

In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning

Marc Amstutz*

Abstract: *Lawmakers and scholars are so busy looking for new ways to develop a European private law that they are failing to see the virtues of an already existing private law harmonisation tool. This tool is the requirement of interpretation in conformity with directives as it has been designed by the Court of Justice in Marleasing and its progeny. In this paper, it is submitted that this case law operating at the level of rules on legal reasoning, and not at the level of substantive law, is a far more sophisticated means of private law harmonisation than all the measures discussed in the last years. Namely, the requirement of interpretation in conformity with directives is allowing the Common Market to develop coherently without neglecting the significance of national legal cultures. How this difficult equilibrium between harmonisation and legal pluralism might be maintained by the tool the Court of Justice developed in Marleasing is explained in this paper with the help of evolutionary jurisprudence.*

I Interlegality in European Private Law

That we are living in a porous legality, in ‘multiple networks of legal orders’,¹ is today no longer dismissed as a silly whim of legal anthropologists. *Interlegality*, a term coined by de Sousa Santos,² is a reality. Given the now undeniable linkages among legal discourses, the question can only be: How are we to deal with interlegality? A good context for discussing this issue is European private law. It raises a problem which, at first sight, might seem unusual in a private law context, but which is characteristic for bodies of law operating not *in*, but *between* national states, namely, that bodies of law, such as the European directives, merely harmonise national legal orders without replacing them

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¹ B. De Sousa Santos, *Towards a New Legal Common Sense: Law, Globalization, and Emancipation*, 2nd edn (Butterworths, 2002), at 437.

² De Sousa Santos, *op. cit.* note 1 *supra*, at 437.

with unified rules applicable homogeneously in all the countries concerned.³ I would call this the problem of *constitutionalising interlegality*. Here, I treat the term *constitution* neither in a strictly legal, nor in a strictly political, but chiefly in a sociological sense.⁴ In this specific sense, a constitution is to be understood as a *tool of integration of legal norms into real life processes*. As Smend has put it, integration is the generalised adoption of legal norms by a group of people leading them to experiencing these norms as a common good. He spoke of the ‘social synthesis’ of legal norms.⁵ The constitutionalisation problem of interlegality can then be described as follows: How is the integration of norms, emerging in a context located at the interstices of the traditional State-based polities, to be achieved? How can their ‘social synthesis’ succeed?

These questions have for some time been discussed in the European Community⁶, notably under the heading of the governance of a ‘sovereignty association of a special nature’⁷. Ordo-liberalism and neo-functionalism long set the tone.⁸ More recently, however, various proposals have lent the debate new impetus: deliberative supranationalism,⁹ law’s polyarchy,¹⁰ a universal code of legality,¹¹ non-majoritarian transnational institutions,¹² etc. Hopes centre particularly around attempts to make use of patterns drawing on *democracy theory*.¹³

These theoretical endeavours have in common that they struggle with the difficulties of translating the democracy patterns into a polycontextual ‘language’: ultimately, the democratic state based on the rule of law and its corollaries (separation of powers, human rights etc.) are concepts with *hierarchical* connotations.¹⁴ Endeavours to

³ On the concept of ‘harmonisation’ of European private law, see W. van Gerven, ‘Harmonization of Private Law: Do We Need It?’, (2004) 41 *Common Market Law Review*, 505–532, at 505–507.

⁴ For the question as to how the concept of ‘constitutionalisation’ is to be understood, see the overview in U. Haltern, ‘Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination’, (2003) 9 *European Law Journal*, 14–44, at 19–24; see also A. Dashwood, ‘The Relationship Between the Member States and the European Union/European Community’, (2004) 41 *Common Market Law Review*, 355–381, at 376–380.

⁵ R. Smend, *Staatsrechtliche Abhandlungen und andere Aufsätze* (Duncker & Humblot 1955), 149.

⁶ See, e.g., A. Fischer-Lescano, ‘Globalverfassung: Verfassung der Weltgesellschaft’, (2002) LXXXIX *Archiv für Rechts- und Sozialphilosophie*, 349–379, at 350 with further references.

⁷ M. R. Lepsius, ‘The European Union as a Sovereignty Association of a Special Nature’, in C. Joerges, Yves Mény and J. H. H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* (European University Institute, 2000), 212–221; see also Dashwood, *op. cit.* note 4 *supra*, at 355–357.

⁸ See C. Joerges, ‘Good Governance in the European Internal Market: The Two Competing Legal Conceptualisation of European Integration and their Synthesis’, in A. von Bogdandy et al. (eds), *European Integration and International Coordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer, 2002), 219–242.

⁹ C. Joerges, ‘The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective’, (1997) 3 *European Law Journal*, 378–406.

¹⁰ O. Gerstenberg, ‘Law’s Polyarchy: A Comment on Cohen and Sabel’, (1997) 3 *European Law Journal*, 343–358.

¹¹ K. Günther, ‘Rechtsppluralismus und universaler Code der Legalität: Globalisierung als rechtstheoretisches Problem’, in L. Wingert and K. Günther (eds), *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit: Festschrift für Jürgen Habermas* (Suhrkamp, 2001), 539–567.

¹² G. Majone, ‘Nonmajoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach’, (2001) 57 *Journal of Institutional and Theoretical Economics*, 57–78.

¹³ See the overview in T. Cottier and M. Maya, ‘The Prospects of 21st Century Constitutionalism’, in G. Kohler and U. Marti (eds), *Konturen der neuen Welt(un)ordnung: Beiträge zu einer Theorie der normativen Prinzipien internationaler Politik* (de Gruyter, 2003), 120–162.

¹⁴ This issue is discussed in P. Eleftheriadis, ‘Cosmopolitan Law’, (2003) 9 *European Law Journal*, 241–263.

'polyarchise' these concepts are under full steam, but where they will end up nobody knows. The suspicion that democracy theory may be refractory about opening up to a heterarchical logic is, however, increasingly leaving traces in the discussion.¹⁵ Scholarly thinking is more and more turning around the 'eigen-values'¹⁶ of the law. The focus is partly shifting away from experimentation with deliberative, discursive and participatory schemes towards investigation of the *intrinsic logic* of modern law-making processes (as, e.g. the scholarship studying the modern *lex mercatoria*).

At the centre of the present article is the thesis that interlegality can only be constitutionalised *by itself*. The point is that such a constitutionalisation cannot be achieved by linking heterarchical law-creating processes back to public, democratic decision-making,¹⁷ but only by processes organising themselves 'through a practice of trial and error . . . accessible to neither individuals nor the State'.¹⁸ In order to establish this thesis, I shall experiment with the tools of *evolutionary legal theory*. This approach concentrates on how the law manages to maintain its own special features in the various shifts of social evolution.¹⁹ How does it defend itself against being taken over by politics and economics, without losing sight of 'society'? With the support of evolutionary legal theory, I will try to show that the *requirement of interpretation in conformity with directives* developed by the Court of Justice in its case law is an instrument that *supplies the interactions of European and Member State private-law systems with a kind of 'heterarchical' constitution, i.e. constitutionalises private law in the transnational context of European Community*.²⁰ My thesis can be subdivided into three statements:

- (1) First, the requirement of interpretation in conformity with directives is the *trigger* for a *legal process* that does not one-sidedly harmonise the European private-law systems vertically (i.e. 'from above'), still less forcibly unifies them, but brings them into relation with each other with an eye to producing '*normative compatibilities*'.²¹ The advance in this procedure lies in refraining from setting up a *hierarchy of legal norms* on the model of territorial state law. Implicitly, this builds on the insight that it is not necessary to merge the national legal systems, which as Legrand says constitute 'autonomous epistemological clusters',²² into an umbrella code for the Member States, in order to derive the

¹⁵ See, e.g., D. Chalmers, 'The Reconstitution of European Public Spheres', (2003) 9 *European Law Journal*, 127–189.

¹⁶ See, e.g., H. v. Foerster, 'Understanding Understanding: An Epistemology of Second Order Concepts', (1981) 1 *Aprendizagem/Desenvolvimento*, 83–85.

¹⁷ For such a view see, e.g., Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto', (2004) 10 *European Law Journal*, 653–674, at 669; see also H. Collins, 'Editorial: The Future of European Private Law: An Introduction', (2004) 10 *European Law Journal*, 649–652, at 650; M. W. Hesselink, 'The Politics of a European Civil Code', (2004) 10 *European Law Journal*, 675–697, at 691–694.

¹⁸ K-H. Ladeur, 'Die rechtswissenschaftliche Methodendiskussion und die Bewältigung des gesellschaftlichen Wandels: Zugleich ein Beitrag zur Bedeutung der ökonomischen Analyse des Rechts', (2000) 64 *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, 60–103, at 82.

¹⁹ See in detail M. Amstutz, *Evolutionarisches Wirtschaftsrecht: Vorstudien zum Recht und seiner Methode in den Diskurskollisionen der Marktgesellschaft* (Nomos, 2001), at 101–103.

²⁰ See for a similar view on the necessity of legal dynamic experiment in the Community M. Cremona, 'The Union as a Global Actor: Roles, Models, and Identity', (2004) 41 *Common Market Law Review*, 553–573, at 554.

²¹ See A-J. Arnaud, *Pour une pensée juridique européenne* (PUF, 1991), at 234.

²² P. Legrand, 'Against a European Civil Code', (1997) 60 *Modern Law Review*, 44–63, at 44; see also Haltern, *op. cit.* note 4 *supra*, at 17.

added value of the Common Market. The notion of producing ‘normative compatibilities’ uses Hayek’s distinction (to be spelled out below)²³ between legal order and order of actions. On this view the concept of producing ‘normative compatibilities’ means linking various legal systems in such a way as to create *one* coherent order of actions—in the case in point, an integrated economic area as a palpable field of action for Union citizens.

- (2) The requirement of interpretation in conformity with directives triggers an *evolutionary formation of law*. This second statement points to two things: (i) first, that the requirement in question does not harmonise the private-law systems in the EU with each other in some rational thought process (that would be the European Civil Code variant).²⁴ Instead, it triggers integrative forces within those systems that stimulate *institutional learning*.²⁵ This brings about the Member States to rearrange the relationship of their civil law norms to the Community legal order, as it were defining their ‘niche’ in the ‘biotope’ of European law. They do so in a *trial-and-error* process that never comes to an end but continually restarts, i.e. operates in evolutionary fashion. (ii) A further feature is that this process makes direct use of the *reflexive potential* of the national private-law systems involved:²⁶ it is the rationalities of these systems themselves, rather than superordinate law, which decide on their approximation.²⁷ The requirement of interpretation in conformity with directives is in fact not a ‘command to take over foreign law’ but, with a little exaggeration, a ‘self-reflexivity order’.²⁸ Thus, the process engendered by this ‘order’ is not one of application of existing norms, but in reality one of *production of law*. The rather harmless-sounding formula of ‘interpretation in conformity with directives’ buries the fundamental, indeed well-nigh subversive, nature of what is really going on: should the self-reflexivity ‘ordered’ actually produce ‘normative compatibility’, then accustomed legal structures are dissolved and new ones created. What is happening here is far-reaching rearrangements of normative equilibriums that have settled down in Member State private law systems in the course of time, in order to interweave these systems into the heterarchical network of European private law.
- (3) Lastly, the requirement of interpretation in conformity with directives is predominantly seen as *meta-law*, i.e. as ‘law about law’. This third statement too addresses manifold things. On the one hand, it stresses that this precept seeks

²³ See *infra*.

²⁴ See, by contrast, the concept of a ‘postmodern’ European private-law codification in U. Mattei and A. di Robilant, ‘The Art and Science of Critical Scholarship: Post-modernism and International Style in the Legal Architecture of Europe’, (2002) 1 *European Review of Private Law*, 29–59, at 55–57.

²⁵ The concept of institutional learning seems to become more and more important in European law; see, e.g. S. Regent, ‘The Open Method of Coordination: A New Supranational Form of Governance?’, (2003) 9 *European Law Journal*, 190–214, at 191, 210–211.

²⁶ See on the concept of ‘reflexivity’ in law e.g. D. Ashiagbor, ‘Soft Harmonisation: The “Open Method of Coordination” in the European Employment Strategy’, (2004) 10 *European Public Law*, 305–332, at 320–323.

²⁷ See on the details of this principle, *infra* 781–783.

²⁸ Standard doctrine explains this by saying that the directive does not have the structure of a ‘lex’, but merely constitutes a mandate to legislate; see C-W. Canaris, ‘Die richtlinienkonforme Auslegung und Rechtsfortbildung im System der juristischen Methodenlehre’, in H. Koziol and P. Rummel (eds), *Im Dienste der Gerechtigkeit: Festschrift für Franz Bydliński* (Springer, 2002), 47–103, at 52–53.

to constitute the polycentric legal order of European private law not through *substantive law*, but through *procedural law*. To that extent, it brings Member State private law systems into relation not by directly intervening at the substantive level of law, but by influencing national methodological doctrines. Furthermore, perhaps less obviously, the requirement of interpretation in conformity with directives (as a norm on application of law) is primarily a *conflict-of-laws rule*, and only secondarily an *interpretive norm*. To be sure, it cumulates both functions, though admittedly with the objective—and this is the sole point—of defining the respective spheres of the substantive norms of national and Community private law.

II The Illusions of Norm Hierarchies

Legal scholarship is fairly confused when it comes to grasp the requirement of interpretation in conformity with directives,²⁹ and looks for ways to integrate it into the theoretical edifice of traditional legal methodology. In Franzen's formulation, the cause of the unease lies in the fact that 'the interpretation of the legal text to be applied to a specific case at dispute is at least partly determined by a norm from a different context'.³⁰ This of course means a decisive break with the principle, deep-rooted in the western legal tradition, of the *lex superior*.³¹ What we need is, as Flessner has put it, 'a legal methodology adapted to the plurality of sources of law . . . and to the diversity of the contents of law'.³²

The epicentre of the earthquake that the Court of Justice sparked off with the requirement of interpretation in conformity with directives undoubtedly lies in its *Marleasing* decision,³³ which, as will later be shown,³⁴ discloses and seeks to overcome the problem of the separation of legislative and judicial functions for the area of networked legal systems. This decision takes off from the requirement, first laid down in the *Von Colson and Kamann*³⁵ and *Harz*³⁶ decisions, that within their competences Member State courts 'in applying the national law and in particular the provisions of a national law specifically introduced in order to implement [a] directive . . . interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 [now 249 (3)]'.³⁷ This formulation, clarified by the Court of Justice to the effect that 'an interpretation conforming with directives is required only 'in so far as it [the national court] is given discretion to

²⁹ On the concept of interpretation in conformity with directives see among many U. Ehrlicke, 'Die richtlinienkonforme und die gemeinschaftsrechtskonforme Auslegung nationalen Rechts: Ein Beitrag zu ihren Grundlagen und zu ihrer Bedeutung für die Verwirklichung eines "europäischen Privatrechts"', (1995) 1 *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, 598–644, at 603–604.

³⁰ M. Franzen, *Privatrechtsangleichung durch die Europäische Gemeinschaft* (Springer, 1999), at 323.

³¹ Franzen, *op. cit.* note 30 *supra*, at 325.

³² A. Flessner, 'Juristische Methodenlehre und europäisches Privatrecht', (2002) 57 *Juristenzeitung*, 14–23, at 16.

³³ Case C-106/89 *Marleasing* [1990] ECR I-4135.

³⁴ Cf. *infra* 777.

³⁵ Case 14/83 *Von Colson and Kamann* [1984] ECR 1891.

³⁶ Case 79/83 *Harz* [1984] ECR 1922.

³⁷ Case 14/83 *Von Colson and Kamann* [1984] ECR 1891 para 26; *Harz*, *op. cit.* note 36 *supra*; Case 222/84 *Johnston* [1986] ECR I-3969, para 53; Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3533 para 12; Case 125/88 *Nijman* [1989] ECR, para 6.

do so under national law',³⁸ was then drastically tightened in *Marleasing*. This decision states that the requirement of interpretation in conformity with directives 'precludes' the interpretation of provisions of national law in a particular way incompatible with the relevant directive.³⁹ This suggests that conformity with directives takes primacy over all domestic interpretive criteria, indeed seems positively to compel national *contra legem* adjudication. At the same time, the Court of Justice maintains a certain ambivalence by relativising the rigour of this phrasing by the statement that the national court is required to interpret national law 'as far as possible, in the light of the wording and the purpose of the directive'.⁴⁰ Obviously, *Marleasing* does not answer the question of what now applies: *preclusion* of interpretive findings other than those conforming with directives, or merely the *precept* of interpretation in conformity with the directive 'as far as possible'?

Legal scholars have been unwilling to go into such questions. They have preferred to seek ways of restoring the hierarchy of law lost through the *Marleasing* decision,⁴¹ whether at *Community-law* or *national* level:

- (1) Some scholars maintain that Community law and its directives *always override* national law (including the national constitution),⁴² so that interpretation in conformity with directives enjoys absolute primacy over national interpretive methods.⁴³ In this light, then, *Marleasing* is correct and rightly continually cited as a leading case in Court of Justice case law.⁴⁴ The shortcoming with this theory is, however, that it neglects the fact that the directive lacks full direct effect.⁴⁵ This is, yet, what this scholarly opinion ultimately does with the aim of being able to reinterpret the 'lateral' collisions between European and Member State law as being of a 'vertical' nature, which can then be resolved using the proposition of the primacy of international law. Interpretation in conformity with directives thus becomes a *derogational primacy rule*. This construction should, however, be

³⁸ Thus the summary by Canaris, *op. cit.* note 28 *supra*, at 60, following *Von Colson and Kamann* and *Harz*.

³⁹ *Marleasing*, para 9.

⁴⁰ *Marleasing*, para 8.

⁴¹ See also Flessner, *op. cit.* note 32 *supra*, at 15–17.

⁴² See Case 6/64 *Costa/ENEL* [1964] ECR 1251 ff; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 ff; Case 106/77 *Simmmenthal II* [1978] ECR 629 ff.

⁴³ This theory argues essentially that a directive can in the first place create relations only between the Community bodies and the Member States. To this end, it is using the distinction between 'applicability' and 'validity' (see W. Brechmann, *Die richtlinienkonforme Auslegung: Zugleich ein Beitrag zur Dogmatik der EG-Richtlinie* (Beck, 1994), at 133–168): from the postulate that Community law itself—and not, as otherwise usual in international law, the national law—decides the validity and applicability of its legal acts in the domestic sphere, the conclusion is drawn, as a thesis, that 'all norms of Community law are valid domestically and therefore applicable, as long as the Community-law norm allows this on the basis of its structure and content, and there are no other Community-law prohibitions barring application (not validity!)' (Brechmann, *op. cit.*, at 138). From this first thesis the further conclusion is then drawn that any possible (still) lacking domestic applicability of a directive is as it were 'made up for' by the fact that this directive is addressed to the body acting for the Member State involved. For the courts, this direct validity is seen as meaning primacy for interpretation conforming with directives over the national rules of interpretation.

⁴⁴ See for instance Case C-334/92 *Wagner Miret* [1993] ECR I-6911, para 20; Case C-355/96 *Silhouette* [1998] ECR I-4799, para 36; Joined cases C-240/98 and C-244/98 *Océano* [2000], ECR I-4941, para 30; Joined cases 397/01 and 403/01 *Pfeiffer* [2004] paras 110–120.

⁴⁵ See for details P. Craig and G. de Búrca, *EU Law: Text, Cases, and Material*, 3rd edn (Oxford University Press, 2003), at 202–227.

regarded with suspicion, insofar as the directive itself (apart from the few cases where it is *self-executing*)⁴⁶ has no derogational legal force.⁴⁷

- (2) Others wish instead to continue to retain the traditional territorial-state legal hierarchies. Alongside mere rejection of any primacy of Community-law propositions,⁴⁸ one can in this camp also find attempts to save the verticality of hierarchies of international and national law by assuming that the Court of Justice only requires the national courts to test whether national law admits of several interpretations, and if so to prefer among them those that lead to an outcome in conformity with directives.⁴⁹ Commentators supporting this line of reasoning argue that '[o]n the whole, one . . . should not overestimate the importance of the [*Marleasing*] decision . . . nor conclude from it that the ECJ has accomplished such a dramatic shift as would be involved in giving up the requirement for 'room for discretion' in national law'.⁵⁰ The shortcoming with this theory is, however, its contradiction with the language and spirit of the *Marleasing* decision. It should in fact be borne in mind that: (i) in *Von Colson and Kamann* and in *Harz* interpretation in conformity with directives was prescribed to the submitting courts, although these courts had previously denied the existence of interpretive discretion in the national law (and thereby the possibility of an interpretation in conformity with directives in the sense just described); (ii) the *Marleasing* decision even explicitly barred Member State courts from interpretive outcomes contrary to directives; and (iii) 'the outcomes the ECJ has endorsed since 1984 . . . depart considerably from those there would have been in the specific cases had national interpretive methods alone been applied to autonomously enacted national law'.⁵¹

⁴⁶ See Case 8/81 *Becker* [1982] ECR 53, para 25.

⁴⁷ See among many Canaris, *op. cit.* note 28 *supra*, 52–53; Y. Schnorbus, 'Autonome Harmonisierung in den Mitgliedstaaten durch Inkorporation von Gemeinschaftsrecht: Eine Untersuchung zur einheitlichen Anwendung und Auslegung europäischen und autonomen nationalen Rechts und zur entsprechenden Zuständigkeit des EuGH im Vorabentscheidungsverfahren', (2001) 65 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 654–705, at 685–686.

⁴⁸ On these approaches see Brechmann, *op. cit.* note 43 *supra*, at 214–234.

⁴⁹ This theory argues that the meaning of European law for the national law is to be established using the distinction between the *order to apply* issued by Community law and the *permission to apply* given by the Member State's legal system, which enables compliance with the order (see Brechmann, *op. cit.* note 43 *supra*, at 273; Franzen, *op. cit.* note 30 *supra*, at 343–344; Canaris, *op. cit.* note 28 *supra*, at 67–78): Whereas the permission to apply is mostly to be found in the national constitutions, the order to apply is seen in Art 249 (3) EC, read as an articulation of the principle that the law of directives contains 'precisely as much effect of "enforcement" and "primacy" over national law as it itself orders' (Brechmann, *op. cit.* note 43 *supra*, at 255). Correspondingly, interpretation in conformity with directives would have the objective of primacy over national interpretive methods only in those areas where the Court of Justice exceptionally takes the directive as having direct effect. In other areas—constituting the ordinary case—the admissible interpretive framework is marked out by 'domestic methodological doctrine and the functional demarcation between law-making and adjudication' (Franzen, *op. cit.* note 30 *supra*, at 343), so that the weighing-up process sketched in the text has to come about; this is clearly the line taken by Ehrlicke, *op. cit.* note 29 *supra*, 612–616; M. Zuleeg, 'Die gemeinschaftskonforme Auslegung und Fortbildung mitgliedstaatlichen Rechts', in S. Reiner (ed.), *Auslegung europäischen Privatrechts und angeleglichen Rechts* (Nomos, 1999), 163–177, at 171–172.

⁵⁰ Canaris, *op. cit.* note 28 *supra*, at 60; see also R. Iglesias, G. Carlos and K. Richenberg, 'Zur richtlinienkonformen Auslegung des nationalen Rechts (Ein Ersatz für die fehlende horizontale Wirkung?)', in O. Due et al. (eds), *Festschrift für Ulrich Everling*, vol. II (Nomos, 1995), 1213–1230, at 1221–1222.

⁵¹ S. Grundmann, *Europäisches Schuldvertragsrecht: Das europäische Recht der Unternehmensgeschäfte* (de Gruyter, 1999), at 116.

Against the background of the shortcomings of these two scholarly opinions that dominate the debate, it seems appropriate to assume, as does Grundmann's 'middle way' thesis, that according to the Court of Justice, interpretation in conformity with directives is always to be given primacy over national interpretive methods wherever a *legislative will* has been expressed in a Member State to transpose the directive correctly.⁵² This thesis, linking the primacy of interpretation in conformity with directives to the prerequisite of an indication of will by the Member State and accordingly claiming only *limited primacy*, is additionally favoured by developments in the Court of Justice's more recent case law. Thus, in *Wagner Miret*, the upshot was that in those cases where the national legislator took the view that provisions already in force met the requirements of a directive, the original legislative intent must, in order to achieve the aims of the directive, be disregarded by the national court and replaced by the Member State's intent to transpose.⁵³ This statement by the Court of Justice, however, does not just speak in favour of the prerequisite mentioned, to which according to the 'middle way' thesis the primacy of interpretation in conformity with directives is tied, but seems also (quite in line with *Marleasing*) to confirm the obligation where necessary to adjudicate *contra legem*.⁵⁴ On this very point, *Océano* suggests—perhaps even more fundamentally than *Marleasing*—that the Court of Justice is aiming, with the requirement for interpretation in conformity with directives, at re-dimensioning the adjudicating power of national courts from a Community law viewpoint.⁵⁵ According to this decision, the requirement concerns not just the interpretation of a norm but additionally, where necessary, procuring compliance with the aim of the directive by overruling statutory law by judge-made law.⁵⁶ This manifestly implies relinquishing central bounds (such as in particular the requirement to demonstrate a statutory lacuna)⁵⁷ set on judicial power by the national rules on legal reasoning.

Such a far-reaching reading of the requirement for interpretation in conformity with directives, which denies old, traditional axioms of legal theory, cannot content itself with pointing to the 'spirit and language' of Court of Justice decisions, if it is to be credible. Here, firmer underpinnings are required. I will try to develop these by tackling the question whether the constitutionalisation of an interlegal system entails the break-up of the classical dichotomy between the legislative and judicial functions.

III Normative Compatibilities and the Common Market

From the predominant readings of the requirement for interpretation in conformity with directives described, one point clearly emerges: that traditional legal scholarship retains domestic or international-law hierarchies with their fiction of higher and lower

⁵² Grundmann, *op. cit.* note 51 *supra*, at 116–118; see also E. Steindorff, *EG-Vertrag und Privatrecht* (Nomos, 1996) at 451.

⁵³ Case C-334/92 *Wagner Miret* [1993] ECR I-6911 ff., paras 20–21.

⁵⁴ See Franzen, *op. cit.* note 30, at 340 n. 116, and T. Heukels, 'Von richtlinienkonformer zur völkerrechtskonformen Auslegung im EG-Recht: Internationale Dimensionen einer normhierarchiegerechten Interpretationsmaxime', (1999) 2 *Zeitschrift für Europarechtliche Studien*, 313–333, at 317 n. 12; contra T. M. J. Möllers, 'Doppelte Rechtsfortbildung contra legem? Zur Umgestaltung des Bürgerlichen Gesetzbuches durch den ECJ und nationale Gerichte', (1998) 33 *Europarecht*, 20–46, at 43–44.

⁵⁵ Joined cases C-240/98 and C-244/98 *Océano* [2000] ECR I-4941.

⁵⁶ *Ibid.*, paras 25–32.

⁵⁷ See Flessner, *op. cit.* note 32 *supra*, at 21.

legal norms at all costs, and disregards anything else as legally irrelevant.⁵⁸ At bottom, the reflexes at work here have not shifted since the early nineteenth-century commitment of legal scholarship to the ideal of geometric logic.⁵⁹ Since that consolidated in European legal thinking the ‘ideal of a simultaneously positive, i.e. autonomous, and philosophical, i.e. systematic and methodical, legal science’,⁶⁰ extra-legal arguments were for long banned from legal reasoning.⁶¹ Law thus became, through statute, the bearer of a rigid model of law and society in which legal norms are supposed to shape reality unilaterally.⁶² Calls for a European Civil Code spring from this tradition of thought.

By contrast, the Court of Justice senses that, in the dynamic context of the networking of European private-law systems, this tradition of thought takes us no further. Its case law at any rate seems not to be about—in Wiethölter’s words—‘traditional form-content definitions’, but about judicial work at ‘the “boundaries” between system and environment’.⁶³ In other words, the Court of Justice is not, by using the instrument of interpretation in conformity with directives, imposing unilateral models of law and society on Member States, but stimulating the development of institutional learning directly in the legal systems of Member States.⁶⁴ This becomes clear when, using Hayek’s distinction between *legal order* and *order of actions*, one observes how the Court of Justice is compelling the traditionally monadological worlds of Member State legal systems to open up cognitively. Hayek used this distinction to point out that a system of legal rules (*Rechtsordnung*) is not identical with a particular order of actions (*Handelnsordnung*). Correspondingly, it is only together with the concrete facts of the moment that the law determines the order of actions of the whole.⁶⁵ For Hayek, law is at most a necessary, but at any rate not sufficient, condition for the establishment of an overall order. It is this very discrepancy that the Court of Justice is now utilising in *Marleasing* and its progeny, in order to stimulate the Member States to expose themselves to new experiences, on the basis of their existing experiences.⁶⁶

In a nutshell, the production of ‘*normative compatibilities*’ in the edifice of European private-law systems (as the objective of the search-and-discovery process initiated by the requirement for interpretation in conformity with directives) is, properly considered, a dual formula: ‘normative’ work should bring about ‘compatibility’ of actions;

⁵⁸ See, e.g., I. Weyland, ‘The Application of Kelsen’s Theory of the Legal System to European Community Law: The Supremacy Puzzle Resolved’, (2002) 21 *Law and Philosophy*, 1–37.

⁵⁹ See, e.g., M. Herberger, *Dogmatik: Zur Geschichte von Begriff und Methode in Medizin und Jurisprudenz* (Klostermann, 1981), at 393.

⁶⁰ F. Wieacker, *A History of Private Law in Europe* (Oxford University Press, 1967), at 367.

⁶¹ For more detail on all this see M. Amstutz, ‘Form und Funktion im Wettbewerbsbeschränkungsrecht: Bemerkungen zu BGE 127 II 32’, (2001) 73 *Schweizerische Zeitschrift für Wirtschaftsrecht*, 248–262, at 253–254.

⁶² See D. Wielsch, *Freiheit und Funktion: Zur Struktur- und Theoriegeschichte des Rechts der Wirtschaftsgesellschaft* (Nomos, 2001), at 193.

⁶³ R. Wiethölter, ‘Recht-Fertigungen eines Gesellschafts-Rechts’, in C. Joerges and G. Teubner (eds), *Rechtsverfassungsrecht: Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie* (Nomos, 2003), 13–21.

⁶⁴ Wielsch, *op. cit.* note 62 *supra*, at 209–222; for an analysis of the Court of Justice case law in this sense see van Gerven, *op. cit.* note 3 *supra*, at 515–524.

⁶⁵ F. A. V. Hayek, *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Routledge & Kegan Paul, 1978), at 135–137.

⁶⁶ See R. Wiethölter, ‘Proceduralisation of the Category of Law’, in C. Joerges and D. M. Trubek (eds), *Critical Legal Thought: An American-German Debate* (Nomos, 1989), 501–524.

or in Hayek's own language: *various* (and different) legal systems should be interwoven in such a way that *a single* (and unitary) order of actions emerges. Perhaps the most important (and at the same time paradoxical) thing about the Court of Justice's procedure is that it seeks to achieve this *interweaving by accepting differences*: the core of its concern is for the Member State's legal systems to approximate to each other from their own forces, utilising the properties and peculiarities of their specific legal cultures, as it were 'organically' and not by grafting foreign legal ideas on.⁶⁷ Community private law is to come about not *against*, but *with* the national legal 'mentalités'.⁶⁸ To this end, the requirement for interpretation in conformity with directives is aimed at the institutional arrangements in Member States that set the framework conditions for social action, and to be quite specific, not at the legal institutions to be found in Member States as such, but at the historical and cultural '*embeddedness*'⁶⁹ of these institutions. This calls for some elucidation.

The 'varieties of capitalism approach'⁷⁰ has plausibly shown that a norm never 'functions' autonomously in a vacuum (and 'functioning' here means producing a socially adequate overall order of actions, along with Hayek's concrete facts of the moment). The notion (which still largely dominates the field of legal harmonisation) that institutions are entities 'that are created at one point in time and can then be assumed to operate effectively afterwards'⁷¹ is rejected.⁷² In reality, institutions can perform their tasks only on the basis of common experiences and expectations ('shared understandings'): 'The implication is that the institutions of a nation's political economy are inextricably bound up with its history'.⁷³ In terms of legal theory, this means that national legal systems tend to develop 'a lasting resistance to institutional transfer . . . in short, a remarkable historical continuity in their own stubborn development, even and especially in times of all-leveilling globalization'.⁷⁴ From this viewpoint, a harmonisation of European private legal systems by means of a grand codification seems a problematic undertaking. Moreover, it can be seen that the harmonisation method of interpretation in conformity with directives, which may at first sight seem rather underhand, is in a heterarchical context (like the set of national private-law systems in the Community) marked out by realism: instead of replacing organically grown and socially embedded institutions of national law by legal figures with no social context, Member States

⁶⁷ See in this connection also K. P. Berger, 'The Principles of European Contract Law and the Concept of the "Creeping Codification" of Law', (2001) 9 *European Review of Private Law*, 21–34, at 23–28.

⁶⁸ Legrand, *op. cit.* note 22 *supra*, at 45; see also Hesselink, *op. cit.* note 17 *supra*, at 678–679.

⁶⁹ See on this concept M. Granovetter, 'Economic Action and Social Structure: The Problem of Embeddedness', (1985) 90 *American Journal of Sociology*, 48–510.

⁷⁰ See, e.g., D. Soskice, 'Divergent Production Regimes: Coordinated and Uncoordinated Market Economies in the 1980s and 1990s', in H. Kitschelt, P. Lange, G. Marks, J. D. Stephens, R. H. Bates, E. Comisso, P. Hall, J. Migdal and H. Milner (eds.), *Continuity and Change in Contemporary Capitalism* (Cambridge University Press, 1999), 101–134.

⁷¹ P. A. Hall and D. Soskice, 'An Introduction to Varieties of Capitalism', in P. A. Hall and D. Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001), 1–68, at 13.

⁷² See H. Collins, 'Formalism and Efficiency: Designing European Commercial Contract Law', (2000) 8 *European Review of Private Law*, 211–235, at 213.

⁷³ Hall and Soskice, *op. cit.* note 71 *supra*, at 13; similarly, H. Collins, 'European Private Law and the Cultural Identity of States', (1997) 5 *European Review of Private Law*, 353–365, at 355 and 362–363.

⁷⁴ G. Teubner, 'Idiosyncratic Production Regimes: Coevolution of Legal and Economic Institutions in the Varieties of Capitalism', in J. Ziman (ed.), *The Evolution of Cultural Entities: Proceedings of the British Academy* (Oxford University Press, 2002) 161–181, at 174.

are encouraged to open themselves to new civil law experiences (without, however, having the mode of processing these experiences laid down), and from these experiences producing the 'normative compatibilities' in their private law systems.⁷⁵ This sets going cognitive processes, which are, to be sure, held back from drifting into factuality because a normative legal 'nucleus' acts as a signpost. This signpost is the aspect of conformity with directives, which thus acts as the actual medium for 'linking autonomies'.⁷⁶

A reading of the strategy underlying *Von Colson and Kamann, Harz*, and *Marleasing* and their follow-up decisions⁷⁷ in the way just sketched out leads one to suspect that the requirement for interpretation in conformity with directives constitutionalises European private law by bringing 'culture' and 'society' into the legal discourse. That leads one into dark regions of legal theory, into thorny questions of the formation of law and its processes, and ultimately into the mysteries of the 'concept of law'. Here at least the inherent tension in every legal system between *nómos* and *physis*, statute and law, law making, and adjudication, becomes tangible.⁷⁸ And at this point one must ask why the Court of Justice considers it necessary to push forward the approximation of private law systems by relativising the principle of separation of powers, i.e. a fundamental category of legal and political theory. Why not simply rely on traditional means, for instance the Regulation pursuant to Article 249(2) EC, or international treaties? Why this link-up with the meta-level? My answer is, because the *complexity* introduced into the legal system by the legal *text*⁷⁹—and each of the procedural options just mentioned is text—cannot, in a heterarchical environment engaged in producing 'normative compatibilities', be *coped with without reorganizing the feedback loops between legislation and adjudication*.⁸⁰ The requirement for interpretation in conformity with directives is this reorganisation. This thesis is now to be explained from its starting point, namely the *necessity of interpretation* that every text brings.

The written form creates in the law a difference between sign and meaning, between text and interpretation: 'All law set down in writing is . . . law that has to be interpreted'.⁸¹ Interpretation brings indeterminacy into the law, because a text enables repeated reading, and correspondingly also ever-new understanding. This immediately, however, makes the text's horizon of meaning infinite, and the law too becomes infinite, losing its character as law: 'Who would then have the right to say what "really" is law? If one does not know that, it is just as good, or as bad, as having no law at all'.⁸² Accordingly, there must be a fixing of the meaning of the legal text, a definition of what is law.⁸³ And it must be decided who is authorised for interpretation. Since the

⁷⁵ See also Collins, *op. cit.* note 73 *supra*, at 362.

⁷⁶ See *supra* 774–775.

⁷⁷ On this case law see *supra* 771–772.

⁷⁸ On this tension, see R. M. Kiesow, 'Ius sacrum: Giorgio Agamben und das nackte Recht', (2002) 1 *Rechtsgeschichte*, 56–70.

⁷⁹ M. T. Fögen, *Römische Rechtsgeschichten: Über Ursprung und Evolution eines sozialen Systems* (Vandenhoeck & Ruprecht, 2002), at 82–84.

⁸⁰ N. Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, 1993), at 289 [english translation: *Law as a Social System* (Oxford University Press, 2004)].

⁸¹ Luhmann, *op. cit.* note 80 *supra*, at 256.

⁸² Fögen, *op. cit.* note 79, at 132.

⁸³ See N. Kasirer, 'The Common Core of European Private Law in Boxes and Bundles', (2002) 10 *European Review of Private Law*, 417–437, at 421–423 (expounding the thesis of law as a 'meta-linguistic concept').

separation-of-powers theories of the eighteenth century, *feedback* and *counter-binding* have been used here: the judge has to make the policy of an applicable statute specific to the 'case', but do so while rejecting any legal innovation, for which the legislator is exclusively competent.⁸⁴ In other words, it is *jurisprudence* that is called on to construe the text, bringing out in the interplay of practice and theory a 'prevailing opinion' as the authoritative interpretation of the text, aimed solely at rendering the meaning.

The fact that this pattern has never worked the way it was supposed to, namely through a judge as 'subsuming robot',⁸⁵ but has always worked through (necessary) subterfuges and artifices,⁸⁶ not methodically recorded or processed even today,⁸⁷ is not yet the point here (though as we shall immediately show the ruses invented by practice play a central part in the approximation mechanisms set up by the Court of Justice). What is to the fore here is the way the pragmatic coherence of this concept depends on the premise that only *one* mode of jurisprudence has power of interpretation in the sense described (and not *several at once*).⁸⁸ Only if it is *de facto* guaranteed that *one* particular interpretation of the text 'is valid' in the same way for all the actors in a given area of action can the dichotomy between legislative (text-setting) and judicial (text-interpreting) functions be maintained.⁸⁹ Because this is obviously not the case in Community private law, the Court of Justice had to take to new paths in order to stimulate the production of the 'normative compatibilities' needed for a 'unitary' order of actions, and draw the design of a new 'concept of law', which we have now to analyse.

IV *Marleasing* as Evolutionary Constitutionalism

I assume (and see in this the real innovation in the *Marleasing* decision) that the 'concept of law' embodied in the requirement for interpretation in conformity with directives operates at the level of *law-making* and to this end uses *evolutionary* mechanisms in *operational* fashion. Had the Court of Justice trusted, as the traditional scheme suggests, the integrative power of the Community legislature, then it would have been unable to take into account the peculiarity that Community law 'while it certainly [is] an autonomous system of law, valid in itself in the Member States', is nonetheless 'dependent on the Member States' legal systems, in order to be able to have effect'.⁹⁰ It would have thereby had to leave out the fragmenting and particularizing effect of plural judicial systems tied into differing cultural contexts. The thoroughly courageous decision to intervene at the level of the rules governing legal reasoning (where the link

⁸⁴ Luhmann, *op. cit.* note 80 *supra*, at 289.

⁸⁵ The *locus classicus* for the analysis of this image of the judge is R. Ogorek, *Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert* (Klostermann, 1986).

⁸⁶ See, e.g., the historical study by M. Bors, 'Politique et Droit—Droit et Politique: Le cas du droit des enfants naturels dans les pays rhénans rattachés à la Prusse sous le régime du Code civil (1815–1900)', (2002) 58 *Mémoires de la Société pour l'Histoire du Droit et des Institutions des anciens pays bourguignons, comtois et romands*, 71–92.

⁸⁷ See Luhmann, *op. cit.* note 80 *supra*, at 303–304; R. Dreier and N. Luhmanns, 'Rechtsbegriff', (2002) LXXXIX *Archiv für Rechts- und Sozialphilosophie*, 305–322, at 321.

⁸⁸ See A. Chamboredon, 'Form v Substance? An Ideological Venture Beyond the Dichotomy in European Law of Contract', (2000) 8 *European Review of Private Law*, 237–247, at 243–246.

⁸⁹ E. Ehrlich, *Freie Rechtsfindung und freie Rechtswissenschaft* (Leipzig 1903)—*Soziologie und Jurisprudenz* (Czernowitz 1906), 2nd edn (Scientia, 1987), at 7.

⁹⁰ P. Behrens, 'Gemeinschaftsrecht und juristische Methodenlehre', (1994) 5 *Europäische Zeitschrift für Wirtschaftsrecht*, at 289; see also J. S. Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems', (2003) 9 *European Law Journal*, 599–613.

between text-setting and text interpretation is made) and—*propter unitatem juris*—extend the law-making powers of the national judiciaries beyond the *contra legem* boundary drawn by long-established legal theory (and thus into the legislative sphere defined mirrorwise by the same legal tradition) is, for reasons which will be set out in more detail, a *socially adequate* (albeit also highly risky) alternative strategy. Perhaps, however, this apparently so bold step by the Court of Justice is merely the overdue transposition of an observation that has been around a long time, and discussed, in legal science, the consequences of which had however still not really (at any rate not explicitly) been drawn,⁹¹ yet in practice develop secret (and thoroughly perceptible) effects:⁹² namely, the observation that application of the rules of legal reasoning is not able to determine the outcome of the judicial procedure of finding the law, and the genuinely separation-of-powers concerns of these rules must inevitably remain a Utopia.⁹³ Perhaps at long last here the ‘unfitting’ (and never ‘adjusted’) construction of the relation between legislation and adjudication as ‘a hierarchy of instructions’⁹⁴ is resolved by proposing a plausible alternative.

However, what does this alternative consist of? If things actually are the way modern legal theory assumes,⁹⁵ ‘that the court itself “creates” the law it “applies”’,⁹⁶ that in the end statute is merely a (political) ‘irritation’ of the legal system,⁹⁷ then a functional equivalent for the principle that the legislator is above the judge, which as we know is intended to prevent the law’s favouring friends and discriminating against foes, must be sought. Or more generally: bulwarks have to be set up to protect the law from losing its intrinsic rationality in the twists and clashes of social discourse. In the requirement for interpretation in conformity with directives this functional equivalent, as indicated, takes the form of *systematic employment of evolutionary mechanisms of law*, in order to control the law-making processes in European private law. Revealing the ways these

⁹¹ A symptomatic position is, for instance, the one taken by S. Vogenauer, ‘Richtlinienkonforme Auslegung nationalen Rechts: Entscheidung des House of Lords vom 19. Oktober 1995 (Webb v. EMO Air Cargo [UK] Ltd [No2])’, (1997) 5 *Zeitschrift für Europäisches Privatrecht*, 158–171, at 170

⁹² See in this sense Luhmann, *op. cit.* note 80 *supra*, at 303–304: ‘Since the 19th century changes helping to break up the hierarchy model have been accumulating, without its having been fundamentally questioned, still less replaced through a move to some other form of differentiation’.

⁹³ See, among many, Ehrlich, *op. cit.* note 89 *supra*, at 27; H. Jsay, *Rechtsnorm und Entscheidung* (Scientia, 1970), at 60–82 and 161–183; D. Simon, *Die Unabhängigkeit des Richters* (Wissenschaftliche Buchgesellschaft, 1975), at 88–89; W. Hassemer, ‘Rechtssystem und Kodifikation: Die Bindung des Richters an das Gesetz’, in A. Kaufmann and W. Hassemer (eds), *Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart*, 6th edn (C. F. Müller, 1994), at 248–268; F. Müller, *Methodik, Theorie, Linguistik des Rechts: Neue Aufsätze (1995–1997)* (Duncker & Humblot, 1997), at 81; K. Engisch, *Einführung in das juristische Denken*, 9th edn (Kohlhammer, 1997), at 135–136; R. Christensen and H. Kudlich, *Theorie richterlichen Begründens* (Duncker & Humblot 2001), at 25–26.

⁹⁴ Luhmann, *op. cit.* note 80 *supra*, 302.

⁹⁵ For representative analyses see O. Depenheuer, *Der Wortlaut als Grenze: Thesen zu einem Topos der Verfassungsinterpretation* (Decker/Müller, 1988); J. Neuner, *Die Rechtsfindung contra legem* (Beck, 1992); M. Herbert, *Rechtstheorie als Sprachkritik: Zum Einfluss Wittgensteins auf die Rechtstheorie* (Nomos, 1995).

⁹⁶ Luhmann, *op. cit.* note 80 *supra*, at 306.

⁹⁷ See M. A. Niggli, ‘Zurück zu den 10 Geboten? Gesetzesflut und Strafrecht’, in A. Holderegger (ed.), *Aufbruch ins dritte Jahrtausend: Millenniums-Vorträge an der Universität Freiburg* (Universitätsverlag, 2000), at 139; Kiesow, *op. cit.* note 78 *supra*, at 60; one finds a good example for what is addressed here in G. Brüggemeier, ‘Gesellschaftliche Recht-Fertigung oder “Der Kodex als Irritation des Rechts”—eine Glosse’, in C. Joerges and G. Teubner (eds), *Rechtsverfassungsrecht: Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie* (Nomos, 2003), 101–112.

mechanisms work will require a brief excursus into the current state of knowledge in sociological and legal evolutionary theories.

Evolution is today no longer understood in the classical Darwinist sense of the so-called 'adaptationist programme' that 'regards natural selection as so powerful and the constraints upon it as so few that direct production of adaptation through its operation becomes the primary cause of all . . . form, function and behaviour'.⁹⁸ This traditional view regards it as unlikely that evolution is guided by any other forces than those arising in the environment of the evolving entity. This implies that this entity's 'endogenous' logic plays no significant part in the evolutionary process other than providing variation (something not creative, but merely 'enabling' creation), that only selection, accomplished exclusively by 'exogenous' factors, acts creatively. This view of things is opposed by more recent work devoted to studying on the one hand the mutual relationship between the *self-organisation* of complex systems and on the other *selective* influences of the systems' environments.⁹⁹ This work builds on the thesis that *the evolvability of systems depends on a special internal order of their elements*: these must operate *in parallel* (i.e. in close connection with each other, or in 'networks'), and not sequentially (i.e. each element for itself).¹⁰⁰ And just this presupposes a *spontaneous formation of the system's internal order*, whereby the system's elements secure the evolvability continually to repeat the same sequence of a few states of the system (so-called 'state cycles').¹⁰¹ This sort of spontaneous formation of order gives the system *homeostatic stability*, i.e. an autonomy of a special quality distinguished by the feature that a sudden, short-term interruption to the activity of individual elements of the system does not lead to paralysis of the system.¹⁰² It remains able, despite this disruption, to restore the original 'state cycles'. Homeostatic stability of the system depends on a very specific, extremely flexible linkage of its elements (so-called 'low connectivity') that protects the system from either 'freezing' (dying) or drifting into chaos.¹⁰³ Only if this sort of flexible order is set up *in* the system (and *by* the system) can it become an object of selection. Thus evolution flows from two sources, namely *spontaneous self-organisation* (of the evolving system) on the one hand and *selection* (through the forces operating in the evolving system's environment) on the other.¹⁰⁴

Why only systems with the properties described are capable of evolution is explained by the fact that they are located *between order and chaos*.¹⁰⁵ What this metaphor means is that in relation to environmental influences they are endowed with a special dynamics: because they operate in an ordered régime that however borders on chaotic régimes, they have an enhanced capacity to deal with and absorb perturbations from the environment. This high adaptability of systems at the 'interface region between order and

⁹⁸ S. J. Gould and R. C. Lewontin, 'The Spandrels of San Marco and the Panglossian paradigm: a critique of the adaptationist programme', *Proceedings of the Royal Society London (Series B)* 205 (1979), 581–598, at 584–585.

⁹⁹ See, e.g., S. J. Gould, *The Structure of Evolutionary Theory* (Harvard University Press, 2002), at 1208–1214.

¹⁰⁰ S. A. Kauffman, *At Home in the Universe: The Search for Laws of Self-Organisation and Complexity* (Oxford University Press, 1995), at 95–112.

¹⁰¹ Kauffman, *op. cit.* note 100 *supra*, at 77–78.

¹⁰² Kauffman, *op. cit.* note 100, at 79–80.

¹⁰³ See S. A. Kauffman, *The Origins of Order: Self-Organisation and Selection in Evolution* (Oxford University Press, 1993), at 192–203.

¹⁰⁴ See, e.g. J. C. Schank and W. C. Wimsatt, 'Evolvability: Adaptation and Modularity', in R. S. Singh, C. B. Krimbas, D. B. Paul and J. Beatty (eds), *Thinking about Evolution: Historical, Philosophical, and Political Perspectives* (Cambridge University Press, 2001), at 323

¹⁰⁵ See, among many Gould, *op. cit.* note 99 *supra*, at 1210–1214.

chaos¹⁰⁶ is connected with the fact that in their internal organisation they possess, alongside very loose control parameters, also fixed ones that prevent propagation of the perturbations through the whole system, without however taking away its responsiveness to outside influences.¹⁰⁷ This recognition now also decisively affects the concept of selection, which loses its classical Darwinist role as the great and sole creator of the world, and mutates into a sort of *search engine*: it brings internally adequate organised systems to where their evolutionary opportunities are best (and tries to keep them there): *on the verge of chaos*.¹⁰⁸ It follows from all this that selection cannot set evolution going off its own bat. Only the existence of systems organised internally on the 'low connectivity' pattern described can start up a durable evolutionary process. The 'low connectivity network' then becomes—with all the reservations such a statement calls for¹⁰⁹—a sort of 'unit of selection'. For selection can operate only on systems that have this internal order, and remains unhelpful for other entities and useless to them. Ultimately, however, this conclusion merely reflects just this highly complex way in which self-organisation and selection interact in the process of evolution.

The object of evolutionary legal theory is, on the basis of a transposition of the model just described, to identify the *conditions* for law to provide contributions to a society differentiated in numerous social systems that are not mirror images of the rationality of those very systems, but are endowed with a specific legal *proprium* while at the same time remaining responsive to society and its changes. Were it possible to locate those conditions, then realising them in legal communication would open the road to a *self-legitimation* or *self-constitutionalisation* of law that would lessen the urgency of the patterns being sought in the theoretical debate about 'democratising' Community law¹¹⁰ and bring the question of the legitimacy of Community private law under new premises. The model transposition proposed here assumes that the law needs a particular *self-organising value* in order to stay capable of evolution within society's evolution. This self-organising value cannot however be created *globally* by law, since society itself does not evolve globally. It must differentiate into entities capable of evolution, which reflect society's differentiation and can keep up with the evolution of the social discourses. These 'entities' are here, following Walz, called *legal subsystems*:¹¹¹ they constitute the embodiment of the specialised legal discourses that are *inevitably coupled* with specific discourses in society at large.¹¹² Only legal subsystems can—because of the fragmentation of society—form those self-organising values that together guarantee the law's evolvability *as a whole*. Consequently, they also constitute the entities, the 'units of selection', that evolve and underlie the selection process of legal evolution.¹¹³

¹⁰⁶ Kauffman, *op. cit.* note 103 *supra*, at 218.

¹⁰⁷ Kauffman, *op. cit.* note 103 *supra*, at 218–221.

¹⁰⁸ Kauffman, *op. cit.* note 103 *supra*, at 232.

¹⁰⁹ See E. Sober, *The Nature of Selection: Evolutionary Theory in Philosophical Focus* (MIT Press, 1984), at 215–217.

¹¹⁰ See *supra* 767–768.

¹¹¹ R. W. Walz, *Steuergerechtigkeit und Rechtsanwendung: Grundlinien einer relativ autonomen Steuerrechtsdogmatik* (v. Decker, 1980), at 199–201; the same terminology as here is used by Flessner, *op. cit.* note 32 *supra*, at 16.

¹¹² N. Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie*, at 626 [english translation: *Social Systems* (Stanford University Press, 1995)].

¹¹³ What a 'legal subsystem' is in detail cannot be defined in terms of classificatory logic. It depends solely on the self-description of the legal subsystems, and thus on the 'line the law's discursive praxis itself draws between itself and the environment' (G. Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism', (1992) 13 *Cardozo Law Review*, 1443–1462, at 1452).

What, then, creates the ‘self-organising values’ of a legal subsystem? It is *legal policy* understood as a uniting bond between the individual elements of that subsystem (i.e. positive norms, judge-made law, and customary law), crystallised into ‘spontaneous organisation’. Or, put differently: Legal policy, as source of ‘self-organising values’ in law, should be thought of as a *regulatory network*, ‘regulatory’ in the sense that it links the components of the subsystem together into a *self-consistent whole*, or in Dworkin’s image, makes these components—seen as ‘chain novels’ added to each other by an imaginary author—together form a ‘coherent and aesthetic story’.¹¹⁴ Here the point is—loosely transferring Wieacker’s concept into the present theoretical context—the ‘secret material, social, ethical designs’¹¹⁵ lying behind each legal subsystem, the narrative whereby it seeks to write the scenario for society. It is in legal policy in the sense just described that the law’s mysterious *proprium* lies.

The question then immediately arises, however, where the entryways for ‘society’ are to be found in the structure of the legal subsystem. In what way does selection (as an external factor of evolution) act on the subsystem? In short, how does the subsystem adapt to its social environment, to the social discourses coupled with it? The evolutionary model just presented suggests the answer: *through the plasticity of the elements joined together into the subsystem*. Unlike legal policy, which confers on them *relational consistency* (consistency in their ‘totality’), these elements themselves are open to social evolution. Legal policy merely marks the outside boundary of their plasticity. Correspondingly, within the subsystems they are ‘receptors’ for the perturbations from the outside world, irrespective of whether they are statutory, judge-made, or customary law. They create the possibility for selection to drive the subsystem towards where it is most effective, i.e. where its social adequacy is enhanced.

Self-organising value from legal policy on the one hand, social responsiveness through the plasticity of the normative elements networked together into legal subsystems on the other—these are, in a nutshell, the conditions for an evolutionary law that self-legitimises itself through a long-term-oriented protection of its *proprium* in the differentiation of society. But how does the requirement for interpretation in conformity with directives bring about these conditions in the process of shaping Community private law?

The point is that the Court of Justice is, with *Marleasing* (in a realistic assessment of late modernity and its legal pluralism),¹¹⁶ giving up the impossible ideal of creating a ‘common metadiscourse’¹¹⁷ in European private law. It immediately accepts the multiplicity of legal ‘*moralités*’ present in Europe and takes seriously the fact that the various legal cultures in the Union each constitute ‘discrete epistemological formations’.¹¹⁸ By betting, as we have shown, on ‘institutional learning’ in national civil law,¹¹⁹ it is allowing Member State legal systems’ ‘self-organising values’ free play. The internal culture-specific ‘constraints’ on national adjudication remain unaffected by the requirement for interpretation in conformity with directives; local specificities of the various

¹¹⁴ R. Dworkin, *Law’s Empire* (Harvard University Press, 1986), at 28.

¹¹⁵ F. Wieacker, *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft* (Scriptor, 1953), at 25.

¹¹⁶ See Teubner, *op. cit.* note 113 *supra*, at 1445–1447.

¹¹⁷ P. K. Feyerabend, *Farewell to Reason* (Verso, 1987), at 274.

¹¹⁸ Legrand, *op. cit.* note 22 *supra*, at 47–48; see also P. Legrand, ‘On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations’, (2002) 1 *European Review of Private Law*, 61–76.

¹¹⁹ See *supra* 768–770.

legal discourses are not pushed aside, say, by rational arguments that in the end are always weaker than the constraints of organically grown legal cultures.¹²⁰ For ultimately it is the legal policies present in the private law of the individual Member States that act as ‘regulators’ in the process of incorporating Community private-law positions into the national legal discourses. They are ensuring that two separate sets of norms do not emerge in Member States’ civil legal systems—one deriving from the historical trajectory of the State concerned, the other dictated by the Community. They alone can offer guarantees for a Community private law integrated into the national legal culture, and this fact immediately makes it clear how they ensure the evolutionary capacity of national law in the biotope of the European Community: by on the one hand—as artful combinations of ‘flexible’ and ‘fixed’ control parameters—blocking the propagation of the ‘perturbations’ from European law throughout the national private law, without on the other losing the national law’s responsiveness to EC law.

The question admittedly remains what actual mechanism lets the *European-law viewpoints*—conformity with directives—gain entry to the national law. The Court of Justice here uses the entryways identified by the legal evolutionary model just adduced, through which ‘society’ flows into law: it deliberately uses the *plasticity of the elements of national private law* by rooting in Member States’ rules on legal reasoning, through the requirement for interpretation in conformity with directives, a corresponding *duty to take into account* European directives.¹²¹ Willingness so to use them becomes clear not just in the *Marleasing* decision, according to which the whole of the national law coming within the sphere of application of a directive is covered by that requirement,¹²² but also (and especially) in the *Océano* case, which, as already explained,¹²³ goes one step further by imposing on Member State courts the obligation to secure compliance with the directive’s aim, where necessary through analogies with norms not directly aimed at by the directive, or by concretising general principles of law. It is ultimately through the limited *malleabilité* of the subsystem elements—limited by legal policies in national private law—that the *metafunction* of the requirement for interpretation in conformity with directives is accomplished: conflicts between European and national private law are resolved in the light of the Community-wide approximation of private law, with their respective elements being made compatible where they emerge into conflict with each other, in a legal evolutionary process.¹²⁴ The acceptance of this process in Member State legal discourse on which the chances for this whole way of resolving the conflicts depend is promoted by the *Marleasing* case law because the intervention comes about not at the level of legislation, but right where law is actually formed, namely in the ‘blending’ of norm and fact, i.e. at the level of adjudication. The Court of Justice thus goes well beyond the harmonisation concept of Article 249(3) EC, which

¹²⁰ See Teubner, *op. cit.* note 113 *supra*, at 207.

¹²¹ The Court of Justice’s use of the plasticity of the subsystems’ elements to make the viewpoint of conformity with directives flow into the private law of Member States is consistent, since here it is not a normative but a *social-theory* aspect that is to the fore, namely the creation of a meaningful order of actions by producing ‘normative compatibilities’.

¹²² Case C-106/89 *Marleasing* [1990] ECR, para 8.

¹²³ See *supra* 773.

¹²⁴ For a correct analysis of this point see M. Schmidt, ‘Privatrechtsangleichende EU-Richtlinie und nationale Auslegungsmethode’, (1995) 59 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 569–597, at 584; contra: U. Ehrlicke, ‘Die richtlinienkonforme Auslegung nationalen Rechts vor Ende der Umsetzungsfrist einer Richtlinie’, (1999) 10 *Europäische Zeitschrift für Wirtschaftsrecht*, 553–559, at 554.

takes the roundabout route via the national legislator and therefore, as many Court of Justice judgments make clear, practically conjures up implementation bottlenecks that should not be underestimated.¹²⁵ It is in the avoidance of this roundabout route that the ‘cunning of reason’ of *Marleasing* lies.

V Epilogue: A New Distinction in European Private Law

The requirement for interpretation in conformity with directives *constitutionalises* the various autonomies of the European private-law systems heterarchically, not by formalisation, nor by substantivisation, but ‘procedurally’, i.e. by setting going a process that is guided in its evolution by metanorms. But what happens in this constitutional process, what exactly is going on in the in-between worlds the Court of Justice has rather violently opened up with its hammer blows in *Von Colson and Kamann*, *Harz*, *Marleasing*, *Wagner Miret*, *Océano* etc.?

The constitutional process sparked off by the requirement for interpretation in conformity with directives aims at *conflict resolution in the network-type Community private law for the sake of approximation of private law*. The problem here is that neither the national private law nor European law are fixed points, but systems *changing over time*. Their conflicts with each other cannot be brought to resolution through some rigid scheme; their mutual relationship cannot be ‘cleared’ once and for all.¹²⁶ What accordingly has to be played out in the in-between worlds mentioned is this: the ‘tethering’ of the conflict-resolving mechanisms to the temporal cycles of the conflicting European and national norms, so that they become endowed with the same dynamic that also marks the development of those norms. But how is this ‘tethering’ to succeed?

The Court of Justice seems here to place its hopes on the reorientation of the legal discourse towards a new distinction: a reorientation from *structure/process* to *evolution*. Traditional jurisprudence has developed the ongoing adaptation of the legal system to its environment as a genuinely legal and definitely not social praxis, coped with through what Luhmann describes as ‘*double selectivity*’, viz. the selectivity of *structures* and the selectivity of the *processes* (happening in structures). According to modern systems theory, structures work selectively, by defining what is ‘possible’ in the system,¹²⁷ while processes select events as elements of the system in such a way as to enable the further selection of another event.¹²⁸ System change in this way is conceivable only on the condition that compatibility requirements are met: ‘structures must . . . enable the follow-up capacity of . . . [system] reproduction, if they are not to give up the basis for their own existence, and this limits the range of possible changes’.¹²⁹ Much the same is true for processes: ‘For a process, it is . . . the *before/after difference* that is decisive. The process defines itself in starting from what is current at the moment and making a transition to a (new) element that fits in with that but is different from it’.¹³⁰ Since both Community private law and the national private-law systems are disconnected and dis-

¹²⁵ See (with a pessimistic finding) L. Niglia, ‘The Non-Europeanisation of Private Law’, (2002) 10 *European Review of Private Law*, 575–599.

¹²⁶ See on this also T. Wilhelmsson, ‘Private Law in the EU: Harmonised or Fragmented Europeanisation?’, (2002) 10 *European Review of Private Law*, 77–94, at 90–94.

¹²⁷ Luhmann, *op. cit.* note 112 *supra*, at 388.

¹²⁸ Luhmann, *op. cit.* note 112 *supra*, at 482.

¹²⁹ Luhmann, *op. cit.* note 112 *supra*, at 62.

¹³⁰ Luhmann, *op. cit.* note 112 *supra*, at 388.

continuous in their developments, the conflicts becoming discernible in the Member States' civil legal systems can be resolved neither through the selectivity of their structures nor through the selectivity of their processes. For the required 'compatibility test'¹³¹ would obstruct the emergence of a common European private law (and a meaningfully integrated 'order of actions' in the Community).

The requirement for interpretation in conformity with directives now implants in the legal methodological doctrines of Member States *selective bars on follow-ups*: it is in this innovation that the real reason for academic legal theory's refusal to interpret the *Marleasing* decision in its hierarchy-deconstructing significance lies.¹³² As long as one is willing, with Luhmann, to define evolution as 'a mechanism that uses 'chance' to induce structural changes'¹³³ (where chance is to be taken as meaning an event lying *outside* the system's developmental logic),¹³⁴ then it can be seen that the Court of Justice is seeking to entrust the conflict task in the context of approximation of private law to *evolutionary mechanisms*, in the manner described above that interweaves self-organisation and selection.¹³⁵

The consequences of this change are at present hard to foresee. The process of *constitutionalisation* of a network of private law systems after all—conceptually—presupposes acceptance of *autonomy* of these very systems. Correspondingly, national rules on legal reasoning would have to open to the evolutionary logic of the constitutionalisation strategy lying behind *Marleasing*. This would in turn presuppose far-reaching rearrangements in continental European methodological thinking, which still—in the exegetical tradition—places statute at the centre of its operations and the legislator above the judge. Whether the Member States' courts are prepared to meet the challenge of *Marleasing* is a question only the future can show.

¹³¹ U. Schimank, *Theorien gesellschaftlicher Differenzierung*, 2nd edn. (Leske + Budrich, 2000), at 182.

¹³² See *supra* 771–772.

¹³³ N. Luhmann, *Soziologische Aufklärung 3: Soziales System, Gesellschaft, Organisation*, Opladen (Westdeutscher Verlag, 1978), at 184.

¹³⁴ See in detail Schimank, *op. cit.* note 131 *supra*, at 182.

¹³⁵ See *supra* 779.