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A Camouflaged Political Question Doctrine in EU Law?

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ABSTRACT: This article examines the emergence of a political question doctrine (PQD) within the European Union legal order. Originating in US constitutional law, the PQD has traditionally operated as a substantive limitation on judicial review, shielding certain inherently political matters from adjudication. While the EU Treaties make no explicit reference to such a doctrine, recent developments in the case law of the European Court of Justice (ECJ) suggest the presence of an embryonic PQD, particularly in the field of the Common Foreign and Security Policy (CFSP). The article maintains that, although still in its formative stage, the PQD is becoming an implicit yet significant tool in the ECJ's evolving jurisprudence. In light of the broader constitutional architecture of the EU, the article argues that judicial abstention in certain domains is not a weakness but rather an inherent feature of a legal system based on the rule of law, such as the EU.

KEYWORDS: political question doctrine – European Court of Justice – Common Foreign and Security Policy – judicial review – rule of law – separation of powers.

1. Introduction

In recent years, questions about the proper boundaries of judicial review have become increasingly pressing across legal systems. Courts are ever more frequently called upon to address matters at the intersection of law and politics, particularly in fields such as foreign relations, security, and lately climate change.[1] In this context, the political question doctrine (PQD) has resurfaced in academic and judicial debates as a conceptual tool to delineate what is justiciable from what must remain within the exclusive remit of political institutions. As will be seen in this article, the doctrine is deeply rooted in the constitutional tradition of the United States, and it is not foreign

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[1] See C Eckes, 'Tackling the Climate Crisis with Counter-majoritarian Instruments: Judges Between Political Paralysis, Science, and International Law' (2021) 6 *European Papers* 1307.

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to EU Member States' systems. However, its possible emergence in the European Union legal order raises important normative and practical questions.

This article examines whether a PQD has emerged in the EU legal order, in light of the Union's constitutional framework as interpreted by the European Court of Justice (ECJ). It argues that such a doctrine has indeed surfaced, albeit in a camouflaged form, and that its emergence is consistent with the logic of a legal system based on the rule of law,[2] such as that of the EU.

The article is structured as follows. Section 2 outlines the notion of the political question beyond the EU legal system and sketches its current status. Section 3 surveys the case law of the ECJ in which the PQD has been explicitly or implicitly discussed, with particular emphasis on the Common Foreign and Security Policy (CFSP), though examples from other areas will also be considered. Section 4 offers broader reflections on the place of the PQD in the Union's constitutional order. Section 5 concludes by drawing together the main findings.

2. What is the PQD, and what is left of it in contemporary constitutional systems

Attempting to pin down a precise definition of the PQD is arguably a futile exercise. While its origins lie clearly in US constitutional law, with the modern formulation typically traced to the landmark ruling of the US Supreme Court in *Baker v Carr*,[3] its contours remain elusive. As one scholar has astutely observed, even in the US, where the doctrine was first articulated, 'entire swaths of lawyers are graduating with only a passing and confusing acquaintance with the PQD'.[4] This article will not dwell excessively on definitional debates. Instead, it adopts a succinct yet effective definition provided by a European scholar: the PQD 'can be understood as placing outside the purview of the […] judiciary certain constitutional questions, whose final and definitive resolution is entrusted to the political branches of government. [It] operates as a substantive limitation on judicial review',[5] and 'its applicability is conditioned upon judicial self-restraint'.[6]

[2] As the Union, back then Community, was declared to be as early as 1986, when the ECJ handed down the landmark *Les Verts* ruling. See Case 294/83 *Les Verts v European Parliament*, EU:C:1986:166, para 23.

[3] See *Baker v Carr*, 369 U.S. 186 (1962), in which Justice Brennan, at p. 217, laid down the famous six-prongs catalogue, defining (or attempting to define) the PQD as follows: 'Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question'.

[4] J Pettinato, 'Executing the Political Question Doctrine' (2006) 33 *Northern Kentucky Law Review* 63.

[5] JA Gutierrez Fons, 'The Contribution of the United States Supreme Court and the European Court of Justice in the Vertical and Horizontal Allocation of Power' (Queen Mary University of London, 2009), 80, at qmro.qmul.ac.uk.

[6] Ibid

Concise as it is, this definition captures the doctrine's essential features: namely, a) some issues are deemed not amenable to judicial review and reserved for the executive and/or legislative branches; b) the doctrine limits judicial engagements with the merits of such issues; and c) its application rests on judicial self-restraint. On the third element, however, one clarification is needed from the outset. As this article will argue, the PQD is not merely a self-imposed limitation by the judiciary. Rather, it is rooted in the structural features of any constitutional order based on the rule of law. Courts are entrusted with the task of determining whether, in the case before them, the legal system itself imposes restraints on judicial review. The ultimate source of those restraints is not judge-made doctrine but the constitution (and, in the EU context, the Treaties).

In the US constitutional tradition, the emergence of the PQD is often seen as a necessary corollary of the landmark *Marbury v Madison* decision,[7] in which the US Supreme Court laid the foundations of judicial constitutional review. As Chief Justice Marshall famously stated, '[i]t is emphatically the province and duty of the judicial department to say what the law is […] If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply'.[8] From that starting point, US judges 'have tried to define a category of 'political question' outside the scope of that power'.[9] Over the years, the Supreme Court, as well as lower federal courts, have treated a range of disputes as falling within the PQD, most of them concerning foreign affairs and, in particular, matters of defence. For instance, lower courts have held that the constitutionality of airstrikes over Cambodia without congressional authorisation was non-justiciable under the PQD;[10] similarly, the US Supreme Court considered a political question President Carter's unilateral decision to terminate the 1954 Mutual Defence Treaty with Taiwan with a view to normalising diplomatic relations with China.[11] Quantitatively, it has been noted that the US Supreme Court itself has invoked the PQD in only a handful of

[7] See *Marbury v Madison*, 5 U.S. (1 Cranch) 137 (1803).

[8] Ibid 177–178.

[9] JP Mulhern, 'In Defense of the Political Question Doctrine' (1988) 137 *University of Pennsylvania Law Review* 99.

[10] See *Holtzman v Schlesinger*, 484 F.2d 1307, 1309–1312 (2nd Cir. 1973).

[11] See *Goldwater v Carter*, 444 U.S. 996 (1979). It is worth noting, as has been rightly pointed out, that US courts tend to show considerable deference to the executive whenever matters of international law are at stake. This applies to issues such as the recognition of States, interpretation of international treaties, the status of customary international law, sovereign immunity, and so forth. For an overview, see CA Bradley, 'The Political Question Doctrine and International Law' (2023) 91 *The George Washington Law Review* 1555, 1570 ff. By contrast, the ECJ is much less hesitant in dealing with international law issues, as demonstrated by the *Front Polisario* saga. See the thoughtful considerations made by E Cannizzaro, 'In Defence of *Front Polisario*: The ECJ as a Global *Jus Cogens* Maker' (2018) 55 *Common Market Law Review* 1, 7 ff.

cases,[12] whereas it has featured far more prominently in the practice of lower courts.[13]

While no serious voices deny the existence of the PQD in US constitutionalism, the most prominent scepticism has been articulated by Louis Henkin on grounds of legitimacy. He famously observed that in a system founded on the rule of law, where judicial review is firmly established, "[a] doctrine that finds some issues exempt from judicial review cries for strict and skeptical scrutiny'.[14] The central difficulty, of course, lies in distinguishing between a genuinely political question reserved to the political branches of government and a non-political question that remains amenable to judicial review. Over time, scholars have proposed different approaches to delineating its scope.[15] Consistent with the earlier commitment not to dwell at length on definitional debates, this article will not attempt to provide a conclusive delimitation of the PQD in US constitutional law. Rather, it will seek to trace the general trends emerging from the work of American scholars who have addressed the doctrine.

To begin with, cases falling under the first criterion of the *Baker v. Carr* formula, namely, 'where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department', are regarded as the least problematic. In other words, if the Constitution clearly entrusts a matter to a political branch, there is little reason for the judiciary not to defer. Instances of such questions are admittedly rare, but a classic example is Article IV of the US Constitution, which commits Congress to guaranteeing a republican form of government in every State, a provision traditionally deemed non-justiciable.[16]

Apart from these relatively clear-cut cases, there is considerable disagreement among scholars on how to distinguish conclusively between political and non-political questions. With a degree of abstraction, three main trends can be identified. The first is represented by scholars such as Mulhern and Choper, who differentiate between cases in which courts must protect individual rights against government oppression and those in which they do not perform this function. The latter category typically involves questions of vertical separation of powers (conflicts between the federal government and the states) or horizontal separation of powers (between the

[12] The scarcity of Supreme Court precedents may be explained by the Court's power of certiorari, which allows it to decide, at its discretion, whether to hear a case from the lower courts. A writ of certiorari, granted when at least four of the nine justices agree, is typically issued only for cases of broad constitutional or legal significance. As Mulhern (n 9) 106, observes, the 'Supreme Court has avoided, with its power to deny certiorari, resolving divisive issues that lower courts avoided by applying the political question doctrine'.

[13] CA Bradley and EA Posner, 'The Real Political Question Doctrine' (2023) 75 *Stanford Law Review* 1034, who have counted hundreds of lower court cases in which the PQD has been applied.

[14] L Henkin, 'Is There a Political Question Doctrine?' (1976) 85 *Yale Law Journal* 600.

[15] A comprehensive account of the American scholarly debate is provided by Bradley and Posner (n 12) 1040 ff.

[16] For a thoughtful analogy between this provision and Article 7 TEU, which is also an eminently political instrument, see Gutierrez Fons (n 4) 101 ff.

executive and the legislative branches). According to this view, such disputes fall outside the scope of judicial review.[17] A paradigmatic example, outside the sphere of foreign policy, is the US Supreme Court's refusal to exercise 'supervision over training and command of the Ohio National Guard, explaining that the executive and the legislature were better equipped for this task'.[18] This reasoning finds an interesting parallel in recent case law of the ECJ, which declined to assess the adequacy of equipment for EU missions abroad – a point to which we shall return below. Crucially, the obligation to safeguard fundamental rights means that issues generally regarded as political questions may exceptionally become justiciable if individual rights are at stake. A clear example concerns the use of war powers. While ordinarily reserved to the executive and the legislative branches, the equation changes where the exercise of such powers directly endangers individual rights – for instance, if soldiers were ordered to conduct hostilities in a manner amounting to war crimes under international law.[19] In such circumstances, judicial scrutiny is necessary to shield the individuals from the illegitimate exercise of war powers.

A second perspective is advanced by proponents of so-called populist constitutionalism. This approach draws a distinction between the 'thick' and the 'thin' constitution. Judicial review over the thick constitution is accepted, but the thin constitution is regarded as the preserve of the people acting through political processes rather than the courts. Central to this reasoning is the delimitation of what constitutes the thin constitution. To borrow from Tushnet, 'we can think of the thin Constitution as its fundamental guarantees of equality, freedom of expression, and liberty'.[20] From this vantage point, the PQD reflects the idea that 'some constitutional decisions [are left] to Congress and the president with no possibility of judicial review'.[21] This second trend is in many ways the opposite of the first. Whereas the first view considers individual rights a compelling reason for courts to exercise judicial oversight, the second treats questions relating to fundamental civil liberties, such as racial justice or reproductive rights, as matters to be resolved through political processes, not judicial adjudication.

A third perspective has gained traction in more recent times. Building on the observation that the judiciary has become markedly more influential in contemporary constitutional systems, some authors describe this expansion of the 'province of the judicial department' as the judicialisation of politics.[22] This development has progressively eroded the domain of issues traditionally reserved for the political

[17] See Mulhern (n 9) 165–170.

[18] JH Choper, 'The Political Question Doctrine: Suggested Criteria' (2005) 54 *Duke Law Journal* 1468.

[19] See Choper (n 18) 1497–1498.

[20] See M Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 1999) 11.

[21] Ibid 16.

[22] See CN Tate and T Vallinder, *The Global Expansion of Judicial Power* (New York University Press 1995); but also M Shapiro and A Stone-Sweet, *On Law, Politics, and Judicialisation* (Oxford University Press 2002).

branches, leading to the gradual demise of the PQD.[23] From this standpoint, while the doctrine may once have served a valid purpose, it has little relevance in the current 'transition to what I have termed "juristocracy"'.[24] This view reflects the increased polarisation of politics, which, it is argued, requires '[c]ourts [to] be a "counter-majoritarian force" and stop constitutional excesses within the other branches'.[25] According to this view, virtually no issue falls outside the scope of judicial scrutiny.

In conclusion to this assessment of the US constitutional system, where the PQD originated, it appears reasonable to affirm that the doctrine is unanimously acknowledged, yet disagreement persists as to its precise scope, and its current status in constitutional law remains uncertain - particularly how it shapes the contours of judicial scrutiny in light of evolving constitutional dynamics. Before turning to the ECJ's case law in section 3, it is worth noting that analogous doctrines have developed in several civil law jurisdictions,[26] such as the *acte de government* in France or the *atto politico* in Italy. The issue has recently re-emerged in the context of strategic climate litigation, where courts are increasingly called upon to determine whether, and to what extent, national governments' climate measures (or lack thereof) are open to judicial review.[27]

3. The subtle emergence of a PQD in the case law of the ECJ

The survey of the relevant ECJ's case law should begin with a basic clarification. As Luigi Lonardo noted in 2017, 'the judges of the Court of Justice […] have never endorsed, nor indeed even discussed, this doctrine'.[28] Unlike developments in the US and other national constitutional systems, the PQD *stricto sensu* has not formally entered the EU legal order. That said, there are numerous indications of its subtle emergence.

Let us begin with a hint that is not particularly subtle, as it is explicitly codified in EU primary law. As is well-known, the jurisdiction of the Court of Justice in CFSP matters is generally excluded, subject only to a number of claw-backs expressly provided for in the Treaties,[29] and others that the ECJ has inferred as implicit. This general limitation of the Court's powers in foreign affairs has often been seen as an

[23] See R Hirschl, 'The Judicialization of Politics' in GA Caldeira, RD Kelemen and KE Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 119, 123.

[24] Ibid 138.

[25] C Smith, 'Suspension of the Rules: Why Federal Courts Should not Fear Adjudicating Cases Involving the Legislative Branch' (2024) 9 *University of Pennsylvania Journal of Law and Public Affairs* 515.

[26] See D Amoroso, 'Judicial Abdication in Foreign Affairs and the Effectiveness of International Law' (2015) 14 Chinese Journal of International Law 99, 102.

[27] See L Pantaleo, 'The Climate Crisis and the Separation of Powers in the EU. What Role for the Court of Justice?' (2024) 26 *Diritto pubblico comparato ed europeo* 653, 665 ff.

[28] See L Lonardo, 'The Political Question Doctrine as Applied to Common Foreign and Security Policy' (2017) 22 *European Foreign Affairs Review* 571, 572.

[29] Such as those mentioned in Article 24 TEU.

indirect and implicit codification of the PQD by the Treaty framers,[30] consistent with the constitutional traditions of the Member States, 'with regard to the absence of substantive judicial review of foreign policy decisions'.[31] We shall return to this question in the analysis of the relevant ECJ's decisions below.

The first indication that certain political questions in the EU legal order should be reserved for the political institutions can be traced back to *Opinion 1/60*. In that case, the ECJ was asked to assess whether a proposed amendment of the European Coal and Steel Community (ECSC) Treaty was compatible with the conditions laid down in the ECSC Treaty itself. When confronted with the argument that such an amendment might result in higher taxes imposed by the High Authority, the Court observed that 'the appraisal of any disadvantages of a possible, but not inevitable, increase in the rate of levy is a political and not a legal matter'.[32] The Court stopped short of explicitly endorsing the PQD. Yet, its reasoning suggests an awareness that certain issues simply fall outside the scope of judicial determination.

The next relevant ruling is *Commission v Greece (FYROM)*, one of the rare cases in which Article 347 TFEU was invoked by a Member State. Greece had imposed an embargo on products originating in, coming from, or destined for the (then) former Yugoslav Republic of Macedonia. The Commission challenged the measure, arguing that it breached EU law on several grounds. In his Opinion, AG Jacobs formulated what might be described as a 'lite' version of the PQD.[33] Addressing Greece's claim that the embargo was necessary to prevent serious civil disturbances of such magnitude that the maintenance of law and order would become impossible, the Advocate General dismissed the argument as 'vague and unsubstantiated. No details have been provided about specific disturbances of public order. Greece has not in fact come anywhere near establishing the massive breakdown of public order needed to justify recourse to Article [347] on grounds of serious internal disturbances affecting the maintenance of law and order. I conclude that Greece was not entitled to invoke Article [347] on such grounds'.[34] However, AG Jacobs adopted a more cautious stance when considering the second ground for invoking Article 347 TFEU, namely war or serious international tension constituting a threat of war. He acknowledged that this issue 'is far more complex and raises the fundamental issue of the

[30] See P Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: in Search of a New Balance between Delimitation and Consistency' (2010) 47 *Common Market Law Review* 987, 999.

[31] See G De Baere, 'European Integration and the Rule of Law in Foreign Policy' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 210, 216.

[32] Opinion 1/60 *Procedure for the amendment of the Treaty pursuant to the third and fourth paragraphs of Art. 95 of the ECSC Treaty*, EU:C:1960:8, p. 51

[33] See G Butler, 'In Search of the Political Question Doctrine in EU Law' (2018) 45 *Legal Issues of Economic Integration* 329, 338–339; of the same view is De Baere (n 31) 217.

[34] Opinion of AG Jacobs in Case C-120/94 *Commission v. Greece (FYROM)*, EU:C:1995:109, para 49.

scope of the Court's power to exercise judicial review in such situations'.[35] While stopping short of endorsing Greece's claim that the ECJ should refrain from scrutiny altogether, he accepted that '[t]he scope and intensity of the review that can be exercised by the Court is […] severely limited on account of the nature of the issues raised. There is a paucity of judicially applicable criteria that would permit this Court, or any other court, to determine whether serious international tension exists and whether such tension constitutes a threat of war'.[36]

The dispute was discontinued by the Commission, so the Court did not have the opportunity to rule on the matter. The Advocate General, however, came very close to explicitly endorsing a PQD. In particular, his reasoning indirectly suggested that Article 347 TFEU is, at least in part, insulated from judicial review and therefore encompasses political questions. Yet, as has been convincingly argued, the provision cannot lie entirely beyond the Court's purview; otherwise, Article 348 TFEU, establishing an expedited procedure for reviewing measures adopted under Article 347 TFEU, would serve little purpose.[37] The Court itself has never provided a detailed interpretation of Article 347 TFEU, limiting itself to general observations on its exceptional nature.[38] Still, it seems reasonable to conclude that certain aspects of the provision are subject to judicial review – for example, whether serious internal disturbances affecting law and order exist - while others, such as the assessment of whether a threat of war arises, are reserved for political institutions. This understanding aligns with the case law of the US Supreme Court, which treats questions such as the existence of war as falling within the prerogatives of the President,[39] and it finds indirect support in AG Jacob's Opinion.[40]

The next case in which the PQD was raised is *Kadi I*. The Council, the Commission and the United Kingdom argued that measures implementing Security Council resolutions necessary for the maintenance of international peace and security were, in principle, excluded from judicial review, with the Commission explicitly invoking the PQD.[41] AG Maduro firmly rejected this view, stating that '[t]he implication that the present case concerns a "political question", in respect of which even the most humble degree of judicial interference would be inappropriate, is, in my view, untenable',[42] and insisting that the Court should review compliance with fundamental

[35] Ibid para 50.

[36] Ibid

[37] See Gutierrez Fons (n 5) 123.

[38] See Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206, para 26.

[39] See *Martin v Mott*, 25 (12 Wheat.) 19, 30 (1827).

[40] But see Lonardo (n 28) 580, who sees AG Jacobs' Opinion as a taking 'a stance against the PQD'.

[41] See Opinion of AG Poiares Maduro in Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, EU:C:2008:11, para 33.

[42] Ibid para 34.

rights. As is well known, the ECJ did not refer to the PQD at all, but nonetheless held that the 'Community judicature must, in accordance with the powers conferred on it by the EC Treaty, *ensure the review*, *in principle the full review*, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law'.[43]

Kadi I can scarcely be read as a general rejection of the PQD. Rather, it is a ruling in which the doctrine was set aside in light of the specific circumstances of the case. In this respect, it is worth noting a parallel development in the US legal order, where the existence of the PQD itself is not in doubt. As has been observed, the US Supreme Court 'did not apply the political question in any of its "war on terror" decisions concerning the detention and trial of alleged combatants and suspected terrorists, despite the national security context of the cases',[44] choosing instead to review the compatibility of the measures adopted by the political branches with fundamental individual rights.

One might therefore be tempted to conclude that, for the ECJ, the protection of fundamental rights is the decisive factor in distinguishing between political and non-political questions. Later case law, however, points in a different direction. In its most recent judgment to reignite the debate on the PQD in EU law, namely *KS and KD*, the Court of Justice explicitly rejected this line of reasoning. The case concerned actions brought by two Kosovar individuals, KS and KD, who claimed to have suffered harm during criminal investigations conducted by the European Union Rule of Law Mission in Kosovo (EULEX Kosovo), a Common Security and Defence Policy (CSDP) mission. They alleged that EULEX and its officials had committed serious failings in handling their cases, resulting in violations of their rights, including the rights to life, to a fair trial, and to an effective remedy.[45] The General Court dismissed the actions for lack of jurisdiction, holding that CFSP matters generally fall outside the Court's remit under Articles 24 TEU and 275 TFEU.[46]

AG Ćapeta's Opinion squarely endorsed the view that judicial scrutiny of CFSP measures must be ensured in order to safeguard fundamental rights. She acknowledged the existence a PQD in EU law, observing that '[t]he limitation of jurisdiction of the EU Courts could […] be understood as a sort of codified 'political question doctrine'.[47] She further explained that certain policy choices are, by their very nature, outside the scope of judicial review, and stressed that 'this is true for any area of EU

[43] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, EU:C:2008:461, para 326 (emphasis added).

[44] Bradley and Posner (n 13) 1040.

[45] For a summary of the background, see Joined Cases C-29/22 P and C-44/22 P *KS and KD v Council and Others*, EU:C:2024:725, paras 13 ff.

[46] Ibid paras 27 ff.

[47] See Opinion of AG Ćapeta in Joined Cases C-29/22 P and C-44/22 P *KS and KD v Council and Others*, EU:C:2023:901, para 113.

law, not just for the CFSP'.[48] At the same time, however, she argued that 'Article 275 TFEU may be construed as ensuring that there is no limitation on judicial review of *all those CFSP measures which restrict the rights of individuals*'.[49] This interpretation, which she conceded was simplistic but plausible,[50] was based on a combined reading of Article 24 TEU and 275 TFEU. While the latter explicitly refers only to annulment actions against restrictive measures, the former more generally mentions 'certain decisions'. AG Ćapeta notably omitted to quote the full sentence, which reads 'certain decisions as provided for by the second paragraph of Article 275', thereby expressly limiting the scope to restrictive measures. Be that as it may, she concluded that the limitation on the ECJ's jurisdiction 'cannot go so far as to exclude the review of conformity of CFSP measures with fundamental rights'.[51]

We will not dwell further on AG Ćapeta's reasoning regarding the delimitation of the ECJ's jurisdiction in CFSP matters.[52] It is sufficient to note that her position closely resembles the first trend identified above in American scholarship, which similarly emphasises the need to safeguard individual rights. It also echoes the view advanced by Lonardo, whose proposed test for identifying the PQD in EU law was specifically designed not to 'affect human rights. Any time, and only when, the question genuinely revolves around rights, the Court has jurisdiction'.[53] Such a delimitation would apply horizontally across all cases involving alleged infringements of fundamental individual rights.

However, that was not the position taken by the Court of Justice in *KS and KD*. The ECJ made it clear that 'the claim that the acts or omissions which are the subject of an action brought by an individual infringe that individual's fundamental rights *is not in itself sufficient* for the Court of Justice of the European Union to declare that it has jurisdiction to hear and determine that action'.[54] The Court held that the wording of Article 24 TEU and 275 TFEU constitutes an insurmountable barrier: to rule otherwise would deprive those provisions 'of their effectiveness in part and the principles of conferral and of institutional balance [would be] infringed'.[55] The Court's reasoning in *KS and KD* will be discussed in greater detail below. For now, it suffices to note that, in

[48] Ibid para 115.

[49] Ibid para 132 (emphasis added).

[50] Ibid

[51] Ibid para 121.

[52] For a thoughtful yet quite critical assessment see C Contartese, 'Conclusioni dell'AG Ćapeta nelle cause *KS/KD* (C-29/22 P e C-44/22 P) e *Neves* (C-351/22) del 23 novembre 2023, ovvero come la CGUE dovrebbe assicurarsi che "qualsiasi treno che possa arrivare a Strasburgo deve prima fermarsi a Lussemburgo"?' (BlogDUE, 1 February 2024), at www.aisdue.eu.

[53] See Lonardo (n 28) 581. It is possible that this author has influenced AG Ćapeta's reasoning, given that he is referenced in the footnotes to the Opinion (but in relation to a different question).

[54] Joined Cases C-29/22 P and C-44/22 P *KS and KD v Council and Others*, EU:C:2024:725, para 73.

[55] Ibid

the ECJ's view, there is no overarching fundamental rights safeguard that would automatically render justiciable all disputes concerning their alleged breach.[56]

A similar issue arose in *Opinion 2/13*. Only a few years after suggesting in *Kadi I* that anti-terrorism sanctions might fall outside the Court's jurisdiction on the basis of the PQD, the Commission reversed its position, advancing an expansive interpretation of the notion of 'restrictive measure'. It argued that all '[a]cts that have binding legal effects are, in so far as they are capable of violating fundamental rights, "restrictive measures" within the meaning of the second paragraph of Article 275 TFEU and could, therefore, be the subject of an action for annulment before the EU judicature'.[57] A comparable argument was raised again in *KS and KD* by the Commission, this time with the support of all intervening MS except France.[58] We know, however, how the Court ruled in that case. In *Opinion 2/13*, the ECJ did not endorse the Commission's expansive reading. Instead, it reaffirmed that '*as EU law now stands*, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice'.[59] The reference to EU law 'as it now stands', which is absent in *KS and KD*, echoes an earlier pre-Lisbon statement by the Court. In *Segi,* the ECJ noted that while 'a system of legal remedies, in particular a body of rules governing non-contractual liability, other than that established by the treaties can indeed be envisaged, it is for the Member States, should the case arise, to reform the system currently in force in accordance with Article 48 EU'.[60] As is well known, in *Bank Refah,*[61] the sequel to *Segi*, the ECJ eventually concluded that the innovations introduced by the Lisbon Treaty sufficed to bring actions for damages concerning CFSP measures within its jurisdiction.[62]

What occurred with regard to actions for damages, together with the Court's reference to EU law 'as it stands' in *Opinion 2/13*, may be read as suggesting that the

[56] See See L Lonardo, 'How the Court Tries to Deliver Justice in Common Foreign and Security Policy, Where the Need for Judicial Protection Clashes with the Principles of Conferral and Institutional Balance. Joined Cases C-29/22 P and C-44/22 P *KS and KD*' (2024) 9 *European Papers* 830, 840, who noted 'I read the Court as saying here that the AG went a step too far in her Opinion'.

[57] Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* EU:C:2014:2454, para 99.

[58] See Contartese (n 52) 8.

[59] Opinion 2/13 (n 57) para 252 (emphasis added).

[60] Case C-355/04 P *Segi, Araitz Zubimendi Izaga and Aritza Galarraga v Council of the European Union*, EU:C:2007:116, para 50.

[61] Case C-134/19 P *Bank Refah Kargaran v Council*, EU:C:2020:793.

[62] The Court has used a number of grounds in order to assert its juisdiction in the case, with a special importance given to the 'bridge' between the TEU and the TFEU established by Art. 215 TFEU. See E Bartoloni, '"Restrictive measures" Under Art. 215 TFEU: Towards a Unitary Legal Regime? Brief Reflections on the *Bank Refah* Judgment' (2020) 5 *European Papers* 1359, 1364 ff. Further on Art. 215 TFEU in the context of sanctions, see E Cannizzaro, 'The EU Antiterrorist Sanctions' in P Eeckhout and M Lopez-Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart Publishing 2017) 531, 537 ff. But see the critical assessment of the ECJ's approach made by T Verellen, 'In the Name of the Rule of Law? CJEU Further Extends Jurisdiction in CFSP (*Bank Refah Kargaran*)' (2021) 6 *European Papers* 17, 21 ff.

ECJ refrains from exercising full judicial review over all aspects of EU law, particularly in the CFSP, only because the Treaties impose explicit limitations. Put differently, the Court could be understood as implying that, absent the jurisdictional carve-outs for the CFSP, which can in principle be removed through a Reform Treaty, it would apply the same full review advanced in *Kadi I*, leaving no space for a PQD in the CFSP. In my view, this interpretation is unwarranted. Were the current express limitations on CFSP jurisdiction to be lifted, the Court would undoubtedly expand its review beyond the existing restrictions. It would, for instance, in my opinion, review the compliance of CFSP acts with fundamental rights, since in the absence of explicit carve-outs, disputes concerning individual rights granted by a valid legal source would fall squarely within the scope of judicial review. Yet this does not mean that any matter brought before it would automatically be deemed justiciable. As the case law demonstrates, the position is more nuanced.

To grasp this fully, we must return to *KS and KD*. As noted above, the ECJ rejected the idea that fundamental rights operate as a general claw-back to its jurisdiction in the CFSP. Yet later in the judgment, the Court came strikingly close to articulating a PQD proper. It held that its 'jurisdiction […] may be based on the fact that the acts and omissions at issue are not *directly related to the political or strategic choices* made by the institutions, bodies, offices and agencies of the Union in the context of the CFSP, and in particular the CSDP'.[63] Put differently, by way of *argumentum a contrario*, the court suggested that CFSP acts (perhaps all CFSP acts) that are directly linked to political or strategic choices made by the competent political institution (or by bodies established by them) lie beyond judicial review. In other words, qualify as political questions reserved for political branches.[64] The ECJ did not, however, provide general criteria for distinguishing political or strategic questions reserved for the political branches. Instead, it appeared to favour a case-by-case approach.[65]

Unsatisfactory as it may be,[66] this approach bears a striking resemblance to the case law of the US Supreme Court. The ECJ, for instance, treated the alleged insufficiency of resources made available to the EU mission in Kosovo as an issue directly tied to political or strategic choices. Although the Court did not elaborate further, it is noteworthy that the US Supreme Court reached the very same conclusion when confronted with a comparable question concerning the adequacy of resources allocated to the Ohio National Guard. In that case, the Supreme Court opined that

[63] *KS and KD* (n 54), para 116.

[64] See T Verellen, 'The CJEU's Jurisdiction in the KS and KD Case' (Verfassungsblog, 24 September 2024), at verfassungsblog.de, who notes that 'the Court did embrace the AG's suggestion of an EU political question doctrine, concluding that "political or strategic" decisions made within the framework of the CFSP fall outside the CJEU's jurisdiction'.

[65] KS and KD (n 54) para 121.

[66] See the criticism formulated by Verellen (n 64).

> 'It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible - as the Judicial Branch is not - to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system'.[67]

Although the ECJ did not reach anywhere near the level of elaboration developed by its American counterpart on this issue, it is reasonable to assume that similar considerations underpin the statement made in *KS and KD*.

However, the Court indirectly clarified what does not qualify as a political or strategic question beyond judicial scrutiny. It held that: a) 'the decisions taken by Eulex Kosovo as to the choice of personnel employed by that mission are not directly linked to the political or strategic choices made by it in the context of the CFSP' as they concern the day-to-day management of the mission;[68] b) the decision concerning the 'the absence of provisions for legal aid in proceedings before the review panel'[69] is not directly linked to the political or strategic choices given its procedural nature; c) 'the decision whether or not to make the acts and omissions of that mission subject to a review mechanism'[70] is not directly linked to the political or strategic choices, as they relate to the mission's administrative management; d) 'the absence of both […] remedial action and a legally sound review'[71] does not relate to political or strategic choices;[72] e) by contrast, 'the decision to remove the executive mandate of a CFSP mission, and in particular a CSDP mission'[73] is instead a political or strategic choice not amenable to judicial review (although the Court gave no reasons for this conclusion).

We can attempt a tentative systematisation of what falls within the PQD in light of *KS and KD*. Matters such as the resources allocated to an EU mission abroad appear to qualify as political questions reserved for political institutions. By contrast, procedural, administrative and managerial aspects of such missions remain fully reviewable. This, however, is only a rough sketch. As has been noted, it will inevitably

[67] *Gilligan v Morgan*, 413 U.S. 1 (1973) 10.
[68] KS and KD (n 54) para 128.
[69] Ibid para 130.
[70] Ibid para 131.
[71] Ibid para 133.
[72] No clear reason was given for this statement, but later in the judgment the Court qualified it as a 'misuse or abuse of executive or public power'. See ibid para 137.
[73] Ibid para 136.

be 'difficult for the CJEU to distinguish "political or strategic" choices from other measures'.[74] Lonardo's suggestion to 'start by looking at the wording of the Treaties'[75] provides guidance: when decisions are expressly described as strategic, as in Art. 26 or 38 TEU, it is plausible to assume that they will fall outside the Court's remit. Yet a purely textual interpretation will not suffice. More case law will be required, and it seems likely that the ECJ deliberately left many questions unanswered in order to revisit the issue over time, gradually shaping a PQD through its much-celebrated stone-by-stone approach.

Having concluded the survey of the relevant case law, we can now turn to the next section, which offers some broader and more general reflections on the PQD in EU law.

4. A PQD in EU law

The analysis above reveals the following. The PQD has never been explicitly endorsed by the Court of Justice. Nonetheless, it has surfaced in varying degrees in the Opinions of AGs, has been advanced by the political institutions and several Member States, and has attracted some attention in the literature. In *KS and KD*, the ECJ came close to acknowledging it, though without naming it as such.[76] The substance of that ruling, however, points to the existence of an (at least) embryonic form of the PQD in EU law.[77] Many questions remain unresolved and will likely be clarified by the Court in future cases. It is therefore appropriate to make some general reflections.

To begin with, one might be tempted to argue that, if a PQD exists in EU law at all, it applies to the CFSP, and perhaps to the CFSP alone. As noted in Section 3, the Treaties themselves expressly acknowledge the (enhanced) role of political discretion in this domain. Furthermore, no clear counterpart to *KS and KD* can be found in other areas of EU law. It is also worth noting that the Commission, arguably the most proactive advocate of the PQD in the EU context, has defined it as excluding the ECJ's jurisdiction 'only with regard to CFSP acts which are an expression of *sovereign foreign policy*'.[78] As already discussed in section 2, it is undeniable that

[74] See Verellen (n 64).

[75] See Lonardo (n 56) 841.

[76] This is also the opinion of S Vandenbosch, 'What the European Court of Human Rights and the Court of Justice of the European Union Tell Us About the Changing Contours of Judicial Review in Europe' (Verfassungsblog, 30 October 2024), at verfassungsblog.de, who notes that ' the ECJ does not recognize explicitly the existence of a political question doctrine in the EU's legal order […] Nevertheless, it seems to refer to the political question doctrine in all but name'.

[77] This is also the expression used in 2012 by E Fahey, 'Reviewing High Politics. A Methodology for the Justiciability of EU-US Legal Relations' (Amsterdam Centre for European Law and Governance Working Paper Series 1-2012), at papers.ssrn.com 4, where she stated that 'a political question doctrine, is largely embryonic in EU Law'.

[78] Opinion of AG Wahl in Case C-455/14 P, *H v Council of the European Union and Others*, EU:C:2016:212, para 33 (emphasis added).

certain issues of foreign affairs, particularly defence, may qualify as non-justiciable political questions *par excellence*.[79] That said, it is one thing to acknowledge that foreign affairs matters are more likely to give rise to non-justiciable political questions than other areas. It is quite another to claim that questions unrelated to foreign relations can never fall within the PQD. *KS and KD* is, after all, a typical CFSP judgment, where debates on the ECJ's jurisdiction are almost routine. By contrast, such jurisdictional issues are less likely to arise in non-CFSP contexts. It is nevertheless submitted that even outside foreign affairs, certain issues may involve discretionary political choices that are not amenable to judicial review, even if such cases are likely to remain quantitatively rare.

This is confirmed not only by the American case law discussed above, for instance, the ruling on the republican form of government, but also by more recent developments. The PQD has been expressly invoked in the context of strategic climate litigation, both by US courts[80] and by the *Tribunale di Roma*.[81] In both instances, the courts declined jurisdiction, holding that climate-related measures fell within the sphere of political discretion and were therefore not amenable to judicial review. This is not the place to assess whether the judicial self-restraint shown in those cases was justified (it most likely was not).[82] What matters is that this case law illustrates how certain policy choices, even when entirely domestic in scope, may involve non-reviewable political decisions that fall beyond the reach of judicial scrutiny. Within national systems, one can immediately point to familiar examples: a central bank's decision to raise interest rates; the setting of revenue tax levels; or choices about reallocating expenditure from education to defence, or vice versa. The key question is whether such reasoning can also be transposed to the EU legal order.

It is submitted that it is possible to find indirect confirmation of this in the case law of the ECJ. Not only did the Court explicitly acknowledge the existence of political questions in *Opinion 1/60*. Another line of decisions clearly points in the same direction, namely, those concerning the exercise of discretionary powers by the political institutions. As has been rightly observed, the ECJ has traditionally 'been reluctant to interfere with legislative and administrative acts issued by other institu-

[79] After all, as noted by Choper (n 18) 1468, even Chief Justice Marshall was convinced that some issues are exclusively for the political organs to decide. He held that the 'power to extradite under a treaty is properly committed to the executive department because only that branch can have a complete view of how this judgment will affect the nation's foreign relations'.

[80] United States Court of Appeal for the Ninth Circuit, *Juliana et al. v. United States of America et al.*, 17 January 2020, available at static1.squarespace.com 47 F.3d 1159 (9th Cir. 2020), 1171.

[81] See Tribunale di Roma, Sez. 2 civile, 26 February 2024, no. 35542, available at www.ambientediritto.it.

[82] For a critical appraisal of the Italian case, see R Mazza, 'Alcune riflessioni sul contenzioso climatico a partire dal *Giudizio Universale* e dal caso *KlimaSeniorinnen*. Quale dimensione assume il principio di separazione dei poteri?' (2024) 8 *Diritti comparati* 237, 251 ff.

tions when these involved the weighing of different interests and Community policies. Underlying this reluctance is the view that courts are primarily concerned with legal rather than political questions'.[83] In such cases, the Court 'confines itself to examining whether there are manifest errors or a misuse of power and whether the acting authority clearly exceeded the bounds of its discretion'.[84] To preserve broad political discretion for the EU institutions, the ECJ typically relies on proportionality, limiting its review to whether the measures adopted are manifestly inappropriate,[85] or, as the Court put it in *Gauweiler* and subsequent rulings, whether the institution has made a manifest error of assessment.[86] It is true that in this line of case law, the ECJ does not practise full judicial abstention. Rather, it modulates the intensity of the judicial scrutiny: the broader the discretion, the lighter the review. Yet this case law is inextricably linked to the PQD. The underlying rationale is the need to safeguard the institutional balance of power enshrined in the Treaties. AG Tizzano made the point explicitly, arguing that when sensitive political choices are at stake, especially those requiring complex economic assessments, '[t]he rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system, do not […] allow the judicature to go further, and particularly […] to enter into the merits of the Commission's complex economic assessments or to substitute its own point of view for that of the institution'.[87] From this perspective, the institutional balance ensures that powers are exercised by the body to which the Treaties have conferred them, as exemplified by the classic *Meroni* doctrine.[88] When the Court defers to political discretion, it is effectively applying *Meroni* to itself: the balance of powers would be breached 'if the courts usurped discretionary powers reserved to other institutions'.[89] Where broad political discretion is involved, judicial review should therefore be either narrowly limited on grounds of institutional balance or excluded altogether under the PQD. It follows that even within the EU legal order, there are acts of internal governance that escape judicial review. A paradigmatic example is the decision made by the European Central Bank to raise, lower or maintain key interest rates, which reflects discretionary monetary policy choices not amenable to judicial scrutiny as such.[90]

[83] See A Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' (2010) 47 *Common Market Law Review* 361, 368.

[84] Ibid 370.

[85] See A Rosas, 'Separation of Powers in the European Union' (2007) 41 *The International Lawyer* 1033, 1039–1040.

[86] Case C-493/17, *Proceedings brought by Heinrich Weiss and Others*, EU:C:2018:1000, para 24.

[87] Opinion of AG Tizzano in Case C-12/03 P *Commission of the European Communities v Tetra Laval BV*, EU:C:2004:318, para 89.

[88] Case 9/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, EU:C:1958:7, p. 152.

[89] See Fritzsche (n 82) 382.

[90] The picture changes in a *Gauweiler*-type scenario, where the issue is whether the establishment of the outright monetary transactions (OMT) programme fell outside the ECB's mandate, that is,

If one accepts the existence of a PQD in EU law, as this article does, the central challenge becomes how to distinguish between political and non-political questions. In other words, how to define what qualifies as a political question. Here we return to the starting point of our analysis: the difficulty of drawing clear boundaries based on inherently contestable criteria. As we have already seen, even in the jurisdiction where the PQD first developed, lawyers and scholars remain largely in the dark. Beyond acknowledging its existence, there is little consensus in the US as to its precise scope or content.[91] Such uncertainty is, after all, intrinsic to any understanding of the PQD.

As announced, this article does not seek to provide yet another scholarly delimitation of the PQD. Rather than pursuing an ultimate definition, two alternative approaches to the subject can be considered. The first is centred on (evolutive) interpretation. Like any legal doctrine, the PQD is subject to interpretation, and its meaning may shift over time in response to a range of variables. One of the most significant is the constitutional context. As noted above, the constitutional systems of Western democracies grounded in the rule of law are experiencing a marked process of judicialisation. Without necessarily endorsing the view that the PQD has lost all relevance, it is undeniable that the judiciary has steadily expanded its remit, thereby reducing the space traditionally reserved for political discretion.[92] Questions that were once deemed non-justiciable may no longer be regarded as such today, and may likely not be seen as such in decades to come. As the constitutional landscape evolves, so too does the PQD. As has been observed, judicial attitudes towards review shift periodically,[93] in line with broader political and social developments. We are, in all likelihood, living in a period of expanded judicial review in which the PQD is correspondingly contracting.

Beyond evolutive interpretation, the PQD can be linked to the separation of powers. More specifically, it may be seen as a specific manifestation of that theory, or at least as a mechanism, among others, for preserving it. At its core lies a *vexata quaestio*: the supposed distinction between law creation and law application. In Montesquieu's classical conception, itself rooted in Aristotle's understanding of law,[94] judges were merely *la bouche de la loi*, strictly bound by the law in force and barred from encroaching upon the prerogatives of the legislature. Under this view,

whether it was *ultra vires*. In such cases, judicial scrutiny is required, but it is confined to assessing whether the ECB committed manifest errors of assessment in breach of proportionality. The intensity of review is therefore limited.

[91] See Butler (n 33) 331.

[92] R Grote, 'Rule of Law, Rechsstaat and "Etat de droit"' in C Starck (ed.), *Constitutionalism, Universalism and Democracy. A comparative Analysis* (Nomos 1999) 269, 288.

[93] See Bradley (n 11) 1557.

[94] See G Conway, 'Recovering a Separation of Powers in the European Union' (2011) 17 *European Law Journal* 304, 306-307.

the legitimacy of adjudication depends on adherence to existing law.[95] A different reading shifts the focus from the divide between creation and application of law to the distinction between legislative law-making and judicial law-making. Only a legislature is entitled to create law from scratch, that is, legally unprecedented rules. Judges, by contrast, may develop new norms only to the extent that they build upon valid and existing legal sources, using recognised canons of interpretation.[96] Seen through this lens, the ECJ's approach to the PQD in *KS and KD* becomes clearer. Had the Court accepted AG Ćapeta's proposal to carve out a general fundamental rights exception, it would have overridden the express wording of Art. 24 TEU and 275 TFEU.[97] This would have amounted to legislative law-making, effectively rewriting the Treaties. Instead, the Court engaged in judicial law-making. It has resorted to the PQD, a doctrinal resource firmly embedded in the constitutional traditions of the Member States. It was not inventing law from nothing, but rather extrapolating from existing law through interpretation.

What is more, it is submitted that the PQD is inherent in the EU legal order as a system based on the rule of law. As has been observed, 'abstinence with respect to certain constitutional issues is a necessary implication of the rule of law'.[98] From this perspective, far from undermining the integrity of the system, the PQD forms an integral part of any order based on the rule of law. Put differently, the excessive expansion of judicial power 'may be detrimental to the rule of law itself'.[99] The PQD is therefore necessary, among other things, to preserve the balance between the different branches of power. The Court of Justice is fully aware of this: its proactive stance in safeguarding the rule of law, particularly in response to recent episodes of democratic backsliding, confirms its pedigree in this regard.[100] As the case law reviewed in this article shows, and as future case law will likely confirm, the PQD is the latest addition to the ECJ's rule of law toolbox.

To conclude this section, it is fair to say that the PQD in the US constitutional system has decades of history behind it. By contrast, in the Union's legal order, despite early signs such as *Opinion 1/60*, it has only begun to take shape in recent years, at a time when constitutional systems worldwide are generally moving towards greater judicial scrutiny of the legislative and (above all) executive branches. This

[95] See J Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Cambridge University Press 1996), 172-238. See also J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal*, 1346-1406.

[96] See J Gardner, *Law as a Leap of Faith. Essays on Law in General* (Oxford University Press 2012), 35-41.

[97] This is also the opinion of SO Johansen, 'The (Im)Possibility of a CSFP "Internal Solution"' (2024) 9 *European Papers* 783, 793.

[98] See Mulhern (n 9) 176.

[99] See BZ Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge University Press 2004) 110.

[100] See M Bonelli and M Claes, 'Judicial Politics in the EU Rule of Law Crisis' in M Dawson, B de Witte and E Muir (eds), *Revisiting Judicial Politics in the European Union* (Edward Elgar 2024) 100, 104-106.

broader trend may help explain why the doctrine is emerging in the EU with tentative and uncertain first steps. Its precise contours will ultimately be drawn by the ECJ. Its existence, however, should no longer be seriously doubted.

5. Concluding remarks

This article has examined whether a PQD exists in the EU legal order. The analysis has shown that, while the doctrine has never been formally endorsed by the Court of Justice, there are consistent indications of its emergence, albeit in a camouflaged form. Unlike the US constitutional system, where the PQD has a long pedigree, the EU system has seen the doctrine appear only tentatively and indirectly, with its clearest (yet still camouflaged) manifestation so far in the *KS and KD* ruling.

The comparison with the American experience is illuminating. In the United States, the PQD is both recognised and contested: its existence is ordinarily admitted by a majority of scholars and is corroborated by court practice, especially lower courts. However, its scope and legitimacy remain controversial. US scholarship has oscillated between treating it as a necessary corollary of judicial review, a safeguard of political discretion, or, conversely, as an anachronistic doctrine in an era of 'juristocracy'. As already mentioned above, the most learnt and eloquent critique of it came from Louis Henkin. Even he did not deny the existence of political questions. This distinguished scholar acknowledged that certain responsibilities are entrusted to the political branches, the exercise of which is 'ordinarily not subject to review by courts'.[101] He did not deny that 'wisdom might sometimes advise the courts to stay their hand',[102] yet he maintained that the PQD was ultimately unnecessary. In his view, it is the law itself that enables judges to retreat and to defer to the discretion assigned to the political branches. At first glance, this may appear contradictory. In reality, it is not. Once again, Henkin's own work helps to resolve this apparent paradox. In a modern constitutional system based on the rule of law, it is natural that certain matters are reserved for the political domain. In some instances, such a reservation is expressly set out in the constitutional text, as is the case with CFSP decisions in the EU legal order. In other cases, it is implicit, as suggested in *Opinion 1/60* and in the rulings concerning the monetary policy measures adopted by the ECB. As Henkin clarified, this is not an 'extra-ordinary abstention from judicial review', but rather the 'ordinary respect by the courts for the political domain',[103] which is inherent in the constitutional order itself.

Against this background, the ECJ appears to be moving along such a path, though with great caution. Its case law seems to imply the awareness that some issues are not for judicial resolution. *Opinion 1/60* already hinted at this, while *Commission v. Greece (FYROM)* and the reasoning of AG Jacobs came close to articulating a PQD.

[101] See Henkin (n 14) 624.
[102] Ibid 617.
[103] Ibid 601.

Kadi I rejected the doctrine in favour of safeguarding fundamental rights, but later developments, especially *KS and KD*, signalled that questions directly tied to political or strategic choices in the CFSP fall outside the Court's remit. What emerges is a dual track: within the CFSP, procedural and administrative issues remain justiciable, whereas political ones are not.[104]

This embryonic PQD seems not to be confined to foreign affairs. The Court's cautious deference to institutional discretion in cases such as *Gauweiler* shows that domestic decisions involving broad policy trade-offs, with monetary policy being the prime example, also raise issues of non-reviewability. Here, judicial review is modulated to avoid usurping the prerogatives of the political institutions, a move that is consistent with the principle of institutional balance.

Seen through the broader lenses of constitutional theory and separation of powers, the PQD is neither alien nor threatening to the EU legal order. On the contrary, abstaining from adjudication on certain issues is a structural requirement of the rule of law itself. Without it, judicial power risks overreaching and undermining the equilibrium between institutions.

The PQD in the EU remains, for now, somewhat camouflaged: never openly acknowledged, often implicit, and still in its formative stage. Yet its emergence is unmistakable. Its contours will, in all likelihood, be shaped gradually, stone by stone, by the Court of Justice. The CFSP, where the Treaties expressly recognise a broader margin for political discretion, may well prove the natural testing ground for the doctrine's development. In my view, the Court's case law in the field of the CFSP seems to be gradually moving towards the position that the general exclusion of its jurisdiction applies only to those CFSP acts that concern matters of high politics, which are expressly exempted from judicial review by the Treaties themselves. Yet, it is reasonable to assume that a PQD in EU law will extend beyond the CFSP, even if its scope in the CFSP is likely to be wider than in other areas of the Union legal order.

There is one final issue that merits mention. It should not go unnoticed that *KS and KD*, the decision that reignited the debate about a PQD in EU law, was delivered against the backdrop of the EU's second attempt to accede to the European Convention of Human Rights (ECHR). There is little doubt that the 'approach proposed by the Commission [in *KS and KD*] would have rendered the path to ECHR accession clearer'.[105] Had the Court carved out a general human rights exception in the CFSP, one of the main obstacles to accession would have been removed. Yet, as Johansen

[104] As we have seen, the Court referred to them as 'political or strategic choices made by the institutions, bodies, offices and agencies of the Union in the context of the CFSP', it may be assumed that the term 'strategic' is used in *KS and KD* as a synonym for 'issues pertaining to high politics'.

[105] Editorial Comment, 'From Opinion 2/13 to KS and KD: Confronting a Legacy of Constitutional Tensions' (2024) 61 *Common Market Law Review* 1455, 1468.

rightly argues, such an outcome would have been at odds with the principle of autonomy.[106] This is not to suggest that the ECJ decided *KS and KD* with the intention of sending a signal to the political institutions on the question of ECHR accession. Rather, there were sound systemic reasons behind its (almost) articulation of a PQD, as this article has attempted to demonstrate. Still, the broader context of *KS and KD* underscores that the Court is acutely aware of its political environment.[107] To borrow from Shapiro's classic characterisation of the US Supreme Court as a political body in the non-derogatory sense,[108] and from Tushnet's observation that 'courts everywhere are parts of the national political system',[109] the same can be said, *mutatis mutandis*, of the Court of Justice. The case law analysed in this article points precisely in that direction.

[106] See Johansen (n 97) 790.

[107] For an analysis of the Court's political awareness in the field of internal market law, see U Šadl and S Hermansen, 'The European Court of Justice, an Able and Unwilling Lawmaker: Evidence from 920 Free Movement of Persons Judgments ' in M Dawson, B de Witte and E Muir (eds), *Revisiting Judicial Politics in the European Union* (Edward Elgar 2024) 282, 300, who, after a detailed survey of the relevant case law, demonstrate that 'the Court issued more audacious judgments in times of relative pro-European accord, like in the mid-1970s and mid-1990s'.

[108] See MM Shapiro, *Law and Politics in the Supreme Court. New Approaches to Political Jurisprudence* (Free Press of Glencoe 1964).

[109] See Tushnet (n 20) 134.