Articles

Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order

Elina Paunio[*]

A. Stability, Flexibility – or both?

Legal certainty requires a balance between stability and flexibility. Following the hermeneutical footsteps of legal theorists such as Aulis Aarnio and Alexander Peczenik, a distinction can be made between formal and substantive legal certainty; between predictability and acceptability of legal decision-making.[1] Formal legal certainty implies that laws and, in particular, adjudication must be predictable: laws must satisfy requirements of clarity, stability, and intelligibility so that those concerned can with relative accuracy calculate the legal consequences of their actions as well as the outcome of legal proceedings. Substantive legal certainty, then, is related to the rational acceptability of legal decision-making. In this sense, it is not sufficient that laws and adjudication are predictable: they must also be accepted by the legal community in question.

The dichotomy between predictability and acceptability is connected to the classic division between valid norms and their validity as action. It concerns the distinction between what is valid in itself and what can gain validity as an act performed.[2] Formal predictability suggests that law is immobile, independent, and pre-established as well as pre-settled. Substantive acceptability, however, concerns the more flexible aspect of law and adjudication: it refers to law's reflexivity, fluidity, and context-sensitivity. These two distinct and sometimes opposing values come together in the notion of legal certainty.

This article discusses legal certainty from the viewpoint of adjudication in the context of EU law. That is, the focus is on the European Court of Justice (ECJ). Legal certainty encompassing both its formal and substantive elements is generally considered as one of the most important principles in national legal systems: emphasis is nonetheless placed on

[*] Lawyer linguist, European Court of Justice and doctoral student, Centre of Excellence in Foundations of European Law and Polity, University of Helsinki Faculty of Law. Views expressed in the article are solely those of the author. Email: <elina.paunio@helsinki.fi>

[1] AULIS AARNIO, THE RATIONAL AS REASONABLE 3 (1987); ALEXANDER PECZENIK, ON LAW AND REASON 31 (1989) and ALEXANDER PECZENIK, VAD ÄR RÄTT? OM DEMOKRATI, RÄTTSSÄKERHET, ETIK OCH JURIDISK ARGUMENTATION 43 (1995).

[2] GEORG HENRIK VON WRIGHT, NORMS AND ACTION: A LOGICAL INQUIRY (1963).

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

predictability.[3] Less evident, however, is whether and to what extent legal certainty enjoys a similar role in the legal order set up by the European Union. One can ask whether legal adjudication can fulfill the requirements of stability and flexibility, of predictability and acceptability at the same time. And, in particular, can this twofold conception of legal certainty be applied in the context of EU law?

Normative concepts can, *inter alia*, refer to legal principles used by courts in adjudication; or to characteristics of an ideal legal order. In the first sense, they include principles used as interpretative tools in legal reasoning. In the second sense, however, concepts form a representation of underlying basic principles of a particular legal order. That is, they express fundamental values of a legal system.[4] This article does not examine the principle of legal certainty used by the ECJ as an interpretative tool in its reasoning.[5] Rather, the focus is on legal certainty as an underlying, perhaps even an ideal, principle expressing the fundamental rationality of the EU legal order. More specifically, this article turns on the more general aspects of ECJ legal reasoning, that is, on the ECJ's argumentation. This choice is based on the presumption that the ECJ can, by way of argumentation, assure more legal certainty.

However, the teleological approach to interpreting EU law which the ECJ has adopted is often said to collide with the principle of legal certainty.[6] Interpreting EU legislation by reference to systemic and, in particular, teleological considerations is said to run contrary to ideas associated with the principle of legal certainty, especially that of predictability. On this view, teleological interpretation disregarding the wording of a rule makes adjudication within the context of EU law particularly unpredictable.[7] In the following, I try to answer the question: what does legal certainty mean in EU law? Drawing from Jürgen Habermas' discourse theory of law, I discuss how the principle of legal certainty may be conceptualized within the context of EU law from the viewpoint of ECJ legal reasoning.[8]

---

[3] It should be noted that the concept of legal certainty is generally used in Civil law systems. In Common law, the closest equivalent would be the principle of rule of law. See *e.g.* PECZENIK (note 1), 31.

[4] KAARLO TUORI, OIKEUDEN RATIO JA VOLUNTAS 152–158, 221–247 (2007).

[5] This is also why the ECJ's extensive body of case law related to the principle of legal certainty is not discussed in this article.

[6] Isabel Schübel-Pfister, *Enjeux et perspectives du multilinguisme dans l'Union européenne : après l'élargissement, la « babelisation »*, 488 REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE, 332 (2005); HJALTE RASMUSSEN, TOWARDS A NORMATIVE THEORY OF INTERPRETATION OF COMMUNITY LAW 33 (1993).

[7] *Id.* RASMUSSEN, 33.

[8] The choice of a systemic theory as the basis for my analysis is explained by the fact that the principle of legal certainty has been of particular interest to theorists with a background in Civil law legal systems.

B. Discourse and Legal Certainty

I. Introducing the Discourse Theory of Law

Habermas' theory of communicative action is founded on the idea that actors in a particular society seek to reach a common understanding and to coordinate actions by reasoned argument, consensus, and cooperation rather than strategic action that strictly aims at realizing the participants' own goals.[9] The idea also functions as the basis for Habermas' understanding of law. Essentially, the discourse theory of law claims that law is legitimated on the basis of the discourse principle in justification discourse by voluntary, intersubjective agreement in the lawmaking process among all those affected and that the law can be impartially applied in application discourse through the principle of appropriateness.[10]

Whereas a rationally motivated consensus, which is the starting point for Habermas, rests on reasons that convince parties in the same way, a compromise is reached when different parties accept a decision for different reasons.[11] Arguably, the EU lawmaking process is based on an implicit "agreement not to agree".[12] This form of bargaining resulting in compromise, not consensus, is typical of the EU lawmaking process. The result of this process is legislation based on different normative assumptions: political bargaining facilitates compromise in this deliberative process where issues of political importance are left undecided.[13] As a result of the 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. Consequently, the role of the ECJ in justifying EU law provisions is highlighted.

The Habermasian principle of discourse ethics is of particular significance in this respect: only such norms can claim to be valid that meet (or could meet) with the approval of all those concerned in a practical discourse.[14] As explained above, EU legislation is not

[9] JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION. VOL. 1: REASON AND THE RATIONALIZATION OF SOCIETY 86 (1984).

[10] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS – CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW 222–236 (1996). See also RONALD DWORKIN, LAW'S EMPIRE 239–240 (1986).

[11] *Id.* HABERMAS, 166.

[12] Miguel Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1 EUROPEAN JOURNAL OF LEGAL STUDIES, 1, 9 (2007).

[13] *Id.*, 9.

[14] JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 66 (1990). See AARNIO (note 1), 225 for criticism of value cognitivism.

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

necessarily based on shared normative assumptions. In terms of deliberative democracy, the fact that emphasis shifts from the political process to the courts might be considered as particularly problematic: political questions are no longer decided in a process in which those concerned can participate, at least not directly. Instead, politically important questions are given a legal answer through ECJ case law.

II. Balancing Between Certainty and Acceptability

In his book *Between Facts and Norms*, Habermas addresses the question of legal certainty in more detail. Essentially, he tries to answer the question of how the certainty and the legitimacy of law can be simultaneously achieved in adjudication. He argues that the socially integrative function of legal systems requires that adjudication must simultaneously satisfy the conditions of consistent decision-making and rational acceptability, a view closely connected to that of Aarnio.[15]

It follows that, on the one hand, legal certainty requires that decisions are consistent with the framework of the existing legal system. On the other hand, the claim to legitimacy demands decisions that are not only consistent in relation to the surrounding legal system, but that should also be rationally justified so that all participants can accept them as rational decisions. The rationality problem which Habermas discusses is the following: how can continually evolving and developing law be applied in a way that guarantees both certainty and rightness?[16] Or, more specifically: how can the appropriateness of selective decisions be justified so that all participants perceive them as acceptable?[17] The answer to these questions is related to the idea of a paradigm of law that guides adjudication.

Habermas stresses the importance of a particular paradigm of law in guiding the process of interpretation. A paradigm of law is based on a particular understanding of the legal system: it is an implicit social theory of a legal system.[18] More specifically, it makes the rationality of the interpretative process explicit by reference to a specific purpose.[19] Additionally, building a bridge between predictability and acceptability respectively is connected to the distinction between justification discourses and application discourses.

[15] See, *supra,* note 10, HABERMAS , 194–237.

[16] *Id.*, 198–199.

[17] *Id.*, 202.

[18] *Id.*, 194–195.

[19] See, *supra,* note 10, DWORKIN 52.

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

Justification discourses refer to the lawmaking process, whereas application discourses are relevant in adjudication.[20]

On the basis of this distinction, norms remain inherently indeterminate until they have been *applied* in an individual case to a particular factual situation. Because norms are only *prima facie* applicable, courts enter an application discourse in order to test whether they apply to a specific case or whether they have to give way to another norm in the context of application. Indeed, on this understanding the fact that a norm is disregarded in a specific case does not affect its validity. The fact that a norm is valid before application means that it has been impartially justified; a valid decision in a particular case requires that it has also been impartially applied.[21] The validity of the general norm does not therefore guarantee validity in an individual case. Understood this way, application discourses in legal adjudication concern a norm's appropriate reference to a situation, not its formal validity.[22]

The choice as to the relevant facts and their description is made within application discourses in adjudication. Courts decide which are significant for interpreting the situation in the case at hand; further, they must determine which of the *prima facie* valid norms are appropriate for deciding the case. In this respect, adjudication is a hermeneutical process whereby norm application is interconnected with a description of the circumstances and a concretization of generally valid norms: interpretive issues are finally decided by the meaning equivalence between the description of facts in the case and the descriptive component of norms, their application conditions.[23]

Habermas observes that the distinction between justification and application discourses results in use of the concept of legal certainty (understood here as predictability) being somewhat problematic, since on this understanding legal norms contain no predetermined application procedures. As a result, a legal system cannot guarantee that court decisions possess the degree of predictability required by the principle of legal certainty. However, Habermas adds that according to the formal view of legal certainty, legal certainty is a principle that must itself be weighed and balanced against other interests and principles in the case at hand.[24] For example, in ECJ case law, considerations of legal certainty (*i.e.*

[20] Klaus Günther, *A Normative Conception of Coherence for a Discursive Theory of Legal Justification*, 2 RATIO JURIS, 155, 157 (1989). See also JÜRGEN HABERMAS, JUSTIFICATION AND APPLICATION 35 (1993).

[21] See *inter alia, supra,* note 1, PECZENIK, 142 on the conceptual difference between valid norms and their validity as acts performed.

[22] See, *supra,* note 10, HABERMAS, 217. Habermas seems to suggest that in modern legal systems courts need to engage in both discourses of justification and application, since the political process does not alone justify norms sufficiently from a communicative perspective.

[23] *Id.*, 218.

[24] *Id.*, 220.

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

predictability) are sometimes weighed against other principles such as that of effectiveness and uniformity in particular.[25] Nonetheless, Habermas argues that the certainty of law can be secured on a different level.

III. Procedural Legal Certainty

Habermas introduces the concept of *procedure-dependent certainty of law* in order to resolve the paradoxical relationship between certainty and acceptability. In essence, procedural rights guarantee legal persons the possibility of a fair procedure. Instead of guaranteeing certainty of outcomes in individual cases, procedural legal certainty assures "a discursive clarification of the pertinent facts and legal questions."[26] In this respect, what is important is not the predictability of the outcome itself, but rather, the certainty that legal persons have the opportunity to affirm their legal situation in a court procedure according to a predetermined set of procedural rules. In fact, the procedural paradigm of law supported by Habermas only creates the conditions for those participating in the procedure to actualize their rights. It does not guarantee a specific and predetermined outcome; rather, it ensures the necessary procedural setting where different values may be balanced on a case-by-case basis.[27]

Due to the flexible and, one might even argue, "liquid" nature of EU law, the EU legal system is in constant movement and continuously adapting to societal changes. It follows that the priority relations between values protected by the legal system change over time. The case of environmental protection in the context of Community law serves as an example: the emergence of environmental considerations in ECJ case law coincided with general political developments in the Member States.[28] In fact, for Günther norms are ranked in a transitive order that is unavoidably connected to possible application situations. These are generalized descriptions of specific types of application situations. These paradigms form a background context in which are embedded current assessments

[25] See *inter alia,* Case 238/84, *Criminal proceedings against Hans Röser*, 1986 E.C.R. 795; Case 173/88, *Skatteministeriet v. Henriksen*, 1989 E.C.R. 2763; Case C-64/95, *Konservenfabrik Lubella Friedrich Büker GmbH & Co. KG v. Hauptzollamt Cottbus,* 1996 E.C.R. I-5105; Case C-161/06, *Skoma-Lux s.r.o. v. Celní ředitelství Olomouc*, 2007 E.C.R. I-10841.

[26] See, *supra,* note 10, HABERMAS, 220.

[27] *Id.,* 388.

[28] See *e.g.* Case C-240/83, *Association de défense des brûleurs d'huiles usages*, 1985 E.C.R. 531 and C-2/90, *Commission v. Belgium*, 1990 E.C.R. I-4431.

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

of situations as well as *prima facie* moral judgments.[29] What orients adjudication, then, is the paradigmatic legal understanding of the legal community prevailing at the time. In other words, although no guarantee exists as to the outcome in individual cases, the intersubjectivity of adjudication nonetheless restricts the possibilities of the courts.[30]

However, equating predictable adjudication with a specific legal paradigm is not without problems: the outcome of a procedure is predictable for the parties only insofar as the relevant paradigm determines a background understanding which both legal experts and citizens share. Habermas concludes that coherent interpretations within a fixed legal paradigm remain indeterminate as they compete with equally coherent interpretations of the same case within an alternative paradigm.[31] To my mind, the issue of indeterminacy highlights the role of argumentation and justification in the context of adjudication. Indeed, it is for the courts and, more specifically, the ECJ within the EU legal system, to facilitate communication through argumentation in order to reach agreement as to the legal paradigm to be followed in interpreting EU law.[32]

Although Habermas advocates a procedural understanding of law and legal certainty in particular, it becomes clear from his analysis that procedure is not enough to guarantee legal certainty. While he argues that procedural rights create a form of legal certainty in that people know that they have an opportunity to get their case heard according to certain procedural rules, he concedes that this is not in itself enough to fulfill the requirements of legal certainty. Importantly, because it is impossible to create laws that are precise at the outset, legal certainty is guaranteed on the one hand by procedural means (creating procedural predictability) and on the other hand by means of argumentation (rational acceptability). Applying the analysis to EU law, it may be argued that legal certainty consists in a combination of procedural safeguards and argumentation. In this respect, the ECJ's role is to support its decisions by reasons that convince the legal

[29] See, *supra,* note 20, Günther, 163. *Cf.* HANS-GEORG GADAMER, WAHRHEIT UND METHODE. GRUNDZÜGE EINER PHILOSOPHISCHEN HERMENEUTIK 275–290 (1990).

[30] See, *supra,* note 10, DWORKIN, 239–240. For Dworkin, intersubjectivity is expressed by the political morality of the legal community, which guides adjudication.

[31] See, *supra,* note 10, HABERMAS, 221. *Cf.* CHAÏM PERELMAN AND LUCIE OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION (1971); CHAÏM PERELMAN, JUSTICE ET RAISON (1963), whose notion of an ideal audience and its role from the viewpoint of acceptability of argumentation is connected with Habermas' views.

[32] Illustrative examples include the so-called *Viking Line* and *Laval* cases: Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union, v. Viking Line ABP*, 2007 E.C.R. I-10779 and Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767. These have raised a discussion concerning the relationship between free movement provisions and the right to collective action. The question is whether the ECJ should follow a paradigm of law that is based on the supremacy of free movement principles over fundamental rights. It might be argued that the ECJ decided the cases in accordance with the prevailing paradigm of EU law, *i.e.* that of supremacy of free movement. However, an entirely different question is whether the arguments presented convinced the legal community of the ECJ's interpretation.

community of the suitability of the decision.[33] In this respect, the role of the EU legal community[34] is of particular importance in determining the acceptability of ECJ case law.

This leads to the question of how the legal community can agree on a specific legal paradigm so that the problem of indeterminacy in legal decision-making can be resolved. Habermas proposes a reflexive form of communicative action to resolve the problem. In other words, agreement among the legal community with regard to the interpretation of a legal text in a specific case requires that the rights of all participants are recognized in legal argumentation. Indeed, for Habermas, the paradigmatic preunderstanding of law can limit the indeterminacy of legal decision-making and guarantee a sufficient degree of legal certainty in so far as the paradigm is shared by all citizens and expresses the self-understanding of the entire legal community.[35] This seems to imply that predictable legal decision-making cannot exist without substantive acceptability. It requires a shared preunderstanding of the paradigm that governs legal decision-making.

Applying Habermas' proceduralist understanding of law to the EU context, some issues stand out. Firstly, since the proceduralist understanding of law is closely connected to the idea of "discursively regulated competition among different paradigms", it implies a connection between legal certainty and judicial dialogue among European courts. That is, the ECJ is in constant interaction with national courts as well as the European Court of Human Rights (ECHR): arguments given by the ECJ to justify its decisions must first and foremost be accepted by national courts that apply EU law.

In this respect, it is worth noting that communication between these courts is built on a different normative basis. Communication between the ECJ and national courts is based on Article 234 of the EC Treaty requiring national courts, in certain situations, to request a preliminary ruling in questions related to interpretation and validity of EU law, while "discourse" between the ECJ and the ECHR is built on a more voluntary basis. For example, the Treaties contain no express reference to an obligation to take into consideration ECHR case law.

It follows that national courts are, at least in principle, bound by ECJ case law. However, it could nonetheless be argued that although national courts are required to follow ECJ case

[33] See *e.g.* Thomas Wilhelmsson, *Yleiset opit ja pienet kertomukset ennakoitavuuden ja yhdenvertaisuuden näkökulmasta*, 102 LAKIMIES 199, 220 (2004) on predictability of argumentation.

[34] Here the concept of a legal community is understood in the strict sense: that is, as primarily encompassing the juristic community operating in the EU legal system, both on national and EU levels.

[35] See, *supra,* note 10, HABERMAS, 222–223. Habermas tries to develop Dworkin's One Single Right Answer thesis beyond the monological, judge-centered view that seems to be at the centre of Dworkin's theory. Indeed, Dworkin does not address the issue of different legal paradigms that are simultaneously present in a given community. See also, *supra*, note 10, DWORKIN , 225.

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

law, ECJ 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, could be argued to give 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, it is left to national courts to decide on the proportionality of a specific measure.[36]

Secondly, the role of argumentation in legal decision-making is highlighted. What is important in creating a shared paradigm of law is the question of what counts as a "good reason" in the context of ECJ legal reasoning. In other words, the ECJ needs to give arguments to justify its decisions which are accepted by the pluralistic EU legal community. The underlying idea is therefore to rationally motivate those participating in argumentation to accept the corresponding descriptive or normative statement as valid.[37] The ECJ proffers arguments in its decisions to convince the EU legal community of the rightness of its decisions so that their acceptability is enhanced.

Habermas claims that "good reasons" for convincing participants to accept a particular statement as valid may only be identified in light of the argumentation game, that is, the contribution which that statement makes in accordance with the rules of that game for deciding the interpretative question with regard to a contested claim in the case at hand.[38] Essentially, the rightness of legal decisions is ultimately weighed against how well legal reasoning satisfies the communicative conditions of argumentation that are a prerequisite for impartial decision-making.[39] In this respect, Habermas sees legal discourse as an institutionalized form of communication that is itself embedded in the legal system. Again stressing the role of procedure, he understands rules of procedure as a means of compensating for the fallibility and uncertainty of legal decision-making resulting from the fact that the requirements of rational discourses can only be roughly fulfilled.[40]

---

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

[37] See, *supra,* note 9, 22–42.

[38] See, *supra,* note 10, HABERMAS, 227.

[39] *Id.*, 230. See in more detail ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION – THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION (1989). Habermas discusses at length Alexy's thesis of legal argumentation as a special case of practical argumentation. Although the relationship between moral and legal argumentation cannot be discussed here in detail, suffice it to mention that Habermas does not agree with Alexy in that for him legal discourse cannot be defined as a special case of moral-practical discourses.

[40] See, *supra,* note 10, HABERMAS, 233–234.

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

IV. Dialogue between Courts

While Habermas' theory of law is based on the idea that balancing predictability and substantive legal certainty is possible through procedural guarantees, predictable procedure in the EU is not enough to guarantee legal certainty in the substantive sense. In addition to procedural guarantees, substantive legal certainty requires transparent and open argumentation. Habermas sees adjudication as a forum where different views are discussed in an institutionalized setting and, hence, where agreement exists as to the "communicative rules" of this process. In this respect, it seems Habermas assumes that legal adjudication follows – at least to a certain extent – the idea of communicative action. In other words, an underlying aim exists to reach consensus, if not on the case to be decided but in the context of procedural guarantees aiming to give the parties an opportunity to have their say: adjudication is a means of communicative action in which the primary role of courts is to guarantee the realization of basic rights.[41] Indeed, another way of describing adjudication is that of dialectics: it is a dialogue where different interpretations are discussed according to a given set of procedural rules.[42]

Although principally dialectical, when a court pronounces judgment it does not, however, discuss it openly with other parties involved in the proceedings.[43] For example, in the EU no direct dialogue takes place between the ECJ and national courts in the sense that they engage in discussion about the most suitable interpretation in a given case. The dialogue takes place through the following forms of communication: dialogue is inherent in judgments, and particularly in the preliminary ruling procedure. The preliminary ruling procedure in reality engages the ECJ in "a constant dialogue with the national courts."[44] But the nature of the preliminary ruling procedure is 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 for national courts as to the proper interpretation and application of EU legislation.[45]

---

[41] *Id.* Habermas argues that courts should not be concerned with essentially political or moral questions but, rather, they should primarily be concerned with securing the system of rights.

[42] See, *supra,* note 29*,* 317, on the dialectical relation between question and answer in the process of understanding. However, it should be observed that Gadamer's hermeneutical philosophy is based on analysis of individuals, not on analysis of collective groups such as courts and their interpretative processes.

[43] JARKKO TONTTI, RIGHT AND PREJUDICE – PROLEGOMENA TO A HERMENEUTICAL PHILOSOPHY OF LAW 35 (2004). Tontti describes adjudication fittingly as a forum where different interpretations compete: legal interpretation includes a continuous conflict between interpretations.

[44] Allan Rosas, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, 1 EUROPEAN JOURNAL OF LEGAL STUDIES 1, 4 (2007).

[45] However, in other cases, too, the dialogue has taken a different path in that national courts have not fully agreed on the ECJ's interpretation on certain questions of a principled nature: see, *inter alia* the cases related to human rights, for example the so-called Solange decisions as well as the Maastricht decision of the German

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

Importantly, then, the discourse situation in which communication between the courts takes place is 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.

Additionally, the adversarial procedure to which Habermas implicitly refers in describing legal certainty in procedural terms does not as such exist in the EU. The preliminary ruling procedure is a case in point. Under this procedure, after a national court has referred a question to the ECJ, all parties to the proceedings before that court, the Member States as well as the Commission and other European institutions (under certain conditions) are allowed to take part in the proceedings before the ECJ. In this respect, the procedure in reality transforms the referred question from a simple legal dispute between two parties in a national setting to a larger 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 a certain sense, the procedure at the ECJ resembles lawmaking instead of traditional adjudication. In this procedure, different legal paradigms compete based on different standards for balancing between values, principles, and policies.

Consequently, one might argue that the ECJ must engage in both justification and application discourses: norm justification requires that all interests concerned are taken into account, whereas norm application requires that all features of a situation are considered before deciding a case.[46] Due to the nature of EU legislation as "incompletely theorized agreements"[47], laws remain in need of discursive justification at court-level. Essentially, emphasis is placed on ECJ legal reasoning.

Balancing between stability and flexibility means that the focus shifts from the former to the latter. In other words, a shift occurs from emphasizing formally predictable outcomes to substantive legal certainty that essentially requires rationally acceptable legal decision-making and, consequently, substantively acceptable legal reasoning. The pluralistic nature of the EU legal order encompassing diverging national legal systems expressed in a multiplicity of languages provides an additional source of indeterminacy in adjudication. Within national legal systems, legal texts are relatively stable because only a limited number of specialists (primarily judges) have the authority to decide what those texts mean in that specific legal system.

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 of June 30, 2009, BVerfG, cases 2 BvE 2/08, available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

[46] See, *supra* note 20, Günther, 155.

[47] CASS SUNSTEIN, ONE CARE AT A TIME (1999).

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

However, predictability should not be understood as meaning that every person identically interprets legal texts without communicating with others. Rather, it means that when engaging in a communicative process nearly all lawyers are convinced that the proposed interpretation is acceptable. The criterion is therefore whether clear agreement on an interpretation may be reached among authorized experts but not whether everyone would reach the same interpretation in all possible situations. This idea seems particularly workable if one takes into consideration the inherent indeterminacy of language. Further, applying this line of thought to the context of EU law, one could argue that constructing legal meaning that is valid in all languages requires the relevant specialists to agree that the interpretation proposed by the ECJ is sensible and can therefore be accepted.[48] Again, emphasis is placed on the way legal decisions are justified.

In essence, the acceptability of ECJ case law depends on the reactions of other courts because of the dialogical relationship between the ECJ and national courts as well as the ECHR. In this sense, both the argumentation as well as the end result of proceedings is subject to control by other courts: if they follow ECJ case law – even when they have not made a reference for a preliminary ruling – then it can be argued that the decisions have been essentially accepted. Here, the plurality of international, European, and national norm-givers and norm-appliers underlines the importance of European values and principles as yardsticks guiding interpretation. Indeed, they might even be argued to form a means for tying together pluralistic societies and adding predictability and stability not only to the legal system but to contemporary societies in general.[49]

In this respect, the role of courts, and more specifically that of the ECJ in the European context, is increasing with regard to articulating and interpreting such values and principles.[50] The emergence of a plurality of legal systems and subsystems that constantly interact in a pluralist world means that courts must interact, too. Values and principles that guide adjudication in courts, such as those included in teleological arguments (expressing "the political morality" of the community) at the ECJ, function as road-signs not only for the court deciding the case but to the wider pluralistic and multilingual legal community. In this sense, the values and principles articulated in decision-making perform a twofold function. On the one hand, they guide decision-making. On the other hand, they also constitute a medium for other courts and the wider legal community to evaluate ECJ rulings. Additionally, it may be argued that values and principles guiding adjudication should emerge and evolve in a deliberative process where courts and other decision-

[48] Jan Engberg, *Statutory Texts as Instances of Language(s): Consequences and Limitations on Interpretation*, 29 BROOKLYN JOURNAL OF INTERNATIONAL LAW 1135, 1165 (2004).

[49] See, *supra,* note 44, 1.

[50] *Id.*

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

makers (such as the legislator) interact in search of acceptability.[51] In the EU context, this deliberative process is essentially based on the ECJ's ability through its arguments to communicate underlying values and principles in its decisions to the scrutiny of the legal community.

C. Convincing and Acceptable Argumentation?

I. Rational Argumentation and Audiences

The topic of this article is closely connected to the idea that legal decisions and, more specifically, legal argumentation aiming at justifying those decisions are directed towards an audience.[52] This perspective might be characterized by means of the following regulative principle related to legal adjudication: legal interpretation should aim to secure the support of the majority in a rationally reasoning legal community.[53]

The interrelationship between argumentation and audience is based on Chaïm Perelman's theory of argumentation where the relationship between rational and reasonable is analyzed. Rational argumentation is aimed at a universal audience to which all rational persons belong (an essentially ideal audience).[54] Legal interpretation (adjudication) is also dialectical: it proceeds as a dialogue between the court and its audience.[55]

Building on Perelman's views concerning argumentation and audiences, Aarnio develops his version of audiences. On the one hand, a universal and concrete audience exists that is not relevant for legal decision-making, since such a Perelmanian audience includes all persons irrespective of their rationality. On the other hand, it is possible to define a particular concrete audience in a concrete argumentative situation. However, no means exists of guaranteeing the rationality of the reaction of such an audience. Hence, for the purposes of legal argumentation, Aarnio develops the notion of a particular ideal audience. This audience must fulfill the following criteria. Firstly, its members are bound by the rules

[51] *Id.*, 15.

[52] See, *supra,* note 31, PERELMAN AND OLBRECHTS-TYTECA; see, *supra,* note 31, PERELMAN.

[53] See, *supra,* note 1, AARNIO, 226–227.

[54] This universal audience in fact corresponds to Habermas' "ideal speech-situation" where the possibility of manipulation and persuasion has been eliminated and therefore all participants are in the same position. See, *supra,* note 9.

[55] See for a critical account of dialectics of legal interpretation, see, *supra,* note 44, 125. He essentially argues that dialectical legal interpretation is characterized by conflict, power, and normativity.

of rational discourse. Secondly, those members have also adopted common values. That is, within the context of legal discourse, the particular ideal audience is limited to the boundaries of the legal community.[56]

Essentially, to realize the aim of (rationally) acceptable legal decision-making and as a result, substantive legal certainty, the interpretative choices made by a court must be acceptable not only normatively but also rationally so that they conform to the values of that particular community.[57] In this respect, Habermas' understanding according to which *all* participants should be able to accept the decision is not realistic: it is an ideal situation that cannot be reconstructed in actual adjudication.

The notion of a particular ideal audience in the context of adjudication comes close to the way in which it is possible, in legal communication or in communication in general, to distinguish between direct and indirect receivers. Indirect receivers are all persons affected by legislation, including the general public. Direct receivers, on the other hand, are specialists, *i.e.* the legal community.[58] 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, the acceptability of ECJ decisions would require substantial acceptance of its decisions, in particular by direct receivers: the EU legal community. An agreement with regard to "EU law meaning" can only be achieved through communication between those participating in the communicative game, that is, the ECJ and the EU legal community. The primary receivers of ECJ case law are national courts and authorities who daily apply and interpret EU law in Member States. Additionally, receivers might also be taken to include the wider EU legal community comprising EU institutions and the EU juristic community as well as similar legal communities in Member States.

How can the ECJ convince this pluralistic audience of the suitability of its interpretations? By using its authority, the ECJ uses language to create law and endows EU law with concrete meaning in the cases it decides. Such decision-making is not, in Habermasian terms, an ideal speech situation, free from persuasion or manipulation: instead, in order to succeed in this task, the ECJ needs to convince the audience of the rightness (rational acceptability) of the decision in order to fulfill the requirements of substantive legal certainty.

---

[56] In Wittgensteinian terminology, this audience is tied to a certain form of life that is defined culturally and socially.

[57] See also *supra,* note 10, DWORKIN, 255.

[58] HANS KELSEN, ALLGEMEINE THEORIE DER NORMEN 40–41 (1979). See also MARK VAN HOECKE, LAW AS COMMUNICTION 86–87 (2002).

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

II. How to Convince an Audience? – Logos, Ethos, and Pathos

In this section, I discuss the issue of rational acceptability of ECJ case law. In doing so, I use rhetorical tools based on the Aristotelian distinction between three types of argument: *logos* (based on logic or reason), *ethos* (appeal based on the character of the speaker), and *pathos* (based on emotion). A conceptual difference exists between, on the one hand, convincing argumentation and (rationally) acceptable legal interpretations on the other. The former is related to the rhetorical possibilities available in argumentation and the latter to the rationality of argumentation. In legal interpretation, however, a close connection exists between convincing and acceptable adjudication: they are both related to the outcome in a particular case.[59] For a particular legal decision (judgment) to be acceptable from the viewpoint of argumentation, it must correspond to the values of the audience. Additionally, it must be rational.[60] Importantly, while convincing argumentation is not necessarily rationally acceptable and vice versa, a close connection exists between the two notions. In the legal field in particular, convincing argumentation is closely related to the rationality of the decision. Rationality is a prerequisite for acceptability.[61]

For example, Mirjami Paso argues that while ECJ legal reasoning is perhaps rationally acceptable, it is nonetheless not, in many respects, convincing. According to Paso, the reason is twofold. Firstly, legal sources that are said to govern the case at hand are only mentioned but not elaborated and clarified: their content is not explicated to the audience or they are not connected by logical arguments to the factual situation in the case at hand so as to help understand their relevance. Secondly, argumentation proceeds on a highly abstract and general level.[62]

Indeed, ECJ legal reasoning may be described as essentially *meta-teleological*: decisions are based on a small number of recurring general and abstract purposes. These include effectiveness of Community law, uniformity of application, legal certainty, and legal protection.[63] Indeed, it might be argued that the ECJ's style of reasoning is often authoritative both in style and argument. This means that a gap may exist between the

[59] MIRJAMI PASO, VIIMEISELLÄ TUOMIOLLA. SUOMEN KORKEIMMAN OIKEUDEN JA EUROOPAN YHTEISÖJEN TUOMIOISTUIMEN RETORIIKKA 353 (2009).

[60] See, *supra,* note 1, AARNIO, 185–195. The requirement of rationality consists of L-rationality and D-rationality.

[61] See, *supra,* note 59, 352.

[62] *Id.*, 195–280, on categorizing ECJ arguments in accordance with the Aristotelian logos, ethos, pathos distinction.

[63] MITCHEL LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 211–229 (2004).

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

facts of the case and the legal sources as well as the purposes and aims of the text and the Treaty given as arguments to support the outcome of the case. Indeed, from this perspective teleology is not in itself problematic. Rather, it is a question of how and to what extent the aims and objectives mentioned in reasoning are connected to the factual background of the case at hand.

Authoritative arguments that assume a key role in ECJ reasoning are categorized in rhetorical terms as *ethos* arguments, arguments that concern convincing the audience by the character of the author. Additionally, many central arguments in ECJ judgments are *pathos* arguments. They include arguments that are meant to persuade by appealing to the audience's emotions. In legal argumentation, however, *logos* arguments are of particular importance.[64] This is because they refer to the internal consistency of the message, *i.e.* "to the clarity of the claim, the logic of its reasons, and the effectiveness of its supporting evidence."[65] The impact of *logos* on an audience is generally called "the argument's logical appeal."[66] Acceptable legal decision-making requires use of legal sources and interpretative criteria generally regarded in the particular legal community as acceptable and applying them to the facts of the case.[67] In ECJ case law, accepted interpretative criteria include linguistic, systemic and contextual as well as teleological arguments.[68] These are the main elements with which the ECJ may convince its multilingual and multicultural audience.

III. Building Blocks of Convincing Legal Reasoning

Although acceptable and convincing argumentation may be conceptually distinguished, the two elements are intertwined in ECJ legal reasoning. Arguably, in order for the ECJ to succeed in creating substantive legal certainty, it needs to provide both acceptable and convincing arguments in support of its decisions. Next, to illustrate the theoretical discussion related to acceptable and convincing argumentation in the context of ECJ case law, I consider the *Omega*[69] case.

---

[64] See, *supra,* note 59, 353.

[65] JOHN RAMAGE AND JOHN BEAN, THE GUIDE TO WRITING 81–82 (1998).

[66] *Id*.

[67] See, *supra,* note 1, AARNIO, 189–195.

[68] See in more detail JOXERRAMON BENGOETXEA, THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE 218–270 (1993).

[69] Case 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-9609.

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

The *Omega* case concerned commercialization of a laser gun that could be used for simulated "killing games" in Germany. The police authority of the city of Bonn issued an order prohibiting games involving firing at human targets. The central argument was that this game constituted a violation of human dignity as guaranteed in Article 1 (1) of the German Constitution. The *Bundesverwaltungsgericht* (the Federal Administrative Court of Germany) referred the case to the ECJ because it was unclear whether the prohibition was compatible with the freedom to provide services and the free movement of goods enshrined in the EC Treaty.

The ECJ confirmed, by reference to its judgment in the *Schmidberger*[70] case, that protection of fundamental rights in principle justifies a restriction on fundamental freedoms. The ECJ shared the opinion of the Advocate General, who concluded that "the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law."[71] In essence, both in *Omega* and *Schmidberger* the ECJ allowed use of measures seeking to ensure respect for human rights even though they were deemed to have a negative impact on free movement. The following extract illustrates:

> It should be recalled in that context that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, 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 European Convention on Human Rights and Fundamental Freedoms has special significance in that respect (see, inter alia, Case C-260/89 ERT [1991] ECR I-2925, paragraph 41; Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37; Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25; Case C-112/00 Schmidberger [2003] ECR I-5659, paragraph 71).
>
> As the Advocate General argues […], the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in

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

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

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

> Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.[72]

These two paragraphs may be tentatively categorized as examples of legal reasoning based on principally *ethos* and *pathos* arguments. Indeed, the ECJ typically uses references to its own case law as arguments for justifying its decisions. However, these remain authoritative *ethos* arguments, if analogical use of cases mentioned is not consistently justified with substantive reasons. In other words, the ECJ uses its own case law to support the outcome in a particular case, but does not necessarily explain *why* these cases are relevant and *what* makes them similar to the case in question. Arguably, analogical reasoning based on previous case law plays a key role in ECJ reasoning. Although this approach ties individual cases to a longer line of cases and therefore may be argued to enhance consistency, at the same time it may involve problems concerning the persuasiveness of argumentation. This is particularly so if the relevance of cases referred to is not explained.[73]

The ECJ also frequently resorts to *pathos* arguments. Emphasizing the importance of human rights in the EU legal order as well as the role of the ECHR seems to aim at convincing the audience of the rightness of the decision.[74] In the case under discussion, the ECJ proceeds with caution, seemingly reluctant to create a monolithic European standard as to how human rights should be defined in Member States. By holding that the EU legal order aims to ensure respect for human dignity and by emphasizing protection of human rights on a general level, the ECJ does not need to address in detail the question of whether the prohibition was compatible with free movement provisions. It might also be argued that a different line of reasoning would not have been accepted by the EU legal community as reasonable due to the importance of human dignity as an independent fundamental right in Germany. By keeping its argumentation on an abstract and general level, the ECJ allows leeway for different solutions in Member States.

In this respect, general principles of law play an important role in ECJ argumentation. As the above-cited paragraphs show, the ECJ stated in the *Omega* case that ensuring respect for human dignity constitutes a general principle of law protected in EU law. In reality, such arguments are easily accepted by an audience that has adopted a European (legal) culture

---

[72] Case 36/2002, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-9609, paras. 33–34.

[73] See, *supra,* note 59, 364. The ECJ also often only refers to relevant legal sources, principles, and legislation, without opening these arguments by explaining why they are relevant and what their content is.

[74] See *e.g.* Katharina Sobotà, *Logos, Ethos, Pathos – A Quantitative Analysis on Arguments and Emotions in Law*, *in* RETORIK OCH RÄTT: SETT GENOM TIO FÖRFATTARES ÖGON 155, 170–171 (Mikael Mellqvist and Mikael Persson eds., 1994).

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

based to a great extent on protection of human rights.[75] Indeed, just as in the *Omega* case, the ECJ frequently uses different principles 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. This is not problematic *per se*.

However, from the viewpoint of convincing and acceptable argumentation, the use of principles, or arguments related to aims and objectives of the legal system (*telos*), as *pathos* arguments may nonetheless be problematic. For example, an argument from principle becomes a *pathos* argument when the application criteria of those arguments are not explained. In such cases no substantive connection is made between the particular case and the arguments given to support the outcome in that case.[76] Just as with *ethos* arguments based on the authority of the author, *pathos* arguments remain incomplete without an established connection between them and the factual situation to which they are applied.

While *ethos* and *pathos* may be effective means of persuasion, from a rhetorical viewpoint they are both incomplete. This is because neither type of argument shows that the argument itself is correct. Essentially, *logos* concerns providing factually accurate and logically meaningful reasons in support of the outcome. This is particularly important in the context of legal reasoning. Factual argumentation means that conclusions follow from accurate assumptions and factual information: in order to convince the linguistically as well as culturally pluralistic legal community of the rightness of a particular interpretation requires all three types of argument.[77]

Because the ECJ must convince an audience that is significantly wider and more diverse (both linguistically and culturally) than that of national courts, the ECJ needs to make recourse to arguments that are not confined to the wording of the text. In doing so, it needs arguments that appeal to emotion. In this respect, compared to national courts ECJ legal reasoning might be seen as somewhat atypical: the ECJ not only needs to establish a

[75] See, *supra,* note 59, 256. See also Rosas (note 44), who sees values and principles as constituting a means of judicial dialogue.

[76] See, *supra,* note 59, 254.

[77] *Id.,* 362. Paso notes that arguments from comparative law may prove useful for the ECJ in convincing the audience in this dialogue. In that sense, she suggests that using a greater number of arguments from comparative law could result in a more nuanced dialogue and open ECJ legal reasoning to a critical balancing of different arguments and views. *Cf*. *supra* note 12, 6. Maduro argues that the ECJ should not use comparative law as a means of identifying what it believes to be the best legal solution in the abstract. The "bottom up" construction and legitimacy of EU law, in which the ECJ enjoys a key role, requires that the ECJ respects common national legal traditions and does not simply use comparative law to search for its preferred legal solution among different national legal systems. See also Jan Smits, *Comparative Law and its Influence on National Legal Systems*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 513, 537 (Mathias Reimann and Reinhard Zimmermann eds., 2006).

rationally acceptable decision but must also succeed in persuading its audience.[78] Indeed, persuasion is necessary because of the special features of the EU legal system. The audience to be convinced is both multicultural and multilingual so that cultural prejudices that *prima facie* condition understanding and interpretation of legal texts are not identical.[79]

Here, the ECJ's role is decisive: it might be argued that, if it succeeds in convincing the audience of the suitability of its interpretation, by the same token it enhances the acceptability of its interpretation and, on a more general level, that of the legal order. Arguably, in order for the ECJ to succeed in changing the underlying prejudices of national courts interpreting EU law in national contexts, it needs arguments that appeal not only to logic but also to values. Indeed, from a rhetorical viewpoint *pathos* arguments are important in convincing the audience of the rightness of the interpretation.[80]

On this understanding, none of the different arguments are enough if taken separately: although using arguments that appeal to emotion involves a risk of manipulation, they are nonetheless necessary with regard to the power of the argumentation. Indeed, an interpretation that is supported by both *logos* and *pathos* arguments is from a rhetorical perspective more plausible than an interpretation supported merely by *logos* arguments.[81] To guarantee argumentation that is not only convincing but also rationally acceptable, the ECJ should explain why certain arguments are relevant (and why others are not) and on what grounds: for instance a certain outcome better promotes the aims and objectives of the text in question and the legal system in general. This relates closely to the transparency and openness of legal reasoning, too.

So, from the perspective of the need to convince a particularly divergent audience, the fact that ECJ reasoning is characterized by *telos*, *i.e*. arguments based essentially on aims and objectives of the legal system, is not a bad thing; rather, it is a tool to tie individual cases to a longer line of cases and to make explicit the underlying social theory guiding the ECJ legal decision-making process. However, the issue is whether the ECJ succeeds in connecting these arguments sufficiently with the question at hand.

---

[78] *Id.,* 340. Appealing to emotion is generally associated with political, not legal argumentation.

[79] See, *supra,* note 43, 177. Tontti bases his notion of tradition in legal interpretation on the Gadamerian idea of prejudices that condition all understanding and, consequently, interpretation. See, in this respect, *supra,* note 29, 275–290.

[80] See, *supra,* note 74, 170–171.

[81] See, *supra,* note 59, 340.

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

D. Context-sensitive Communication as a Basis for Legal Certainty in the EU

I. Bringing Habermas Back into the Picture

The discussion on legal reasoning in the previous sections reveals a constantly present element of conflict in legal interpretation. Although dialectical in nature, legal interpretation – and at the ECJ in particular – makes use of authority as well as emotionally appealing arguments. This seems to contradict Habermas' thesis of communicative action as the basis of adjudication where consensus is presupposed between those participating in communication. Procedural guarantees, which in Habermasian terminology guarantee "rational consensus," are needed so that all relevant parties have a realistic opportunity to present their view in the process. However, legal interpretation involves an intertwining of conflict, power, and normativity.[82] While communication in the form of a dialogue between the players in the communicative game is indeed a necessary prerequisite for mutual understanding on the underlying values and purposes of the EU legal order, this does not necessarily result in consensus. The result may also be an agreement, based on different normative assumptions, between the specialists of the legal community on the most suitable interpretation in that particular case.[83]

Although it is impossible to make legal interpretation predictable in the strict sense, some degree of predictability may be created by making determinacy a question of agreement among language users, or in this case the EU legal community.[84] In this respect, ECJ legal reasoning may be regarded as the primary means for facilitating communication that – if it succeeds – leads, if not necessarily to consensus then at least to rational agreement as to the legal paradigm to be followed in interpreting EU law. In this sense, principles expressing values of the legal community may function as a basis for a dialogue between the ECJ and national courts. Consequently, such value-discussions may also act as a foundation for creating an agreement within the EU legal community on suitable legal interpretations in accordance with the dominant legal paradigm.[85]

Substantive legal certainty may be enhanced through emphasizing the communicative relationship between the ECJ and the EU legal community. On this view, transparent

[82] See, *supra,* note 43, 131.

[83] See, *supra,* note 48, 1152–1155.

[84] *Id.*, 1155. See also Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 NEW YORK UNIVERSITY LAW REVIEW 1109, 1123 (2008).

[85] See*, supra,* note 44, 15.

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

argumentation is a key to a more open dialogue. The EU legal order is a dynamic entity that must with increasing rapidity adapt to societal and political changes. This is why transparent argumentation, aiming at rational acceptability of legal decision-making within a specific legal community, should be regarded as a key element of legal certainty that can still be regarded as a valuable concept in law and not just a "rhetorical balloon."[86]

II. Communicating Legal Certainty

In a multilingual and pluralistic legal system where linguistic uncertainty increases compared to relatively stable national legal systems, legal certainty cannot, without difficulty, be reduced to predictability. Indeed, emphasizing predictability also makes context-sensitivity an empty notion.[87] Rather, as I have argued above, the focus should shift to ECJ legal reasoning: this is essential for the acceptance of judgments through which interpretative choices are communicated to the legal community.

Substantive legal certainty depends on whether the legal community in question accepts the arguments advanced to support and justify a specific outcome in a case at the ECJ. Defining legal certainty as encompassing substantive legal certainty that may be enhanced through communication between relevant legal actors in a given legal community comes close to Habermas' understanding of legal certainty. In essence, Habermas' emphasis on the role of procedural guarantees may be understood as a way of balancing between predictability and context-sensitive legal interpretation. Importantly, the fact that both laws and contexts of interpretation change means that something is needed to guarantee at least some level of stability. In this sense what remains stable and predictable is the procedure itself.[88]

Although Habermas sees law and adjudication primarily as mediums for realizing communicative or strategic action, it might be possible to think of legal interpretation within the EU context in these terms, too: the legal sphere, taking the form of a discourse between legal actors, is the domain where EU and national legal systems interact. The discourse is a process whereby the different rationalities of these legal systems come into

[86] See, *supra,* note 4, 225–226. Tuori warns that a risk exists that concepts such as the rule of law and legal certainty are "pumped up" with everything that is perceived as positive. What happens, then, is that these concepts lose their status, instead becoming "rhetorical balloons". See also *supra,* note 33, 220. One could argue that through such argumentation it would be possible to reach a greater level of predictability in legal decision-making too, since transparency opens the interpretative process to critique and to a real dialogue between legal actors in the EU legal community.

[87] See, *supra,* note 10, DWORKIN, 104.

[88] See, *supra,* note 10, HABERMAS, 386.

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

contact with each other and where agreement between the underlying social theories of these systems is sought. One could argue that legal argumentation aiming at rational acceptability of adjudication can be conceptualized as rational agreement between legal actors (primarily the ECJ and national courts, but also the wider EU legal community) on the interpretative choices made.[89] To a certain extent, the discourse is still a bargaining process where the result is a negotiated compromise between different legal cultures and traditions intertwined in the EU legal order.

The role of political actors may be described in the following terms: "success of actors is ultimately decided in the galleries."[90] Applying this description to EU law, it could be argued that communication in the EU legal sphere is characterized by a dichotomy between elites and the wider public. The dialectics of legal interpretation discussed here essentially forms an elite discourse between the ECJ and national courts, with those participating in proceedings in the courts also forming a part of this elite culture. However, the legitimacy of the legal order requires that the interpretations decided in judicial discourse satisfy the sense of justice of the majority of the community.[91] To succeed in convincing the audience of the rightness of its decisions, the ECJ needs to refer to a legal paradigm supported by a majority of the community. For example, in the *Omega* case the protection of human rights constituted the underlying value-basis for balancing between different interests in the legal system.

Although Habermas is critical of courts deciding political or practical issues, the ECJ cannot avoid these issues. This is due to the nature of EU legislation as "incompletely theorized agreements."[92] That is, they are agreements reached on the basis of different normative assumptions. In this sense, EU law is a product of complex political bargaining: the result contains a certain degree of sometimes even intentional, politically necessary fuzziness.[93] As long as the political process cannot itself complete the only partial agreement on EU legislation, these incomplete legislative decisions necessarily lead to a delegation of lawmaking 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 political process.[94]

---

[89] This is based on Habermas' own view on European integration. A European constitution does not work due to the lack of a shared culture ("*Lebenswelt*") on the EU level. In this sense, he could be seen as being in favor of a "bottom-up" approach to European integration.

[90] JEAN COHEN AND ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY 492–563 (1992).

[91] JOHN RAWLS, A THEORY OF JUSTICE 364 (1971).

[92] See, *supra,* note 47. See also *supra,* note 12, 9.

[93] KAISA KOSKINEN, BEYOND AMBIVALENCE. POSTMODERNITY AND THE ETHICS OF TRANSLATION 86 (2000).

[94] *Id*. See also *supra,* note 12, 9. Although the problems of political bargaining are particularly important in the EU where 27 Member States with widely differing national interests participate in the legislative process, the incompleteness of lawmaking is not as such an unknown phenomenon in national settings either. Collective labor

It follows that the argumentation of the ECJ must include a certain reflexivity that takes into account the differing legal cultures and traditions that underlie the pluralistic EU legal community. In this respect, the dialectical relationship between the ECJ and its audience constitutes a forum where different normative views meet and compete.

E. Concluding Remarks

In this article, I have tried to analyze the concept of legal certainty in the EU legal order from the viewpoint of adjudication by using Habermas' discourse theory of law as a yardstick. Although Habermas' views cannot be applied to EU law and ECJ legal reasoning without some creativity, his theory seems to be a useful point of reference because of the importance he places on procedural guarantees and communication in balancing certainty and acceptability in adjudication. These also appear to form the basic ingredients of legal certainty in EU law. Tentatively, and on a purely theoretical level, the formula for legal certainty could be the following: predictable procedure plus rationally acceptable and transparent legal reasoning in accordance with the underlying values of the legal community in question equals legal certainty.

The shortcomings of the EU legislative process result in a situation where the ECJ must legally resolve questions involving broad political significance. In this respect, it is particularly important that the procedure before the ECJ guarantees participatory rights to those concerned by the legal question decided. A procedure ensuring equal consideration of participants' interests as procedurally correct agreements is therefore also of key importance in the EU context from the viewpoint of legal certainty. Habermas' procedural paradigm of law results from the competition of different paradigms: the concrete outcome in a specific case depends on the arguments presented by those participating in the procedure. In this sense, the procedure only creates the conditions for fulfilling rights without guaranteeing a specific solution in a particular case. Flexibility and context-sensitivity take precedence over stability.

Emphasizing flexibility means that the focus shifts from formal legal certainty (predictability) to substantive legal certainty (acceptability). The ECJ is of particular importance in guaranteeing substantive legal certainty. However, in order to succeed in this task, the ECJ must convince the EU legal community of the acceptability of its interpretations. What is important in this respect is that all relevant arguments are recognized in ECJ legal reasoning and that reasons for which a specific interpretation is chosen are stated openly. From the viewpoint of substantive legal certainty, Habermasian

agreements are a case in point: they are often left intentionally vague so that the negotiating parties can reach agreement, at least in principle: the problem of defining the actual content of the agreement is left to the courts.

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press

communication between those participating in the communicative game assumes a key role.

https://doi.org/10.1017/S2071832200018332 Published online by Cambridge University Press