Developments

The Interpretation of Community Law by the European Court of Justice

By Giulio Itzcovich [*]

A. Premise

In the legal literature on European integration there is a rather stereotyped tendency to constantly discover new elements of rupture with the past. In the legal domain, at every step we are confronted with some revolutionary novelty arising from European institutions and practices; on a regular basis, we face innovations which are said to mark significant developments in respect of the traditional forms of international governance as well as in respect of the traditional forms of national federalism. The vast literature on the interpretative criteria adopted by the European Court of Justice (hereafter the "ECJ") only partially escapes this tendency.[1] Surely the experience of European legal integration does

[*] Researcher, University of Brescia. I am grateful to Giuseppe Martinico and to all participants in the workshop "The ECJ under siege: new constitutional challenges for the ECJ," Sant'Anna School of Advanced Studies, Pisa, 19-20 December 2008, for their suggestions and observations. A special thank goes to Stanislas Adam and Riccardo Guastini for their many helpful comments and corrections to an earlier version of this article. The errors that remain are, of course, my own. Email: itzcovich@jus.unibs.it.

[1] Without claim to completeness, see R.M. Chevallier, *Methods and Reasoning of the European Court of Justice*, 2 COMMON MKT. L. REV. 21, 21–35 (1964–1965); P. Pescatore, *Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de Justice*, *in* 2 MISCELLANEA W. J. GANSHOF VAN DER MEERSCH 325–63 (1972); H. Kutscher, *Alcune tesi sui metodi d'interpretazione del diritto comunitario dal punto di vista d'un giudice*, RIVISTA DI DIRITTO EUROPEO 283–314 (1976); *id*. at 3–24 (1977); C.J. Hamson, METHODS OF INTERPRETATION – A CRITICAL ASSESSMENT OF THE RESULTS, JUDICIAL AND ACADEMIC CONFERENCE, 27-28 SEPTEMBER 1976 (1976); A. Bredimas, METHODS OF INTERPRETATION AND COMMUNITY LAW (1978); J. Bengoetxea, THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE: TOWARDS A EUROPEAN JURISPRUDENCE (1993) [hereinafter LEGAL REASONING]; David A.O. Edward, *The Role and Relevance of the Civil Law Tradition in the Work of the European Court of Justice*, *in* THE CIVILIAN TRADITION AND SCOTS LAW (D.L. Carey Miller & R. Zimmermann eds., 1997); D.L. Carey Miller & R. Zimmerman, THE CIVILIAN TRADITION AND SCOTS LAW: ABERDEEN QUINCENTENARY ESSAYS 309–20 (1997); A. Arnull, *Interpretation and Precedent in European Community Law*, *in* EUROPEAN COMMUNITY LAW IN THE ENGLISH COURTS 115–36 (M. Andenas & F. Jacobs eds., 1998); A. Albors-Llorens, *The European Court of Justice, More than a Teleological Court*, *in* 2 CAMBRIDGE YEARBOOK IN EUROPEAN LEGAL STUDIES 373–99; T. Koopmans, *The Theory of Interpretation and the Court of Justice*, *in* 1 LIBER AMICORUM IN HONOUR OF LORD SLYNN OF HADLEY – JUDICIAL REVIEW IN EUROPEAN UNION LAW 45–58 (D. O'Keeffe & A. Bavasso eds., 2000); H.G. Schermers & D.F. Waelbroeck, JUDICIAL PROTECTION IN THE EUROPEAN UNION 10 (2001); J. Bengoetxea, N. MacCormick & L. Moral Soriano, *Integration and Integrity in the Legal Reasoning of the European Court of Justice*, *in* THE EUROPEAN COURT OF JUSTICE 43–85 (G. De Búrca & J.H.H. Weiler eds., 2001); J. Joussen, *L'interpretazione (teleologica) del diritto comunitario, in* RIVISTA CRITICA DEL DIRITTO PRIVATO 491–537 (2001); M. Lasser, *Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court*, Jean Monnet Working

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not lack revolutionary ruptures and, also from the viewpoint of legal argumentation, it is true that the interaction between jurists coming from different legal experiences has produced some novelties: for example, an increasing hybridization and crossover effect ("Europeanisation") between patterns of legal reasoning which are characteristic of different national legal cultures.[2] However, this phenomenon has been largely tempered by the typically French syllogistic judicial style of ECJ's rulings. Moreover, despite the novelties identified, the literature on Community law interpretation cannot deny the apparent fact that the interpretative criteria and, more generally, the legal argumentation techniques of the ECJ are essentially the same ones which are familiar to the national legal contexts.[3] It would be surprising if this were not the case, since the judges of the ECJ are trained within the national legal systems and the judgments of the Court are generally expected to be implemented by the national courts. Their grounds must thus be perceived as being legally sound, and not merely political or evocative.

However, even if there is no absolute specificity of Community law as to its interpretation, there are nonetheless some peculiarities of ECJ case law which are worthy to be stressed, systemised and theoretically discussed. Building on the existing literature on Community law interpretation, this study will make some observations in this regard. I will avoid the usual approach of deriving normative consequences and directives from a theoretical reconstruction of the legal nature of the European Community/European Union (hereafter the "Community"). On the contrary, I will investigate the legal nature of the Community on the basis of a survey of the interpretative criteria actually employed by the ECJ. The question I will address is whether Community law is generally conceived and interpreted as international law or as constitutional law, and, in the letter case, I will try to explore which kind of constitution it embodies according to the case law of the ECJ.

Let us first remark that the subject of this study is the interpretation *of* Community law, not the consistent interpretation of domestic law in the light of Community law. This last topic is highly controversial after the *Marleasing* judgment, in which the ECJ stated that national courts are bound to interpret their domestic law "as far as possible, in the light of the wording and purpose of the directive" in order to avoid conflicts between national law

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Paper No. 1/03 (2003), http://www.jeanmonnetprogram.org/papers/03/030101.html; M. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY (2004); O. Pollicino, *Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint*, 5 GERM. L.J. 283 (2004); A. ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE 515 (2006); M. Poiares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism,* EUR. J. LEGAL STUDIES (2007), http://www.ejls.eu/2/25UK.pdf; E. RUSSO, L'INTERPRETAZIONE DEI TESTI NORMATIVI COMUNITARI (2008).

[2] *See* Case C-148/78, Ratti, 1979 E.C.R. 1629, in which the ECJ makes recourse to the typical common law doctrine of estoppel. *See generally* G.F. Mancini & D.T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, 1 COLUM. J. EUR. L. 397 (1995).

[3] *See* J. Bengoetxea, N. MacCormick, L. Moral Soriano, *supra* note 1, at 48 ("[T]here is no special case of European legal reasoning, nor anything particularly European about the way the ECJ proceeds to justify its decisions.").

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and Community law.[4] The requirement of consistent interpretation and the topic of the purposive and result-oriented approach to statutory interpretation give rise to various interesting issues—practical problems and also problems of theoretical import—which nonetheless exceed the subject area of this study.[5]

B. Rules on Community Law Interpretation. The Problem of the Sources

The treaties establishing the European Communities and their subsequent modifications do not contain any provision concerning the interpretation of Community law. Moreover, there are no provisions of secondary Community law (regulations, directives, decisions, etc.) aiming at regulating the interpretation of the EC Treaties or the interpretation of the normative acts adopted by the Community. The Charter of Fundamental Rights of the European Union (also known as "Nice Charter") marks an exception, as it details the criteria to be followed in its interpretation. However, the European Council at Nice did not include the Charter in the Nice Treaty and therefore the Charter is not legally binding—it is a typical act of soft law. The Treaty establishing a Constitution for Europe and the Treaty of Lisbon integrated the Charter within primary Community law. However, after the negative referenda in France, the Netherlands and Ireland, the future of the Charter remains uncertain. Today the Charter has mainly a political value and, at the most, it might play an auxiliary role in the implementation of the general principles of Community law.[6] I will not deal here with a regulation concerning the criteria to be adopted in interpreting a document which almost lacks any legal relevance, although such regulation presents some interest with regard to the topic of the "multilevel" protection of fundamental rights within the EU.[7]

Therefore, there is no provision concerning the interpretation of Community law, there is no explicit legal norm on the matter. By "explicit legal norm" is meant a norm which

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[4] Case C-106/89, Marleasing v. Comercial Internacional de Alimentación, 1990 E.C.R. I-4135 (broadening the scope of the requirement of consistent interpretation originally devised by ECJ); Case C-14/83, Von Colson and Kamann v. Land Nordrhein-Westfalen, 1984 E.C.R. 1891.

[5] *But see* G. Betlem, *The Doctrine of Consistent Interpretation – Managing Legal Uncertainty*, 22 OXFORD JOURNAL OF LEGAL STUDIES 397 (2002); M. Amstutz, *In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning*, 11 EUR. L.J. 766 (2005); M. Klamert, *Judicial Implementation of Directives and Anticipatory Indirect Effect: Connecting the Dots*, 43 COMMON MKT. L. REV. 1251 (2006).

[6] The Charter of Nice has played such an auxiliary role in some judgments of the ECJ. For instance, on family reunification see Case C-540/03, Parliament v Council, 2006 E.C.R. I-5769 ("While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance.") and Joint Cases C-402/05 & C-415/05, Yassin Abdullah Kadi and Al Barakaat International Foundation, Judgment of 3 September 2008 (regarding the freezing of funds of persons suspected of terrorism).

[7] *See* TUTELA DEI DIRITTI FONDAMENTALI E COSTITUZIONALISMO MULTILIVELLO (A. D'Atena & P. Grossi eds., 2004); LA TUTELA MULTILIVELLO DEI DIRITTI: PUNTI DI CRISI, PROBLEMI APERTI, MOMENTI DI STABILIZZAZIONE (P. Bilancia & E. De Marco eds., 2004); ASPETTI E PROBLEMI DEL COSTITUZIONALISMO MULTILIVELLO (P. Bilancia & F.G. Pizzetti eds., 2004).

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constitutes the meaning, or one of the possible meanings, of a legal provision.[8] Explicit legal norms thus result form normative texts, which are (a) texts, i.e. written documents, (b) expressing norms which are generally regarded as binding, authoritative, mandatory upon every interpreter, and endowed with *erga omnes* effects. This does not mean, however, that we also lack implicit legal norms on the interpretation of Community law: norms which do not result from normative texts, because (a) they are customary norms—they are not derived by texts, but emerge from a practice which is constantly followed under the belief that it is obligatory; or because (b) they are norms which are formulated by the legal doctrine or by the case law—they do not stem form an authoritative source, but from an influential source; they have no binding force, but they enjoy just a persuasive force.

However, in Community law we may find some criteria of interpretation which are established by the case law of the ECJ. In other words, there are interpretative techniques which the ECJ is used to follow but which are not codified in a normative text because they have not been prescribed by the Community legislator. Moreover, this interpretative criteria have often been "reconstructed" (described and/or prescribed) by Community legal doctrine. Legal doctrine enjoys a persuasive force; it is not binding upon the interpreter, but it interacts with the system of courts and aims at directing the judges. The legal doctrine formulates directives and criteria which may be actually followed by the practice because they are influential, not because they are formally binding.

C. Community Law and International Law: Autonomy and Heteronomy

In order to ascertain the interpretative methods of Community law it is necessary to analyse Community doctrine and jurisprudence. Before engaging in such an analysis, however, it is necessary to take into consideration one possible objection to this approach. One may indeed argue that a formal regulation of Community interpretation exists and that such regulation ought to be found in the Vienna Convention on the Law of Treaties of 1969.

Article 31 of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[9] In addition, the interpreter is bound to take into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" and "any subsequent

[8] R. Guastini, DALLE FONTI ALLE NORME 30 (1990); R. Guastini, IL DIRITTO COME LINGUAGGIO. LEZIONI 31 (2006).

[9] Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

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practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[10]

The last rule is fairly important for our analysis. It means that the actual behaviour of the contracting parties is a relevant factor for treaties interpretation. In case of doubt on the content and extension of the duties accepted by the states, it is necessary to take into consideration, among other things, the way in which the parties have intended to comply with the treaty attributing to it certain content and a certain scope. The will of the parties is the formal source of validity of the treaty and, in order to reconstruct such a will, it is necessary to pay attention to the courses of action which the parties have adopted after the treaty conclusion.

All this is not surprising. International treaties are, to a certain extent, contracts between sovereign states. It is a very traditional and perhaps old-fashioned conception of the treaty, but it still holds some explicative and normative force. It is—or maybe was—generally said that, as the contract stems from the convergence of the wills of the private parties, so the treaty derives its validity from the gathering of the "wills" of the states. This conception is reflected, among other things, in the legal language. The German word *Vertrag* means contract as well as treaty, in English, French, Spanish and in other languages the parties of a treaty are called "contracting parties" and we speak interchangeably of "international treaty" and "international convention."

However, the fundamental theoretical point is the following: the international treaty is, just like the contract, an expression of autonomy. In the case of contracts one generally speaks of "private autonomy"; in the case of treaties one speaks of external sovereignty, i.e., the capability of the state of becoming a party to an international treaty and of binding itself through manifestations of will. When we have a legal source that is an expression of autonomy, the individual who is bound by the legal norm is the same one who has contributed to create the norm and to give it a certain content. Statutes, on the contrary, are not an expression of (private) autonomy but rather of (public) authority. To put it differently, statutes are heteronomous legal sources. The author of a statute may be bound by the norm he has enacted, but such norm is in general directed to regulate the behaviour of a community of people who have not directly taken part into its enactment.

This has some consequences on the interpretative criteria of the heteronomous legal sources and of the autonomous legal sources. In the case of contract, the interpret may be called to take into account the "common intention" of the contracting parties and, in order for him to be able to assess such common intention, he may be required to pay attention to "their overall behaviour, even if subsequent to the conclusion of the contract" (Article 1362 Italian Civil Code). The same applies, as we have already seen, in the case of treaty

[10] Vienna Convention, art. 31(3).

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interpretation. So, to take just one example, in one of the most influential treatise on international law of the 19th century in Continental Europe we may read that "the international treaty is not only called convention, but it is actually a convention [*Vertrag*: treaty, contract]. Therefore, for its interpretation the principles which have been developed by private law doctrine are largely applicable."[11] On the contrary, in case of statutory interpretation, the interpreter is required to give effect to the literal meaning, i.e., "the sense . . . exposed by the proper meanings of the words," and to the will of the legislator (Article 12 Preliminary Provisions of the Italian Civil Code). It would make no sense that the judge, in order to determine the extension of the ban on theft, were to take into consideration the general behaviour of the citizens or, in hypothesis, the behaviour of a class of citizens, such as the thieves.

These observations are pretty obvious, but they bear an important consequence on the problem of Community law interpretation, as they hint at a fundamental theoretical and political issue, which may be expressed in the following terms: is Community law an expression of the autonomy (better, sovereignty) of the states, or is it an autonomous, authoritative source of law, which is binding upon the states even when it conflicts with their wills?

To this question, there is no clear-cut, simple and neutral solution. It is a question which still sharply divides the legal theory on European integration. Is the Community an international organisation whose effectiveness still depends on the ongoing will of the states to comply with its norms? Or may the Community be compared, to a certain extent, to a state, and in particular to the federal state, because it is capable of enacting norms which are binding and effective upon the states and their citizens even when they conflict with state's will and interests?

One may arrive at a differentiated answer. One may argue that EC Treaties continue to be international treaties, i.e., an expression of a common will of the states, and that the Community secondary law, on the contrary, is an expression not of state sovereignty, but of the authority of Community institutions. Nonetheless, if we are interested in the interpretation of Community law as it is practised by the ECJ, this differentiated solution has no bearing on our topic. With regard to Community law interpretation, no difference can be drawn between primary and secondary Community law. Although the ECJ tends to be more creative when it interprets the Treaties, the legal arguments and interpretative criteria it employs seem to be essentially the same ones in the case of primary and secondary Community law.

It is perhaps proper to circumscribe the importance of the alternative which opposes the federal state and the international organisation, and which conceives Community law as

[11] F. von Liszt & M. Fleischmann, DAS VÖLKERRECHT SYSTEMATISCH DARGESTELLT (1925).

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being either an expression of the sovereignty of the states or a limit to their sovereignty. With regard to the legal nature of the Community, already in the early sixties a standard answer had emerged from the scholarly debate. The Community is not a federal state, not even a federal state "in the making," nor is it an international organisation; on the contrary, it shall be regarded as a *sui generis* legal order, i.e., as a legal order which remains distinct both from federal law and from international law.[12] This was a paradoxical definition of the legal nature of the Community. Being purely negative and content-void, it showed the impossibility of a "systematic capture" of the Community and it aimed solely at expressing the crisis of the international/national law dichotomy.

Moreover, with regard to the interpretation of Community law, it is possible to set aside the controversy on the legal nature of the Community, in order to approach the topic in a different way, by simply taking into consideration the interpretative techniques actually used by the ECJ. That is, instead of deriving directives on the better ways to interpret Community law from general theories on the nature of the Community (international, federal or *sui generis*), it is possible to proceed in the opposite way, by looking at the way in which, as a matter of fact, Community law is interpreted and applied, in order to sketch out some hypothesis on the legal nature of the Community. Staying on this analytical and realistic plan, as it is opposed to a dogmatic and conceptualist approach, we may make the following observations.

One may note that the possibility of extending the interpretative criteria established by the Vienna Convention to Community law, or even solely to Community primary law, is precluded by the long-standing and well-established case law of the ECJ, which denies that Community law may be identified with international law. In the leading case *Van Gend en Loos* of 1963, the ECJ still considered Community law as constituting "a new legal order of international law," but soon the ECJ started to underline the autonomy of Community law until it came to their sharpest distinction already in the *Costa* case of 1964.[13]

Why did the ECJ, already in the first part of the Sixties, feel the necessity to differentiate Community law from international law? One of the reasons surely has been the will of the ECJ to exempt Community law from some well-established international law doctrines and

[12] Among the first theories on the *sui generis* nature of the Community, *see* E. Van Raalte, *The Treaty Instituting the Coal and Steel Community*, 1 INT'L & COMP. L.Q. 73 (1952); P. Guggenheim, *Universalismo e regionalismo europeo nel diritto internazionale*, *in* COMUNITÀ INTERNAZIONALE 422 (1953); R. Monaco, *Le comunità sopranazionali nell'ordinamento internazionale*, *in* COMUNITÀ INTERNAZIONALE 441–458 (1953); L. Delvaux, *La notion de supranationalité dans le Traité CECA*, *in* 2 ACTES OFFICIELS DU CONGRÈS INTERNATIONAL D'ETUDES SUR LA CECA (MILAN-STRESA, 31 MAI-9 JUIN 1957) 227 (1957).

[13] See the classical analysis of E. Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. OF INT'L L. 1 (1981); J.H.H. Weiler, IL SISTEMA COMUNITARIO EUROPEO. STRUTTURA GIURIDICA E PROCESSO POLITICO (1985); H. Rasmussen, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE (1986); J.H.H. Weiler, THE CONSTITUTION OF EUROPE (1999); T.C. Hartley, CONSTITUTIONAL PROBLEMS OF THE EUROPEAN UNION (1999). For more references and a detailed account, see G. Itzcovich, TEORIE E IDEOLOGIE DEL DIRITTO COMUNITARIO 115 (2006).

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interpretative methods. Amongst these interpretative methods, there was, as a direct consequence of the principle according to which limitations of sovereignty should not be presumed, that the treaties should be interpreted strictly. To presume limitations of sovereignty, i.e., to create new obligations upon the states by means of legal interpretation, would have meant a multiplication of potential breaches to conventional international law. In order to avoid international conflicts, the early legal doctrine, from Grotius and Vattel since the *Lotus* decision of the Permanent Court of International Justice, recommended to interpret international law in a strict way, so that mutual rights and duties of the states were to be clearly defined; sometimes, that doctrine used to remind the general private law principle of the *favor debitoris.*[14]

Moreover, a fundamental interpretative principle was the one already mentioned, which required – and which still requires, according to the Vienna Convention – to take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." But in the Sixties and in the Seventies the ECJ and the Community legal doctrine wanted to broaden, and not to limit, the mutual rights and duties of the states, by extending the scope and the effectiveness of Community law; in order to achieve that goal, the ECJ and the Community legal doctrine should conceive Community law as constituting an autonomous legal order, i.e., a legal order which distinguishes itself from international law as well as from domestic law.[15] Indeed, international law represented a legal system which was too sensible to the interests and practices of its institutional actors, the states. The ECJ and the Community legal doctrine aimed at transforming Community law in a heteronomous, authoritative legal source. Community law should rule not just as an expression, but as an effective limit to states' sovereignty.

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[14] S.S. Lotus (France v. Turkey), 1927 P.C.I.J., (ser. A) No. 10, 18 (Sept. 27) ("International law governs relations between independent States. The rules of law binding upon States therefore emanate form their own free will as expressed in conventions or by usages. . . . Restrictions upon the independence of States cannot therefore be presumed."). After the II World War, the growing tendency toward international organisation eroded this hermeneutic principle. *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ REP. 174, 180 (Apr. 11) ("[T]he rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."). *See also* H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 THE BRITISH YEARBOOK OF INT'L LAW 48 (1949).

[15] *See, e.g.*, G. Jaenicke, *Die Europäische Gemeinschaft für Kohle und Stahl (Montan-Union): Struktur und Funktionen ihrer Organe*, 14 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 727, 729 (1951); C.F. Ophüls, *Zwischen Völkerrecht und staatlichem Recht – Grundfragen des europäischen Rechts*, 4 JURISTEN-JAHRBUCH 137 (1963/63); A. Trabucchi, *Preambolo*, *in* 1 TRATTATO ISTITUTIVO DELLA COMUNITÀ ECONOMICA EUROPEA, COMMENTARIO 18, 25 (R. Quadri, R. Monaco & A. Trabucchi eds., 1965); L.-J. Constantinesco, *La specificité du droit communautaire*, REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 1 (1966); P. Pescatore, *International Law and Community Law: A Comparative Analysis*, 7 COMMON MKT. L. REV. 167 (1970).

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And the achievement of this transformative objective could not but reflect upon the criteria to be adopted in the interpretation of Community law. Evolutive and dynamic interpretation of Community law should become the main instrument of that policy of Community law. This will be shown in the following pages, which will concentrate principally, although not exclusively, to the Community law interpretation during the years of the constitutionalization of the Treaties.

D. The Preliminary Ruling Procedure

Before we move to the analysis of the interpretative methods of the ECJ, it is necessary to consider the subject of the preliminary ruling proceedings. The very existence of this procedure explains why is it so important what the ECJ says about the interpretation of Community law. The reason is that the preliminary ruling procedure is designed to secure the uniform interpretation of Community law throughout the Community. According to Article 234 (formerly 177) of the EC Treaty, the ECJ has jurisdiction to give preliminary rulings concerning the interpretation of the Treaty and the validity and interpretation of acts of the institutions of the Community. Where any such question is raised in a case pending before a national court, the court can (or must, if it is a court of last instance) refer the question to the ECJ.

Following Wróblewski, in legal theory it is common to distinguish three uses of the word "interpretation."[16] Firstly, interpretation in the widest sense signifies an understanding of a cultural object, e.g., interpretation of a painting. Secondly, interpretation in a wide sense is meaning attribution to any spoken or written language. Interpretation signifies understanding of language. Thirdly, interpretation in a strict sense refers to the situation in which there are doubts concerning the proper understanding of a text; interpretation signifies removing these doubts. Given this last strict significance of interpretation, we may say that Article 234 establishes the ECJ's monopoly on the interpretation of Community law.[17] Obviously the effectiveness of the interpretation monopoly depends upon the willingness of national judges to comply with their duty to address the ECJ questions on the interpretation of Community law. Nonetheless, from a legal point of view, it is apparent that EC law attributes an interpretative monopoly to the ECJ. To describe such monopoly, Community jurists often say that in preliminary ruling

[16] J. Wróblewski, THE JUDICIAL APPLICATION OF LAW 87 (1992).

[17] *See also* Treaty Establishing the European Community, art. 292, Dec. 29, 2006, 2006 O.J. (C 321E) 172 ("Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein."). In the *Mox-case,* Case C-459/03, Commission v Ireland, 2006 E.C.R. I-4635, the ECJ concluded that, by instituting dispute-settlement proceedings against the UK under the UN Convention on the Law of the Sea, Ireland had violated the "interpretative monopoly" of the ECJ under Article 292 EC Treaty: according to the ECJ, the provisions of the UN Convention formed an integral part of the Community legal order, and thus Ireland should have abstained from submitting a dispute concerning its interpretation and application to an arbitral tribunal.

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proceedings the ECJ is competent to interpret Community law and the national judge is competent to enforce it. If the national court can enforce Community law without interpreting it, because its meaning is clear, then the national court must enforce it. If, instead, it is necessary to make recourse to interpretation because there are doubts on the meaning of Community law, sooner or later the question on the interpretation must be referred to the ECJ.

This distribution of competences between the ECJ and national judges may be reconstructed in terms of interpretation vs. application[18] and in terms of hard cases vs. easy cases. If the case pending before the national court is easy because the meaning of Community law is clear and non-controversial, then the national judge must enforce it; if the case is hard because there is some doubt on the meaning of a Community provision, then the national judge of last instance must refer it to the ECJ.

However, as we will shortly see, this clear-cut distinction may not be in practice as clear as one might think.

E. The Hard Distinction between Easy and Hard Cases: The *Cilfit* Case

Within the preliminary ruling proceeding the distribution of competences between national courts and ECJ is centred on the distinction between interpretation (in the strict sense) and application (or enforcement) of Community law, or, to put it differently, it is centred on the distinction between easy cases, where no interpretation is required, and hard cases, where it is necessary to interpret. But how shall we distinguish between easy cases and hard cases, i.e., between interpretation and immediate understanding followed by an unproblematic application?

The ECJ has decided that the very notion of interpretation under Article 177 (now 234) may be subject to interpretative controversies.[19] This issue has been confronted by the ECJ in the *Cilfit* case.[20] The Italian *Corte di Cassazione* had referred to the ECJ a question concerning the scope and the limits of the duty to submit a preliminary ruling request to

[18] The distinction between interpretation and application has originally been drawn by the ECJ. *See* Joint Cases C-28/62, C-29/62 & C-30/62, Da Costa en Schaake v. Administratie der Belastingen, 1963 E.C.R. 61 ("When it gives an interpretation of the Treaty in a specific action pending before a national court, the Court [of Justice] limits itself to deducing the meaning of the Community rules from the wording and spirit of the Treaty, it being left to the national court to apply in the particular case the rules which are thus interpreted.").

[19] *See* Case C-13/61, De Geus en Uitdenbogerd v. Bosch, 1962 E.C.R. 89 ("Since the meaning of the words 'the interpretation of the Treaty' in Article 177 may itself raise a question of interpretation, the National court is free to put its request in a simple and direct form, leaving to the Court of Justice to rule on that question only within the limits of its jurisdiction.").

[20] *See* Case C-283/81, Cilfit v. Ministero della Sanità, 1982 E.C.R. 3415.

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the ECJ under Article 177. The *Corte di Cassazione* asked the ECJ whether Article 177 lays down an obligation to submit the case which precludes the national court from determining if the question raised is justified or whether Article 177 makes that obligation conditional on the prior finding of a reasonable interpretative doubt. In other words, is the national judge always bound to suspend the proceeding and to refer the question to the ECJ when one of the parties to the case raises some doubts on the interpretation of Community law? This would certainly be an excessive conclusion: the parties would have been given the right to always suspend the proceeding by submitting unfounded and purely speculative questions. On the other hand, a broad and penetrating control of the national judge on the soundness of the interpretative question would contravene the *ratio legis* of the preliminary ruling proceeding, because such control could jeopardize the objective of a uniform application of Community law among all the Member States of the Community.

In the *Cilfit* case, the ECJ adopted a midway solution between these two possible extremes. The ECJ ruled out that the national judge would bound to suspend the proceeding and refer the question to the ECJ when the solution of the interpretative question is "not relevant," because "the answer to that question, regardless of what it may be, can in no way affect the outcome of the case." In addition, the ECJ ruled out the existence of a duty upon the national judge to refer to the ECJ when the interpretative question, although relevant, is "materially identical with a question which has already been the subject of a preliminary ruling in as similar case," or when "previous decisions of the ECJ have already dealt with the point of law in question, irrespective of the nature of the proceedings . . . even though the questions at issue are not strictly identical."

In case of an interpretative question which is relevant and substantially new, the ECJ held that the national judge is obliged to suspend the proceedings and refer the question to the ECJ, "unless it has established that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt." Any reasonable doubt must thus be solved by the ECJ and solely by the ECJ. Instead, when the doubt is unreasonable, because it is merely a pretext to suspend the proceeding, then the national court can decide not to refer the matter to the ECJ and it can directly rule on the "question." The point is that in the former case—the hard case, the reasonable doubt—the interpreter enjoys discretion, and such discretion must be exercised by the ECJ, while in the latter case—the easy case, the unreasonable doubt—the interpreter enjoys no discretion, because he is clearly bound by the letter and spirit of the law and no genuine interpretative question arises.

However, the distinction between easy cases and hard cases is highly problematic. It is a distinction which is more or less clear in theory, but in practice it is a hard distinction to be drawn. The distinction between the cases in which the judge enjoys discretion and the cases in which he does not enjoy such discretion depends on a highly discretional decision

of the judge.[21] It may happen—and it has happened on several occasions[22]—that a judge, by holding that the case at hand is clear and that there is no doubt whatsoever, adjudicates in a way which is incompatible with Community law and the case law of the ECJ. The ECJ was fully aware of this danger and therefore in the *Cilfit* case it laid down directives concerning the criteria to be adopted by the national judge in order to assess the soundness of the preliminary question.

The first criterion laid down in the *Cilfit* case has already been mentioned: there is a genuine "interpretative question" only when the "correct application of Community law is [not] so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved." Moreover, if the judge comes to the conclusion that the case is clear and that it poses no serious interpretative question, that is not enough: "the national court or tribunal must [also] be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice." In order to conduct such evaluation, the national judge shall take into consideration "the characteristic features of Community law and the particular difficulties to which its interpretation gives rise."

What are these characteristic features and particular difficulties? In the *Cilfit* case the ECJ held that the national judge shall bear in mind that "Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions." Moreover, even where the different language versions are entirely in accord with one another, the national judge shall bear in mind that "Community law uses terminology which is peculiar to it," because it employs "legal concepts" that "do not necessarily have the same meaning in Community law and in the law of the various Member States." Finally, the ECJ ruled that "every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a

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[21] R. Guastini, L'INTERPRETAZIONE DEI DOCUMENTI NORMATIVI 36 (2004); R. Guastini, DALLE FONTI ALLE NORME 77, 80 (1990) ("[T]he uncertain boundaries between 'light' and 'penumbra' are the object of interpretative decisions . . . the penumbra is the outcome of the discretion of the interpreters."). *See also* Bengoetxea, MacCormick & Soriano, *supra* note 1, at 55 ("The distinction between clear cases and hard cases is pragmatic. Cases are problematized or clarified depending on different circumstances.").

[22] Most recently, see Italian *Consiglio di Stato*, Judgment of 08/08/2005, n. 4207, GIURISPRUDENZA COSTITUZIONALE 3391 (2005). By making reference to—and by misinterpreting—the *Cilfit* judgment of the ECJ, the *Consiglio di Stato* avoided to refer a preliminary question which was undoubtedly relevant. *See* G. Itzcovich, *Fundamental Rights, Legal Disorder and Legitimacy: The* Federfarma *Case*, Jean Monnet Working Paper, No. 12/08, http://www.jeanmonnetprogram.org/papers/08/081201.html. Among the most famous cases of omitted preliminary reference, see the Cohn-Bendit case, French *Conseil d'État*, Judgment of 22/12/1978, n. 11604, 36 COMMON MKT L. REV. 701 (1979), in which the French Council of State openly challenged the ECJ, as it blocked a request from a lower French administrative court for an ECJ preliminary ruling, and it held that the Community directives cannot be relied upon by individuals in action for annulment of individual administrative decisions (a deportation order on the well-known political activist Daniel Cohn-Bendit).

whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied."

F. The Interpretative Methods of Community Law

So, in the *Cilfit* case the ECJ tries to clarify what is a reasonable interpretative doubt and proposes a set of criteria for interpreting Community law. By borrowing and freely adapting a useful classification of Bengoetxea,[23] it is possible to order such criteria in the following way:

1) *Linguistic (or semiotic) criteria*. They derive legal arguments form the semantic and syntactic features of the language in which legal provisions are expressed, or from the comparison of the different language versions in which legal provisions are formulated (*Cilfit*: the judge shall bear in mind that "Community legislation is drafted in several languages" and that "Community law uses terminology which is peculiar to it").

2) *Systemic (or contextual) criteria*. They take into consideration the normative context in which the legal provision is placed and derive consequences—in a logically binding way or, more often, in a way which is not logically binding, but which is persuasive—form other legal norms belonging to the same normative text, or belonging to the same area of the legal system, or belonging to different areas of the same legal system (*Cilfit*: "every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole"). The comparative argument may be ranked amongst these systemic criteria of interpretation, because it derives interpretative consequences from legal norms which belong to different legal systems.

3) *Dynamic criteria*. They take into consideration not the wording of the provisions, nor the "static system" to which they belong, but the objectives which Community law pursues, or which Community law should pursue according to the interpreter. The foreseeable consequences of the decision are taken into consideration, as well as the opportunity of granting the effectiveness of Community law and the opportunity of promoting the development of Community law towards its pre-eminent purpose: the integration of the legal orders of the Member States within a supranational legal order and their evolution towards "an ever closer union among the peoples of Europe," according to the words of the Preamble of the Treaty (*Cilfit*: "every provision of Community law must be . . . interpreted in the light of . . . the objectives [of Community law] and to its state of evolution at the date on which the provision in question is to be applied").

[23] LEGAL REASONING, *supra* note 1, at 234*;* see also Bengoetxea, MacCormick & Soriano, *supra* note 1*,* at 58 (Table 3.1.).

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In this respect it is possible to recall another leading case: in the *Costa* decision the ECJ invented the famous phrase "the spirit, the general scheme and the wording of the EEC Treaty." Without forcing the text, it can be said that the "wording" corresponds to the linguistic criteria, the "general scheme" corresponds to the systemic criteria and the "spirit" of the Treaty corresponds to the dynamic criteria of interpretation.

I. The "Wording" of Community Law. The Linguistic Criteria

Among the linguistic criteria employed by the ECJ there is the traditional one of the "proper meaning of the words," which is at the basis of literal interpretation and *a contrario* reasoning. *In claris non fit interpretatio*: if the meaning of a provision is clear, then there is no room for interpretation.

However, this is certainly not the most typical argumentative directive followed by the ECJ. On the contrary, on several occasions the ECJ has departed from the proper and ordinary meaning of the words;[24] its systemic and evolutive interpretations of the EC Treaties have been so bold as to give the impression that the Court perceived its role not as that of a judge who is bound to apply the law "as it is," but as that of an autonomous political actor, which is capable of pursuing and imposing its own constitutional policy, shaping the law "as it ought to be."[25] One may praise or criticize such judicial activism; however, there is no doubt that the ordinary meaning of the words is not a conclusive argument within the ECJ's case law; it is an argument that may be overridden by competing considerations, which may suggest the interpreter to adopt a more creative approach.

With regard to linguistic criteria one further point shall be stressed. The proper meaning of the words may be the meaning which anybody with normal linguistic skills and knowledge would understand when, in a given context, a certain word or words combination is proffered: it is the proper meaning of the words in ordinary language. But the proper meaning of a word may also be the meaning which a jurist understands when a legal concept is used. This is the proper meaning of the words of the legal language, and it can hardly be distinguished from the "systemic meaning" of the provision—thus, linguistic criteria of interpretation and systemic criteria may often overlap. The technical meaning

[24] During the so called "constitutionalization" of EC Treaties, the ECJ departed from literal interpretation in all its leading cases, such as Case C-26/62, Van Gend en Loos v. Administratie der Belastingen, 1963 E.C.R. 3; Case C-6/64, Costa v. ENEL, 1964 E.C.R. 1141; Case C-29/69, Stauder v. Stadt Ulm, 1969 E.C.R. 419; Case C-11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1125; Case C-41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337; Case C-120/78, Rewe v. Bundesmonopolverwaltung für Branntwein, 1979 ECR 6.4.9. ("Cassis de Dijon"). On this case law, some references *supra* at note 13.

[25] *See, e.g.*, H. Rasmussen, *supra* note 13; H. Rasmussen, THE EUROPEAN COURT OF JUSTICE (1998); Sir Patrick Neill, THE EUROPEAN COURT OF JUSTICE: A CASE STUDY IN JUDICIAL ACTIVISM, HOUSE OF LORDS SELECTED COMMITTEE ON THE EC, MINUTES OF EVIDENCE, 18TH REPORT, 218 (1995); T.C. Hartley, *supra* note 13; J. Coppel, A. O'Neill, *The European Court of Justice: Taking Rights Seriously?*, 29 COMMON MKT. L. REV. 669 (1992).

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of the legal concepts is regularly subject to controversy, it is described but also modified ("constructed") by the legal doctrine, it may vary significantly from state to state and, within the same state, it may vary form court to court.

Already in its first judgments the ECJ has maintained that it is not bound by this kind of "proper meaning" of the words of the legal language, i.e., the technical meaning of the legal concepts as it results from the legal culture of the Member States. The ECJ has thus vindicated its power to create a new "proper meaning," a meaning which is specific to Community law and which best fit to its enforcement. For instance, the ECJ held that it is within the jurisdiction of the ECJ, and not within the jurisdiction of the national legal orders, to decide what is a court or tribunal within the meaning of Article 234 (former Article 177) of the EC Treaty. Even the Dutch Arbitration Tribunal of the Fund for non-manual workers employed in the mining industry,[26] the Appeals Committee for General Medicine of the Royal Netherlands Society for the Promotion of Medicine,[27] or even the Finnish Rural Businesses Appeals Board,[28] are, according to the ECJ, courts and tribunals under Article 234, and are therefore competent to submit to the ECJ a request for preliminary ruling. The very fact that "Community law uses terminology which is peculiar to it" (ECJ, *Cilfit*) may be seen as a consequence of the autonomy of Community law, which means autonomy from international law as well as autonomy from domestic law.

With regard to linguistic criteria of interpretation, it is worth noting that the standard of the proper meaning of the words encounters a supplementary difficulty in Community law. Community provisions, in fact, are drafted in all the official languages of the European Union, which currently amount to 23 official languages for 27 Member States. It is clear that such linguistic complexity may produce not one but several "ordinary meanings" and raise serious interpretative questions when the different language versions are not entirely in accord with one another. How to choose? Which is the "most official" language of the Community?

The ECJ denies the existence of a "most official" language within the Community and therefore it cannot rely on a favourite and most reliable linguistic version of the provisions it interprets.[29] When two or more versions diverge, the general approach of the ECJ has been to interpret the provision in a way which is consistent with all except one versions.[30]

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[26] Case C-61/65, Vaassen-Göbbles v. Beambtenfonds voor het Mijnbedrijf, 1966 E.C.R. 377.

[27] Case C-246/80, Broekmeulen v. Huisarts Registratie Commissie, 1981 E.C.R. 2311.

[28] Joint Cases C-9/97 & C-118/97, Jokela, 1998 E.C.R. I-6267.

[29] Case C-296/95, The Queen v. Commissioners of Customs and Excise, ex parte EMU Tabac and others, 1998 E.C.R. I-1605 ("All the language versions must, in principle, be recognised as having the same weight and this cannot vary according to the size of the population of the Member States using the language in question.").

[30] Joint Cases C-283/94, C-291/94 & C-292/94, Denkavit Internationaal and others v. Bundesamt für Finanzen, 1996 E.C.R. I-5063 ("It follows from the wording of that provision, and in particular from the use of the present

If this is not possible, the ECJ tends to make recourse to systemic interpretation and to teleological or consequentialist interpretation. The Court takes into consideration, on the one side, the normative context to which the provision belongs and, on the other side, it takes into consideration its purpose, or the purpose of the piece of legislation to which the provision belongs: "The different language versions of a Community text must be given a uniform interpretation and hence in the case of a divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part."[31]

II. The "General Scheme" of Community Law: The Systemic Criteria

The systemic criteria of interpretation assume that legal provisions shall be interpreted, in case of doubt, in a way which is consistent with the "system," that is to say, coherent with the principles, the rules and the concepts characteristic of the same area of the legal system to which the provision belongs, or characteristic of distinct areas within the same legal order, or, finally, characteristic of a different legal order (comparative argument).

The ECJ makes recourse to all these kinds of legal arguments. The systemic criteria are here intended in the broadest sense, and they include most of the interpretative technique familiar to the legal culture of the Member States: *a contrario* interpretation, recourse to analogy, *a fortiori* reasoning, *ad absurdum* argument, argument from precedent, principled argumentation, balancing reasons,[32] etc. It shall be noticed that in the case law of the ECJ the comparative arguments are much rarer than one would expect and they are instead more frequent in the opinions of the Advocates General.[33]

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tense . . . in all language versions except the Danish, that . . . ."); *see also* Case C-30/77, Régina v. Bouchereau, 1977 E.C.R. 1999 ("A comparison of the different language versions of the provisions in question show that with the exception of the Italian text all the other versions use different terms in each of the two article, with the result that no legal consequences can be based on the terminology used."); Case C-372/88, Milk Marketing Board v. Cricket St Thomas, 1990 E.C.R. I-1345 ("[T]he English version . . . cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in this regard. Such an approach would be incompatible with the requirement for the uniform application of Community law."); Case C-56/06, Euro Tex Textilverwertung, 2007 E.C.R. I-4859 ("Consequently, as the Commission argued, the interpretation . . . is not contrary to any language version of that protocol, whereas the interpretation suggested by Euro Tex—involving distinguishing between simple and complex matching operations—is inconsistent, at the very least, with the language versions mentioned in the preceding paragraph.").

[31] Case C-30/77, Régina v. Bouchereau, 1977 E.C.R. 1999. Well-established case-law: see, for instance, Case C-236/97 Skatteministeriet v. Aktieselskabet Forsikringsselskabet Codan, 1998, E.C.R. I-8679; Case C-420/98 W.N., 2000 E.C.R. I-2847; Case C-56/06, Euro Tex Textilverwertung, 2007 E.C.R. I-4859.

[32] On ECJ and balancing judgments, see Bengoetxea, MacCormick & Soriano, *supra* note 1, at 64; G. Itzcovich, *L'integrazione europea tra principi e interessi. Giudici nazionali e Corte di giustizia nella "guerra delle banana"*, MATERIALI PER UNA STORIA DELLA CULTURA GIURIDICA 385–424 (2004).

[33] *See* C.N. Kakouris, *L'utilisation de la méthode comparative par la Cour de Justice des Communautés européennes*, *in* COMPARATIVE LAW AND THE COURTS 97–111 (U. Drobnig & S. van Erp eds., 1999); M. Kiikeri,

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We can easily imagine that the recourse to legal comparison is a widespread and everyday argumentative tool in the closed door sessions of the ECJ. Jurists belonging to different legal cultures confront themselves and discuss the various possible solutions to the legal question under consideration; inevitably, they tend to make references to the law of their Member State of origin. From a practical as well as a theoretical viewpoint, the comparative argumentation is opposite to those linguistic and systemic arguments which make reference to the autonomy of Community law, because, as we have seen, autonomy is autonomy from international law and domestic law; the doctrinal and jurisprudential concept of autonomy of the Community legal order encompasses the idea of the autonomy of its legal concepts.

III. The Genetic Argument

The genetic argument, also called "historical" argument or "psychological" argument, is typical of the French Exegetic School and of the tradition of the so-called "legislative legal positivism." It prescribes to interpret the legal provisions in a way corresponding to the will of the legislator. It is a well-established interpretative technique, which is commonly used for interpreting the heteronomous legal sources, i.e., the sources which are binding upon subjects who did not enact them. This interpretative directive may be ranked among the linguistic criteria as well as among the systemic criteria: it is a linguistic criteria if we maintain that the meaning of a (normative) statement is influenced by the intentions of the speaker (the legislator); it is a systemic criteria if we hold, as it seems preferable to do, that the relevance of the speaker's (the legislator's) intentions depends upon a choice of the addressee (the interpreter), or that it depends upon a context which is external to the communication (such as a certain legal culture), which may be more or less favourable to this kind of considerations.

According to a widely held opinion, this interpretative criterion, although it is not at all alien to the case law of the ECJ, plays a marginal role within its legal reasoning. Surely the genetic argument is subordinated to other interpretive techniques, which—especially in the case of dynamic and evolutive interpretation—may limit the scope of the genetic argument to that of an auxiliary argument, which is endowed with a narrow persuasive force and which is never conclusive.

Thus, the ECJ has resolutely denied any binding or even persuasive force to the will of the contracting parties of the Treaties. This interpretative and constitutional choice of the ECJ has had a paramount impact on the case law of the ECJ. On several occasions the ECJ has challenged the will of the Member States—or, to say it better, the will of the national governments—by adopting decisions which were unpopular among the majority of the national political élites, and which were far behind the intentions of the framers of the

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COMPARATIVE LEGAL REASONING AND EUROPEAN LAW (2001); K. Lanaerts, *Interlocking Legal Orders in the European Union and Comparative Law*, 52 INT'L & COMP. L.Q. 873 (2003).

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Treaties. The reason for the refusal to take into consideration the original intentions of the contracting parties is that the ECJ cannot rely on documents which have not been published and which are not, therefore, accessible to the general public.

In order to modify this interpretative attitude of the ECJ and, above all, in order to include the public opinion of the Member States in the constitutional process of the European Union, the Member States have recently changed their work method: at the Intergovernmental conferences of 1996 (Amsterdam Treaty), 2000 (Nice Treaty), 2003-2004 (Rome Treaty), 2007 (Lisbon Treaty), and at the European Conferences of 1999-2000 (Charter of Fundamental Rights) and of 2002-2003 (Rome Treaty establishing a Constitution for Europe) several preparatory documents (*travaux préparatoires*) have been published and made accessible to the general public. In particular, the documents discussed and approved by the second European Convention (the so called Convention on the Future of Europe, which drafted the Rome Treaty) were immediately put online, ensuring accessibility for (inter)national and (non-)governmental organisations and individuals worldwide. In that occasion, a "Praesidium" was established, consisting of the Convention Chairman and Vice-Chairmen and nine members drawn from the Convention, and it was committed to the task of drawing guidelines for the interpretation of the Constitutional Treaty.[34]

Apart from these recent developments, it shall be stressed that the enactment of secondary Community legislation is always accompanied by an intense preparatory activity of political negotiation and of economic, scientific and legal research and grounding. In interpreting Community law, the ECJ may pay attention to these working documents only if they have been rendered public.[35] Such documents can be considered as a source of "soft law," as they express norms which are not legally binding but which can nonetheless direct in many ways the process of Community law implementation. Note, however, that the Community normative processes result in a highly complex institutional dynamic to which

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[34] Preamble of the Charter of Fundamental Rights of the Union, as modified by the Treaty establishing a Constitution for Europe: "The Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention." *See also* Treaty Establishing a Constitution for Europe, art. II-112, para. 7, Dec. 16, 2004, 2004 O.J. (C 310) 1.

[35] Case C-15/60, Simon v. Court of Justice, 1961 E.C.R. 225 ("In the absence of working documents clearly expressing the intention of the draftsmen of a provision, the Court can base itself only on the scope of the wording as it is and give it a meaning based on a literal and logical interpretation."); Case C-292/89, Queen v. Antonissen, 1991 E.C.R. I-745 ("A declaration recorded in the Council minutes at the time of the adoption of a provision of secondary legislation cannot be used for the purpose of interpreting that provision where no reference is made to the content of the declaration in the wording of the provision in question and the declaration therefore has no legal significance."); Joint Cases C-283/94, C-291/94 & C-292/94, Denkavit Internationaal and others v. Bundesamt für Finanzen, 1996 E.C.R. I-5063 ("Expressions of intent on the part of Member States in the Council . . . have no legal status if they are not actually expressed in the legislation. Legislation is addressed to those affected by it. They must, in accordance with the principle of legal certainty, be able to rely on what it contains.").

several actors take part, and therefore, even when the ECJ decides to take into consideration these acts of soft law and the various preparatory documents, what may emerge is not necessarily the will of the legislator, but it is often an incoherent and inconclusive plurality of viewpoints and opinions.

IV. The "Spirit" of Community Law. The Dynamic Criteria

The dynamic criteria of interpretation are certainly the most characteristic of the ECJ's legal reasoning: the ECJ is not the only court which makes recourse to dynamic and evolutive interpretation, but it is a widely accepted fact that the ECJ makes frequent recourse to such interpretative criteria in its landmarks decisions, in its most creative and less predictable judgments. Always following Bengoetxea,[36] the dynamic criteria may be ranked in three classes as follows.

1) *Functional Interpretation*. It assumes that in case of doubt a legal provision must be interpreted in a way which warrants its effectiveness, its "useful effect" (French: *effet utile*) and its capability of functioning in an efficient and effectual way.

2) *Teleological (or Purposive) Interpretation*. It assumes that in case of doubt a legal provision must be interpreted in a way which is coherent with the goals and purposes explicitly or implicitly established by a rule or set of rules of the legal order. The judge must therefore justify the interpretation from the perspective of its instrumental function in relation to such goals and purposes.

3) *Consequentialist Interpretation*. It assumes that in case of doubt a legal provision must be interpreted by taking into consideration the foreseeable consequences of the interpretive decision.

This classification is useful, although it may be criticized in several ways. First of all, the distinction between dynamic criteria and systemic criteria of interpretation may be partially or totally missing: the teleological interpretation may be regarded as a kind of systemic interpretation, if the goal that it takes into consideration has been explicitly established by the legislator, or if the goal is part of the system constructed by the legal doctrine. Also the consequentialist interpretation overlaps with the systemic interpretation, if the consequences that are taken into consideration are not the practical effects "out there," in the world, but are the internal legal effect in the system.

Moreover, the dynamic criteria of interpretation often operate jointly and reinforce each other; they are mixed and confused, so that the distinction between them may sometimes be artificial and questionable. Surely, the distinction may occasionally be clear-cut. For

[36] LEGAL REASONING, *supra* note 1.

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instance, when in *Van Gend en Loos* (1963), the ECJ holds that "the objective of the EEC Treaty, which is to establish a common market . . . implies that this treaty is more than an agreement which merely creates mutual obligations between the contracting states," it is making recourse to teleological interpretation ("the objective . . . implies"). When the ECJ holds that "a restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Article 169 and 170 would remove all direct legal protection of the individual rights of their nationals," it is making recourse to a consequentialist reasoning ("a restriction . . . would remove"), which is then supplemented by a functional argument: "There is the risk that the recourse to the procedure under these Articles *would be ineffective* if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty." Another functional argument, taken from the same decision, is the following: "the vigilance of the individuals concerned to protect their rights amounts to *an effective supervision* in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States."

However, at other times the distinction between the dynamic criteria of interpretation fades away or simply cannot be traced. For example, in the *Costa* case (1964) the ECJ established the primacy of Community law on the basis of this crucial argument: "the executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty." Here the ECJ takes into consideration the practical consequences of a negative decision (the executive force of Community law would "vary from one state to another," the objectives of the Treaty would be "jeopardiz[ed]"), but also takes into consideration the necessity to warrant the effectiveness of Community law (its "executive force"), and finally takes into consideration the necessity to warrant the achievement of EC's goals ("the attainment of the objectives of the treaty").

In any case, the dynamic criteria present a common feature: they promote a transformation, an evolution of Community law. In the alternative, which is typical of constitutional law, between "originalist" interpretation and "evolutive" interpretation, the dynamic criteria are all set on the side of letter. Indeed, the dynamic criteria have no regard to the literal wording of the provision: the literal wording must be repealed in order to pursue a goal of Community law and avoid the negative consequences of a mechanical enforcement of the provision. The dynamic criteria set aside the original intentions of the drafters of the provision: instead of binding the interpreter to an "historical," "genetic," "original" will, they project the activity of meaning attribution towards an objective that must be achieved. Finally, the dynamic criteria can also be conceptually distinguished from the systemic criteria of interpretation in this important respect. The systemic criteria bind the interpreter to a given set of norms: a "static" system, as it has been fixed by the legislator, by the doctrine, by the settled case-law. On the contrary, the dynamic criteria charge the interpreter with the burden of contributing to the evolution of Community law. They attribute to the judge a sort of legislative function and responsibility: the

responsibility of creating new norms exceeding the literal wording, the original intention of the legislator and the well-established system.

G. Conclusions

The analysis of the interpretative methods of the ECJ allows us to summarize its main conclusions and derive some further theoretical implications.

Already since the beginning of the Sixties, Community legal norms have been conceived of by the ECJ as deriving by an autonomous source, i.e. a source of validity which is separated from national law as well as from international law. The very language in which Community provisions are drafted is, according to the ECJ, an autonomous legal language which is not constrained by the legal culture of the Member States and by domestic case law and jurisprudence. Therefore, from the viewpoint of the states, Community legal norms are not an expression of autonomy, but are heteronomous norms: they are not the expression of sovereignty, as they are only a limit to state sovereignty.
It follows that the interpretative criteria generally adopted in case of sources which are an expression of autonomy, such as contracts and treaties (in particular: research of the common intention of the parties, as it results from their behaviour subsequent to the conclusion of the contract), do not operate in Community law. Nonetheless, we have also seen that the genetic argument, which is typical of the interpretation of the authoritative legal sources, is not operative or that it has a marginal importance with regard to Community law. In Community law that criterion is often overridden by the dynamic criteria of interpretation, i.e. by arguments based on consequences, purposes and efficiency.

There appears to be no specificity of Community law interpretation. Apart from the problems arising from the multilingual nature of Community law and the criteria for their solution, we may say that the arguments employed by the ECJ are the same that we find by any other jurisdiction: literal interpretation, genetic arguments, systemic arguments, principled argumentation, evolutive interpretation, etc. However, among these argumentative tools, the *a contrario* argument and the genetic argument occupy a subsidiary position, while the dynamic criteria of interpretation hold a prominent rank.

A conclusion may be drawn. Apart from the way in which we may be tempted to answer to the question of the legal nature of the Community—international organization or federal state? —It is clear that the interpretative techniques of Community law are significantly nearer to constitutional interpretation than to treaty interpretation. The EC Treaties are interpreted as if they were the constitution of the Community, instead of being an international convention among sovereign and independent states. This is implicit in the very concept of autonomy of Community law: the Community legal order is autonomous because, according to the ECJ, it does not derive its validity from international

law or domestic law, and the Treaties are thus the "constitution", the formal source of validity, of this new legal order.

There remain, nonetheless, some important differences between this Community "constitution" and the constitutions of the Member States. Some of these differences are pretty clear. I will only point out those which affect the interpretation of Community law. One may expect that a constitution draws a line: it traces a distinction between what the public powers can legally do and what they ought not to do. The EC Treaties also do this, obviously, but because of the way in which they are interpreted by the ECJ, above all they formulate a project: they set out the objectives of the Community, among which is to achieve "an ever closer union among the peoples of Europe," and thus they aim at the change (integration) of the legal orders of the Member States. Also the national constitutions contain programmatic norms, but only the EC Treaties are imbued with teleology from top to bottom, as they are functional to a project of transformation of the legal orders of the Member States.[37] Here the distinction between what Community institutions can do and what they cannot do must be structurally uncertain. The limit must vary in the course of time, as it must move along with the deepening of integration.

This structural uncertainty may also depend on the drafting style of the EC Treaties. They establish the goals of the Community institutions, contain programmatic norms, broad directives, and set the procedures for their implementation. The first Community jurists used to say that they were a *traité-cadre*, an outline-treaty, a framework-treaty, or a plan-constitution: "they plan out the framework for the dynamic development that they should put in motion."[38] The Treaties do not so much establish mutual obligations between the contracting states, as they advance a project and create the institutions entrusted to pursue that project. But the structurally dynamic and evolutive nature of the Community "constitution" depends also, and to a great extent, on the interpretative criteria adopted by the ECJ: the functional, teleological and consequentialist arguments which repeal the literal wording of the provisions, disregard the intentions of the framers and modify the system in consideration of the necessity to pursue the Community project.

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[37] A further argument in support of teleological argumentation has been recently provided by Maduro, *supra* note 1, at 8: "Reasoning through *telos* will be an increased necessity in the context of a pluralistic legal order." Note the usual dogmatic, conceptualist structure of the argumentation, which derives a normative consequence (the opportunity of teleological reasoning) from a theoretical reconstruction of the legal nature of the Community (a pluralistic legal order).

[38] C.F. Ophüls, *Die europäische Gemeinschaftsverträge als Planungsverfassungen*, *in* 1 PLANUNG 229 (J.H. Keiser ed., 1965); *see also* P. Reuter, *Aspects de la Communauté économique européenne*, REVUE DU MARCHÉ COMMUN 161 (1958) ("*traité-cadre*"); P. Reuter, *Juridical and Institutional Aspects of the European Regional Communities*, 26 LAW AND CONTEMP. PROBS. 381, 382 (1961) ("What appears is the framework for a treaty"); *id*. at 389 ("a framework, a *carte blanche*"); *id*. at 397 ("a skeletal agreement"); W. Hallstein, *The EEC Commission: A New Factor in International Life*, 14 INT'L & COMP. L.Q. 727 (1965) ("outline-treaty").

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The analysis of the interpretative criteria adopted by the ECJ suggests, if not an answer to the question on the legal nature of the Community, at least an answer to the question on the way in which the ECJ conceives of the Community. The ECJ conceives the Treaties as a constitution[39] and as a constitution of a special kind. The organization shaped by this "European constitution" is not a structural defined and functionally open-ended political community (such as the state, structurally endowed with the monopoly on the legitimate use of force and capable of pursuing whatever objective it chooses); on the contrary, the organization shaped by this "European constitution" is a structurally uncertain political community (it is a process of transformation of national legal orders), which is functionally defined on the basis of the fundamental objective of states' integration. This conception of the European constitution results from the ECJ's recourse to teleological interpretation, from its refusal to construct a "static Community legal system" and from its refusal to pay attention to the "historical will" of Community legislator.

[39] *See* Section C, *supra*. It is not surprising that the assumption of the constitutional nature of EC Treaties has been common among Community scholars since the beginning of the experience of European integration. *See, e.g.*, C.F. Ophüls, *Juristische Grundgedanken des Schumanplans*, NEUE JURISTISCHE WOCHENSCHRIFTS 290 (1951); Reuter, *Aspects de la Communauté économique européenne, supra* note 38, at 163; R. Monaco, *Caratteri istituzionali della Comunità economica europea*, RIVISTA DI DIRITTO INTERNAZIONALE 11 (1958). *See also* Case C-294/83, Les Verts v. Parliament, 1986 E.C.R. 1339 ("It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional Charter, the Treaty.").

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