*Dimitrios Kyritsis*, **Shared Authority: Courts and Legislatures in Legal Theory**, Oxford: Hart Publishing, 2015, 172 pp, hb £50.00.

The space between legal theory and constitutional theory can sometimes feel like a chasm. This might be thought surprising given the common concerns which are the focus of much debate in these disciplines: authority and normativity; right and might; systems, their institutions, and their subjects. In addition, legal theory and constitutional theory are both significantly structured by reference to disagreement between competing conceptual perspectives: the classic debates between positivists and anti-positivists on the one hand, and on the other (perhaps more contentiously) differences in emphasis between legal and political constitutionalists. Dimitrios Kyritsis’ new book, *Shared Authority*, is a welcome attempt to bridge these gaps, both between the substantive concerns of legal and constitutional theory, and between the philosophical antagonists who dominate these alternative landscapes.

Kyritsis characterises his task as an exercise in ‘particular jurisprudence’ (22), and seeks to explore the relationship between courts and legislatures – a mainstay of constitutional theory – from the perspective(s) of legal philosophy. The goal here is not to craft a universal account of an ideal or inherent conceptual relationship between courts and legislatures, but ‘to elucidate the essential by examining how it is instantiated in a specific context’ (23). In particular, Kyritsis aims to assess a specific aspect of the courts–legislatures relationship – the dependence of the judiciary on legislative decisions – in the context of the paradigmatic legal systems in which such institutions are found. The positivistic presentation of legislatures as ‘rule-creating’ institutions and courts as ‘rule-applying’ institutions on the basis of supposed ‘conceptual necessity’ is rejected (10), with Kyritsis instead seeking to develop and defend an (anti-positivist) interpretive account of the circumstances in which judges are under a duty to give effect to a legislative directive (and, by extension, the circumstances in which judges, in performing their official role, are not under a duty to give effect to a legislative directive).

It is in developing this alternative interpretivist account of the place of legislative directives in legal deliberation and decision-making that Kyritsis breaks new ground. Having argued, in chapter 2, that the existence and nature of jurisdictional limits on the law-making power of a legislature, where enforced by the courts, cannot be explained by reference to the work of Raz (the sources thesis is suggested to be a ‘distorting influence’, and this positivistic approach, in insisting that considerations of value are irrelevant to the validity of legal norms, ‘suppresses the importance of a whole host of moral concerns about the proper exercise of authority that have to do with who gets to decide what’ which should be at the heart of a system of judicial constitutional review (54)), the remainder of the book is concerned with articulating ‘the institutional component of interpretivism’ (155). This account builds on Dworkin’s model of constructive interpretation, by which, famously, the existence of a legal norm is established in so far as it fits with, and provides an appealing justification for, the past political decisions made in a society (R. Dworkin, *Law’s Empire*, London: Fontana, 1986, 254-258), but in addition, Kyritsis also recognises and emphasises the engagement of the courts and legislature in what is described as the ‘joint project of governing’ (12-15). Conceived this way, the judge must not only take into account considerations as to the (moral) content of a legislative directive when determining whether it can possess legal force, but also ‘must bring considerations of institutional design to bear on the interpretation of a legislative decision’ (73); indeed, assessing such considerations – relating to what the judge’s official role in the joint project of governing ought to be – will be significant, and ‘in large part determine how much weight he ought to assign that decision and what, precisely, fidelity to it requires’ (73). In so doing, ‘[u]nless the judge finds some good reason for the assignment of a certain power to the legislature ... he fails no official duty in disregarding the decisions coming from it, just as he would not if he disregarded a decision made by a private citizen dictating what the rest of us ought to do’ (73).

There is much therefore potentially at stake in an interpretive assessment of the calibre of the institutional design of a relationship between the courts and the legislature in a particular legal system. How, then, are such considerations of institutional design to be captured and evaluated in the process of such legal decision-making? For Kyritsis, these matters – relating to the ‘systemic dimension of legality’ (107) – must fundamentally be determined by reference to the principle of the separation of powers, which displaces the Dworkinian ideal of integrity as the primary value which must structure judicial deliberation about the legal force of a legislative directive. There are two structural considerations of the foremost importance, encompassed by the overarching idea of the separation of powers, both of which must be given weight in legal interpretation: first, the ‘division of labour dimension’ which ‘evaluates institutional arrangements by the extent to which they assign a certain government power to the institution that is well suited to exercise it’; and second, the ‘checks and balances dimension’ which ‘reflects the importance of putting in place institutional mechanisms that monitor the exercise of government power and can effectively prevent its abuse’ (109). If these two dimensions of the separation of powers are given adequate effect in a legal system, the ‘moral merit’ of the joint project of governing between courts and legislatures can be assured (128), along with the legitimacy of the constitutional order established.

Perhaps most striking about Kyritsis’ institutionally-aware interpretivism is the extent to which it seeks to reframe the calculus of legal decision-making, shifting away from concern as to the justice (or lack thereof) of the content of specific legislative decisions, and towards establishing the legal force of norms in the context of the broader roles of, and even constitutional relationship between, the courts and the legislature. Indeed, there is much to admire about this attempt to look philosophically at legal practice from ‘the perspective of a constitutional designer’ (116), and in the process to challenge the court-centricity of the Dworkinian interpretivist tradition: ‘if we acknowledge the importance of considerations of institutional design’, Kyritsis argues, ‘we will end up dethroning courts from their position of prominence in the interpretivist edifice’ (94). There is a strong thread of constitutional realism which permeates the book, often absent from work heavily influenced by Dworkin’s romanticised judicial interpretivism, recognising both the significance of legislatures and the fallibility of courts (‘[i]t is of course no accident that the struggle over the content of our political rights ordinarily takes place in the legislature. This is the forum where our political differences and disagreements play out and a solution which takes them into account is forged’ (102); ‘courts have often succumbed to the temptation of imposing their views on issues that it was the legislature’s job to address under the guise of review’ (151)). From this perspective, Kyritsis’ book will surely make a significant contribution to debates among interpretivists, and offers a potent restatement of such an approach to legal theory.

Nevertheless, ‘conciliatory’ though this argument may be in parts, and as seriously as ‘the insights, concerns and objections of the other side’ may certainly be taken, critics of interpretivism are unlikely to find in it an end to what Kyritsis diagnoses as a jurisprudential ‘stalemate’ (3). For while the intention to knock the courts off their philosophical pedestal is genuine, Kyritsis’ account remains open to the objection that his interpretivism still gives them clear, perhaps unassailable, priority, even where they ostensibly ‘*share* the authority to govern’ (12, emphasis in original). While the courts must interpret legislative decisions in the light of the principles of institutional design which establish their role and function in the broader constitutional order, it is still *the courts* that must conduct this exercise in moral reasoning, and finally determine the parameters of their role. No matter how deferentially or intensively the courts opt to accept the force of legislative decisions, for many the very idea that they are entitled to weigh up these institutional considerations themselves will feel flawed as a matter of constitutional design, as well as (and no less importantly) objectionable as a matter of political principle. Court-centricity is not simply a function of the powers of the judiciary, and the degree of reverence (or otherwise) they must afford a directive issued by their collaborators in the legislature, but also about how these institutions are positioned, and how the interactions between them are framed. It is not clear how any theory of interpretivism derived from Dworkin could avoid giving priority to the courts if, ultimately, the force of any legal norm is dependent on evaluation of its moral propriety (whether based on institutional concerns, or those related to the justice of that norm’s particular content, or a combination), couched in an abstract language of principle which necessarily favours the judiciary’s specific style of interaction with the law. On such a model, a legislature simply could not engage in this collaborative process of governing on equal terms with the courts – it could only enact legislation and hope that in the forum of legal decision-making it was judged worthy, and therefore valid.

That the courts would have the separation of powers to guide them does not ameliorate this difficulty. Indeed, while this principle is fleshed out and given life by Kyritsis, it remains fluid, abstract and contested. (Is it right, for example, to presume that the separation of powers inherently recommends the introduction of checks and balances? What about separation of powers as a principle of non-interference with distinct, defined institutional competences?) It is, moreover, for the same reasons not clear that this principle can take the weight required of it, in so far as it is through the separation of powers that the moral merit of a joint project of governing is to be established. Indeed, ideas of division of labour seem to leave many of the key questions about how exactly power is legitimately to be allocated hanging – Kyritsis is aware of the need for the idea of a ‘constitutional division of labour’ to be animated by further concepts, most important among them democracy (109). But surely democracy is so fundamental a principle of constitutional and political legitimacy that it stands well above, rather than being filtered through, the doctrine of the separation of powers, especially since a majoritarian (or ‘procedural’) understanding of democracy is actually potentially incompatible with the idea of judicial ‘checks and balances’ which the account of separation of powers defended by Kyritsis seems to demand.

Yet setting this aside, it is also not clear how such an instruction to the courts – to determine the nature of their official role by reference to institutional considerations captured in the idea of the separation of powers – might shift the balance of legal decision-making in practice. While of course this is a theoretical model, and will rightly need to be sensitive to variations in different legal cultures and circumstances, in what situation, in a democratic state, would the unattractive content of a legal norm override the legislature’s institutional claim to definitively settle a contentious political issue? When the deck of ambiguity is loaded in favour of the courts, can such interpretive theories – no matter how sophisticated – really dispel the conclusion that courts may feel encouraged to engage in imposing their own utopian schemes of justice at a strategic moment of their own choosing?

In such circumstances of profound uncertainty, we might be attracted to a positivist response: is it not the very function of a constitution to fix a scheme of institutional design, in advance and in light of ideas of political and constitutional legitimacy, and thereby establish in law the respective powers of, and the relationship between, the courts and the legislature? Kyritsis of course anticipates such an objection, arguing that ‘one cannot warn enough against overestimating the ability of constitutional provisions and conventions to settle difficult questions of institutional design’ (82). Yet that these *are* difficult questions is precisely the reason that we should not overestimate the ability of courts to settle them, on the basis of their own interpretation of principles of political morality which may underlie the allocation of authority established in a constitution (whether that takes the form of a codified text or an uncodified set of legal arrangements). Do we really imagine, in contrast, that the courts are entitled to revisit and potentially reshape this allocation of authority each time the question of whether they must enforce a legislative decision comes before them, routine and settled though this institutional relationship is likely to be for the vast majority of the time? To embrace a positivist constitution is not to abandon principles of institutional legitimacy, but to suggest that they belong elsewhere than in the gift of the judiciary.

Perhaps some of these issues arise from the fact that Kyritsis’ account of interpretivism – despite being importantly informed, and certainly enhanced, by notions drawn from constitutional theory – is at its core a work of legal philosophy. From such a starting point, the challenge of finding space for politics in explaining the contours of the courts–legislatures relationship is evidently more acute. As should by now be clear, Kyritsis is certainly not insensitive to the significance of at least certain components of politics – the political morality of certain institutional design considerations, particularly those flowing from his account of the separation of powers, will be fundamental to the official role of the courts in his model of interpretivism. But the more pragmatic face of politics – ‘political expediency’, ‘political struggles’, ‘political “noise”’ – is seen as ‘messy’, and while it (rightly) must be taken into account ‘because it makes a difference to the law’, it is taken into account by being rationalised and reshaped to ensure the ‘divergent and often ill thought out intentions and plans’ of ‘political actors’ are only relevant to the extent that they can be subsumed in the broader, judicially determined, project of governing (129). In this sense, political morality may now, on Kyritsis’ account, be afforded a place in the courts’ interpretive calculus, but the legalistic focus of this theory may limit its constitutional significance, especially to those who see political activity (both practical and principled in nature) as fundamentally animating, indeed even constituting, the social systems which claim the authority to enact and utilise law in the collective interest.

An interesting final chapter on legal institutions and citizens provides a useful illustration of these challenges. Kyritsis notes the ‘uneasy place’ which citizens occupy in legal theory (132), and seeks to challenge the ‘insulation’ of officials from citizens’ attitudes to the law in the work of the leading legal positivists Hart and Raz (137). Yet important though a focus on ‘active’ citizenship undoubtedly is, on the interpretive account this is filtered through engagement with the legal practice of constitutional review, rather than considering how the concerns of citizens, their ability to challenge exercises of legal authority, or the extent to which they can hold officials to account can be more broadly translated into political reality through the constitutional design of institutional relationships. To suggest that interpretivism provides a model of legal deliberation, framed by reference to the value of the separation of powers, which reflects the reasoning of ‘protestant’ citizens who are thereby assigned a ‘crucial role’ in challenging an exercise of legal authority (147), may be to offer preferential status to those civil society groups who are most able to challenge power through engagement in a legalistic discourse, while providing merely the illusion of influence to those lacking in the necessary resources effectively to do so. While the purpose of such an interpretive account is not to close off other avenues of (political) accountability, we might nonetheless query whether the idea of a constitutional order framed around the separation of powers, and essentially the subject of judicial moral-political evaluation, could have a distorting influence, both on theory and in practice. This may ultimately be the result if citizens (and, indeed, legislatures, and also the other political actors who are not the direct subjects of Kyritsis’ book) must be brought within a legalist paradigm in order to hear, and give force to, their attempts to challenge (or to claim) institutional authority.

This is, therefore, a book which brings an innovative, challenging perspective to a range of pressing issues – its central argument is considered and reflective, and Kyritsis draws on, and analyses rigorously, the work of a broad range of theorists in weaving an effective narrative (in addition to those already mentioned, the work of Waldron is discussed frequently, and in interesting ways). In seeking to draw together insights from legal and constitutional theory, *Shared Authority* may ultimately serve to bring into sharper focus the continuing existence of a range of differences between interpretivists and positivists, and (implicitly) tensions between legal and political models of constitutionalism. Yet in his rich and stimulating exploration of the relationship between courts and legislatures, Kyritsis steers interpretive legal theory in a significant new direction, impressively pushing beyond the work of Dworkin and, in the process, poses new challenges for the critics of such theories.

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