Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism

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There is an emerging body of literature which describes a context of constitutional pluralism, in particular by reference to the EU legal order and its relationship with national legal orders. Usually such constitutional pluralism identifies the phenomenon of a plurality of constitutional sources which creates a context of potential constitutional conflicts between different constitutional orders to be solved in a non-hierarchical manner. Such context affects the role of courts and the character of judicial adjudication. In this essay I want to focus on the European Court of Justice and how its role is impacted by and needs to be adapted to such context of constitutional pluralism. Moreover, I want to undertake this analysis by reference to a broad notion of pluralism. This pluralism expresses a new context in which courts (including the ECJ) have to exercise their judicial function. In this respect, it is necessary to distinguish between the internal and external sources of pluralism in the European Union legal order.

We can identify four main sources of internal pluralism. First, there is a plurality of constitutional sources (both European and national) which have fed the EU constitutional framework and its general principles of law, particularly as developed in the jurisprudence of the Court of Justice. Second, the acceptance of the supremacy of EU rules over national constitutional rules has not been unconditional, if not even, at times, resisted by national constitutional courts. This confers to EU law a kind of contested or negotiated normative authority.[1] Third, there is an emergence of new forms of power that challenges the traditional private/public distinction and the different mechanisms of accountability associated to them.

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[1] This is the hard core and starting point of traditional constitutional pluralism analysis in the context of the EU. **M.P. MADURO**, "Contrapunctual Law: Europe's Constitutional Pluralism in Action" in **N. WALKER**, *Sovereignty in Transition*, Oxford, Hart, 2003, pp. 501-537; **M. KUMM**, "Who is the Final Arbiter of Constitutionality in Europe?", *Common Market Law Review*, 1999, p. 356; **J. KOMÁREK**, "European Constitutional Pluralism and the European Arrest Warrant: Contrapunctual Principles in Disharmony", Jean Monnet Working Paper No 10/05; see also: **N. WALKER**, "The Idea of Constitutional Pluralism", *Modern Law Review*, 2002, pp. 317-359; which, however, presented already a broader picture of constitutional pluralism.

Such pluralism in the forms of power challenges, in turn, the traditional legal categories upon which EU rules have been framed. Fourth, the European Union is also dominated by a form of political pluralism that can assume a rather radical form since the conflicting political claims are often supported by corresponding claims of polity authority.

External pluralism derives from the increased communication and inter-dependence of the European Union legal order with international and foreign legal orders. From this, different relationships emerge that can take the forms of legal integration (where the EU participates in another legal order), interpretative competition (where, albeit the Union is not part to another legal order, it shares a similar set of norms and, possibly, jurisdiction with that legal order), legal externalities (where the decision taken in a certain jurisdiction has a social and an economic impact, albeit not legal impact, in another jurisdiction) and what Neil Walker as called of sympathetic consideration.[2]

My argument is that such context of internal and external pluralism affects different dimensions of the role of courts. What is sketched here is a normative approach to how courts, and particularly the European Court of Justice, should address some of the challenges brought by increased political and legal pluralism. In the process I will relate some of the traditional originalities usually identified in the interpretative methods and role of the Court of Justice to such context. The role of courts being intimately connected with issues of legitimacy the present text also addresses some of the conditions that determine the legitimacy of courts in general and of the Court of Justice in particular.

Discussions on the role of the Court of Justice tend to focus on its particular methods of interpretation. Interpretation can perhaps be suggestively described as the software of Courts. In a narrow sense interpretation can be understood simply by reference to the methodologies to be employed in the interpretation of rules: the types of legal arguments used by Courts, their techniques of exegesis of the text and the rules of logic that make of legal reasoning a form of practical reasoning. However, debates about legal interpretation often

[2] Manuscript by Neil Walker, not yet published, forthcoming in the proceedings of the conference "Rethinking Constitutionalism in an Era of Globalisation and Privatisation", organised by the Floersheimer Center for Constitutional Democracy at Benjamin N. Cardozo School of Law, New York School of Law, University of Paris I (Panthéon-Sorbonne), the International Journal of Constitutional Law (I-CON), and the U.S. Association of Constitutional Law.

assume a broader dimension linked to the proper role of courts in a democratic society. In this broadest sense, the role of courts is a function of the hermeneutics, institutional constraints and normative preferences that determine judicial outcomes in the light of an existent body of rules. Interpretation is here at the intersection of the debates not only about different methods of interpretation (or forms of legal reasoning) but also about broader questions on the proper role of courts in a democratic society. The concrete interpretation to be given to legal rules is therefore a product of legal reasoning and of the institutional constraints and normative preferences that determine the role of courts in a given political community.

The blending of these different dimensions may be presented in the form of a theory of constitutional or judicial adjudication. It is also frequently presented as a matter of judicial philosophy. In this sense, all courts (and their members) have a judicial philosophy, be it publicly articulated or not. Such a judicial philosophy is however, to a large extent, a product of the system of law in which those courts operate. The methods of interpretation used by courts as well as their institutional and value choices reflect (or ought to reflect) a certain systemic understanding of the normative preferences and institutional constraints of the legal order in which those courts operate. Only such an approach is both capable of securing the coherence and integrity of that legal order (by fitting individual decisions into a coherent whole) and judicial accountability (by constraining the power of courts in individual decisions and subjecting them to a normative, and not political, scrutiny with regard to the normative preferences they attribute to their legal order). Understood in this way, a theory of judicial adjudication or a judicial philosophy (which ought not to be confused with a judicial ideology or, even less so, with a political ideology) serves not only to objectivise and constrain the subjective preferences of judges but to define and legitimate the proper role of courts in a given political community.

In this present contribution I want to discuss two of those three dimensions of judicial adjudication in discussing the role of Court of Justice in a context of constitutional pluralism. I will start by briefly reviewing the methods of interpretation employed by the Court of Justice with a focus on the importance of comparative law and teleological reasoning. I will try to highlight how a context of constitutional pluralism affects both the legal rules which the Court is to interpret and the nature of its legal reasoning.

In the second part of the article I focus on the institutional constraints arising from the context of constitutional pluralism, in particular with regard to the relations among courts. In this context, I will start by highlight how the role played by the Court is also a function of institutional constraints and how the interpretation of legal rules is only properly understood in the light of the interplay between courts and other actors.[3] Second, I identify the role of the Court in framing forms of institutional dialogue and securing the coherence and integrity of the EU legal order in a context of internal legal pluralism. Third, I discuss how the external forms of pluralism may also require forms of judicial dialogue with other jurisdictions.

In a subsequent article I hope to relate the institutional and methodological dimensions of judicial adjudication with the normative preferences of a particular legal system so as to highlight both how the judicial role in interpreting the law ought also to be a function of institutional choices and what should guide those institutional choices. Together, these three dimensions help sketching an emerging a theory of judicial and constitutional adjudication in the EU legal order. In this context I restrict my analysis to the first two.

I. Methods of interpretation and legal reasoning at the Court of Justice: In defence of *Telos*

Legal interpretation at the Court of Justice is governed by text, context and *telos* or purpose. These are the three methods indicated early on in the *Van Gend en Loos* judgment by the reference to "the spirit, the general scheme and the wording" of the legal provisions which the Court has to interpret.[4] But the Court has done more than simply refer to these methods of interpretation. It has, in effect, deduced from the treaties a particularly hermeneutic framework distinct from that of traditional international law.

It is what is often referred to as the constitutional interpretation of the treaties or constitutionalisation of Community law.[5] This constitutional construction departed from a

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[3] **M.P. MADURO**, "Contrapunctual law: Europe's Constitutional Pluralism in Action", in **N. WALKER**, *Sovereignty in Transition, supra* note 2.
[4] **E.C.J.,** Case 26/62, *Van Gend & Loos,* 1963, ECR, p. 1.
[5] Here goes one more footnote with some classic texts on the constitutionalisation of Community law: **J.H.H. WEILER**, *The Constitution of Europe: Do New Clothes Have an Emperor? And Other Essays on European Integration*, Cambridge, Cambridge University Press, 1999; **K. LENAERTS**, "Constitutionalism and the Many Faces of Federalism", *American Journal of Comparative Law*, 1990, pp. 38-ff., at p. 205; **E. STEIN**, "Lawyers,

particular epistemological understanding of EC law as an autonomous legal order. In its initial path-breaking decisions the Court interpreted such legal order as an agreement between the peoples of Europe and not simply their States. The autonomous and peculiar character of the European Communities legal order required, in turn, a constitutional reading of Community law founded on the principles of direct effect and supremacy, complemented with the adoption of concepts such as fundamental rights, implied competences, state liability, effectiveness, separation of powers (institutional balance) and, broadly, the notion of a community of law (the EU equivalent of Staatsrecht or the rule of law).

Teleological interpretation in EU law does not, therefore, refer exclusively to a purpose driven interpretation of the relevant legal rules. It refers to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules. In other words, the Court was not simply been concerned with ascertaining the aim of a particular legal provision. It also interpreted that rule in the light of the broader context provided by the EC (now EU) legal order and its "constitutional *telos*". There is a clear association between the systemic (context) and teleological elements of interpretation in the Court's reasoning. It is not simply the *telos* of the rules to be interpreted that matters but also the *telos* of the legal context in which those rules exist. We can talk therefore of both a teleological and a meta-teleological reasoning in the Court.[6]

This is particular important in view of the autonomy of the Community legal order and its subjection to the rule of law. This assumes both an independent normative claim (EU law determines its own criteria or validity) and a claim of completeness (that it can provide legal answers to all the legal questions that emerge within its jurisdiction). These claims faced possible challenges from national legal orders (particularly national constitutions) upon which the authority of the 'constitutive' authority of the Community legal order ultimately rested. In the face of such potential challenges and of largely 'incomplete' legal texts it was only natural for the Court to 'appeal' to national legal orders. This was particularly the case when confronted with the need to provide legal answers which could not be directly and easily

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Judges and the Making of a Transnational Constitution", *American Journal of International Law*, 1981, pp. 1-ff.; **G.F. MANCINI**, "The Making of a Constitution for Europe", *Common Market Law Review*, 1989, pp. 595-ff.

[6] **M. LASSER**, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford, OUP, 2004, at p. 359. More generally on legal reasoning of the European Court of Justice, see **J. BENGOETXEA**, *Legal Reasoning of the European Court of Justice*, Oxford, OUP, 1993.

found in the Community texts. Reference to the general principles of law common to the member states[7] is both an expression of the particular legitimacy of the Community legal order (which ultimately rests on the peoples of Europe and their national legal orders) and a method of interpretation particularly useful in the light of the gaps of the Community legal order[8] and the ambiguity of its texts. It is this that explains the importance that comparative law has acquired in the case law of the Court.[9] Moreover, a law which is based on the common law of the member states will also provide an added guarantee for the social acceptance of its decisions and its smoother application by national courts. The use of comparative law is not, however, without doubts. What exactly should be the method of comparison, and what should constitute the yardstick for such comparison? Early on Advocate General Lagrange stated that the Member States "should not be content to derive from its sources a mean, more or less arithmetic, but it should select from all the member countries those of the various national solutions which […] appear as the better ones or, if one wants to use the word, the most progressive. This is also the spirit which has guided the court until now."[10]

One must not take this statement too literally, however. The Court does not and should not use comparative law to identify what it believes to be the best legal solution in abstract. Such use of comparative law would risk being merely instrumental: national law would be used in the discovery process of the 'best law' and not really as a tool for the construction of a common law. A comparative law approach mindful of constitutional pluralism will not only see in national law a source of inspiration but recognise to it a particular authority. The bottom up construction and legitimacy of EU law requires the Court to pay due respect to the common national legal traditions and not simply to search for its preferred legal solution among a variety of national legal regimes. On the other hand, one of the values of

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[7] **E.C.J**., Case C-50/00, *Unión de Pequeños Agricultores v Council*, 2002, ECR-I-6677, § 39.

[8] **P. PESCATORE**, *Le Recours, dans la jurisprudence de la Cour de Justice des Communautés Européennes, a des normes déduites de la comparaison des droits des États membres, Conférences et rapports*, *VII [1979-1980],* pp. 337-359; **K. MORTELMANS**, "Les lacunes provisoires en droit communautaire", *Cahiers de droit européen*, 1981, pp. 410-436; **P. PESCATORE**, "La carence du législateur communautaire et le devoir du juge", *Rechtvergleichung, Europarecht und Staatenintegration*- Gedächtnisschrift für L-J. Constantinesco, Köln-Berlin-Bonn-München, G. Lücke, G. Ress, M. R. Will-Carl Heymanns Verlag KG, 1983, p. 559.

[9] **K LENAERTS**, "Interlocking Legal Orders in the European Union and Comparative Law", *International and Comparative Law Quarterly*, 2003, pp. 873-906.

[10] **E.C.J.,** Case C-14/61, *Koninklijke Nederlandsche Hoogoovens en Staalfabrieken v. High Authority*, 1962, C.J.Comm. E. Rec. 485, 593 (1962)

constitutional pluralism and of a proper comparative law methodology is the learning and experimentalism it promotes among different legal orders. It creates a framework for arbitrating between different legal solutions which compete in answering to what might be a common problem.[11] As a consequence, a comparative law methodology that would amount to a simple arithmetic exercise will also ignore the value of constitutional pluralism. It will also ignore that such comparative exercise takes place not as an academic exercise but in the context of questions arising within the EU legal order and should be mindful of the specificities of this legal order. The methodology of comparative law to be employed by the Court has, therefore, to balance the respect of national legal traditions with the need to accommodate them to the specific needs of the EU legal order. In this respect, the comparative law methodology to be employed by the Court must be shaped by a requirement of consistency within the EU legal system. In other words, it is not simply a question of determining what legal solution is common to the national legal orders. It is also, or mostly, a question of determining what legal solution fits better with the EU legal order (in the light of its broader set of rules and principles and of its context of application). Comparative law becomes, in this way, one more instrument of what is the prevailing technique of interpretation at the Court: teleological interpretation. The best solution to which Advocate General Lagrange referred to is the solution that best fits the underlying goals and requirements of the EU legal order and its particular context of application.

The interpretation methods of the Court have, sometimes, been the subject of criticism particularly its reliance on teleological interpretation. Some perceive teleological interpretation as a source of judicial activism. In fact, the emphasis given to different methods of interpretation is often connected to different conceptions of the role of courts and their legitimacy. Theories of interpretation which emphasise reliance on text (such as constructivism or originalism),[12] for example, are theories that articulate a vision of judicial deference and a conception of courts as simple 'carriers' of the legislative will, devoid of any autonomous set of normative preferences or value choices. In this sense, theories arguing for an interpretation based on the literal meaning of the legal rules coincide with historical intent theories in that they appear to believe to be both possible and desirable for judicial decisions

[11] **R. STITH**, "Securing the Rule of Law through Interpretive Pluralism: An Argument from Comparative Law", Jean Monnet Working Paper No 1/07.
[12] **A. SCALIA**, *A matter of interpretation*, Princeton University Press, 1997.

to be, in themselves, value free and deprived of discretion. This would be, furthermore necessary, because courts would not benefit from the same legitimacy as the political (democratic) process.

But is such an approach both possible and desirable in the context of the EU legal order? I believe not, both from a general point of view and taking into account the particular constrains of the EU legal order and its context of constitutional pluralism. It is important to note, at the outset, that the fact that courts benefit from a different legitimacy from the legitimacy of the political process does not mean that they benefit from a lower legitimacy. Judicial legitimacy flows from the legal document that attributes powers of judicial review over the acts of the political process to courts. If the idea is that courts legitimacy can never be opposed to that of the democratic legitimacy of the political process, then the idea of judicial review is itself under attack.[13] When courts should defer or not to the political process has therefore to be a function of a more sophisticated theory: the theory of constitutional or judicial adjudication that is embodied in the Constitution or of a similar legal document giving powers of judicial review to courts.

In here I would like to argue that a method of interpretation which pays due attention to teleological and meta-teleological reasoning is the more appropriate for the EU legal order. Reasoning through *telos* will be an increased necessity in the context of a pluralistic legal order. Such pluralism tends to increase the textual ambiguity of legal provisions and to enhance the potential for conflicting legal norms. In the EU legal order this is, first and foremost, a consequence of its plurality of languages and different legal traditions. It is not uncommon for the same legal rule to be susceptible of rather different textual interpretations depending on the linguistic version one appeals to. Since they all have the same legal value

[13] This is not to say that the idea of judicial review is only conceivable where courts are given powers of constitutional review and much less that the pursuit of constitutional values is primarily a task of the judiciary. There are certainly States which do not have a system of constitutional review and, nevertheless, by reasons, among others, of political and constitutional culture, may be even more effective in protecting those values. The only point made in here is that the legitimacy of courts, when given powers of judicial review, and to the extent of these powers, is not weaker than the legitimacy of the political process. These differences may explain why the debate in the US is much stronger and dominated by the counter-majoritarian fear.In the US, judicial review was, to a large extent, a "creation" of the Supreme Court itself. The American debate is therefore contaminated by a kind of original sin syndrome; **A.S. SWEET**, "Why Europe Rejected American Judicial Review: And Why It May Not Matter", *Michigan Law Review*, 2003, pp. 2744-2780.

the Court has to 'arbitrate' such linguistic disputes under different criteria.[14] Moreover, the pluralism of languages and legal traditions brings with it conceptual problems of translation. In a context of this type, teleological interpretation is also the more appropriate form of guarantying a uniform application of EU law at the national level. It is also the form of interpretation that can best guide national courts as the 'first instance' courts of Community law: it not only provides a specific legal outcome for the case at hand but offers a broader normative 'lesson' with which to address future cases. One must remember that the function of the European Court of Justice, under the preliminary ruling mechanism, is not solely that of helping national courts deciding individual cases. The Court must also state the law. In a decentralised legal order it is important for the Court to reason its decisions so as to provide a thicker normative understanding of the law beyond the decision in the case of hand. Only this is capable of guiding national courts in interpreting and applying EU law in the large majority of EU law cases which never reach the ECJ.[15]

The textual ambiguity of EU law is also a function of a deeper normative ambiguity. In fact, the constitutional pluralism of the Union also entails an extreme form of political pluralism. Different political positions are often entrenched in strong institutional positions which make it particularly difficult to reach political consensus. As a consequence, EU rules could often be characterised as "incompletely theorised agreements";[16]agreements reached on the basis of different normative assumptions. They are the product of a complex political bargain where, to a certain extent, there was an "agreement not to agree". So long as the political process itself will not be capable to follow upon on that incomplete agreement, such decisions are bound to lead, intentionally or not, to a delegation to courts of the final decisions on those issues. This is not necessarily negative: a political community may legitimately decide to exclude certain issues from the passions of the political process and 'delegate' them to more insulated institutions. It is important, however, for such 'delegation' not to become so extensive or systematic as to reduce the space for democratic deliberation. The answers to be given by courts, in this context, should be mindful of this concern and should, as far as

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[14] **C. BALDUS and F. VOGEL**, *Metodología del Derecho Privado Comunitario: Problemas y perspectivas en cuanto a la interpretación literal e histórica*, p. 84.

[15] This is also why a minimalist approach to the judicial role is difficult to fit with a legal order such as the EU [see below]. For an introduction to political minimalism, see **C. SUNSTEIN**, *One Care at a Time*, Cambridge (Mass.), Harvard University Press, 1999.

[16] The expression, which is used here in a slightly different sense, belongs to Cass Sunstein.

possible, not pre-empt future democratic deliberation on those questions but, instead, help to promote and rationalise such deliberation. There is a paradox, in this respect, in the European Union. On the one hand, the difficulties of its political process often demands from the Court legal answers to questions of broad political relevance. On the other hand, this context also puts a particular responsibility on the Court as the 'rigidity' of the political process makes it more difficult for the solution provided by the Court to be politically overcome.[17]

Since, however, courts cannot deny jurisdiction on the basis of the legal complexity or political sensitivity of a certain issue the only appropriate way to deal with these issues is to try to decide them under what the courts perceive as the underlying normative foundations of their legal order. Questions of this type can often only be *legally* solved by appealing to universal principles. Courts remain courts in this instance because they reason in normative terms (by appeal to a certain normative conception of their legal order) and because they are bound by the constraints of legal reasoning, defined by the limits imposed by the text, by the logical rules of practical reasoning,[18] and by the systemic requirements of coherence and consistency.[19] In this respect, teleological reasoning reinforces the Court's accountability as it increases transparency as to its normative choices In the context of ambiguous or conflicting provisions, *telos* signifies an higher constrain than pure reference to wording or intent. It binds courts to a consistent normative reading of those provisions.

Teleological interpretation can also be seen as more faithful to the democratic outcomes since it prevents textual manipulation of the legal rules. In fact, an interpretation that pays attention to the goals of the rule, and not simply its wording, prevents opportunistic behaviours and minimises the risk of an interpretative manipulation of the legislation. Such a manipulation would derive, in practise, effects from those rules which were neither wished for nor debated in the political process. As such, to allow such interpretative manipulations would affect the mechanisms of political responsibility and the democratic control of legislative choices. In other words, certain subjects would obtain, outside the democratic political process, the satisfaction of certain policy preferences. It can certainly be said that the

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17 M. SHAPIRO, "The European Court of Justice" in **P. CRAIG and G. DE BÚRCA**, *The Evolution of EU Law*, Oxford, OUP, 1999, pp. 321-345.
18 R. ALEXY, *A theory of legal argumentation*, Oxford, Clarendon, 1989.
19 R. DWORKIN, *Law's Empire*, Fontana, 1986; **N. McCORMICK**, *Legal Reasoning and Legal Theory*, Oxford, OUP, 1978.

teleological interpretation of a particular rule may also not correspond to what was sought by the legislator. However, while teleological reasoning favours a debate among alternative normative preferences in the interpretation of the rule, a simple appeal to text would hide those alternatives and preclude a debate among them.

There is one more argument in favour of the importance of teleological interpretation in the EU legal order. EU Treaties frequently appeal to broad universal principles. This is so because the member states trusted on the universalisability potential of such principles both as mechanisms of self-discipline imposed on themselves and as instruments for the development of a legal order that would be, at once, dynamic and principled based. Both the nature of the project of European integration (increased integration)[20] and the incomplete character of its political and legal instruments required the formulation of universal principles. In the European Union the appeal to universal principles fulfils two main purposes. The first is that of allowing agreement on a delicate and controversial political question by politically deferring its practical effects to a legal solution to be derived from a universally agreed principle. The second is that of providing an instrument for the continuous adaptation of the EU legal order to its fast moving context of application. Universal principles maintain the legal text updated. They are a function of the dynamic character of the process of integration recognised in the Treaty (notably by objective of creating "an ever closer union among the peoples of Europe"). In particular, they offer a rational and legitimate basis to solve legal conflicts in the increasing number of cases where the political, economic and social reality of the Union is not matched by the available legal rules. Consider, for example, how the protection of fundamental rights in the Community legal order was necessary in the light of the normative authority which had been recognised to EC rules in national legal orders and which, at the same time, prevented their review under national fundamental rights.[21] In the same way, the introduction of new principles in EU law can have a radiating effect over the entire legal order. It may not only create new rights and obligations but require a reinterpretation of pre-existent rights and obligations. That was the case with the introduction of European citizenship which, more than providing a new set of rights, granted a new status

[20] Which is not to be confused with increased centralisation.
[21] **E.C.J**., Case 11/70, *Internationale Handelsgesellschaft,* 1970, p. 1125. Note how the Court closely linked these two dimensions: the supremacy of EC rules and the need to guarantee the protection of fundamental rights in the Community legal order.

in the light of which many of the existing Community rights acquire a new dimension. The Court has stated so, for example, in the domain of the free movement of persons.[22]

As with Constitutions the EU Treaties are based on principles so as to be open to the future.[23] Since, in particular, they tend to have a broad normative ambition (a juridification of the social sphere) as well as temporal ambition (they are often 'rigid' legal documents) they need to be formulated in principles open to development and reinterpretation. Any interpretation that would freeze them in time would go against *la raison d'être* of the constitutional project and would risk to imprison current generations to the decisions of those of the past. EU constitutional law is no different. On the contrary, its constitutional pluralism requires an ever greater adaptability which, must, at the same time be respectful of the limits imposed by national constitutionalism. In this respect, teleological and meta-teleological interpretation is the mechanism through which such principles are developed in a controllable and transparent manner. They impose on the Court to highlight the second order choices involved in its reasoning[24] and to make transparent how it balances conflicting principles.[25]

The importance of teleological interpretation is a function of the particular nature of the EU legal order but, moreover, it does not give free reign to the Court neither does it makes of its judicial function a function of its members value preferences or an exercise in political discretion. Instead, the Court's interpretation has a very clear set of constraints. First, as mentioned earlier the Court's use of teleological interpretation is always combined with other legal arguments be them based on wording (the normal departing point), legislative history, comparative law, context or other. Teleological reasoning is, instead, an element of accountability within the space of discretion left by the other legal arguments to the Court. Second, the Court always filters its reasoning through the canons of practical reasoning, highlighted by the classical frequent recourse to syllogism. If anything, the Court is sometimes also accused of using a too strict syllogistic reasoning. In this respect, the

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[22] **E.C.J.,** Case C-184/99, *Grzelczyk*, 2001, ECR I-6193; **E.C.J.**, Case C-456/02 *Trojani*, 2004, ECR I-7573; **E.C.J.,** Case C-413/99, *Baumbast*, 2002, ECR I-7091; **E.C.J.,** Case C-224/02, *Pusa*, 2004, I-5763.

[23] "Fifty Years of Activity of the Constitutional Court", Speech by President Emeritus G. Zagrebelsky, at the meeting of 21 April 2006 at Palazzo Quirinale. [Own Translation from Italian] "Cinquanta anni di attività della Corte costituzionale" Relazione del Presidente Emerito G. Zagrebelsky, in occasione dell'incontro del 21 aprile 2006 al Palazzo del Quirinale.

[24] **N. McCORMICK**, *Legal Reasoning and Legal Theory*, *supra* note 20.

[25] On the nature of legal reasoning in the context of competing universal principles, see: **K. GUNTHER**, *The Sense of Appropriateness*, Albany, Suny Press, 1993.

identification by the Court of the purpose it attributes to certain rules and of the systemic understanding of the EU legal order that permeates its interpretation of EU rules in general should be welcomed. It is a move beyond pure syllogism. As stated before it actually highlights the second order choices, to which legal philosophers often refer as a necessary part of judicial deliberation, particularly in the so-called hard cases.[26] It makes the Court judicial justification correspond closer to its judicial deliberation. It may be true that the Court does not always fully articulate why it identifies a particular goal as the predominant one in a certain area of the law. However, the fact that such choice is made public allows a debate about these second order choices, promoting a form of judicial accountability. Moreover, a more articulated presentation of the different alternative teleological interpretations can often be found in the opinions of the Advocate Generals. Mitchel Lasser has noted that the legitimacy of the reasoning of the Court of Justice is, in fact, supported by the co-existence of two argumentative modes: a more magisterial, syllogistic and deductive mode, to be found in the judgements of the Court; and a more personal and teleological one, to be found in the Opinions of its Advocates Generals.[27] But he also noted that they finally coincide at a meta-purpose or meta-teleological level.

The difference between the legal reasoning of the Advocate Generals Opinions and the Court's judgments is explicable by different reasons but among the most important of them it is certainly the particular character of judicial deliberation at the Court. The lack of dissenting opinions and the constraints of collective deliberation (which, moreover, takes place in a foreign language) no doubt helps explaining the different nature of the reasoning of the judgements of the Court, when compared with the Opinions of its Advocate Generals. In this respect, one of the functions of the Advocate Generals, by their broader discussion of the systemic impact of the individual case and their identification of the alternative teleological foundations for a certain interpretation, is to map to the Court and to the legal community the deeper normative choices involved in a particular case. In doing so they provide a basis to understand better how the judgment of the Court fits into a particular systemic and meta-teleological understanding of the EU legal order. All this favours judicial accountability.

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[26] **N. McCORMICK**, *Legal Reasoning and Legal Theory*, *supra* note 20.
[27] **M LASSER**, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*, *supra* note 7.

Finally, the Court is also constrained by a 'precedent-oriented' approach. Independently of determining whether or not its decisions have the nature of a classical legal precedent, the Court has consistently stated that deference is due to a well established line of case law. The authority which the Court itself recognises to its previous decisions is a consequence of the need to guarantee the values of coherence, uniformity and legal certainty inherent to any legal system. But these values are particularly important in the framework of a decentralised system of enforcement such as that of the EU legal order. Moreover, a proper use of a 'precedent-oriented' approach is only meaningful if it is coupled with a teleological and meta-teleological legal reasoning. Such form of reasoning is necessary to control that a Court is coherent and consistent not only with respect to the interpretation it gives to particular rules but also with regard to how that interpretation fit into its broader pattern of decision making. In other words, it is not enough for a court to be consistent in how interprets a particular legal rule. It is necessary for that court to be consistent in its interpretation of that rule in the light of its interpretation of the entire legal system.

Zagrebelsky (former President of the Italian Constitutional Court) has stated that discretion is unavoidable in the judicial function.[28] It is even more so, I would argue, in a pluralist, open and dynamic system of law such as the EU legal order. In a context of this type, the importance of teleological interpretation (both at a rules and systemic level) is both a product of the nature of the legal order, itself, and, actually, the best form of constraint on the exercise of the judicial function. It forces the Court to highlight its normative understanding of the EU legal order and it creates a yardstick to better assess the coherence and consistency of its case law. It also creates an opportunity for a broader debate on the nature of the EU legal order and its underlying values. While more formal forms of legal reasoning would hide discretion and preclude debate, teleological reasoning fosters the conditions necessary for such a debate, in which the plurality of actors that 'construct' the EU legal order can participate. It is to that that I will turn next.

II. A court among courts

[28] See footnote 24.

The Court of Justice is one in a community of legal actors that 'constructs' the EU legal order. Such constitutional pluralism means that the development of EU law is dependent on a discursive process with other actors and that it is both shaped by that discourse and has to be shaped in the light of its likely 'appropriation' by those actors. But what consequences ought therefore to be taken from such constitutional pluralism in institutional terms?

Apart from the methodological constraints of interpretation, the Court's role is also a product of institutional constraints. The European Court of Justice is one actor in a community of actors that composes the EU legal order. The success of this legal order was the product of the cooperation between the Court of Justice and the different national legal actors. First, EU law is today a source of rights to which litigants can appeal; in this way, EU law has given individuals a direct stake in the promulgation and implementation of this legal order. One could say, along with Burley and Mattli, that "the Court created a pro-community constituency of private individuals by giving them a direct stake in promulgation and implementation of Community Law".[29] The court has also benefited from the questions posed by national courts; these have in a sense helped to shape EU law. It was often national courts that proposed some of the most dynamic and creative interpretations of Community law.[30] At the same time, these same national courts provided ECJ decisions with the same authority of national judicial decisions.[31]

This created a dynamic of cooperation between national courts and the European Court of Justice and a dynamic of development of Community law between litigants that fed the case law of the Court of Justice. This also means, however, that the development of EU law is at least partially a function of, or dependent upon, national courts and national litigants.

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[29] **A.M. BURLEY and W. MATTLI**, "Europe Before the Court: A Political Theory of Legal Integration", *International Organisation*, 1993, 47, p. 41, p. 521.

[30] This created a dynamic that Volcansek has characterised as 'a pattern of positive reinforcement for national courts seeking preliminary rulings'. In her words: "[…] the Court of Justice accepted all conceivable requests from national courts and invited wide participation"; **M.L. VOLCANSEK**, *Judicial Politics in Europe*, New York, Lang, 1986, p. 265.

[31] Why national courts were willing and available to do so is another question; **J.H.H. WEILER**, "Journey to an Unknown Destination: A retrospective and Prospective of the European Court of Justice in the Arena of Political Integration", *Journal of Common Market Studies*, 1993, pp. 417-ff., at p. 423; **A.M. BURLEY and W. MATTLI**, "Europe Before the Court" *supra* note 30, at p. 60. In the same sense, **J.H.H. WEILER**, "A Quiet Revolution: The European Court of Justice and its Interlocutors", *Comparative Political Studies*, 1994, pp. 510-534. See also the chapters by **K. ALTERN**, **W. MATTLI and A.M. SLAUGHTER**, as well as **A.S. SWEET** in **A.M. SLAUGHTER, A.S. SWEET and J.H.H. WEILER**, *The European Court and National Courts-Doctrine and Jurisprudence: Legal Change in its Social Context*, Oxford, Hart 1998.

They set an important part of the agenda of the EU jurisprudence and they 'make use' of such jurisprudence in the decentralised application of EU law and the Court's rulings. Legal discourse is a two-way road. The role played by a larger legal community means that legal outcomes and interpretations are a function of this larger legal community. What the law is does not become the exclusive property of courts. The rules, decisions, and interpretations given by courts are instead taken over and used by a broader legal community with meanings that may not always be consistent with those originally intended by courts. To a certain extent we could draw a parallel with the free market in the sense that the final allocation of the judicial and legal resources is determined by supply and demand. Interpretative criteria are not simply a result of judicial drafting, but of a complex process of demand and supply of law in which a broader legal community participates. Judicial decisions do not singly command the use of law but are subject to transformation by other legal actors.

This discursive character in the construction of law assumes a particular relevance in the context of the EU legal order because of its decentralised nature. This explains why this discourse is often referred to in the European Union context as a discourse among equals. There is no better example of this than the so-called question of constitutional pluralism in the European Union legal order. It is well known that EU law has supremacy and direct effect in national legal orders. It is to a certain extent the higher law of the Union and the criteria of validity of secondary rules and decisions as well as of all national legal rules and decisions within the scope of application of EU law. However, it is also true that in many national legal orders the supremacy of EU law is often recognised through national constitutions, preserving to a certain extent an idea of supremacy also of national constitutions. This creates fears of constitutional conflict between the European Union legal order and national constitutional legal orders, but those have nevertheless never clearly manifested themselves. From a theoretical point of view, this situation does require a conception of the law which is no longer dependent on a classical, hierarchical understanding and construction of the law and the constancy of supremacy. It is I have called of 'counterpunctual' law.[32] Similar to what happens in music, where you can have different melodies, one can have different mechanisms

[32] **M. P. MADURO**, "Europe and the Constitution: What If This is As Good As It Gets?" in **J.H.H. WEILER and M. WIND**, *European Constitutionalism Beyond the State,* Cambridge, Cambridge University Press, 2003. I develop this point in **M.P. MADURO**, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", *supra* note 2. See also: **N. McCORMICK**, "Beyond the Sovereign State", *Modern Law Review*, 1993, pp. 56-ff.; **N. WALKER**, "The Idea of Constitutional Pluralism", *Modern Law Review*, 2002, pp. 317-ff.

of recognising the supremacy of EU law that can be perfectly compatible with one another so long as they lead to the same result.[33] Thus, to take full advantage of this idea of legal and constitutional pluralism we need to conceive forms of reducing or managing the potential conflict between legal orders and promoting communication between them.

There are in this respect conclusions to be drawn from the institutional and constitutional pluralism of the European Union legal order both for the exercise of the judicial function of national courts and the European Court of Justice. In other words, how should this internal pluralism be framed in the EU legal order? What kind of meta-methodology and values must be shared by all the actors? In other words, what are the conditions and the language necessary for such communication.

First of all, there is a requirement of systemic compatibility. Different legal systems and institutions can defer to each and accommodate their jurisdictional claims so long as they are compatible in systemic terms. For example, the supremacy and direct effect of EU law is accepted and not interfered with by national constitutional orders because it is assumed, and properly so, that there is a systemic compatibility; that is, an identity as to the essential values of the two systems.[34] EU law does not challenge the constitutional identity of national constitutional orders because it is grounded on the same legal values. The same approach has to a certain extent been adopted by the European Court of Human Rights regarding potential conflicts between the European Convention case law and acts of the European Union.[35] Both the national constitutional approaches and the ECHR approach can be seen as the other side of the development by the Court of Justice of the basic principles of the European Union legal order precisely by reference to national constitutional orders and also by reference to the European Convention of Human Rights and Freedoms. This fostered the systemic compatibility necessary to support a fruitful dialogue between courts and prevent conflicts between their respective legal orders.

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[33] The metaphor of counterpoint is taken up and developed by Judge **K. SCHIEMANN** in "Europe and the loss of sovereignty", *International and comparative law quarterly*, 2007, pp. 475-489.

[34] **M.P. MADURO**, "Contrapunctual Law: Europe's Constitutional Pluralism in Action" in **N. WALKER**, *Sovereignty in Transition, supra* note 2, at p. 504; **A.M. SLAUGHTER, A.S. SWEET and J.H.H. WEILER**, *The European Court and National Courts-Doctrine and Jurisprudence: Legal Change in its Social Context*, *supra* note 32; **B. De WITTE**, "Direct Effect, Supremacy, and the Nature of the Legal Order", in **P. CRAIG and G. De BÚRCA**, *The Evolution of EU Law, supra* note 18, pp. 177-213.

[35] **E.C.H.R**., *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi [Bosphorus Airways] v. Ireland,* 30 June 2005.

But such decentralised development of systemic compatibility is a product of another necessary requirement imposed on the judiciary in a pluralist context: institutional awareness. Courts must increasingly be aware that they don't have a monopoly over rules and that they often compete with other institutions in their interpretation. They have to accept that the protection of the fundamental values of their legal order may be better achieved by another institution or that the respect owed to the identity of another legal order should lead them to defer to that jurisdiction. This requires courts to both develop instruments for institutional comparison and to set the limits for jurisdictional deference at the level of systemic identity.

The third requirement imposed on the courts developing such a pluralist and decentralised legal order is the sharing of the same hermeneutic framework. This is particularly the case where a legal order risks being asymmetric. In the case of the EU legal order, it is as important for national courts to know EU rules as it is for them to understand the particular methods of interpretation of EU rules. National courts when acting as EU courts have also to have a different institutional understanding of their role. They are obliged to reason and justify its decisions in the context of a coherent and integrated European legal order. In fact, the European legal order integrates both the decisions of national and European courts interpreting and applying EU law. In this context, any judicial body must justify their decisions in a universal manner by reference to the EU context. The decisions of national courts applying EU law must be grounded in an interpretation that could be applied by any other national court in similar situations. This is the core of the CILFIT doctrine.[36] It requires national courts to decide as European courts and to internalise in their decisions the consequences to the European legal order as a whole.

As I stated in the beginning, internal pluralism is not the only form of pluralism. Nowadays, legal pluralism has a broader dimension because, increasingly, legal orders communicate. This is the domain of what I described as external pluralism. This form of pluralism has also promoted forms of dialogue between courts.[37] I think there are three ways

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[36] **E.C.J.,** Case 283/81, *Cilfit,* 1982, ECR, p. 3415.

[37] **A. ROSAS**: With a little help from my friends: International case-law as a source of reference for the EU Courts The Global Community – YILJ 2005 Vol. I (2006), p.203.
This issue has been particularly discussed in the US. See for a notable example the debate between Justices Scalia an Breyer "The relevance of foreign legal materials in U.S. constitutional cases: A conversation between

one can use and make reference to foreign legal sources and foreign courts in our own legal order. The first one is largely consensual: when a foreign legal source is mostly a matter of fact in the decision of the court. One example is in the context of private international law where a court might have to use international legal sources or the rules of another legal system as a matter of fact to reach a decision in its case.

The second model of using foreign legal sources starts to be more controversial. It is the use of foreign legal sources or decisions of other courts as an argument of persuasion but not of authority in the context of deliberation and/or the justification of a certain judicial decision. There are three possible reasons to use foreign legal sources and the case law of other courts in the context of another legal order. The first one is intellectual persuasion. It's the same thing basically as scholarship. I ask myself: has that court solved a certain legal problem that is similar in a manner that is convincing to me? If it has, then I will use it. And maybe the best way for me to make clear to the outside world why I've decided this way is by making reference to how that other court has decided.

The second instance is as a form of communication between systems. This is even more complex and controversial. But it is most likely justified when legal systems interpret the same rules or their legal orders communicate or interlock between themselves. It corresponds to the instances of interpretative competition and legal externalities which I've identified above in the context of external pluralism. To a certain extent, looking at the jurisprudence of another court, promotes some form of informal coherence among these legal orders. A good example may be the mutual attention that the European Court of Justice, the European Court of Human Rights, and EFTA court give to each other's case law. Through this communication between legal systems, courts actually co-interpret "shared" rules.

The third possible reason is what former Chief Justice Barak of Israel described, in a rather beautiful metaphor, as foreign law being a mirror of oneself. It is the idea that by looking at other courts you can better differentiate yourself or enter into a process akin to judicial introspection; an effort to better understand what you yourself are doing.

Justice Antonin Scalia and Justice Stephen Breyer", in *International Journal of Constitutional Law*, 2005, No 4, pp. 519-541.

These are three reasons to use foreign legal sources as an argument of persuasion in judicial reasoning. Much more controversial and much more difficult to support is the use of foreign legal sources as legal authority, so as to argue that judges are, to a certain extent, bound by the foreign source. The merits of this approach depend, in my view, on the instrument that the court is called to interpret. The legitimacy of a court comes from a particular political community and it is based on the values of that polity, values that are expressed in the legal document that that the court is supposed to interpret. Hence, to use a foreign legal source in this context, as a mandatory source of authority, is in my view highly contestable. But this might not be so, if the legal instrument the court is supposed to interpret itself adheres to universal values, and if it adheres to them in a manner that indicates that they ought to be interpreted in light of the set of values of a *broader* set of political communities. A good example of this is the South African Constitution. It has a provision that expressly mandates the constitutional court to interpret fundamental rights in the light of international standards of fundamental rights protection.

Courts are thus, increasingly, operating in dialogue with other courts both within their legal order and from other legal orders. In this way they are not only subject to legal pluralism but they shape such legal and constitutional pluralism.

III. Conclusion

I have argued that the increased context of internal and external legal pluralism requires the Court of Justice to adopt particular methods of interpretation and assume a particular institutional position in the context of the European legal order. I have highlighted how the nature of the EU legal order explains and requires an extended recourse to teleological interpretation and comparative law. But I have further noted that teleological interpretation must also take place at the systemic level (meta-teleology) and that the methodology of comparative law should be guided by a requirement of 'best fit' the EU legal order. Furthermore, I have argued that the interpretation of EU law is a function of a border community of actors (notably national courts). This imposes requirements on the reasoning of the Court of Justice (which must not simply decide cases but provide normative guidance to national courts as European courts). It also fosters judicial dialogue and a decentralised development of the EU legal order. In this respect, I've tried to suggest some meta-principles

which ought to guide the Court of Justice and national courts in their respective tasks. I concluded by briefly highlighting how instances of external pluralism may also affect the future role of courts and the nature of their legal reasoning.