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Constitutional Pluralism and Judicial Adjudication:

On Legal Reasoning, Minimalism and Silence by the Court of Justice

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Abstract:

The Court of Justice of the European Union has for decades relatively successfully negotiated its way under circumstances which the theory of constitutional pluralism adequately portrays. In part, this achievement is due to the Court's warranted minimalist approach to adjudication, its way of legal reasoning in interpreting EU law, and the techniques with which it reserves space for communication, interaction, and even conflict between legal orders. Building on existing accounts of both the Court's practice and constitutional pluralism, this chapter concentrates on the prerequisite that the members of the community of judicial discourse understand the Court's established patterns of legal interpretation and reasoning, as well as their role in maintaining the pluralist European legal order.

Keywords:

Legal reasoning; constitutional pluralism; criteria of interpretation; Court of Justice of the European Union; minimalism; deference.

> 'While teleological reasoning favors a debate among alternative normative and institutional preferences in the interpretation of the rule, a simple appeal to text would hide those alternatives and preclude a debate among them. Teleological and systemic reasoning foster the conditions necessary for communication with the plurality of actors of the community of judicial discourse while preserving the integrative force of the law. In this way, they become the best vehicle for the introduction of comparative institutional analysis into the constitutional reasoning of courts.'[1]

Introduction

For plenty of lawyers, to suggest reconsidering the value of textual interpretation (clear meaning) in judicial adjudication as well as the ideals of predictability of law, strict separation of law from politics, and undivided national sovereignty seem equivalent to suggesting a bungee jump without a cord. Instead of this chapter, these lawyers would rather consult, for example, Gerard Conway's treatise arguing for more subjective originalist interpretation of EU law or Trevor Hartley's chapters on how to interpret EU law textually.[2] For others, call them interpretivists, realists, or pluralists, if at all persuaded by autonomy of the EU legal order, the idea(l) of a common European legal order composed of national and EU legal orders, and for whom the nature of law is essentially dynamic instead of static, reading this chapter outlining a framework of judicial adjudication of the Court of Justice (Court) suited for a theory of constitutional pluralism may prove more useful.

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1 Miguel Maduro, 'In Search of a Meaning and not in Search of the Meaning: Judicial Review and the Constitution in Times of Pluralism' (2013) Wisconsin Law Review, 541, 563.

2 This point of view (as well as many others) can be supported by appealing to rule of law and democracy, see Gerard Conway, The Limits of Legal Reasoning and the European Court of Justice (Cambridge University Press 2012), 248. The differences in style between continental and common law reasoning may explain why strong critique stems from the common law tradition, see, e.g., three pieces by Trevor C Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 122 The Law Quarterly Review, 95, 96; Constitutional Problems of the European Union (Hart Publishing 1999), 26 and 44-60; The Foundations of European Community law: An Introduction to the Constitutional and Administrative Law of the European Community, 8th edn, (Oxford University Press 2014), 70-78.

What this chapter does is connect existing literature on constitutional pluralism and existing accounts of Court practice, in order to articulate how the Court's everyday adjudicative interaction with other courts could be understood to embody or even pursue a constitutional pluralist ideal. This chapter limits itself to the Court's perspective, or a perspective on the Court, in the European judicial discourse. The first section lays out how reasoning relates to constitutional pluralism; the second introduces the Court's legal reasoning model; the third section presents techniques used by the Court in its minimalist approach; and the final section concludes. The general aim of this chapter is simple: to connect legal reasoning with constitutional pluralism and offer vocabulary to discuss this interaction.

Relationship between what the Court does and Constitutional Pluralism

Maduro's (latest) version of constitutional pluralism puts forward the empirical claim that national and EU legal orders are both autonomous and form part of one European legal system, simultaneously.[3] Each legal order has a legitimate claim to ultimate authority, yet none is generally supreme to another.[4] Legal practice in the participating legal orders reflects belonging to a European legal system, which in turn 'implies a commitment to both legal orders and imposes an obligation to accommodate and integrate their respective claims'.[5] Here the question turns into what accommodating and integrating such claims means, or whether it is even possible. The answer, in turn, depends to a high degree on the concept of (EU) law one holds and to which kind of political theory of the EU one subscribes.

Whereas the empirical (descriptive) claim of constitutional pluralism ('the question of final authority remains open') may be more broadly accepted, and accepting the normative (prescriptive) claim ('the question of final authority ought to be left open') may depend on whether one assumes it is a situation-dependent medium-term fact or permanent goal, whereas accepting the thick normative claim ('it provides a closer approximation to the ideals of constitutionalism [as it can] reconcile again the opposing pulls of pluralism and unity that have always dominated constitutionalism') requires adopting quite a

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[3] Miguel Poiares Maduro, 'Three Claims of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds), Constitutional Pluralism in the European Union and Beyond (Hart 2012), 70. On the distinction between legal order and legal system, see Kaarlo Tuori, Critical Legal Positivism (Ashgate Publishing Ltd 2002), 121, and Kaarlo Tuori European Constitutionalism (Cambridge University Press 2015), 15. [see chapter by Tuori in this volume].

[4] See Maduro 2012 (n XX), 77.

[5] Maduro 2012 (n XX), 70

specific heterarchic standpoint.[6] The middle-ground, the normative claim, already necessarily suggests that in addressing the Court's adjudication, focus should shift away from 'possible conflicts of authority' as long as conflicts 'do not lead to a disintegration of the European legal order' because it is precisely through such encounters, or conflicts of differing scales, that constitutional pluralism can yield the added value of a 'closer approximation to the ideals of constitutionalism'.[7] Hence whatever the model 'for communication with the plurality of actors of the community of judicial discourse',[8] it must create or reserve adequate space for institutions, here courts, to assert the claim to (ultimate) authority on behalf of their respective legal orders.[9] This is *sine qua non* not just for continued communication – which is what the normative claim(s) of constitutional pluralism hinges on – but also in order to avoid conflict-induced effective or real disintegration.

One's receptiveness in accepting the interpretative and adjudicative constitutionally pluralist framework in which the Court operates – how it creates space for a disagreement or the occasional conflict between courts through its minimalist style of adjudication, or legal reasoning – follows a similar scale as the theory itself. The theory even suggests that its empirical claim does not hinge on courts making their commitment to the European legal system express by mentioning constitutional pluralism or overtly engaging with other courts as, nevertheless, empirically 'judicial actors have changed their the internal perspective of their of their legal order in order to accommodate the

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[6] Maduro 2012 (n XX), 75, 77, 84. The thick normative claim of Maduro's brand of constitutional pluralism would already seem to result from the theory, or analytical framework, that informs it, which assumes all institutions are imperfect and hence concentrates on choice between them: comparative institutional analysis by Neil K Komesar (*Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press 1994); and *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (Cambridge University Press 2001). For a concise presentation of pluralism and a pluralistically conceived EU, see Matej Avbelj 'Pluralism and Systemic Defiance in the EU', in András Jakab and Dimitry Kochenov (eds) *The Enforcement of EU Law and Values: Ensuring Member State's Compliance* (Oxford University Press 2017),45-49, [see Avbelj in this volume] and for a suggestion, building on the philosophy of Jean-Luc Nancy, that legal and political subjectivity of the EU community is both singular and plural, see Susanna Lindroos-Hovinheimo, 'There is no Europe – On Subjectivity and Community in the EU' (on file with author).

[7] Maduro 2012 (n XX) , 77.

[8] Maduro 2013 (n XX), 563.

[9] From the point of view of the EU legal order, the responsibility relates to asserting that national competence must be exercised in compliance with EU law that 'due regard' must be had to EU law (see, e.g., Case C-135/08, Rottmann, EU:C:2010:104, paras 39, 45, 47, and 48), from the point of view of Member States, to Art. 4(2) TEU and specific authority stakes when national constitutional courts are involved.

claims of the other legal order'.[10] However, in order to assume that a viable European legal system can exist, one must assume the legal orders forming part of it share a similar enough understanding of fundamental principles, the deep culture of the law.[11] Whether or not this is descriptively accurate and not just a normative goal is revealed through communication between orders. From such a point of view, and not fixating on ultimate authority but instead on a general legal reasoning and adjudication model, what do accommodating and integrating actually mean and where can one observe the mutual accommodation of claims? Maduro calls legal reasoning the 'currency for transactions' on the market of judicial activity.[12] The ability to understand this currency, to recognise the dialogue-facilitating framework in action in case-law as deference, minimalism or silences, among other trademarks of the legal reasoning of the Court, is beneficial for all: for those not fully convinced by the thick normative claim of constitutional pluralism; for those to whom it remains a rather undesirable empirical claim; to those who subscribe to the thick normative claim; and generally for all who wish to critique the Court (overall, or especially for failing to meet the ideal of constitutional pluralism). In other words, it is necessary to first establish a baseline in order to gauge departures from it.

Much like the empirical claim above as to the national courts' covert change of perspective, in drawing on descriptive literature on the Court to construct the interpretation and adjudication model here, it is less important whether, or not, and to which degree that literature itself normatively subscribes to constitutional pluralism. Literature deconstructing the Court's own criteria of interpretation, though preceding the formulation of the theory on constitutional pluralism, therefore offers a good starting point.[13] Regardless of any theories attached, or not, by legal scholars to court judgments, in general or particular, the Court is by now well versed in the actual practice of adjudicating under the descriptive conditions of constitutional pluralism. Literature on international tribunals has even established

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[10] Maduro 2012 (n XX), 75, citing as examples the fundamental rights jurisprudence (70) and national constitutional courts amending the national constitution when required by EU Treaty amendments (73).

[11] On the different levels of mature legal orders, see Tuori 2002, 147–196, and on EU and national legal systems sharing a deep culture that is more stable than the surface-level of law, see Tuori 2015, 16. [Or Tuori in chapter X of this volume.]

[12] Miguel Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in Neil Walker (ed) *Sovereignty in Transition* (Oxford University Press 2003), 514.

[13] Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press OUP 1993). For an analysis of a branch of Court's case-law employing Bengoetxea's model, see Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing 2013).

that the Court is the most successful one of such institutions in existence.[14] Yet the will and ability of the Court to abide by the ideal varies over time and context, like with international courts generally.[15] Moreover, as courts are not single-rationality agents, it would be foolish to expect that any theory of interpretation could fully constrain a court.[16] Though at times the empirical reality may diverge from the theory, this does not lessen the worth of an alternative (ideal) understanding of judicial adjudication built on, and compatible with, the (thick normative) claim of constitutional pluralism. What is needed is neither further abstraction or theoretical elaboration nor empirical studies but, instead, simply connecting the existing dots again: turning the focus within constitutional pluralism from more abstract accounts of inter-court deference and dialogue to the humble hands-on craft of legal reasoning and methodological or procedural choices that preserve space for inter-court discussion.[17] Hence, the next section connects existing empirical observations on how the Court behaves to the existing theory of constitutional pluralism is the aim of this chapter.

On the Court's Criteria of Legal Interpretation

Published in 1993, the work of Joxerramon Bengoetxea elaborated the criteria of legal interpretation, or the model of the Court's legal reasoning, combining a specific theoretical approach with observations drawn from the reasoning of the Court in its case-law and complemented by extrajudicial writings of Judges.[18] In other words, the model reflects what the Court has defined as its own interpretative criteria – it is not, therefore, a grand theory of legal reasoning imposed on the Court from the outside, but rather one aspiring to derive the model for its (ideal) reasoning from its reasoning.[19]

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[14] Laurence R Helfer and Anne-Marie Slaughter 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale Law Journal 273, 336. The theory argues that a mixture of internal and external factors affects the success of international and supranational courts in terms of compliance with their rulings, interpretive authority and institutional legitimacy (see concisely at 336). Recently, Karen J Alter, Laurence R Helfer and Mikael Rask Madsen, 'How Context Shapes the Authority of International Courts' (2016) 79 Law & Contemporary Problems 1, 1.

[15] On recent twists and turns as to the internal and external factors affecting the Court's jurisprudence and thereby also authority, see Urška Šadl and Suvi Sankari in Daniel Thym (ed.) Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU (Hart Publishing, 2017) forthcoming.

[16] J Harvey Wilkinson III, Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance. (Oxford University Press 2012), 11.

[17] Sankari (n XX).

[18] Based on theories of institutional legal positivism and legal argumentation (new rhetoric), the work supervised by Neil MacCormick precedes his pluralist theory.

[19] Bengoetxea 1993 (n XX), 180. The background for the model is institutional legal positivism, new rhetoric and argumentation, and it presumes that an idea of

The approach shares certain fundamental assumptions with constitutional pluralism. First, non-state-law is considered law and a European legal order possible.[20] Second, whereas Maduro describes EU law's degree of indeterminacy in terms of a normative gap, referring to the nature of primary law as that of incompletely theorised agreements,[21] Bengoetxea generally suggests the meaning and scope of positive norms is not fixed in their pre-interpretative stage.[22] Both moreover treat law as a dynamic evolving phenomenon, not static.

The Treaties, though often vaguely worded incompletely theorised agreements forming part of primary EU law, may not be that much more indeterminate than secondary EU law.[23] However, the Treaties are more influential than legislation.[24] The Court, although itself the highest authority interpreting EU law and in charge of ensuring that the law is observed,[25] is bound to honour the Treaties as primary law. The duty internal to EU law of conform interpretation requires interpreting secondary law consistently with primary law.[26] With the duty to interpret national law consistently with EU law, there is no duty to make a *contra legem* interpretation and,[27] likewise, the Court should not interpret secondary EU law *contra legem* in order to

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rationality as method is inherent in both legal discourse and rational practical discourse.

[20] Bengoetxea 1993 (n XX), 2-3, 37.

[21] Maduro uses this expression differently than it is used in its original US context (Sunstein 1996, 35ff), to refer to EU law's textual ambiguity which is a product of transnational political bargaining, of an 'agreement not to agree', see Miguel Poiares Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism', in Jeffrey L. Dunoff and Joel P. Trachtman (eds) *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009), and Maduro 2013 (n XX), 545, 548.

[22] Bengoetxea 1993 (n XX), 41-42. Textual indeterminacy is somewhat heightened in EU law, meaning less of a chance to find an objectively clear meaning, like in any constitutional order operating in more than one official language. For an integrated legal and linguistic view on indeterminacy of natural language, see Elina Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice* (Ashgate 2013), 11. See also Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2012), 52-57.

[23] Andreas Grimmel '"This is not Life as it is Lived Here": The Court of Justice of the EU and the Myth of Judicial Activism in the Foundational Period of Integration through Law' (2014) 7 *European Journal of Legal Studies* 2, 56, 74-75. For example, in the context of Patient's Rights Directive, Julio Baquero Cruz, 'The Case Law of the European Court of Justice on the Mobility of Patients: An Assessment', in van de Gronden et al. (Eds) *Health Care and EU Law* (T.M.C. Asser Press, 2011), 80–102, 98.

[24] Point forcefully put in Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 *European Law Journal* 2, 2–22.

[25] Art. 19 TEU.

[26] On the duty, see Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction*, 2nd revised edn (Hart Publishing, 2012), 72.

[27] See Case C-268/06, *Impact*, EU:C:2008:223, para. 99 (and cases referred to there).

manipulate it into consistency with primary law.[28] Political pressure to achieve results in Treaty negotiations – even by agreeing not to agree, purposively dumping the decision on judges[29] – is reflected in that legal meanings must later be assigned to provisions in order to extract norms. Absent clear meaning, textual interpretation is not likely to produce an answer to the question requiring interpretation.[30] Extracting norms from EU law provisions calls for interpretation based on the interpretative criteria specific to EU law. In practice, not just the starting point but also the outcome of interpretations, judgments, may at times exhibit features of incompletely theorised agreements, as courts (the Court included) are not single-rationality agents, though often treated as such, but instead composite rationality institutions.[31]

To engage with the Court, one needs an understanding of how it (regularly) reasons. The Court stated in 1963 that to interpret EU law 'it is necessary to consider the spirit, the general scheme and the wording of those provisions',[32] and since then, these standards have been referred to in many judgments.[33] Legal scholarship has presented the Court's tripartition as compatible with the more general classification legal arguments into dynamic (teleological), systematic (or contextual), and textual (or semiotic) arguments, or reasons, or referred to them as methods of interpretation of EU law.[34] In Bengoetxea's account, they are first-order interpretative criteria, i.e., 'characteristic interpretative arguments', and they consist of semiotic ('wording'), systemic ('general scheme') and dynamic ('spirit')

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[28] Should consistency with primary law be truly impossible, secondary law should be declared void. See Art. 264(2) TFEU.

[29] In Judge Kutcher's words: 'problems will not wait for a legislative solution. If they arise in an action, the judge must solve them. It is a well known fact that the inactivity of the legislature compels the courts to decide questions and to solve problems the settlement of which properly belongs to the province of the legislature.' Hans Kutscher, 'Methods of Interpretation as seen by a Judge at the Court of Justice', in Judicial and Academic Conference 27–28 September 1976 (Court of Justice of the European Communities, 1976), I-1, I-35.

[30] For a Judge of the Court drawing this conclusion in the early days of EU law, see Kutscher (n XX), I-15. More recently and generally, see Elina Paunio and Susanna Lindroos-Hovinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law' (2010) 16 European Law Journal 4, 395.

[31] Maduro 2013 (n XX), 543.

[32] See Case 26/62, Van Gend & Loos, EU:C:1963:1.

[33] For examples mentioning all three, see Joined Cases C-120/06 P and C-121/06 P, FIAMM and Others, EU:C:2008:476, para. 108, Case C-482/98, Italy v Commission, EU:C:2000:672, para. 49, Case C-434/97, Commission v France, EU:C:2000:98, para. 22, and Case C-372/88, Milk Marketing Board v Cricket St Thomas Estate, EU:C:1990:140, para. 19.

[34] Concisely, see Jan Komárek 'Legal Reasoning in EU Law' in Anthony Arnull and Damian Chalmers (eds) The Oxford Handbook of European Union Law (Oxford University Press 2015), 45-49.

arguments.[35] These are the interpretative directives the Court applies to determine meaning. Semiotic criteria are arguments that concern the ordinary meaning of text or the prevailing meaning of multi-lingual EU law, the EU law meaning of concepts, the literal meaning of text, and the evaluation and qualification of facts.[36] Systemic criteria are context-establishing criteria, drawing inferences from legal norms or their contexts, whereas teleo-systemic criteria (a borderline mix of both systemic and dynamic arguments) infer the aims and objectives of a norm from its context or interrelationships with other norms.[37] Dynamic criteria are arguments (functional, teleological and consequentialist) that relate to the purposes of the Treaties and arguments for giving full effect to EU law, requiring its primacy and precedence.[38] The lines between categories of criteria are porous, especially between systemic and dynamic criteria,[39] however, the main point to take home is that all of the first-order interpretive criteria should always be applied to the interpreted text before concluding that the wording 'seems to be clear'.[40]

The rather universally employed first-order criteria are not as such the gist of Bengoetxea's argument. The point is how to establish whether an interpretative choice exists and, if it exists, how to choose one meaning over the other. For this purpose, second-order criteria of interpretation, concerning preference between the different meanings established with applying first-order criteria, are drawn from the Court's case-law. One second-order criterion is that when the Court interprets EU law, it has a 'preference in favour of systemic-cum-

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[35] Bengoetxea 1993 (n XX), 227, 233–262. In a similar vein, see Anthony Arnull, *The European Union and its Court of Justice*, 2nd edn (Oxford University Press 2006), 608 and 612. Bengoetxea links the criteria to certain values: semiotic criteria promote legal certainty and rule of law; systemic criteria promote autonomy, integrity, and consistency of the legal system; and dynamic criteria promote integrity-coherence, innovation, and adaptability, Joxerramon Bengoetxea, 'The Scope for Discretion, Coherence and Citizenship' in O. Wiklund (ed.) *Judicial Discretion in European Perspective* (Norstedts Juridik Kluwer Law International 2003), 63–64.

[36] See Bengoetxea 1993 (n XX), 234–240. In preliminary references, evaluation of facts is ultimately in the hands of the national court applying the law, however, interpretation cannot take place wholly unrelated to facts, and substantive reasoning is included in Bengoetxea's broader 'model justifications' include also a category of 'substantive reasonings'. They do does play a role in the Court's legal reasoning, however, should substantive reasons unconnected to law for example appear alone as the justification, the decision would not be legally justified, see Sankari (n XX), 177, 230-241.

[37] Bengoetxea 1993 (n XX), 240–251.

[38] Bengoetxea 1993 (n XX), 251–262.

[39] For criticism on the division into three kinds of first-order criteria, and the subdivision of dynamic criteria into functional, teleological and consequentialist, as they cannot always be neatly separated from each other, see Giulio Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' (2009) 10 *German Law Journal* 5, 555.

[40] Bengoetxea 1993 (n XX), 233.

dynamic interpretation'.[41] Logic would dictate that if wording were not clear, textual criteria of interpretation would not resolve meaning. Another second-level criterion (of constitutional interpretation) requires that 'the Community Treaties, as the constitution of the Community are to be interpreted broadly… - …and its corollary criterion, i.e. that exceptions to fundamental Community principles are to be narrowly interpreted'.[42] This is another way to assert essentially the same thing as discussed above in terms of the duty of conform interpretation internal to EU law as well as in the duty to interpret national law consistently with EU law.

Bengoetxea's typology does not include a distinctive or separate meta-teleological criterion. The distinction between a teleological (*telos* of a provision) and meta-teleological (*telos* of the legal context, extending all the way to that of the entire legal order) approach to interpreting EU law seems rather recently drawn by Lasser and Maduro.[43] However, as mentioned above, the borderline category between systemic and dynamic criteria, 'teleo-systemic criteria', suggests that drawing inference from the *telos* of a norm or norm context is systemic, whereas drawing from *telos* more meta-teleologically (functioning and aims of the Treaties) would be dynamic. Three observations are called for at this stage. First, neither Bengoetxea nor Maduro suggest meta-teleological interpretation justifies *contra legem* interpretation – it does not equal unrestrained discretion and in this sense legal text does not always just matter, but rather matters greatly. Second, much of the criticism directed at the Court actually concerns Treaty goals, the speech-acts of Treaty makers, and much improvement, or at least change, could take place there as well as in EU policies and institutions.[44] The second point, significant for a reasonable activism/restraint discussion, leads to the third point made by Maduro: despite the fact that courts reason in normative terms and are bound by many constraints, ideally teleological reasoning 'reinforces the Court's accountability as it increases transparency concerning its normative choices.'[45]

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41 Bengoetxea 1993 (n XX) , 228 and 234. Cf. Arnull 2006, 617 and Brown and Kennedy 1994, 321.

42 Bengoetxea 1993 (n XX), 233.

43 Mitchel de S.-O.-l.-E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2004), 350–360 and Maduro 2009 (n XX) 'Courts and Pluralism…'.

44 See, for example, Davies (n XX); Renaud Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Macmillan 1998), 121; and Julio Baquero Cruz, 'Another Look at Constitutional Pluralism in the European Union' (2016) 22 *European Law Journal* 3, 356–374.

45 Miguel Poiares Maduro, 'Interpreting European Law' in Henning Koch, Karsten Hagel-Sørensen, Ulrich Haltern & Joseph H. H. Weiler (eds) *Europe – The New Legal Realism* (DJØF Publishing 2011), 467.

One practical application of the above criteria is the activism debate with the tools provided by a legal reasoning approach.[46] It could be argued, for example, that if going through preliminary rulings leads to the result that criteria of interpretation replaced with silence or use of substantive reasoning, this would reflect a higher than normal probability of judicial activism, even the negative kind. Yet judicial activism, justified or not, is not the inevitable or only conclusion one could draw from discovering a lack of reasoning, but it understandably does raise the question whether there is something the Court is trying to hide. However, much depends on the Court's generally minimalist approach to legal interpretation and what the legal community makes of it.

On Minimalism and all that jazz

Because legal decision-making requires interpretation, the Court, like any other court, cannot escape either its legal or political use of power – an aspect included in any act of interpreting the law. The Court must solve the cases it has jurisdiction over. For Bengoetxea, the Court is a rational social agent, under a legal duty to give (sincere) reasons for the decisions it makes.[47] When choice exists, rational reasoning requires justification for choosing one interpretation over another, choosing between applicable norms to interpret, and choosing between alternative understandings of the facts. It is tempting to combine this insight with constitutional pluralism in a way that would suggest single instances of constitutional reasoning of the Court (or any single court), in other words individual judgments, should ideally provide the 'debate among alternative normative and institutional preferences in the interpretation of the rule'[48] by dialectic reasoning (i.e., justifying the use of discretion: preferring one interpretation over another).[49] Yet a sincerely and sufficiently reasoned judgment does not necessarily have to be maximally (exhaustively) reasoned. It should justify the choice of applicable norm (if there is one) and its interpretation. In fact, in

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[46] For an application, see Sankari (n XX).

[47] Bengoexea 1993 (n XX), 159, 161–164, suggesting moral sincerity differs from legal sincerity, and legal sincerity is different for lawyers and judges. Those of us who are not Judges of the Court must assume sincerity of reasoning, because for secrecy of deliberation it cannot be verified.

[48] Maduro 2013 (n XX), 563.

[49] For criticism against the Court, calling for more dialectic reasoning as means not employed for the end constitutional pluralism strives for, see for example, Conway 2012, 161–163 and 280, and Vlad Perju, 'Reason and Authority in the European Court of Justice', (2009) 49 Virginia Journal of International Law 2, 307, 329–341. For one questioning the practical use of dialectic (as well as seriatim) ponderings, see Michal Bobek, 'A Fourth in the Court: Why Are There Advocates General in the Court of Justice?' in C Barnard, M Gehring, and I Solanke (eds), Cambridge Yearbook of European Legal Studies, vol 14, 2011–2012 (Hart Publishing 2012), 558.

addition to exhaustive unitary decisions of collegiate courts being a contradiction in terms, maximalist reasoning would seem to go some way against the very basic idea(l) which constitutional pluralism shares with Komesar's analytic framework: space should be preserved for both continued communication within the legal community and for institutional choice (rights can be better protected by deference to another jurisdiction or another institution than a court). In other words, there is value in courts being underspecified, or incompletely theorised in their judgments. Moreover, the Court is not required to provide dialectic argumentation neither should it actively pursue to act as legislator, nor develop legal doctrine, nor focus on public opinion.

Understanding the Court's minimalist approach requires listening carefully to what it says as well as what it does not say, because it makes use of both speaking and staying silent. Sarmiento suggests that minimalist decisions by the Court have increased over the last few decades.[50] Sarmiento's contribution is illustrative of how one should pay attention to the special nature of preliminary references, which are unlike ordinary litigation. He lays out the options available for the Court in answering national court's preliminary references as: an exhaustive reply, partial silence, complete silence, or a reply that most likely will go unheard by the referring court – an ignored preliminary ruling.[51] An exhaustive reply does not (substantively) reformulate the questions posed by national court into something more narrow, it addresses all questions, interprets all provisions raised in the questions that are necessary for deciding the case, and might even go beyond the questions posed.[52] Silence is partial when the Court defers the concrete answer to the national court, leading it only half-way in interpretation.[53] Complete silence takes place when the Court implicitly or explicitly refrains from answering all or one of the

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[50] Daniel Sarmiento 'Half a Case at a Time: Dealing with Judicial Minimalism at the European Court of Justice' in Monica Claes, Maratje de Visser, Patricia Popelier & Catherine Van de Heyning (eds), Constitutional Conversations in Europe: Actors, Topics and Procedures (Intersentia 2012), 27.

[51] See Daniel Sarmiento 'The Silent Lamb and the Deaf Wolves: Constitutional Pluralism, Preliminary References and the Role of Silent Judgments in EU Law' in Matej Avbelj and Jan Komárek (eds), Constitutional Pluralism in the European Union and Beyond (Hart Publishing 2012), 302–305.

[52] When the Court recognises the most specific provisions applicable to the situation at hand and stops at interpreting only them, as the rest is considered unnecessary for deciding the case, it is not staying silent. Exhaustive answers at times venture well into the domain of national courts, the application of the law.

[53] Such situations can be considered appropriate sharing of interpretative responsibility, marked by 'it is for the referring court to ascertain', or the like, often relating to the facts and proportionality review, are more implicit deference when part of the grounds for decision and more explicit deference when included in the dispositif (operative part).

question posed or reformulates them restrictively in its reply.[54] Going beyond Sarmiento's taxonomy, also reasoning insufficiently – in a way hampering understandability[55] – could be considered as silence under 'unheard replies', in case it leads to ignoring the Court's rulings.

The analysis is elegant, in fact perhaps too elegant. Silence is not always used constitutionally, to defer, to avoid conflict or promote discourse. Neither is silence always a positive feature, even from a constitutionally pluralist perspective of facilitating peaceful coexistence of a plurality of legal orders. There are also instances of habitual silence, or confused silence. The habitual form of silence, or minimalism, relates to incrementalism in that 'legal principles laid down by the Court are sometimes only given full effect in decisions following those in which they are first identified'.[56] This delay tactic, as the argument goes, softens reactions against such moves while it also helps to legitimise decisions as grounded in precedents. At least incrementalism decreases the risks included in making far-reaching legal interpretations in light of one single case and may serve to increase the inflow of references. Moreover, in terms of incrementalism, the Court is in an institutionally privileged position where it can tactically sequence the depth of its replies with regard to cases it knows are pending before it.[57] These mechanics enable the Court to assemble an established body of case-law on a given issue while simultaneously boosting its own authority by an influx of further cases.[58] The other type, confused silences in reasoning, seem to relate to the size of the composition of the Court (Grand Chamber judgments especially), hence may well relate to Judges not finding enough common ground to justify the interpretative outcome they (or a majority of them) agree on. Because of the confused silences now and again, as well as the incremental approach in general, the Court would seem to accept a strategy to develop lines of cases, where a legal interpretation may only become fully comprehensible once a sufficient number of judgments complement each other or when they are complemented by an exhaustive reply.[59] What is more, the Court's interpretation in a

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[54] For example, this category of minimalist replies, includes giving a restrictive "useful answer" to the national court whereby the Court dodges one of often many issues explicitly raised by the national court.

[55] The Grand Chamber justificatory silence in Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm), EU:C:2011:124 is a good often quoted example of an excessively brief and confusing judgment.

[56] Miguel Poiares Maduro, We the court: the European Court of Justice and the European Economic Constitution. A critical reading of Article 30 of the EC Treaty (Hart Publishing 1998), 10.

[57] E.g., Ruiz Zambrano (n XX) followed by Case C-434/09 Shirley McCarthy v Secretary of State for the Home Department, EU:C:2011:277

[58] See also Sarmiento 2012 (n XX) 'Half a Case…', 32-33.

[59] Sankari (n XX), 224ff.

judgment can be more or less tied to the facts of the case at hand, either concrete or abstract[60] – making its applicability in future cases more limited or more universal. Strategic choice is involved in this way of purposively alternating between judgments in individual or concrete cases and more principled or abstract ones.[61]

The Court interprets EU law, keeping in mind the pluralist European legal order in which it and its fellow courts are supposed to (co-)operate. Moreover, it sticks to the complex context rationality of EU law and, when necessary, should assert the claim to (ultimate) authority on its own behalf. The downside of the Court's minimalist approach is that it adds to legal indeterminacy.[62] For Sarmiento, the Court's 'minimalist approach forces other institutional partners to assume an interpretive responsibility that the Luxembourg Court is not willing to undertake alone'[63] thereby sacrificing uniformity, coherence, and systemic consistency of EU law, in other words, the Court is neglecting to do its job. However, from a normatively constitutional pluralist perspective, there may be good reasons for minimalism, and to a certain degree the (temporary) added indeterminacy may be an acceptable price to pay for room for discourse, legal change, and institutional choice.

From the point of view of normative constitutional pluralism, minimalist interpretation can be a way to share power and responsibility, and to address defective institutions and path-dependent biases, 'a form of self-imposed external constitutional discipline on national democracies'.[64] As to power, Sarmiento argues that: 'If interpretation is a form of power, every minimalist judgment necessarily creates a vacuum of power, a vacuum that will be filled by national courts, the political process or international actors.'[65] In regular minimalist cases of interpretation, those vacuums of power are exactly what is required for the purpose of continued conversation. In these instances, the only problem is that power has not been neatly allocated beforehand and hence there can be disagreement over the

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[60] On concreteness especially from the point of view of national court, see Gareth Davies, 'Activism relocated. The self-restraint of the European Court of Justice in its national context' (2012) 19 *Journal of European Public Policy* 1, 76, 79ff.

[61] For one arguing the Court is capable of distinguish between *arrêt d'espèce* and *arrêt de principe*, see Sarmiento 2012 (n XX) 'Half a Case…', 20, where he collects signals the Court explicitly uses for this distinction (and not rarely in operative parts of judgments): 'in the specific circumstances of the present case, or 'in those precise circumstances,' or 'taking into account all the relevant factors in the individual case,' or 'a person in the circumstances of the appellant in the main proceedings'. See also Conway 2012 (n XX), 225-246.

[62] Sarmiento 2012 (n XX) 'Half a Case…', 32.

[63] Sarmiento 2012 (n XX) 'Half a Case…', 32-33 (italics in the original).

[64] Maduro 2012 (n XX), 77.

[65] Sarmiento 2012 (n XX) 'Half a Case…', 29.

interpretation as well as who has the power or responsibility to make it – all sides of the conversation may wish to approach the issue as minimalistically as possible. However, too much minimalism, and the critique by Baquero Cruz would indeed hold: 'sometimes the real danger is not conflict, but that Union law is emptied of substance and becomes irrelevant.'[66] Moving from regular disagreements to larger scale or more fundamental disagreements, constitutional conflicts, the space for conversation lessens, as from the perspective of some legal order – for compelling reasons for that particular order – the issue is such that the power up for grabs has to be taken (as it is not given). These are the types of disagreements where, in extreme cases, even institutional disobedience could take place. Baquero Cruz suggests national constitutional review could result in disobeying EU law, but only on strongly constrained basis: that is, disobedience would be a last resort political act of publicly well-reasoned dissent justified by fidelity to law, for which the disobedient Member State accepts the legal and political consequences for itself, other Member States, and the EU.[67] Rare and well-reasoned disobedience, unlike a generalised and sustained disobedience, would not immediately equal disintegration.

A more regular example of the effects of power vacuums created by partial silences described above would be, for example, proportionality review. It is a task often ultimately assigned to the national court by preliminary rulings and though a procedural notion, instead of rights-discourse,[68] can serve two different purposes in the conversation. First, from the more fundamental point of view of normative constitutional pluralism, national constitutional law may suffer from morphostasis and a challenge successfully placed by EU law can induce morphogenesis through constitutional discourse. As constitutional principles are open to the future,[69] more reflexive constitutional adjudication would counteract the tendency in constitutional law of 'denying the potential of an indeterminate constitutional law to give voice and normative power to the justice demands made by a revolutionary polity, which lives far beyond the moment of constitutional instantiation', after all the constitutional 'legal task is… - …one of responding to enduring extra-legal revolution with a

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66 Baquero Cruz 2016 (n XX), 368.

67 See Baquero Cruz 2012 (n XX), 265-267 and Baquero Cruz 2011 (n XX), 65-70, Baquero Cruz 2016 (n XX).

68 See Michelle Everson and Julia Eisner, *The Making of a European Constitution: Judges and Law Beyond Constitutive Power* (Routledge-Cavendish 2007), for example, 73-77. Similarities between procedural notion based discourse and reservations as to preference between substantive goals in Komesar's comparative institutional analysis and thereby with Maduro's thinking seem apparent.

69 See, for example, Maduro 2011 (n XX), 469.

constantly self-legitimating law.'[70] Second, when proportionality analysis is approached as a rationality check of national choices by the Court,[71] applying its own rather formal rationality criteria and not substantively engaging with competing national rationalities is in line with the Court's minimalist approach. What proportionality review especially, and judicial review of national measures more broadly, is ultimately about is to 'ensure some kind of participation in and scrutiny of the national political processes by the broader political community.'[72] This is easy to combine with the insight of Komesar's comparative institutional analysis that all decision-making processes skew decision-making and all available alternative institutions for furthering any particular social goal are imperfect as they necessarily reflect participation-biases.[73]

The minimalist approach leaving power up for grabs allows debate among preferences in interpretation, as the concept of debate suggests, and should in the continental European tradition be understood as furthering exchange between judicial, legislative and academic branches of the legal community, instead of monologues by the Court.[74] From a normatively constitutional pluralist perspective, the ensuing indeterminacy may be an acceptable price to pay.

Conclusions

Granted, the legal reasoning model suggested above is compatible with a host of cosmic constitutional theories, including pluralist ones. Ultimately they are, and should remain, more personal convictions both for scholars and for judges of a collegiate court like the Court of Justice. Nevertheless, though the legal reasoning approach just laid out does not have to be endemic or exclusive to constitutional pluralism in order to work with it, when paired with a normative theory of constitutional pluralism, it at least engages with some shortcomings of judicial adjudication recognised by comparative institutional analysis.

It would be rather against the values underlying a pluralist dynamic take on law to try and capture one precise and permanent adjudicative mechanic the inter-court aspect of constitutional pluralism requires in order to operate, as one can choose to read both the law and the Court in many ways. To complicate things further, one can rather firmly

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[70] Everson and Eisner 2007 (n XX), 89-90, 76.

[71] See Everson and Eisner 2007 (n XX), 60.

[72] Miguel Poiares Maduro, 'Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights' (1997) 3 European Law Journal 1, 55-82, 68.

[73] See Komesar 1994 (n XX), 11; Komesar 2001 (n XX), 189.

[74] Baquero Cruz 2016 (n XX), 369.

assume there are factions within the Court interpreting the law quite differently from each other. Taking also this plurality into account, it is however reasonable to argue that, in terms of legal interpretation, the Judges need to share some common ground and actually might negotiate during deliberations on how to interpret EU law in the case at hand according to the established legal reasoning model of the Court.

Such a conclusion goes rather well with the supposedly free-wheeling "hippie" mindset of constitutional pluralism that,[75] among many other things, one can also perceive this 'as a welcome discovery and not as a problem in need of a solution.'[76] For what are yardsticks for interpretative action like theories of legal reasoning supposed to be, even when read in a pluralism accommodating light? They are ideals, at best. Something to strive for, not something to reach. Moreover, in interpretative terms, the quest is not to fix the meaning but to fix a meaning that is open for discussion and reinterpretation. At the end of the day, as Matej Avbelj has recently put it: 'A pluralist Union is thus, thanks to plurality, inherently open, therefore unstable, but simultaneously also very strong if this openness is recognized, cherished, and exercised with an eye on the claims of the other entities as well as on the wellbeing of the whole.'[77]

[75] What this chapter aimed to do was not to elaborate further complicated theories and thereby aim to earn its place as part of the 'legacy of a "hippie" constitutional pluralism formulated at such levels of abstraction that it loses touch with socio-economic realities', critiqued by Agustín José Menéndez, 'Which Citizenship? Whose Europe?—the Many Paradoxes of European Citizenship' (2014) 15 German Law Journal 907, 933. Menéndez's criticism would seem to cut both ways between different constitutional theories. For further criticism in the same general direction, see Julio Baquero Cruz 2016 (n XX), 369.

[76] Maduro 2012 (n XX), 77.

[77] Avbelj 2017 (n XX), 49.