

Conflict, power, and understanding – judicial dialogue between the ECJ and national courts

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In Pierre Bourdieu's terms, law is a battlefield where holders of legal 'capital' compete to reach a position where they can say what the law is (Bourdieu 1986, 4–12). Although in hermeneutical terms every instance of interpretation contains elements of conflict, this feature may be said to be particularly paradigmatic in the legal field.¹ However, legal interpretation (adjudication) may nonetheless be described as essentially dialectical: it proceeds as a dialogue between the court and its audience.² While legal decision-making can be conceptualised in terms of a dialogue, the views presented in that dialogue are necessarily different.³ Indeed, if this were not the case, no dialogue would be needed. As a consequence, each participant in this dialogue attempts to force their conceptual framework onto other participants. (Tontti 2004, 37; cf. Derrida 1994, 32–33.)

In the context of adjudication, the element of conflict that law carries is particularly visible: essentially, adjudication consists of a struggle about the meaning of law. In court, parties present their interpretations of a particular factual situation and applicable legal norms. On the basis of this dialectical situation, by using their power and authority courts create law by way of judgments: they give law

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¹ Tontti 2004. In this respect, Tontti's inspiration can be traced back to works by Lyotard and Ricoeur. See *inter alia* Lyotard, 1983, 29 and Ricoeur 1990, 19.

² See for a critical account of dialectics of legal interpretation Tontti 2004, 125 *et seq.* Essentially, he argues that legal interpretation is characterised by conflict, power, and authority.

³ Gadamer 1990, 317 on the dialectical relationship between question and answer in the process of understanding.

a concrete meaning in the cases they decide.⁴ In this sense, law is not static but constantly evolving on the basis of new interpretations moulding it. All players engaged in the game of law produce new law when they propose differing interpretations of the legal tradition of a particular legal community. Although new and different, they nonetheless remain applications of the same tradition. In this respect, the tradition of law may be conceptualised as ‘an ongoing historical process of conflicting interpretations’ based on a struggle for hegemony over other interpretations. (Tontti 2004, 35.)

The relationship between different courts may also be conceptualised in terms of a dialogue – understood in a broad sense – that of *judicial dialogue* (see e.g. Claes 2006; Rosas 2007a). This article discusses one specific form of judicial dialogue: that which takes place between the European Court of Justice (ECJ) and national courts within the context of the preliminary ruling procedure under Article 267 Treaty on the Functioning of the European Union (TFEU). In this procedure, the ECJ engages in an indirect dialogue with national courts that enjoy a key role in the daily application of EU law. In reality, national courts function as EU courts in that they apply EU legislation in national contexts. From this perspective, a question worth exploring is the following: on what kind of theoretical basis could the dialogue between the ECJ – as the ‘highest’ court on the EU level – and national courts be conceptualised?

Just as could be said for every interpretative enterprise, elements of conflict and power form part of ECJ adjudication to which judicial dialogue between the ECJ and national courts relates. The relationship among these EU courts is often described as a power struggle – especially in the context of issues concerning jurisdiction with regard to questions carrying constitutional importance but also in relation to the principle of supremacy of EU law.⁵ However, this article argues that although this relationship necessarily contains elements of conflict and power, it also includes elements of agreement.

In this sense, it seems necessary to add a third concept to those of conflict and power introduced above; that of mutual understanding. This article conceptualises judicial dialogue between the ECJ and national courts by taking as its starting-point a hermeneutical understanding of (legal) interpretation. Essentially,

⁴ In a similar vein Carl Schmitt argues that concrete decisions function as the basis of law. See Schmitt 1960, 79.

⁵ See e.g. Kumm 1999; Claes 2006; cf. Rosas 2007a, who emphasises the importance of maintaining and developing a dialogue among international courts. To a certain extent, this article also relates to the classic question of judicial activism; see for well-known criticism e.g. Rasmussen 1986; cf. e.g. Rosas 2007b.

the article claims that the relationship under discussion may be conceptualised by using three notions: conflict, power, and mutual understanding. Further, this article suggests that striking a balance between these contradictory elements requires that in this dialogue, emphasis is placed on fundamental rights, since they highlight the need for mutual understanding.

Chaining it together: a story called law

Communicating within a culture

Communication that takes place within a culture consists of taken-for-granted background assumptions that provide us with implicit cultural meanings necessary for communication as well as for interpreting and understanding. Interpretation is conditioned by pre-understanding or preconceptions of the object of interpretation (Heidegger 1993, 16–17). For example, Hans-Georg Gadamer characterises the necessary prerequisite for all interpretation with the notion of prejudice (pre-understanding). On this view, the interpreter needs to possess initial prejudices on the subject matter that is interpreted in order to be able to attach meanings to an object (Gadamer 1990, 270–281; see also Tontti 2004, 24–25). This means that every conscious interpretation requires initial understanding of what is being interpreted. Thus, strictly speaking, understanding and interpretation cannot be conceptually differentiated.

Shared culture makes understanding possible. It could be said that prejudices occur in legal culture in this Gadamerian sense, too: this explains why legal communication and forming legal knowledge is possible. However, in order for communication to take place, shared preconceptions must exist between those taking part in communication (Jääskinen 2008, 216–217). It may indeed be that such basic presuppositions concerning law exist: all lawyers share these – at least to a certain extent (Van Hoecke & Warrington 1998, 514–515). Arguably, the basic presupposition in law includes a basic concept that makes it possible to conceptualise law as a relatively consistent field of normative meaning. This can be achieved by referring to sources of law according to certain principles expressing principles of legality and constitutionalism. These principles are based on a shared conception of courts as normative institutions that resolve social conflicts. Accordingly, this shared basic concept of law may also enable communication and understanding between legal orders (Jääskinen 2008, 217).

On this understanding, the EU legal community necessarily shares certain basic ideas about law: for example, these basic ideas might be said to include a particular set of sources of law and principles, including fundamental rights. (Cf. Van Hoecke & Warrington 1998, 514–515; Jääskinen 2008, 217) According to this view, at least the possibility of shared understanding about law exists, something that forms a prerequisite for building a common basis for those involved in the process of interpreting and applying EU law.

Certainly, the situation in the EU is interesting from the viewpoint of communication, since legal meaning is not stable in the same way as within national legal orders. In national legal orders, the number of participants in the process of establishing legal meaning is limited to a group of specialists, or more specifically, judges, who possess authority to decide what legal texts mean. In fact, legal meaning arguably constitutes an agreement between specialists on the most sensible interpretation in a given context (Engberg 2004, 1137). Within national legal orders, legal concepts are relatively stable due to the fact that only a limited number of specialists (primarily judges) have the authority to decide what legal words in that specific legal order mean. So in the EU, a search for agreement among courts participating in judicial dialogue is of particular significance.

This relates to the question of how senders and receivers are conceptualised in legal communication.⁶ In legal communication as well as in communication in general, a distinction may be made between direct and indirect receivers (addressees). In the legal context, indirect receivers incorporate all persons affected by legislation, including the general public. Direct receivers, on the other hand, are specialists, that is, the legal community.⁷

If one acknowledges the importance of the ECJ in developing EU law on the basis of cases that are brought before it, then the same distinction could be made between direct and indirect receivers of ECJ judgments. On this view, then, ECJ decisions are primarily directed to the EU legal community. Agreement with regard to the meaning and context of EU law can only be achieved through communication between those participating in the communicative game, that is, the ECJ and the surrounding legal community. In this case, the primary receiver

⁶ See in this respect Van Hoecke 2002 for an in-depth analysis of components of legal communication.

⁷ Kelsen 1979, 40–41. Cf. Van Hoecke 2002, 86–87, who criticises this narrow understanding of direct receivers in the context of law. However, it should be noted that the distinction made between direct and indirect receivers in this article does not suggest that norms are only intended for judges. Rather, this distinction aims to emphasise the role of courts in developing the EU legal order.

ers of ECJ case law include national courts and authorities who daily apply and interpret EU law in Member States. In this respect, the relationship between the ECJ and national courts is of key importance from the viewpoint of constructing EU law.

Chains and traditions

Ronald Dworkin famously argues that in legal interpretation judges assume the role of consecutive authors of a novel where authors write individual chapters: each writer adds their own chapter to the ongoing story (of law). However, in writing their chapter each writer must assure coherence of the whole story, that is, chapters must fit the larger picture; they must constitute a coherent part of the story as a whole. In this sense, judges function as authors of ‘a chain novel called “law”’. (Dworkin 1986, 228–239.)

In this respect, legal adjudication forms a collective enterprise whereby each judge interprets the story of law, i.e. statutes and precedent, written by other judges, related to the case and adds their own chapter to the story. The task of each participant is to construct their chapter in a way that contributes to the best possible novel (legal order) according to the political morality of that particular community. In this way, individual judgments should contribute to coherence of the legal order through realising the political morality of the community in question.

The term ‘political morality’ may be described as referring to the idea that morality is integrated into law by judges adopting communally accepted moral principles in hard cases. On this view, the judge’s decision must be drawn from an interpretation that both *fits* and *justifies* the whole story (legal order) (Tontti 2004, 34). In other words, interpretation of individual rights and legal interests or values in the context of the overall political morality inherent in a legal order must fit the overall purposes of the legal order (Dworkin 1986, 255). In the context of EU law, it would be realistic to say that not only the ECJ but national courts who daily apply EU legislation participate in this interpretative enterprise that constitutes EU law.

Although the chain-novel metaphor in many respects accurately describes the interpretative process in adjudication, it nonetheless disregards conflict and power, which arguably also form part of legal interpretation. Certainly, for Dworkin the previous chapters of the chain-novel depict a *coherent* picture of the

system of law. However, law could be said not so much to represent a coherent whole but, rather, to involve a continuous conflict of interpretations.⁸

Indeed, interpretation within the context of law may be characterised as an ongoing interpretative activity whereby different interpreters of law (players in the communicative game of law such as judges, lawmakers, law professors) constantly reconstruct law by reinterpreting it (see e.g. Van Hoecke 2002, 172 *et seq.*). In the context of adjudication, judges continuously create *new* interpretations and, consequently, new law. In this sense, law could be said to be in a dialectical conflict with new legal materials in interpretation: as a result, law is recreated when the new and the old are combined in adjudication (Tontti 2004, 35).

To the conceptualisation of adjudication in terms of Dworkin's chain-novel metaphor can be added notions of conflict and normativity (Tontti 2004, 35–37). In essence, it may be argued that law is an ongoing historical process of conflicting interpretations where different interpretations compete to reach hegemony over other interpretations. Indeed, interpretative situations necessarily contain a *choice* among different interpretations. In this respect, chosen interpretations hide other possible ways of describing and interpreting the situation in question. (Tontti 2004, 36.)

On this view, every interpretation creates new law that does not necessarily form a coherent representation of the rest of the legal order. In the context of such a patchwork of differing legal norms that are to a large extent constructed through individual judgments, *acceptability* of adjudication assumes an important role. From the viewpoint of acceptability in particular, it seems necessary to add a third notion to those of conflict and power briefly discussed above: that of mutual understanding. For if those participating in creating law – in the EU context, the ECJ and national courts, in particular – do not share a similar understanding of values and principles that guide interpretation, then acceptability seems a problematic goal.

⁸ MacCormick 2005, 13, who notes that law forms 'a locus of argumentation'. On this view, differing views about the content of law may always be expressed due to the indeterminate character of all human communication.

Dialectics of judicial mutual understanding

Dialogue between the ECJ and national courts

In the previous sections, the notion of conflict and power were discussed in the context of legal interpretation and adjudication on a general level. In the following, these notions are analysed in relation to the dialogue between the ECJ and national courts based especially on Article 267 TFEU.

As noted above, adjudication forms a dialogue even though it includes conflicting views: in fact, if different views did not occur in this dialogue, no need for it would exist in the first place. However, a court pronouncing judgment does not discuss it openly with other parties involved in the proceedings. For example in the EU context, no direct dialogue takes place between the ECJ and national courts: they do not engage in a direct and open discussion concerning the most suitable interpretation in a given case. Rather, the dialogue is inherent in judgments, particularly taking place in the preliminary ruling procedure. To a certain extent, the preliminary ruling procedure engages the ECJ in a constant dialogue with national courts. (Rosas 2007a, 4.)

This dialogue functions on the basis of Article 267 TFEU requiring national courts to request a preliminary ruling in cases related to interpretation and validity of EU law. Consequently, when a national court is confronted with a problem of interpretation that relates to an EU law provision, or if doubts arise before the court about the validity of EU legislation, national courts and tribunals have a right, and courts of last instance an obligation, to request a preliminary ruling from the ECJ.

Although theoretically dialectical, the preliminary ruling procedure is by nature such that national courts and the ECJ are not on a level playing field; rather, it is for the ECJ to state the law and give instructions to national courts as to the most suitable interpretation and application of EU legislation.⁹ Importantly, the discourse situation in which communication between the courts takes place is

⁹ Although in principle the ECJ possesses – in accordance with the supremacy of EU law – hierarchical authority over national courts in questions related to EU law, this does not imply that national courts always fully agree on the ECJ’s interpretations in questions of a principled nature: see *inter alia* cases related to human rights, for example the so-called Solange and Maastricht decisions of the German Federal Constitutional Court, BVerfGE 37, 271, BVerfGE 73, 339, and BVerfGE 89, 155. See also the recent German Constitutional Court judgment concerning the Lisbon Treaty (Treaty on the Functioning of the European Union) of June 30, 2009, available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html. See also Claes 2006, 666 *et seq.*

not ‘ideal’, in that communication is not primarily reciprocal; instead, it is based on the authority of the ECJ as the highest court in the EU to ‘dictate’ meanings and give content to abstract provisions of EU law. (Cf. Habermas 1984.)

True, the relationship between the ECJ and national courts does not form a relation of vertical hierarchy in that the ECJ does not function as a court of appeal empowered to annul or modify national court judgments.¹⁰ However, preliminary rulings are not only binding on the national judge making the request; they also play a role in guiding interpretation in all Member State courts and authorities. Indeed, failure to respect ECJ interpretations, or similarly, failure to request a preliminary ruling when doubts exist about the correct interpretation of EU legislation or the validity of a Community act may constitute an infringement leading to proceedings before the ECJ initiated by the Commission or an action for damages instigated by a private person against the Member State(s) in question.¹¹

So, why may it nonetheless be argued that this judicial interaction forms a dialogue? Firstly, the interaction between the ECJ and national courts can be said to constitute a particular dialogue in the sense that it is up to national courts to formulate the questions on which the ECJ will give a preliminary ruling.¹² While these questions may sometimes be re-formulated by the ECJ, the ECJ is in principle bound by the questions referred by national courts. Besides, national

¹⁰ Rosas 2007a, 7. The ECJ preliminary ruling also applies retroactively, in principle going back to the entry into force of the provision at hand. See also Jans *et al.* 2007, 270–271 for an analysis of the binding character of ECJ preliminary rulings.

¹¹ Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic* [1991] ECR I-5357. See also the *Köbler* case, case C-224/01, *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239, para. 118 *et seq.* In that case the ECJ held that liability of a Member State may in principle also arise in cases where the alleged infringement consists of refusal by a national court of final instance to request a preliminary ruling. Indeed, if a court of final instance fails to request a preliminary ruling, this may also constitute an obligation, under certain conditions, to review a decision that has become final as a result of a judgment of the court that in light of a subsequent ECJ ruling constitutes a misinterpretation of EU law. See also *inter alia* case C-453/00, *Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren*, [2004] ECR I-837, paras 27 and 28. The *Kempter* case is also related to the issue, case C-2/06, *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas* [2008] ECR I-00411, especially paras 57–60.

¹² Information Note on References from National Courts for a Preliminary Ruling, OJ 2005, C 143 according to which: ‘the referring court may, if it considers itself to be in a position to do so, briefly state its view on the answer to be given to the questions referred for a preliminary ruling’, available at: <http://curia.europa.eu/en/instit/txtdocfr/autrestxts/txt8.pdf>.

courts may also suggest an answer or outline optional answers in a reference for a preliminary ruling.¹³

Secondly – and perhaps most importantly – while the ECJ ruling on questions referred is binding, national courts decide the case before them to which the reference relates. Further, although national courts are required to follow ECJ case law, the ECJ's interpretations are often of a general character, in practice leaving to national courts the application of rules stated in ECJ case law. This, in turn, arguably gives at least a degree of leeway to national courts in subsequent application of ECJ case law. Or, as is often the case with principles such as that of proportionality, the ECJ leaves to the referring national court (in preliminary ruling cases) the task of deciding whether a specific measure is in accordance with the principle of proportionality.¹⁴

Of particular significance in this respect is that the so-called adversarial procedure, in the form typical to national law, does not as such exist within the context of the preliminary ruling procedure. Instead, under this procedure, after a national court has referred a question to the ECJ, all parties to the proceedings before that court as well as the Member States and the European institutions (subject to certain limitations) may take part in the proceedings before the ECJ.

Before the ECJ, the case in question turns into a broader question, sometimes of a principled nature. In this respect, the procedure at the ECJ transforms from a simple legal dispute between two parties in a national setting to a broader EU-related legal question bearing not only on the actual case to be decided by the referring court but also on other similar cases in all Member States. Viewed objectively, the procedure before the ECJ in a certain sense resembles lawmaking instead of traditional adjudication: the ECJ must give a legally binding answer to questions often involving broad, EU-wide political significance.

Conflict and power – but what about mutual understanding?

The discussion in the previous sections of this article suggests that the dialectical relationship between the ECJ and national courts includes three distinct elements: conflict, power, and mutual understanding. Firstly, under the preliminary

¹³ Rosas 2007a, 8. He notes that views expressed by the referring court may also in some cases be reflected in the actual ECJ judgment.

¹⁴ See *inter alia* case C-219/07, *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v. Belgische Staat*, [2008] ECR I-4475, para. 41. See also case C-510/99, *Criminal proceedings against Xavier Tridon*, [2001] ECR I-7777, para. 58.

ruling procedure, the ECJ is faced with conflicting interpretations: not only may the national court outline possible interpretations, while Member States as well as the Commission (and in certain situations other EU institutions, too) often take part in the proceedings to express their own view as to the correct interpretation in the question at hand.

Secondly, as a result of the preliminary ruling procedure, the ECJ decides on the interpretative question giving EU law provisions a specific meaning through its case law using the power conferred on it by the Treaties. Essentially, the nature of EU legislation may be described in terms of 'incompletely theorized agreements' (Sunstein 1999; Maduro 2007, 9). That is, they refer to agreements reached on the basis of different normative assumptions. Arguably, EU law is a product of complex political bargaining: the result contains a degree of sometimes even intentional, politically necessary fuzziness (Koskinen 2000, 86). It follows that as long as the political process can itself complete only partial agreement on EU legislation, these incomplete legislative decisions necessarily lead to a delegation of law-making power to the ECJ. In such a situation, the ECJ is required to legally resolve and decide on issues that have not been agreed on in the actual legislative process (Maduro 2007, 9; see also Koskinen 2000, 86).

Thirdly, while an argument could be made that it is enough that the ECJ imposes its interpretation on other participants in judicial dialogue on the basis of supremacy of EU law, the fact that the EU lawmaking process is based on an implicit 'agreement not to agree' entails a shift of emphasis from power to mutual understanding. As a result of shortcomings in the political process of lawmaking, emphasis necessarily shifts to adjudication, to the role of the ECJ in justifying general legal rules by way of individual judgments. (Maduro 2007, 9)

Applying the above theoretical discussion, it could follow that each ECJ interpretation forms a new, independent instance of law that moulds the tradition of EU law. Here, it seems particularly important that each interpretation is justified to the legal community, primarily to the direct addressees (receivers) of ECJ judgments: national courts. Besides, it seems that in the context of EU judicial dialogue, where both the ECJ and national courts interpret and develop EU law, a mutual understanding should exist on the underlying values on the basis of which conflicts between different interests are decided.

In this respect, as the dialogue in question is indirect, ECJ argumentation should include a certain reflexivity that takes into account the differing legal cultures and traditions that underlie the pluralistic EU legal community. It would be realistic to describe the dialectical relationship between the ECJ and national courts as constituting a forum where different normative views meet and com-

pete. It follows that in order for ECJ interpretations to gain acceptance, they should be based on a shared understanding of underlying values of the legal order.

Further, the acceptability of ECJ case law could be said to depend on the reactions of other courts because of the dialectical relationship between the ECJ and national courts.¹⁵ For this reason, the ECJ is in a position where it must express arguments, in turn accepted by the pluralistic EU legal community, to justify its decisions. Since national courts daily apply and interpret EU law – in a sense functioning as filters between the ECJ and national legal communities – it seems particularly important that a mutual understanding as to correct interpretations of EU law should exist among the ECJ and national courts.

The underlying idea is to rationally motivate judgments in order for those participating in argumentation to accept the corresponding descriptive or normative statement as valid (Habermas 1984, 22–42). In this case, it is a question of primarily convincing national courts of the correctness of ECJ interpretations. Although continuous dialogue between those participating in the creation of EU law also includes elements of conflict and power, a ‘hegemony of interpretation’ seems difficult to reach without a shared understanding of the underlying values guiding interpretation. This is so because of close interaction that takes place between the ECJ and national courts in the context of the preliminary ruling procedure where judicial cooperation plays a significant role. (Rosas 2007a, 15–16.)

Clearly, acceptability of adjudication does not entail that every person identically interprets legal texts without communicating with others. In the context of judicial dialogue, acceptability of adjudication means that when engaging in a communicative process courts are convinced that the proposed interpretation is acceptable. The criterion is therefore whether clear agreement on an interpretation may be reached among authorised experts but not whether everyone would reach the same interpretation in all possible situations (cf. Engberg 2004, 1165). Arguably, constructing legal meaning that gains acceptance irrespective of national cultures requires that relevant specialists (especially national courts) agree on the interpretation proposed by the ECJ and consider it sensible from the viewpoint of underlying values of the legal order.

In this sense, both the argumentation as well as the end result of proceedings is subject to control by other courts: if national courts follow ECJ case law – even

¹⁵ To the list of courts that ‘control’ ECJ judgments, one could also add the European Court of Human Rights. See in more detail Rosas 2007a, 9 and Ojanen 2007, 91–128 on the increasing importance of fundamental rights in the context of free movement of goods.

when they have not made a reference for a preliminary ruling¹⁶ – then it could be argued that the decisions have been essentially accepted. Here, the plurality of European and national norm-appliers underlines the importance of European values and principles as yardsticks guiding interpretation. (Rosas 2007a, 15.)

In search of a balance between free movement and fundamental rights

To illustrate the theoretical discussion related to judicial dialogue, I briefly consider the *Schmidberger*¹⁷ case. In this case, the Austrian government granted permission for a demonstration to take place on a closed motorway. The demonstration was organised as a protest against high levels of pollution in the Alps caused by heavy traffic on the motorway. In essence, Schmidberger, a German transportation company, argued that allowing the demonstration to take place on the closed motorway interfered with free movement of goods: as a consequence of the demonstration the company was unable to transport goods from Germany through Austria to Italy.

The ECJ recognised that closing down the motorway did indeed restrict the free movement of goods. However, it also considered whether the restriction of free movement of goods could be justified on the basis of freedom of expression and freedom of assembly. The ECJ analysed the relation between Articles 10 (freedom of expression) and 11 (freedom of assembly) of the European Convention on Human Rights (ECHR), on one hand, and the free movement of goods guaranteed in the EC Treaty, on the other hand.

The ECJ confirmed that, in principle, protection of fundamental rights justifies a restriction on fundamental freedoms. Essentially, the ECJ held that the restriction on free movement of goods was justified and that the national authorities were entitled to authorise the demonstration. The following illustrates:

According to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, inter alia, Case C-260/89 ERT [1991] ECR

¹⁶ Cf. Jans *et al.* 2007, 271 who notes that, in reality, courts do not always comply with their obligation to request a preliminary ruling.

¹⁷ Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich* [2003] ECR I-5659.

I-2925, paragraph 41; Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37, and Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25).

The principles established by that case-law were reaffirmed in the preamble to the Single European Act and subsequently in Article F.2 of the Treaty on European Union (*Bosman*, cited above, paragraph 79). That provision states that “[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

It follows that measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community (see, *inter alia*, ERT, cited above, paragraph 41, and Case C-299/95 Kremzow [1997] ECR I-2629, paragraph 14).

Thus, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.¹⁸

The ECJ followed this line of argumentation, *inter alia*, in the *Omega* case concerning the commercialisation of a laser gun that could be used to simulate ‘killing games’. In that case, it was unclear whether the prohibition was compatible with the freedom to provide services and the free movement of goods guaranteed in the EC Treaty.¹⁹ In essence, both in *Omega* and *Schmidberger* the ECJ allowed use of measures seeking to ensure respect for fundamental rights even though they were deemed to have a negative impact on free movement. Arguably, emphasising the importance of fundamental rights in the EU legal order as well as the role of the European Court of Human Rights aims to convince addressees of the rightness of the decision. However, it may equally be argued that in cases related to fundamental rights, the ECJ proceeds with caution. It often seems reluctant to create a monolithic European standard as to how human rights should be defined in Member States.²⁰

¹⁸ Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich* [2003] ECR I-5659, paras 71–74.

¹⁹ Case 36/2002, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, para. 34.

²⁰ In this respect, see especially case 36/2002, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, para. 34. In essence, the ECJ stated in the *Omega* case that ensuring respect for human dignity constitutes a general principle of law protected under EU law.

Interestingly, by keeping its argumentation on an abstract and general level, the ECJ in fact allows leeway for different solutions in Member States. Besides, the judgment seems to suggest that national courts are allowed to interpret free movement provisions in a way that takes the key importance of fundamental rights into account. Moreover, argumentation based on fundamental rights may be more easily acceptable to – and accepted by – a legal community sharing an understanding about law based to a great extent on protection of fundamental and human rights.²¹

Internal market logic or something else?

Clearly, just as in the *Schmidberger* case, the ECJ frequently uses different principles – increasingly including fundamental rights – in its reasoning. It often refers to principles such as effectiveness, legal certainty, observance of the right to be heard, equal treatment, and so on. As in Dworkin’s chain-novel metaphor, where judges aim to find in a specific set of coherent principles related to people’s rights and duties the best constructive interpretation of the political community underlying that particular legal order, the ECJ could be said to use principles as guidelines for interpreting EU law provisions. Moreover, understood in this way, argumentation based on values and principles is a tool for tying individual cases to a longer line of cases and to make explicit the underlying social theory guiding the ECJ legal decision-making process. (Cf. Habermas 1998, 194–195)

Although in this article fundamental rights are described as possible building-blocks of a judicial dialogue based on mutual understanding, recent ECJ case law nonetheless suggests that fundamental rights do not, for the time being at least, constitute a clear-cut foundation on which balancing different interests is based.²² In addition to the cases discussed above, where the ECJ accepted restrictions on free movement on the basis of the need to ensure protection of fundamental rights, illustrative examples include the *Viking Line*²³ and *Laval*²⁴ cases. These cases raise a question concerning the relationship between free movement

²¹ Cf. Paso 2009, 256. See also Rosas 2007a, 15, who sees values and principles as constituting a means for judicial dialogue.

²² See also Ojanen 2009 who describes fundamental rights as the ‘Achilles’ heel’ of EU constitutionalism.

²³ Case C-438/05, *International Transport Workers’ Federation, Finnish Seamen’s Union, v. Viking Line ABP* [2007] ECR I-10779.

²⁴ Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

provisions and the right to collective action. The issue is whether the ECJ should follow a paradigm of law based on the supremacy of free movement principles over fundamental rights. While it may be correct to say that the ECJ decided these cases in accordance with Dworkin's chain-novel metaphor by following the prevailing paradigm of EU law – that of supremacy of free movement over fundamental rights – the question whether the arguments presented convince national courts of the ECJ's interpretation is nonetheless worthy of discussion from the viewpoint of judicial dialogue.

For example, the case could be argued that although the rationality of the EU legal order has traditionally been constructed on the basis of protection of fundamental freedoms instead of fundamental rights, the increasing complexity of issues tried at the ECJ means that Member State legal orders become increasingly intertwined with that of the EU – not least after entry into force of the Treaty on the Functioning of the European Union (TFEU), adding questions with a close connection to protection of fundamental rights to ECJ jurisdiction.²⁵

In other words, due to the ever-growing range of questions covered by EU law and tried at the ECJ that do not naturally follow 'internal market logic', the dialogue between the ECJ and national courts gains all the more importance. As the EU legal order interacts with national legal orders, it is of key significance that courts interact, too. To facilitate judicial dialogue, it seems particularly important that values and general principles of law are openly articulated. (Rosas 2007a, 15) Arguably, in such a situation, the role of fundamental rights as expressing the underlying value-basis of the legal order operates to enhance mutual understanding in judicial dialogue: fundamental rights form a representation of the underlying rationality of the legal order is plausibly shared – at least to a certain extent – by the ECJ and national courts.

The above discussion on fundamental rights also illustrates the role of conflict, power, and mutual understanding in the context of judicial dialogue. Certainly, a potential conflict exists between views as to how to reconcile, on the one hand, fundamental rights as guaranteed in national legal orders – and after entry into force of the TFEU, in the Charter of Fundamental Rights – with fun-

²⁵ ECJ jurisdiction has extended significantly after the pillar structure disappeared with entry into force of the TFEU. Consequently, the ECJ has acquired general jurisdiction to give preliminary rulings in the area of freedom, security and justice. Additionally, the Charter of Fundamental Rights of the European Union now possesses the same legal value as the Treaties so that it forms part of the body of rules and principles on the basis of which the ECJ adjudicates.

damental freedoms as enshrined in the EC Treaty, on the other hand. Equally, the delicate issue of hierarchy between, for example, national supreme courts and the ECJ closely relates to the issue of fundamental rights and use of power in the dialogue among these courts. The issue relates to the power struggle often described as taking place between these courts with regard to the question of which European court should function as the final arbiter of questions involving broad constitutional significance.

To illustrate, the judgment delivered by the German Constitutional Court in June 2009 on the Lisbon Treaty (TFEU) suggests that courts taking part in the dialogue described in this article may use fundamental rights as means of acquiring more power in this relationship. Briefly put, in its judgment the German Court restated the famous formula according to which it does not examine compatibility of European secondary legislation with German fundamental rights as long as such fundamental rights protection exists on the EU level as is comparable with that of the German Basic Law.²⁶ Additionally, and in accordance with the so-called ‘Maastricht’ case, the German Court held, *inter alia*, that it is a matter for national decision-makers to realise fundamental rights in matters such as criminal law or cultural issues such as language, family, and education as well as questions related to fundamental rights including freedom of expression, freedom of association, and freedom of religion.²⁷

This judgment suggests that conflicting views certainly exist in the dialogue between the ECJ and national courts. Hence, searching for a ‘common European legal discourse seems increasingly necessary (cf. Kjær 2004, 396 *et seq*). In this article, the suggestion is that in the context of judicial dialogue this discourse could be based on fundamental rights. Undoubtedly, in order to succeed in convincing national courts of its decisions, the ECJ needs to refer to a ‘legal paradigm’²⁸ or underlying social theory supported by its receivers. For example, in the *Schmidberger* case protection of fundamental rights constituted the underlying value-basis for balancing between different values in the legal order. In this respect, protection of fundamental rights may, tentatively, be described as

²⁶ German Constitutional Court judgment concerning the Lisbon Treaty (TFEU) of June 30, 2009. See also a special issue of the German Law Journal (10, 2009) concerning the Lisbon judgment.

²⁷ German Constitutional Court judgment concerning the Lisbon Treaty of June 30, 2009, especially with specifications in paras 245–260.

²⁸ For elements constituting a legal paradigm, see in particular Van Hoecke and Warrington 1998, 514–515.

representing the Dworkinian underlying political morality on which the legal order is built.

The above seems to suggest a requirement for value-based argumentation built especially on a shared understanding of fundamental rights. Essentially, a strong case exists that in order for national courts to *accept* ECJ interpretations as valid, a mutual understanding – not a relationship based solely on conflict and power – should exist between these courts. Importantly, recent developments in the context of judicial dialogue among European courts described above further highlight the need for more nuanced argumentation based *inter alia* on fundamental rights: such arguments, as suggested above, could form a basis for dialogue based increasingly on mutual understanding that relates to the values underlying the legal order.

Conclusion: value-based dialogue

One might of course protest and say that the dialogue between the ECJ and national courts under discussion is not, in reality, a dialogue. Instead, it could be presented as a ‘prescriptive monologue’²⁹ whereby the ECJ decides on the meaning of EU law in a process solely characterised by conflict and power. However, in a legal order in which questions of broad political significance are increasingly decided by courts, the process in which general rules are justified by way of individual judgments should include discursive elements founded on a shared value-basis. This article suggests that judicial dialogue between the ECJ and national courts should emphasise argumentation based on underlying values of the legal order in order to reach a relationship primarily based on mutual understanding, not conflict and power.

This value-discourse among legal actors may – at best – function as a domain where EU and national legal orders interact in search of a shared legal paradigm. Clearly, judicial dialogue forms a process whereby the different rationalities of these legal orders come into contact with each other and where agreement between the underlying social theories of these systems is sought. Moreover, legal argumentation aiming at acceptability of adjudication can be conceptualised as agreement between legal actors (primarily the ECJ and national courts, but also the wider EU legal community) on the interpretative choices made.

²⁹ I wish to thank Christopher Goddard for this valuable insight as to how this judicial relationship may also be conceptualised.

To a certain extent, judicial dialogue as described above could be said to constitute a bargaining process where the result is a negotiated compromise between different legal cultures and traditions intertwined in the EU legal order. Importantly, the role of values and principles (and in particular, fundamental rights as expressions of these values) is highlighted in order to assure the acceptability of this judicial enterprise. General acceptability of ECJ adjudication requires that those taking part in creation of EU law by way of individual judgments at different levels of the legal order (at the ECJ as well as on the national level) engage in a dialogue that expresses the underlying value-basis on which these instances of law are based.

Bibliography

Books

- Claes, Monica: *The National Courts' Mandate in the European Constitution*. Hart Publishing, Oxford 2006.
- Derrida, Jacques: *Force de loi. Le "Fondement mystique de l'autorité"*. Éditions Galilée, Paris 1994.
- Dworkin, Ronald: *Law's Empire*. Fontana Press, London 1986.
- Gadamer, Hans-Georg: *Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik*. J. C. B. Mohr, Tübingen 1990 [1960].
- Habermas, Jürgen: *The theory of communicative action. Vol. 1: Reason and the rationalization of society*. Blackwell Publishing, Boston 1984.
- Habermas, Jürgen: *Between Facts and Norms – Contributions to a Discourse Theory of Law*. Blackwell Publishing, Boston 1998.
- Heidegger, Martin: *Sein und Zeit*. Max Niemeyer Verlag, Tübingen 1993 [1927].
- Jans, Jan, de Lange, Roel, Prechal, Sacha & Widdershoven, Rob: *Europeanisation of Public Law*. Europa Law Publishing, Groningen 2007.
- Jääskinen, Niilo: *Eurooppalaistuvan oikeuden oikeusteoreettisia ongelmia*. Helsinki 2008.
- Kelsen, Hans: *Allgemeine Theorie der Normen*. Manz Verlag, Wien 1979.
- Koskinen, Kaisa: *Beyond Ambivalence. Postmodernity and the Ethics of Translation*. Tampereen yliopistopaino, Tampere 2000.
- Lyotard, Jean-François: *Le Différend*. Les Éditions de Minuit, Paris 1983.
- MacCormick, Neil: *The Rule of Law*. Oxford University Press, Oxford 2005.
- Paso, Mirjami: *Vuimeisellä tuomiolla. Suomen korkeimman oikeuden ja Euroopan yhteisöjen tuomioistuimen retoriikka*. Helsingin Kamari Oy, Hämeenlinna 2009.
- Rasmussen, Hjalte: *On Law and Policy in the European Court of Justice: a Comparative Study of Judicial Policy-making*. Martinus Nijhoff Publishers, Dordrecht 1986.
- Ricoeur, Paul: *Soi-même comme un autre*. Éditions du Seuil, Paris 1990.
- Schmitt, Carl: *Der Nomos der Erde im Völkerrecht des Ius Publicum Europaeum*. Dunker & Humblot, Berlin 1960 [Greven Verlag, Köln 1950].

- Sunstein, Cass: *One Case at a Time. Judicial Minimalism on the Supreme Court*. Harvard University Press, Cambridge, Mass. 1999.
- Van Hoecke, Mark: *Law as Communication*. Hart Publishing, Oxford 2002.
- Tontti, Jarkko: *Right and Prejudice – Prolegomena to a Hermeneutical Philosophy of Law*. Ashgate, Aldershot 2004.

Articles in books:

- Kjær, Anne Lise: 'A Common Legal Language in Europe?' In Mark van Hoecke (ed.): *Epistemology and Methodology of Comparative Law*. Hart Publishing, Oxford 2004, 377–398.
- Ojanen, Tuomas: 'Tavaroiden vapaa liikkuvuus EU-oikeuden nykytilassa'. In Tuomas Ojanen and Arto Haapea (eds): *EU-oikeuden perusteita II*. Edita, Helsinki 2007.
- Rosas, Allan: 'The European Court of Justice and Fundamental Rights: Yet Another Case of Judicial Activism?'. In Carl Baudenbacher and Henrik Bull (eds): *European Integration through Interaction of Legal Regimes*. Universitetsforlaget, Oslo 2007, 33–63. (Rosas 2007b)

Articles in journals:

- Bourdieu, Pierre: 'La force du droit. Pour une sociologie du champ juridique'. (64) *Actes de la recherche en sciences sociales* (1986), 3–19.
- Engberg, Jan: 'Statutory Texts as Instances of Language(s): Consequences and Limitations on Interpretation'. 29 (3) *Brooklyn Journal of International Law* (2004), 1135–1166.
- Kumm, Mattias: 'Who is the Final Arbiter of Constitutionality in Europe?'. 36 (2) *Common Market Law Review* (1999), 356–381.
- Maduro, Miguel: 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism'. 1 (2) *European Journal of Legal Studies* (2007), 1–21.
- Ojanen, Tuomas: 'Perus- ja ihmisoikeudet – eurooppalaisen konstitutionalismien Akilleen kantapää?'. 107 (7–8) *Lakimies* (2009), 1106–1124.
- Rosas, Allan: 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue'. 1 (2) *European Journal of Legal Studies* (2007), 1–16. (Rosas 2007a)
- Van Hoecke, Mark & Warrington, Mark: 'Legal Cultures and Legal Paradigms: Towards a New model for Comparative Law'. 47 (3) *International and Comparative Law Quarterly* (1998), 495–536.

