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Interpretation in the Court of Justice of the European Union: Originalism, Purposivism, and *L' Economie Générale*

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Court of Justice of the European Union

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INTERPRETATION IN THE COURT OF JUSTICE OF THE EUROPEAN UNION: ORIGINALISM, PURPOSIVISM, AND *L'ÉCONOMIE GÉNÉRALE*

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* Judge, Court of Justice of the European Union. Opinions expressed in this paper are author's personal opinions.

I. INTRODUCTION

There is a question that permeates almost every professional conversation among lawyers, both practicing and academic alike: how will a certain case come out? While the answer to that question is almost always speculative, it cannot be denied that there are certain constraints under which judges operate and that such constraints may have some predictive value. In brief, the question dissolves into two separate issues. First, on what grounds of authority will a case be decided, and second, how the choice of that authority, and not another, can be justified. While the weight given to specific legal authority, such as the Constitution, a statute, or judicial precedent, is different in common law and civil law legal systems, in either case it is at intersection of authority and justification where interpretative concepts such as textualism, originalism, purposivism,¹ or *l'économie générale*² come into play.

This paper is structured as follows: first, in Section Two, I provide a short overview of different approaches to interpretation, drawing on certain differences and similarities between doctrines developed in both the United States and the European Union (EU). In Section Three, I briefly look into the formative constitutional interpretation in the EU and the United States and identify its key elements, such as text and purpose. In Section Four, I present an outline of instances of interpretation according to *l'économie générale* in case law of the Court of Justice of the European Union (CJEU or the Court). In

1. See Lawrence B. Slocum, *Originalism, Hermeneutics and the Fixation Thesis*, in *THE NATURE OF LEGAL INTERPRETATION* 130, 131 (Brian G. Slocum ed., 2017) (explaining that the approach to interpretation of a legal text as formulated or understood by its authors (*subjective approach*) or by the public (*objective approach*), at the time of its original adoption, is sometimes referred to as originalism. The invention of the term “original understanding” is ascribed to Paul Brest who defined originalism as an approach “that accords binding authority to the text of the Constitution or the intentions of its adopters.”); see also Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) (describing that in Europe, a form of originalism is interpretation according to legislative history or *travaux préparatoires*, that seeks justification in the meaning of text as understood by its authors).

2. The expression *l'économie générale* is a derivative of a more general concept of *économie* that can be traced to ancient Greek and Christian tradition. In practice of the Court of Justice of the European Union, the English translation is “general structure and purpose,” which does not reflect the subtlety of the French expression.

Section Five, I discuss the meaning and function of *l'économie générale* in EU law. Finally, in Section Six, I present a few concluding remarks suggesting that *l'économie générale* relies on or, even constructs, a narrative within which statutory interpretation takes place and that the very concept of *l'économie générale* is inherently non-political.

II. APPROACHES TO INTERPRETATION

Interpretation, both statutory and constitutional, is at the core of judicial work. It goes without saying that courts, as interpretative subjects, develop specific approaches that are sometimes referred to as canons of interpretation.³ Descriptors of different approaches to judicial interpretation include concepts such as judicial self-restraint, judicial activism, textualism, deferentialism, functionalism, originalism, or teleology (purposivism).⁴ In the process of interpretation, a rule expressed in written form, which is an object of interpretation,⁵ is attributed certain meaning by a judge. The judge can define that meaning in a number of ways, for example, from how the text was understood by its authors; how it was understood by the public at time of its making; how it is understood by the interpreting subject at time of interpretation; or by “discovering” its “inherent qualities,” that are believed to be independent from the author, the interpreter, and the public.⁶

All of the above-mentioned ways of interpretation are justificatory and not constitutive. In other words, an interpretative approach does

3. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 51 (2012); see also William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1099 (2017) (defining the canons of interpretation as unwritten rules that set interpretive defaults, establish priority of sources, and provide guidance for judges when they are faced with uncertainty).

4. See SCALIA & GARNER, *supra* note 3, at xii-xvi; Frank H. Easterbrook, *Foreword in ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xxi, xxi (2012); Richard H. Fallon Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1237-40, 1279-95 (2015).

5. It can also be said that the object of interpretation is a legal rule, not text itself (text being an evidence of a legal rule).

6. Fallon, *supra* note 4, at 1237-39.

not decide a case on its own right, but rather justifies the choice of legal authority and the judicial decision based on it.

Certainly, the meaning of legal authority depends on the choice of interpretative approach that the interpreting judge makes. This concept holds true even when it is considered that judges should do no more than re-state the intentions of long-gone authors and remain faithful to the original text.⁷ Fidelity to text, being *la bouche de la loi*, requires volition in the same way that purposivism does.⁸

American and European traditions of statutory interpretation appear to be considerably different, in that the differences go beyond merely nominal considerations, such as between textual interpretation and teleological or purposive interpretation.⁹ Yet, there is a clarification to be made. There is a difference between relying on text and legal concepts on one side, and relying on function and purpose of law, on the other. While originalism, at least nominally, positions itself in the textualist camp,¹⁰ there seems to be a lack of clarity as to whether it is inherently non-purposive. In my opinion, textualism, in its own right, seems to be neither inimical to functionalism and purposivism, nor necessarily originalist.

How can textualism be reconciled with functionalism and

7. Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 MINN. L. REV. 612, 614 (2006) (suggesting that “even if the meaning of a constitutional provision was not fully settled at the time of ratification, it could be fixed by precedent and the originalist today is as bound by that fixed meaning as he would be by the meaning of constitutional provisions that were unambiguous upon ratification”).

8. See *id.* at 640-41 (referencing Marshall’s opinion in *Gibbons v. Ogden*, which argues that “tackling an obscure and equivocal document” requires exploring meaning through the language of the instrument in connection with its purpose).

9. See Robert S. Summers & Michele Taruffo, *Interpretation and Comparative Analysis*, in INTERPRETING STATUTES: A COMPARATIVE STUDY 461, 461-63 (D. Neil MacCormick & Robert S. Summers, eds., 1991) (explaining that differences arise in political theory, institutional structure, legal culture, conceptual framework, and personnel).

10. See, e.g., Randy Barnett, *Kavanaugh Testimony, Part 1: On Originalism*, VOLOKH CONSPIRACY (Sept. 14, 2018, 5:00 PM), <https://reason.com/volokh/2018/09/14/kavanaugh-testimony-part-1-on-originalis> (responding to Senator Mike Lee on textualism vs. originalism: “originalism, as I see it, means, in essence constitutional textualism, meaning the original public meaning of the constitutional text”).

purposivism? While text is always a starting point around which legal argumentation revolves, nowadays, no one seems to be a pure textualist any more. As Antonin Scalia and Bryan Garner have put it, “words are given meaning by their context and context includes the purpose of the text.”¹¹

More generally, functional or purposive reading of a text may be directed towards different postulated purposes, past and future alike. As Steven Pinker has explained, in order to be “teleological” (purposive) one needs: “a way of sensing the state of itself and its environment [this is where text is relevant], a representation of a goal state (what it ‘wants,’ what it’s ‘trying for’), an ability to compute the difference between the current state [the text] and the goal state [the outcome of interpretation], and a repertoire of actions that are tagged with their typical effects.”¹²

For example, the word “marriage” may, depending on the desired goal state of the interpreter be defined as either “heterosexual only” or as to “include persons of the same sex.” The point is that the former approach is not less purposive (or teleological) than the latter, as both follow Pinker’s teleological pattern and seek to achieve a certain goal state. Possible arguments that there is some inherent or original meaning of the word are justificatory in nature. If the authors of the text originally intended to reserve the word “marriage” for persons of different sex that reading, from a present-day vantage point, is no less purposive than the one that seeks justification in the principle of non-discrimination and leads to the opposite result. It is only after one has chosen an interpretative approach that the word “marriage” acquires the meaning purported by the interpreting subject.

Since text can have different meanings, depending on what the interpreting subject wants to achieve, textualism is not prejudicial to purposivism. On the other hand, conceptualism in the United States is, as Felix Cohen articulated, a dilemma between “transcendental

11. SCALIA & GARNER, *supra* note 3, at 56 (positing that the difference between a textualist and a purposive interpretation is not that textualists never consider the purpose, but rather the four limitations that textualists implement).

12. STEVEN PINKER, ENLIGHTENMENT NOW: THE CASE FOR REASON, SCIENCE, HUMANISM AND PROGRESS 21-22 (2018) (internal notes added by author).

nonsense” and “functional approach.”¹³ The choice is essentially between indulging to conceptual purity of a rule and interpreting the rule as to perform certain function or produce certain legal or social effects; and thus lending itself to a different kind of critique. For Cohen, jurisprudence is a “special branch of the science of transcendental nonsense” because “[r]ules of law, which refer to [these] legal concepts are not descriptions of empirical social facts . . . but rather theorems in an independent system. It follows that a legal argument can never be refuted by a moral principle nor yet by any empirical fact.”¹⁴ Indeed, while functionalism relies on what a rule does, or is supposed to do, in the real world, conceptualism seeks justification within a purely normative sphere.¹⁵ Importantly, since both originalism and purposivism seek to interpret law in order to bring about some desired social change, the need to make a choice between the two emerges only once legal conceptualism is abandoned. Indeed, prevailing conceptual legal thought may be a reason why the struggle between originalism and purposivism is largely absent in Europe.¹⁶

Less so in the EU. The CJEU practices the functional approach, and its functional interpretations sometimes contradict conceptual interpretations of national court.¹⁷ For example in *Höfner*,¹⁸ the CJEU had to decide whether a Member State-operated employment agency is subject to application of EU competition rules that apply only to “undertakings.” The CJEU applied a functional approach and decided that an entity should be defined as an undertaking, regardless of its formal legal status under national law.¹⁹ The Court defined an

13. See Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935) (explaining that the functional approach has been presented as a substitute for the theological jurisprudence; however, the phrase “functional approach” has no structured definition).

14. *Id.*

15. See *id.* at 809, 821-22.

16. Europe, meaning legal thought and legal practice of European Member States.

17. See Case C-41/90, *Hofner v. Macrotron GmbH*, 1991 E.C.R. I-1979, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=97109&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11565764>.

18. See *id.* ¶ 20.

19. See *id.* ¶ 34.

undertaking as “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.”²⁰

Using a functional approach is often necessary in order to overcome differences between national legal concepts and apply EU law instead.²¹ The dilemma here is not only between a broad and a narrow reading of the term “undertaking,” but rather whether EU competition rules can operate smoothly if their meaning diverges from one Member State to another. In other words, the functional approach of the CJEU performs an integrative function. The problem here concerns the question of how to justify an interpretative approach when it comes to the interpretation of ambiguous statutory text. In *Höfner*, the CJEU opted for a functional reading of the word “undertaking,” without explaining the choice, and made no reference to any specific interpretative cannon.²² In any case, the functional approach is dominantly used to define the meaning of EU law in a broad spectrum, including the concept of the “State”²³ or the concept of a “court or tribunal.”²⁴

20. See *id.* ¶ 21.

21. See Cohen, *supra* note 13, at 822.

22. See *Höfner*, 1991 E.C.R. I-1979, ¶ 21 (“[I]n the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity.”).

23. Case C-188/89, *Foster v. British Gas*, 1990 E.C.R. I-3313, ¶ 17, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=96665&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11565877> (“Where a person is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with community law.”).

24. See Case C-394/11, *Belov v. CHEZ Elektro Bulgaria AD*, ECLI:EU:C:2013:48, ¶ 38 (Jan. 31, 2013), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=133241&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=12658707>; Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, 2008 E.C.R. I-9641, ¶ 6, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=67750&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=12658132>; Case C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, 1997 E.C.R. I-4961, ¶ 23, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=43728&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11565919> (“In order to determine whether a body making a reference is a court or tribunal for purposes of Article 177

In brief, the functional approach responds to the question: What does a rule do in the real world? Once that question is asked, further dilemmas emerge, such as: What did the authors of the rule want the rule to achieve? What did the public think the rule was going to achieve (general public meaning)? What does the interpretative subject think the rule was meant to achieve? None of these questions can be answered by referencing to legal concepts.

III. *L'ÉCONOMIE GÉNÉRALE* BETWEEN TEXT AND PURPOSE AND ITS CONSTITUTIONAL DIMENSION

The notion and concept of economy, originates from the ancient Greek notion *oikonomia*, meaning administration of the house.²⁵ Giorgio Agamben points out that the “*techne oikonomike*” differs from politics, just as the house (*oikia*) differs from the city (*polis*).²⁶ According to Agamben, “Xenophon defines this activity or ordered administration as ‘control’ (*episkepsis*, from which derives *episkopos*, ‘superintendent,’ and, later, ‘bishop’).”²⁷ Furthermore, the economy implies “the ordering of the themes (*taxis*), a choice (*diairesis*) and an analysis (*exergasia*) of the topics.”²⁸ Agamben continues, that, “in the Christian age, the term *oikonomia* is transposed into a theological field, in which, according to a widespread belief, it would acquire the meaning of a ‘divine plan of salvation’ (with particular reference to Christ’s incarnation).”²⁹ Existence of divine economy implies the

of the Treaty . . . the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter parties, whether it applies rules of law and whether it is independent.”).

25. See Dotan Leshem, *Retrospectives: What Did the Ancient Greeks Mean by Oikonomia?*, 30 J. ECON. PERSP. 225, 225 (2016) (explaining that the term *oikonomia* is loosely connected to budgeting, but it is not relevant to contemporary economics).

26. GIORGIO AGAMBEN, *THE KINGDOM AND THE GLORY: FOR A THEOLOGICAL GENEALOGY OF ECONOMY AND GOVERNMENT* 17 (Werner Hamacher ed., Lorenzo Chiesa & Matteo Mandarini trans., 2011).

27. *Id.* at 18.

28. *Id.* at 19.

29. *Id.* at 20-22 (citing 1 *Corinthians* 9:16–17 (King James)) (suggesting that “*oikonomia* is the task (as in Septuagint, Isaiah 22:21) that God has assigned to Paul, who therefore does not act freely, as he would in a *negotiorum gestio* but according

possibility of only one correct interpretation. As Timothy 1:3-4 states, “[y]ou were to command certain persons to give up teaching erroneous doctrines and studying those interminable myths and genealogies, which issue in mere speculation and cannot make known the *oikonomia* of God, which works through faith.”³⁰

In the sphere of law, interpretation according to *l'économie générale* relies partly on the place of a rule under interpretation within a more general regulatory scheme and partly on the purpose that it allegedly seeks to achieve.³¹ In its English iteration *l'économie générale* is translated as “general structure and purpose.”³² This reliance on the purpose of a rule, as opposed to fidelity to the text, evokes an uncanny resemblance with the distinction between the textualist approach and the purposive approach in American legal interpretation, a resemblance I would like to dispel.

Legitimacy of adjudication is often mentioned as one of the principal reasons that fidelity to the text should be preferred over teleology.³³ As a creation of a legislature, text is more readily understood to impart some historical, allegedly original, stabile, or at least pre-determined meaning that was, and arguably continues to be, the will of the legislature.³⁴ In that view, interpretation that would rely

to a bond of trust (*pistis*) as *apostolos* (‘envoy’) and *oikonomos* (‘nominated administrator’).”).

30. See *id.* at 22 (citing 1 Timothy 1:3–4 (King James)).

31. See, e.g., Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 12, <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=D8A14A1B37714566F0BBCAC96FF97515?text=&docid=87120&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7532687> (applying the concept of *l'économie générale* in considering the spirit, wording, and the general scheme).

32. Compare *id.* at 12 (using the term “general scheme” for the English translation), with Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 22 (Fr.). <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=87120&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1&cid=1546602> (using the French word “*l'économie*” for the English term “general scheme” in the French translation).

33. See VALERIE C. BRANNON, STATUTORY INTERPRETATION; THEORIES, TOOLS, AND TRENDS 1, 2, 11 (2018), <https://fas.org/sgp/crs/misc/R45153.pdf> (discussing that the legitimacy of the court’s statutory interpretation hinges upon its fidelity to congressional will and, therefore, textualism supports that legitimacy in believing that the text provides a clear indication of legislative intent).

34. See John F. Manning, *Textualism and Legislative Intent*, VA. L. REV. 419,

on contemporary meaning of a rule does not reflect either the original intent of the authors or its original public meaning.³⁵ A court opting for contemporary meaning typically discards the original intention of the legitimate lawmaker, and becomes a legislator.³⁶ As Chief Justice Roberts opined in *King*, “in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan.”³⁷

Interpretation according to *l'économie générale* approaches the problem of legitimacy of adjudication in another way. It does not claim to either establish the original meaning of a rule or to give a contemporary interpretation, but instead looks into its “intrinsic” qualities.³⁸ What *l'économie générale* pursues is not overturning the textual meaning of a rule, but discovering its useful meaning by placing it into a broader framework of reference, by looking at it as a part of a broader, analytical context.³⁹

As I would suggest, interpretation according to *l'économie générale* is a combination of ontological and teleological interpretation that seeks to reconcile the text with ontology of the legal system and with the function that the rule under interpretation performs within it. Inasmuch it takes the text as a starting point, *l'économie générale* seems to be similar, though not identical, to the objectivist stream of

419-20 (2005) (describing the textualists' approach to prioritize the text over legislative history, in order to help prevent potential discrepancies that may arise due to the complexities of the legislative process and inaccuracy of interpreters of legislative history).

35. See *id.* at 421 (explaining that leading modern textualists prioritize the true interpretations behind the text, while classical textualists favor an objective or reasonable interpretation).

36. See *Palmer v. Massachusetts*, 308 U.S. 79, 83 (1939) (discussing the follies of legislative interpretation and the potential risk of exceeding the role of interpretation).

37. See *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015).

38. See, e.g., Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 12, <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=D8A14A1B37714566F0BBCAC96FF97515?text=&docid=87120&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7532687> (applying the concept of *l'économie générale* in a consideration of the spirit, general scheme, and wording in legal interpretation).

39. See *id.* (finding a legal interpretation in applying the wording of the provisions amidst the general context and intent).

the American original intent approach.⁴⁰ The main similarity between the two being that both start from an assumption that a text must have some fixed and independent meaning. Nevertheless, there are a variety of options that can be used to understand that fixed meaning, such as:⁴¹ the will of the founding fathers, by determining its objective public meaning, or by looking into inherent properties of the rule under interpretation. Both, American original intent and *l'économie générale* assume certain inherent qualities of the rule under interpretation and include a functional and teleological component, that is the objective that the rule seeks to achieve. Interestingly, this interpretative approach was present in formative periods of constitutional interpretation, both in the United States and the EU.⁴²

A. THE UNITED STATES

The idea that certain constitutional rules have an intrinsic meaning that is embedded into the constitutional arrangement can be traced back to *Marbury v. Madison*, where Chief Justice Marshall construed the doctrine of judicial review from the nature and structure of the Constitution.⁴³ As it follows from *Marbury*, judicial review is an inextricable and intrinsic part of constitutional design, *attached* to the idea of constitutional supremacy. The *province* and *duty* of the judiciary to engage in judicial review flows naturally from that grand scheme and does not require reference to specific constitutional text

40. See Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. L. REV. 703, 703 (2009) (opining that the American original intent approach incorporates the goal of finding the objective meaning of the text to a reasonable person, while the mental state of the drafters is not applicable to the analysis).

41. See, e.g., Smith, *supra* note 7, at 613-14 (discussing that the concept where a meaning is “fixed” post-ratification, as opposed to at ratification, reconciles both the ability to fix the meaning at a given point of origin and the discrepancies that can exist in interpretations of framers’ intent at the time of ratification).

42. See, e.g., *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (acting as the fundamental and paramount law of the United States); *Van Gend en Loos*, 1963 E.C.R. at 12 (discussing the spirit of the law).

43. See *Marbury*, 5 U.S. at 177 (“This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. . . . It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule.”).

or other legal authority.⁴⁴ Years later in *McCulloch v Maryland*, Chief Justice Marshall invoked the nature of the Constitution in the famous sentence “we must never forget that it is a Constitution we are expounding.”⁴⁵ As in *Marbury*, the Court in *McCulloch* suggested that the Constitution is “intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs.”⁴⁶ This dichotomy between permanence of the constitutional text and the need for its adjustment to contingent circumstances both necessitates and justifies the idea of judicial review.

Openness of the constitutional text is not accidental and plays a key role as part of the grand scheme of the judiciary. Supremacy of the constitutional text flows not only from its hierarchical position in respect of ordinary legislation, but also from its inherent idea that establishes separation of powers and from the accompanying narrative to which law, legislative and judge-made alike, has to fit.⁴⁷ The tension between the idea of the fixed original meaning and judicial fine-tuning in constitutional interpretation, is nicely articulated by Chief Justice Marshall who wrote that the nature of a constitution requires that “only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.”⁴⁸

44. See *id.* at 178-79 (opining that the Constitution prescribes authority to the courts to decide whether a case is in conformity to the law regardless of explicit reference to judicial review in the constitutional text).

45. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (“Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations found in the 9th section of the 1st article introduced? It is also in some degree warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a Constitution we are expounding.”).

46. See *id.* at 415.

47. See M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 52, 55 (1998) (arguing that the Constitution upholds the concept of separation of powers in separating specifically the legislative and executive branches).

48. *McCulloch*, 17 U.S. at 407.

B. EUROPEAN UNION

Unlike the comprehensive U.S. Constitution, the EU is based on the Founding Treaties, which fall short of having constitutional character in its classic understanding.⁴⁹ Nevertheless, the Founding Treaties represent the basic and paramount source of law that is not infrequently identified with a constitutional charter.⁵⁰

The cornerstone of EU law, as we know it today, was laid down in the landmark *Van Gend en Loos* case.⁵¹ The case is best known for its bold introduction of the direct effect of the Founding Treaties and assertion that EU law directly creates individual rights, which national courts must protect.⁵² It is, however, less remembered that the Court, immediately after defining the question posed by the Dutch court, addressed the question concerning the direct effect of, then, Article 12

49. See *EU Treaties*, EUR. UNION, https://europa.eu/european-union/law/treaties_en (last visited, Feb. 9, 2019) (explaining that EU law is, instead, based on treaties that are voluntarily approved by each member country).

50. See generally Opinion 2/13, On Accession of the European Union to the European Convention on Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:1990:440, ¶ 163 (Dec. 18, 2014), <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=95839&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11567045>; Opinion 1/91, Draft Agreement Between the Community, on the One Hand, and the Countries of the European Free Trade Association, on the Other, Relating to the Creation of the European Economic Area, 2014 E.C.R. I-6079, ¶ 21, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=97703&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11566922>; Case C-314/91, Beate Weber v. European Parliament, 1993 E.C.R. I-1093, ¶ 8, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=98243&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11566965>; Case C-2/88 Imm., Zwartveld & Others, 1990 E.C.R. I-3365, ¶ 16, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61988CO0002%2802%29>; Case 294/83, Parti écologiste 'Les Verts' v. European Parliament, 1986 E.C.R. 1339, ¶ 23, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=92818&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11566569>; Opinion 1/76, Draft Agreement Establishing a European Laying-Up Fund for Inland Waterway Vessels, 1977 E.C.R. 741, ¶ 12, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=89181&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11566709> (providing sources of law that do not rely upon a core constitutional framework).

51. See generally Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, <http://curia.europa.eu/juris/showPdf.jsf?sessionid=D8A14A1B37714566F0BBCAC96FF97515?text=&docid=87120&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7532687>.

52. See *id.* at 1, 7, 16.

of the Treaty establishing the European Economic Community (EEC Treaty).⁵³ At the beginning of its discussion of the merits of the case stated, “it is necessary to consider the spirit, the general scheme and the wording of those provisions.”⁵⁴

These elements, the spirit, general scheme (*l'économie générale*), and the wording, are explained in the subsequent paragraphs where the Court explained that the objective of the EEC Treaty is to establish a common market. This objective is confirmed by the Preamble, which refers not only to the Member States' governments but also to the people and creates common institutions, such as the CJEU, and gives it the role to interpret the Founding Treaties.⁵⁵ Based on these claims, the CJEU has drawn the conclusion that the Treaties created a “new legal order of international law for the benefit of which the Member States have limited their sovereign rights.”⁵⁶

The wording of the judgment does not clearly distinguish the spirit of the Court's ruling or the EEC Treaty,⁵⁷ but rather deals with them together. While the spirit of the EEC Treaty can be implied from the Schuman's Declaration of May 9, 1950, the Court explicitly referred to the objective of the EEC Treaty, which is the creation of a common market.⁵⁸ At the same time, reference to the common institutions and the role of the CJEU defines the agents by which this objective will be achieved. Together, the objective (common market) and the means for its achievement (common institutions) create the grand plan, laid down by the Treaties, or in other words, the economy of European integration.⁵⁹

53. *See id.* (stating the purpose of Article 12 is to ascertain whether the provisions extend enough to consider the spirit and grand scheme of the wording of those provisions); *see generally* Treaty Establishing the European Economic Community art. 12, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty] (stating that member states shall refrain from introducing any new customs duties, or increasing any duties, between the commercial relations amongst themselves).

54. *Van Gend en Loos*, 1963 E.C.R. at 12.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *See id.* (claiming the Treaty is more than just an agreement to create mutual obligations because it affects member states and their citizens to cooperate in a community).

The Court continued to analyze the economy of the EEC Treaty in the area of customs duties and measures of equivalent effect by referring, first, to the essential character of the customs union and emphasizing its prominent place in the part of the EEC Treaty that defines the *fondements de la Communauté*.⁶⁰ The assertion that Article 12 creates a clear and unconditional prohibition that serves as the basis for the direct effect of that EEC Treaty provision that is, its applicability in relations between individuals and the member states, makes sense only in the light of the aforementioned *economy of the Treaty*.⁶¹ In other words, this assertion makes sense only in light of the grand scheme according to which the customs union, the foundations of the EU Community and prohibition against introducing new customs, duties, and measures of equivalent effect, and, finally, the judicial review by means of a preliminary reference to the CJEU, all serve to a more prominent, yet unspoken, purpose. The prominent, yet unspoken, purpose being the process of European integration.

In *Van Gend en Loos*, *l'économie générale* was referred to in order to justify the direct effect of EU law and the new legal order within which it operates.⁶² These features of EU law were not obvious at the time and the case itself could have had an entirely different outcome. The Court did not refer to any black letter legal authority,⁶³ likely because such legal authority did not exist. In other words, *l'économie générale* was invoked in order to justify the distinction between the existing concept of international law and the “new legal order” that was introduced by the Court. That justification is ontological, as it relies on inherent characteristics of the legal order of the EU. Individual rights based in EU law and judicial protection thereof are, from the beginning, an inextricable part of the new legal order and the source of its identity. That is so because of the grand scheme on which the Founding Treaties are based, namely their spirit and *l'économie*

60. See *id.* at 12 (stating that the Treaty defines the “Foundations of the Community” in Article 12 which bases the Community upon a customs union).

61. See *id.* at 13 (“The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation.”).

62. See *id.* at 12-13 (stating the nature of the Article 12 prohibition makes it ideal to produce direct effects in the legal relationships between member states).

63. See generally *id.* at 1 (showing there is no black letter law used within the opinion).

générale.

The system of preliminary references enshrined in Article 267 of the Treaty on the Functioning of the European Union (TFEU Treaty) is also a part of the same grand scheme.⁶⁴ In *Simmenthal 2*,⁶⁵ the Court linked the *l'économie générale* of then Article 177⁶⁶ to its useful effect. In paragraph nineteen, the Court pointed out that the power of a national court to address a preliminary reference to the Court follows from the *l'économie générale* of that Article in which the Article includes a right to refer; once the reference is decided by the CJEU, it includes the power to set aside any contradicting national legislation.⁶⁷ In paragraph twenty, the Court continued by observing that any obstacle to do so would diminish the useful effect of Article 177.⁶⁸ Again, it is not about a desired goal or outcome of the Founding Treaties, but rather about its inherent structure and idea. And once again, the answer follows from the grand scheme, not from a specific legal authority. To extent that *Simmenthal 2* is an extension of *Van Gend en Loos*, both cases make part of the same plan and scheme of judicial review.⁶⁹

64. Consolidated Version of the Treaty on the Functioning of the European Union art. 267, Oct. 26, 2012, 2012 O.J. (C 326) 1, 164.

65. Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E.C.R. 629, ¶¶ 19-25, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=89693&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11567641>.

66. Article 177 is one of the key provisions of the Founding Treaties since the beginning of the EU. Numeration of articles changed over time and today it is Article 267 of the Treaty on Functioning of the European Union. *See* EEC Treaty, *supra* note 53, art 177.

67. *Simmenthal S.p.A.*, 1978 E.C.R. 629, ¶ 19.

68. *Id.* ¶ 20.

69. *Compare id.* ¶¶ 19-20 (“The effectiveness . . . would be impaired if the national court were prevented from forthwith applying Community law in accordance with the decision or the case-law of the Court.”), *with* Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 12, <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=D8A14A1B37714566F0BBAC96FF97515?text=&docid=87120&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7532687> (“Independently of the legislation of Member States, Community law therefore not imposes obligations on individuals but is also intended to confer them rights which become part of their legal heritage.”).

IV. L'ÉCONOMIE GÉNÉRALE IN JURISPRUDENCE OF THE CJEU

Incidence of interpretation according to *l'économie générale* in practice of the Court is not negligible; five in the first quarter of 2019, twenty-three in 2018, thirty-four in 2017, thirty-two in 2016, twenty-six in 2015, and thirty in 2014.⁷⁰ With that relatively high incidence in mind, my aim is to shed some light on the concept of *l'économie générale*, as a means of legal interpretation, and on what the Court looks into when it refers to *l'économie générale* of a certain legal rule or arrangement.

The CJEU does not seem to have developed a coherent approach as to when and how to apply *l'économie générale* as an interpretative tool. As I have shown above,⁷¹ in the formative period of the EU, the CJEU invoked *l'économie générale* as a justification of the European legal order.⁷² The CJEU has since referred to *l'économie générale* in a variety of situations. The cases referred to below are representative, yet not exhaustive.

A. FINDING THE MEANING OF LAW

When there are discrepancies between different linguistic versions of secondary EU law, the meaning of a rule needs to be determined by reference to *l'économie générale*.⁷³ This has become a well-established, uncontested, and relatively frequent practice.⁷⁴ Again, *l'économie générale* is used to discover an inherent meaning of the

70. Figures based on author's research. See EUR-Lex: Access to European Union Law, <https://eur-lex.europa.eu/homepage.html> (search "l'économie générale" and limit results to judgments of the CJEU).

71. See *supra* Section III.B.

72. *Id.*

73. Case C-688/15, *Agnieška Anisimovienė v. 'Indėliu ir investiciju draudimas' VI*, ECLI:EU:C:2018:209, ¶ 78 (Mar. 22, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=200548&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=12867775>.

74. See *id.* (stating that it is settled case law that when there is a divergence between language versions of legislative text, the provision must be interpreted by reference to the purpose of the rules of which it forms part); see also Case C-16/16 P, *Kingdom of Belg. v. Comm'n*, ECLI:EU:C:2018:79, ¶ 49, (Feb. 20, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=199442&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=12869309>.

legal rule based on its original intent. Because the meaning is supposed to be the same in the entire EU, different linguistic versions of a rule are not more than an imperfect reflection.

In case C-688/15, pronounced on March 22, 2018, the CJEU decided: “it is settled case-law that, where there is a divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.”⁷⁵

In this particular instance the Court takes interpretation *en fonction de l'économie générale* seriously. First, it is invoked as authority by reference to, and citation of, what is considered by the CJEU to be settled case law.⁷⁶ The Court normally employs such references when it intends to emphasize that its decision is based on solid legal authority.⁷⁷ Second, when it comes to the citation of cases, the word “inter alia” (“*notamment*”) implies that the cited cases are only a selection from a much larger pool and the same can be said in respect of the reference to “jurisprudence citée,” that is, earlier judgments referred to in the cited cases.⁷⁸

While *l'économie générale* is used to interpret the meaning of EU law, the way in which the CJEU does it varies. In case C-58/17, the Court referred to documents that, although not legally binding, provide for additional indication that can clarify the *l'économie générale* of the directive.⁷⁹ In that particular case, the meaning was determined based on the grounds of the meaning of the directive, as informed by non-binding documents.⁸⁰

75. *Agnieška Anisimovienė*, ECLI:EU:C:2018:209, ¶ 78.

76. *See id.* (citing to the judgments of C-604/11, *Genil 48* and *Comercial Hosteleria de Grandes Vinos*, EU:C:2013:344, ¶ 38 (May 30, 2013), and C-48/16, *ERGO Poist'ovna*, EU:C:2017:377, ¶ 37 (May 17, 2017)).

77. The argument might otherwise be vague because the meaning of text is not obvious, and it is not clear why the Court opted for one interpretation and not for another.

78. *Agnieška Anisimovienė*, ECLI:EU:C:2018:209, ¶ 78.

79. Case C-58/17, *INEOS Köln GmbH v. Germany*, ECLI:EU:C:2018:19, ¶ 41 (Jan. 18, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=198528&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=12871379>.

80. *Id.* (explaining that “guidance on allocation methodologies” documents clarify and inform the directive and the decision, even though the documents are not

However, sometimes the Court restricts itself to simply stating that *l'économie générale* determines the meaning of a rule. In the *Roquette Frères* case,⁸¹ the Council invoked *l'économie générale* in order to argue that the European Parliament does not have a right to intervene before the Court.⁸² The Council argued that because Parliament did not have standing to sue for annulment of an act, it also did not have a right to intervene.⁸³ The Council also argued that Parliament did not have a legal interest in the outcome of the case and that the Court should control whether such interest existed.⁸⁴

The Court, in paragraph twenty-one, declared the Parliament's intervention was admissible, by reference to *l'économie générale* of Article 37 of the Statute of the Court that allows persons, other than Member States and the EU institutions, to intervene provided such persons have a legal interest.⁸⁵ The Court concluded that Article 37 also supported the assertion that institutions, including Parliament, are not subject to this restriction.⁸⁶

B. DEFINING THE SCOPE OF EU LAW

In *Slovakia Republic v. Council*, the Court invoked *l'économie générale* to define the scope and application of paragraphs two and three of Article 78 of the TFEU Treaty.⁸⁷ Those provisions regulate the common European asylum system and provide, in paragraph two,

legally binding).

81. See Case C-138/79, SA Roquette Frères v. Council Eur. Cmty., 1980 E.C.R. 3333, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=90473&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=12872666>.

82. *Id.* ¶ 17 (explaining that the EEC Treaty does not grant the European Parliament the authority to intervene in proceedings pending before the Court).

83. *Id.* ¶ 20.

84. *Id.*

85. *Id.* ¶ 21.

86. *Id.* (“Although the second paragraph of Article 37 of the Statute of the Court provides that persons other than States and the institutions may intervene in cases before the Court only if they establish an interest in the result, the right to intervene which institutions, and thus the Parliament, have under the first paragraph of Article 37 is not subject to that condition.”).

87. Case C-643/15 & C-647/15, Slovak Republic, Hung. v. Council E.U., ECLI:EU:C:2017:631, ¶¶ 2-3 (Sept. 6, 2017), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=194081&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=11347401>.

that “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system” and in paragraph three, envisage emergency situation where one or more Member States are confronted with a sudden inflow of nationals of third countries.⁸⁸ In the latter case, the Council, on a proposal from the Commission and after consulting the European Parliament, may adopt provisional measures.⁸⁹ Such measures based on Article 78(3) were proposed by the Commission on September 9, 2015, and after, amendments were adopted.⁹⁰ Those measures were subsequently attacked by Hungary as being adopted on the wrong legal basis, thus, giving rise to a breach of an essential procedural requirement, as the European Parliament was allegedly not properly consulted.⁹¹ In dismissing this argument, the Court invoked *l'économie générale* to establish a relationship between paragraphs two and three of Article 78 of the TFEU.⁹² According to the Court, these two provisions pursue different objectives, notably, to quickly respond to a crisis (paragraph three) and to regulate common asylum policy for an indefinite period in a general way (paragraph two).⁹³ Accordingly, a restrictive interpretation, according to which acts adopted on the legal basis of Article 78(3) can only refer to those adopted on basis of Article 78(2) and may not derogate from them, was rejected by the Court.⁹⁴

C. FILLING REGULATORY LACUNAE

The CJEU occasionally employs *l'économie générale* to fill lacunae in the legal text. For example, in *Florea Gusa*, the Court invoked the *l'économie générale* to determine whether persons who ceased to work as self-employed persons are within scope of a Directive rule

88. Consolidated Version of the Treaty on the Functioning of the European Union art. 78, ¶¶ 2-3, 2016 O.J. C 202.

89. *Id.* at art. 78, ¶ 3.

90. *Slovak Republic*, ECLI:EU:C:2017:631, ¶¶ 3, 102 (demonstrating that the Commission submitted a proposal for establishing provisional measures for the benefit of Italy, Greece, and Hungary).

91. *See generally id.* (portraying Hungary's attack throughout the Judgment).

92. *See id.* ¶ 72.

93. *Id.* ¶¶ 2(3), 73.

94. *Id.* ¶ 334.

applicable to persons who have ceased to work as employed persons.⁹⁵ The Court explained that it follows from *l'économie générale* of the Directive that it applies to both categories.⁹⁶

Similarly, in *Austria Asphalt*, the Court was seized to interpret Article 3 of Council Regulation (EC) No. 139/2004 of 20 January 2004, on the control of concentrations between undertakings.⁹⁷ According to Article 3, a concentration is to be deemed to arise, *inter alia*, where a change of control on a lasting basis results from the acquisition, by one or more undertakings, of direct or indirect control of the whole or parts of one or more other undertakings,⁹⁸ but only where that undertaking performs on a lasting basis on all of the functions of an autonomous economic entity.⁹⁹ The Court observed “it cannot be determined from the wording of Article 3 of the regulation alone whether a concentration, within the meaning of that regulation, is deemed to arise as a result of a transaction by which the *sole control of an existing undertaking becomes joint when the joint venture resulting from such a transaction does not perform all the functions of an autonomous economic entity*”¹⁰⁰ Accordingly, the answer needs to be found by reference to *l'économie générale*.¹⁰¹

D. INSTRUCTING NATIONAL COURTS HOW TO DECIDE

Interpretation according to *l'économie générale* is not reserved for

95. See Case C-442/16, *Florea Gusa v. Minister of Soc. Prot., Ir.*, ECLI:EU:C:2017:1004, ¶ 38 (Dec. 20, 2017), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=198063&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13080658>.

96. *Id.* (explaining that it cannot be inferred from Article 7(3)(b) that (b) covers only the situation of persons who have ceased to work as employed persons, excluding those who have ceased to work as self-employed persons, but rather that this can be concluded when read within the general scheme of Directive 2004/38).

97. Case C-248/16, *Austria Asphalt GmbH & Co OG v. Bundeskartellanwalt*, ECLI:EU:C:2017:643, ¶ 1 (Sept. 7, 2017), <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-248/16>.

98. *Id.* ¶ 5 (referencing Article 3(1)(b) of Council Regulation (EC) No. 139/2004).

99. *Id.* (referencing Article 3(4) of Council Regulation (EC) No. 139/2004).

100. *Id.* ¶ 18 (emphasis added).

101. See *id.* ¶ 20 (“When a textual interpretation of a provision of EU law does not permit its precise scope to be assessed, the provision in question must be interpreted by reference to its purpose and general structure.”).

the CJEU. Where EU law refers to national law, such as in the case of Directive 93/13/EEC,¹⁰² the Court can instruct the national court to examine the matter according to *l'économie générale*. That was the case in *Andriciuc*,¹⁰³ where the Court was seized with interpretation of, inter alia, Article 1(2) of the Directive according to which “[t]he contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area” fall outside scope of the Directive.¹⁰⁴ According to observations of Rumanian Government, that may have been the case with a clause of contract in question, that was, allegedly a reflection of Rumanian civil code.¹⁰⁵ The Court went on to instruct the national judge to establish whether the contractual rule in question satisfies criteria that would bring it within the scope of the Directive, or not.¹⁰⁶ That should have been assessed by taking into account “the nature, the general scheme and the stipulations of the loan agreements concerned.”¹⁰⁷

E. JUSTIFICATION OF NATIONAL MEASURES

The CJEU consistently refers to *l'économie générale* as a justification of national measures in area of state aid. In contrast to situations where the assessment is left to the national courts, in state aid cases the CJEU scrutinizes the economy of a national rule itself.¹⁰⁸

102. Council Directive 93/13/EEC, 1993 O.J. (L 95) 29 (EC).

103. See Case C-186/16, *Ruxandra Paula Andriciuc v. Bana Romaneasca SA*, ECLI:EU:C:2017:703 (Sept. 20, 2017), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=194645&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13088259>.

104. Directive 93/13/EEC, *supra* note 102, at art. 1(2).

105. See *Ruxandra Paula Andriciuc*, ECLI:EU:C:2017:703, ¶ 26.

106. *Id.* ¶ 29.

107. See *id.* ¶ 30 (“In the present case, as the Advocate General observed in point 59 of his Opinion, it is for the referring court to assess, having regard to the nature, the general scheme and the stipulations of the loan agreements concerned, as well as the legal and factual context in which those matters are to be viewed, whether the term in question, under which the loan must be repaid in the same currency as that in which it was advanced, reflects statutory provisions of national law, within the meaning of Article 1(2) of Directive 93/13.”).

108. See, e.g., Case C-148/04, *Unicredito Italiano SpA v. Agenzia delle Entrate, Ufficio Genova 1* ECLI:EU:C:2005:774, ¶ 51 (Dec. 15, 2005),

This line of practice can be traced back to 1974, when the Court found that the Italian system, by relieving employers from payment of a part of social charges aimed for family allowances was not justified by the nature or general scheme, that is, by *l'économie générale* of the Italian fiscal system.¹⁰⁹ That justification is echoed in the “Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation” of 1978,¹¹⁰ and in subsequent practice of the Court. In order to be justified on this ground, a national measure needs to result directly from the founding principles of the national system of taxation.¹¹¹ Recently, the Court has further clarified that a distinction needs to be made between inherent mechanisms of the fiscal system that are necessary for achievement of its objectives, and mechanisms that are external to it, only the former being accepted as

<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=57088&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3016524> (“The tax reduction is not justified by the nature and overall structure of the tax system in question. . . . It is not an adaptation of the general scheme to the particular characteristics of banking undertakings. It is apparent from the documents before the Court that it was put forward expressly by the national authorities as a means of improving the competitiveness of certain undertakings at a certain stage in the development of the sector.”).

109. Case C-173/73, *Italy v. Comm’n*, ECLI:EU:C:1974:71, ¶ 15(3) (July 2, 1974), <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=88673&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3018370> (“It must be concluded that the partial reduction of social charges pertaining to family allowances devolving upon employers in the textile sector is a measure intended partially to exempt undertakings of a particular industrial sector from the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system.”).

110. Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation (EC) 1998 O.J. (C 384), ¶¶ 1-3 (noting the importance and desirability of compatible taxation systems across Member States in the establishment of a common market).

111. Case C-88/03, *Portugal v. Comm’n*, ECLI:EU:C:2006:511, ¶ 81 (Sept. 6, 2006), <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=66445&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3024825> (“A measure which creates an exception to the application of the general tax system may be justified by the nature and overall structure of the tax system if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system. In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives.”).

a justification.¹¹²

F. OTHER EXAMPLES OF *L'ÉCONOMIE GÉNÉRALE*

In another line of cases *l'économie générale* is invoked in order to establish a relationship between a general rule and derogation.¹¹³

The CJEU invoked *l'économie générale* to interpret the objective of the framework decision on the European Arrest Warrant, which is, according to the principle of mutual recognition, a replacement of the multilateral system of extradition by a system of surrender based on cooperation of national judicial authorities.¹¹⁴

It is interesting to note that the CJEU only refers to *l'économie générale*, in context of systemic change in the system of extradition, in *Piotrowski* which is the most recent of the three cases discussed here—*Aranyosi* and *Kovalkovas* being the other two.¹¹⁵ At the same

112. Case C-374/17, *Finanzamt B v. A-Brauerei*, ECLI:EU:C:2018:102, ¶ 48 (Dec. 19, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=209352&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3024825>.

113. Case C-560/16, *E.ON Czech Holding AG v. Michael Dédouch*, ECLI:EU:C:2018:167, ¶ 26 (Mar. 7, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=200014&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13089869>; see Case C-367/16, *Dawid Piotrowski*, ECLI:EU:C:2018:27, ¶ 47 (Jan. 23, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=198646&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13090561>.

114. See *Dawid Piotrowski*, ECLI:EU:C:2018:27, ¶ 46 (“As regards the context and overall scheme of Article 3(3) of Framework Decision 2002/584, it should be noted that, as is apparent in particular from Article 1(1) and (2) and recitals 5 and 7 thereof, the purpose of the framework decision is to replace the multilateral system of extradition based on the European Convention on Extradition of 13 December 1957 with a system of surrender, as between judicial authorities, of convicted or suspected persons for the purpose of enforcing judgments or of conducting prosecutions, the system of surrender being based on the principle of mutual recognition.”).

115. See *id.* ¶¶ 46-47 (noting the cornerstone of judicial cooperation in criminal matters is that member states are obliged to give effect to arrest warrants); see generally Case C-404/15, *Pál Aranyosi v. Generalstaatsanwaltschaft Bremen*, ECLI:EU:C:2016:198 (Apr. 5, 2016), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=175547&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=7632447>; Case C-477/16 PPU, *Openbaar Ministerie v. Ruslanas Kovalkovas*, ECLI:EU:C:2016:861 (Nov. 10, 2016), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=185243&pageInd>

time, all three cases refer to the link between Article 1 and recitals 5 and 7 of the Framework Decision.¹¹⁶ While this looks similar to ordinary development of case law, that is in the Court's parlance development of *jurisprudence constante*, or in English, well-established case law, it invokes a different kind of authority. Namely, the Court, by invoking *l'économie générale*, refers to "inherent" characteristics of a rule, in this case inherent relationship between recitals of the Framework Decision and its Article 1.¹¹⁷ Once established by the Court, this relationship is inherent and cannot be changed by the evolution of case law.¹¹⁸

V. MEANING AND FUNCTION OF *L'ÉCONOMIE GÉNÉRALE* IN EU LAW

Even a quick look into the phenomenology of *l'économie générale* in judicial reasoning of the CJEU shows a few regularities: (a), there is a variation of reference to "*l'économie générale*" and to "*l'économie générale et la finalité*," suggesting presence of ontological and teleological elements of the concept.¹¹⁹ Also, reference to *l'économie générale* sometimes presents as a single and independent interpretative tool, and sometimes, as a validation of other legal arguments or as corroboration of explicit legal authority, such as

ex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=7632895.

116. See *Dawid Piotrowski*, ECLI:EU:C:2018:27, ¶ 46; *Pál Aranyosi*, ECLI:EU:C:2016:19, ¶ 75 ("[T]he purpose of the Framework Decision, as is apparent in particular from Article 1(1) and (2) thereof and recitals 5 and 7 in the preamble thereto, is to replace the multilateral system of extradition"); *Ruslanas Kovalkovas*, ECLI:EU:C:2016:861, ¶ 25 ("[I]t should be noted that, as is apparent from Article 1(1) and (2) and recitals 5 and 7 thereof in particular, the purpose of the Framework Decision is to replace the multilateral system of extradition.").

117. *Dawid Piotrowski*, ECLI:EU:C:2018:27, ¶ 46; *Pál Aranyosi*, ECLI:EU:C:2016:19, ¶ 75; *Ruslanas Kovalkovas*, ECLI:EU:C:2016:861, ¶ 25.

118. *Dawid Piotrowski*, ECLI:EU:C:2018:27, ¶ 46; *Pál Aranyosi*, ECLI:EU:C:2016:19, ¶ 75; *Ruslanas Kovalkovas*, ECLI:EU:C:2016:861, ¶ 25.

119. See Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877, 888 (1997) (recognizing ontological actualities transpired from classifications designed to describe behavior results in a failure to notice effects of this transformation); see also Koen Lenaerts, *Interpretation and the Court of Justice: A Basis for Comparative Reflection*, 41 INT'L L. 1011, 1016 (2007) (noting the European Court of Justice's teleological interpretation method in order to understand the purpose of a provision).

legislation or *jurisprudence constant*, and (b), interpretation from *l'économie générale* is justificatory and in function of choosing among two or more sources of written authority.¹²⁰

A. ONTOLOGY AND TELEOLOGY OF *L'ÉCONOMIE GÉNÉRALE*

The concept of *l'économie générale*, as applied by the CJEU comprises two dimensions: ontological (general scheme, German: allgemeine Systematik) and teleological (purpose, German: Zweck).¹²¹

The ontological dimension expresses the idea of a grand scheme within which a rule under interpretation operates.¹²² That scheme can be of constitutional nature, as we have seen in *Van Gend en Loos*, but may also represent specific areas of EU law, such as competition, consumer protection, or an area of freedom, security, and justice.¹²³

In any case, when invoking *l'économie générale*, the Court inscribes the rule under interpretation into broader schemata of the European legal order. In doing so, the Court constructs an impression of objectivity and inevitability of a given interpretation.¹²⁴ Among

120. See generally AM. BAR ASS'N, SCOPE OF REVIEW: GENERAL PRINCIPLES 2, 5, 7 (Oct. 10, 2005), https://www.americanbar.org/content/dam/aba/migrated/adminlaw/eu/Treaties_JudRev_Ron_wdraft.authcheckdam.pdf (emphasizing the Court of Justice takes a “creative approach” to legal interpretation and applies a variety of “general principles of law” in the development of EU jurisprudence); see also Lenaerts, *supra* note 119, at 1016 (explaining the three primary interpretation methods used by the Court of Justice that focus on text, context, and purpose).

121. See generally Johannes Busse et al., *Actually, What Does “Ontology” Mean? A Term Coined by Philosophy in the Light of Different Scientific Disciplines*, J. COMPUTING & INFO. TECH. 29 (2015) (discussing the term “ontology” from the perspective of various disciplines); see also Martin Bertman, *Kant's Theology and Teleology*, 3 RES COGITANS 47, 48 (2006) (“The fulcrum of theology is the principle of God’s teleology – (telein in Greek connotes perfectly complete) – in the organ of nature.”).

122. Schlag, *supra* note 119, at 898.

123. Damian Chalmers & Luis Barroso, *What Van Gend en Loos Stands For*, 12 INT'L J. CON. L. 105, 109, 122-23, 129 (Jan. 2014), <https://doi.org/10.1093/icon/mou003>.

124. See Dr. Günter Wilms, *Protecting Fundamental Values in the European Union Through the Rule of Law*, EUROPEAN UNIV. INST. 58, 67, 75 (2017), http://cadmus.eui.eu/bitstream/handle/1814/44987/RSCAS_Ebook_Wilms_EU_RuleOfLaw_2017.pdf?sequence=3&isAllowed=y (recognizing the role of the CJEU is to ensure, in applying and interpreting the Articles of the TFEU, observation of the

more possible interpretations, the one which is chosen and valid is the one that best fits the grand scheme. In fact, it is the grand scheme that validates the chosen interpretation.¹²⁵ Moreover, alternative interpretations that may have been discussed in process of adjudication are usually not even mentioned in a judgment, except from time to time where they may be detected in an opinion of the Advocate General.¹²⁶ This is not surprising, since the very concept of *l'économie générale* rests on idea that the chosen interpretation is based on a pre-existing and unalterable authority. In such circumstances when *l'économie générale* is invoked, there is no pressing need to refer to *jurisprudence constante* or any other authority. Both the rule and the general scheme speak for themselves through agency of the Court. While a reference to *jurisprudence constante* generally entails a citation of relevant case law, reference to *l'économie générale* does not, except where the interpretation according to *l'économie générale* itself has become *constante*.¹²⁷

law).

125. *Id.* at 67. According to Article 19(1) TFEU, the CJEU ensures that in the interpretation and application of the Treaties (TEU and TFEU) the law is observed. The expression “the rule of law” is not expressly mentioned but the wording of Article 19 TFEU is wide enough to cover it. The Treaties encompass both the values under Article 2 TFEU and the control mechanism of Article 7 TEU.

126. *See* Case C-16/16P, Kingdom of Belgium v. European Commission, ¶ 49, 2018 E.C.R. (“In order to maintain the uniform interpretation of EU law, in the case of divergence between those versions, the provision in question must therefore be interpreted by reference to the purpose and general scheme of the rules of which it forms part”); *see generally* Pál Aranyosi, ECLI:EU:C:2016:19; Ruslanas Kovalkovas, ECLI:EU:C:2016:861 (neither judgment makes mention of alternative interpretations discussed).

127. *See* Case C-404/16, Lombard Ingatlan Lízing Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság, ECLI:EU:C:2017:759, ¶ 21 (Oct. 12, 2017), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=195433&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13097059> (“À cet égard, il ressort d’une jurisprudence constante de la Cour que les dispositions du droit de l’Union doivent être interprétées et appliquées de manière uniforme, à la lumière des versions établies dans toutes les langues de l’Union européenne. En cas de disparité entre les diverses versions linguistiques d’un texte du droit de l’Union, la disposition en cause doit être interprétée en fonction de l’économie générale et de la finalité de la réglementation dont elle constitue un élément (arrêt du 17 mai 2017, ERGO Poist’ovňa, C-48/16, EU:C:2017:377, point 37.”); *see also* Case C-367/16, Dawid Piotrowski, ECLI:EU:C:2018:27, ¶ 40 (Jan. 23, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=198646&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13090561>.

Similarly, the teleological dimension and the wording that the Court uses sometimes explicitly includes the word *finalité*.¹²⁸ Again, the purpose of a rule under interpretation is understood as being objective and pre-determined. It is purported to be given by regulatory authorities and not to be a creation of the Court. If there is a written authority referred to, it is usually confined to recitals of a directive or other secondary EU legislation.¹²⁹ Yet, the expression *finalité* appears to refer to the authors' objectives of the rule understood within the grand scheme of *l'économie générale*.¹³⁰ In other words, such objectives are to be pursued only and insofar as they correspond to that grand scheme. One could imagine interpretation according to *l'économie générale* behaving like a ballistic missile, in which its target is carefully chosen and aimed at in advance, and once it is launched, the task of the Court is only to plot and describe the pre-determined trajectory.

B. WRITTEN AUTHORITY AND JUSTIFICATORY NATURE OF *L'ÉCONOMIE GÉNÉRALE*

In legal systems based on civil law, courts are inclined to rely on legislation as a dominant legal source.¹³¹ Nevertheless, court-made law is also relevant and the need to ensure uniform interpretation of law is recognized.¹³² Whereas, in common law systems, uniformity and coherence of law are ensured by judicial precedent. Legal systems based on or influenced by French law recourse to the doctrine of

128. See, e.g., *Dawid Piotrowski*, ECLI:EU:C:2018:27, ¶ 25.

129. See generally *id.* ¶¶ 3-9 (citing directly to primary authorities and regulatory directives).

130. See, e.g., *id.* ¶ 25 (emphasizing that the Court of Appeals in Brussels considered it necessary to seek clarifications from the Court of Justice regarding the scope and purpose of provisions under European Law to assure it is interpreted in the manner consistent with the authors' intention, or "afin d'assurer une interprétation du droit belge conforme au texte et à la finalité de celle-ci").

131. *Key Features of Common Law or Civil Law Systems*, WORLD BANK GRP., <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law> (last visited Feb. 27, 2019).

132. *Opinion No. 20 on the Role of Courts with Respect to Uniform Application of the Law*, COUNCIL OF EUR., <https://www.coe.int/en/web/ccje/the-role-of-courts-with-respect-to-uniform-application-of-the-law> (last visited Mar. 27, 2019) (highlighting the role of courts with respect to uniform application of the law).

jurisprudence constante, and so does the CJEU.

Nowadays, both judicial precedent and *jurisprudence constante* materialize in written form and contribute to the reduction of complexity.¹³³ Such reduction is inherent to judicial work, during which the initial multiple feasible outcomes dissolve to singular solutions. When a court refers to written authority it does it for a reason—to create an impression of stability and predictability that are built around legal sources that constitute firm and documented referential points. Regardless of whether such referents are legislative or praetorian, they constitute the legal reality to which future legal propositions relate and, in such a way, reduce complexity.

The difficulty with *l'économie générale* is that, while it is typically presented as an objective picture of legal reality, it often lacks a direct and easily discernible link to explicit legal authority.¹³⁴ In contrast, reference to *jurisprudence constante*, by the very nature of the concept, demonstrates a continuous chain of purportedly coherent legal authority.¹³⁵ Accordingly, claims from *jurisprudence constante* correspond to existing legal authority and are based on expectations that *jurisprudence constante* will be followed; whereas claims from *l'économie générale* are more akin to Laplacean extraordinary claims that, in order to be validated, require extraordinary evidence.¹³⁶

133. See Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 776, 779 (2005) (highlighting the “abstract” terms that comprise civilian codes compared to the “specific” terms used in common law jurisdictions); Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1187-88 (2007) (noting the evolution of written statutes and judicial opinions, particularly the development of textual common law resulting from judges’ opinions).

134. See, e.g., Case C-30/14, *Ryanair Ltd v. PR Aviation BV*, ECLI:EU:C:2015:10, ¶ 40 (Jan. 15, 2015), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=161388&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13100635>; Case C-138/79, *SA Roquette Frères v. Council Eur. Cmty.*, 1980 E.C.R. 3333, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=90473&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=12872666>.

135. See Vincy Fon & Francesco Parisi, *Judicial Precedent in Civil Law Systems: A Dynamic Analysis*, 26 INT’L REV. L. & ECON. 519, 522 (2006).

136. PIERRE-SIMON DE LAPLACE, THÉORIE ANALYTIQUE DES PROBABILITÉS xvi (3d ed., Courcier 1820) (suggesting that the weight of evidence for an extraordinary claim must be proportioned to its strangeness).

Paradoxically, arguments from *l'économie générale* are often employed exactly because such evidence is missing what makes their validation contingent on imagination and faith.

Yet, the problem with imagination and faith is in what Pierre Schlag calls “self-referential complexity,”¹³⁷ in which a situation where any outcome of thinking is possible. In order to avoid that trap, *l'économie générale*, is in a need of a plausible narrative, a plan devised by an authority external to, and independent from, the interpreter itself. Thus, when referring to *l'économie générale* courts seek to deliver singular legal outcomes by justifying those that fit into a supposedly pre-existing narrative and by dismissing the ones that do not.

At the outset of any interpretative effort there is a text, which is equally valid for interpretation of literature, historical documents, religious scripture, and legal rules. In fact, Judeo-Christian tradition, rules, and social practices are based on a book, more specifically, on certain pre-existing authority that is documented in written form and subject to subsequent interpretation.¹³⁸ But how did we arrive from initial certainty of a text to the interpretative abundance creating the need to reduce complexity?¹³⁹ Obviously, if text had a single and

137. Schlag, *supra* note 119, at 889 (“It is precisely because the fundamental ontological entities were imaginary that all manner of complex relations could be established among them. Because the units of analysis lacked any robust or stabilized referent, virtually anything could be said about how they were related to each other.”).

138. See Dr. Richard Lee, *Seven Principles of the Judeo-Christian Ethic*, SERMON CENTRAL, <https://www.sermoncentral.com/content/Richard-Lee-7-Principles-Judeo-Christian-Ethic?ac=true&csplit=9060> (last visited Mar. 27, 2019).

139. See generally WOLFGANG WILDGEN, *THE EVOLUTION OF HUMAN LANGUAGE: SCENARIOS, PRINCIPLES, AND CULTURAL DYNAMICS* 90 (2004) (describing the expansion of the written word and the increased need for interpretation); *Zechariah 5:1-4* (New Kings James); Frederic William Maitland, *Outlines of English Legal History, 560—1600*, in 2 *THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND* 203-05, 230 (Herbert Albert Laurens Fisher eds., Liberty Fund, Inc. 2011) (1911) (summarizing the formation of the Roman Twelve Tables); Dirkie Smit, *Reading the Bible Through the Ages? Historical and Hermeneutical Perspectives* 1 *STELLENBOSCH THEOLOGICAL J.* 175, 175-76 (2015) (recounting the history of Biblical reception and interpretation); Write873, *Hammurabi's Code: Babylonian Law Set in Stone*, *ANCIENT HIST. ENCYCLOPEDIA* (Oct. 4, 2011), <https://www.ancient.eu/article/68/hammurabis-code-babylonian-law-set-in-stone/> (noting the strict and absolute nature of laws such as Hammurabi's code).

definitive meaning, interpretation would not be necessary. The same holds if we could determine, with confidence, which text governs the case at hand. In either case, *l'économie générale* helps. It both provides guidance as to what the text may mean and which text, exactly, is applicable. In order to make sense, interpretation has to fit within a broader narrative. *L'économie générale* is such a narrative that provides a meaning to a sequence of independent but interconnected interpretative events. It provides for a context within which relevant interpretative events make sense. This said, it is not entirely unexpected that origins of *l'économie générale* can be found in the Bible.

According to the Gospel of Matthew, after forty days in a desert Jesus is approached by Satan and challenged by what is commonly known as the temptations of Christ.¹⁴⁰ In the first temptation, Satan says: “If you are the Son of God tell these stones to become bread” (*Matthew* 4:3).¹⁴¹ Jesus replies by reference to Deuteronomy: “It is written: ‘Man shall not live on bread alone but on every word that comes from the mouth of God’” (*Matthew* 4:4).¹⁴² Jesus responds to the temptation not by appealing directly to the power of God, but instead, by referring to written authority, and apparently, to the reference of him being identified as a Son of God on occasion of his baptism.¹⁴³ Similar reference to Psalms continues in the second temptation, where Satan himself refers to written authority with Psalm 91:11-12 in mind: “For it is written, ‘He will command his angels concerning you and they will lift you up in their hands so that you will not strike your foot against a stone’” (*Matthew* 4:6).¹⁴⁴ And in the third temptation Jesus replies: “Away from me Satan! For it is written: worship the Lord your God and serve him only” (*Matthew* 4:10).¹⁴⁵

Here we are dealing not only with an archetype of legal argument that invokes and relies on written authority, but also with the structure within which legal argumentation takes place. There are three perfectly articulated constituents, namely the tempter (Satan), the

140. *Matthew* 4:1-2 (New King James).

141. *Matthew* 4:3 (New King James).

142. *Matthew* 4:4 (New King James); *Deuteronomy* 8:3 (New King James).

143. *Matthew* 3:17 (New King James).

144. *Matthew* 4:6 (New King James); *Psalms* 91:11-12 (New King James).

145. *Matthew* 4:10 (New King James).

tempted (Jesus), and the authority (what is written). Also, we are presented with the resolution of the conflict, a judgment that leaves no doubt that Jesus has won the case and that it is his reading of the authority, and not Satan's, that is the valid one.

But how do we know where the authority of text stops and where context and purpose start to play role? How do we know, without connecting the dots backwards, that it is Jesus, and not Satan, who should win the dispute? How is the authority referred to by Jesus better than authority referred to by Satan, knowing that both refer to the presumably equally authoritative text of Psalms? In other words, which Psalm is applicable to the case at hand? Apparently, Jesus wins because the entire dialogue takes place within a broader and pre-arranged scheme, a narrative according to which the life and death of Christ is instrumental to the fulfillment of the God's plan, and accordingly, written authority is validated only insofar as it fits into that plan which, itself, remains tacit. In absence of that plan, known as the economy of salvation,¹⁴⁶ it would not be possible to explain which reference to written authority should prevail.

VI. CONCLUSION

The notion of *l'économie générale* is a well-established legal concept and a tool for legal interpretation. It is rooted in European tradition and it imports at least some meaning from analogous ancient Greek and Roman Catholic concepts.

First, the *idea of the grand scheme* is present in all of its iterations: in the Greek tradition it is order (*taxis*), a choice (*diairesis*), and an analysis (*exergasia*);¹⁴⁷ in Catholic tradition it is a Divine Plan, which is being accomplished through the Church;¹⁴⁸ and in EU law it is the master scheme of European integration that is maybe best illustrated by Schuman Declaration of May 9, 1950.¹⁴⁹

146. See J. Patout Burns, *The Economy of Salvation: Two Patristic Traditions*, 37 THEOLOGICAL STUD. 598, 600 (1976).

147. Robert S. Reid, "Neither Oratory nor Dialogue": *Dionysius of Halicarnassus and the Genre of Plato's "Apology,"* 27 RHETORIC SOC'Y Q. 63, 69 (1997).

148. See discussion *supra* Section V.B.

149. *The Schuman Declaration—9 May 1950*, EUR. UNION, <https://europa.eu/european-union/about-eu/symbols/europe-day/schuman->

Second, the idea of *l'économie générale* seems to be *inherently non-political*. This does not mean that its narrative may not refer to political issues, but rather that it is not concerned with or involved in political process. According to Agamben, “the idea of an *oikonomia*, conceived as an immanent ordering—domestic and not political in a strict sense—of both divine and human life”¹⁵⁰ Thus, *l'économie générale* does not entail deference to current political power, but invocation of the grand scheme devised by a pre-existing ultimate authority, which is what makes it constitutional in nature. Indeed, the idea of the EU was not political at first, but there was a grand plan, for example, an immanent ordering, according to which European integration was to unfold. In fact, *l'économie générale* excludes deference to, and imposes itself on, the political branch for all the elements of the “proper” interpretation are given in advance and only need to be discovered in process of interpretation.¹⁵¹

Third, in all its iterations, *l'économie générale* is in the need of an *οικονόμος*, a superintendent: the head of a household. In other words, the existence and pursuance of *l'économie générale* is possible only through some institutional agency, such as the Church or the judiciary.¹⁵² That agency presents itself as an utterer of the pre-existing order and as a vigil that acts based on a bond of trust, indeed as a nominated administrator. Finally, there is an element of faith that binds together the agent and the narrative of *l'économie générale*, a collective cognitive imperative that is, “a culturally agreed-on expectancy or prescription which defines the particular form of a phenomenon and the roles to be acted out within that form.”¹⁵³

Fourth, written word, is an inherent element of the *l'économie générale*. Namely, as economy is based on authority and its pursuance

declaration_en (last visited Mar. 30, 2019).

150. AGAMBEN, *supra* note 26, at 1 (emphasis added).

151. Arguments from *l'économie générale* are different from arguments from legislative history in sense that the latter belong to the political process, while the former are thought to be inherent into the rule as a part of a more general order.

152. See, e.g., Burns, *supra* note 146, at 607 (“Because the Church is the sole mediator of the grace of Christ to humans during their earthly life, it is a constitutive element in this limited functioning of the economy of salvation.”).

153. JULIAN JAYNES, *THE ORIGIN OF CONSCIOUSNESS IN THE BREAK-DOWN OF THE BICAMERAL MIND* 324 (First Manner Books 2000) (1976).

entrusted to an *oikonomos*, that authority needs to be available in some generally accessible form – a covenant, (Hebrew *b'rit*, ברית) pact, or treaty between men and God, which originally involved animal sacrifice, letting of blood as a constituent of an agreement.¹⁵⁴ Such a covenant, as a medium for communication of authority would typically stabilize in written form, although it can also be transferred verbally through rituals or other behavioral forms.¹⁵⁵ Today, such a pact takes form of a constitution or, as the case is in the EU, the Founding Treaties.

In brief, *l'économie générale* appears to be a juridical iteration of a more general idea, the elements of which comprise:

- An external and independent *authority*, usually accessible in a written form;
- A grand *scheme* or plan devised by that authority;
- An *agent* acting as a steward in pursuance of that plan; and
- Individuals sharing the collective cognitive imperative that makes them *participants* to it.

These elements are constitutive of the EU, which was conceived by its founding fathers who devised a plan for European integration constructed around economic freedoms, solidarity, and individual rights. It was codified by the Founding Treaties, the plan stewarded by European institutions, including the CJEU, which individuals believe in or at least consent to.¹⁵⁶

154. See DANIEL J. ELAZAR, *COVENANT & POLITY IN BIBLICAL ISRAEL: BIBLICAL FOUNDATIONS & JEWISH EXPRESSIONS* 30 (Routledge 2017) (1995) (“[A]n agreement in which a higher moral force, traditionally God, is either a direct party to, or guarantor of the particular relationship.”).

155. See Michael J. Gorman, *The Bible: A Book, a Library, a Story, an Invitation*, in *SCRIPTURE AND ITS INTERPRETATION* 3, 11 (Michael J. Gorman ed., 2017) (noting that the covenant significantly contributed to the spread of written and verbal authoritative scripture in the Jewish and Christian faiths).

156. See generally *The EU in Brief*, EUR. UNION, https://europa.eu/european-union/about-eu/eu-in-brief_en (last visited Mar. 29, 2019) (summarizing the goals and values of the European Union); *Historical Development of European Integration: The First Treaties*, EUR. PARLIAMENT, <http://www.europarl.europa.eu/factsheets/en/sheet/1/the-first-treaties> (last visited Jan. 24, 2019) (providing an overview of the historical development of European integration).

For everyone in the business of applying law, interpretation according to *l'économie générale* can prove to be a practical tool for maintaining normative coherence and argumentative power of law, both on the constitutional and sectorial level. Moreover, in the EU, *l'économie générale* serves as a normative and argumentative support of European liberal ontology and the grand scheme of European solidarity that is stewarded by the European institutions. In other words, it provides the underlying narrative within which interpretative events make sense.

Those aware that law is not objective, but context sensitive and subject to interpretation, a fact that is also recognized by the French Code Civil,¹⁵⁷ might conclude that it is the Court and the judges that determine the meaning of law. Further concluding that the judges seek coherence by means of interpretation need to justify their decisions in order to ensure legitimacy of adjudication, and ultimately, to that end, construct interpretative narratives and develop tools for their perpetuation, such as *l'économie générale*.

157. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1191 (Fr.) (“Lorsqu’une clause est susceptible de deux sens, celui qui lui confère un effet l’emporte sur celui qui ne lui en fait produire aucun.”).