accordingly their scholarship. This also means that the way in which they observe and understand EU law is influenced by their own perceptions. In other words, claiming that doctrinal EU law scholarship, while also being concerned with conceptual, theoretical, and critical approaches to the EU legal order, is predominantly, if not exclusively, interested in the wording of the Treaties and EU case law is reductive.[60] Rather, based on their sensitivities, EU legal scholars may react more strongly to specific characteristics of the reasoning and behaviour of the EU Court of Justice. In so doing, they imbue their own legal traditions and training in the discussion around EU law.[61] While this scholarship may be perceived as less inclusive because it focuses mostly on the Court of Justice and not on other actors, it in fact constitutes an important testament to the plurality of legal traditions co-existing within the EU.

The 'untold story' of the co-existence of empirical elements with doctrinal approaches in the DNA of EU law scholarship prompts two recommendations for current and future EU legal scholars. First, competition between research methods

[57] Takis Tridimas, 'Black White and Shades of Grey: Horizontality of Directives Revisited' (2002) 21 *Yearbook of European Law* 327.

[58] Anthony Arnull, 'The Use and Abuse of Article 177 EEC' (1989) 52(5) *Modern Law Review* 622.

[59] Eleanor Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 *Maastricht Journal of European and Comparative Law* 35.

[60] This claim has been advanced by several authors, see Gentile, Glavina, and Nowak (n 9) and citations at 231.

[61] See Brito Bastos (n 9).

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in EU law may not be as productive as one may think, risking the distortion of the multifaceted, nuanced nature of EU law (scholarship). Second, and consequently, researchers in EU law may want to embrace modesty regarding methodology labels, without adopting strong positions in or advocacy for one methodological school or another. The boundaries of each methodology or approach to the study of EU law may not be as pure or clear as they may think. All in all, the untold story of the empirical underpinnings of EU law scholarship offers a lesson: methodological modesty in the field of EU law appears a wise way forward that can respect the nature of EU law while also acknowledging the limits of various research questions and methods.

3.5 CONCLUSION

In this chapter, I have sought to advance critical reflections on the relationship between empirical and doctrinal methods in EU law. I have done so by presenting some critical observations on possible deviations of empirical research methods in EU law and by telling the untold story of the origins and nature of EU law scholarship. Empirical methods could foster a view on the law which is 'computational', in other words lacking the nuances of human input. The chapter has further revealed the proto-empirical components of EU legal scholarship since its inception. The ultimate objective of this piece was one of reconciliation and invitation to methodological modesty: because of the features of the law, research methods will present varying limitations and gaps. There is no perfect mix of research methods that could lend itself to the most comprehensive knowledge of EU law. This is precisely because of the nature of the law, and even more so, EU law; shaped by various actors and sources, and open to contestation, full, complete knowledge of EU law may be hard (if not impossible) to achieve.

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