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Interpretation of Law in the Global World: From Particularism to a Universal Approach

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List of Abbreviations

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
AGM	Annual General Meeting
CEBS	Committee of European Banking Supervisors
CEIOPS	Committee of European Insurance and Occupational Pensions Committee
CEO	Chief Executive Officer
CESR	Committee of European Securities Regulators
CISG	Convention on Contracts for the International Sale of Goods
CPCCN	*Código Procesal Civil y Comercial de la Nación* (Code of Civil and Commercial Procedure, Argentina)
CSJN	Supreme Court of Justice of Argentina
CT	Constitutional Tribunal (Poland)
DS	Decision
EAW	European Arrest Warrant
EBC	European Banking Committee
EC	European Community
ECGI	European Corporate Governance Institute
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights)
ECJ	Court of Justice of the European Union (Luxembourg)
ECR	European Court Reports
ECtHR	European Court of Human Rights (Strasbourg)
EC Treaty	Treaty establishing the European Community
EIOPC	European Insurance and Occupational Pensions Committee
ENISA	European Network and Information Security Agency
ESC	European Securities Committee

EU	European Union
EU Treaty	Treaty on European Union
FCC	Federal Constitutional Court
FEU Treaty	Treaty on the Functioning of the European Union
GAFTA	Grain and Food Trade Association
HKSAR	Hong Kong Special Administrative Region
ICA	International Commercial Arbitration
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ILA	International Law Association
ISD	Directive on Investment Services in the Securities Field
LSC	*Ley de Sociedades Comerciales* (Law on Corporations, Argentina)
MDR	Billion Swedish Krona (BSK)
MERCOSUL/MERCOSUR	(Portuguese: *Mercado Comum do Sul*, Spanish: *Mercado Común del Sur*, English: Southern Common Market)
MiFID	Directive on Markets in Financial Instruments
MTF	Multilateral Trading Facility
NED	Nonexecutive Director
NPM	New Public Management
OECD	Organisation for Economic Co-operation and Development (Paris)
SC	Social Cost
SICSEC	Swedish Industry and Commerce Stock Exchange Committee
SSA	Swedish Shareholders' Association
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCP	Uniform Custom and Practice for Documentary Credits
UEFA	Union of European Football Associations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
VAT	Value-Added Tax
WLR	Weekly Law Reports
WTO	World Trade Organisation

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Introduction
Capturing the Change: Universalising Tendencies in Legal Interpretation

Joanna Jemielniak and Przemysław Mikłaszewicz

International and supranational integration on the European continent, as well as the harmonisation of the rules of international trade and the accompanying development and global popularity of the resolution of commercial disputes through arbitration, constantly exerts a considerable influence on modern legal systems. The sources of each of these phenomena are different, and their action is dissimilar. Each can be described as reaching either from the top to the bottom, through the direct involvement of interested States and consequently affecting their internal legal systems (international and supranational integration; harmonisation of trade regulations through public international law instruments), or bottom-up, as a result of activity by private parties, leading to the achievement of uniform practices and standards (arbitration, *lex mercatoria*). Nonetheless, they both enrich national legal cultures and contribute to transgressing the limits of national (local) particularisms in creating, interpreting and applying the law.

The aim of this book is to demonstrate how these processes have influenced the interpretation of law, how they have shaped the methods and techniques of the interpretation and with what consequences for the outcomes of the interpretative procedures. In assessing the extent of this influence, due regard must be paid to the fact that the interpretation of law is not, in principle, directly determined by the provisions of law itself. There are many factors that have set its form and limits, in particular the powers and position of the institution interpreting the law, the source of the legal provision subject to interpretation, the legal culture predominant in the environment in which the interpretative process is conducted and the established directives of legal analysis.

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1 Factors Stimulating and Impeding the Adoption of a Universal Approach to Law Interpretation at a National Level

International and supranational bodies, such as the ECtHR and the ECJ, as well as arbitral tribunals, apply a universal approach to the legal interpretation, which is a result of their institutional position and the role they play in the legal environment. Their powers, and most particularly the competence to provide such interpretation, derive from sources that are not national or local. In the case of European courts, international treaties are a source of such powers. As far as the ECJ is concerned, its formal legitimacy is rooted in the legal system that becomes even more distant from national context as far as it may be considered a supranational legal order (Weiler, 1999, Poiares Maduro, 2003).

Although binding upon State actors and, in certain circumstances, also with regard to individuals, decisions of international and supranational courts do not impose a universal approach to the interpretation of law at a national level. The principal reason for this is the fact that there are usually various ways of achieving the result provided for in a decision of the ECtHR or the ECJ. The choice of the method of interpreting national law is left to the decision of a domestic court as long as it contributes to the effective enforcement of international obligations. This finding is corroborated by the acceptance, as a rule, in the case law of international courts, of national courts' discretion with regard to interpretational techniques to be applied in a concrete case, or at least by the tolerance for a certain discretion in this respect. The subsidiarity of international scrutiny of human rights, the national margin of appreciation, procedural autonomy of national legal orders, all these are mechanisms of international adjudication allowing national courts to keep control over the process of interpreting national law. These issues will be discussed further in our text.

In the field of applying transnational regulations on international trade, the strive towards universal interpretative approach is particularly visible in the adjudication practice of international commercial arbitration. Despite the fact that arbitral tribunals are private by nature and their authority is always derivative from the will of the parties, their role in explaining the uniform law of international trade is undeniable. As discussed in detail *infra,* reasoning schemes presented in arbitral awards may serve as a source of inspiration for the domestic adjudication not as an official pattern, but by virtue of their persuasive force. A characteristic feature of legal interpretation in arbitration is a wide adoption of comparative study. In *lex mercatoria*-based cases, resolved through arbitration, the extensive use of this method is perceived as leading to creative results: it is the *sui generis* arbitral case law through which autonomous rules of international trade are formulated and solidified.

Notwithstanding the limits to the formal impact of the activities of supranational and international organs on the very process of law interpretation at a national level, such influence does in fact exist. These activities provide inspiration for national bodies and encourage them to 'open up' the interpretation of law and apply a more universal approach. In principle, the inspiration is not imposed upon domestic courts

(*ratione imperii*) but offered to them. Its strength lies mainly in the authority and legitimacy of international bodies, and the crucial factors determining that authority are openness to dialogue, transparency of reasoning, and as solid and coherent argumentation (*imperium rationis*). National courts will 'borrow' interpretational tools of international origin if they find them appropriate, justified and, most importantly, useful in carrying out justice and achieving goals set by national and international law. The application of international and supranational methods of law interpretation by lower national courts may also be a means to circumvent an unfavourable attitude of senior domestic judges with regard to a given understanding of national law. At the same time, however, it seems that lower courts might be more keen to rely on international methods of adjudication if such practice is supported and enforced by higher judicial organs.[1] This mechanism may also work in the opposite way. Undermining the very legitimacy and authority of international case law by senior national judges (with regard to the ECtHR, see Hoffmann, 2009) may adversely affect the influence of such case law on the interpretation of domestic law. This is especially the case once the critique becomes the official position of the State's highest court.[2]

Apart from a possible general unwillingness of higher courts to allow reliance on international and supranational modes of interpretation, further limits to such reliance may result from the perception of the division of powers within a State. These ordinary judges, who represent a traditionally positivistic vision of the interpretation and application of law, will most probably avoid any excess beyond the literal meaning of a legal text. From this perspective, constitutional courts may play a crucial role in promoting a more universal approach to the interpretation of law, in particular through the application of novel interpretational tools. The possible influence of legal interpretation methods and strategies, exercised by arbitral tribunals, onto ordinary national courts seems even more discreet. It can be assumed that the domestic judges, faced with the challenge of applying uniform law of international trade to the merits of a dispute, might be willing to avoid reinventing the wheel and to seek valuable inspiration from already existing case law and accompanying literature.

2 The Interpretation of National Law in Conformity with EU Law: A New Method of Interpretation to Serve the Effectiveness of the *acquis communautaire*

The national courts of EU Member States are under a duty to interpret national law in conformity with EU law. The normative source of this obligation can be traced both in EU law and in national constitutional provisions.

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[1] This issue will be further developed in the text below.

[2] It must be noted, however, that Lord Hoffmann retired as Lord of Appeal in Ordinary (House of Lords) on 20 April 2009, i.e. in nearly 1 month following the publication of the text at stake, which is, in addition, an expression of his private opinions. Cf. http://www.number10.gov.uk/Page18955.

Article 4(3) of the EU Treaty establishes a principle of sincere co-operation between the Member States and the Union. Under similar provision of the former EC Treaty (Article 10), national courts were declared to be bound to interpret national law 'in the light of the wording and purpose' of EC law.[3] Similarly, certain national constitutional courts qualify such a 'harmonious' interpretation as a constitutional requirement or at least acknowledged the duties of national courts following from Article 10 of the EC Treaty.[4] These duties are a powerful tool capable of influencing the very methods of interpretation and application of national law, not only the outcomes of the interpretations. This is because when traditional interpretation no longer suffices to ensure the full effectiveness of EU law, a judge may involve another tool into the adjudication process, namely the conforming interpretation. The purpose of interpretation is thereby incorporated into the very concept and process of interpretation (Łętowska, 2009). Such interpretation is no longer particular: it becomes intrinsically universal.

There are, however, certain limits to the application of the directive of a 'harmonious' interpretation of national law. These limits result both from the EU law and from national constitutional constraints.

EU law does not, in principle, oblige national courts to apply a *contra legem* interpretation in order to secure a full application of the *acquis communautaire*.[5] In addition, in the area of criminal law, the duty to interpret national law in conformity with EU law is even more limited if it were to result in determining or aggravating criminal liability of individuals.[6] Furthermore, due to respect for national procedural autonomy, national courts are not bound to create new remedies in order to

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[3]Judgement of the ECJ of 10 April 1984 in the case 14/83 *von Colson*; more recently: judgement of 5 October 2004 in joined cases C-397/01 to C-403/01 *Pfeiffer*.

[4]For example, see decisions: of the Constitutional Court of the Czech Republic of 3 May 2005, Pl. ÚS 66/04 [European Arrest Warrant], http://angl.concourt.cz/angl_verze/doc/pl-66-04.php (discussed by Pollicino, 2008); of the German Federal Constitutional Court of 8 April 1987, 2 BvR 687/85 [Kloppenburg] and of 9 January 2001, 1 BvR 1036/99 [Rinke – medical training] (discussed by Scheuing, 2004; see also Banaszkiewicz & Bogdanowicz, 2006); of the Italian Constitutional Court of 5 June 1984, 170/1984 [Granital]; see also subsequent decisions of 22 October 2007, 348/2007 and 349/2007, and of 12 February 2008, 102/2008 and 103/2008 (discussed by Rossi, 2009); of the Polish Constitutional Tribunal of 21 April 2004, K 33/03 [Bio-components in gasoline and diesel], of 11 May 2005, K 18/04 [Accession Treaty], of 27 April 2005, P 1/05 [European Arrest Warrant], of 17 July 2007, P 16/06 [Commercial agency contract] (discussed by Mikłaszewicz, 2008a, see also Kowalik-Bańczyk, 2005).

[5]For example, see judgement of the ECJ of 22 May 2003 in the case C-462/99 *Connect Austria*. Courts that interpret national law 'must do so, as far as possible, in the light of the wording and the purpose' of relevant Community provisions. At the same time, however, in some decisions the ECJ *de facto* significantly reduces the flexibility of the 'as far as possible' proviso – cf. judgements of 22 September 1998 in the case C-185/97 *Coote* and, with respect to the police and judicial co-operation in criminal matters, of 16 June 2005 in the case C-105/03 *Pupino*. The relationship between this issue and the power of national courts to refuse to apply national provisions contrary to EU law will be discussed below.

[6]Cf. judgement of the ECJ of 12 December 1996 in joined cases C-74/95 and C-129/95 *Criminal proceedings against X*. See also Nita (2009).

secure the full effectiveness of EU law. At the same time, however, the requirement of the effective judicial protection of rights deriving from EU law may, in some cases, encourage this interpretation of national procedural rules that give full effect to Community provisions.[7]

National limits on the conforming interpretation may result from two fundamental principles of national constitutional orders, namely the supremacy of a national Constitution and the assumption that the constitutional provisions are a source of legitimacy of Community law operating within the territories of Member States.[8] From this perspective, the 'harmonious' interpretation of national law may not lead to results that are irreconcilable with the minimum guarantee functions ensured by the Constitution. In particular, the application of a 'pro-European' method of interpretation should not result in lowering or questioning the minimum threshold of the constitutional protection of individual rights and freedoms.

These two categories of constraints of different legal origin are mutually independent, i.e. they should not be put in the context of disputes over the primacy of EC law and national constitutional law. Conforming interpretation is a tool in the hands of a national judge, who is in the best position to assess to what extent the tool in question may and should be applied. Although the incorrect application of the tool may, in certain cases, raise the issue of the extra-contractual liability of a State for a breach of the obligations flowing from the treaties,[9] it is primarily up to the national court to choose the method of interpretation. The court's, and hence the State's, responsibility for this selection is a corollary of its power to choose. International and supranational organs should show restraint in imposing the interpretation method to be applied by a national judge. If it is legitimate for these organs to state *what* must be done, it is not necessarily always appropriate to imperatively decide *how* it should be done.[10] In general, there are various ways to achieve the desired result through the interpretation of law. National courts are, in principle, better placed to develop the reasoning ensuring full effectiveness of EU law that would fit the conditions and arrangements of the internal legal system. They should be encouraged to do so by solid arguments of the ECJ strengthening the legitimacy of the national law interpretation in line with the *effet utile* of EU regulations.

The influence of the pattern of the conforming interpretation on the process of decoding national law is clearly visible in the area of consumer protection due to the substantial development of the *acquis communautaire* in this field.

In the case law of the Polish Constitutional Tribunal, certain assumptions are made regarding the level of consumer protection under national law subject to constitutional review, and more specifically the control covers national provisions read

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[7]Craig and de Búrca (2008), p. 313 *et seq*. trace the evolution of the ECJ case law in this respect.

[8]Cf. German decisions of 22 October 1986, 2 BvR 197/83 [Solange II], of 12 October 1993 in the case 2 BvR 2134, 2159/92 [Maastricht]; Polish decisions of 11 May 2005, K 18/04 [Accession Treaty], of 27 April 2005, P 1/05 [European Arrest Warrant].

[9]ECJ judgement of 30 September 2003 in the case C-224/01 *Köbler*.

[10]On the functional redundancy of the *vis imperii* principle in the case law of the ECJ and the ECtHR, see Łętowska (2009).

in the light of Community law (Łętowska, 2006). In particular, in the case on banking enforcement titles[11] the level of consumer protection under Polish law subject to control was established with due regard paid to EC secondary law. Consequently, due to existing legal safeguards, the privileged position of banking titles in the enforcement civil proceedings was found to be in conformity with constitutional provisions on the right to fair trial and consumer protection.

In another case, which concerned languages used in foreign contracts, the Constitutional Tribunal ruled that the substantive contents of a general constitutional provision on consumer protection (Article 76) must be decoded taking into account the existing standards of EC law. The obligation imposed on professionals to use easily comprehensible language in contracts with consumers was identified as a common feature of the *acquis communautaire*. The formal consent of the consumer to conclude a business-to-consumer contract in a foreign language was found unsatisfactory in view of the requirements of consumer protection under Article 76 of the Constitution. At the same time, as all measures with an effect equivalent to quantitative restrictions on imports were prohibited under Article 28 of the EC Treaty, the obligation to use easily comprehensible language for a consumer seemed more appropriate than a general provision undermining the legal pertinence of contracts concluded in foreign languages.

The adaptation of traditional tools for the interpretation of contract law for the purpose of consumer protection in line with EU requirements is a task for ordinary national courts tackling private disputes. In particular, it may result in the adjustment of a general principle of party autonomy and freedom of contracts to the specific conditions of B2C relationships, namely the structurally weaker position of a consumer. The usual approach to the burden of proof is also subject to corrections in line with EU law. Furthermore, when appropriate, general clauses in private national law should be read and applied in the context of supranational standards of consumer protection. Likewise, Community informational duties might be taken into account when a court establishes the standard acting in good faith and with due diligence or when it examines possible misrepresentation in contractual relations between a consumer and a professional (Schulze et al., 2003; Vigneron-Maggio-Aprile, 2006; Mikłaszewicz, 2008b). As mentioned above, the decision at which stage of the interpretation and application of law the necessary adjustments ought to take place should remain within the national court's discretion. Certainly, there are obstacles to the proper implementation of EU standards by national courts (Łętowska et al., 2007). In some situations, it may justify national legislative action in a given field. It should not, however, automatically preclude national courts from exercising its interpretative discretion or legitimise the supranational imperative imposition of a concrete method of interpretation of national law.

Co-operation in criminal matters is another field where a tool of conforming interpretation is applied, and hence is potentially capable of transforming national

[11] Judgement of the Polish Constitutional Tribunal of 26 January 2005, P 10/05 [Banking enforcement titles].

methods of interpreting law (Nita, 2009). In light of the ECJ judgement in the *Pupino* case,[12] national courts are bound to interpret national law in conformity with framework decisions on police and judicial co-operation in criminal matters. However, in that very decision, it was stressed that the obligation 'is limited by general principles of law, particularly those of legal certainty and non-retroactivity.' Furthermore, in the Court's view the interpretation of Framework Decision on the standing of victims in criminal proceedings ought to respect fundamental rights, including the right to a fair trial as set out in Article 6 of the ECHR and the relevant case law of the ECtHR (Callewaert, 2008). In this respect, the observance of the fundamental right to a free trial in the process of the interpretation of national law in conformity with EU law was eventually left to the referring domestic court. This approach of the ECJ affords national courts a certain margin of appreciation, which is particularly important in criminal matters that are subject to numerous constitutional constraints. Certainly, due to the specificity of criminal law and its far-reaching interference in personal basic rights, the *contra legem* interpretation of national law is not only unnecessary but even inadmissible if it were to result in adverse consequences for individuals. This is an important limitation to the use of conforming interpretation in the area of criminal law.

3 The Power of National Courts to Refuse to Apply National Provisions Contrary to EU Law. The Rise of a European Judicial Review or an Escape from the Difficult Task of Conforming Interpretation?

Apart from the duty to interpret national law in conformity with EU law, national courts are bound to set aside, and more specifically to disapply, provisions of national law that are in conflict with a Community rule.[13] Whenever national law is harmoniously interpreted in line with the *acquis communautaire* there is no reason to refuse its application. However, if such conformity could be achieved only through a *contra legem* interpretation of national law, domestic courts will tend to disapply conflicting national provisions. It would generally be more appropriate to refuse the application of national law if its conforming interpretation were to cause incoherence within the domestic legal system or if it were to ignore basic premises of correct interpretation of law.

At the same time, however, this instrument of 'European' judicial review might encourage national courts to suspend efforts to fully integrate the purpose of EU regulations into existing domestic legal arrangements. In such case, the refusal to

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[12] Judgement of the ECJ of 16 June 2005 in the case C-105/03 *Pupino*.

[13] Judgements of the ECJ: of 9 March 1978 in the case 106/77 *Simmenthal*; of 22 October 1998 in joined cases C-10/97 to C-22/97 *IN.CO.GE'90*. Regarding the limits of this obligation see the ECJ judgement of 16 March 2006 in the case C-234/04 *Kapferer*. Cf. also decisions of national constitutional courts mentioned above in footnote 4.

apply national law contrary to EU law would amount to an escape from the difficult task of conforming interpretation. The ultimate decision as to which approach should be followed lies in the hands of national judges. It should be taken with due regard to the complexity of national institutions and the tradition of legal reasoning, as well as developments in the relevant case law of domestic courts.

4 From Formal to Real Guarantees of Individual Rights: The Influence of the Case Law of the ECtHR on the Interpretation of Domestic Constitutional Provisions

Decisions of the ECtHR in cases concerning rights and freedoms guaranteed in the Convention have exerted a considerable impact on the level of protection of fundamental rights in the Member States of the Council of Europe. Interestingly, apart from the substantive aspect of its case law, the Court's approach to the interpretation of the Convention may also be of vital inspiration for national courts.

Certainly, States must abide by final judgements of the Court in cases in which they are parties (Article 46(1) of the ECHR). They do so under the supervision of the Committee of Ministers of the Council of Europe (Article 46(2) of the ECHR). If the Court finds a violation of rights under the Convention, the respondent State is bound 'to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.'[14] The Court, in principle, confirms the States' freedom to choose the means of compliance with a judgement. There are, however, numerous cases in which a State's discretion in executing ECtHR judgements was limited in practice by the Court (Lambert, 1999). Recent and novel examples of such limitations are 'pilot judgements' identifying systemic failures to comply with the Convention and suggesting systemic solutions to the identified problems (Krzyżanowska-Mierzewska, 2008).

The practical impact of the ECtHR's decisions on national legal orders is to a large extent dependent upon the support of domestic courts (Garlicki, 2008). Firstly, Strasbourg judgements are binding in principle only *inter partes* and it is by authority of national judges that they may be treated as universal sources of Convention standards. Secondly, if the ECtHR indicates how a given violation should be remedied, be it in the form of a pilot judgement or otherwise, the directive is addressed to the respondent State and not specifically to its courts. Even if national courts are at a source of violation, for example when divergent practices of national supreme or constitutional courts amount to the interference of a right to fair trial (Article 6 of the ECHR),[15] there is virtually no possibility to impose upon courts a desired interpretation of domestic law they should adopt. A State may discharge its duties under the

[14] Judgement of the ECtHR of 31 October 1995 in the case *Papamichalopoulos and Others v. Greece*, application no. 14556/89.

[15] See judgements of the ECtHR: of 6 December 2007 in the case *Beian v. Romania (no. 1)*, application no. 30658/05; of 15 May 2008 in the case *Faltejsek v. Czech Republic*, application no.

Convention, e.g. by introducing necessary amendments to national law and thereby allowing individuals to seek justice on the grounds of new legal provisions.

By contrast, domestic courts may turn to be co-operative at will and display all interpretational efforts to give full effect to Strasbourg judgements. Furthermore, such an attitude by lower courts may even be required pursuant to the case law of domestic supreme or constitutional judicial organs. In any event, judges sitting in lower courts might feel encouraged to rely on the ECHR if their senior colleagues do so (Krzyżanowska-Mierzewska, 2008). Seen from this perspective, the power of the ECtHR is mainly persuasive and its judgements are more likely to be followed if they are based on strong, coherent and well-structured arguments. At the same time, the subsidiarity of Strasbourg control and the doctrine of margin of appreciation left to the States strongly support co-operation between the ECtHR and domestic courts and stimulate the latter to draw inspiration from the Strasbourg case law.

Certain models and techniques of interpretation applied by the ECtHR influence the approach of national courts to the interpretation of national law. This process is more common among constitutional courts due to their specific tasks of reconciling and weighing conflicting rights and freedoms, which is also the operational mode of the ECtHR. As Central and Eastern European constitutional courts seem to rely on Strasbourg decisions more often (Sadurski, 2008), it is legitimate to present some examples of this influence in the region.

Pursuant to well-established case law of the ECtHR, 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.'[16] Accordingly, it is not sufficient that rights are formally proclaimed by national legal provisions. They should be practically enforceable, which means in particular that appropriate procedural guarantees should be present in law and in fact. In addition, the concept of 'chilling effect' is present in the decisions of the ECtHR[17]: certain legal arrangements, or their application by national authorities, may deter individuals from exercising their rights under the Convention. Whenever such practical limitation of fundamental rights is not necessary in a democratic society to reach legitimate goals, it is in breach of the ECHR.

The above forms of reasoning of the ECtHR have influenced the interpretation of constitutional provisions in cases before Polish Constitutional Tribunal.

In a decision on the crime of defamation,[18] criminal liability for the defamation of a public person resulting from truthful allegations was declared contrary to the Constitution. One of the arguments for this finding was that journalists faced with

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24021/03; of 27 January 2009 in the case *Ştefan and Ştef v. Romania*, application nos. 24428/03 and 26977/03.

[16] Judgement of the ECtHR of 9 October 1979 in the case *Airey v. Ireland*, application no. 6289/73; more recently: judgement of 29 June 2007 in the case *Folgerø and Others v. Norway*, application no. 15472/02.

[17] Judgements of the ECtHR: of 3 May 2007 in the case *Bączkowski v. Poland*, application no. 1543/06; of 24 April 2007 in the case *Lombardo and Others v. Malta*, application no. 7333/06.

[18] Judgement of the Constitutional Tribunal of 12 May 2008, SK 43/05, Digest of the Case Law of the Constitutional Tribunal 2008/4A/57. Further on this decision see Safjan (2009).

the risk of such severe liability could refrain from publishing materials contributing to public debate and from taking part in public life. Such a situation would constitute, in the eyes of the Tribunal, a form of auto-censorship with consequences comparable to preventive censorship forbidden under the Constitution.

The chilling effect of the provisions under review was also taken into account in the context of a new statutory fast track of levying immunity of judges of common courts.[19] The Tribunal considered the possible impact of such rapid decisions taken within 24 h without hearing the interested judge on judicial independence and impartiality. Pursuant to the Tribunal's findings, such a procedure of levying immunities was capable of promoting conformism among judges whose position and good reputation could be easily undermined by unverified allegations of private parties or the executive interested in the outcome of certain cases. This would, in turn, undermine judicial independence and impartiality being a necessary prerequisite for the fundamental right to fair trial.

5 Harmonised Rules of the International Trade and their Impact onto Legal Interpretation

Supranational harmonisation efforts are particularly visible in the sphere of regulations dedicated to international commerce and take effect in the areas of both substantive and procedural rules. Legal instruments used to achieve the effect of convergence are diversified. They include acts of public international law (e.g. such widely adopted instruments of critical importance for the international commercial exchange and its legal effectiveness as the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, hereinafter referred to as the New York Convention, and the 1980 United Nations Convention on Contracts for the International Sale of Goods, hereinafter referred to as the Vienna Convention or CISG). National legislative efforts, forming common patterns, must also be mentioned, either via an actual establishment of a concerted regulatory practice or by following a more formalised standard, such as shaping domestic legislation of the interested States after model laws (as the 1985 UNCITRAL Model Law on International Commercial Arbitration).

Additionally, what is described as a phenomenon characteristic for this field (De Ly, 2001) is an established practice of self-regulation of the international trade: a process initiated and conducted by private means and parallel to the public initiatives indicated above. Contrary to the latter, the results of self-regulation are not endorsed by the authority of the State and thus often denied the status of the law by advocates of the positivist concept of the sources of law (Goode, 2000). Besides international trade customs, being an effect of a spontaneous self-regulation, commercial practice

[19] Judgement of the Constitutional Tribunal of 28 November 2007, K 39/07, Digest of the Case Law of the Constitutional Tribunal 2007/10A/129.

has also led to a deliberate and intentional development of various unifying instruments (such as standard contractual forms and clauses; self-regulatory contracts; rules of trade organisations; procedural techniques; and substantive rules known as the new *lex mercatoria*, formulated by the means of arbitral case law and private codifications, among others).

These instruments, private by nature, have been the object of intense discussion. Their use for regulatory purposes has been questioned, as they might be perceived as a mere and direct consequence of a consummation of the basic principle of party autonomy (where the parties are entitled to act so by their respective national legal orders). From the traditionally positivist positions the described change – if acknowledged – would thus not be considered a paradigmatic one, but rather a statistical increase in use of particular forms of contractual freedom, observable within the last several decades in the sphere of international commercial relations. For some authors, however, the global phenomenon of self-regulation of the international trade cannot be reduced to such categories, as it is impossible to simply squeeze it back into the old contractual matrix, even if it has risen therefrom (and the creative role of arbitral legal interpretation is invoked as an argument supporting this view) (see Teubner, 1997, 2002). From this perspective, self-regulation is perceived as an example of a tendency towards various business and social relationships slipping from under the regulatory power of the State along with the increase of globalisation processes.

When considering the impact of those regulatory harmonisation and unification efforts onto the sphere of legal interpretation, their dual nature, as described *supra*, has to be taken into account. Instruments of public international law, adopted by the interested States, are construed by the domestic courts as a part of the national legal orders, supported by the authority of the State. Regulations proposed by the model laws are *ex definitione* implemented in particular legal systems via national legislation, and thus there is often no direct incentive for the court to search for their universalised interpretation, reaching beyond the domestic perspective; it is dependent on its own insight and inquiry. In the sphere of international conventions, the doctrine of their autonomous interpretation (Sinclair, 1984) (along with such modifying directives as a regard towards public international order (McDougal et al., 1994)) serves as a foundation for their consolidated rendition by the courts in the various countries being parties thereto. Still, as Andre Abbud (2009) demonstrates, using the example of the New York Convention reception in Brazil, access to a well-formed international doctrine and abundant case law does not automatically mean that the courts obliged to apply the convention will indeed seek and follow universalized interpretative patterns. Even if the instruments to be applied were deliberately designed as uniform, their interpretation in particular countries might thus still be in practice performed in a cocooned manner.

Scepticism regarding the absorbance and re-clarification of uniform standards in local circumstances is expressed also in the context of analyses of transplanted regulations of a non-mandatory, soft character. The transnational character of such standards might not be deliberate but secondary, due to their actual impact on the solutions accepted in other countries. As Karin Jonnergård and Ulf Larsson-Olaison

(2009) indicate, explaining the adoption of the British Cadbury Code solutions in Sweden, local variations of supranationally approved rules, although ostensibly convergent, might in fact be deeply dissimilar to their original versions. Their official explanations as adjustments to internationally acclaimed benchmarks may thus be, in fact, lacking substance. The problem of an only ostensible adoption of a universalised, interpretative standard (Safjan, 2009) is thus persistent also in the sphere of private regulations. Interpreters might still construe local variants of seemingly harmonised standards in accordance with established domestic interpretative patterns, while raising *ad pompam* arguments of their universal value. In Cristian Gimenez Corte's (2009) view, the domestically formed background of a judge, sitting in a national court and applying transnational rules of the New Law Merchant, and his or her established field of expertise, might determine the way in which those standards are interpreted. Under such circumstances, it is not the transnational character of the rules in question that determines the selection of adequate interpretative means – it is the pre-acquired means that shape the direction of the conducted reasoning.

6 Role of International Commercial Arbitration in the Development of a Universal Interpretative Approach

The genuine character of the universalisation of the interpretative standard in the application of transnational rules seems to be less controversial in arbitral case law than in the adjudication practice of the domestic courts. As a matter of fact, the contemporary version of the Law Merchant is largely perceived as a result of creative activity of arbitral tribunals. The new *lex mercatoria* is frequently described as a body of rules developed by the means of thorough and specific, arbitral case law (see Henry, 2005). This view has also been explicitly expressed by the arbitral practice – as stated in *Dow Chemical v. Isover Saint Gobain* ICC interim award:

> [t]he decisions of these tribunals progressively create case law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond.[20]

Pierre Duprey (2005) observes that, although arbitral awards are formally lacking the binding force of a precedent, other characteristic features of case law can be found in the adjudicatory practice of arbitral tribunals, which express and apply autonomous rules of international trade. In particular, the chains of decisions, issued by various tribunals worldwide, but sharing the same rationale, as well as an established practice of references to previous awards can be observed. As a consequence, it might be assumed that the *lex mercatoria*-based arbitral decisions form a *sui generis* case law, influencing further awards and establishing decisional patterns,

[20]ICC Interim Award of September 23 1982 in No. 4131, Yearbook Commercial Arbitration, P. Sanders (ed.), Vol. IX (1984), p. 135.

followed not due to their official binding force but because of the persuasive force of the presented reasoning.

As Ana López Rodríguez explains

> [m]ore precisely, lex mercatoria is the result of a substantive method of adjudication, alternative to traditional conflictual techniques (...). Due to the persuasive character of the reasoning of some arbitral decisions, it gradually develops into a body of case law, which *de facto* serves the same function as national law, in the resolution of international commercial disputes. (López Rodríguez, 2003, p. 111)

The complex intertwinement between international commercial arbitration and the New Law Merchant affects also the sphere of legal interpretation. Unparalleled popularity of arbitration as a way of resolving international commercial disputes in the last decades has decided about its advancement from one of available alternatives to domestic litigation to the default technique of deciding controversies of this kind (Lalive, 1987).

Rapid expansion of arbitration in the field of commercial disputes has not been accompanied by the, directly analogous, increase of significance for the substantive autonomous law of the international trade. Despite the, sometimes expressed, optimistic opinions (see Jagusch, 2005), ICA and the New Law Merchant can hardly be described as two corresponding sides of the same coin. Undoubtedly, the driving force in both cases is a private endeavour of the international community of businesspeople (*societas mercatorum*) towards establishing a convenient and predictable regulatory framework (both procedural and substantive) for managing their affairs. Still, there is only a partial intersection of both sets (New Law Merchant is developed not only through arbitration; on the other hand, *lex mercatoria*-based awards form a mere fraction of all cases resolved through arbitration). The intensity of the evolution of those two legal phenomena in recent years has also been uneven; as some authors suggest, despite academic acknowledgment, the actual impact of *lex mercatoria* onto arbitral practice might have in fact been overrated (Herber, 2003). However, the body of New Law Merchant-based rulings has been constantly growing over the years and the transformations of legitimising grounds provided for the use of these rules in arbitral decision-making (and in related judicial practice) demonstrate their gradual congealment (Jemielniak, 2005).

The influence of this bond between *lex mercatoria* and arbitration onto the directions and methods of legal interpretation is remarkable for several reasons.

Firstly, because of its unparalleled, creative character. In the ongoing dispute regarding the status of the New Law Merchant as the law (controversial, as it is formulated mostly privately and lacking State endorsement), some authors take a stance that the modern *lex mercatoria* is not a body of pre-formulated rules, but a substantive method of adjudication (see López Rodríguez, 2003). This position seems to be a compromise between the objections raised by proponents of the traditional theory of the sources of law and the ongoing practice of applying transnational private rules to the merits of disputes. As Emmanuel Gaillard observes, when so defined, the New Law Merchant relies upon

> deriving the substantive solution to the legal issue at hand (...) through a comparative law analysis which will enable the arbitrators to apply the rule which is the most widely accepted (Gaillard, 1995, p. 224).

The body of rules and the methods of legal inquiry leading thereto, so established through arbitral case law, directly influence the adjudication practice of the domestic courts in those cases where the parties after the award seek recourse to the court.

Secondly, because of the innovativeness of techniques applied by the arbitrators in order to construe and apply transnational commercial standards – in *lex mercatoria* cases the methods of comparative inquiry (unlike in domestic adjudication) are frequently used not as a subsidiary and supporting source of interpretative arguments but as an intrinsically creative tool for the discovery, expression and formulation of the uniform rules of international trade. It refers to the very primary concept of the New Law Merchant as a common core of different legal systems[21] or a

> common denominator of principles underlying the laws of the various nations governing contractual relations.[22]

This practice is particularly noteworthy in the context of the universalisation of interpretative standards: the uniform effect is achieved here not through transplanting rules (as in the case of the Cadbury Code implementation and interpretation in Sweden, mentioned above) but as a result of pulling out standards shared by different legal systems. This method has also been officially adopted and applied in private codifications of the New Law Merchant (see, e.g. Bonell, 1996 on the preparation of the UNIDROIT Principles of International Commercial Contracts; Berger, 2002 on the 'creeping codification' concept, underlying the CENTRAL Database).

Finally, *lex mercatoria* – a body of uniform transnational rules of trade, developed largely in the form of arbitral case law by the means of comparative legal analysis – has become a regulatory and interpretative model for other areas of supranational rule-making, such as *lex sportiva.*[23] It is also a direct source of inspiration for national adjudication, even if currently not used to its full potential. The *lex mercatoria*-based arbitral awards have on occasion been the object of judicial review; transnational rules of trade may also be applied by the domestic courts as a result of the choice by the parties or the court's own determination of the proper law. In all cases, the domestic judges, faced with the challenge of application of autonomous rules of the international trade, have access to the accomplishments of arbitral case law in this regard.

The effect of regulatory convergence in arbitration, affecting the sphere of the interpretation of law, can also be traced at a procedural level. Solutions, adopted

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[21] See, e.g. the pioneering awards: *Petroleum Development, Ltd. v. Sheikh of Abu Dhabi*, International Law Reports 18 (1951); *Sapphire International Petroleums v. NIOC*, International Law Reports 35 (1967).

[22] UK Court of Appeal, decision of 24 March 1987 in *Deutsche Schachtbau- und Tiefbohr GmbH v Rakoil. Yearbook Commercial Arbitration*, A. J. van den Berg (Ed.), Vol. XIII (1988), 535.

[23] See Court of Arbitration for Sport award no. 98/200 *AEK Athens & SK Slavia Prague v Union of European Football Associations (UEFA).*

in the rules of procedure of the leading arbitral institutions worldwide, are often approximating over time. Gradual liberalisation of the grounds for applying transnational substantive rules and the, more recent, wide adoption of *voie directe* as a standard competence of an arbitrator[24] are but selected examples of this trend. This unprompted, self-organised process of harmonising private procedural rules has led some authors to the point that it should be described as the emergence of a new *lex mercatoria arbitralis* (see Schroeder, 2007). It is a frequently raised argument that the growing autonomy and harmonisation of procedural standards of arbitral institutions is accompanied by their increasing formality, extensiveness and intricacy, described as judicialisation (Brower, 1994) or the colonisation of arbitration by litigation (Nariman, 2000). This regulatory phenomenon, and the accompanying accumulation of research and literature related thereto, facilitates the diffusion and global discussion of interpretative suggestions for shared legal constructs and concepts.

Finally, the universalisation of the interpretative approach in arbitration on the procedural level may be analysed in the context of the discretionary power of an arbitrator. This problem is particularly evident in those cases where the parties not only come from various legal systems but also represent different legal traditions. A wide autonomy is usually granted to arbitral tribunal as regards the detailed organisation of proceedings; nevertheless, it has become a habitual practice to propose a compromising *modus operandi* for virtually all stages of the proceedings to the parties coming from a common law legal system on one side and from a civil law one on the other, i.e. to apply a universalised approach instead of promoting procedural standards characteristic to only one party's legal environment (Elsing and Townsend, 2002). Also, the complex history of arbitrations of those commercial disputes, where one party comes from the Islamic legal tradition and the other from one of the Western systems, reveals a tendency towards seeking a middle ground in procedural schemes, after the past phase of evident forwarding solutions perceived by Islamic commentators as purely Europocentric (Brower and Sharpe, 2003).

7 Legal Interpretation in a Process of Change

The described phenomena, and particularly the influence of globalisation and economic integration processes onto adjudication practice, have undoubtedly affected the repertory of interpretative means and methods. In an attempt to grasp the character of this change, as this book proposes, two questions seem justified. Firstly, it would be useful to consider whether current transformations of interpretative standard are indeed signs of a major qualitative change or rather tokens of the reorganisation of the, already known, repertory of instruments for legal rendition. Secondly, it is worth examining whether the described change of rendition patterns

[24] See, e.g. ICC Arbitration Rules Art. 17.1; Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce Art. 22.1; 2006 Rules of Arbitration of the International Arbitration Centre of the Austrian Federal Economic Chamber (Vienna rules) Art. 24.2.

might be perceived as a crisis of a positivist model of legal reasoning and legal interpretation.

It seems reasonable to ask whether the changes in interpretative paradigm are of a purely quantitative nature, which would mean that the, already known and well-described, instruments of legal interpretation are used with a different frequency than in the process of adjudication taking place in an entirely domestic environment. This would be, however, possible to be stated only in ideal circumstances, where the field of domestic adjudication was practically insulated from any transnational influence. However, a quantitative, paradigmatic change would have taken place through a shift of accents, a re-composition of already established elements of the interpretative repertory, via, e.g., increased use of directives of purposive interpretation with a relatively diminished significance of textual methods. As the authors of this volume demonstrate, the reorganisation of interpretative standards in such a way can be indeed stated as existent, albeit to a different extent, in various fields of application of transnational rules.

In the described processes, the reconstruction of the interpretative paradigm by the novel use of old components is undoubtedly taking place. But are there any new ingredients to be found in the contemporary interpretative repertory? Is a 'quantitative change' a sufficient and accurate description of the observed phenomena? Or have there also been any qualitative amendments and modifications introduced to the patterns of legal reasoning applied in a process of interpretation and application of the law?

The assembled material shows that signs of a qualitative transformation of the interpretative practice can indeed be found in different areas of transnational rules application. In particular, the independent and creative use of comparative legal inquiry seems unprecedented. This method is nowadays directly used for the construction of transnational norms of both public and private origins and occasionally (as in the *lex mercatoria* cases) also for the discovery and expression of the rules themselves. This is a practice by far exceeding the exercise of traditional methods of comparative legal interpretation known, for example, to the classical conflict of laws doctrine. Comparative study was conventionally recommended in the resolution of private international cases in order to provide an authentic rendition of rules of the determined, proper law, in accordance with the interpretative standards and directives of this very law, which was frequently a system foreign to the court (see Juenger, 2005). Comparative research was thus serving explanatory purposes; occasionally, it might have also been admitted as a modifying tool, but was still firmly placed in a positivist paradigm of legal interpretation, ascribing to legal rules fixed meanings, to be determined within the legal systems to which they belong.

In its more recent variation, comparative analysis has gained significant autonomy as a tool for discovering common forms of regulation, analogous legal institutions and shared values that might be expressed in judicial decisions and arbitral awards as evidence of globalised regulatory processes. This conscious approach is indeed manifest not only in adjudication but already in transnational

law-making at various levels. For example, the general acknowledgement of the value of following uniform procedural standards for the recognition and enforcement of arbitral awards has had different roots in various legal traditions, but it enabled the New York Convention to become one of the universally adopted instruments in the discussed sphere. The continuing quest for determining a possible common core of diverse legal systems has been the driving force of the *lex mercatoria* development through arbitral case law, as well as via private codification efforts. An ascertainment that a principle is shared by different legal traditions, even if protected by the means of different legal instruments (such as the civil law *non concedit venire contra factum proprium* rule and its common law *equitable estoppel* counterpart), might have been treated by the arbitral practice as a starting point for formulating a relevant, transnational rule of the New Law Merchant.

The comparative method is also frequently combined with a purposive interpretation, as the comparative inquiry is generally accompanied with the recognition of a common ground of shared principles and values and of the intrinsically supranational, and not domestic, context of the legal relationship in question. Such concepts as public international order, *bona fides* in international commercial transactions or shared European values provide a basis for the corrections of the course of the conducted construction of supranational rules.

Those quantitative and qualitative changes in the sphere of interpretative approach and repertory, apparent in the practice of supranational bodies, but also affecting domestic acts of judicial legal interpretation, can raise the question of whether they are symptoms of a supposed crisis of the positivist, syllogistic model of legal interpretation as an adjudication standard.

The core of these changes seems to lie not in the simple replacement of one dominant model of legal reasoning by another. A claim that positivism and textualism are becoming out of fashion, whereas the redefined, comparative and purposive interpretation methods are taking their place (at least in the sphere of applying harmonised, transnational regulations) would be a grave oversimplification. What we are witnessing is rather a, relatively newly acquired, pluralism of interpretative strategies, a loss of a dominant position by the syllogistic model and the emergence of theoretical responses addressing these issues, proposed by jurisprudence (see Wojciechowski, 2009).

Undoubtedly, this process is far from being complete; it is a ‘work in progress’, necessarily interconnected with the changing circumstances of economic, political and regulatory harmonisation efforts that have triggered it. What might seem a paradox is that the strive towards universalism of interpretative approach, as described by the authors of this volume, lies in abandoning the Montesquieuan concept of a single, undisputed meaning, supposedly radiating through the rules, a myth of the legal Logos, present also in the classical positivist concepts. This book is an attempt to capture this movement at its current stage and to possibly estimate its actual significance.

Subsequent chapters, addressing these issuse in detail, are organised as follow:

Legal Theory

The chapter by **Ewa Łętowska** touches directly upon the reasons for a global approach in thinking of law and shows how the very process of legal interpretation is transformed by the duty to achieve certain goals. In the author's view, a global approach to law is a consequence of the globalisation of exchange, the emergence of new goods, services and risks. A multicentre architecture of the modern global legal system is a significant factor to be taken into account. The actions of respective centres competent to interpret and apply national law, European law and the law of human rights produce effects within the same territory. As a result, Łętowska claims that the interpretation of law should build the consistency of the system and avoid its fractioning and disintegration.

Traditionally, the interpretation of law is aimed at its clarification and at *Rechtsfindung*, namely deriving norms from the legal system within the scope of the margin of appreciation of an organ charged with interpreting law. At the same time, however, the duty to achieve certain final goals is becoming an element of the process of law interpretation that is supposed to serve the purpose at stake. The purpose of law is thereby included in the very construct of the interpretation of law. Ewa Łętowska gives examples of this process within the European legal order: *effet utile*, the direct effect of Community law, total harmonisation, the acknowledgement of national courts as Community courts entrusted with special duties, etc. At the same time, however, deficiencies in necessary dialogue between domestic and international courts (ECtHR and ECJ) are indicated. The author is of the opinion that international courts should not impose their understanding of legal texts on national courts without a sound and convincing explanation of the reasons upon which the interpretation is founded. This is because such an imperative approach is counterproductive: it results in the "split interpretation" and decomposes the dogmatics of law, which is a helpful tool in legal analysis.

The issue of a model of legal interpretation, befitting the challenges of adjudication in the conditions of multiple normative orders and in an increasingly multicultural society, is the main topic of a chapter by **Bartosz Wojciechowski**. The questions raised by the author are substantial in the context of the application of supranational rules of various origins, as the positivistic approach might frequently turn out to be unsuitable or insufficient for this purpose. By the means of legal theory, Wojciechowski presents and explains the recent process of transforming the forms of judicial reasoning, which he characterises as abandoning the dominant syllogistic paradigm in favour of an argumentative one. He assumes, after Habermas and Alexy, that the intrinsically discursive character of legal reasoning is accompanied by a strive towards communicative rationality, which poses an increased challenge, and also an opportunity for a judge to exercise a particularly active role.

As Wojciechowski argues, the discourse ethics (concerning duties regulating human coexistence) play a critical role in this endeavour, as they "lead to such a way of justifying norms and obligations that – in the case of a conflict among the intra-particular moral, religious or view-of-the-world notions – can constitute an elementary, common ground for an acceptable agreement." (p. 54) Hence, the

development of discourse ethics can be perceived as a particularly fertile theoretical ground for the formation of a universal approach in legal interpretation.

Deborah Cao, in her chapter, addresses yet another vital aspect of the process of achieving and applying presumably uniform legal standards in a multicultural environment: an interpretation of bilingual and multilingual laws, enjoying the status of being equally authentic. Linguistic uncertainty, an inherent component of the law, becomes inevitably enhanced if the law is formulated in more than one language, which requires particular attention and specific methods of scrutiny from an interpreter.

Deborah Cao examines and compares the methods of judicial inquiry used in Hong Kong and in the European Union with regard to the legislative drafting process and its competing forms: translation and simultaneous drafting. The author investigates case law from both jurisdictions, tracing interpretive patterns followed by judges in order to construe applicable rules in the conditions of linguistic differences between the official versions of relevant legal acts. She also demonstrates how "judicial interpretation involving linguistic uncertainty is unique and is constrained by established laws, statutory interpretive rules, policy and other considerations by creating a legal fiction in the equal authenticity rule" (p. 72). It is argued that judicial activity serves as a way in which the actual effect of harmonisation and legal certainty might be achieved in the cases where the linguistic duality or multiplicity of authentic sources leads to normative and interpretive ambiguities.

The problem of coexisting cultural and normative orders, resulting in elevated demands for the interpreter of the law, is a central issue of the subsequent chapter. **Anne Wagner**, using the research perspective of legal semiotics, provides an analysis of the representations of Tolerance and Diversity concepts in the public discourse on European law. This analysis serves as a basis for evidencing the dual nature of transnational harmonisation within the European Union – a phenomenon that the author describes as disclosing fragmentation and unity tendencies at the same time. The ongoing tension between the nationally oriented efforts of the societies of the EU Member States with the unifying practice of the European institutions is enhanced by what Wagner describes as multi-stage dynamics (p. 89).

The harmonisation effect in public discourse will therefore be perceived as an equilibrium to be constantly, carefully balanced, rather than a solid and immutable formation. As Wagner argues, it can be achieved as "unity without uniformity and diversity without fragmentation" (p. 88 and ff.). She illustrates this assumption with a case analysis of the strive towards working out such supranational standards on two issues: rights of homosexual individuals to marriage and to adoption; and disability. In both cases, the author traces the cultural symbolism of the relevant concepts and its changes, the resulting domestic and supranational regulatory efforts and interpretive outcomes of the application of harmonised rules.

European Law

Marek Safjan presents two possible meanings of the process of universalisation of law interpretation. Firstly, it may be defined with a reference to interpretative

techniques themselves. Semantic interpretation is subject to radical transformations: concepts, legal constructions, legal institutions, principles and values are interpreted in a dynamic way with due regard paid to the phenomena in the sphere of social, economic and political events, on local, international and supranational levels. Purposive interpretation is gaining importance in delimiting the sense of legal concepts and institutions. Secondly, universalisation may be perceived as a distinct tendency towards building common foundations, principles and values of legal systems in the integrating Europe. In this case, universalisation would mean achieving convergent results of legal interpretation despite differences of normative constructions in particular legal systems. The author examines both positive aspects of a universal approach to the interpretation of law and the risks connected with the need to abandon established patterns of judicial reasoning, with the possible expansion of judicial discretion and with undermining certainty and predictability of law. Furthermore, three models of the universalisation of the interpretive standard in judicial practice are presented in the chapter. These are as follows: a real (genuine) impact on interpretation and its results, subsidiary or complementary application of a universal standard, and finally illusory or decorative application of such standard. The author extensively describes examples of the application of these models in the case law of Polish Constitutional Tribunal in matters relating to EU law and to the ECHR.

Ermal Frasheri examines choices made by domestic courts in the process of interpreting and applying law. The author claims that judges are always faced with the same obstacles and issues irrespective of whether they operate in a single system of values or are faced with a choice between a universal and a particular approach. The debate over the indeterminacy of choice is recalled in the context of the opposition: domestic versus universal values. The EU legal system is, Frasheri argues, as indeterminate and contradictory as domestic legal systems. Consequently, a simple dichotomy between universal values and particular domestic traditions does not fully explain the process of the interpretation of law. Instead, judges need a normative theory allowing them to become progressive actors. The globalisation of law and the emergence of the European legal consciousness are elements upon which the normative empowerment of judges may be founded.

The paper by **Camilla Hørby Jensen** and **Nina Dietz Legind** demonstrates that the choice of a method of implementing EC directives through public or private national law may influence the application and interpretation of relevant legal rules. This phenomenon has been described with regard to the implementation of MiFID and the new Consumer Credit Directive in Denmark and the protection of consumers provided for in these EU legal acts. The authors stress the importance of the effective enforcement of the protection rules and of access to an out-of-court dispute resolution board. The effectiveness of consumer protection is undermined by the implementation of some of EU legal provisions as public law rules with no direct civil law sanctions guaranteeing their enforcement. It is argued that the Danish Complaint Board of Banking Services is reluctant to apply public law rules when resolving private law disputes.

Henceforth, the method of implementation of EC law, even the full harmonisation measures, is of particular significance.

The chapter by **Monika Niedźwiedź** is aimed in particular at explaining the relationship between the type of Community competence in the field of intellectual property and the coherence and uniformity of interpretation of TRIPS agreement at a national level. The issues of direct effect and conforming interpretation are discussed in this context. Furthermore, the author presents relevant national (Polish) case law in order to verify whether national judges are aware of the impact of EU competence on the very process and outcome of the interpretation of law. Although Niedźwiedź acknowledges the multicentre architecture of contemporary legal environment, she admits that it produces risks of divergent interpretation leading to fractionating of law and undermining legal certainty. It is argued that the entry into force of the Lisbon Treaty would contribute to the uniform interpretation of the TRIPS agreement, but at the expense of individuals if no direct effect of the TRIPS provisions is admitted by the ECJ.

Mariusz Golecki presents, in his chapter, various strategies of the standardisation of adjudication in the area covered by EU law. These are as follows: the public strategy based on the action for an infringement of Treaty obligations, the deliberative strategy through preliminary referrals, and the strategy of privatisation based on recent ECJ decisions in Köbler and Traghetti concerning claims of private parties against the state for an infringement of EC law. It is assumed that national courts are likely to submit preliminary references to the ECJ only if there is a reasonable doubt as to the meaning of EU law. As an alternative to public strategy, the development of ECJ case law on State liability for an infringement of the Treaty by national courts is capable of strengthening the uniformity and efficiency of EU law. At the same time, once national courts are requested to review domestic decisions with regard to their conformity with EU law, it may negatively affect the structure of judiciary of a Member State. It would be particularly problematic in cases of judicial control of activities of higher national courts by lower instances.

European Criminal Law

Barbara Nita examines the problems of the pro-European interpretation of criminal law in EU Member States with regard to the implementation of the European Arrest Warrant. The chapter is focused on tensions between the principle of primacy of European law and the constitutional supremacy, in particular in the context of constitutional guarantees concerning criminal law. In the author's view, a pro-European interpretation of national provisions does not allow conflicts with constitutional norms to be fully eliminated, due to the prohibition of *contra legem* interpretation. In the field of criminal law, this prohibition is of particular importance, and additional limitations are also applicable, namely those resulting from general principles of law: the principle of certainty and non-retroactivity. Furthermore, a pro-European interpretation cannot lead to the determination or aggravation of criminal liability.

As Nita argues, these are the limits to a universal approach to the interpretation of criminal law. In her opinion, the area of potential normative conflicts may be reduced through derivation by the ECJ of general principles of Community law from the constitutional traditions common to the Member States. In addition, the further progressive convergence of the criminal law systems of the EU Member States, with due respect for the constitutional standards, is capable of eliminating certain problems described above.

The chapter by **Barbara Nita** and **Andrzej Światłowski** discusses the issue of the multiplicity of the language versions of European law, taking as example the prohibition imposed by the *ne bis in idem* principle in Article 54 of the Schengen Convention. The authors point at the necessity to take into account and compare, in the process of interpreting law, various language versions of the legal provision at stake. EU legal acts from the third pillar, including the Schengen Convention, are interpreted by the ECJ and by domestic courts and other national authorities, which is capable of producing discrepancies in the interpretation of the same provisions. A linguistic interpretation of Article 54 of the Schengen Convention is not sufficient to determine the meaning of that provision as it leads to divergent reading of the scope of the prohibition imposed by the *ne bis in idem* principle. The authors admit that comparative interpretation is capable of reducing these divergences. At the same time, however, the application of the comparative method of law interpretation by the ECJ and by national courts may lead to different results. This is because domestic authorities are keener to rely on national language version of a legal act subject to interpretation, which in turn promotes a particularistic approach. As Nita and Światłowski argue, even the obligation for national courts to refer to foreign language versions of EU law has its limits, as it cannot lead to the determination or aggravation of the criminal liability of individuals.

Whereas some of the authors of this volume discuss the problem of an ostensibly universalising interpretation (presented as such for argumentative reasons, rather than actually rooted in a supranational perspective), **Alicja Ornowska** highlights the opposite phenomenon. She researches an authentic application of new methods of legal rendition, disguised by judges due to a remarkably rigid stance of official jurisprudence as regards the scope and methods of legal interpretation in the chosen field of criminal law.

The author studies adjudicative practice in the area of criminal law in a European context and analyses whether interpretative instruments, offered by legal hermeneutics, are used by judges deciding criminal cases. From the positivistic perspective, the very idea of the hermeneutic construction of those provisions might seem a *contradictio in adiecto*, as criminal law has traditionally been a field where the standards of strict, textual rendition have been particularly strictly formulated and adhered to. As Ornowska points out, however, this is not necessarily a theoretically unattainable concept, and neither is the judiciary sharing the predominant, strict doctrinal view. Although judges still do not openly oppose the officially recommended ways of construing the provisions of criminal law, in fact they increasingly often tend to smuggle hermeneutic perspective and interpretative instruments into their reasoning.

Private Law

André de Albuquerque Cavalcanti Abbud discusses the evolution of the Brazilian judicial approach to the application of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). He exposes the somewhat reluctant stance of the Brazilian judiciary, which, despite the adoption of the Convention by Brazil in 2002, tends to apply the provisions of the 1996 Arbitration Act while resolving controversies on enforcement claims of foreign arbitral awards.

The author argues that, despite this observable judicial scepticism towards a direct application of the international act, the Brazilian national regulation on arbitration is indeed heavily patterned after the New York Convention. This leads to the question as to what extent are Brazilian judges facing the challenges of adjudication based indirectly on supranational standards, and how aware they are of its consequences. The author analyses case law, demonstrating that judicial reasoning based on the domestic Arbitration Act is still conducted rather without a major connection to the advancement of the international legal thought, dedicated to the Convention. He also discusses the dissimilarities between the standards adopted on the ground of the New York Convention and in the Arbitration Act (on such issues as the public policy exception to the enforcement and the requirements as to the form of the arbitration agreement) as a source of arguments and disputes that have already started to arise.

Karin Jonnergård and Ulf Larsson-Olaison, in their chapter, use the research perspective of the theory of organisation to highlight the course and consequences of the process of implementing transnational rules in a domestic context. This chapter offers a reader a valuable insight into explanatory discourses of transnational regulations, expressed from an approach different but complimentary to those of the authors, specialising in jurisprudence.

Jonnergård and Larsson-Olaison base their analysis of the process of implementing the corporate code of conduct in Sweden on the assumption that the local interpretation of transnational rules might be performed on two levels. Firstly, the import of the rule itself has to be explained and justified; and secondly, the content of the adopted norms is an object of official (including judicial) explanation. Whereas other chapters of this volume generally concentrate on the second tier of those endeavours, Jonnergård and Larsson-Olaison point out the significance of the other, logically initial aspect of the public discourse, dedicated to achieving the effect of regulatory convergence. As they observe, "[t]ransnational regulations are not merely motivated by local demands, but furthermore are imposed by negotiations and discussions on international level. (. . .) Our intention is to investigate how (. . .) international agendas may make the import of rules understandable and thereby influence local action" (p. 304). Consequently, they focus on examining this first level of interpretation, exploring how the rules are "explained as appropriate in the national context" (p. 321), which also affects a further, second-level interpretation. They also propose a theoretical explanation of a broad empirical material on the adoption of the corporate code of conduct in the local context of the transformation of corporate ownership structure in Sweden.

The perspective of organisation studies is represented also in the chapter, authored by **Ulf Larsson-Olaison**, where the official discourses on the import of another set of transnational rules (the adoption of the institution of nomination committees) to the corporate governance standards in Sweden are investigated. The author employs the concepts of transplantation and convergence, drawn from the law and economics studies, as well as the broader concept of translation, developed by theorists of organisation, and encompassing the impact of the social actors involved in the regulatory process. In this chapter, the role of those actors is examined on a corporate as well as on a regulatory level. The key concepts are used for an exploration of the "intersections between international best practice regulation and local practices on the one hand, and between actions by the regulator and those regulated on the other hand" (p. 325).

The argumentation by the author is based on an analysis of extensive, empirical material that illustrates the course of adoption (transplantation) and transformations of the institution of a nomination committee in Sweden and the development of its local variation. Ulf Larsson-Olaison explores the limits of the local translation processes and contests the weight of the convergence effect, which, while domestically achieved and formally unquestionable, turns out to be disputable as to the substance of the institution in question when analyzed at a transnational level.

In the chapter by **Cristián Gimenez Corte**, special attention is paid to the problem of the influence of a judge's background and prevailing adjudication experience in the domestic field of either civil or commercial law onto his or her interpretative patterns, disclosed in applying the rules of transnational commercial law. After providing a historical framework for his analysis, the author discusses four cases decided by the Argentinean courts, tracing the way in which customary transnational rules were applied in resolving controversies regarding bank operations used in commercial transactions. The author highlights the legitimisation patterns for the application of customary standards and the differences at the level of explanatory effort made by the judges in order to substantiate the content of the applied rules.

The title of the chapter might be interpreted on three levels. Firstly, it refers to the overlapping processes, which the author characterises as the commercialisation of civil law and, postulated by him, the civilization of commercial law, explained in a historical context. But secondly, Cristián Gimenez Corte also perceives the area of transnational commercial law as a field influenced by the practices stemming from both traditions: that of *ius civile* and that of *ius mercatorum*. Finally, in the author's view, the actual specialisation of a judge in one of those branches of the domestic law might affect his or her approach to the application of transnational rules.

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Part I
Legal Theory

Chapter 1
Transformations in Law Interpretation: Towards a Universal Approach – The Phenomenon, Causes and Symptoms

Ewa Łętowska

Abstract This chapter refers to the context and features of interpretation, understood as a process of extracting the law, and not to the contents of law read through interpretation. The globalisation of contemporary exchange forces a more global approach to interpretation. Novel law instruments – in order to meet demand – must bear the feature of universality. The purpose to be achieved becomes an element of the very concept of interpreting law. The law becomes a multicentre system encompassing national law, European law and the law of human rights. The interpretation of law should reinforce the consistency of the multicentre system and avoid its fractioning or disintegration. Meanwhile, deficiencies in the dialogue between domestic and international courts (ECtHR and ECJ) occur. Furthermore, examples may be given of interpretation imposed *vi imperii* by international courts, without sound and convincing explanation. This practice results in the "split interpretation", entailing a certain decomposition of the dogmatics of law and revealing a culturally counterproductive facet.

1 Introduction

1.1 The transitively formulated problem

The subtitle of the volume ("From Particularism to a Universal Approach") devoted to the interpretation of law in the contemporary globalised world emphasises its dynamics and draws attention to the very **mechanism of law interpretation**. From this perspective, it is a process, an emergence ("what happens to interpretation") that corresponds to the subject of the book, rather than a statically rendered condition ("where the interpretation leads").

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1.2 Law (as text) exists only through its meaning

Law is revealed only in the process of interpretation. What is more, it exists solely because of interpretation. Those who apply the law (*law in action* – for the sake of simplicity we may assume it is always the court) and those who write about the law (commentators – *law in books*) depict as such (deciding cases, commenting on law) mere results of their interpretation, various readings of the law, instead of the law itself. As a result, the law itself exists objectively, at best, as a printed piece of paper. As to the meaning of the text – it is always a construction of the reader, i.e. the interpreter. An unread and undeciphered text stands void of meaning. The word "void" does not mean here that the text is "insignificant", but merely that it remains **solely** the carrier of what was recorded therein, but not as meaning – the latter concept understood as a matter of social communication.

1.3 Ambiguity of the notion of "law interpretation"

There are basically two senses of the term "law interpretation" discernible in legal discourse. One concerns the "meaning of law" – the way in which the law is read in the course of text interpretation, in which case the term signifies the effects of the foregoing extraction of the contents of law. This may be achieved both in the process of applying the law (*law in action*) and in a purely scholarly analysis (*law in books*). While justifying a judicial decision or an author's opinion on law, both the court and the scholar are ready to **present their own arguments on the contents of the law**, rather than a mere reading (interpretation *sensu stricto*). Certainly, the ontological argument serves the dispute strategy better than the hermeneutic one. Such eristic procedures further obscure the borderline between law and interpretation. The persuasive strategy by which the interpreter masks the fact that he provides the world with the meaning of law as it was read by himself (his own interpretation) as the law itself is supposed to give the participant of a dispute an advantage. In fact, each of the parties implied partakes in the struggle for supremacy in interpretation, rather than speaks of the true "contents of the law".

1.4 Confusion between the two meanings of "law interpretation" – as the action and the effect

The depicted controversy concerning the relation between law and its reading only adds to the confusion of the meanings: the sense concerning the implements destined for operations carried out by lawyers and the sense where "interpretation" refers to both the object and effect of such operations – the law unveiled (via interpretation). The German term *Rechtsfindung* signals, better than "interpretation", the ambiguity of the phenomenon incorporating both the **process** and the **effect, the extraction of law**.

1.5 The volume's thematic issue: the study of interpretation or of its results? (law contents)

If it is assumed that the thesis of an evolution in the interpretation of law "from" particularism "to" universalism is a true one, and once it is decided that this volume should be devoted to this question, then we are confronted (because of the conceptual ambiguity mentioned above) with the dilemma (1) whether to describe the evolution by presenting its context, symptoms, changes regarding methods and instruments of interpretation in the conditions of the dynamic tendency mentioned above or rather (2) whether to present the contents of law, extracted by means of interpretation, and to demonstrate, for example with the aid of selected examples, that these are "more" universal in the contemporary world (consolidated, globalised) than they used to be. The former approach focuses on the process itself, the skills and tools of interpretation as *Rechtsfindung* – extraction of law. The concern of the latter, on the other hand, would be the law laid down in the process of interpretation. Thus, the former type of analysis concerns the study of interpretation ("interpretology"), whereas the latter investigates into law as such, as currently shaped and influenced by the globalisation of the world, society and commerce for which the law has been enacted.

1.6

This chapter represents the former approach (study of interpretation). **The article refers to the context and features of interpretation, understood as a process of extracting the law, and not to the contents of law read (attained) through interpretation.** Naturally, it is not an exhaustive presentation of all the relevant circumstances, their interrelations and features of interpretation conceived as a process. Instead, the aim is to draw the readers' attention to phenomena and mechanisms that the author considers noteworthy in the *global approach* to interpretation.

2 Legal Transactions in the Process of Globalisation – The Premise and Cause of the Atrophy of Particularism in the Interpretation of Law

2.1 Features of the contemporary exchange of goods and services in favour of the atrophy of particularism

The contemporary exchange of goods and services bears a number of features that contribute to the *global approach* in the interpretation of law. In the first place, globalisation affects the economic circulation of goods themselves. Trade is **fast** – owing to electronic means of processing and data transfer, which enables virtual e-transactions **to affect parts of the world** formerly excluded from exchange due

to the long distance and peripheral location. At the same time, the fast and wide circulation of goods makes the exchange more **intense**. A vaster than before number of simultaneously concluded transactions has become possible. Banks, stock markets, carriers, stockholders, insurance companies and salesmen work faster these days, concluding ever more contracts, while consumers are likewise consuming quicker – also making more transactions. The speed, accessibility and intensity of the exchange contribute to the elaboration of new instruments, legal implements, constructions and contract types appropriate for the new types of trade. This, in turn, brings about a deficit in interpretation attempting to grasp the complexity, to estimate and to qualify theoretically the novelties by the participants of the exchange and their professional counsels and the juristic assimilation thereof.

2.2

The emergence of **new, previously unknown complex goods and products** leads towards the same end. It shapes **new demands**, which then boost commerce. Novelties require new legal implements, which in turn require explanations, analyses and interpretation. Transactions (of new types, on a larger scale) made under such circumstances bear a **higher economic risk**. This also leads to the emergence of new legal instruments aimed at protecting against such risk.

2.3

At the same time, there is a growing demand for private international law instruments, enabling the regulation of conflicts or interference from the legal system in time and space. The demand is a result of the characteristic **internationalisation of transactions**, caused by the existence of the common market and shifts in exchange forms connected with the increased mobility of production, capital and people, and the emergence of e-commerce – all these triggering an increase in the number of contracts with a foreign element. **The growing number of transactions with international (transnational) elements** implies a growth in demand for instruments enabling the resolution of collisions between legal systems in time and space. In turn, **rapid amendments of the law (with Europeanisation as one of the causes) unveil the shortage of tools for resolving temporal collisions (intertemporal law)**.

2.3.1

Previously there used to be a sort of “internationalised consumption” on the domestic market. The buyer would purchase foreign goods on the local market, from

an importer. Nowadays, it is the buyer, the tourist, the borrower, the insured (etc.) himself who partakes directly in internationalised consumption as a party to contracts concluded on the globalised market. Consumers themselves are more mobile: they go abroad or take advantage of a foreign offer (without travelling anywhere), encouraged by the existence of the common market (in Europe). Further possibilities emerge from the fact that their foreign professional partners function in their (the consumers') country due to the free transfer of goods, services and capital. Again, this may happen because of an international expansion of professionals – be it the mere placement of goods and services out there or the establishment of a foreign branch of the enterprise.

2.3.2

The proliferation of e-commerce makes the initiative of a contract, the place of its conclusion and the moment when its performance takes place (these are the circumstances and criteria decisive for determining the applicable law and jurisdiction for a given transaction) more difficult to identify than in the traditional forms of circulating goods.

2.3.3

Then, the universally detectable inflation of legislation (broadened scope of regulation or especially the frequency of amendments) reveals a deficit of legal implements enabling resolutions for conflicts of law in time (intertemporal law). Contemporary law requires to a larger extent that collision-solving instruments be implemented (intertemporal norms, private international law) or that instruments eliminating the emergence of such collisions be elaborated, i.e. the harmonisation of law (which boils down to its globalisation). Since the legislator frequently fails to include intertemporal regulations while drafting or amending laws, these are the courts that must fill this gap out of necessity in the course of interpreting statutory provisions. Courts – resolving disputes based on real situations inevitably stretched over time, regardless of the amendments of binding law – cannot abstain from intertemporal decisions, and consequently it is mainly the courts that are burdened with the task of deciding on intertemporal issues. Thus, the contemporary increased risk of temporal collisions is tantamount to ballast imposed on courts to take responsibility for resolving conflicts of law.

2.4 The globalisation of exchange forces the global approach to interpretation

Novel law instruments – in order to meet demand – must bear the feature of universality. In order to serve the universal, fast, broad, intense, internationalised commerce – frequently in the form of e-transactions – they cannot be particular

themselves. Transactions, their clauses, contents and form, constructions, liability terms, terminological consistency have to be conceivable for the actors on the globalised market. If this is the case, they must not be particular. Then, since law exists through interpretation, this interpretation itself (equipping a statutory text with meaning by a person applying or analysing law) should give up on particularism – in its methods and reasoning strategies. This influences the methodology of interpretation and the interpreters' axiology (cf. p. 5).

2.5 Imposing the features of universality on legal particularism – arbitration at work

It would be a truism to ascertain that in the contemporary market context (especially in large-scale commerce) it is not uncommon to refer potential disputes to arbitral tribunals instead of professional courts or to make a choice of law applicable for a given contract. However, it would not be justified to state that referring a legal relationship to alternative dispute resolution is inevitably accompanied by the construction of an individualised contract (*amiable composition*), independent of regulations of any existing system of law. It is a much more frequent business practice on the part of the parties involved to construct the contract in such a way as to justify (through the rules of private international law) the choice of a particular legal system and/or the competence of a geographically defined court. As a result, certain particular systems of law (and courts) gain a broader and more universal scope. For instance, the legal systems of New York or Delaware (easy to found a company), the London courts, etc. enjoy a good reputation in business practice. As a result, certain legal systems are known to actors on the legal venue, especially to actors capable of forcing their intentions on other partners of contracts, undergo universalisation. In this case, the term *global approach* stands for the expansion of particularism towards universalism. In the context of arbitration the predictability of interpretation is of primary significance. Predictability, in turn, is a derivative of the knowledge of a given legal system or rather the way the system is generally interpreted. It is the familiar system (the own system of the lawyer drafting the contract, the case law of his domestic courts) that stands a stronger chance of being notoriously applied within the formula of arbitration. In this manner, peripheral and unknown systems of law are left out of the game, whereas systems equally particular, yet popular, undergo further popularisation and become widespread and more frequently applied. Thus, some particular systems undergo a process of globalisation.

Undoubtedly, the detection of this regularity was one of the stimuli for the attempts at unification, and the launch of European contract law. It was not as much about passing a unified code as about the restatement (as soft law) of a set of principles, constructions and solutions that could serve as a source of inspiration for business. That is how the Principles of European Civil Law or different variants of the Common Frame of References (among others) were supposed to function. The

participants[1] of this large-scale project of civil law unification, conducted under the auspices of EC institutions, have not confined their goal to the draft of a unification statute. Instead, they emphasised the broader meaning of their project: providing a source of inspiration for universalised interpretation, the elaboration of the common (universal) conceptual network for the dogmatics of law (i.e. the tools of interpretation), which could surmount particularistic approaches to interpretation. Thus, the culture-formative aspect of the interpretation of law in the spirit of European integration has been stressed.

3 Multicentre "Interpretation Market"

3.1

The tradition that forms legal reasoning makes us look at the system of law as a hierarchical and monocentric structure functioning within state borders. These days, however, instead of the hierarchically framed monocentric model, a multicentre one may be detected (which is at least apparent in Europe). It is characterised by the diversity of decision-making centres in the field of legal enactment and interpretation. In addition, this model is transnational. Currently, within one state, on a single territory, there are exterior, supranational centres, competent for many countries, enacting, applying and **interpreting** law. Such a situation not only contradicts the traditional views on the system of law but also involves lawyers in ideological and political issues (disputes on sovereignty). The multicentricity of law and its interpretation is nowadays not only a mere fact but also a simple necessity, due to international co-operation and control (common market). Such a situation requires the implementation and facilitation of coexistence: resolving law collisions and conflicts and maintaining dialogues – all these without breaching the principle of sharing a common field by a number of centres. In this respect, the art of **interpretation assumes a new dimension and new objectives it has to strive for. It already encompasses not only (1) the explanation (clarification) and (2) co-shaping of the system of law (extraction of norms from the legal system within decision-making competences of the interpreting body, based on provisions that account for the system – *Rechtsfindung*) but also (3) the obligation to achieve the final aim that the interpretative procedures are supposed to serve (*effet utile*, directive of EU-friendly interpretation)**. The incorporation of the purpose of interpretation into its very concept – especially when the objective is to abide by certain principles considered crucial in the European legal environment shaped

[1]Principle, Definitions and Model Rules of European Private Law (DCFR), Study Group on European Civil Code and the Research Group on EC Private Law (Acquis Group) based in part on a revised version of the Principles of European Contract Law, ed. By Ch. Von Bar, E.C. and H. Schulte-Nölke and H. Beale, J. Herre, J. Huet, P. Schlechtriem, M. Stormne, S. Swann, P. Varul, A. Veneziano, F. Zoll.

by EU law – assumes diversified forms when confronted with EU regulations (*effet utile*, direct applicability of Community law, complete consolidation, ascribing the EU court status – connected with specific responsibilities – to national courts, etc.).

3.2

As is legitimately pointed out in writings (Łętowska & Wróbel, 2006), international courts, especially the ECJ, leave it to national courts and the doctrine for the interpretative care of how to adjust or reconcile some of their opinions with national systems. This signifies special interpretative obligations at the service of legal integration, which explicitly demonstrates the expectation of shifting the centre of gravity of court interpretation towards a *global approach*. Thus, the ECJ is justly reproached for burdening national courts with responsibilities that serve *par excellence* political goals: assuring European integration more strictly and more intensely than stipulated in the Treaty. This phenomenon may be exemplified (*Pupino* case[2]) by the recommendation of the ECJ to implement the principles of interpretation in the area belonging to Pillar III, taking into consideration the obligation of national courts to contribute effectively to the "achievement of the Union's objectives".

3.3

This type of *vis imperii* imperative of interpretation is, by its nature, an approach that should be considered favourable for the *global approach* in interpretation. However, a negative result of surmounting particularism this way is the **phenomenon of "split interpretation"** discussed amply in German literature on the subject (Heiderhoff, 2004). **In practice, the interpretation runs along different lines for provisions implementing EU law and domestic law regulations**. This discrepancy is generally forced and often accepted by national courts as something arbitrary. What is more, such a strategy entails a certain decomposition of the dogmatics of law, conceived as a tool helpful at legal analysis and systematisation. As a result, the (forcefully attained) globalisation of interpretation reveals at this point its culturally counterproductive facet (not to mention the political aspect of such an intervention).

3.4

The traditional hierarchical construction of the legal system has consolidated the views that identify disputes on superiority in interpretation with the struggles over the interpreters' place in the hierarchy. These views assume two shapes: either the competing centres claim that the superiority in interpretation offered by one of them

[2]ECJ C-105/03, 16.6.2005, Pupino case.

is decided on the basis of their place in formal hierarchy (the one who occupies a higher place is right) or any dispute concerning the quality of reasoning or persuasive superiority can be taken for an assault on the place in hierarchy occupied by the author of a given interpretation.

3.5

Deciding disputes regarding interpretation (which, or rather whose, interpretation should be considered "better") involves the use of either of the two argumentative strategies: *ratione imperii* or *imperio rationis*. The former is the case when – within *law in action* – the position and competence of an organ applying law make the interpretation given by this body legally binding, even if it is not very weighty in arguments. As a result, the court interpretation of law (indeed any interpretation made in the process of applying the law) is capable of winning the confrontation with competitive readings, even if the court justifies its decision carelessly or incorrectly (e.g. from the point of view of the principles of logic, jurisprudence, etc.). This type of danger is discernible in the context of the already signalled arrogance of international and national courts of the highest instance. On the other hand, the interpretation given within *law in books* can function and defend itself exclusively by the force of argumentation.

3.6

Courts, especially international ones (the ECtHR or the ECJ, but also domestic courts, particularly in the highest instances), are sometimes legitimately criticised for their arrogance (Herzog & Gerken, 2008). Aware that they are able (as has been pointed out) to impose their own interpretation upon others as the binding settlement of a dispute concerning the contents of law, they do not pay much attention to the persuasive justification of their decisions. The truth is that they know their interpretation is going to "win" on the competing interpretation market and that it is going to define the contents of the law. Such a situation may be regrettable, but it remains a fact that the scrupulosity of international and highest instance courts (whose decisions do not undergo review from further instances) in their justification of decisions does not match the maxim "it is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".[3] This shortage of persuasive reasoning is even more distressing if we take into account that the development of human rights, citizen capacitation and participatory and deliberative democracy sets higher requirements to the legitimisation of law and its interpretation likewise. The

[3]Rex v. Sussex Justices, 9.11.1923 KBR 1924, vol. I, s.259: famous statement of Lord Heward.

legitimisation should take place with the view not only to a higher court instance but also to society (media, public opinion). The interpretation of law provided in court decisions (especially by international and highest instance courts) is simply systematically tainted with the persuasive deficit (defective or superficial understanding of national law by an international court, argumentative shortcomings; insincerity or incompleteness of argumentation, and futile repudiation of national court argumentation).

3.6.1

Such instances of interpretative arrogance concerning international courts' overuse of *ratione imperii* argumentation are transparent in the imposition of their own interpretation. The insufficiently thorough approach of the ECJ or ECtHR towards particular decisions and interpretations (of national courts), even if the shortcoming cannot be justified with the need to protect global values, is another form of the same phenomenon. Such insufficient care may derive sometimes from the unfamiliarity of the matter on the part of the international court evaluating a particular (national) interpretation in the course of proceedings. The *Kühne & Heitz*[4] case may serve as a well-known example of the ECJ practice, where the Court formulated binding grounds for the review of administrative proceedings in cases where a binding decision was based on an interpretation of law given by a national administrative court later questioned by the ECJ. In the light of the principle of national procedural autonomy (confirmed again by the ECJ after the heavily criticised *Kühne & Heitz* ruling),[5] a shift in the court interpretation of law (on the part of the ECJ) does not provide sufficient grounds to review administrative decisions. Hence, the stance of the ECJ has been considered an instance of functional redundancy of the *vis imperii* principle (Łętowska & Wróbel, 2005).

3.6.2

In the context of the ECtHR's practice, there is a sense of nonchalance in the Court's treatment of its national partners in the superficial and irrelevant, from the point of view of the case pending before the ECtHR, account of the national litigation stages in the verdicts of the Court. Descriptions of "as to the facts" parts, depicting the progress of the case on the domestic forum, are ordered according to the chronology of particular decisions, instead of the arrangement of particular proceedings where they were reached. This prosaic organisation does not provide us with the knowledge of the purpose of the verdicts served. As a result, blatant mistakes may

[4]C-453/00, Kühne & Heitz.

[5]C-234/04, Kapferer.

occur, e.g. concerning insufficient control of the principle of subsidiarity.[6] A better understanding on the part of the ECtHR of what national courts meant at earlier stages of the litigation in a given case (juristically and axiologically) could assure a better selection of pilot cases.[7] The incorrect selection of these (treating the non-identical and untypical as identical and typical) ensues not only the discontinuation of dialogue but also a de-legitimisation of the procedure of a pilot case. In this way, the possibility of pilot cases serving as factors rationalising access to the ECtHR is turned to nothing.

3.7

The multiplicity of interpretation centres, as a phenomenon that inevitably entails the diversity of legal opinion, leads to collisions in the context of interpretation. These need to be resolved. Instead of arguing who is "exclusively right" and who has a monopoly and "sovereignty to judge", which only leads to questioning the competences of competitive centres in this respect, we should rather concentrate on how to enable a possibly collision-free coexistence of several centres of interpretation. Multicentricity (in Europe stemming from the existence of the ECtHR and the ECJ, as well as national systems) calls for the acceptance of the very thought that various centres may fill in a binding way the same legal space (in the field of interpretation and application). **In general, the traditional legal way of thinking only reluctantly accepts the very thought of multicentricity and reacts to it with a dose of distrust (politicians, ideologists, judges in courts of higher instances,**

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[6]Such was the *Zwierzyński* case*, 19.9.2001*, where the superficial attitude to the national procedure and court verdicts resulted in an erroneous decision with very costly consequences (for Poland). Here the ECtHR acknowledged the need to return the debatable ownership (breach of the right of property), in a situation where the ultimate debate over property was still pending, to a person who turned out not to be the rightful owner. The error concerning the existence of the subsidiarity premise could have been detected if national procedures had been related more carefully. Obviously, the task of national authorities is to signal such mistakes. There still remains the problem whether or not the ECtHR is obliged *ex officio* to take more care in the name of the reliability of its own proceedings.

[7]The *Broniowski* case concerned a settlement as to financial compensation with a person in relation to whom the ECtHR had acknowledged the need to pay compensation for immovable property left abroad (the former USSR) after the displacement to Poland. As regards such people, there was an obligation to compensate them for their loss of assets. The ECtHR clearly invoked particular provisions of Polish Civil Code in this case (evidently without the complete knowledge of their national interpretation). The case was acknowledged as a pilot case: according to its result – so to say automatically – other cases should be decided. Unfortunately, the selection of the case as a pilot one was not correct: repatriates who had not received any compensation by this point were treated equally with those who had already received certain damages and disposed of them subsequently. The unconvincing choice of the pilot case also originated from factual doubts concerning the question of whether the applicant had been the rightful owner of the lost assets at the time of repatriation and the value of the loss.

convinced of the unrivalled status of these courts). This may be exemplified by the difficulties connected with the emergence of several national centres aspiring to the leading "decision-making position" concerning the control and interpretation of law in areas previously "captured". Struggles for "exclusiveness" and the need to take into account prior decisions between constitutional and common or administrative courts can be spotted at a national level, where they originate. (As far as Poland is concerned, rich literature could provide examples of this type of situation – cf. Hauser & Trzciński, 2008.) Similarly, there are (although not always openly demonstrated) interpretative conflicts along the lines: constitutional courts vs. ECJ, national common courts vs. ECtHR (numerous examples to be found in national reports in Keller & Stone Sweet, 2008), as well as between the ECJ and ECtHR (concerning interpretations related to human rights – Canor, 2000), just to mention the most fierce conflict venues. Thus, it is true that the proliferation of courts and tribunals means more frequent interactions between them, "and this opens up the field for potential misunderstandings, if not conflict" (Koncewicz, 2007). The possibility of settling such conflicts can emerge only within a more universalised approach to legal interpretation, taking into consideration the need to carry out the collision-resolving function of this interpretation and the obligation to include the purposeful element it is supposed to serve (peaceful coexistence of many centres of interpretation).

3.8

Harmonisation of Community law, if too quick, not internalised by participants of legal relationships, legislatively or interpretatively extorted, or incapacitating national law, does indeed favour the globalisation of law itself and its interpretation, but it also bears many disturbing features – from the point of view of the preservation of cohesion in this globalised interpretation. This concerns, for example, the tendencies observable in consumer law to replace directives that draw from the idea of minimal harmonisation with complete consolidation (full harmonisation) in the field. If, at the same time, in the text of these acts numerous general clauses and blanket concepts are left, the room for interpretation made by national courts is immense. It is doubtful whether the unity of European law may be preserved in such conditions. It seems that, in such cases, we are having to exorcising the devil with the aid of Beelzebub: the devil of the particularism traced in the implementation of a minimal directive by the national legislator comes back as the Beelzebub of particularism in court interpretation, within the discretion endowed to domestic courts by the legislator (general clauses, vague concepts). The fact that national courts are systematically Community courts of the first instance, and that they are obliged to give pro-European interpretations (ensuring the cohesion of the interpretative effect on a global scale), does not yet mean that these national courts are willing and, primarily, capable of complying with this obligation. For another thing, the obligation does not mean that one should expect and demand more of them (interpretation of general clauses within an act of full harmonisation) than of the

legislator implementing minimal directives. The achievement of a successful *global approach* in court interpretation seems – at least in the aforementioned area – unlikely, especially in the current situation when EU enlargement has incorporated into the Community system countries where the principles of interpretation set by European law have not had enough time to become internalised in the consciousness of domestic judges.

4 Interpretative Dialogue (the Difficulties)

4.1

The co-shaping of legal relationships by the interpretation of national and international courts (ECtHR and ECJ) has to lead to a situation in which the courts "interfere with one another" and to collisions in their interpretations. The postulated dialogue and respect for interpretations of "others", necessary to surmount inevitable tensions (Koncewicz, 2007), entail an awareness that within the community of judges, it should be taken into consideration that some other court might be a more suitable venue for deciding a given question.[8] This leads to a need for legal interpretation capable of soothing conflicts instead of stirring them, as well as a ban on *per non est* treatment of other courts' interpretation, and the need to spot and acknowledge the partners' specificity of functioning on the "market of interpretations". The systems of the European Convention on Human Rights and EU law account for the emergence of a **typical area of co-management in interpretation**, shared by the ECtHR and the ECJ, as well as national courts. Any tacit assumption of the existence of a dialogue in this respect is excessively optimistic. This dialogue currently resembles a kind of monologue multiplicity. Among the constitutive elements of a dialogue, we can enumerate the presentation of one's views to the partner in dialogue, specifying one's statement, voicing objections towards the partner's stance, verifying one's own statement following the exchange of opinions. A dialogue, in other words, requires conscious interaction with the actions of the partner. In practice, we have to do with mere presentations of one's own statement and an expectation – on the part of international courts – that national centres are going to accept their stance. National courts, likewise, are not very conscious of the need for dialogue and the inevitability to verify previous decision-making routines shaped in the period when they enjoyed an interpretative monopoly. There might be numerous examples of references to the practice of other interpretative centres in Polish court verdicts, yet in many cases these references are sheer ornaments. Situations where courts do indeed make a mutual use of their interpretations, considering them, acknowledging relevant arguments, or (less frequently) using them as constructive matter for own argumentation, are much rarer.

[8] Statement of Justice Scalia, Hartford Fire Ins. Co.v. California, 1993.

4.2 Interpretative dialogue – the ECtHR

4.2.1 General principle

The control of breaches of human rights exercised in Strasbourg encompasses the examination of violations of human rights and liberties, and norms grasped subjectively as such. ECtHR verdicts themselves do not control national systems of law *in abstracto*, nor do they in principle verify national decisions. Thus, the results of an ECtHR verdict stating a breach of human rights by domestic authorities boil down directly to the obligation, on the part of the country whose authorities are responsible, to fix the existing condition of human rights protection individually in the first place, in the particular case. There is also an expectation of improvement concerning the standards of human rights observance in general. ECtHR judgements themselves disqualify neither the national law nor the instances of its application (judgements), even though these judgements are the sources of a breach, and the interpretation made within them is deemed as violating the binding standards. Thus, ECtHR verdicts concern – primarily – the evaluation of whether any of the human rights safeguarded by the European Convention of Human Rights has been violated. Secondly, (facultative) financial just satisfaction for the person affected by the breach may also be a direct consequence of the violation. Possible legal amendments undertaken by the involved state in its internal system (legal system, operation of state organs or courts) with the view to preventing future breaches, just as procedural restorative actions *in concreto* (e.g. reopening of court proceedings) as a consequence of the verdict, fall outside of the scope of the decision. Bearing in mind the obligation to loyally comply with international duties, the need to take real restorative measures (both in a preventive and in an individual sense) may be qualified as the obligation on the part of national courts to maintain an honest dialogue with international courts. This commitment is a constitutional duty deriving from the responsibility to meet international obligations acquired by the state (concerning human rights observation). On the other hand, it remains an internal matter of particular countries (their courts, tribunals and legislative) to draw conclusions from an ECtHR decision and reconsider the scope, adequacy, necessity and proportionality of the undertaken measures (concerning amendments of legal provisions, including the need to take a critical glimpse at the existing interpretation). It is the interpretation of domestic law – the search for methods and implements favouring additionally the *global approach* to the protection of human rights (here determined by the interpretation of the standard of their protection given in Strasbourg) – that becomes a tool for dialogue. This approach allows settlements to the conflict between particular interpretations of law and the global line of the ECtHR (Garlicki, 2008), to which the last word belongs as far as the standards of human rights protection are concerned. From this perspective, the recurrent stance, for example, of the Polish Supreme Court declining to take reopening measures (in spite of its interpretative possibilities – Łętowska, 2006) after a judgement of the European Court of Human Rights, concerning a breach of the Convention by a decision of the Supreme Court, must raise criticism. Then, it was a correct observation (Krzyżanowska-Mierzewska,

2008, p. 581; Łętowska, 2005) that the Polish Supreme Court is characterised by a general unwillingness to conduct interpretative dialogue with other participants of multicentre interpretation, which is manifest also in the domestic relations of the Court (e.g. the relationship with the Constitutional Tribunal). An alternative stance, approving of the very awareness of the multicentricity of interpretation centres, as well as the need to soothe tensions detectable among these centres by means of dialogue, is adhered to in Poland by other courts of high instances: the Supreme Administrative Court (Hauser & Trzciński, 2008; Biernat & Wróbel, 2007) and the Constitutional Tribunal. The stance of the latter[9] is clearly friendly in relation to multicentre interpretation: "the observation of Poland's international commitments and care for unity of the legal system (shaped both by domestic law and – within the constitutionally accepted range – international agreements and supranational acts) require that there should be no discrepancies within the law (statutory provisions, legal principles and standards shaped by various centres deciding on the binding character of provisions, bodies applying and interpreting law)." . . . "It is immensely important to determine the genuinely inevitable range of influence of ECtHR decisions on the domestic legal system, in order to take proper precautions in the name of preventing future violations of human rights. This is about concluding on the range of situations to which the ECtHR decision refers (factual and legal situations), so that amendments to domestic law should concern the scope of inevitable and adequate changes."

4.2.2

The premises of dialogue, the performance of which is a task for the ECtHR itself, are not of less significance. As compared with earlier periods, the current decisions of the ECtHR are characterised by more pronounced activism and a decrease in discretion left by the Court to the legislator and national courts. The competence of the ECtHR is special and subsidiary in addition: it refers only to violations of subjective rights and only those breaches that refer to human rights. Moreover, the Court is competent only after the national remedies have been exhausted. The poorer the effectiveness of human rights protection at a domestic level, the larger the inflow of cases to Strasbourg, paralysing the efficiency of this international court. Thus, the ECtHR is genuinely interested in dialogue with national centres, so that the latter become more sensitive in terms of interpretation to the problems of human rights protection. Only then will the inflow of cases diminish in Strasbourg. The problem is that a sense of unceremonious treatment of the interpretative endeavours of national centres by the ECtHR stems from insufficient knowledge by the Court itself concerning the specifics of certain particular, though systematically relevant, phenomena.

[9] Polish Constitutional Tribunal, dated 18.10.2005, P 8/04, OTK-A No. 9/2004, item 92.

4.2.3 "Revindication" cases connected with political transformations in new countries – as an example of a local phenomenon of systematic importance

Such cases are a problem for the ECtHR, which makes effective dialogue with national centres of interpretation difficult. The cases are difficult to grasp for Western lawyers, who have not had a chance to ever encounter similar phenomena. The problem is about situations where currently, after many years – especially when it comes to the restoration of ownership – intentions to remedy historical changes emerge, for example concerning the confiscation of assets, nationalisation or other forms of ownership collectivisation that took place after the Second World War, in the course of installing the socialist regime. Historical processes (nationalisation, agrarian reform, effects of border changes, consequences of migrations from East to West, of the displacement of population carried out by foreign armies) and infringements of law, even of the law binding at the time, are treated in the same way, whereas in national judicial decisions these questions were interpreted differently. Over a number of years, in many categories of revindication cases, national courts (e.g. the Supreme Court in Poland) have elaborated a stance reflecting a compromise between contradictory axiological postulates. A better understanding on the part of ECtHR of such interpretative endeavours could only contribute to a better grasp of revindication problems. For national courts, the dialogue could provide an opportunity to become more sensitive to the ECtHR *acquis* and to saturate their own interpretation with the spirit of responsiveness to human rights breaches. The axiologisation of national courts in this respect implies furnishing them with a beneficial stimulus for interpretative search in the spirit of *global approach* in this area.

4.3 Interpretative dialogue – the ECJ

Accession to the EU makes the Community legal system the state's "own" system. Thus, on the territory of a member state both the national legal system and all *acquis communautaire* are officially binding. The interpretation of Community law is reserved for EU institutions, but when it comes to courts deciding questions encompassed by the *acquis*, the situation is a little different. These are national courts themselves that become Community institutions, gaining a "Janus' appearance". Hence, we encounter a situation where – within the law **binding in a member state, including EU law** – law enactment is divided as to competence into national and EU law, the division itself developing dynamically towards an increase in competences of the Community centre. Interpretation (extraction of law, *Rechtsfindung*) by national centres themselves is excluded whenever it concerns EU law. Their (national courts') possible doubts in this respect may be dispelled not by their own actions but by the ECJ, set aside the obligation to refer preliminary questions reserved by the ECJ. Owing to ECJ case law, an exquisite system of rules resolving collisions of law, leading to the principle of priority of EU law application (and the monopoly of EU institutions to interpret this law), has been developed.

4.4

The multicentre system requires **friendly interpretation** working "in both directions". Thus, national courts and tribunals ought to interpret domestic law in such a way as to make it (because of *effet utile*) abide not only by the letter of EU law but also by its spirit. This question is relatively well elaborated when it comes to EU law indications (situations, norms and evaluation patterns) embodied in the decisions of the ECJ. However, we have to consider what it means that **interpretation should be mutually friendly**. If this signifies a recommendation for the ECJ to decide cases moderately (as to the matter itself and adopted rhetoric), then the postulate is undoubtedly correct (especially pragmatically). Nevertheless, its implementation in the body of ECJ decisions – the Court is not too sensitive to the dialogue in practice – is more from wishful thinking than a description of the state of affairs. Still, one should stress as a postulate **the need to acknowledge the "mutuality of friendly interpretation", so that its result – regardless of what body gives the interpretation and what act is interpreted – can enable not just delimitation, but also "co-operation" between both systems (where a *quoad usum* division of competences is at play)**. This delimitation allows for separation, though at the cost of elimination, which will always take place at the expense of national interpretation under the terms of the principle of Community law priority.

5 Interpretative Dialogue – The *Global Approach* to Interpretation Methods

5.1 The mechanism for the emergence of interpretative doubts can be depicted by the triad: to see–want–be able to

The first stage of the exposure of "interpretative deficit" is axiological sensitivity. An interpreter in a particular situation begins to sense the urge for an interpretative endeavour, unable to accept axiologically the existing interpretation. At this task a kind of sensitivity is needed, enabling the acknowledgement that the "interpretative deficit" is genuinely out there, as the interpretation generally made thus far is simply "improper". The second stage is the desire to alter the interpretative routine. Finally (third stage), the interpreter has to be equipped with an ability to make an interpretative proposal defensible – from a technical point of view.

5.2

The emergence of "interpretative deficit" depends on the interpreter's sensitivity, his understanding of axiological shifts in evaluation, enabling him to spot that a seemingly correct interpretation of law accepted so far leads to decisions that can no longer be axiologically upheld. The emergence, as an interpretative factor, of

the need to provide interpretation complying with the Constitution entails the obligation to take constitutional axiology into account. The entrance to the system of the Council of Europe involving the axiology inspired by human rights, as well as becoming a part of the EU law system, causes far-reaching changes in the system of values, which gives a stimulus for the rise of interpretative doubts. This is particularly apparent in "new" democracies. More attention to the protection of various types of privacy, the disapproval of different (even statutory) limitations to the rights of individuals (even if foreigners), more emphasis on the free circulation of information, interpretative protection of diverse forms of economic freedom, interpretation of the classical institutions of contract law in the spirit of a preference for economic freedom and consumer law, interpretation-related consequences of provisions "de-reifying" animals – all these are examples of the emergence of a new type of sensitivity, which – once spotted and realised – may become an impulse for the formulation of interpretative doubt. The activation of this type of interpretative readiness depends on the general condition of legal culture and civic sensitivity among judges. It is not easy for the interpreters themselves – especially in the countries of Central and Eastern Europe. Such lawyers were educated in times and legal systems connected with a different axiology, taught to cherish every provision excessively, even if the provision was doubtful, e.g. constitutionally or in terms of its compatibility with human rights standards.

5.3

The first condition of interpretation, axiological discomfort, remains under the pronounced influence of the *global approach*, stemming from the consequences of human rights axiology (ECtHR impact) and ECJ decisions. The following observation (Keller & Stone Sweet, 2008, 13) concerning the influence of the ECtHR seems correct: "the more the Court undertakes to interpret the Convention in a progressive, expansive, and open-ended way, the more likely it is that right protection in one or several States will routinely fall below Convention standards, creating pressure for national adaptation. In this situation, the Court arguably plays the role of a European Constitution Court." This impact concerns mainly the sphere of axiology; on its basis, national courts have to develop their interpretative creativity (because of the characteristic competence of the ECtHR and the indirect effect of the Court's decisions on national lines of interpretation). The path from particularism towards the *global approach*, via an interpretative dialogue of domestic centres and the ECtHR, leads through "axiological radiance", the gradual generation in national centres of the axiological need to undertake interpretative actions in favour of the axiology of human rights as a basis allowing for the global aspect. The case law of the Polish Constitutional Tribunal[10] provides numerous examples of this influence of ECtHR decisions.

[10]The case quoted above P 8/04, where the Tribunal stated the unconstitutionality of the provision excluding further appeal against a decision of the insolvency court which relieved the trustee in insolvency of his duties for having committed actions punishable by law. In the justification of its

5.4

The ECJ interpretation has an impact on the interpretation of law given by national centres not only by "arousing the need for interpretation". Primarily, the ECJ axiology itself concentrates around a broader range of affairs than human rights. The ECJ stresses, in the first place, the interpretative need to act in favour of various aspects of economic freedom. Besides, the influence of the ECJ is much more imperative and direct in character than the impact of the ECtHR on national centres of interpretation. Turning domestic courts into Community courts of the first instance imposes on them certain sanctioned obligations: to refer preliminary questions and give pro-European interpretations.[11] Additionally, this interpretation is to be made in such a way as to assure the achievement of *effet utile*. This ensures including the purpose of interpretation as an obligatory element of the *Rechtsfindung.* As a result, while the actions of the ECtHR affect only the axiological element of interpretation, the actions of the ECJ influence its implements and method more directly. The ECJ functions not only in the sphere "know-want" (interpretation axiology) but also within the "know-how" (of interpretation).

5.5 Interpretation methods – from particularism to a global approach

The multicentricity of the system of law and manifold centres of its interpretation, the globalisation of commerce and its impact on law, necessitate a revision of certain well-enrooted views on the methodology of interpretation. The changes lead to more universalisation of its character.

5.5.1

The basic change, deriving from the inclusion of the purpose of interpretation into its process (obligation to achieve *effet utile* in the area of EU law), places purposive interpretation in the first place – before other potentially competitive methods and ways of reasoning. This refers not only to the part of law subjected to the EU system but also to national law, which – even if potentially – endangers the full achievement of EU law effects, with which domestic provisions may compete. This makes purposive interpretation – grasped as

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decision, the Constitutional Tribunal analysed thoroughly the ECtHR verdict, dated 15.11.2001, *Werner versus Poland*, directly pointing to it as a source of axiological inspiration.

[11] The stance of the Polish Constitutional Tribunal (23.1.2003, K2/02, OTK-A No. 1/2003, item 4): "organs applying law in EU member states are expected to give an interpretation of national law complying with Community law (Art. 10 EC Treaty – the principle of loyal co-operation). Even these Community norms that are not directly applicable are a point of reference, an obligatory criterion of the achievement of concordant interpretation. In addition, Community law should be implemented as a pattern for the interpretation of domestic law."

above – become the basic interpretative tool. It is still limited (in principle) to matters regulated within Pillar I of EU law, although one should be aware of the attempts (as the *Pupino* case mentioned above indicates) to expand this interpretative principle. Incorporating the purpose – in addition on a high level of abstraction – into the process of interpretation obviously favours the generalisation of its results.

5.5.2 Decreasing the significance of textualism (interpretation particular – since bound to the language of the interpreted text)

The multicentricity of law and its interpretation is connected with the loss by local languages of the communicative monopoly. Consequently, the significance of interpretation analysing the linguistic meaning of law is on the decrease.

5.5.3 Broadened scope of systematic interpretation

Systematic interpretation, in the context of multicentricity and the growing globalisation of exchange, has changed the object (matter) of its operations. The system implied in the generic name of this interpretation type is broader and more complex at the same time. The systematic interpretation on the conditions of the Kelsenian vision of the system of law, as a pyramid with hierarchical connections, could effectively use simple reasoning, leading to the elimination of elements colliding within the system (*lex superior derogat legi inferiori, lex posteriori derogat legi priori, lex specialis derogat legi generali*). The multicentricity of law and the multiplicity of legal centres make references to these simple rules ordering the system more difficult to begin with. Secondly, resolving collisions through systematic reasoning is not going to eliminate the collisions themselves (as the implementation of traditional rules of collision does). Instead, it leads to proportionality in the satisfaction of the colliding interests, which entails a reduction in the level of this satisfaction. Hence, the systematic interpretation assumes a new quality, which may be considered as proof of the *global approach* enactment.

5.5.4 Observing the multicentricity of interpretation sources is tantamount to equipping the procedure of law interpretation itself in a more global form

As has been already mentioned, the principle of multicentricity requires that *per non est* type of treatment of competitive centres' competences should be avoided and that the results of their interpretative *Rechtsfindung* should be observed. This implies the need for convergent interpretation, friendly towards other courts, one that would not eliminate the results achieved by each centre within its legitimate competences. A proper understanding of the situation is illustrated by a statement of the Polish Constitutional Tribunal: "An interpretation of Article 29 Para. 1 of the Act on VAT, based on the assumption of the lack of universality of the obligation to register in the area of goods and services circulation . . . does not ensure harmonious functioning of Polish and Community law and should be considered in defiance

of the principle of loyal co-operation. As a result, such an interpretation must be rejected."[12] An approach where the Constitutional Tribunal used the reasoning of another interpretative centre (ECJ) as a constructive matter for its own interpretation reaches even further.[13] The type of evaluation of interpretation results that leads to the deprivation of the meaning of another centre's interpretation should be considered methodologically incorrect. (Because of the above, any interpretation based on argumentation stemming from national law that could result in leaving ECtHR rulings without legal consequences on the domestic field should be questioned as excessively particular – including the Polish Supreme Court's interpretation.)

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[12] Decision of the CT, dated 21.9.2004, K 34/03, OTK-A No. 8/2004, item 84. Similarly the verdicts of the CT: dated 31.5.2004, K 15/04, OTK-A No. 5/2004, item 47, CT, dated 27.4.2005, P 1/05, OTK-A No. 4/2005, item 42, CT, dated 19.12.2006, P 37/05, OTK No. 11/2006, item 176.

[13] In a decision dated 21.4.2004, K 33/03, OTK-A No. 4/2004, item 31, the Tribunal controlled the constitutionality of the Act introducing the obligation to use biofuel in Poland. The Act was contradictory to the Community "principle of the country of origin" and the ban on the introduction of measures having effect equivalent to restriction of the free movement of goods. However, this fact could not become the cause of **constitutional** disqualification of the Act. The conclusion that the statutory regulation would become a means of discrimination of goods imported to Poland (as it impedes the circulation of "raw" fuel) and the fact that, because of Community law interpretation, the Act could not be applied to foreign goods (raw fuel) became a constructive premise for the Tribunal for further analysis of the constitutionality of the Act. On the other hand, if we assume that the Act on Biofuel could not (because of the principles of Community law and the obligation, on the part of national authorities, to comply with these principles) apply to foreign producers (sellers) – the problem of *à rebours* discrimination emerges, meaning discrimination affecting only Polish producers (sellers) of fuel. In this case, a significant deterioration in the situation of Polish producers (who, as opposed to foreign entities, would have to "enrich" the fuel with biocomponents, exposing themselves to additional costs, and become involved in a reporting system, endangered by potential sanctions) would take place. It was the realisation of this consequence that became the ultimate argument for the Constitutional Tribunal concerning a violation of economic freedom and, consequently, exceeding the limits of constitutionally acceptable freedom to regulate.

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Chapter 2
Discourse Ethics as a Basis of the Application of Law

Bartosz Wojciechowski

Abstract This chapter forms a theoretical, philosophical, and legal study concerning the issue of legal argumentation and judicial discretion. The issue is discussed in relation to all of the traditionally identified stages of the application of law. I discuss the foundational relation between discourse ethics, the application of law, and democracy. There are two main theses that form the starting point for the analyses presented in this chapter. First, that legal reasoning is inherently discursive and, second, that legal reasoning should be communicatively rational. The statement that legal thinking has a discursive character seems irrefutable. The aim of this chapter is to present the application of law as a process of balancing arguments, meaning a movement from a syllogistic model to an argumentative one, in which – according to the author – abiding by discourse ethics plays a vital role. It is a model which corresponds with liberal and deliberative judicial practice. Morally, it represents the best interpretation of pluralistic and multicultural society. This model is then based on the assumption that finding the meaning of a juridical text is a result of complex discourse, in which it is significant to take into consideration all cultural dimensions and which cannot be conducted without the active role of judges.

1 Introduction

Globalization processes have caused a cosmopolitan, or perhaps still multicultural, society to create a material basis of the new ethics, within which exists a need to justify our behavior not only within a national state but also in front of the whole world. Such new ethics have not only universalistic aspirations, but most of all extra-national and trans- and intercultural ones; however, its main function is to

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serve the interests of all the inhabitants of the world (Kessler, 2000; Apel, 2007, p. 55 et seq.). In my view the communication change made all over the world does indeed attract people's attention to the ethical globality problem; therefore, I would like to emphasize the growing role of the ethical and social concepts that derive from the Frankfurt school, which possess both generality and globality at the same time. In this context, Jürgen Habermas' words are symptomatic: "Universalistic position does not intend to deny pluralism as well as the total non-compatibility of characteristic, historical forms (*historische Ausprägungen*) of «civilized humanity», but the variety of life *limits it to cultural substances* and it proclaims that each culture – if it is capable of achieving a certain degree of «awakening» and «sublimation», must share definite *formal properties of the modern understanding of the world*" (Habermas, 1981, p. 316; Habermas, 2008).

2 General Assumption of Discourse Ethics

Discourse ethics are such ethics that are aimed at duties regulating human coexistence. They refer to the mutual limitation of freedom as well as indicate interests and goals which ought to be assigned a scope and manner of their mutually accepted realizations. Hence, discourse ethics lead to such a way of justifying norms and obligations which – in case of a conflict among the intra-particular moral, religious, or view-of-the-world notions – can constitute an elementary, common ground for an acceptable agreement. One of the most crucial elements contained within discourse ethics is the thesis that the conditions that enable the argumentative process possess themselves an ethical-normative character, thus providing a foundation for the procedure of ethics justification. It allows the combination of serious universal claims with it as well as perceiving it as a project of universal ethics.

The idea of the ultimate norm justification is a fundamental element in the philosophy of transcendental pragmatics. It is impossible here to present its assumptions and the criticism aimed toward it; hence, I will confine myself to indicating its basic messages. The justification of "universal-pragmatic" discourse rules depends on showing that the contract of definite rules is the condition that enables the interpersonal communication, which – according to Apel – obtains a status of the ultimate justification (Apel, 1973, p. 222). Human nature indicates that denying this idea, and at the same time denying the process of argumentation, would lead to schizophrenia and self-destruction (Apel, 1973, p. 414). Habermas, for whom the contract of certain rules is the basis for enabling making definite speech acts, has a similar opinion. Resigning from these speech acts, in turn, is not possible without desisting behavioral forms seen as typically human (Habermas, 1984b, p. 353). According to Apel, the concept of transcendental argument is defined as follows: "This who argues, *implicite* recognizes all possible claims of all participants of the communication community that can be justified by rational arguments ... and also commits oneself to justify all own claims towards others through presenting arguments" (Apel, 1973, p. 424). Discourse rules therefore have a two-level character, between the

formal-procedural final and the consensual-communicative justification of substantial norms. The first-level norms are discourse rules relating to those recognized in the freedom of formal-procedural norms, which are included *implicite* in ethics; the second-level norms, however, would be those that are still distinguished from material (thus relating to a concrete situation) norms given only by practical discourses (Apel, 1997, p. 122).

The assumption that each participant of the discourse has the possibility of each argument means that the interpretation of individual preferences cannot be arbitrally disconnected. The heart of the problem lies in the fact whether there exist reasons supporting ruling out certain preferences or concepts of good from being affected for the choice of justification rules and which reasons could not be rejected by any participant of the discourse (Baynes, 1990). Such a depiction of the civil justification of political rules corresponds with the rudimentary idea of the discourse ethics, which assumes that a norm is justified only when all the participants of the actual discourse are unanimous and where the power of argument is above the argument of power (Habermas, 1986). Furthermore, dealing with the discourse obliges one to observe definite validity claims (understanding, veracity, sincerity, and correctness of what one says). Naturally, the discourse that concerns the laws will be subject to certain limitations stemming exactly from the legal order (Alexy, 1978, p. 62 et seq.). The limitations resulting from democracy, which paradoxically are also subjected to discourse justification, appear to be the most important.

It is therefore important to distinguish various types of discourses according to assumed limitations, which allows us to state that legal discourse differs from a moral discourse, just as both of them differ in their limitations from political discourse (Habermas, 1989, p. 147 et seq.; Alexy, 1978, p. 62 et seq; Neumann, 2008). As a consequence, the model of discourse ethics does not assume and it does not require that the result of each actual discourse be a unanimous agreement. Only within the actual discourse itself can the conditions required for an individual autonomy be explained and justified. Kenneth Baynes ascertains quite accurately that on the basis of discourse ethics it is rather required that either the compromises that are being achieved or those that have been achieved be conscientiously thought over in the sense that the principles, rules, and arguments that order such discourses are open to public discussion and can be substantially agreed upon on the deeper level of justifications (Baynes, 1990). A deeper level of justification of laws and political ideas requires recognizing as well as considering the conditions and the presupposition of the action of the very justification. However, the debates taking place on that deeper level, but concerning the questions of basic constitutional laws or a preferred model of legal and political institutions, are a less relevant subject for an honest compromise or the majority rule, because it is only in the context of these laws and institutions that the rules of making decisions are regarded as honest. Baynes also notices that the changes concerning constitutional matter and basic legal institutions require a broader agreement bordering with unanimity, which, as we know, is practically impossible. In order to solve this problem the so-called stimulation discourses (Rawls, 1971) are not sufficient since they themselves do not guarantee the participation of all citizens in a public debate in the same way; hence, they cannot lead to

the unanimous agreement of all persons involved. Therefore it is postulated to apply the complementary theory of social institutions within which creating such institutions that are indispensable to expanding the possibilities and variety of the actual discourses in the political sphere on all levels will be considered, that is to say, on the level of civil society and on the political-national (constitutional) one as well as on the grounds of the contractual ideal of unconstrained moral-practical discourse understood as the ultimate justification for various forms of institutionalized debate (Baynes, 1990).

The author of *The Theory of Communicative Action* starts off with the conviction that the source of communication rationality is the unifying power of the discourse, without which any constraint establishes the consensus among the participants. By communication rationality then he understands speech based on arguments, thanks to which various discourse participants overcome their originally subjective convictions and thanks to the communally shared rationally justified assumptions they come to the unity of the objective world as well as the inter-subjectivity of their lifetime relationship (Habermas, 1981, p. 33). In such a way, the discourse participants (citizens) determine not only the veracity of the statements and the effectiveness of theological actions (theoretical discourse – instrumental-cognitive rationality), correctness of action norms (practical discourse – moral-practical rationality), or the clarity of statements (explication discourse) (Habermas, 1981, p. 410 et seq.) but also the correctness of legal norms (legal discourse). The law is understood as the expression of "the rational formation of inter-subjectively shared form of life" (Habermas, 1992, p. 192). In other words, the communication reason is confirmed within the binding force of the inter-subjective agreement and mutual recognition, but moreover it constitutes the universe of the common form of life. At the same time the communication action has an emancipated character, though confirming the aspiration toward overcoming the disagreement through argumentation and it expresses the systematic interest of the reason in the assurance material conditions which enable its fullest development. In this context, Habermas states that communication action "is renewed with each act of unconstrained understanding, with each moment of living together in solidarity, successful individualization and saving emancipation. (...) The communication reason acts in history as the soothing power" (Habermas, 1984b).

Everyone who accedes to the discourse assumes the ability of all its participants to take part in rational argumentation, renounce violence as a means of imposing certain acceptable arguments, and moreover agree to accept the conclusion that constitutes the effect of a well-argumented, unconstrained dialogue. In other words, rational argumentation determines the validity and effectiveness of a definite communication action; it's an element allowing the assessment of judgments and actions. As a consequence, rationality manifests itself when a participant of an argumentative process puts forward validity claims, he assumes the existence of rules and processes that are obligatory to acknowledging the court or the effectiveness of actions. Taking on discourse obliges one to obey some definite validity claims (intelligibility, truth, truthfulness, and correctness of what one says). In other words, this means intelligibility claim, the claim to truth (that the propositional

content of his speech act is true), the claim to truthfulness (a speaker communicates authentic statements in such a way that the listener could recognize his statement as reliable, in his speech act he expresses truthfully or authentically his opinions, emotions, wishes, etc.), the claim to normative rightness (the claim to correctness) – the statement is correct in such a meaning that the participants of communicative actions accept his statements in the accepted axiological system (Habermas, 1981, p. 410). The Frankfurt philosopher correctly points out that the mutual understanding and achieving the consensus in the situation (reality), in which lies, mystification and manipulation occur, is not possible. According to Habermas, rationality then has a procedural character and the measure of the rationality of the discourse participants is the ability to justify through, rational argumentation, their views in all circumstances. That means that the concept of communicative rationality belongs to the cognitive stream of ethics as the principles that have the universal, normative, and non-limited character constitute the assumption of each argumentative discourse and enable the consensual achievement of understanding. Habermas also assumes that the knowledge concerning the formal-pragmatic acts of speech is implicitly included in communicative actions and possesses the intercultural importance. The consequence of such a conviction is the fact that "the one that acts communicatively must assume certain pragmatic assumptions that have contractual character" (Habermas, 1992, p. 18). In other words, he must perform the idealization that depends on the necessity of realizing the above-mentioned validity claims.

In other words, the rules, principles, and norms, regarded in discourse as non-limited, serve the rational indication and agreements of social expectations, consequently reducing social tensions. It is important to emphasize that one considers looking for the universal rules of discourse in the basic criterion of the acceptance of the argumentation process with reference to law (especially the process of the application of law). Hence, the principle that "Each legally valid (in force) norm must meet this condition that the results and side effects, supposedly emerging from its common perception in order to satisfy each and every one's interest could be accepted without any compulsion by all who are interested" (Habermas, 1984a, p. 219). This principle has a universal character, but it is at odds with the transcendental-pragmatic ultimate justification of K.-0. Apel, which, according to Habermas, is not either possible or necessary. At the same time it constitutes the assumption of each practical discourse, thus being the non-limited rule (Alexy, 1978, p. 74). Habermas transfers the assumptions concerning discourse ethics into the considerations concerning the law, transmitting the principle of the discourse onto the surface of law, which in spite of the moral contents is neutral in relation to law and morality. "Only those action norms are valid to which all possibly affected persons could agree as participants in rational discourse" (Habermas, 1992, p. 138). In the consequence of such an application Habermas attempts to find the system of law that would meet the rule of the discourse, that is to say, in which it will be clear why private and public autonomies, human rights, and people's sovereignty overlap.

My goal is to present the judicial application of law from the viewpoint of the theory of discourse, which decisively binds the judge with the norms of valid law even in the circumstances of a discretionary decision that is left to him. I will

try to justify the thesis that the unconstrained recognition of a judge within the argumentative-interpretative (discursive) model will be substantially (or perhaps completely) limited to a relevant balance combining the rules and goals of law by a judge.

3 The Concept of the Discursive Model of the Judicial Application of Law

With reference to J. Habermas' views it was earlier stressed that the behavior of discourse participants in communicative actions ought to be coordinated through acts of reaching understanding and not by egocentric calculations of success. Decisions made in such a manner are rational and correct as they come into existence during an unconstrained discussion and ultimately they mirror the convictions of the participants. The conditions assumed within such a procedure allow balancing definite rights, grant the right to the confrontation of ones own (the judge's) validity claims with others. The paradigm of the application of law is the judicial application of law and within this the legal discourse is close to an ideal situation of the speech as it takes place among separate subjects of the dialogue and toward impartial, independent dispute (not engaged in the court) and the rationality and claims to the correctness constitute its basic features. It might then be stated that reality (the elements of the concrete state of things) depicted in such a way becomes subject to negotiation during a trial as the law is a form of social discourse in which all its participants are equal and limited solely by the procedural rules that are significant in a given case.

It is emphasized in philosophical-legal literature that the ideal discursive situation on the grounds of the law is characterized by certain separate properties. In legal action the discursive situation is not always identified with the communicative one, whose goal is to reach a common consensus. The consensus is often replaced by an authoritative legal settlement, i.e., the arbiter's decision who is acting as an impartial person in a dispute. The authoritative character of the settlement is primarily noticed in criminal proceedings. In a legal discursive situation, the consensus in the formal sense depends on the subjects' agreement concerning the idea of the law as well as on the submission to the arbiter's decision in accordance with this idea. In a democratic society a rational action within legal bounds, serving the common good (social consensus) through the legal safety assurance, the sense of justice and correctness is the limitation of freedom of decision. The non-rational decision can be otherwise referred to as arbitral, excessive, unneeded, or such that violates the basic laws of the individual. Irrational actions, like the decisions based on the freedom, contradict the principle of a law-abiding country. As it is rightfully stressed in the jurisdiction, the freedom to make decisions does not go hand in hand with the principle of the equality of the parties in the discourse, which is treated as a warranty of the respect of an individual and the principle of a democratic legal country, especially in civil proceedings and with certain limitations also in criminal proceedings. In the legal

discourse, the intra-sphere assumption of the gradation of discourse rates appearance is indispensable. This gradation is determined by the autonomy of procedures, i.e., the civil proceedings (liberal proceedings) as well as the criminal proceedings (non-liberal proceedings). (Król, 1992, p. 84)

A judge does not have full autonomy with his independence; rather, he is subordinate to the act as well as the culturally shaped standards of the evaluation of the rationality of the issued decision. On the basis of the highlighted features of an ideal judicial discourse situation we can say that they created "a discursive model of the judicial application of law" within which dispute resolution will be conducted on the basis of a dialogue and the acceptance of the arbitral judicial decision by the parties to the dispute. In the discursive judicial model of the application of law, the validity of the resolution will play a special role. It results from the fact that each contemporary continental system of law assumes a construction of the closure of argumentation, exactly in the shape of the institutions of the validity of the resolution. The force of law as the rule of this discourse has a conventional confirmation of the arbiter's decision that is based on the preceding dialogue that fulfills four communicative requirements. It makes a legally sanctioned method of the closing of pending discourse. The force of law as a form of the obligation that comes from the state is not only an order (the obligatory power of the individual's decision) and a ban (*res iudicata*) but also a procedural framework of the legal (judicial) situation of the discursive situation within the communication of the parties that is widely understood (Król, 1992, p. 84).

Also Ronald Dworkin notices that the theory of the judicial ruling is a discursive theory (Dworkin, 1977, p. 127 et seq.). Such a thesis is based on the assumption that a judge, while settling a given case, ought to first of all depend on the correctness of his own judgment in order to make any judgment, but he also may decide that it is his institutional responsibility to fall back on the judgment of others. Thanks to such a position the judge is certain that his resolution is not ultimately determined by his own views or political preferences. The morality of the oracular judge causes a situation in which the process of his hearing certain testimony by others can become convincing for him; however, his judgment technique does not rule out the issuing of a resolution contradicting popular morality. Also in such a situation the judge is not guided by his own convictions, but he makes a judgment, whose substance is the statement that the social morality is incoherent in a given scope.

In the theory of the legal argumentation it is emphasized that if one wishes to require the connections of the constitutional-legal argumentation processes and statutory requirements one ought to assume that jurisprudence has such criteria and regulations which allow distinguishing correct and incorrect resolutions of the applicant of law (Alexy, 1985, p. 498). Binding by law is understood here as binding by legal rules and legislative will. I want to point out that the legislative will (the rational employer) is treated as an element that identifies the correct judicial decision and which refers to the authority generally accepted in a certain culture. Such a stand introduces a significant anthropological dimension in the theory of discourse. The consequence of this binding is in fact the necessity of the application of definite principles and rules of argumentation (Alexy, 1978, p. 176).

The claim to correctness (*Richtigkeitsanspruch*) assumed in the legal discourse ought to limit judicial discretion through appealing to a wider perspective than principles or rules resulting only from the same applied norm, i.e., to the principles and rules formulated in a communication common to all mankind, that is, to the ethics of speech. Owing to this, the statements of the application of law are a special class of speech acts, which assume a philosophical claim to correctness realized precisely in the universal practical discourse through a relevant procedure (the procedural theory of discourse) (Alexy, 1978, p. 77, 1985, p. 50, 1995, p. 96). Naturally, as the legal discourse is the only example of this practical discourse, it is not possible to formulate the application of the universal law of the claim to correctness for a judicial trial in each case (Alexy, 1978, p. 263 et seq.). Alexy does not explain his concept of the legal discourse whether and why such a claim to correctness should be assumed in the legal practice. He only proves that the principles and forms of arguments of the legal discourse cannot always fulfill the same universal claim to correctness. The claim to correctness is not considered from the interior perspective of the practical analysis of justice, but it is deductively assumed.

The conflict of directives (principles) and goals that limit judicial discretion illustrates the need to understand the application of law as a model that depends on balancing relevant principles and goals. In balancing such principles and goals we may consider preferences, interests, good and values or rules. The balancing of the principles here consists of justified determination of the priority relation between the colliding principles, and in so doing I will refer to principles as such norms which are characterized by gradation. Such a collision of principles and goals results from the fact that various principles (goals) that can be applied in a given case cannot be simultaneously fulfilled in a complete way (Sieckmann, 1995, p. 46, Alexy, 1995, p. 46 et seq.). It is not then about the obvious collision of the norms (rules) of law, which means a situation in which a given case is regulated by more than one legal rule, and these rules designate to the recipients' mutually excluding ways of behavior. It is then not possible for the recipients to act according to the ruling of each of these rules. In order to eliminate such a collision we apply the "colliding principles." The understanding of the goal here refers to the policies distinguished by Dworkin. They set a goal which is to be achieved and which usually refers to the economic, political, or social aspect of life of a certain community. It is then about the understanding of the goal or principles as relatively significant. In my opinion, Dworkin's idea that the principle shows a certain direction of argumentation without extorting a certain decision is accurate. "There may be other principles or policies arguing in the other direction – a policy of securing title, for example, or a principle limiting punishment to what the legislature has stipulated. If so, our principle ('No man may profit from his own wrong') may not prevail, but that does not mean that it is not a principle of our legal system, because in the next case, when these contravening considerations are absent or less weighty, the principle may be decisive" (Dworkin, 1977, p. 26).

The judicial settlement does not then require in each case a consensual fulfillment of the universal resolution of the understanding assumed in the theory of the practical discourse, but it does require the conformity of the resolution with the

text, values, and goals of the norms that belong to the valid legal order. In other words, the rationality of the one who determines cases ought to be adequate to the valid legal rules, the accepted culture, and legal tradition as well as to the rationality understood in a transcendental way, and by the legislator's will. Such a conclusion is the consequence of accepting Alexy's thesis (*Sonderfallthese*) that says that the legal discourse is only the case of the practical case. Consequently it is the application of the rule that is to be the criterion for the discovery of the rational and correct resolution.

We can find such an assumption in the principle of the legal democratic country, from whose substance we learn that each resolution ought to find its own justification in the valid law. The theory of discourse assumes binding a judge with the constitution or an act, but at the same time it indicates that the normative text itself may not determine a complete decision. It is then necessary to appeal to "a code of practical reason" (Alexy, 1978, p. 234 et seq.) in order to properly justify the decision. Thanks to this, the decision will be limited not only by the principles or rules resulting straight from the applied law, but it also realizes the set of rules, which also cover the substance of the same law.

The principle of the legal democratic country with its requirement of the justification and the possibility of review of each decision that is based on relevant legal principles may be treated as a special codified case of the discourse ethics. As we can also see in the theory of the legal discourse, which preserves a positivist understanding of a legal norm, *binding law* is understood as a binding of values and goals that result from it. A judge is not allowed to make decisions which contradict the unanimous tone and goal of a given norm. If he was free to give such a judgment, especially within the range of balancing certain principles and goals that influence a choice of a given legal consequence in a deciding case, he ought to act, next to legal indications, according to the discursively realized rationality claim and other principle of the practical discourse. The process of the application of law and balancing between the given forms and principles of argument, the principles of the practical discourse, and the principles of law ought to take place on the basis of the boundaries which result from the binding of the argumentation with the formal principle of the legal country. A decision made in such a way ought to always be closest to the goals and values resulting from the applied legal text as well as the valid legal order, which undoubtedly guarantees its larger role in the argumentation.

4 Seeking the Priority Principle as a Subject of the Application of Law

The above-mentioned overall depiction of the problems of the limitation of the judge's discretional power will be especially useful in tackling the situation in which the unconstrained recognition of the judge in the process of the application of law within the boundaries designed by the valid law becomes limited to the balance between the colliding principles or legal goals (rights). For example, the collision

of legal rules is the collision of two principles (directives) of judicial sentencing, i.e., the principle of humanity as well as the directive of general prevention. The proof of the approval of the principle of humanity is the hierarchy and the sequence of penalties, adopted in ancient codes, according to which one gives the penalties according to the degree of their significance (non-insulating), that means the ones that do not cause direct sufferings – a financial penalty or the restriction of freedom. However, imprisonment ought to be applied through a decisive court as a last resort when other penalties would be insufficient.

On the other hand, the legislator pointed out the needs within shaping the legal awareness of the society, formulating the directive of the overall prevention as one of the most important directives of the judicial sentencing. This directive is applied so that the fact of the infliction of the punishment has an influence not only on the offender but also on other potential offenders, who, in the first place, ought to be deterred by this punishment and also shape socially accepted attitudes. Such an application of the criminal law and the imposition of appropriate punishments serves to convince the society that criminal law is not artificial but that everyone will bear deserved responsibility in case of inflicting it, which in turn ought to serve the observance of law.

The principles are understood here as a norm, which assume the approximative realization of a certain ideal. The principles are connected with the order of optimization and require the single matter to be settled on the basis of legal and real aspects (possibilities) in a most precise way (Alexy, 1985, p. 75). According to R. Alexy, the connection between the notion of principles and the notion of the optimization is a definitional, analytical connection emerging from the structure of principles. The requirement of the optimization comes from the fact that the principle ascertains an ideal obligation (Alexy, 1995, p. 214). In his interpretation of the principles as non-conclusion directives, also R. Dworkin points out the fact that if a given system of law is sufficiently developed and consists of a group of principles, rules, and constitutional practices as well as numerous precedents and acts, one can always assume the possibility of finding only one correct decision (the right answer) (Dworkin, 1977, p. 285). Moreover, Dworkin also states that a legal principle will be a reason which must be taken into account by a judge while he is making a decision (Dworkin, 1977, p. 26). Taking into consideration the above-mentioned examples, we notice that while determining the legal consequences, the principles (goals) can be fulfilled only to a certain degree. The degree of fulfillment is dependent on the degree of the measure of fulfillment of a given principle or goal in a concrete case to a complete fulfillment (Sieckmann, 1995, p. 47).

According to J.-R. Sieckmann, the acceptable results of balancing and consequently the rules of propriety can be presented as the combinations of "the degrees of fulfillment of the colliding principles (goals)." Consequently, the decision, which is optimally made from the combination, requires every explanation and every justification. The result of balancing is optimal when any other state of things cannot be indicated, which in any case (of the fulfillment of one principle) is better, or at least equal in any other case (of fulfillment of one principle). Another requirement of the optimization is the decision that the result of balancing with the view to the

significance of the colliding principles must be as good as any other possible case. In other words, no other result can be better than the chosen result of balancing.

Sieckmann is correct in admitting that the statement *if the result is better than any other one* must be conducted with the help of a relevant valuation (the use of the valuing function). Such a valuation is supposed to order the results of balancing as equal, good, or at least as good, or better than others (Sieckmann, 1995, p. 48). First, he indicates a purely intuitive way of valuing that depends on the establishment of any result without giving further criteria that justify such a relation. The other possibility depends on valuing the balancing results according to certain balancing of relevant properties. For the balancing of the principles, the establishment "to what degree the colliding principles fulfill each and every possible result of balancing" may be the relevant possibility. The results of the balancing can then be characterized as the combinations of the degrees of fulfillment. The degrees of fulfillment are not the sufficient basis for the justification of the balancing decision as it also depends on the significance of the colliding principles as well as on the validity of their fulfillment. Naturally, such a valuation is connected with the settlement of a given principle on the preference scale values. Such a relation of preferences should be anti-reversible, asymmetrical, and transitive. Naturally, that requires the decision of the assumption of the rationality of the preference process, which in turn is connected with the assumption of the thesis of legislator rationality, especially his axiological rationality.

We learn from these considerations that in the process of the application of law, even within the judicial discretion, there are legal limitations in the shape of the necessity of balancing colliding principles on the basis of a correct principle of priority. The relation (principle) of priority between the colliding principles (goals) allows us to determine what conditions need to be met in order for one definite principle (goal) to take place before another principle (goal) in a discussed case. It is vital to emphasize that balancing (the determination of the priority relation) takes place with regard to the choice of a relevant meaning of the interpreted legal norm, defined legal consequence, or making the right decision that shapes the course of legal proceedings. It must be pointed out that every principle (goal) may give rise to different legal effects.

We may also conclude from it what solution, in a single case, will have to be determined as exactly connected with the valid law as it was discovered by the relevant balancing of the definite principles (Alexy, 1985, p. 78; 145 et seq.; Sieckmann, 1990, p. 65). It must be pointed out that the conditional character of the priority relation allows finding it on the way of the appropriate balancing even when the legal system is not characterized by the ideal noncontradiction and the axiological cohesion. Naturally, these principles that justify binding by an act will play the biggest role. The balancing of legal rules expresses a comparative and normative attitude between the degree of fulfillment of one rule and the importance of another one. This relationship exists only when we assume the fulfillment of the following conditions: such a relationship must be relative to a definite situation and it is only valid in such cases which are characterized by the relative balance of colliding principles.

Referring to various principles (types of arguments) in the process of the application of law may lead to the contradiction in justifications of the issued decision. One must therefore decide which principles come first while justifying a given decision. Making use of the terminology introduced by R. Dworkin, we may talk about the relative significance of rules He states: "Principles have a dimension that rules do not – the dimension of weight or importance. When principles intersect (the policy of protecting automobile consumers intersecting with principles of freedom of contract, for example), one who must resolve the conflict has to take into account the relative weight of each" (Dworkin, 1977, p. 26).

The conclusion is that the essence of binding DS with the statutory goals or values resulting with a given legal order is the answer to the question of whether it is possible to define a solid, always correct relationship of the priority between all statements (values, goals) of the applied laws or the principles that result from them. The most general rule, which can be applied when balancing the principles, is "The higher the degree of nonfulfillment or impairment of the one principle, the greater must be the importance of the fulfillment of the other principle," defined by R. Alexy as balancing law (*Abwägungsgesetz*) (Alexy, 1985, p. 146). The significance of the principles is most often understood here as their relative importance which directs us to say to which degree a given principle should be fulfilled, and on the other hand it justifies the given degree of nonfulfillment or impairment of another colliding principle.

5 The Judge as a Real Participant of the Communication Community

A judge, while deciding a case based on the nature of the discretion that is given to him, must always take into consideration firstly the goal and values of the law and secondly the general goals and values of the whole legal order. Consequently, we can observe the departure from the syllogistic model into the argumentative-interpretative legal application of law. It leads to the necessity of each balancing between a range of goals and principles (directives) that limit the judge's freedom in making a decision and shaping the legal proceedings. It is not possible to indicate a universal principle of priority which could be applied in each adjudicated case unless its form will be as general as to be able to realize such a formal rule: the application of formally established norms; applying norms, which should be valid according to an empirically claimed legislator's will, the application of a norm, which constitutes a rational consequence of articulated or assumed by the legislator, which requires at the same time a relevant interpretation and balancing having a complex character in relation to each case.

Allowing a judge to have the freedom in balancing principles and goals leads to the conclusion that the balancing process is only his individual and subjective concern. However, he is assumed to have the ability of such balancing, recognizing what leads to the formulation of a correct principle or goal in any given case. Moreover,

he is aware of conducting such balancing and he also aims to issue the only correct decision (Vila, 2000, p. 192 et seq.). There should be then objective criteria for the correct application of principle and balancing the colliding principles or goals. The lack of them will trigger the danger of the impossibility of distinguishing between the real application of a principle or realizing a goal and only a belief that the relevant principle was indeed applied. The criteria of controllability, justification, and the rationalization of a decision, i.e., such decisions that will enable us to arrive at a discursively correct decision. Then the problematic and significant issue is the question of whether and how the priority relation (or the decision that such a principle (goal) has the priority, and moreover according to what criteria the priority between the colliding principles (goals)) should be determined.

The justification of the decisions in which balancing was used poses a question about the possibility of binding by the one who decides with the "balancing judgment" of the rationality, correctness and objectivity claims (meaning the inter-subjective normativity. The answer could be produced on the basis of the diversification between the "positive balancing judgments" and the criticism of the "balancing judgments" (in other words "a negative balancing judgment" – *Kritik von Abwägungsurteilen*) (Sieckmann, 1995, p. 52 et seq., p. 63 et seq.). By the term "the positive balancing judgment" we understand the determining of the priority relation between the principles. Such a priority relation may be ascertained intuitively or with the help of definite, further criteria. The intuitive ascertainty of such a priority must be connected with the claim to correctness. J.-R. Sieckmann notices the necessity of binding the judgment, which determines the priority between the colliding principles, with the claim to correctness as it results from the order of its presence in each discourse and with it, its priority before other principles (Sieckmann, 1995, p. 53). Then the one who encounters the balancing judgment must assume that the priority relation (determined by that person) is obligatory and at the same time it is obligatory to settle it.

It is not possible to present the whole concept of "positive balancing judgments." In order to do so it would be vital to discuss the absolute and relative theories of balancing, which are naturally extremely interesting, but the discussion about them would exceed the subject matter and the range of this chapter. I will then limit myself to the introduction of the concept that is generally called "the criticism of balancing judgments," which – in my view – merits a wider, practical application and is more useful from the point of view of the justification of discretional judicial decisions.

The concept of "positive balancing judgments" is based on the assumption that they include the claim to correctness, which implies that the ascertained priority relation should exist and be recognized. The criticism of such judgments can bear a positively different balancing judgment, meaning such a judgment that is connected with the claim to correctness, which imposes the justification problem that is considered here. In other words, the discussed criticism may restrict itself to indicating some mistakes in the justification of "the positive balancing judgment," meaning the violation of the requirements of the impeccable balance. The concept presented by J.-R. Sieckmann includes the complex model of the justification procedure in the case of balancing the colliding principles (goals), in which the one who decides must

always respect the normativity claims and the objective correctness (Sieckmann, 1995, p. 69). The priority principles for the collision of the principles do not allow in themselves, according to such a concept, formulate regardless of the deciding case, but they emerge from each deciding settlement. Such a justification allows giving objective, or even inter-subjective connected criteria for the rationality of decisions, in which balancing rights – that is, the principles, goals, and values influencing the final judgment – must take place despite the fact that the judge was left with a certain degree of freedom. The judge can never present his balancing decision as the only subjective decision. Consequently, the judge from his view point must, in his own decision, take into consideration the thesis about "the only one correct" decision. Such a rationalization of balancing depends on the acknowledgment and the impeccable compliance with the optimization orders, the requirements of consistency and coherence as well as other balancing rights mentioned above. In other words, such balancing may serve as a paradigm of rational normative justifications. A violation of the discussed rights connected with the claim to correctness makes the balancing process a defective one; however, their observance facilitates the avoidance of subjective accusation and the arbitrary balancing of arguments and also avoids the accusation of the contingency of criteria, the acceptance of which influenced the result of the decision.

In summary, it is worth pointing out that the openness of legal argumentation should always lead the judge to the correct decision. Within such an argumentation the court may also come to the conclusion that in a given case important relations (interactions) are against the application of one principle (e.g., the principle of humanity) rather than for it. In such cases the court should abandon the application of such a principle in favor of another principle (e.g., the general prevention directive). The court applies the principle that is more relevant in a given situation and on this basis makes the relevant choice of legal proceedings (or the shape of legal proceedings) within the freedom that it is given. It occurs that the defined principles of goals can be applied only in a part of its range of application and the degree of this "applied part" will be determined by how "useful" the competitive principles or goals will be according to the judge.

The general principles and rules of legal importance formulated in the constitution and other legal acts can achieve the intended goal only when they are taken into account in a concrete decision. Only when they are recognized by the judge when dealing with each case. Thus, justice is always bound by such general principles, values, and goals, which greatly limit the judge's scope even in cases that gave him a great deal of discretion freedom. This limitation of freedom can be presented in two ways: with regard to the choice of alternatives and with regard to the choice of alternatives (or forms of arguments), whose chosen deciding alternative should be justified. The necessity of taking into account different goals and values leads to two consequences: firstly, it allows the definition of the expected result of the decision in a more certain way, and secondly, it also increases the possibility of the realization of the socially expected activities of legal norms, as the closer the results of a judge's activities are assumed, the more permanently they allow us to define the choice of a defined alternative in the case of applying a certain principle

or rule. However, binding the judge in his actions by the contract of the assumption of testing his decisions is a completely different matter.

A judge should realize the great power vested in him over the respective participant of social interactions that take place in front of him in the courtroom. He must then be a rightful participant of the argumentation process, aiming to obtain the nature of law on the basis of his own judgment which would be ethically accepted in a certain society as important, and objective rights would speak for him. He should never act on the basis of opportunistic reasons, he should be far from indolent in the application of law, and can under no circumstances refuse to participate in the legal discourse. We witness here an intriguing problem, especially in the context of the European integration of the participation of lawyers, especially judges, in our culture. The real participation of judges in our culture can guarantee the social approval for decisions that are issued by them. In the decision-making process, a judge should always be guided by the principles and forms of the arguments of the legal discourse. The importance of their fulfillment is closely connected with the reflective realization by the judges themselves of how important a role they play in social life. Through his competent conduct he should aim throughout the whole trial to issue such a judgment which will realize the principles that govern the discourse understood as "the speech regulated by the moral requirements."

The depiction of the application of law as a process of balancing arguments, which are for or against a defined alternative decision, is the expression of distinguishing the mechanical deduction of legal consequences exclusively from legal principles. We witness the journey from the syllogistic model to the argumentative one, which is characteristic for the law of the post-modernism epoch. In the system of institutional law, especially in the argumentative-interpretative judicial model of the application of law, the judicial decision, in the scope of both the material law and the adjective law, is always a decision of the application of law. It finds its reflection in the fact that it is a decision that can be justified by the applied legal norms, relevantly balanced goals, values, and principles that result from them, and moreover by culturally shaped patterns of the level of the rationality of the decision.

In such an understood system of law, the judge's role is to find an optimally legal decision, which is both rational and justifiable. Such a model of the application of law allows the judge to treat the act as only one of many sources of law, which is to be the point of reference for a judge. A legal text only specifies the law, which does not diminish the importance of one regulation, and the judge should be the guarantor of the widely understood law against the legislator's arbitrary action. The application of law moves from the mechanical into the reflective. Both the judges who apply the law and the recipients of their ill-fated verdicts become the equal participant of the communication community that is expressed in the symbolic-linguistic dimension of law. What is more, they can more fully participate in the public sphere as citizens who are able to comprehend or simply accept the legal reality that surrounds them, and they can create a community, of which the identifiable signs in democratic society can be a hermeneutic (argumentative-discursive) model of the application of law. Just as Jürgen Habermas, I perceive democracy as the basic way of solving a conflict and negotiating a collective action (Habermas, 1995, p. 169).

We can agree with the thesis that democracy constitutes "a means that allows different societies to make common decisions and the transition of authority without violence" (Gray, 2000).

The observance of the law and the acceptance of the verdicts are possible, thanks to the fact that the unifying element of society is language (Taylor, 1985, p. 263) expressed here in the shape of legal norms. At the bottom of such a model of the application of law and the vision of democratic society must lie common convictions when it comes to the values that at least take into account only the need for the protection of certain laws and freedom, while at the same time accepting the coexistence of different ways of life. Political morality (Dworkin, 2006, p. 2 et seq.) will be expressed, among other things, in the consideration of the dissimilarity of respective individuals or groups, the acceptance of equality, and the freedom of citizens, allowing them deliberative democracy and moreover – which I hope I was able to justify in this text – in guarantying the right and just procedure of the application of law. I am convinced that the real participation of the individual in the political community without providing legible and correct principle of the linguistic game before the court, and especially equal chances and the objectivity of the jurors, is impossible.

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Chapter 3
Judicial Interpretation of Bilingual and Multilingual Laws: A European and Hong Kong Comparison

Deborah Cao

Abstract In today's globalized world, there has been an increase in the use of two or more languages in law and judicial process as in the case of Hong Kong and the European Union and the Court of Justice of the European Union. In such bilingual/multilingual jurisdictions, one basic legal principle of interpretation is that the law in different official languages is equally authentic and is deemed the same, the 'equal authenticity rule'. Such a principle governs and guides both the legislative drafting process and the judicial interpretation of laws. This chapter describes the legislative drafting process of bilingual and multilingual laws and discusses judicial interpretation of such laws. It outlines the basic legal rule of equal authenticity followed by an examination of the situations in Hong Kong and the EU. It also discusses how the courts approach linguistic disagreements found or allegedly found in bilingual and multilingual laws. Some of the interpretive rules adopted by the courts in the search for meaning and certainty are also highlighted.

1 Introduction

In today's globalized world, there has been an increase in the use of two or more languages in law and judicial process, be it in the newly established bilingual legal regime in Hong Kong or the increasing number of languages used in the European Union (EU) and its legislation and the Court of Justice of the European Union (ECJ). In such bilingual/multilingual jurisdictions, one basic legal principle of interpretation is that the law in different official languages is equally authentic and is deemed the same, the 'equal authenticity rule'. Such a principle governs and guides both the legislative drafting process and the judicial interpretation of laws. This chapter describes the legislative drafting process of bilingual and multilingual laws and discusses judicial interpretation of such laws. It first outlines the basic legal rule of

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equal authenticity. This is followed by an examination of the situations and cases from Hong Kong and the ECJ. It discusses how the courts approach linguistic disagreements found or allegedly found in bilingual and multilingual laws. Some of the interpretive rules adopted by the courts in the search for meaning and certainty are also highlighted. It examines the relevant case law and how the courts in the two jurisdictions reconcile the various types of linguistic and legal differences and ensure legal uniformity and certainty. The essay proposes that the courts provide legal certainty by developing rules of construction and interpretation to resolve linguistic uncertainty. It argues that judicial interpretation involving linguistic uncertainty is unique and is constrained by established laws, statutory interpretive rules, policy and other considerations by creating a legal fiction in the equal authenticity rule. This is necessary for bilingual and multilingual laws for the reconciliation of legal meanings and harmonization of laws as language and interpretation of language is time and space determined and is otherwise inherently uncertain.

2 Equal Authenticity Rule

In the world today, there are a number of jurisdictions that are bilingual or multilingual. Examples of bilingual jurisdictions are Canada and Hong Kong. Multilingual jurisdictions include Switzerland, South Africa and the European Union. In such jurisdictions, the legislative drafting practice differs from that of the monolingual jurisdictions.

In terms of legislative drafting of bilingual/multilingual law, there are basically two methods: the translation method and the simultaneous bilingual/multilingual drafting method. In the former, the law may be drafted first in one language and then translated into other languages. In the latter case, the law is drafted more or less simultaneously in two or more languages. In both cases, the bilingual or multilingual legislative texts may be enacted and promulgated simultaneously, and in the former case, the translated law may be authenticated after the original law in one language is adopted. An example of this is the new bilingual jurisdiction of Hong Kong. Before 1987, all legislation was enacted in English only, but due to the handover of Hong Kong to China, in 1987, the Hong Kong Official Languages Ordinance was amended to require new legislation to be enacted in both English and Chinese. Subsequently, all English statutes were translated and published in Chinese. Thus, the Chinese statutes were authenticated many years after the laws were originally adopted in English only. Now Hong Kong statutory laws are promulgated in both English and Chinese simultaneously.

In other situations, the law may be drafted in two or more languages with drafters, lawyers and linguists and translators working together producing a working document in the form of a bill that is written in all the relevant languages, and then they are published and promulgated simultaneously. Even in such a case, translation is still involved. For instance, in Canada, the practice of bilingual drafting federal legislation in both English and French as opposed to translation from one language

into another was standardized in the 1980s.[1] Another example is the translation of international treaties. At the United Nations, for instance, simultaneous multilingual drafting of treaties was experimented (see Tabory, 1980), but predominately, treaties are normally drafted first in one or two languages, often English and/or French, and then translated into the other official languages. At the European Commission, EU legislative proposals are first drafted in English or French to be translated into the other official languages (Robinson, 2005, pp. 4–10). On the whole, translation is extensively used in most multilingual international instruments, with simultaneous parallel multilingual drafting rarely practiced.

Irrespective of the process, laws written in the authentic languages in a particular jurisdiction are deemed to have the same meaning in all the different authentic language versions – equal authenticity rule. In such laws, words, phrases and the entire texts in the authentic languages are deemed equivalent. This is a fundamental interpretive principle. It means the authentic language versions of a bilingual/multilingual statute are the official, original and authoritative expressions of the law. All the language versions are equally authentic, that is, they enjoy equal legal force. The different language texts do not have the status of a copy or translation, and one does not enjoy priority or paramountcy over the other, at least in theory. The equal authenticity rule has been codified in both international law and domestic laws.[2]

In terms of international treaties (and some of the EU laws are international treaties), the common practice is that in the final clause of a treaty, it usually specifies the original languages of the treaty and the fact that all official language texts are equally authentic, that is, having equal legal force. This practice was codified in the 1969 Vienna Convention on the Law of Treaties (1969 Vienna Convention). Article 33(1) provides that when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.[3] Article 33(3) provides that the terms of the treaty are presumed to have the same meaning in each authentic text.[4] As pointed out, the importance attached to the principle of equal authenticity was intended to confer undisputable authority on each of the authentic texts, de facto eliminating the inferior status of authoritative translations (Sarcevic, 1997, p.199).

Consequently and for our purpose, there is a tension that may arise between the legal principle of equal authenticity and the nature of language. Uncertainty is inherent in language, but law demands exactness and precision. Furthermore,

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[1] See Revell (2004) for his discussion of authoring bilingual laws in Canada and the different models used (the translation model, the co-drafting model and the double drafting model). See also Sullivan (2002).

[2] In international law, the equal authenticity rule is codified in Article 33 of the 1969 Vienna Convention on the Law of Treaties (1969 Vienna Convention). For domestic law, for instance, it is found in Section 10(B) of the Hong Kong Interpretation and General Clauses Ordinance.

[3] The 1969 Vienna Convention, Article 33(1).

[4] The 1969 Vienna Convention, Article 33(3).

vast differences exist among different languages. As we know, no two languages are alike and meanings of words in two or more languages are rarely identical. In translation, very often, words, in particular, legal terms, may be semantically equivalent, but functionally they may be partially equivalent or non-equivalent, rarely completely equivalent. However, the legal fiction is that the words in different authentic language versions are deemed to be equivalent and have the same meaning. Such a fiction is necessary for legal certainty and consistency so that citizens are governed by the same law, being treated equally irrespective of their linguistic diversity. Accordingly, the law requires that a unitary meaning must be achieved.

3 Interpretation of EU Laws in the ECJ

In the EU institutions, multilingual production of legislative texts is an integral part of the legislative process. EU law-related multilingual documents, the so-called *acquis communautaire*, consist of a body of EU law, made up of primary legislation (the treaties), secondary legislation derived from the treaties (regulations, directions, decisions, recommendations and opinions) and the case law of the ECJ.

As regards drafting, in the EU, as part of the European Community legislative process, a proposal for a particular piece of legislation first comes from the European Commission (EC). As reported by Robinson (2005), normally, the first step is that the initial draft of a legislative proposal is prepared by the technical department or technical experts for the sector concerned. Drafters must write in either English or French and their choice is determined by the language used in their department. Once the technical department has prepared its preliminary draft, as a second step, the draft is submitted to the other Commission departments as part of the internal consultation procedure. The Commission's Legal Service is consulted on all draft legislation with lawyers specializing in the sector examining the draft for compliance with the law and coherence with other legislation. The legal revisers, who all have dual legal and language qualifications, will examine it for compliance with the rules on form and presentation of legislation, in particular the joint *(Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of Legislation within the Community Institutions).* As Robinson points out (2005), at this early stage, the draft exists in only one language. As a third step, the text must then be translated into all the official languages by the Directorate-General for Translation. At this stage, the legal revisers will have another opportunity to review the text. The legal revisers must also correct formal or terminological errors and ensure that the legal scope is exactly the same in the different language versions. Then, the legislative proposal is submitted to the European Parliament and the Council where it passes through those institutions' internal pre-adoption procedures before their final deliberation and eventual adoption (Robinson, 2005; see also Gordon-Smith, 1989). Thus, essentially, EU legislation is translated into EU languages and they are equally authentic.

3.1 How ECJ Approaches Divergence in Multilingual Law

When cases come before the court involving disputes arising from the differences, alleged or real, in the different language versions of multilingual laws, some of them inevitably end up in court. For instance, if the law says 'No vehicle is allowed in the park', what would 'vehicle' mean? Hart asks in his classical example to illustrate linguistic and legal uncertainties inherent in legal language (Hart, 1961/1994). In this hypothetical case, the word 'vehicle', Hart says, may refer to a number of things – a car, an ambulance or even a roller skater (Hart, 1961/1994). In 2005, a case came before the ECJ, asking the same question, not just with regard to English, but multiple languages.[5] An EU law has a provision with the wording 'the letting of premises and sites for parking vehicles'.[6] A Danish company letting a site for boats argued that this was not covered by the word 'vehicles'. The court examined the various language versions of the EU law and found they are not consistent. The French, English, Italian, Spanish, Portuguese, German and Finnish versions encompass means of transport in general including aircraft and boats. However, the Danish, Swedish, Dutch and Greek versions have used a more precise term with a more limited meaning, which serves to designate principally land-based means of transport, and the Danish word refers to land-based transport on wheels only. By reference to the purpose and scheme of the relevant law, the court held that the word 'vehicles' used in the provision must be interpreted as covering all means of transport, including boats.[7]

It is said that EU law's effectiveness depends on its ability to harmonize the different versions of its multilingual texts (Huntington, 1991, p. 333). This task largely falls on the ECJ. Over the years, the ECJ has developed a number of legal principles in the interpretation of EU multilingual law.

Firstly, EU legislation is drafted and effective in all the official languages of its member states. This reflects the general principle of linguistic equality among EU members.[8] All the language versions of EU laws are equally binding or equally authentic – the equal authenticity rule. This has been confirmed in ECJ case law.[9]

The legal basis for multilingualism in the EU is set out in Articles 21, 314 and 290 of the Treaty Establishing the European Community and Regulation No 1/58 as amended. Article 314 of the Treaty concerns the rule of interpretation for the ECJ giving effect to equal authenticity of texts (see Athanassiou, 2006). However, it is necessary to point out that the ECJ has held that the language rules laid down

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[5] Case C-428/02 *Fonden Marselisborg Lystbådehavn v Skatteministeriet* [2005] ECR I-1527.

[6] Article 13B(b)(2) of the Six Directive.

[7] Case C-428/02 *Fonden Marselisborg Lystbådehavn v Skatteministeriet.*

[8] For a comparison between the EU and English Common Law approach to legislative interpretation, see McLeod (2004). For criticisms of the ECJ's approach to linguistic equality, see Braselmann (1992) where she attacked the idea of linguistic equality within the EU system and the role of the interpreting judge, cited in Engberg (2004).

[9] Case 283/81 *CILFIT* [1982] ECR 3415; Case C-236/97 *Codan* [1998] ECR I-8679; and Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical*.

by Regulation No 1/58 do not amount to principles of Community law nor do they embody a specific Community law principle of equality between languages, which cannot legitimately be derogated from given the secondary status of the Regulation (see Athanassiou, 2006).[10] Moreover, the ECJ held that Article 314 of the Treaty does not enshrine an absolute Community law principle of the 'equality of languages'.[11] It follows that because *n* absolute value attaches to the provisions of Article 314, there will be circumstances where documents intended to produce legally binding effects can legitimately be drafted in some of the Community official languages only, which would then carry equal weight and authenticity as tools to interpret legislative intent (see Athanassiou, 2006). As pointed out, the ECJ's ruling that Article 21 of the Treaty embodies a general principle of Community law as a specific expression of the general principle of quality and non-discrimination, Article 314 is not a general principle of Community law to which no limitation can be conceived since the focus of Article 21 is on the protection of the rights of individual citizens rather than on the duties of the Community institutions in their external relations or internal operations where linguistic diversity is the fundamental rule (Athanassiou, 2006, p.12).

Secondly, a well-established principle in interpreting EU law is that the different language versions must be given a uniform interpretation. In the case of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part and Community law as a whole.[12] Furthermore, it is also settled law that the interpretation of Community law involves a comparison of the different language versions; it should not be considered in isolation, but in cases of doubt, should be interpreted and applied in the light of the other official languages and in context.[13] In other words, ECJ case law seems to suggest that considerable emphasis has been given to uniform interpretation, the comparison of the different language versions and the paramount consideration of the object and purpose of the law when attempting to identify uniform meaning.

To illustrate, the case *Codan* concerns the wording of Article 12(1)(a) of Directive 69/335 relating to the payment of tax on the transfer of shares.[14] The court found that the wording of the Article is not identical in all the language versions. The Danish and German versions have the equivalent of the phrase 'stock exchange turnover taxes', but most of the other language versions, namely, the Greek, Spanish, French, Italian, Dutch, Portuguese and English versions, have the expression 'taxes on the transfer of securities'. The court held that the interpretation of a provision of

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[10] Case T-120/99 *Kik v Office for Harmonization in the Internal Market* [2003] ECT II-2235.

[11] Ibid.

[12] Case 26/69 *Stauder v Ulm* [1969] ECR 419; Case 30/77 *Régina v Pierre Bouchereau* [1977] ECR 1999; *CILFIT*; Case 100/84 *Commission v United Kingdom* [1985] ECR 1169; and Case C-372/88 *Milk Marketing Board v Cricket St Thomas Estate* [1990] ECR I-1345).

[13] *CILFIT* and *Sumitomo*.

[14] Case C-236/97 *Codan* [1998] ECR I-8679.

Community law involves a comparison of the different language versions, and the need for a uniform interpretation of the language versions requires, in the case of divergence between them, that the provision in question be interpreted by reference to the purpose and general scheme of the relevant law. It thus follows both from a general principle of interpretation of Community law and from the purpose of the Directive that taxes are to be charged for the transfer of shares as indicated in the majority of the language versions.

Another example of the court using different language versions in comparison to clarify or define meanings of words in dispute is found in *Birden v Stadtgemeinde Bremen*.[15] The case concerns the interpretation of Article 6(1) of Decision No 1/80 related to the Association Agreement between the European Economic Community and Turkey. The court found that from a comparison of the language versions, the Dutch, Danish and Turkish versions use the same adjective 'legal' to describe both the labour force of a Member State and the employment pursued in that State.[16] Although the English version does not use the same word in both respects, 'duly registered' and 'legal employment', they have the same meaning. The court also stated that the French (*appartenant au marché régulier de l'emploi d'un État membre* and *emploi régulier*) and Italian (*inserito nel regolare mercato del lavoro di uno Stato membro* and *regolare impiego*) versions use the word 'regular' twice. Finally, the German version (*der dem regulären Arbeitsmarkt eines Mitgliedstaats angehört* and *ordnungsgemässer Beschäftigung*) is less clear, in so far as it uses two different expressions, the first of which corresponds to 'regular' and the second more closely to 'legal'. However, the court said that these versions are clearly open to an interpretation, but the term 'regular' can undoubtedly be understood as a synonym for 'legal' for the purposes of the uniform application of Community law.[17]

The ECJ has also over the years ruled that words in Community law have their own independent meanings in Community law and they must be given a Community definition, taking account of all the language versions. This means that reference may be made to the various versions of the relevant law in the official languages in order to achieve a harmonious interpretation, and the term should not have attributed to it a meaning deriving from domestic law where that would lead to disparate interpretations.[18] In *CILFIT*, it was held that legal concepts do not necessarily have the same meaning in Community law and in the law of the various member states. Even where the different language versions are entirely in accord with one another, Community law uses terminology that is peculiar to it. The court said that every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives

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[15] Case C-1/97 *Birden v Stadtgemeinde Bremen* [1998] ECR I-7747.

[16] Ibid.

[17] Ibid.

[18] Case C-498/03 *Kingscrest* [2005] ECR I-4427. See also Case C-358/97 *Commission v Ireland* [2000] ECR I-6301.

thereof and to its state of evolution at the date on which the provision in question is to be applied.

Another issue in statutory interpretation is how to determine the meaning of wording that is open to several interpretations. One method adopted is that preference is to be given to the interpretation, which ensures that the effectiveness of the relevant law. In *Stichting Zuid-Hollandse Milieufederatie*,[19] it involves the interpretation of Article 2(3) of Decision 2003/199 concerning the non-inclusion of 'aldicarb' in a relevant Council Directive and the withdrawal of authorisations for plant protection products containing this active substance. The action in the main proceedings was essentially due to the divergence between the different language versions of that provision. According to the Dutch version, the member states concerned may grant authorizations to place plant protection products containing the active substance 'aldicarb' on the market, whereas according to the other language versions of that provision, those member states are only able to maintain such authorizations in force.[20]

The court held that, firstly, according to settled case law, where a provision of Community law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness and which does not detract from its validity; and secondly, the need for a uniform interpretation of Community law makes it impossible for the text of a provision to be considered, in case of doubt, in isolation; on the contrary, it requires that it be interpreted in the light of the versions existing in the other official languages.[21] Thus, the court ruled that to interpret the decision that allows Members States to issue new authorizations is both inconsistent with the general scheme and aims of the directive, and inconsistent with the other language versions, in particular, the German, English ('may maintain in force'), Polish and Slovak versions.[22]

Another EU case is also relevant, *North Kerry Milk Products Ltd*,[23] concerning the interpretation of Regulation (EEC) No 1134/68[24] of the Council of 30 July 1968, relating to the payment of aid for the manufacture of casein and caseinates from skimmed milk (see Klimas & Vaiciukaite, 2005). The question arose regarding the meaning of the Article 6 of the Regulation, which related to the receiving of aid. It was not clear from the wording of the provision whether the amount of aid payable to the company was to be calculated with reference to the rate of exchange between the Irish pound and the unit of account applicable on the date of manufacture or to the rate of exchange applicable on the date of marketing of the product, i.e. whether the event triggering the right to receive aid should be understood to be the processing

[19] Case C-174/05 *Stichting Zuid-Hollandse Milieufederatie* [2006] ECR I-2443.

[20] Ibid.

[21] Ibid.

[22] Ibid.

[23] Case 80/76, *North Kerry Milk Products Ltd v Minister for Agriculture and Fisheries* [1977] ECR 425.

[24] Official Journal L 188, 1 8 1968, p. 1.

or the marketing of the casein. The company argued that marketing was relevant even while the Commission maintained that processing was decisive. This dispute arose from the apparent discrepancy between the English wording of Article 6 and the wording of that article in the other official languages. The relevant phrase in English was '... the event... in which the amount... becomes due and payable'. In the French version, the phrase was 'le fait générateur de la créance'. In the Italian version the phrase was 'il fatto generatore del credito'. A phrase equivalent to the French and Italian versions was used in other languages. The ECJ held that

> The elimination of linguistic discrepancies by the way of interpreting may in certain circumstances run counter to the concern for legal certainty, inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words. Consequently, it is the preferable to explore the possibilities of solving the points at issue without giving preference to any one of the texts involved.[25]

In this case, the ECJ examined other EU laws that regulate the organization of the market regarding milk. In the context of these laws, the ECJ held that a proper reading of relevant texts must lead to the conclusion that marketing was the event by which the manufacturer become entitled to aid. Thus, the linguistic discrepancies were reconciled by reference to texts that gave a contextual, broader interpretation rather than choosing one language version over the other language versions (Klimas & Vaiciukaite, 2005).

3.2 Bilingual Statutory Interpretation in Hong Kong

Hong Kong as a new bilingual jurisdiction provides an interesting case for the study of bilingual statutory interpretation.

In Hong Kong, up until 1989, all legislation was enacted in English only and was a monolingual English Common Law jurisdiction despite the fact that the majority of Hong Kong people have always used Chinese in their daily life. Due to the return of Hong Kong to China, both English and Chinese have been made the official legal languages in Hong Kong. Before April 1989, the Chinese translations of Hong Kong laws were for informative purpose only with no official status. In 1987, the Hong Kong Official Languages Ordinance was amended to give the official language status to Chinese in addition to English (Section 3(1)) and to require that all legislation be enacted and published in both English and Chinese (Section 4(1)).[26] Article 9 the Basic Law of the Hong Kong Special Administrative Region 1990 also provides that Chinese and English may be used as official languages by the executive authorities, legislature and judiciary.[27] The new law also provided a mechanism for translating and publishing authentic texts in Chinese of statutes enacted in English and the

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[25] *North Kerry Milk Products*.

[26] Hong Kong Official Languages Ordinance, Section 3(1) and Section 4(1).

[27] Article 9 the Basic Law of the Hong Kong Special Administrative Region 1990.

Chinese translated texts went through the formal legislative process of authentication. Since then, Hong Kong statute law has become fully bilingual. Now both the English and Chinese statutory texts in Hong Kong are equally authentic, that is, both have equal legal force. The Chinese legislative text is neither subordinate to nor a mere translation of its English counterpart, despite the fact that the laws were first enacted in English, and the Chinese texts were their translation. Today, in Hong Kong, there are two types of bilingual laws: the earlier laws that were enacted first in English and subsequently translated into Chinese and went through the authentication process, and the laws that have been enacted simultaneously in both English and Chinese since 1989.

Thus, there are two types of bilingual laws in Hong Kong now, those laws that have English as their original language and later translated into Chinese, and those laws that have been authenticated simultaneously in Chinese and English. There is an issue of time of authentication. The time difference has not gone unnoticed by the court.

The departure point for bilingual statutory interpretation in Hong Kong is the statutory provisions that provide the basic legal framework. According to Section 10(B) of the Hong Kong Interpretation and General Clauses Ordinance:[28]

(1) The English language text and the Chinese language text of an Ordinance shall be equally authentic, and the Ordinance shall be construed accordingly.
(2) The provisions of an Ordinance are presumed to have the same meaning in each authentic text.
(3) Where a comparison of the authentic texts of an Ordinance discloses a difference of meaning which the rules of statutory interpretation ordinarily applicable do not resolve, the meaning which best reconciles the texts, having regard to the object and purposes of the Ordinance, shall be adopted.

These rules can be summed up as the equal authenticity rule, the presumption of the same meaning rule and the two-step approach to reconciliation in case of divergence. Section 10(B)3 also recognizes that ordinary rules of statutory interpretation apply to bilingual laws. Such ordinary interpretive rules include the literal rule, the golden rule and the purposive or mischief approach and many others used in Common Law jurisdictions (see Bennion, 2002). Other relevant provisions in the Interpretation and General Clauses Ordinance include the following:[29]

- Section 9

Chinese words and expressions in the English text should be construed according to Chinese language and custom. Reciprocally, English words and expressions in the Chinese text should be construed according to English language and custom.

[28] Hong Kong Interpretation and General Clauses Ordinance.
[29] Hong Kong Interpretation and General Clauses Ordinance.

- Section 10C

If an expression of the common law is used in the English text while an analogous expression is used in the corresponding Chinese text, the statute should be construed in accordance with the common law meaning of that expression.

- Section 19

A statute is deemed to be remedial and shall receive such a fair, large and liberal construction and interpretation as will best ensure that attainment of the object of the ordinance according to its true intent, meaning and spirit.

S19 is said to be an embodiment of the purposive approach. Its essence is to take and give effect to the overall purpose if that can be done without straining the words or violating the intention of the legislature (see Law Drafting Division Discussion Paper, 1998).

Some of these bilingual interpretive rules have been applied by the courts in Hong Kong. In *R. v Tam Yuk Ha*,[30] the court, citing Section 10(B) of the Interpretation and General Clauses Ordinance, held that under bilingual legislation, both the English and Chinese language texts of an ordinance are equally authentic. It is not the English language text which prevails over the Chinese language text nor vice versa. It is the two authentic texts together which make up the legislation enacted by the legislature. In *Hong Kong Special Administrative Region (HKSAR) v Tam Yuk Ha*,[31] the court held that the English and Chinese texts are presumed to have the same meaning, and both are equally authentic. It is on this basis that the court must interpret the relevant provision. It is only when there is clearly a difference of meaning that the court has to reconcile the two texts.

The court has also ruled that in reading the authentic texts in the official languages, the court is not entitled to read down an authentic text in either of the official languages, but obliged to reconcile the authentic texts in both official language, having regard to the object and purposes of the Ordinance.[32]

In *HKSAR v Lau San Ching and Others*,[33] the court went into considerable length discussing the issue of bilingual interpretation. One of the issues before the court in this case concerns the discrepancy found between the equally authentic English and Chinese laws. One of the issues before the court in this case concerns the discrepancy found between the equally authentic English and Chinese laws. One of the main issues was the discrepancy between the English and Chinese versions of an Ordinance arising from the word 'may' found in the English and its omission in the Chinese version.

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[30] *R. v Tam Yuk Ha* HCMA 933/1996.

[31] *Hong Kong Special Administrative Region (HKSAR) v Tam Yuk Ha* HCMA1385/1996.

[32] HKSAR v Leung Kwok Hung and Others *HCMA16/2003*.

[33] *HKSAR v Lau San Ching and Others* HCMA 98/2002.

The relevant section in this case is Section 4(28) of the Summary Offences Ordinance. Its English text reads:[34]

> Any person who without lawful authority or excuse... does any act whereby injury or obstruction whether directly or consequentially, *may* accrue to a public place or to the shore of the sea, or to navigation, mooring or anchorage, transit or traffic.... shall be liable to a fine of $500 or to imprisonment of 3 months (italics added).

The equally authentic Chinese text when back-translated into English reads:[35]

> Any person who without lawful authority or excuse... does any act whereby injury or obstruction whether directly or consequentially, *accrues* to a public place or to the shore of the sea, or to navigation, mooring or anchorage, transit or traffic.... shall be liable to a fine of $500 or to imprisonment of 3 months (italics added).

Thus, there is a significant discrepancy between the English and Chinese texts. According to the Chinese text, actual obstruction, be it direct or consequential, must have accrued to a public place before the offence can be made out. But according to the English text, obstruction may accrue to a public place to create an offence. The Chinese text gives the offence a narrower meaning in that actual obstruction must be caused before an offence can be made out. As no actual obstruction occurred in this case, the appellant argued that there was no case to answer. Hence, there is a clear conflict between the two authentic texts.

We do not know how the variation in the two versions occurred and why an important word 'may' was left out of the Chinese translation. Possibly, it was an oversight or a translation error. The court relied on a number of principles and factors to resolve the discrepancy. The court noted the different times the two versions were authenticated. The court confirmed the lower court's rejection of the defence's submission that the word 'may' means 'must' as there is a difference in the use of 'may' and its omission. The court also held that the words 'may accrue' should be given their ordinary meaning. The court summarized the issue this way:[36]

> In this case there is a clear conflict between the two authentic texts. The original official English text creates an offence when any person does any act whereby obstruction, whether directly or consequentially, *may accrue* to a public place, but the Chinese text creates an offence when any person does any act whereby obstruction, whether directly or consequentially, *actually accrues* to a public place (emphasis in the original).

In resolving the apparent conflict between the two versions, the court cited Section 10(B) of the Interpretation and General Clauses Ordinance and explained how it applied the law by using the two-step approach in Section 10(B)3. In ascertaining the legal meaning and the legislative intent, the court gave more weight to the English original text given its original status compared with a later Chinese translation even though they are both authentic. The court stated that,[37]

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[34] Section 4(28) of the Summary Offences Ordinance.

[35] Section 4(28) of the Summary Offences Ordinance.

[36] *HKSAR v Lau San Ching and Others* HCMA 98/2002.

[37] *HKSAR v Lau San Ching and Others* HCMA 98/2002.

> In this case, any attempt to reconcile the two conflicting texts would be doomed to failure or, at the very least, be wholly artificial. Section 10(B)2, which presumes that they are to have the same meaning, provides no assistance in resolving the matter and therefore recourse has to be had to Section 10(B)3, which deals with a difference of meaning. Section 10(B)3 provides for a twostep approach: firstly there must be an attempt to resolve the differences of meaning by applying the rules of statutory interpretation. If this fails, then the interpreter has to adopt the meaning which best reconciles the texts with regard to the object and purposes of the legislation.
>
> From that it necessarily follows that if the Ordinance was initially enacted in English, the English text was the original official text from which the Chinese text was subsequently prepared and declared authentic. In ascertaining the ordinance's legal meaning, the English text should be taken as more accurately reflecting the legislature's intent at the time it was originally enacted. In this case, the meaning borne by the original official English text, which was already in existence as early as 1932, should take precedence over the Chinese authentic text.

With regard to errors and inaccuracies in legislation, for those statutes that were initially enacted only in English with their Chinese texts subsequently translated and declared authentic, the court held in *Chan Fung Lan v Lai Wai Chuen* that the English versions were considered the original official texts on the sole basis of which the Chinese counterparts were prepared.[38] In ascertaining the legal meaning of such a statute, the English text should be taken as more accurately reflecting the legislature's intent when the statute was initially passed. The meaning borne by the English version thus takes precedence over the Chinese one.[39]

In *Chan Fung Lan*, the authenticated Chinese text of the proviso to Section 18 of the Estate Duty Ordinance was found to be incorrect. The inclusion of the word *yaji* (charge) does not appear in the English text. The court held that if the authenticated Chinese text of a piece of legislation is incorrect, then it should not be acted upon. Cheung J. found that[40]

> One must bear in mind that the authenticated Chinese text started life simply as a translation of the original legislation and if there are errors in the translation, which are bound to arise in such a mammoth undertaking, such errors should not be given effect simply because under Section 10(B) of the Interpretation Ordinance the two texts are said to be equally authentic.
>
> ... When the court comes to the view that the authenticated Chinese text contains inaccuracies then it should not give effect to that text but should rely on the original legislation. This approach is justified because under s.4B of the Official Languages Ordinance (Cap 5) where the Governor in Council has declared a text to be an authenticated text of an ordinance and it appears to him that there is any manifest error, omission or inaccuracy in that text, he may by order in the gazette correct that error and such correction shall be deemed to be incorporated in the text at the time when it was declared to be the authentic text.

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[38] *Chan Fung Lan v Lai Wai Chuen* HCMP4210/1996.

[39] Ibid.

[40] *Chan Fung Lan*.

4 Implications

A number of implications can be drawn from the foregoing discussion. Firstly, linguistic uncertainty is part of law, involving both one language and more than one language, but law is concerned with establishing unitary and universally applied meanings; accordingly, the courts have devised rules of construction to resolve such uncertainties. Bilingual and multilingual law entails inter-lingual uncertainty. As we have seen from the foregoing discussion, various interpretive rules and approaches exist in the ECJ and Hong Kong to deal with such uncertainties.

Furthermore, some of the examples cited in the foregoing discussion indicate that linguistic or grammatical meanings and legal meanings are not necessarily the same (Cao, 2007). By the same token, ordinary interpretation and legal interpretation are not the same (Cao, 2007). When judges interpret law involving linguistic uncertainty, they make normative decisions. As we have seen, in some cases, the linguistic uncertainties in different languages cannot be easily resolved. But the court is never entitled, on the principle *non liquet* (it is not clear), to decline the duty of determining the legal meaning of a relevant enactment (Bennion, 2002, p. 14). It must provide a single, correct interpretation in case of uncertainty. Judiciary interpretation is constrained by established laws, the legal rules and principles governing statutory interpretation, policy and other considerations. This is particularly so in the case of bilingual and multilingual legal situations in the reconciliation of legal meanings and harmonization of laws. As pointed out (Sullivan, 2004, p. 1022), the enacted law is 'a construction inferred from reading the words of the text in context and relying as well on other evidence of legislative intent'. As stated earlier, the legal fiction that all laws in different languages are the same is necessary as otherwise they will not and cannot be the same, especially if one believes that no two historical social or cultural or legal cultures and languages are exactly the same or are used to represent identical meanings. So, the court has created the necessary legal fiction. Judicial interpretation in case of linguistic uncertainty is unique and is constrained by established laws, statutory interpretive rules, policy and other considerations, and this is particularly the case for bilingual and multilingual law for the reconciliation of legal meanings and harmonization of laws. The court has to resolve linguistic uncertainties to provide the uniform interpretation that the law requires.

Specific to the EU, the issue of the harmonization of EU laws and the influence of EU laws beyond EU countries are worth contemplating. EU is a unique legal system or entity. As a legal system, it was heavily influenced by the civil law legal family and built on the civil law foundation (Mattila, 2006, p. 107) but with different input and features from the legal cultures of different member states. The English common law began to influence Community law since the UK's accession to the European Communities in 1972, with the most apparent feature of the doctrine of legal precedents being formed and developed in the ECJ judicial decisions (Mattila, 2006, p. 107). Related to this is the fact that the ECJ rejects a metalanguage approach and has not sought to create a new type of language by choosing among various texts to find the right translation in every setting and to assemble

a system of meta-terms, culminating in a meta-language (Klimas & Vaiciukaite, 2005). However, as pointed out, now there is an international rule of law in the making and is working in Europe, and the transformation of the European legal system was orchestrated by the ECJ through its bold legal interpretations (Alter, 2001, p. 1). Furthermore, an EU meta-language is also in the process of development (Klimas & Vaiciukaite, 2005). This may be inevitable and necessary given the diverse linguistic, cultural and legal diversities of EU member states. Many terms nowadays used in EU legal and other documents have special and unique meanings within the EU context, for instance, the term 'acquis communautaire' (for discussion of the term, see Mattila, 2006, pp. 120–121). Furthermore, as we have seen in the previous sections, the ECJ has adopted a multilingual doctrine of statutory interpretation to EU laws. Undoubtedly, this has helped with reducing legal uncertainty arising from the sheer fact that EU laws are multilingual involving some 20 different languages, and different languages are inherently not the same.

As the unique EU legal system matures and develops and the ECJ develops its statutory interpretation methodology, we can see that the ECJ has deliberately made clear that the court is independent, and its decisions and its approaches do not come directly from any one particular EU member state, in particular, one language version or one language does not prevail over the other language versions or languages. The other side of the coin is that EU laws and legal concepts are binding and decisive on EU member states. Interestingly, they now also have influence and persuasive power beyond EU borders, and this is what is called legal Europeanization, that is, the impact of EU law on domestic legal orders in EU member states and non-EU countries. This process is very much helped by the two most important of the ECJ's legal doctrines: the Doctrine of Direct Effect and the Supremacy Doctrine, that is, European law can, under certain conditions, create rights for individuals that could be involved before national courts, and EU law is made supreme in member states even to subsequent changes of national law so that states could not pass any law or make any new policy that contradicted their EU legal obligations (Alter, 2001, p. 17). In this regard, the ECJ has played a pivotal role through its judicial interpretation (Alter, 2001, p. 17). Beyond the EU member states, Switzerland is an example of EU's legal influence, although Switzerland is quite special and unique (see Maiani, 2009). The transformative powers and effects of EU laws have produced visible changes on different countries, on the laws, the legal orders and legal thinking (Maiani, 2009), although as pointed out, this transformation is still in the making (Maiani, 2009). I agree that the Europeanization has not resulted in the establishment of a new cannon of legal interpretation yet, but as claimed in the case of Switzerland, it has destabilized the existing cannon, thereby generating systemic uncertainty (Maiani, 2009). This may or may not be a good thing. For the purpose of our present discussion, the approaches to statutory interpretation of multilingual laws by the ECJ may serve as a point of reference and guidance to other bilingual and multilingual jurisdictions beyond the EU, for instance, in faraway places such as Hong Kong albeit the vast differences in its linguistic, cultural and political conditions.

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Chapter 4
The European Dual Nature: Unity/Fragmentation

Anne Wagner

Il fallait attendre que toutes les nations fussent accoutumées à obéir comme libres et comme alliées, avant de leur commander comme sujettes (. . ./. . .). Ainsi Rome n'était pas à proprement parler une monarchie ou une république, mais la tête du corps formé par tous les peuples du monde (. . ./. . .). Ils ne faisaient un corps que par une obéissance commune, et, sans être compatriotes, ils étaient tous Romains. (Montesquieu, 1689–1755: Trois Textes sur les Romains, 17–18: http://www.scribd.com/doc/375258/Montesquieu-Trois-textes-sur-les-Romains-extraits)

Abstract This chapter reflects on the growing importance of fragmentation and unity in the European community. It addresses these two questions over tolerance and diversity, analyzes the relationship between language of law and its power when drafting, reading, saying and using the law. To set the scene for the examination of such representations in law, the chapter will first examine the current status of two legal representations in domestic law and then show how each of them is examined, apprehended and raised the spectre of social fragmentation within the European Union. Every member-state is being asked to become permeable and to "Europeanize" itself. This dual nature – unity and fragmentation – is not a new mask, but a powerful tool for social manipulation. The chapter will then try to give a tentative response to a transnational harmonization within the EU.

1 Introduction

Religious, cultural and ethnic diversity together with European, political and economic integration brings issues of tolerance and diversity to the forefront and raises important questions for the analysis of law over fragmentation and unity. Recent

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events have shown that tolerance and diversity remain under threat despite the best efforts of the European and international community, which has attempted through conventions, treaties and national statutes, to stem the march of intolerance.

The European Union has – undoubtedly – a key role to play in protecting and promoting cultural diversity of their member-states and affirmative measures and legal instruments are a particularly apt means of supporting the protection against oppression or discrimination of any type. Indeed, "Law stands at the center of culture; in a sense it is the culmination of culture, i.e. when it voices the highest standards and normative claims of culture" (Coskun, 2007, p. 331).

Member-states can also encourage equal treatment before the law in the economic, cultural, social and political fields. It is important that all services and facilities are developed in a manner which avoids further discrimination and intolerance. Political will is required to make "unity without uniformity" and "diversity without fragmentation" the contemporary masks of the European Union:

> Only the future can show whether the states will remain the dominant masters of the national diversity/unity "sluice" in the EU constitutional framework (The Debate on European Values and the Case of Cultural Diversity, p. 19).

2 Mapping the European Duality

The dual nature of Europe stimulates the search, detection and identification of numerous manifestations of cultural diversity where Europe can be conceived as a universe in which "fragmentation" and "unity" are seen as "inter-connected islands" (Pauwelyn, 2003–2004, p. 904). Indeed, experiencing "inter-connected islands" in some European countries shows a good map of historical differences and changes in fashion, i.e. legal pluralism (Gotti et al., 2005). It involves rhetorical speculation, or sometimes rhetorical invention, that resembles more "a doctrine akin to that of the 'free finding of law'" (Watson, 1985, p. 86) and can lead to the creation of a new reality. Both features combine rigidity and fluidity in the Law (Wagner & Cacciaguidi-Fahy, 2007). Duality in nature implicitly conveys the cultural ecumene (Wagner, Forthcoming) where the European legal reality is "rather an unsystematic collage of inconsistent and overlapping parts" (Griffith, 1986, p. 4) of concepts of Europeanism and State individualism. However, exchange processes operate at different levels where unity and fragmentation join to negotiate and find transitional spaces:

> We live in a time of porous legality or legal porosity, multiple networks of legal orders forcing us to constant transitions and tresspassings. Our legal life is constituted by an intersection of different legal orders, that is, by *interlegality*. Interlegality is the phenomenological counterpart of legal pluralism, and a key concept in a post-modern conception of law. (Santos, 1995, p. 473).

As such, communication processes, transparency and accessibility to the law remain the prime ideas in making a cohesive decision, a unity in European Law.

2.1 Unity Without Uniformity and Diversity Without Fragmentation

Each European State has a dual nature combining together the expression of a given society but also the foremost of European institutions.[1] Every member-state is a pillar of the European organization and contributes in its way to the stability of the supra-national system where communicative and cooperative processes are determining elements. This duality in nature is quite fragile and needs to be handled with caution as any member-state can be brought into question in terms of internal homogeneity and territoriality.

Indeed, Europe is seen by some as a framework for oppression where national identity, regional-level demands, minority rights issues (Kymlicka, 1996)[2], immigration and State territoriality – amongst others – are no longer inclusive to a State but rather extended to the supra-national level; and so, fragmentation and unity are complementary, rather than mutually exclusive processes (Kevelson, 1993, 1996). These phenomena result from the multi-stage dynamics (Wagner, 2005), where they are more complementary than distinctive, from dynamics which mutually nurture one another (Endicott, 2005; Hutchison, 2000). Every member-state is being asked to become permeable and to "Europeanize" itself. This dual nature – unity and fragmentation – is not a new mask indeed, but a "powerful tool for social manipulation" (Deacon, 1997, p. 428).

Besides, European unity is difficult to achieve as each member-state has its own individual laws. Each of them strongly affirms its sovereignty, its commitment to the principle of non-interference and its right to choose its domestic social, economic and political systems:

> *In the language of political theory, the organs are engaged in a hegemonic struggle in which each hopes to have its special interest identified with the general interest* (Koskenniemi & Päivi, 2002, p. 562).

But confrontations of ideas often emerge and domestic legitimacy is often at stake. Many breaches with European law are highly visible owing to the numbers of European citizens seeking redress from their own member-state. Nevertheless, a harmonious European vision is not a legal fiction but rather "a process in which network nodes mutually reconstruct, influence, limit and control, and provoke one another" (Teubner & Fisher-Lescano, 2003–2004, p. 1019). As such, unity without uniformity and diversity without fragmentation should serve as interfaces, as key forces driving this dynamic in order to facilitate the passage back and forth from State individualism to Europeanism.

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[1] Further reading: *Unesco's Declaration of Principles of Tolerance* and *The Debate on European Values and the Case of Cultural Diversity* (http://www.eurac.edu/edap).

[2] See Lisbon Declaration of 3 December 1996.

2.2 Legal Pluralism

Legal pluralism is a key issue within the European Union, because "rather than being ordered by a single legal order, modern societies are ordered by a plurality of legal orders, interrelated and socially distributed in different ways" (Santos, 1995, p. 114).

Legal pluralism thus creates an image comprising altogether no definite and definitive enclosures with ideas of openness in cultures (Wagner & Bhatia, 2009).[3] In a world of plural regimes, positive nurturing and tolerance of diversity (Clark, 1989, p. 477) are key elements and should be retained:

> Each person, in order to retain those attributes we recognize as human, must live in relation to others, within a social context, a culture which gives meaning to individual existence. This need for cultural meaning is at once the sine qua non of human existence and the source of our greatest danger (. . ./. . .). It is apparent that people everywhere, as they struggle to adjust their traditional worldviews to meet changing circumstances, must take care that they do not throw out the "baby" of cultural meaning and bondedness with the "bath water" of maladaptive institutions, lest they end up with new institutions that are destructive of the human psyche itself (Clark, 1989, pp. 474–475).

Openness of different European cultures is often accompanied by strong feelings of national ethnic, religious and/or social attachments, often causing conflicts among or within different groups of the European Union. The application of these values requires

> (. . ./. . .) rising above the religious dogmas, political ideologies and national allegiances which bitterly divide the world. It entails restating the fundamental truths that lie behind all religions, philosophies and traditions. Consideration of these values. . . leads us to recognize the oneness of the entire human species, an ideal that extends former loyalties and does not abrogate them (Laszlo, 1989, p. 231).

This open acceptance of diversity and culture could be perceived as a threat to the preservation of each national identity, tradition and heritage, as each new domestic rule or legislation is created within the ambit of a pre-existing heritage:

> Although I have presented the resource map as a series of separable elements with their own properties, I have also continually stressed their interconnected nature in relation to the analysis of specific research problems. In this regard, macro phenomena make no sense unless they are related to the social activities of individuals who reproduce them over time. Conversely, micro phenomena cannot be fully understood by exclusive reference to their internal dynamics so to speak; they have to be seen to be conditioned by circumstances inherited from the past. In other words, micro phenomena have to be understood in relation to the influence of the institutions that provide their wider social context. In this respect, macro and micro phenomena are inextricably bound together through the medium of social activity and thus to assert the priority of the one over the other amounts to a "phoney war" (Layder, 1993, p. 17).

[3] See also The Debate on European Values and the Case of Cultural Diversity.

2.3 From Fragmentation to Unity

True unity could only be achieved when individuals become active participants in the ongoing process of the European construction without fear of exploitation or oppression of any sort. These acts themselves are decisive. The longer these fears remain unaddressed, the more fragmentation grows. Addressing these issues in the European legal scene is crucial and will permit finding solutions and ways out of the present situation.

However, these issues of open acceptance of diversity and culture should be addressed together. If a member-state remains silent, this silence could easily be construed as a form of discrimination or even of oppression. As such, fears of any sorts will be solidified and lead member countries further down the road of fragmentation.

In seeking unity, each State's sovereignty is challenged and so leads to the subordination to the European State. As such, a member-state will have to open its borders to people, to goods, to information and cultural products. If it fails to subordinate itself, a member-state could then be confronted with reprimand or with coercive actions in the most serious cases.

This contemporary mask for the classic old game of domination is not new and may lead to the hegemony of a "New World with no shores" (Pauwelyn, 2003–2004, p. 910). However, new developments in the law did not point to unity. One of the latest examples is that of an individual staying in a homosexual union and who was denied adoption by the French State and sought redress before the European Court of Human Rights (E.B. v. France 2008, application n 43546/02).

Unity and fragmentation create an image, but defining their borders proves more difficult as they comprise both a conception of European and domestic societies and conveying concepts such as humanity and cultural diversity as European values:

> The treaty of Maastricht introduced a general, transversal sort of "cultural diversity impact clause" in Article 151 para. 4 EC. It establishes the obligation of the Community to "take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures". This commitment to diversity has been confirmed by the Charter of Fundamental Rights, which states in its Article 22 that "[t]he Union shall respect cultural, religious and linguistic diversity" (The Debate on European Values and the Case of Cultural Diversity, p. 16).

3 Legal Representations of Fragmentation and Unity in Europe

Representations of individuals tackle the issue of law, tolerance and diversity and are examined in the context of domestic and European laws along with the issue of the other's otherness in terms of tolerance and acceptance of differences within our modern society. Both legal representations of marriage and handicap show how fragmentation and unity interfere and can create new images in our modern society.

To set the scene for the examination of such representations in law, it is insightful first to examine the current status of each representation in domestic law and then

show how each of them is examined, apprehended and raised the spectre of social fragmentation (Bibby, 1990; Schlesinger, 1992; Ungerleider, 1992; Bernstein, 1994) within the European Union. Given the commitment of the EU to respecting the cultural diversity of its member-states, these two examples are relevant to the idea of law, tolerance and diversity.

3.1 Same-Sex Couple and Their Rights

Mentalities have evolved, habits have changed and new types of union have arisen. Indeed, nowadays, it is rather frequent to see people of the same sex living together and showing their affection outside the private sphere. Numerous countries in Europe, but also in the rest of the world, have had to look at the question of homosexual marriage, of same-sex couples. Some people say it is a marriage identical to that of a couple consisting of a man and a woman, whereas others refuse to modernize their view of marriage.

3.1.1 Cultural Symbolism over the Word "Marriage"

The word "marriage" is not neutral at all and conveys religious meanings. Indeed, behind this notion of marriage, the symbolism that usually arises is a mystic union between a woman and a man.

Under the Canon Law, marriage was regarded as a lifelong and sacred union that could only be dissolved by the death of one of the spouses. This view of marriage envisaged husband and wife as made of "one flesh" by the Act of God. Marriage was therefore considered as a "sacrament and a mystic union of souls and bodies never to be divided, where the free and mutual consent of the parties was regarded as essential to marriage" (Encyclopedia Britannica, 1991: Marriage). As for St Paul, Christian marriage was the visible sign (the symbol) of a spiritual reality: the union and love of Jesus Christ and of the Church. Christian marriage became one of the seven sacraments of the Church in 1215.

In the case of civic freedom, one of the cultural meanings was modified after the French Revolution where two Acts were voted in 20 September 1792, which stated that a marriage contract was instituted and so could lead, with the use of the term "contract", to divorce by mutual consent. It was the first mark of the separation between the Church and the State.

Nowadays in modern societies, marriage still integrates commonly accepted notions where marriage is contracted for the purpose of living together and procreating children:

> Union légitime d'un homme et d'une femme en vue de vivre en commun et de fonder une famille, un foyer (Cornu, 2007, Mariage)
>
> The voluntary union for life of one man and one woman to the exclusion of all others (Hyde v. Hyde (1866) L.R. 1 P. & D. 130, 133), for the purpose of living together and procreating children (Baxter v. Baxter [1948] A.C. 274, 286).

This institution of marriage still plays an important role in our modern societies as it constitutes one of its structuring key elements where the survival of a whole community is to be considered. But there is now a need to properly dissociate religious and civic freedoms (Pocock, 1967, 1975, 1999) as France slowly began to do in the eighteenth century, and to modify our own conception, the vision of a family (a man and a woman), and to integrate the notion of same-sex couples in a marriage or with the Civil Partnership.

3.1.2 The Legal Shift in Meaning of "Marriage"

Homosexuality has a long recorded history of both acceptance and repression worldwide. In some European countries, gay and lesbian people had their names listed on police files, and these files have only disappeared quite recently. But over the last several decades, mentalities have evolved and, for the purpose of equal treatment in the law, there has been a trend towards increased visibility, recognition and legal rights for same-sex couples, including marriage, civil unions and parenting rights.

Homosexual intercourse was decriminalized, for instance in Denmark in 1933, in Sweden in 1944 and in the United Kingdom in 1967. But there is still a long way to go before a harmonized treatment is reached within the European Union.

In Belgium, there is no difference between homosexual marriage and the old classic version of marriage. Portugal grants partnership rights to same and opposite sex couples which include next of kin, inheritance, property, social security and tax benefits. Denmark has registered partnerships for same-sex couples where they are granted the same rights as married couples. In Sweden, civil unions have been allowed since 1995 and registered gay and lesbian couples receive many of the same rights as married heterosexual couples and are allowed to adopt children. Germany recognizes next of kin and property inheritance rights for same-sex couples who register as partners.

The United Kingdom passed an Act which set up a precise formalism and led to the basic principle of tolerance in diversity. Considering homosexual couples as an official union has been quite recent in the United Kingdom. Indeed, the Civil Partnership Act 2004 received the Royal Assent on 18 November 2004 and came into force on 5 December 2005. Since this date, gay and lesbian couples in the United Kingdom have become eligible to register as "civil partners". By definition, this Act creates a new legal representation, a civil partnership where two people of the same sex can form a couple simply by signing a registration document. It also provides same-sex couples with parity of treatment in a wide range of legal matters. This Act is quite precise as to who is eligible. Indeed, the couple must be of the same sex, not already be in a civil partnership or marriage, be 16 years of age or older, and not be within the prohibited degrees of relationship (i.e. closely related, same family). In England and Wales and Northern Ireland, people who are between 16 and 17 years will have to obtain the written consent of their parent(s) or legal guardian(s) before registering a civil partnership. In Scotland, individuals aged 16 or over will be able to register their partnership without the need for parental consent. As a civil partnership is a contract, it will cease when one partner dies or

with a dissolution order after having sought legal advice. Other amendments were made for equal treatment in terms of parental responsibilities, like stepparents under Section 72 of the Children Act 1989 and adoption provisions were amended in order for civil partners to be treated equally to married couples.

France also has a Civil Solidarity Pact which grants same or opposite sex partners rights of next of kin, inheritance, social security and tax benefits, but the main issue remains parenting rights.

3.1.3 A Search of European Unity: A Case Study

In France, lesbian and gay individuals can adopt children if they hide their sexual orientations and do nothing to rebut the social presumption that every individual is heterosexual. The case of two little girls is telling of the problems same-sex couples face in France when they want to adopt (Le Monde, 2004). Indeed to adopt, Sophie and Claire had to hide their homosexual relationship and have their own flats.

The most recent case on unfair treatment before the law is the case of an individual staying in a homosexual union and who was denied adoption by the French State because of her sexual orientation. Indeed, a French female applicant wanted to adopt a child and made an application to the Social Services of Jura Department and mentioned her homosexual relationship with her partner. The French socio-educational assistant and the paediatric nurse noted in their report dated 11 August 1998 that the image of a family was not reached in their current lifestyle:

> Regard being had to her current lifestyle: unmarried and cohabiting with a female partner, we have not been able to assess her ability to provide a child with a family image revolving around a parental couple such as to afford safeguards for that child's stable and well-adjusted development.

As a consequence, the individual sought redress before the European Court of Human Rights (E.B. v. France, 2008, application n 43546/02) based on sexual discrimination. The French State denied this stance and stated that the main point was the "paramount interest of the child" referred to as "safeguards for that child's stable and well-adjusted development".

The European Court made it clear in its decision that this treatment is analogous to discriminations based on race (Smith & Grady v. UK, 1999, para. 97), religion (Mouta v. Portugal, 1999, para. 36) and sex (L. & V. v. Austria, 2003, para. 45).

Besides, two recent scientific international studies point out that living in a homosexual family does not influence or harm a child:

> There is no scientific evidence that parenting effectiveness is related to parental sexual orientation: lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children ... research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish... (The American Psychological Association, 2004).
>
> The strongest conclusion that can be drawn from the empirical literature is that the vast majority of studies show that children living with two mothers and children living with a mother and father have the same levels of social competence. A few studies

> suggest that children with two lesbian mothers may have marginally better social competence than children in tradition nuclear families, even fewer studies show the opposite, and most studies fail to find any differences. The very limited body of research on children with two gay fathers supports this same conclusion (Department of Justice Canada, July 2006).

The French State was unable to produce international scientific studies where living in a homosexual family could negatively influence or harm a child. As long as the opportunity of applying to adopt a child as an unmarried individual exists in France for heterosexual individuals, the European Court stated that Articles 8 and 14 of the European Convention of Human Rights and Fundamental Freedoms (1953) do not permit French administrative officials and courts to exclude openly lesbian and gay individuals, solely because of their sexual orientations:

Article 8. Right to Respect for Private and Family Life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14. Prohibition of Discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

3.2 Handicap – Disability and the Law

One of the other legal representations of unity and fragmentation in Europe can be seen through the way handicap is perceived and treated at domestic and European levels. As rightly expressed by the Unesco's Declaration of Principles on Tolerance (1995), "Tolerance is harmony in difference" (article 1). Human beings must respect each other in their diversity, and handicap – disability is one part of this diversity. A general understanding is necessary but without too much compassion either; because compassion is not compatible with equality and the main idea is to stop exclusion. Indeed, our current world, based on competition and productivity, is ill-adapted to disabled people. As such, draftsmen have to intervene and help them to be part of the society.

3.2.1 Cultural Symbolism over the Word "Handicap, Disability"

Handicap is produced by the other's vision. As such it is necessary to detail the definition of handicap and its degrees. It is as if you had a prism where a living reality (Gény, 1922) appears owing to the circumstance of the moment. Cassirer goes further in his analyses and states there is a need of regeneration, of radical change and renewal:

> The life and death of nature is part and parcel of the great drama of man's death and resurrection (. . .) Even nature is in need of constant regeneration – it must die in order to live (Cassirer, 1946, pp. 39–40).

Black's Law Dictionary gives a general idea of disability where it is the "inability to perform some function, an objectively measurable condition of impairment, physical or mental". It lists seven types of disability:

Developmental disability: an impairment of general intellectual functioning or adaptive behaviour.
Permanent disability: a disability that will indefinitely prevent a worker from performing some or all of the duties that he or she could do before an accident.
Physical disability: incapacity caused by a physical defect or infirmity, or by bodily imperfection or mental weakness.
Temporary disability: a disability that exists until an injured worker is as far restored as the nature of the injury will permit.
Temporary total disability: total disability that is not permanent.
Total disability: a worker's inability to perform employment-related duties because of a physical or mental impairment.

Some English Acts have defined disability in various domains of law, such as:

> Disability includes mental as well as physical disability (National Assistance Act 1948, s.64).
>
> For the purposes of this Act, a person shall be treated as under a disability while he is an infant or of unsound mind (Limitation Act 1980, s. 38(2)).
>
> Disabled person means someone who in account of injury disease, or congenital deformity is substantially handicapped in obtaining or keeping employment, or in undertaking work on his own account, of a kind which apart from that injury, disease or deformity would be suited to his age, experience and qualifications; and the expression "disablement" in relation to any person shall be construed accordingly (Disabled Persons (Employment) Act 1944, s.1(1)).
>
> Disabled person means a person who is substantially and permanently handicapped by illness, injury or congenital infirmity (Land Compensation Act 1973, s. 87(1)).
>
> Disablement, in relation to persons, means that they are blind, deaf or dumb or substantially and permanently handicapped by illness, injury or congenital infirmity or any other disability prescribed by the Secretary of State (Registered Homes Act 1984, s.20).

But these various definitions that can be sought in common law dictionaries (Black's Law Dictionary, 1999; Saunders, 1988) are distinct from the ones provided in French law for instance.

> Est considéré comme travailleur handicapé au sens de la présente section toute personne dont les possibilités d'obtenir ou de conserver un emploi sont effectivement réduites par suite de l'altération d'une ou plusieurs fonctions physique, sensorielle, mentale ou psychique.
>
> La qualité de travailleur handicapé est reconnue par la Commission mentionnée à l'article L.146-9 du code de l'action sociale et des familles. L'orientation dans un établissement ou service visé au a du 5° du I de l'article L. 312-1 du même code vaut reconnaissance de la qualité de travailleur handicapé (Article L. 323-10 of the Labour Code).
>
> Constitue un handicap, au sens de la présente loi, toute limitation d'activité ou restriction de participation à la vie en société subie dans son environnement par une personne en raison d'une altération substantielle, durable ou définitive d'une ou plusieurs fonctions physiques, sensorielles, mentales, cognitives ou psychique, d'un polyhandicap ou d'un trouble de santé invalidant (Article L.114 of the Social Action Code)

3.2.2 Seeking Unity Before the Law

The Canadian government in 1994 set up a glossary of terms closely connected with disability through the Terminology and Language Standardization Board of the Government of Canada (http://en.thesaurus.gc.ca/intro_e.html). This database contains many terms and sets up the official way to refer to handicaps and to represent disabled people. The main point is to be positive in the expression of the handicap, to avoid discrimination in the public sphere and to use politically correct words with no negative implied content. For instance in French terms, we refer to people in wheel chairs or having difficulties to walk as "personnes à mobilité réduite", disability in French is translated by "invalidité".

Affirmative actions are policies or programmes set up to provide access to minority groups, which are traditionally discriminated against, with the aim of having a more equal treatment in the law. These programmes consist of making less difficult the access to education, to employment or to social welfare.

The principle of equality was proclaimed in Article 1 of the 1789 Declaration of the Rights of Man and of the Citizen and Article 1 of the 1958 French Constitution. The right to equality and non-discrimination is therefore one of the main pillar of our democratic principles. Hence, the law has to prevent any type of discrimination and look for an equal treatment before the law. Many articles in French law do already comply with these principles.

Article L122-45 of the Labour Code refers to disability "to prohibit direct and indirect discrimination in recruitment, practical and theoretical training, dismissal and sanctions, remuneration, redeployment, posting, qualification, promotion, change or renewal of the contract". Article 225-1 of the Criminal Code defining discrimination expressly refers to disability and state of health as being among the main grounds on which discrimination is prohibited (Loi n 2002-203, 4 March 2002). Article 225-5 of this Code imposes "heavy fines and terms of imprisonment for discrimination in the field of employment, the supply of goods and services and any other business, with increased penalties if the discrimination is committed in a place where the public are welcomed".

Article 111-7 of the Construction and Housing Code (L. of 11 February 2005): "the architectural design, facilities and equipment of residential premises, establishments where the public is welcome, installations open to the public and workplaces

shall be such that the said premises and installations are accessible to disabled persons, whatever the type of their disability, i.e. physical, sensory, mental or psychological."

Another Act came into force on 12 February 2005 (L. no. 2005-102). Its aim is to cover all aspects of disabled people's lives. Article 114-1 affirms as a general principle

> Toute personne handicapée a droit à la solidarité de l'ensemble de la collectivité nationale, qui lui garantit, en vertu de cette obligation, l'accès aux droits fondamentaux reconnus à tous les citoyens ainsi que le plein exercice de sa citoyenneté. . ./. . . L'Etat est garant de l'égalité de traitement des personnes handicapées sur l'ensemble du territoire et définit des objectifs pluriannuels d'actions.

Let's just state some of the ground covered by this new Act. Even if the French Labour Code already compels companies with more than 20 employees to ensure that at least six percent of them are disabled people, employers are now required to implement any appropriate measures to facilitate access to occupations and guarantee employment. Hence, financial incentives are offered to employers committing themselves to employing handicapped staff. The amount of the contribution paid can be reduced depending on the efforts involved in employing disabled people. Another important impact of the Act concerns equal treatment. Indeed, handicapped personnel are no longer exempted from the statutory minimum salary, but employers can still ask Authorities for financial compensation if a handicapped employee has a low productivity rate.

Equal treatment before the law is now crucial for any member-state in order to fully transpose Directive 2000/78/EC. However, for the French case 80 "décrets d'application" will be necessary to fully implement this Act.

3.2.3 Seeking European Harmonization

The European Union has developed its policy on the integration of disabled people through four main pieces of legislation: the Equal Treatment Directive 2000, the Council Resolution of the 17 June 1999 on equal employment opportunities for people with disabilities, the EC Resolution of 20 December 1996 on equality of opportunity for people with disabilities, and the European Social Charter, 1961 (revised in 1996).

The EC Equal Treatment in Employment Directive (2000) prohibits direct or indirect discrimination in employment on grounds of disability, age, religion or belief. The directive means that failure to provide reasonable accommodation (Article 5) for a disabled person can constitute discrimination:

Article 5. Reasonable Accommodation for Disabled Persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in or advance in

employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the member-state concerned.

This directive requires that all EU countries must have civil anti-discrimination legislations protecting disabled people in employment (Article 7):

Article 7. Positive Action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any member-state from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.
2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of member-states to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

With the Council Resolution of 17 June 1999 on equal employment opportunities for people with disabilities, EU countries are called upon to put particular emphasis on the promotion of employment opportunities within the framework of their domestic employment policies, and to develop policies to assist their integration into the labour market (para. 2):

The Council underlines that the national action plans for employment provide a comprehensive platform within which the above-mentioned policies should be strengthened. Member-states are therefore called upon:

(a) within the framework of their national employment policies, and in cooperation with the social partners and non-governmental organizations for people with disabilities, to place particular emphasis on the promotion of employment opportunities for people with disabilities and to develop suitable preventive and active policies for the specific promotion of their integration into the labour market in the private sector, including self-employment, and in the public sector;
(b) to make full use of the existing and future possibilities of the European Structural Funds, in particular the European Social Fund, and relevant Community initiatives, to promote equal employment opportunities for people with disabilities;
(c) also in the above context, to attach particular attention to the possibilities offered by the development of the information society for opening new employment opportunities but also challenges for people with disabilities (para. 2).

The EC Resolution of 20 December 1996 on equality of opportunity for people with disabilities calls on member-states to consider whether national policies work towards

– empowering people with disabilities for participation in society;
– mainstreaming the disability perspective into all relevant sectors of policy formulation;
– enabling people with disabilities to participate fully in society by removing barriers; and
– nurturing public opinion to be receptive to the abilities of people with disabilities.

Finally the European Charter 1961, revised in 1996, is a treaty which protects human rights. It seeks to ensure the rights of disabled people to independence, social integration and participation (Article 15):

With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular:

1. to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialized bodies, public or private;
2. to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialized placement and support services;
3. to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.

4 Transnational or Cross-Boundary Harmonization within the EU

The phenomenon of globalization has become a crucial issue, especially when Human Rights are concerned. Distinctions between domestic and external problems are becoming increasingly blurred.

The ideal model would be to have a simplified and harmonized relationship between international law and national laws, a kind of global judicial federalist system that would try to connect the different regimes, or at least progressively diminish the barriers between the national and international legal orders. It will thus create a porosity of the borders between national and international laws (Santos, 1995, p. 473). The Judiciary would therefore have a key role to close the gap (Wellens, 2004) and point to unity (Pauwelyn, 2003–2004). There would be a first instance

judge whose role would consist in guaranteeing that States respect human rights and that an individual be prosecuted if he commits crimes "of concern to the international community as a whole".[4] If we go into that direction, national law would therefore have to conform itself to the substantial requirements of international law.

This model may be – at first sight – considered as a utopia but if we consider decisions of national judges, we can note that they apply international law only when there exists an equivalent rule in his own national legislation. This "role splitting" theory[5] (Scelle, 1956) is even more visible when dealing with Human Rights where the national judge is altogether the guarantor of the national and international laws in this respect.

In *Matthews v. United Kingdom*, the European Court of Human Rights (ECtHR) recalled that the European Convention on Human Rights "does not exclude the transfer of competences to international organizations provided that convention rights continue to be secured".[6] From the perspective of international fragmentation, it is worth noting that the ECtHR described the Convention as "a constitutional instrument of European public order",[7] while on a transnational harmonization perspective, the ECtHR stated that the Convention "should be interpreted as far as possible in harmony with other principles of international law of which it forms part".[8]

But in other cases, the ECtHR has been very cautious and merely refers to existing remedies when it deals with central questions of international law.[9] The harmonization is still in its infancy contrary to the field of international trade where the European Community where it is ready to "submit to an independent international dispute mechanism such as the one at the heart of the WTO" (Clapham, 2002, p. 88).

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[4] Expression taken from the Rome Statute of the International Criminal Court, Article 5.

[5] "The agents granted with an institutional competence or invested by a legal order, used their functional capacity as it is organised in the legal order that instituted it to guarantee the efficiency of another legal order devoid of the organs necessary to its implementation" (Scelle, 1956, p. 331).

[6] *Matthews v. United Kingdom*, 123 I.L.R. 1, 13 at para. 32 (Eur. Ct. H.R. 1999).

[7] *Loizidou v. Turkey*, Judgment on Preliminary Injunction, 310 Eur. Ct. H.R. at 27 (1995).

[8] *Bankovic and Others v. Belgium and* Others, 2001-XII Eur. Ct. H.R. 335–345 (Dec. 12, 2001) at para. 57.

[9] *Al-Adsani*, 34 Eur. H.R. Rep. 273 (2001) at 300–301.

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Part II
European Law

Chapter 5
The Universalisation of Legal Interpretation

Marek Safjan

Abstract This chapter examines the current phenomenon of the universalisation of legal interpretation in the European context. Case law of the Constitutional Tribunal of the Republic of Poland, related to EC law and the ECHR, is being researched for records of this practice, which can be observed on two levels. Firstly, it is argued that, from an operational perspective, there is a significant shift in attention paid to and in the frequency of use of particular methods of legal interpretation (with increasing practical importance of purposive interpretation). Secondly, the universalising practice of the judiciary is reflecting and enhancing a broader process of establishing a common legal sphere of principles and values shared in the integrating Europe. The actual influence of the universalised interpretative standards onto judicial decision-making is also discussed, as it may take the form of a genuine, crucial impact; of a complementary or subsidiary argument; or possible of a mere ornament with no real weight in the line of reasoning developed by a court.

1 Introductory Remarks

At the beginning, it is worth attempting to characterise (even if in a somewhat simplified way) how the universalisation of an interpretive standard can be understood. It is a process taking place in many contemporary legal systems. Thus, it seems useful to consider in what sense we speak of a dissemination of certain methods of interpreting and applying the law, since this sense is not evident and may conceal many diverse meanings.

First – and possibly the most obvious connotation of this phenomenon – is a reference to interpretive techniques themselves. The present period will presumably be characterised in the history of European legal culture as a real end of legal positivism. The present-day change in the interpretive paradigm, prevailing in

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jurisprudence and in the practical application of the law, should not be reduced (as is too commonly and trivialisingly upheld) to the renunciation of the absolute predominance of semantic interpretation. This type of legal interpretation has served as a starting point for all inferential processes, but at the same time it defined the limits of the admissible freedom of interpretation. The current reconstruction of the content of the legal norm is increasingly often performed through a reference to its purpose, to the function of the institution, the intended legislative effects, and to the legal system in which the norm exists as a whole. Considering the state of present discussion on the interpretation and application of the law, this observation seems rather banal.[1] The change in the contemporary techniques of legal interpretation goes much deeper, because it increasingly affects also the very premises, structure and methods of semantic interpretation. A statement *omnia sunt interpretanda*,[2] expressed in opposition to the classical (and still frequently invoked) maxim *clara non sunt interpretanda*, implies a radical, even revolutionary, change in the sphere of semantic interpretation.[3] Concepts, legal constructions, legal institutions, principles and values, expressed by the law, are losing their stable, uniform semantic sense nowadays to much more flexible and dynamic conceptions. These latter are not only influenced by the context of the closed, highly formalised realm of "jurisprudence of concepts"[4] but also determined by phenomena from "the outside" of the system – taking place in the sphere of actual social, economic and political changes, on a local and domestic, as well as on an international and supranational levels.[5] This evolution of the context, in which legal mechanisms are functioning, is imposing changes in the sphere of semantics, just as expectations regarding the

[1]The literature on this issue is quite abundant. The diagnosis of contemporary tendencies in legal interpretation, as proposed by Henri Rabault (1997), seems to be particularly accurate. The universalisation of legal interpretation can be perceived through a category, described by the author as a supradetermination of the sense of the norm ("an interpreter, applying a norm, remains under the influence of everything that has a trait of truth. The phenomenon of the supradetermination of the sense of the norm is exactly an informative phenomenon of interpretation") (p.74).

[2]See Zieliński (2005), where the author states that the meaning of legal notions, as well as of other cultural objects, is determined through humanistic interpretation. It also strongly supports the rejection of a stance consistent with the *clara non sunt interpretanda* rule (p. 120). On this issue, see also Zieliński (1990).

[3]The view that the limits of interpretation are determined by the linguistic meaning of a legal text is, however, still widely represented in jurisprudence (see, e.g. Płeszka, 1997) and in judicial decisions, including those of the Polish Constitutional Tribunal, which in one of its decisions states that "in a state ruled by law, an interpreter always has to take into account primarily the linguistic meaning of a legal text. If the linguistic meaning is clear, then, according to the principle *clara non sunt intepretanda*, there is no need to reach for other, extralinguistic methods of interpretation," judgement of the Constitutional Tribunal of 28 June 2000, K 25/99, Digest of the Case Law of the Constitutional Tribunal 2000/5/141 (today, I could hardly agree with a thesis so formulated).

[4]It is worth remembering that in classical positivist theories the use of historical, sociological and psychological research, or ethical and moral assessments in the process of construing the meaning of legal concepts was entirely excluded (see Stelmach & Brożek, 2004, p. 28 and ff).

[5]In a more radical version, it might be assumed, after American realists, that the rule is what judges are applying and maybe even what the behaviour of the addressees of the law is demonstrating (see Winczorek, 2005, p. 134).

particular role of legal institutions motivate a search for their new meanings. The current change in interpretive techniques is not only a modification within the methods of interpretation (i.e. the overthrow of the primacy of semantic interpretation) but also – and particularly importantly – a mutual penetration of methods that have been perceived so far as largely competing. A purposive interpretation is delimiting the sense of legal concepts and institutions,[6] and the task of drawing the line of demarcation between both categories of interpretive directives is not a simple task these days.[7] Why is this phenomenon of the change in interpretive techniques linked with the "universalisation of the standard" of legal interpretation? It is because the interpretive approach described above, becoming increasingly popular in modern legal systems, is arguably the most important instrument for building the common European sphere.

Another way of understanding the universalisation of the interpretive standard (albeit strongly connected with processes in the sphere of applied techniques of legal interpretation described above) is a distinct tendency towards building common foundations, principles and values of legal systems, as well as hierarchies of those principles within particular systems in the integrating Europe. The pluralism of legal orders, systemic traditions, institutional solutions and concepts of judge-made law in Europe shall not, as is still more commonly believed, pose an impassable barrier for creating a common legal sphere. Hence, the variety of techniques of applying the law, the hierarchies of legal sources and the concepts of case law cannot justify the resignation from seeking a common sense of institutions and the essence of meaning of particular legal notions. The techniques might be different, but the results (e.g. an identical level of guarantees for the fundamental rights or hierarchy of the values within the system) have to be the same. In this sense, the universalisation of the standard consists in aiming at convergent results of legal interpretation, despite the existence of non-identical normative constructions in the particular systems. For example, universal connotations of legal notions present in European law and in judicial decisions, as well as methods of resolving conflicts between principles of the system, might become a point of reference for the reconstruction of meanings of the principles and values of the system. Thus, an interpretive directive of the search for a common sense indicates also that in the event of achieving contradictory results of interpretation in the form of <A and B>, where only A has a semantic value convergent with the universal standard, the value included in A will be selected as a basis for applying the norm. It certainly raises a question about the

[6]This is the reason why, unsurprisingly, the dominant view in jurisprudence for several decades has been that it is not always possible to precisely draw the limits between interpreting and creating the law (see, e.g. Ziembiński, 1980, p.279; Morawski, 2002, p. 22). Lech Morawski also quite accurately observes that, even on the theoretical grounds of a prohibition on a law-making interpretation, it can still be argued that not every creative interpretation is *contra legem* (Morawski, 2006, p. 21).

[7]Still, it should be clearly stated that all derivative theories of legal interpretation aim not at changing the meaning of the interpreted norm but at determining its meaning more appropriately (see Zieliński, 2002, p. 241).

legitimacy of such an interpretive technique. It cannot be explained through a simple reference to purposive interpretation, as purposive interpretation does not itself determine what is a desirable or demanded purpose and function of the norm; it only indicates that the purpose or the function is a criterion for decoding the meaning of the norm. This problem can also not be solved on the basis of a hierarchical construction of legal orders, according to the rule *lex superior derogat legi inferiori* and to the assumption that supranational norms have an absolute primacy over domestic ones. This assumption is only partially true and does not affect constitutional norms, for example, which always retain an attribute of being the highest norms of the system. Additionally, the phenomenon of choice of the *proper, universal sense* of a legal concept or a principle arises not only in those spheres where the domestic law and the international norms might be in collision but also in the sphere of the exclusive application of the domestic norm. A justification stating that for an interpretation of the constitutional norm X or Y it is necessary to refer to ECtHR case law and to apply ECHR standards cannot, therefore, be based on a claim that the equivalent of the norm X or Y in the Convention has a hierarchically higher status than the constitutional norm. The universalisation of the semantic standard (of the principle, value, norm) present in the modern legal systems cannot be derived from a formal interpretive directive explicitly expressed in the constitution or in the primary law or from the hierarchically superior position of the norm, possessing a universal, all-European scope of application. It can be deduced from a set of paradigmatic assumptions, defining relations between the domestic law and the law created supranationally, and expressing the desire to build a democratic legal sphere on the basis of the same set of principles and values – even in those areas where European or international regulations do not apply. It is a strive towards the convergence of European systems on the level of principles, the axiological order and its hierarchy, as well as of the methodology of resolving conflicts between principles and balancing contradictory values – which is essentially connected with creating a European legal order –legitimising the discussed interpretive efforts aiming at the universalisation of the standard.[8] Therefore, it is important to clearly state that the contemporary concept of the interpretation of law in Europe is strictly and inextricably related to the idea of integration and that it is an instrument and a core of broadly understood integrative processes in Europe. Evidence can be found in several decades of European experience showing that, without the universalisation of interpretation, it would have been impossible to reach the current stage of integration. It is not in the hierarchical structure of norms in the legal order nor in the normative orders of one or the other interpretive directive, but in the acceptance by particular states for the idea of building the European sphere as expressed in the primary law where a basis can be found for a creation of a specific interpretive result, which will possibly be most accurately convergent with the universal standard.

[8]Established interpretive directions from the case law of supranational courts play an important role in this regard – particularly the phenomenon known as *stare interpretandis* (see Gogłoza, 2006, p. 118 and ff).

Both forms of the universalisation of the legal standard discussed above are present in the process of interpreting and applying the law: not as alternative and competing, but as complimentary methods that can affect the final result to a different extent, depending on the nature of the interpreted norm, the systemic context and the, sought after, purpose of interpretation.

Before we start exemplifying this statement by constitutional case law, it is worth attempting a more general reflection regarding the sources of this phenomenon. Firstly, in our part of Europe the concepts of the interpretation of law have changed radically due to the impact of democratic changes and the fundamental political and systemic transformation. The example of Poland seems particularly illustrative in this regard: the formally preserved continuity of the legal system after the year 1989 and the evolutionary (not revolutionary) change of system in particular branches of the law required a quick and radical "translation" of the axiology of the new, democratic order onto the sphere of application of the law (while the law itself remained long unchanged in its basic foundations). Legal constructions and mechanisms, established in the past and serving as peculiar but also anachronistic decorations of the transformation, must have been filled with new meanings, sense and functions in accordance with the axiology of the market economy, the hierarchy of values of the democratic society, guarantees of fundamental rights and the new position of the individual in relation to public authority. The seemingly solid meanings, such as those ascribed to basic, systemic general clauses (such as the principles of social coexistence, or social-economic purpose of an obligation) or to certain principles (including party autonomy and freedom of contract, causality and abstractness of obligations and the protection of private property), underwent a deep metamorphosis without changes in their strictly normative depiction. A critical role in this movement was played in the early 1990s by the case law of the Constitutional Tribunal. This case law was shaped on the basis of the principle of democratic state ruled by law introduced to the constitutional order of the Republic of Poland (as described *infra*). This process could not have taken place without fundamental changes in the sphere of legal interpretation: the new systemic context determined the shape of many legal institutions as well as the direction of their interpretation and application. Furthermore already at this early stage of the transformation, the principles and values created in a broader, European context served as a point of reference for changes in the sphere of legal interpretation. Inspirations for a search for the new meaning, function and purpose of particular legal institutions were drawn from the case law of the ECtHR and the ECJ and from the model solutions adopted in countries with an established democracy. The systemic transformation, accompanied by the broad opening of the legal system onto the "democratic axiology" shaped in the free world, strongly stimulated the rejection of a purely positivistic and dogmatic concept of interpretation (see, e.g. Kiedrowska, 2006, p. 177 and ff – remarks on the issue of pro-European interpretation).

At the same time, it would be a perilous oversimplification to assume that the contemporary change of legal rendition standards is a complete breach of continuity with the former line of development of interpretive traditions and that current tendencies do not have their counterparts in the past. Purposive interpretation has

always played a significant role in the field of private law. Even in communist times, relatively many manifestations of a surprising creativity of the courts in the field of civil law might have been found, which could also today be qualified as symptoms of the universalisation of the standard.[9] Nowadays, the new methodology of legal interpretation is discussed in relation to all branches of the law (including criminal law), and, moreover, we might make use of a systematised set of interpretive directives, changing the ideology of legal rendition.

2 Light and Shade of the Universal Standard

As remarked above, the universalisation of the standard of legal interpretation is one of the rudimentary instruments for broadening and solidifying a common legal sphere. It undoubtedly enhances the effectiveness of binding legal mechanisms, particularly in the area of guarantees for fundamental rights. Placing an emphasis on the purpose and function of applied solutions, as well as respecting the adopted order of principles and values on a plane broader than the one delimited by a domestic order, presumably helps avoid incoherence and axiological gaps and fills rights and freedoms with actual content. From this perspective, principles and values cannot be treated as a merely decorative detail, an ornamentation of the system, but they must have a real impact onto the mechanisms of legal protection, situated in the detailed and often seemingly technical, legal solutions. Without a new methodological approach in the sphere of legal interpretation, the phenomenon known as the "radiation" of constitution (manifesting, for example, through the horizontal influence of the fundamental rights onto relationships between the subjects of private law) would not be possible.

Still, the fact that the universalisation of the standard is also associated with a certain risk cannot be disregarded.

Firstly, it may lead to a conflict with traditional, preserved in the system, connotations of legal notions such as property and economic rights, good faith, privacy, autonomy of a person, freedom of contract or a family bond. It often leads to the necessary re-evaluation of established patterns of judicial decisions and jurisprudence.

Secondly, the introduction of the directive of purposive interpretation as a basic one significantly expands the sphere of judicial discretion. As a result, the burden of creating a norm – the content of which is more and more dependent on interpretive operations – is being shifted in the direction of the authorities applying the law, at the cost of the legislator's prerogatives.

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[9]The creation of a new personal right – the right to privacy – by the adjudicatory practice in the 1970s, as well as a statement of an *ex delicto* liability for defective products may serve as good examples of this phenomenon. In both cases, inspirations were drawn from other European and Anglo-Saxon legal systems (see Kopff, 1972; Sołtysiński, 1970).

Thirdly, there is a risk of diminishing the level of certainty and predictability of the binding law: the law exposed to rapid (if not revolutionary) changes in the sphere of interpretation is losing its clarity, which may lead to random and arbitrary results.

Those threats should definitely not be disregarded, though there are no particularly strong arguments supporting the attribution of an absolute force to the traditional, established legal concepts. The evolution of legal concepts is, as mentioned above, a well-known process, quite thoroughly analysed by theory. It also took place on the grounds of traditional methodologies of interpretation and therefore is a natural phenomenon in the development processes of the law. Novelty today lies not in the evolution of legal notions and constructions itself but in the introduction of new instruments of interpretation, which make this process a much more dynamic and rapid one. At the same time, the flexibility of the law and its responsiveness to the demands of the contemporary conduct of legal transactions is increasing. Concerns, resulting from points two and three (judicial discretion and diminished level of certainty of the law), should also not be overestimated, on the condition that, in the process of legal interpretation, the demands of argumentative transparency (which provide for the possibility to verify the correctness of the application of judicial law) will be respected and that the instruments of judicial control – on both domestic and international levels – will work effectively.

3 The Role of the Judiciary in the Universalisation of the Interpretive Standard

It is banal, if not self-evident, to say that eventually it will be the judiciary that will decide about the evolution of interpretive methods and preferences. Still, it is worth noting in this regard the exceptional role of constitutional case law. Its functions and singular features, distinguishing it from the classical body of judicial decisions, mark its decisive role in popularising the new perspective on the interpretation and application process of the law in the entire system. Several reasons for that state of affairs can be found.

Firstly, the competence of the Constitutional Tribunal as the *court of the law* (which, *ex definitione* concentrates its activity on decoding the content of a constitutional norm and a norm under control) is crucial. The constitutional review does not consist in the correct subsumption of a given fact, but in the ascertainment of existing and potential interpretive directions of the scrutinised norm. This should be performed from the broadest possible systemic perspective, encompassing the often heterogeneous consequences of the application of the norm from the point of view of the hierarchically higher norm, with due regard paid to its function and purpose, as well as principles and values of the legal order.

Secondly, due to the nature of constitutional norms (which frequently take the form of specific general clauses for the entire legal system), decoding the meaning and sense of a norm is a constant process of weighing and balancing the values it

expresses in confrontation with other fundamental values. This results in a significant expansion of the sphere of reference of such an operation into an area of necessary axiological choices, performed at a meta-legal level, and related to the core of the mechanisms of a democratic society and the concept of the state of law. This concept has not been defined or specified as to its content, and it relies on a *sui generis* "idealising" model – a historically developed vision of a democratic society. It is not only a sublimation of principles and values, expressed in constitutions of democratic states, and rooted in the European legal tradition. It is also a mouthpiece of the *order of values* – their mutual hierarchy and limits expressed in conflict with other principles of the system. From this perspective, a search for inspiration for such interpretive attempts in a sphere of common constitutional heritage of European democratic states is entirely understandable.[10] A classical, constructive example of performing such interpretive operations were judicial decisions of the Polish Constitutional Tribunal after 1990. The practice of the Tribunal was to acknowledge, on the basis of the principle of rule of law, rights and freedoms not guaranteed explicitly by the Constitution, but derived from the nature of a democratic system and related to the European legal tradition. In this way, even before the new Constitution entered into force in 1997, thanks to the body of rulings by the Constitutional Tribunal, rights and values were recognised and confirmed such as the right to due process, the protection of acquired rights, the protection of private life and informative autonomy, the right to life, a prohibition of the retroactivity of the law and the protection of pending interests (legitimate expectations) of an individual. In those decisions, a judicial self-awareness of the need for the universalisation of the standard played an important role, and the search for a proper sense of the decoded constitutional norm was enhanced by inspirations drawn from ECtHR case law.

Occasionally, the constitutional body of rulings provides a first impulse for seeking new meanings and the scope of applied legal norms, which is then implemented at the level of the common courts and the Supreme Court.[11] However, the significance of judicial decisions, issued by common courts, in shaping the contemporary interpretive standard should not be marginalised. It is becoming ever more frequent that the direction of legal interpretation – new, open and creative – being developed by the common courts is determining an opinion by the constitutional court and affecting the evaluation of the constitutionality of the norm.[12]

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[10] At the level of European law, this concept is explicitly expressed by Article 6 of the Treaty on European Union, which refers to constitutional traditions common to the Member States. At the same time, this provision formulates a directive of the interpretation of European law.

[11] See constitutional case law regarding the issues of property left in the former eastern territories of Poland, which was later widely used in judicial decisions by the Supreme Court. See the judgement of the Constitutional Tribunal of 19 December 2002, K 33/02, Digest of the Case Law of the Constitutional Tribunal 2002/7A/97; judgements of the Supreme Court of 30 June 2004, IV CK 491/03; of 6 October 2004, I CK 447/03.

[12] See the decision of the Constitutional Tribunal on the abuse of a subjective right (Civil Code, Article 5) [judgement of the Constitutional Tribunal of 17 October 2000, SK 5/99, Digest of the Case Law of the Constitutional Tribunal 2000/7/254]; on pecuniary compensation for an abuse of personal rights (Civil Code, Article 448) [judgement of the Constitutional Tribunal of 7 February

4 New Instruments of Legal Interpretation: Pretence or Reality? An Attempt of Exemplification

It is worth answering the question of what forms the phenomenon of the universalisation of the interpretive standard takes in adjudicatory practice. It cannot be ruled out that this process is purely formal and manifesting itself only in verbal declarations formulated by authorities applying the law, rather than the real influence of a new interpretive standard on the direction of undertaken decisions. It is only an analysis of specific decisions that can bring an answer to this question. In anticipation of examining specific examples, an attempt can be made to distinguish three different forms of applying the universal standard and to define characteristic features of each of them.

I would define the first of them as a *variant of a real (genuine) impact on interpretation and its results*.

The second one as a *variant of subsidiary or complementary application*.

The third one as a *variant of illusory/decorative application*.

Ad 1/ The variant of a real (genuine) impact can be characterised through the following components, which may be present alternatively or cumulatively.

Firstly, through its actual, decisive influence on the change of a traditionally fixed stance, as to, for example, the way in which a particular legal construction or its scope of application is understood.

Secondly, when it is determining the choice of one of the available interpretive solutions and at the same time it forms a self-reliant criterion for resolving conflicts between opposed principles and values.

Thirdly, when it is introducing new interpretive extents of the applied norm and significantly affects the constitution of new components of its content.

Ad 2/ a subsidiary or complementary variant plays an important role in an argumentative level as an additional factor, augmenting the stance of the court, but not itself determining the finally adopted, interpretive result. As a matter of fact, it confirms the result achieved by traditional interpretive means and enhances the persuasiveness of the justification of the decision. It is a signal of the awareness of a broader interpretive context, and sometimes it can be a foretoken of a change in an established position or an interpretive direction.[13]

Ad 3/ The role of a variant of illusory/decorative application is that of a mere ornament: it does not bring any new argumentative components and is always only a confirmation of results already achieved by traditional methods.

2005, SK 45/03, Digest of the Case Law of the Constitutional Tribunal 2005/2A/13]; or on a conflict between prescription and the protection of property [judgement of the Constitutional Tribunal of 14 December 2005, SK 61/03, Digest of the Case Law of the Constitutional Tribunal 2005/11A/136].

[13]This method of finding inspiration in adjudicative practice of other courts is sometimes described as a non-independent source of use of precedent for a reconstruction of a norm (see Leszczyński, 2003, p. 154 and ff.).

5 The Real (Genuine) Influence on the Interpretation of Law

The actual importance of the influence of the modern standard of interpretation can be seen when established legal concepts are transformed into judicial decisions and court assessments are based on a newly formulated concept. This technique is often applied in Polish constitutional case law, in which general (indeterminate) and autonomous notions allow for a relatively wide margin for determining a new reading of the applied norm, in accordance with its function and meaning established in European case law. Several examples of this mechanism are presented below.

One of the examples concerns shaping safeguards with regard to the protection of property and proprietary rights, provided for in Article 64 of the Polish Constitution, by the decisions of the Constitutional Tribunal. The influence of the criteria laid down in Article 1 of the First Protocol to the ECHR is clearly apparent in the constitutional case law. The decision on the right to offset the value of property left in the former eastern territories of Poland[14] concerned the application of safeguards contained in Article 64 of the Constitution to a specific compensatory mechanism of a public nature aimed at those who lost their property following territorial changes after the Second World War. Polish law was not clear on whether the possibility of offsetting a certain part of the property lost by a given person in these circumstances in the process of acquiring State-owned property should be treated as a proprietary right. The constitutional safeguards of Article 64 could be applied only if the compensatory mechanism were to be recognised as a proprietary right. A classical approach based on a dogmatic understanding of a proprietary right would not lead to an unequivocal outcome in this respect. However, taking into account the case law of the ECtHR, the Constitutional Tribunal adopted a wider concept of a proprietary interest and, accordingly, of a proprietary right of a public character linked with the interest. As the Tribunal observed:

> The notion of property (possessions) contained in the ECHR may not be limited only to the definition of property from the classical civil law approach. It is an autonomous construct encompassing wide variety of proprietary interests of a given economic value (. . .). From this perspective, the term 'possessions' ('*biens*') used in Article 1 of Protocol 1 to the ECHR encompassing various categories of proprietary rights is closer to notions present in Article 64 (1) of the Constitution, namely to the property and proprietary rights. The latter terms taken together determine the scope of constitutional safeguards for proprietary interests of individuals. In the Tribunal's view the right to offset (to credit) the value of property is not merely an expectancy of property. It is a particular proprietary right of a public nature, the enforcement of which should be ensured by legislative acts. This does not constitute, however, an obstacle to apply standards of protection under Article 1 of Protocol 1 to the ECHR with regard to such right. As it is pointed out in legal writings, the protection is applicable, for example, to rights derived from public law relationships. A similar tendency is discernable in the case law of the European Commission of Human Rights, as well as of the ECtHR.

[14] Judgement of the Constitutional Tribunal of 19 December 2002, K 33/02, Digest of the Case Law of the Constitutional Tribunal 2002/7A/97.

Nevertheless, it seems more productive and interesting to use the concept of a violation of property and proprietary rights developed in the case law of the ECtHR in the assessment of the actions of the public authorities. If the State establishes a compensatory scheme, the operation of which is faced with barriers and difficulties, and thus allows only a small number of injured persons to be compensated, would it lead to raising an issue of a violation of property and proprietary rights? Two fundamental concepts originating from the case law of the ECtHR support a positive answer to this question.

Firstly, States are not only bound to refrain from any action "actively" violating rights and interests protected by the ECHR but they are also under a positive duty to undertake legal and factual actions aimed at the effective enforcement of protected rights. The existence in the legal system of illusory or ineffective legal mechanisms hampering the effective enjoyment of the rights of an individual may be a proof that the State is not discharged of its public responsibilities. In this case, there were no effective compensatory mechanisms on the right to offset the value of property and the situation was found to be a violation of duties of a public authority. As the Tribunal observed:

> From a constitutional perspective, the protection of a given proprietary right extends to safeguarding its effective enforcement, so it presupposes taking into account a wider systemic context in which the right exists. As a result, an assessment of legal provisions that interfere in the enforcement of a right, and *de facto* exclude the enforcement, may lead to declaring such provisions contrary to Article 64(2) of the Constitution [equal protection of proprietary rights].

Secondly, a *de facto* expropriation is another idea present in the case law of the ECtHR. Here, a decisive element is to assess whether the mere existence of barriers in the enjoyment of a right may constitute a violation. The Tribunal introduced the concept of a right devoid of substantive contents and value (*nudum ius*), namely a right that formally exists but has no economic significance for an individual in a given legal and factual context. Taking into account ECtHR case law, the Tribunal assumed that an illusory compensatory scheme, although formally in force, should be qualified as a *de facto* expropriation as it transforms the right into a *nudum ius*. The decision refers to these Strasbourg cases in which the protection under Article 1 of the First Protocol to the ECHR was granted to various proprietary interests that could not be effectively enforced pursuant to national law. As the Tribunal stressed:

> The scope of application of Article 1 of the First Protocol in the case law of the ECtHR extends to such various interests as a right to recover immovable property illegally confiscated by public authorities (see judgement of 30 May 2000 in the case *Belvedere Alberghiera S.R.L. v. Italy*), claims for damages for expropriation (see judgement of 30 May 2000 in the case *Carbonara and Ventura v. Italy*), claims for damages not subject to compensation under national law (see judgement of 20 November 1995 in the case *Pressos Compania Naviera S.A. and others v. Belgium*), a right of the owner *de facto* deprived of the property to use the property (see judgement of 24 June 1996 in the case *Papamichalopoulos and others v. Greece*), and even the reduction of old-age benefits (decision of 18 October 2001 in the case *Labus v. Croatia*, 50965/99).

The decision on the right to offset the value of property is noteworthy for yet another reason, namely because it is an element of a dialogue between the constitutional court and the ECtHR. The case was pleaded in Strasbourg by former owners of the expropriated land. The ECtHR shared, in principle, the reasoning laid down in the judgement of the Constitutional Tribunal as to the appraisal of the compensatory scheme and the assessment of the *de facto* expropriation by the public authorities.[15] The fact that Poland was found to be in violation of the Convention was a result of the public authorities' negligence in enforcing the judgement of the Constitutional Tribunal.

Another interesting example of the use of a new juridical concept explicitly applying the ECHR standard with regard to a constitutional principle can be found in the judgement of 28 April 2003 on the establishment of the paternity of a child.[16] At stake here was the relationship between the protection of private and family right under Article 8 of the ECHR, and the constitutional principle of the protection of a child (Article 72 of the Polish Constitution).

The Tribunal renounced the former concept of a family relationship, as provided for in the Polish Family and Guardianship Code 1964, based on the assumption that in certain situations the establishment, in accordance with the biological truth, of the paternity of a child born out of wedlock, may be blocked by the mother of the child. Refusing to consent to the acknowledgement of a child by a man not married to the mother could prevent the establishment of family ties between the father and the child. This was because the biological father could not ask the court to establish his paternity, i.e. he had no *locus standi* in such proceedings. The Tribunal expressly referred to tendencies discernable in the case law of the ECtHR. Firstly, it concerned growing respect for the right of every person to know their biological identity (*le droit à l'identité biologique* – cf. Safjan & Mikłaszewicz, 2006).[17] Secondly, it was connected with an interpretation of the right to privacy and family rights under the ECHR that would allow the limits of traditional family law to be surpassed, e.g. blocking the possibility to establish the parenthood of an extramarital child. The inspiration for such a wide understanding of the "well-being of a child" and

[15] See judgement of the ECtHR (Grand Chamber) of 22 June 2004 in the case *Broniowski v. Poland*, No 31443/96. The ECtHR found, as did the Constitutional Tribunal, that proprietary rights of the applicant were violated as a result of *de facto* actions and omissions of state authorities: "The mutual interrelation of the alleged omissions on the part of the State and of accompanying acts that might be regarded as an 'interference' with the applicant's property right (. . .). As rightly pointed out by the Polish Constitutional Court (. . .), the imperative of maintaining citizens' legitimate confidence in the State and the law made by it, inherent in the rule of law, required the authorities to eliminate the dysfunctional provisions from the legal system and to rectify the extra-legal practices" (§§ 145 and 184).

[16] Judgement of the Constitutional Tribunal of 28 April 2003, K 18/02, Digest of the Case Law of the Constitutional Tribunal 2003/4A/32.

[17] Cf. judgements of the ECtHR of 7 July 1989 in the case *Gaskin v. United Kingdom*, No 10454/83, § 39; of 7 February 2002 in the case *Mikulić v. Croatia*, No 53176/99, § 54; of 12 January 2006 in the case *Mizzi v. Malta*, No 26111/02, § 90.

of the respect for family life was found in the ECtHR case *Marckx v. Belgium*.[18] In that case, the Court stressed that "as envisaged by Article 8 (...), respect for family life implies in particular (...) the existence in domestic law of legal safeguards that render possible, from the moment of birth, the child's integration in his family."[19] Furthermore, a reference was made to the assertion of the European Commission of Human Rights in the case *Rasmussen v. Denmark* that "effective respect for private and family life within the meaning of [Article 8 of the ECHR] obliges the Contracting States to make available for the alleged father of a child an effective and accessible remedy by which he could have established whether he is the biological father of the child."[20]

The Constitutional Tribunal's decision on the establishment of the paternity of a child clearly confirms the development of a new standard of assessment and of the interpretation of principles determining family relationships. The interpretation of family and a private life under Article 8 of the ECHR established in the case law of the ECtHR significantly influenced the decision of the Constitutional Tribunal in a subsequent case on the acknowledgement of paternity of a stillborn child.[21] Polish law did not allow the acknowledgement of such a child, and this situation was found to be contrary to Article 18 (constitutional protection of parenthood) and Article 47 (protection of private and family life) of the Constitution. The decision stresses the need to take into account, within the framework of constitutional guarantees, the right to personal development and the identity of every human being, i.e. the value protected by Article 8 of the ECHR pursuant to the case law of the ECtHR. As underlined in case *Mikulić v. Croatia*, cited above, "respect for a private life requires that everyone should be able to establish details of their identity as individual human beings, and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality."[22]

A number of characteristic decisions of the Constitutional Tribunal demonstrate the importance of a universal standard as a criterion for establishing the correct meaning of a norm whenever classical rules of interpretation provide for different but equally legitimate meanings. In such situations, a new concept of interpretation acts is applied in a genuine, not illusory way, provided that no interpretation is granted priority following the application of classical models. A good example of this mechanism is disputes over the protection of privacy on the one hand, and the right to information and the transparency of public life on the other.

In one of the cases,[23] the Constitutional Tribunal dealt with the issue of how to qualify those facts of private life of a public figure that have some connection

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[18] Judgement of the ECtHR (plenary) of 13 June 1979 in the case *Marckx v. Belgium*, No 6833/74.

[19] § 31 of the judgement.

[20] Report of the European Commission of Human Rights of 5 July 1983 in the case *Rasmussen v. Denmark*, No 8777/79, § 62.

[21] Judgement of the Constitutional Tribunal of 16 July 2007, SK 61/06, Digest of the Case Law of the Constitutional Tribunal 2007/7A/77.

[22] § 54 of the judgement.

[23] Judgement of the Constitutional Tribunal of 20 March 2006, K 17/05, Digest of the Case Law of the Constitutional Tribunal 2006/3A/30.

with that person's public functions. It turned out that every interpretation of relevant provisions was supported by strong arguments of a semantic, logical and even functional nature. The Constitution itself contained a reservation (Article 61 (3)) that the access to information on the public activities of State agents is subject to limitations aimed at protecting the constitutional rights of an individual, including the right to privacy. At the same time, however, the principle of proportionality that allowed for limiting individual rights, including privacy in the public interest, could lead to different interpretative outcomes. The Tribunal finally adopted a concept directly referring to the standard of transparency of public life enshrined in the European regulations and case law. Given these standards, the Tribunal concluded that "public persons, and particularly the politicians, must accept – as decided in the [ECtHR] judgement *Lingens v. Austria* (. . .) – that the freedom of expression with regard to them is far wider than with regard to other individuals. Persons who assume functions, thereby knowingly accept public control over their acts exercised by journalists and the entire public opinion."[24]

6 Complementary Influence on the Interpretation of Law

As stated above, international or community case law may play a complementary, subsidiary role in the process of legal interpretation, i.e. it may strengthen the outcome of interpretation. A good example of this influence is the Constitutional Tribunal judgement in case K 33/03 on bio-components in gasoline and diesel.[25] In this decision, the statutory duty to add bio-components to liquid fuels and biofuels was found to be in breach of constitutional guarantees of consumer protection (Article 76 of the Constitution) and of the constitutional freedom of economic activity (Articles 20 and 22 of the Constitution).

Interestingly, ECJ case law and Community legal regulations exerted a significant influence on the reasoning of the Tribunal.

Firstly, the constitutional protection of the consumer was strengthened and specified by reference to informational duties incumbent on a professional, which are an element of Community law. In this respect, a wide interpretation of constitutional guarantees of the access to information (Article 54) was adopted, so as to cover horizontal relations including commercial transactions. The informational protection

[24] It was furthermore stated that the relevance for public debate is the decisive criterion for balancing two values, namely the protection of private life and the freedom of expression. Public opinion has a right to be informed and this right is fundamental on a democratic society. In certain circumstances, this right may even encompass aspects of the private life of public figures, in particular of politicians. The reasoning of the judgement refers to decisions of the ECtHR of 18 May 2004 in the case *Éditions Plons v. France*, No 58148/00; of 24 June 2004 in the case *Von Hannover v. Germany*, No 59320/00.

[25] Judgement of the Constitutional Tribunal of 21 April 2004, K 33/03, Digest of the Case Law of the Constitutional Tribunal 2004/4A/31.

was supposed to include commercial speech, and this conclusion was corroborated by the ECtHR judgement in the case *Casado Coca v. Spain.*[26]

Secondly, the constitutional standard of the freedom of economic activity was formulated in the context of the Community free movement of goods and the prohibition on adopting measures with an effect equivalent to quantitative restrictions on imports (Article 28 of the EC Treaty, currently Article 34 of the FEU Treaty). Statutory obligations imposed on fuel producers would either adversely affect foreign producers operating within the common market or, if applied solely to Polish producers, discriminate them *à rebours*. The application of the contested regulation to all producers was found contrary to the prohibition on restrictions in imports of goods that are in compliance with the requirements of the state of origin – ECJ judgement in the case 120/78 *Cassis de Dijon*.[27] Meanwhile, a wider understanding of the constitutional freedom of economic activity encompassing the consequences of applying Articles 28 and 30 of the EC Treaty excluded arbitrary limitations of economic activity of national producers (discrimination *à rebours*).[28] This is because, if only national producers were obliged to add bio-components to fuels marketed in Poland, their competitiveness would clearly be diminished with regard to foreign producers not bound by such obligations.

The discussed decision was rendered before Poland's accession to the EU and therefore references to EC law and to case law of the ECJ simply supported the adopted interpretation of Article 20 of the Constitution on the freedom of economic activity. At the same time, the principle of the interpretation of national law in conformity with EC law ("sympathetic interpretation") was formulated in that very decision. As the Tribunal remarked, drawing inspiration from EC law in the process of interpretation of the law by the Constitutional Tribunal means, in principle, using EC law to decode the constitutional basis of review. In other words, whenever notions and principles contained in the Constitution are also present in European law, their interpretation should be performed with due regard paid to their meaning in the *acquis communautaire*.

Another example of the complementary influence of European legal reasoning on the interpretation of national law may be traced in the Constitutional Tribunal judgement SK 43/05 on the crime of defamation.[29] Statutory provisions on the crime of defamation were subject to review with regard to constitutional freedom of expression (Articles 14 and 54 of the Constitution). The transparency of public life, a prominent value in the case law of the ECtHR, was an important argument supporting the findings of the Constitutional Tribunal. The crucial issue to be solved was whether criminal liability for the defamation of a public person resulting from truthful allegations could be excluded only if they were disseminated in a socially

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[26] Judgement of the ECtHR of 24 February 1994 in the case *Casado Coca v. Spain*, No 15450/89.

[27] Judgement of the ECJ of 20 February 1979 in the case 120/78 *Rewe-Zentral* (*Cassis de Dijon*).

[28] As the Tribunal stressed the prohibition of discrimination, *à rebours* is not a matter of Community law, though it may be indirectly inferred from treaty freedoms.

[29] Judgement of the Constitutional Tribunal of 12 May 2008, SK 43/05, Digest of the Case Law of the Constitutional Tribunal 2008/4A/57.

justified interest. The Tribunal ruled that, in such a situation, the latter precondition was unconstitutional. In this respect, several well-known decisions of the ECtHR were invoked in order to demonstrate that the openness of public debate is a necessary component of a democratic society and that it prevails over the protection of reputation of public figures.[30]

7 Illusory/Decorative Influence of Supranational Interpretation

Decisions of the Constitutional Tribunal, as well as rulings of the Supreme Court and common courts, often refer to international and community standards for decorative purposes, simply to confirm the reasoning of the court. This may happen when the reasons for a decision are already built on national law and based on constitutional principles and axiology resulting from the constitutional case law. This technique was applied in particular in the Constitutional Tribunal's judgements on freedom of assembly[31] and the protection of privacy with regard to medical data.[32] In both cases, the outcome of the review would be the same irrespective of whether decisions of the ECtHR were invoked or not.

At the same time, however, it would be too far reaching to say that the "technique of ornamentation" is entirely unjustified and devoid of any persuasive value. Such "decorative" referrals may play a double role. Firstly, they inform and educate, broaden legal consciousness by showing the wider context of legal issues at stake. Consequently, they encourage and inspire the search for judicial references also in other fields. Secondly, the "decorative" referrals serve as a verification tool, as the confrontation with the reasoning of other foreign and international courts may be a test for the correctness of adopted arguments.

8 Conclusion

Future developments in the process of European integration will eventually determine the very process of the application of law in courts across Europe. It may be assumed that the "decorative" referrals to supranational decisions will be marginalised and that genuine instruments of interpretation, aimed at searching for the correct assessment of a case, will gain importance. This "opening" of the courts

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[30] Pursuant to the decision, the concept of a "democratic society" not only determines the meaning of the freedom of expression but also sets limits of that freedom. A conflict may arise between the freedom of expression and the right to respect one's private life. Although the freedom of expression is not, therefore, absolute, it is asserted in the case law of the ECtHR that limits of acceptable criticism are far wider when the expression contributes to the public debate necessary in a democratic society.

[31] Judgement of the Constitutional Tribunal of 10 November 2004, Kp 1/04, Digest of the Case Law of the Constitutional Tribunal 2004/10A/105.

[32] Judgement of the Constitutional Tribunal of 19 May 1998, U 5/97, Digest of the Case Law of the Constitutional Tribunal 1998/4A/46.

becomes a natural element of judicial opportunism, this time without its pejorative connotations. It is demonstrated by a tendency to avoid conflicts between legal principles and constructs at a national and supranational level whenever it is possible, to assure their coexistence with the use of proper techniques of interpretation. A court applying these techniques thereby prevents its decisions from being questioned at international or supranational levels, which are more and more relevant for cases on internal forums.

Admittedly, it would be an oversimplification to assume that changes in the judicial application of law are driven solely by pragmatic factors. In this respect, particular attention should be given to the multiplicity of information channels, as well as national and supranational case law databases. The significance of these elements is often neglected. A good example of the role of such factors is the cooperation among European constitutional courts within the framework of the Venice Commission "Democracy through Law", and its very useful database of constitutional case law. Decisions of constitutional courts are a mutual source of inspiration, for example, the judgement of the Polish Constitutional Tribunal on the European Arrest Warrant was subject to analyses and express referrals in decisions of the Czech, German and Cypriot constitutional courts. In several European states (Germany, Poland, Denmark), similar arguments were used to determine the relationship between constitutional regulations and the principle of interpretation of national law in conformity with EC law. Issues concerning the settlement of past legacies in Central and Eastern Europe (Poland, Lithuania, Hungary) were common in some parts and mutual inspirations were drawn in this regard (Sadurski, 2005).

The dynamics of the development of European law, which powerfully stimulates changes in judicial interpretation and the application of law at all levels, is in my view of utmost importance. EU law forces the implementation of its rules through various legal instruments available in national law, not only via legal acts but also based on the rational and open application of law (*l'effet utile*). Consequently, it favours openness, creativity and cooperation among courts. The expansion of European law is achieved not only by regulating new issues but also through its impact on new fields of law, not necessarily subject to harmonisation. This process is clearly visible in the sphere of private law, where important concepts, constructs and assumptions are revalued under the influence of EU consumer law.

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Chapter 6
The Power of National Courts in Interpreting Domestic and EU Law: The Indeterminacy of Choice

Ermal Frasheri

Abstract This chapter analyzes the range of choices available to courts. Presented in the dichotomy of the universal and the particular, the process of adjudication encounters the same obstacles or issues that a judge would face in supposedly dealing within a single system of values. The emergence of the global consciousness, and in our case the European legal consciousness, enables judges to be progressive actors in domestic and regional politics. The problem of presenting the choice between domestic and universal values highlights the tension that brings us to the core of the problem of any legal system, the indeterminacy debate. It is not difficult to note that despite centrifugal forces of integration, EU legal system is as indeterminate and contradictory as any domestic legal systems. Judges need a paradigm that transcends a simple dichotomy between universal values and particular domestic traditions, a normative theory that empowers the judge to be a progressive actor.

1 Introduction

The process of European integration for new Member States and candidate countries alike introduces a thorny path of choices for the judiciary that transcends a simple dichotomy between national prerogatives and the "European interests." The role of judiciary as redistributors of resources is emphasized considering the trend toward a regulatory state and the decline of legislator's powers. However, determining how courts rule or should rule in the context of European integration has to contend with the politicization of the European law and its indeterminacy as a *sui generis* legal system. Thus, any normative theory should move beyond the dichotomy of the universal and the particular. A few words are in order to clarify the terminology used herein. The term "Eastern Europe" includes all former communist countries. While

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I am aware of the significance of other terms such as "Central Europe," "Southeast Europe," "Western Balkans," I choose to use the term "Eastern Europe" to indicate the relationship of "the other" to a system of values adopted by the EU Member States before the 2004 enlargement.

In this chapter, I argue that the process of judicial decision making is inherently similar whether it considers particular or universal norms, absent hierarchical relations of power. In the context of Europeanization of the universal and particular, the juxtaposition of particular versus universal values can be misleading in two ways. On the one hand, it presents the universal as detached from the particular, although that is not to say that I treat the EU law and domestic legislation from a monistic perspective; on the other hand, the escape toward the "universal" can be treated as a way of deflecting responsibility for judicial decisions, by referring to the supranational character of the European*ness*.

In this framework, any normative theory that aspires to create an universal understanding of European values, and which in turn aspires to constitute an overarching theoretical and normative framework for adjudication, does not provide the judge with an easy way to trump peripherical "home grown" norms for a norm dressed in "central universalism." In other words, even if one presupposes that a judge would reject any local interests as inherently contradictory to universal values, the universal as a system will fail her in "finding" the law. In a system that claims to include a comprehensive account of universal values, there simply is not one idea that ought to be enforced; rather, one can think of universal idea*s* as enmeshed in the domestic, in the same way as the domestic is trying to become embedded in the universal. As a result, the decision will be based on balancing policies and interests, which in turn are subject to ideological preferences.

This chapter first takes a brief look at the evolution of the understanding of what I call the Europeanization of the universal, especially with regard to candidate countries for accession into the Union. I argue that the evolution of European*ness* has not been a simple trajectory; rather, it is loaded with inconsistencies and reflects accommodations in the balance of power between center and periphery. I also bring together various strands of American legal thought in emphasizing the need for a policy choice that ought to be acknowledged and reflected in the European adjudication process.

The evolution of the EU law to encompass not only economic freedoms but also human rights values highlights the need for a normative theory regarding the values of universalism. It thus refutes any notion of an implied coherence in the universal. In this context, the process of adjudicating on the universal as juxtaposed to the particular does not differ from any process of legal reasoning that a domestic judge has to undertake within a presumptively purely domestic matter.

Lastly, this chapter concludes with some observations and future research questions. I must make it clear to the reader that the ideas and arguments presented in this chapter are still very much a work in progress of a larger picture of mapping power relations and modes of governance in the European Union. As such, I only hope that the reader will find some provocative ideas and thoughts that can be pursued in future works.

2 Europeanization of the Universal

The history of Europe has long been defined by the struggle between particularism and universalism. Many a leader has tried to impose a particular ideology as the universal over the continent. As any reader of European Union textbooks would find out, there is always a start with the genesis of Europa, enlightenment, and the deep roots of what is today understood as the culmination of the European integration process, the European Union (Chalmers et al., 2006; Malmborg & Stråth, 2002).[1] The European destiny, however, remains shrouded in mystery, but such is the genius stroke of the founding fathers in coining a term, "an ever closer union," with an ever changing meaning. In this overarching but ambiguous definition of a political entity, we can safely talk about the rise of a moral system that is contemporarily reflected in the European Union characterized by the now famous pillar structure.[2] We can detect two distinct processes of how the universal is projected. These processes gravitate toward the evolution of the EU law, the harmonization of legislation, and the expansion of the Union competencies.

Chalmers, for instance, notes this evolution by drawing attention to the emergence of the system of fundamental rights protection, first by the Court of Justice of the European Union (ECJ) and then by the other institutions (Chalmers et al., 2006). In Weiler's seminal article on the evolution of the EU law, the scope and mode of Community action have transformed Europe from the goal of economic recovery toward the goal of an "ever closer union" (Weiler, 1991).[3]

This evolution of the universal is not a simple process of formulation and projection. In the context of understanding sovereignty as a bundle of rights, there is a constant tension between the EU rights and prerogatives, and the national capitals

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[1] For example, Chalmers notes that " . . . the first proposal suggesting a Europe in which the state system was to be replaced by a system within which thee was a sovereign central body, came from the Frenchman, Saint-Simon . . . " Other authors, such as Malmborg, recast the European Union as a Union of Member States " . . . the universal pretensions are downloaded and nationalized. Rather than 'How shall Europe be united?', the questions dwelt upon in public debate have been 'How European is our nation?' . . . ".

[2] Article 2 of the consolidated version of the EU Treaty after the adoption of the Lisbon Treaty, although not yet in force, provides that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal C 115 of 9 May 2008.

[3] In describing the foundational phase of the EU and the EU law evolution, Weiler says that " . . . the paradox can be phrased in noncomparative terms: from a legal-normative point of view, the Community developed in that first phase with an inexorable dynamism of enhanced supranationalism. European legal integration moved powerfully ahead. From a political-decisional-procedural point of view, the very same period was characterized by a counter-development towards intergovernmentalism and away from European integration."

as a result of what they claim are the EU efforts to carve out an ever-expanding area of competencies from their conception of sovereignty.[4]

2.1 Looking for the Unicorn: Universalism and Particularism

I propose that one way of understanding the Europeanization of the universal, or what I call the European*ness*, is to look at the interplay of particularism and universalism, through a dichotomy of individualist and altruistic values embedded, respectively, in the four rights of freedoms and social rights. In the same sentence of Article 1 of the Lisbon Treaty, next to the creation "of an ever closer union among the peoples of Europe," the Treaty recognizes the imperatives of the particular in providing that decisions are to be taken as openly as possible and as closely as possible to the citizen.

From its start, the Treaty recalls that universalism is constituted of particularism; in this way, it makes more sense to inquire after the process of infusion and projection. A constitutive part of this process is the influence of the periphery on the universal through the mechanisms of multicultural theories. Particularism is to be found not only in the tradition but also in what competencies are left for Member States as well as, or even more importantly, what competences and relationships are reserved for regional or local authorities within a Member State. The Union has been successful in this latter regard in breaking down barriers of national sovereignty, by reaching its tentacles beyond national capital and onto the local units of power.

I claim that the process of forming the European*ness* cannot be understood as a simple one-way street, as something that is created in the center and then distributed to the peripheries of the continent and beyond. In discussing the EU enlargement, Glyn Morgan attributes the formation of the EU membership, as a good, to endogenous and exogenous forces in a continuous process of change and modification (Morgan, 2003). In being a recipient transforming good, the EU, that is the universalism represented by the EU, aims at reforming and structuring a country to mirror its values, understood already as the universal.

In being a donor transforming good, the EU itself opens the door to subtle but irresistible influences and transformations that a new Member brings to the Club (*Id*.). In our pursuit of deciphering the formation of the European*ness*, we ought to move beyond a simple constitutional law model that foregrounds the official actors. Following this approach, an institutionalist perspective gives us an understanding on the diffusion of acting roles in international law, and in our case, it foregrounds the role of domestic judiciaries and the legal profession in networking and shaping a common understanding of what the law should be (Burley & Mattli,

[4]It is worth pointing out that the transfer of sovereign rights toward the EU is also accompanied by EU efforts to decentralize national governments for the benefits of local governments.

1993). Thus, apart from structural conditions, we might be in a better position to picture and situate judges, business and civil society leaders, whether in a domestic or European context, as political actors in a dynamic process of trafficking knowledge and power.

However, it is worth reminding ourselves that this "many ways to universal" approach does not account for the intensity and political reasons for projecting the European*ness* beyond the EU borders. So, for instance, in discussing the correlation between politics and the ways and means that powers use to persuade, or transform others, David Kennedy writes that since EU does not have a hard power, it uses law to respond to the foreign policy challenges posed by the fall of the Berlin Wall. In this way, by extending its regulatory regime eastward, the EU capitalizes on its legal powers to change the regimes of Central and Eastern Europe (Kennedy David, 2006).

In the context of the reception of the universal, or the re-appropriation of the universal by the periphery, Duncan Kennedy describes the process as one carried out by local jurists who have interests and orientations, so that there is always an element of "selection," along with the element of imposition. The national systems are so complex and so embedded in the non-legal national culture, and the elements imposed or received are so ambiguous, that the reception process is a producer of difference as well as of integration (Kennedy Duncan, 2006a, b).[5]

The emergence of differences relates to the re-appropriation of the universal as well as to the process of influencing the universal. It can be argued that the extent and intensity of the "East" influencing the European*ness* is not exactly the same as in the case of an existing Member state, or that of a strong Member State versus a weaker counterpart. Not all Member States are France and Germany. Thus, it could be said that the Union is Europeanizing the East of the Center, while at the same time the Union is also being somewhat Easternized in return. In particular, this tension is reflected in the EU–Turkey relationship, and the awareness of how much Turkish*ness* will Turkey bring into the Union.

The preamble to the founding treaty talks for itself on the subject of mutual influences when it recognizes the universal as drawn from a process that synthesizes the particular. It describes the process of formulating the European*ness* as drawing inspiration from the cultural, religious, and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality, and the rule of law. The inclusive character of constitutionalizing EU law can thus be interpreted as embodying Kantian versions of universal moral law.[6] From this perspective, universalism is within the contours of what gets prescribed in different European fora.

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[5] In "Thoughts on Coherence, Social Values and National Tradition in Private Law," Duncan responds to a work by G. Teubner on the contradictions and divergences that emerge from the unification of law.

[6] Although the question remains how much coherent can morality be?

2.2 Multiculturalism as an Alternative

In projecting the universalism, we can distinguish between the process of nascence of the universal as a result of the interplay of multiculturalism of the Member States, the evolution of the universal as the product of the EU central institutions, and the process of reception of the universal in new Member States and candidate countries, which I characterize as the ultimate periphery of the Europeanization context. In the former, where the universalism can be interpreted as the result of a marriage with multiculturalism, the process of trafficking of values is concurrent with their role in constructing the European*ness*. However, further sociological work is needed to shed light on the extent to which the universal is influenced or dominated by exogenous factors. In the latter, the projection of the universal is perceived in its purest sense as a transplant to a host society. Thus, we can talk of Europeanization of Eastern Europe, but we cannot really talk of Europeanization of the West.

This process of formation of the universal can demonstrate that the paradigm based on the dichotomy of particularism and universalism is outdated, and more importantly, it obscures an essential and existential element, that of multiculturalism. Thus, perhaps it might make more sense to talk of a trichotomy of particularism, multiculturalism, and universalism. Even in this model, it is prudent to avoid making categorical jumps as to what is particular, multicultural, and universal as these categories are not static, but at contrary, are characterized by dynamism (Kennedy Duncan, 2006a, b).[7]

In an analysis of multiculturalism as juxtaposed with Kant's universalism, Joshua Parens writes that the multiculturalist identification of knowledge and power stems from the Kantian attempt to make the universal manifest in particularistic politics (Parens, 1994).[8] Reflecting on the legal cultures, Gibson gives an understanding of values that shape legal cultures by drawing attention to the legal consciousness. This in turn refers to specific attitudes toward legal issues and institutions, legal cultural values, and more general cultural values, such as a preference for individualism over collectivism, trust in people (Gibson & Caldeira, 1996).

The dominance of some versions of particularism over others in shaping regional legal consciousness is reinforced by Duncan Kennedy when he argues that not all countries are equal in producing and disseminating ideas. Jurists in some countries have more input than those in other countries, and some countries are well described as receiving rather than producing developments in the conceptual structure and langue (Kennedy Duncan, 2006a, b).

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[7]Duncan Kennedy writes of three periods of transnational legal consciousness from the 1850s to the present day, characterized as Classical Legal Thought, the rise of the Social, and the contemporary legal thought.

[8]For Kant culture can have the attributes of being universal, whereas multiculturalists talk of an aggregate mass of cultures.

2.3 An Evolving Universal

With an expansion of its competencies, the Union embodying the universal has evolved from an economic community tasked with reconstruction and development to an overarching political entity tasked with a transformational project, changing the political, economic, and societal landscape. The four fundamental freedoms, with the emphasis added on the "fundamental," or as I call them the "original universal," while essential in guaranteeing the free movement of factors of production, no longer provide the sufficient conditions for the transformative project of the contemporary European Union. Something else is needed to arouse the spirit of the Union and enhance the project's legitimacy. Furthermore, the instruments of transformation are also a work in progress.

In the monumental *Van Gend en Loos*, the Court of Justice of the European Union (ECJ) constructed the *sui generis* character of the EU legal order ". . .for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals" (Case 26/62 *Van Gen en Loos v. Nederlandse Administratie der Belastingen* (1963) ECR 1). Structuring the character of the Union in such a unique way can be interpreted as an interplay of multiculturalism and universalism. The latter is evident in the formation of certain sovereign rights for the Community, i.e., the exclusive areas of competence, and the application of an entrenched European*ness* of "rights" directly to *demoi*. The rise of the doctrine of direct effect can be thus interpreted as the first instrument of the European*ness*.

In *Costa v. Enel*, the court reinforced the idea of a *sui generis* legal order with its own binding mechanism when it states that "the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question" (Case 6/64 *Costa v. ENEL*, 1964, ECR 585). Such a powerful rhetoric establishing the doctrine of supremacy paved the way for the diffusion of the European*ness*.

The *Internationale Handelsgesellschaft* continued the path of explicit references to the clash of norms that we can describe as the clash between the universal and particular. The Court held that "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure" (Case 11/70 *International Handelsgesellschaft v. Einfuhr – und Vorratstelle für Getreide und Futtermittel*, (1970, ECR 1125).[9] It is

[9]In another case, Case 106/77 *Amministrazione della Finanze dello Stato v. Simmenthal* (1978) ECR 629, the Court goes even further in asserting this primacy of the Universal "every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule."

crucial to note that, at the time of the decision, the idea of economic integration constituted the central and universal value of the Community; thus, economic freedoms were the backbone of that particular meaning of universalism, or the European*ness*. Any domestic provision that was viewed as contrary to the EU law had to give way, and the whole domestic system, with the Constitution in the place of honor, had to be brought in line with the nature of the Union.

Whereas these two doctrines dealt with the modes of diffusion of the European*ness*, Chalmers attempts to connect the idea of European*ness* with the question of the sovereignty of the EU, and in turn the limited sovereignty of Member States. As such, this approach has implications regarding the primacy of EU law, as it governs the conditions of its application and the question of Union's competences. The EU law determines the limits of its own authority according to the competence–competence principle, and the question of fidelity. In short, it is only correct to maintain the point that the EU law establishes a rule of law *like*, to which all its institutions and other public institutions within the Member States are subject, including national courts (Chalmers et al., 2006). However, in a diametrically opposite position, according to MacCormick, constitutional tribunals, or supreme courts, can determine for themselves the competence to determine competencies (MacCormick, 1995).

In organizing the debate on the supremacy of the universal, Chalmers tends to obscure the patterns of influence of the particular, or multicultural, in the formation of the universal, as well as the other way around (Chalmers et al., 2006). This approach overemphasizes the formality of the mechanical application of rules, or the quest after normative theories of adjudication between the universal and particular. However, once recognizing the fluidity that characterizes the interaction between systems, the very idea of systems, juxtaposing the local with the universal, gives rise to a supposition that as long as we find the right jurisdiction then an appropriate solution can be found (*Id*.). One can easily find the mixture of the universal with the multicultural or particular in any of the EU Treaty provisions on the four freedoms. On the one hand, the Treaty provides for abolishing any restrictions to the movements or measures having equivalent nature, but on the other, it recognizes the inherent right of particular government to restrict such freedoms on grounds of public policy, public security, or public health.

The doctrine of implied powers provides the necessary tool to define the extent of the universal. Thus, Article 308 of the Treaty Establishing the European Community provides that if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures (Official Journal C 325 of 24 December 2002).[10] With the doctrines of indirect effect and state liability,

[10]Whereas, Article 5 provides that the limits of Union competences are governed by the principle of conferral. Under the principle of conferral, the Union shall act only within the limits of the

the Union attempts to complete the toolbox needed to ensure the diffusion of the universal by institutional means.

Finding the particular in the established legal systems of the Member States, and delineating the particular from the universal, is not an easy exercise. In the trajectory between the universal and particular, or otherwise between the exclusive areas of EU competence and those areas left to the Member States, lies that gray area of shared competencies.[11] In areas such as the internal market, social policy, economic, social, and territorial cohesion, agriculture and fisheries, excluding the conservation of marine biological resources, environment, consumer protection, transport, trans-European networks, energy; area of freedom, security, and justice,[12] the Union, in pursuing its objectives by appropriate means to commensurate with the competences which are conferred upon it in the Treaties, makes use of the principles of subsidiarity and proportionality (Kennedy Duncan, 2006a, b).[13]

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union acts only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at the central level or at the regional and local levels, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level.[14] The two tests that are foreseen by the Treaty in the application of the principle of subsidiarity, the first when the objectives cannot be successfully achieved by the local governments and the second on the desired outcome of a Union's measure, ought to involve the Court in a balancing test beyond a simple determination of efficiency of the government action.

In short, both Member States and the Union have the authority to regulate and coordinate any of the above-mentioned areas, most of which have a redistributional character. It is worth mentioning that areas under the exclusive competence of the

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competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

[11] The exclusive areas of competence are those where only the Union's institutions have the authority to act. It is worth noting that the EU makes efforts to regulate areas that fall under the shared competencies, often drawing strong criticism by the concerned Member States.

[12] The Union has exclusive competence in the areas of customs union; the establishment of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; and the common commercial policy.

[13] Duncan Kennedy calling proportionality "the counsel of despair" notes that it can be "the method for adjudicating among powers as well as among rights, including conflicts of separated governmental powers or among the elements of a federation or a transnational formation like the EU, or between domestic and international instances."

[14] For instance, Art. 5 of TEC provides that in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Union display the same distributional traits (Cohen, Felix S. 1935).[15] Although, in *prima facie* the rule seems clear that Member States cannot regulate something, which the European Union has already regulated, the situation is far more complex. It is clear that in any area of mutual competence the number of activities and standards to be promulgated is almost indefinite.

In this context, it is hard to find an indicator or guideline for the judge to decide when the domestic interest preempts the European, or vice versa, especially in areas that directly contribute to the economic well being, and therefore are more salient for the public. Another difficulty arises in the context of new powers of the European Union regarding the adoption of the Charter of Human Rights. The ECJ and the domestic courts will be faced with choices of law from their respective constitutional traditions, the European Convention of Fundamental Freedoms and Human Rights, and the newly adopted Charter.

The balance between economic rights, the heart and blood of the European Union, and the respect of human rights already rests on sketchy foundations. There are no reasons why we should assume that vesting more powers in the Union, with respect to human rights, would ameliorate the situation as to preventing newer conflicts or tensions between the ECJ and domestic courts in interpreting and making laws.

3 Judges as Social Engineers

As we open the discussion on the nature of the judicial reasoning, considering the multitude of sources and the plurality of understandings on the legal systems, and since a judicial decision is a social event, choosing particularism or universalism ought to turn our judges into social engineers. This approach, in turn, sits uneasy with the formalist/legalist perspective encouraged to be taken by the judges. Imagine two domestic judges. She is a successful young judge, aspiring to modernize and bring a candidate country or a recent Member State in the fold of the European family or European values. He, on the other hand, is an older judge, or what is called in politics "an old fox,"[16] somewhat versed in the mechanical application of the law, but turned conservative and pragmatist, as experience is a cruel teacher to men in the periphery.[17] The two of them work with the same tools in deciding

[15] In *Transcendental Nonsense and the Functional Approach*, Felix Cohen writes that: " ... we have to worry about redistribution, as property is a function of inequality. It is a fallacy that in creating new private property courts are benefiting society, or that the courts are adding to the wealth of society because it is adding to the wealth of the particular individuals whose control over thee sales device it protects."

[16] Italian expression "vecchi volponi," used widely to describe sly politicians.

[17] In *How Judges Think*, Richard Posner writes that pragmatists the word refers to basing judgments on consequences rather than on deduction from premises in the manner of a syllogism. Pragmatism bears a family resemblance to utilitarianism and, in a commercial society like ours, to welfare economics, but without a commitment to the specific ways in which those philosophies evaluate

cases. What would influence their decisions? Now, as Posner asks, because behavior is motivated by desire, we must consider what judges want (Posner, 2007).

3.1 Lost Formalism

Where is the greatest strength, lies the greatest weakness too, as the adage goes. In the quest for constructing a comprehensive legal system with the adequate instruments for enforcement lie the tools for undoing it as well. By including references to constitutional traditions and doctrines of fundamental rights of Member States,[18] while being careful not to explicitly add new powers to the EU institutions as the locus of the universal, Member States provide their domestic courts with a powerful rhetoric of rights and, hence, greatly enhance their arsenal of tools. In requiring national authorities to interpret and apply domestic legislation in conformity with the requirements of EU law, the ECJ demands that domestic courts engage in a balancing test, which in turn, as we know from 100 years of legal realism and post-realism, reflects particular policy choices, which can be analyzed based on ideological grounds and prerogatives of national constituencies.

In fact this is an attempt at constructing a normative theory of judicial behavior, a phenomenon that finds resonance in Dworkin's proposal that we all, judges, lawyers, citizens, interpret and apply abstract constitutional clauses on the understanding that they invoke moral principles about political decency and justice (Dworkin, 1996).

In Duncan Kennedy's description of particularism as embedded in tradition, we can find particularism embedded in a positivist approach to law as well as in the rise and fall of the informal in the Eastern Europe. Regarding the last two elements, the Eastern European countries' experience of uprooting the societal and legal regimes after the 1990s under the shock therapies indicates the positivist approach to law in drafting and transplanting almost all of their legal regimes. The shock therapy reinforced the orthodoxy of treating the legal system as an autonomous sphere, requiring a mechanical, deductive method of "finding" the law. Simultaneous with the great modernization process of the early 1990s, the rise of the informal sector filled a vacuum associated with the demise of norms from the *ancient regime*.

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consequences. In law, pragmatism refers to basing a judicial decision on the effects the decision is likely to have, rather than on the language of a statute or of a case, or more generally on a preexisting rule.

[18]For instance, Article 6 of the Lisbon Treaty provides that the Union recognizes the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. These rights and freedoms do not extend in any way the competences of the Union as defined in the Treaties. But it adds that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

The mode of spreading this new legal consciousness came from numerous legal reform projects from the center, semi-peripherical countries, as well as international institutions. It was common that social norms associated with the *ancient regime* became taboo and instead the society turned to formal and informal laws for guidance. However, what took place can be described as a competition of forces in the vacuum resulting, on the one hand, from a lack of home-grown social norms to operate in a free society, and on the other, problems with the transplants themselves, or the gap between law in the books and law in action. The resulting disconnection between those two processes led to the coexistence of the formal with the informal.

What can be observed in the last 18 years of transition is a parallel development of social norms and legal formalism. The former is a product of peripheries, people cut off from the chores of running a state, whereas the latter is a newborn, a transplant, product of the center, the nation's capital, where the domestic cooperates successfully with the international. On the relationship of tradition and public policy norms, Holmes would write that "traditionalism overrides rational policy after first having been misunderstood, and having been given a new and broader scope than it had when it had a meaning" (Holmes, 1897).

The surge of formalism as the way of understanding law came from adopting policies related to the necessities of the market, that is to say the demand for clear, precise, and systemic laws that guarantee the functioning of the market economy and the terrain for attracting foreign investments. In this stage, the adoption of Washington consensus policies requires an instrumental understanding of law, both formal and informal. The new development strategy based on governance and rule of law sees law as the epicenter of reform and not simply as an instrument of change.

In this sense, according to Merryman, legal reform either tinkers with the legal system, follows, or leads the social change (Merryman, 1977). For instance, if Southeast Europe is to reflect modern Europe, the method of doing so is by "catching up," and mirroring more developed countries, "if only those countries could look like Denmark. . ." goes the rhetoric. The plethora of legal reform projects under the hand of international factors has turned them into what Frankenberg call the "[j]uridic midwives of capitalism. . . monitored by representatives of supra-or international organizations they dismantle and overhaul the old normative superstructure, importing, adapting, and transplanting legal codes" (Frankenberg, 1997).

Formalism reached, and still maintains, a high point of matching gaps with rules as if to petrify the idea that the more precise and rigorous the rules are, the better off a society will be. However, formalism does not present the whole picture of the societies, where the turn to law has become a vocabulary for judgment, for action, for communication, a mark of legitimacy, which in turn has become the currency of power (Kennedy, February 28, 2008).

3.2 A Synthesis of Theories of Judicial Reasoning

In "How Judges Think," Posner brings together a compilation of theories that can be used to decipher that esoteric sphere of judicial reasoning. The theories that Posner articulates are the attitudinal, the strategic, the sociological, the psychological, the

economic, the organizational, the pragmatic, the phenomenological, and the legalist (Posner, 2007).[19]

According to the attitudinal theory, one way of deciding which way the judges would go is by finding out what political preferences they bring to their cases. The hotter the issue, the greater the explanatory power of the political variable (*Id.*). This theory requires us to determine a particular political economy and ideological frameworks for each of the universal, or domestic, values that are being considered. In a hierarchical structure of norms, the judge can be left little room to decide, and a lot would thus be explained by either pragmatic or phenomenological, how the judge perceives the law, considerations. In this exercise, the judge would be involved in a strategic behavior of gauging and balancing the reactions of relevant constituencies as well as her own preferences. If they happen to be on a panel, they would have to factor in the small group dynamics.[20] This theoretical framework emphasizes the instrumental and intrinsic characteristics of judicial reasoning.

The political choices are ripe for consideration even in cases where values have no particular hierarchical relationship to one another. Thus, for instance, in the case of "rights" involving abortion, divorce, freedom of expression, and blasphemy, it would be hard to deny the role of politics in adjudication. Furthermore, since a space for such rights has been carved out in the European Union, this form of policy considerations by domestic judges in interpreting and applying Union and domestic legislation would be the rule rather than the exception.

If we use the organizational theory, then we will have to consider the interests of both the principal, in our case the government, and the agent, in our case, the judge. According to this theory, an agent and his principal have divergent interests and that the principal will try to create an organizational structure that will minimize this divergence and the agent will resist (Posner, 2007). As the government can be thought of reflecting a certain social consensus, although much remains to be said about this particular proposition in the context of the European integration and the positive conditionality, the government will attempt to ascertain that the judiciary will also strengthen the consensus by safeguarding the social values. After all, according to Cohen, law is a social process, a complex of human activities, and an

[19] A promising psychological approach, writes Posner, focuses on strategies for coping with uncertainty. This approach highlights the importance and the sources of preconceptions in shaping responses to uncertainty. The arguments of the utility function include money income, leisure, power, prestige, reputation, self-respect, the intrinsic pleasure of the work, and other satisfactions that people seek in a job. The phenomenological theory of judicial behavior is a bridge from the pragmatic theory to the legalist theory. Whereas psychology studies primarily the unconscious processes of the human mind, phenomenology studies first-person consciousness experience as it presents itself to the conscious mind. So Posner writes, we might ask what it feels like to make a judicial decision?

[20] In discussing why a panel would yield to the wishes of a minority, Posner articulates two hypothesis, one is that the odd man out acts as a whistleblower, threatening to expose in a dissenting opinion the majority's position as unprincipled. The other is that he simply may bring insights that the other judges, with their different political orientation, have overlooked. Dissent aversion reflects the simultaneous difficulty and importance of collegiality.

adequate legal science must deal with human activity (Cohen, Felix S. 1935); or to paraphrase Holmes, courts serve as the instrument for predicting the incidence of the public fore (Holmes, 1897).[21] In these circumstances, both judges would be juxtaposed to the position of the executive branch.

From a center–periphery perspective, David Kennedy argues that the European Union empowers the individual to trigger judicial actions against decisions taken by democratic national powers in the name of supranational rules taken by a transnational technical class. Kennedy maintains that the European legal order affects the new and old Member States in a different way and brings with it a whole development policy and particular modes of economic and social life (Kennedy, February 28, 2008).

Despite the insights that the above-mentioned theories provide in unearthing the motives of judicial decisions, Posner writes that the belief in formalism/legalism remains the official theory of judicial behavior. However, Posner is quick to add that while judges follow precedent regularly even though not invariably, it does not support the legalist theory as strongly as one might expect (Posner, 2007). In this line of arguments, Duncan Kennedy writes that the substantive and formal conflict in private law cannot be reduced to disagreement about how to apply some neutral calculus that will "maximize the total satisfactions of valid human wants" (Kennedy Duncan, 1976). These two positions only reinforce Dworkin's argument that the moral reading is not revolutionary in practice but a phenomenon where lawyers and judges in their day-to-day work instinctively treat the Constitution as expressing abstract moral requirements that can be applied to concrete cases through fresh moral judgments (Dworkin, 1996).

This takes an unprecedented weight in the European context, and in particular in Central and Eastern Europe, where on the one hand, as was discussed in the previous part, the legal reform programs have attempted at embedding the belief of autonomy of spheres and the mechanical, politics free, considerations of the adjudication. On the other hand, integration is a legal institution, managed by judges, technocrats, politicians, each of them having a particular agenda. As such, there is a nuanced dance between national judges and the ECJ counterparts. Therefore, it is worth the effort in discussing or, more accurately, reiterating the propositions of the American legal realism, in facilitating our judges in their decision-making process.

Duncan Kennedy writes of formality as the attempt to accomplish substantively rational results that maximize a set of conflicting purposes – through substantive rational formulation and mechanical application of rules rather than directly through substantive rational decision processes (Kennedy Duncan, 1973). An understanding of the legal sphere in such terms, as a technical system composed of many different rules or standards applying to closely related situations, is difficult to master and confusing in practice (Kennedy Duncan, 1976).

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[21] Holmes, *supra* note 37. Holmes goes on to say that the reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel gilt goblet and the sea coal fire, is the he foresees that the public force will act in the same way whatever his client had upon his head.

We can go as far back as Holmes to learn of the skepticism that a legal system can be worked out like mathematics from some general axioms of conduct. Holmes writes that certainty generally is illusion and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, and yet the very root and nerve of the whole proceeding. In that way, Holmes concludes, it is a fallacy the notion that only force at work in the development of the law is logic (Holmes, 1897).

In no other area than the freedom of movement of goods could the battle against the fallacy of promoting belief in a legalist/formalist approach to law be better described. Articles 28 and 29 of TEC regarding the free movement of goods call for the prohibition of quantitative restrictions and measures having equivalent effect on imports and exports of goods between the Member States (Official Journal C 325 of 24 December 2002). They give broad powers to the Commission and the Court in determining the nature of any relevant measure that a Member State can adopt. In an extreme case, pragmatist and modernist judges would find no difficulty in upholding these provisions and ruling against any measure that infringes upon them.

The Court of Justice of the European Union has not been much help in this regard either. It has fluctuated between various meanings of the nature of restrictions and measures of equivalent effect. In *Dassonville*, the ECJ finds that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially intra-Community trade are to be considered as measures having an equivalent to quantitative measures" (Case 8/74 *Procureur du Roi v. Dassonville* (1974) ECR 837). Indeed, such is the broad extent of this interpretation that it gave rise to the notion of economic constitutionalism in debating between the effect and intent of measures relevant to Articles 28 and 29, thus effectively preventing Member States from regulating trade and giving rise to economic freedoms for individuals on the basis of Community's competence (Chalmers et al., 2006).

In this understanding, it is easy to interpret the series of decisions upholding the free movement of goods as an agenda for the "Europeanization" of the existing Member States. Pursuant to the stages of evolution of the EU law, *Cassis de Dijon* shifts the focus of the free movement of goods from whether a measure has a discriminatory effect to whether it had a restrictive effect upon trade (*Id.*). The swing back to a more restrictive interpretation of the articles on the free movement of goods occurred after the Court must have realized that it had gone too far.[22] This change of mood as a result of legitimacy concerns becomes evident considering that the Court has rarely entered into circular arguments, not to mention the debate on the characteristic of wines in determining whether tax law is discriminatory. According to Chalmers, by setting out red lines about what measures fall within the meaning of the articles on the free movement of goods lies a particular formalist approach and hence also its strength (*Id.*).

[22]This trend can be detected in the Keck case, note the year, 1993. Joined Cases C-267 and C-268/91 *Keck and Mithouard* (1993) ECR I-6097.

The agenda of Europeanization and legitimacy lurks behind these decisions. In considering the interpretation and enforcement of Articles 28 and 29, the Court of Justice of the European Union, as well as any domestic court, could have used Article 30 on the prohibitions or restrictions on imports, exports justified on grounds of public morality, public policy, or public security; the protection of health and life of humans, animals, or plants; the protection of national treasures possessing artistic, historic, or archaeological value; or the protection of industrial and commercial property.

In such a way, our two judges, whether at a domestic level or at a European level, would be able to balance between altruistic or individualistic values, by determining what is a public good that ought to be protected. In that context, shall our judges "find" for Blackstone's "public good is in nothing more essentially interested than in the protection of every individual's private rights" or for the protection of public policy? The answer most likely would depend on which side the pendulum of politics is swinging.

The inconsistency in pacifying the objectives of the Treaty, such as balancing of undistorted free trade measures with the protection of national heritages, puts the judge in a corner. It is no big wonder to note the shortages and inconsistencies of the Court for coming up with a normative proposal regarding the traditions of local, regional, or national cultures and the imperatives of the single market. In another case, *Schmidberger v. Republic of Austria*, the ECJ recognized the conflict between two opposing universal and fundamental norms, such as free movement of goods and freedom of expression, albeit noting restrictions in their application by referring to the notion of absolute rights (Case C-112/00 *Schmidberger v. Republic of Austria* (2003) ECR I-5659). It went further in recognizing the wide discretion of national authorities to consider and weigh interests, circumstances in light of the legitimate objectives pursued, and their social purposes.

On the nature of choices presented to any domestic judge and rejecting any hints of formalism, Pound would tell our judges that legal systems have their periods in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence (Pound, 1909). Whenever we face legal plurality or a mushy terrain of overlapping norms and hegemonies, Kennedy would recommend us to learn to deal with that complexity and use law as a strategic weapon (Kennedy David, 2006).

4 Conclusions

In this short chapter, I attempted to point out the traffic of norms and values between different systems that shape the formation of the universal. This process draws the attention to the capacity for re-appropriation of the universal, or in our case the European legal consciousness, by the periphery. In doing so, my goal was to highlight the dilemmas facing the judiciary as ultimate redistributors, as well as call attention to the emergence of a multitude of decision-making centers.

This brings us to the second consideration, or as David Kennedy describes it, using the law as a strategic weapon (*Id*.). The globalization of law and the centralization of law as rhetoric for politics, in particular in the context of a European traffic of ideas, can empower the judge, as a political actor, to better navigate the systems in attempting to realize a Senian "human flourishing" (Sen, 2001). In balancing interests and policy considerations drawn from numerous sources of power, our judges are left with a wide range of choices, the direction of which calls for a normative theory of adjudication.

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Chapter 7
Implementation of European Regulation of the Financial Sector: Consequences for the Consumer Protection

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Abstract Both MiFID and the new Consumer Credit Directive aim at ensuring increased protection to consumers, who invest or take up credits. This is an essential element in the development of a single European financial market. In this chapter it is shown that the national ways of implementation of the directives as either public law or private law may affect the consumer protection, as the way of implementation can affect the application and the interpretation of the rules.

Two essential elements of the protection are the effectiveness of the enforcement of the protection rules and the access to an out-of-court dispute resolution board, as the consumer is hereby ensured an easy, inexpensive and rapid treatment of complaints. It has turned out that the Danish Complaint Board of Banking Services is reluctant in applying and interpreting public law rules when solving a private law case. This tendency makes the actual consumer protection in the directives less trustworthy, as some of the consumer protection rules are (or are supposed to be) implemented in Danish law as public law rules with no direct civil law sanctions attached. When the Complaint Board does not apply and interpret the public law rules in private law cases concerning questions regulated in these rules, the consumer does not fully benefit from the rules.

1 Introduction

The overall central objective of the EU regulation of the financial sector is to create a single market for financial services. Traditionally, the regulation has been concentrated on securing an efficient market access for financial undertakings which are authorised by their home country to carry on financial business.

A central element of the further development of a single European financial market is the Financial Services Action Plan from 1999.[1] The action plan includes 47

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[1] COM (1999) p. 232.

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initiatives of which the Directive on Markets in Financial Instruments (MiFID) is essential.[2] There are, however, also outside the scope of the Financial Services Action Plan legal initiatives the purpose of which is to ensure a single financial market, e.g. the recently adopted Directive on Credit Agreements for Consumers (Consumer Credit Directive).[3]

One common feature of MiFID and the new Consumer Credit Directive is that both sets of rules aim at ensuring increased protection to the investors/consumers, which is an essential element in the creation of a single financial market. In this chapter the consequences of the national ways of implementation are analyzed regarding the interpretation of the implemented rules and hence its consequences for the consumer protection according to these two directives. Two essential elements of the consumer protection are the *effectiveness of the enforcement* of these rules and the possibility of making a complaint to an *out-of-court complaint board*. These two aspects are fundamental in analyzing the implementation's significance for the interpretation of the rules.

The reason for choosing those two directives is their current interest. In relation to investor protection only the protection of retail investors (consumers) is discussed.

The question is discussed from a Danish perspective, where it seems to be a topic, but is of general relevance to the countries in which a distinction is drawn between public law and private law.

Matters concerning the current financial crisis and the new proposal for a Directive on Consumer Rights are not discussed in this article.[4]

2 The Regulation of the Financial Sector

2.1 Initiation by EU

A single financial market has been a theme since 1985, cf. the White Paper Completing the Internal Market.[5] The regulation of the financial sector is to a large extent initiated by EU, and the regulation has been based on the requirements which follow from the objective of creating a single financial market. It has, e.g. been an important objective of the regulation to ensure an effective *market access* for financial undertakings which have authorisation from their home country to carry out financial business. The regulation has therefore traditionally been concentrated on the *mutual recognition* of authorisation (Single Licence Principle) combined with *home country supervision*, cf. the recast Credit Institutions Directive.[6] One single authorisation is then sufficient to gain access to the market of another Member State.

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[2]Directive 2004/39/EC. OJ L 145, 30.04.2004, pp. 1–44.

[3]Directive 2008/48/EC. OJ L 133, 22.05.2008, pp. 66–92.

[4]COM (2008) p. 614.

[5]COM (1985) p. 310.

[6]Directive 2006/48/EC. OJ L 177, 30.06.2006, pp. 1–200.

This has meant that primarily issues like capital requirements and supervision have been regulated. The regulation of the relationship between the financial undertakings and the clients has until recently been a minor issue.

Several factors do, however, contribute to consolidating an integrated single financial market, inter alia *consumer protection*. A high level of consumer protection and consumer trust is a general theme in the regulation of the relationship between financial undertakings and their clients.

> This relationship is regulated to a higher extent than the relation between financial undertakings and business clients. It is due to the fact that consumers have normally more need of protection than business clients. In addition most Member States recognize the principle of contract freedom in business relations. National contract law therefore normally do not cause barriers in relation to the single market.

Since the Financial Services Action Plan from 1999 there has been much focus on a single market for retail financial services to consumers, cf. most recently Green Paper on Retail Financial Services in the Single Market.[7] Equally *investor protection* is a theme regarding an integrated single financial market and it is also a strategic objective in the Financial Services Action Plan. Other considerations than the market access are attended to in order to complete the objective of an integrated single financial market. MiFID and the Consumer Credit Directive are examples.[8]

The development during recent years seems to indicate that the regulation on EU level by directives will lead to full harmonisation of the rules of the Member States, see, e.g., the directives mentioned.[9] Regulation adopted in accordance with the Lamfalussy procedure, see below point 3, will probably contribute further to full harmonisation of the rules in the Member States.

2.2 The Implementation of EU Directives

The systematisation of national law is in principle a national matter. In the civil law countries including Denmark the distinction is made between public law and private law while a similar distinction is not used in common law countries.[10] Traditionally, public law regulates the relationship between authorities and private parties (persons or companies), while private law regulates the relationship between two (or more) private parties. While a *both–and perspective* is used in the EU, an *either–or perspective* is traditionally used in Danish law. This means that a rule is basically

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[7] COM (2007) p. 226.

[8] For further details on the development of the European regulation of the financial sector, see, for example, Selvig 2005, pp. 3–21.

[9] See also the Directive 2002/65/EC on Distance Marketing of Consumer Financial Services. OJ L 271, 09.10.2002, p. 16–24.

[10] David and Brierley 1985, p. 81 and p. 335.

regarded as falling under either public law or private law. On the contrary EU is less rigorous in its development and application of the regulation.[11]

The fact that the systematisation of national law is a national matter means that the national Member States by implementation of EU directives basically are free to divide the national legislation into public law and private law. The distinction should, however, not mean that parts of a directive after the implementation are neglected or only interpreted indirectly. The distinction should therefore not be used to stop an adequate regulation of a certain issue. Though it does not seem to be the intention, this seems to a certain extent to be the case in Denmark.[12]

2.3 The Danish Systematic

Basically, in Danish law the regulation of the financial sector – which concerns a number of issues that relate to even different themes – is divided into two areas: *The Institution Pillar* concerning the relation between the financial undertakings and the authorities (rules of structure) and *the Client Pillar* concerning the relation between the financial undertakings and the clients (rules of conduct).[13] The regulation in the Institution Pillar is primarily initiated by the EU, whereas the Client Pillar has traditionally been regulated by the national Member States.

The basis in Danish law is that the different acts within the financial area belong to *one* of the pillars. However, there is no final division of the rules regarding the pillars, and legislation containing both rules of structure and rules of conduct exists. The law may therefore appear fragmentary. For example, the Financial Business Act primarily regulates structural issues, but to a certain extent it regulates conduct, too. The Act contains, e.g. in section **43a fair practices rule and rules on price information, and in section 47–48 sureties for loan given by a bank are regulated.

The legal basis of the Institution Pillar is found in that part of the regulation that can clearly be characterised as belonging to *public law*. This is obvious as the regulated issues concern the relation between the financial undertakings and the authorities. In Danish law the Institution Pillar is regulated in detail in *one* single act – the Financial Business Act with several attached executive orders and codes of guidance. Matters like authorisation and sole right, supervision, requirements to accounting and management plus capital requirements are regulated.

The Client Pillar – the regulation of which is fragmentary and contained in various acts and rules, as opposed to the Institution Pillar – is mainly based on private law. There is, however, an increased tendency to regulate the Client Pillar by means

[11] For further details on the distinction between public law and private law, see, for example, Basse and Zahle 1996 and Boe 2002.

[12] Nielsen and Tvarnø 2008, p. 146 and Nielsen 2003.

[13] Andersen 1997, p. 12 and Andersen and Juul 2006, p. 13.

of acts, which are characterised by being of a *public law* character.[14] One of the reasons is that the Minister for Economic and Business Affairs was given the power of the area in 2002. The Consumer Ombudsman is thus no longer the competent authority in the area and the Ministry of Economic and Business Affairs is thus the appropriate department for issues concerning financial undertakings. Contrary to this tendency the Credit Agreements Act, which generally gives rules for credit granting, belongs to another jurisdiction – the Ministry of Justice – and is of a private law nature.

Normally a close interpretation of each single rule can decide whether a rule has a character of public law or private law. An interpretation of the executive order shows that most of the rules are of private law character. In spite of this the Code of Guidance to the Executive Order on Good Business Practice for Financial Undertakings states that the regulation is public law.[15] According to the code of guidance, the public law label means that non-observance of the executive order has no direct civil law consequences. The rules can, however, according to the code of guidance affect certain civil law issues.

> The objects of the codes of guidance are normally other authorities and the codes are of a *non-binding* character for private parties and the courts. However, it is seen that codes regarding the financial undertakings concern activities of the financial undertakings and the relation to the customers. However, these circumstances cannot change the legal status of the code of guidance.

Therefore in the regulation of the financial sector, a certain integration of public law and private law takes place – the rules of conduct consist of both public law and private law rules and the main act in the Institution Pillar (Financial Business Act) contains both rules of structure and rules of conduct. Thus the traditional distinction between private law and public law becomes less visible.

3 Presentation of MiFID

The cornerstone of the Financial Services Action Plan is the Directive on Markets in Financial Instruments (MiFID), which regulates securities trading and investment service. The purpose of the directive is to ensure the function and stability of the securities markets and to increase the protection of the investors.

The Directive has been adopted by using what is known as the Lamfalussy procedure, which is a special decision process originally introduced to the securities area in order to increase efficiency in the rule-making so it could easily catch up with the fast development of the market. In 2002 the procedure was adopted for the whole financial area. The Lamfalussy procedure consists of four levels. At level 1

[14] Cf., e.g. the Executive Order on Good Business Practice for Financial Undertakings (No. 965 of 30.09.2009) and the Executive Order on Investor Protection in connection with Securities Trading (No. 964 of 30.09.2009).

[15] Code No. 86 of 13.10.2009.

the Council of the European Union and the European Parliament adopt framework directives after suggestions from the Commission, which establishes overall principles and fundamental requirements within the area in question. MiFID is such a framework directive. At level 2 the Commission lays down more detailed and technically accentuated rules for fulfilment of the framework directives. This is carried out, in cooperation with various European financial committees.[16] This is done by using what is known as the comitology procedure, which implies an extensive consultation of the participants of the market. In relation to MiFID two supplementary sets of rules have been adopted, Directive 2006/73/EC concerning the implementation of MiFID regarding organisational requirements and operating conditions for investment firms (hereafter Directive 2006/73/EC),[17] and Regulation 1287/2006, which concerns the implementation of MiFID regarding recordkeeping obligations for investment firms, transaction reporting, market transparency and admission of financial instruments to trading.[18] Level 3 consists of the different European financial committees whose task is to ensure a unified and uniform implementation of the rules laid down. Under level 4 the Commission supervises that the Member States respect and efficiently sanction the rules. The Commission can bring an action against a state at the Court of Justice of the European Union if the rules are not observed.[19]

MiFID replaces the Directive on Investment Services in the Securities Field (ISD) from 1993, which introduced the principle of the European passport and home country supervision for investment firms.[20] As opposed to ISD, which exclusively included regulated markets, MiFID includes all the trade systems in which information is exchanged and transactions carried through in financial instruments. Compared to ISD, MiFID extends in addition the number of investor-oriented activities whose exercise requires authorisation and compliance with certain requirements. For the investment firms this means also an extension of the European passport as the undertakings to a higher extent will carry through cross-border activities alone in the light of the authorisation obtained in the home country. The group of financial instruments, which only undertakings with authorisation can deal with, is extended, too. Compared to ISD – and of particular interest for this article – MiFID furthermore means a differentiation of clients so that different rules

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[16] ESC (the European Securities Committee), EBC (the European Banking Committee) or EIOPC (the European Insurance and Occupational Pensions Committee). The committees consist of representatives from the national appropriate ministries. The precise area is decisive for the participation of a particular committee in a particular area.

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[17] OJ L 241, 02.09.2006, pp. 26–58.

[18] OJ L 241, 02.09.2006, pp. 1–25.

[19] For further details on the Lamfalussy procedure, see Winther Løfquist 2008, p. 321.

[20] Directive 1993/22/EEC. OJ L 141, 11.06.1993, pp. 27–46.

apply, depending on the type of client. MiFID divides the clients in retail clients (non-professional clients), professional clients and what is known as eligible counterparties. Finally MiFID is a full harmonisation directive in contrast to ISD, which was only a minimum harmonisation directive.

An essential part of the objective of the Financial Services Action Plan to create a single financial market in the EU and therefore an essential objective of MiFID is to ensure the investors an increased and extended degree of protection, cf. recital 2. This work is, for example, carried out by harmonisation of the rules of business conduct and by seeking to ensure that the investors obtain the best possible result of their trade in the securities market, see below point Sects. 5.15.1 and 5.2.

The deadline for the Member States to implement MiFID was 1 November 2007. In Denmark MiFID is implemented by an almost literal transfer of the directive text to the national regulation, and the implementation of the directive, including the provisions for protection of the investors, has happened as part of the *public law* regulation of the financial market. Most provisions for protection of the investors are implemented at the executive order level, the non-performance of which will be imposed sanctions of either injunction or fine. No civil law effects are attached to the infringement of the rules, see below point Sect. 7.2.1.

4 Presentation of the Consumer Credit Directive

In 2002 the Commission made a proposal for a new directive on harmonisation of Member State legislation and administrative provisions on consumer credit.[21] After several proposed amendments a new Directive on Credit Agreements for Consumers was adopted in 2008. The directive repeals the Directive 87/102/EEC on Consumer Credit as amended in the Directives 90/88/EEC and 98/7/EC.[22]

The Directive means largely a total harmonisation of the legislation in each individual Member State. It follows from Article 22(1) that:

> Insofar as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive.

The background for the introduction of a fully harmonised framework is the request for a well-functioning single market for consumer credit. The minimum harmonisation according to the first consumer credit directive meant that each single Member State had or introduced different provisions at the national level. In some cases these provisions were an obstacle to a single market for consumer credit.[23]

The Directive is applicable for agreements on consumer credit, cf. Article 1. The Directive does not, however, extend to all credit agreements, e.g. credit agreements to ensure credits in real estate, credit agreements – the purpose of which is to finance

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[21] COM (2002) p. 443.

[22] OJ L 42, 12.02.1987, pp. 48–53.

[23] COM (2002) 443, p. 5. For further details on ways of harmonisation regarding consumer credit, see Winther Nielsen 2005, pp. 115–129 and Nordby 2005, pp. 131–141.

purchase of real estate – or credit agreements for under EURO 200 or above EURO 75,000, cf. Article 2.

The original proposal for a new consumer credit directive from 2002 contained rules on advising. In the proposed directive from 2005 the advising concept was modified without, however, being completely abolished.[24] Thus the adopted Directive from 2008 does not contain rules according to which there is a direct obligation of the creditor to act as advisor at credit granting, though due to Article 5(6) there is at duty of an advisory character, see point 6.1. Advising in connection with credit granting is therefore not regulated by EU and thus primarily left to be regulated nationally. However, there is still some focus on advising, cf. Green Paper on Retail Financial Services in the Single Market and White Paper on the Integration of EU Mortgage Credit Markets,[25] and both investment advising and advising functions in connection with insurance mediation are regulated.

The obligation to convey information before a person enters into a credit agreement and requirements to the contents of the credit agreement make up a principal element in the consumer protection. This is supplemented, for example, by the right to withdraw from the credit agreement; consumers have a time limit of 14 calendar days to withdraw from a credit agreement entered into. Both questions are discussed below.

The original Directive on Consumer Credit (87/102/EC) as later amended is implemented in Danish law in the Credit Agreements Act which basically is a private law act. Besides general private law rules and the public law regulation of the relationship between financial undertakings and their clients, the regulation is supplemented by the rules in the Credit Agreements Act. The Consumer Credit Directive is expected to be implemented in Danish law by an amendment to the existing Credit Agreements Act. In the new Consumer Credit Directive, consumer protection is, however, founded in more and other issues than the obligation for the creditor to convey information, which is primarily the case for the former directive. This will probably mean that selected parts of the Directive will not be included in the already existing Credit Agreements Act, see below point Sect. 6.3.

5 MiFID's Investor Protection Rules

MiFID contains in Articles 19–24 various requirements to investment firms in order to secure sufficient protection to the investors. These rules are elaborated in Directive 2006/73/EC. In addition to investor protection rules MiFID contains provisions on the European passport for cross-border activities, new market structures, market transparency, transaction reporting and organisational requirements. The rules on transparency of the Directive aim at securing the function of the securities markets, but function equally as investor protection, cf. recital 44.

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[24] COM (2005) p. 483.

[25] COM(2007) 226 respectively COM(2007) p. 807.

5.1 Conduct of Business Obligations

The Directive contains in Article 19 a number of requirements which the investment firms must observe in order to follow conduct of business rules when they provide investment service. Generally the directive states that the investment firms must act honestly, fairly and professionally in accordance with the best interests of its client, cf. Article 19(1).

According to Article 19(2) any information that is sent to the clients shall be fair, clear and not misleading. This requirement states that the information must not emphasise any potential benefits of an investment service or financial instrument without also giving a fair and prominent indication of any relevant risks. Furthermore, the information must be given in a way that is likely to be understood by the average member of the group to whom it is directed, and the information must not disguise, diminish or obscure important items, statements or warnings, cf. Directive 2006/73/EC Article 27(2).

According to MiFID Article 19(3) the client must receive appropriate information in a comprehensible form about the investment firm and its services, execution venues, costs and associated charges and financial instruments and proposed investment strategies, including appropriate guidance on and warnings of the risks associated with investments in those instruments or with respect to particular investment strategies. This information will enable the client to understand the nature and risks of the investment service and of the specific type of financial instruments that is being offered, so that the client can take investment decisions on an informed basis. Articles 28–34 of Directive 2006/73/EC elaborate the requirements to this information and differentiate them according to the category in which the client belongs.

MiFID Article 19(4) and (5) contain what is known as the know-your-client principle which means that the investment firm must obtain information from and about the clients when investment service is carried out. The extent of the information depends on the type of investment service to be granted. In connection with investment advice or portfolio management, information must be obtained, which enables the company to make what is known as a *Suitability test* of the client, i.e. enables the firm to recommend the investment services and financial instruments that are suitable for the particular client. If the investment firm does not get the information required, it is not permitted to recommend the service or the financial instruments to the client. At the exercise of other investment activities the investment firm must provide the information which enables the company to make what is known as an *Appropriateness test*, i.e. enables the company to assess whether the investment service or product envisaged is appropriate for the client. If on the basis of the information obtained the company finds that the product or service is not appropriate to the client, the investment firm shall warn the client.

In Sect. 8 it is laid down that the client must receive adequate reports on the service provided to the clients. This includes costs associated with the transactions and services undertaken on behalf of the client. If the investment firm on behalf of the client has carried out an order, other than for portfolio management, they

must promptly provide the client with the essential information concerning the execution of that order, cf. Directive 2006/73/EC, Article 40. Should the investment firm provide the service of portfolio management, it must provide the clients with a periodic statement of the portfolio management activities carried out, cf. Directive 2006/73/EC, Article 41.

5.2 Best Execution

Another element in the investor protection is the principle of best execution. According to MiFID, Article 21 the investment firms are consequently obliged to carry out orders on terms most favourable to the clients. Price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order should be taken into account. Directive 2006/73/EC sets up a number of criteria for determining the relative importance of the factors just referred to.

According to Sect. 2 the investment firms must establish and implement effective arrangements to comply with the best execution obligation, including establishing and implementing an order execution policy. According to Sect. 3 the clients must have appropriate information on the firm's order execution policy. The investment firms must annually review the execution policy to decide whether it functions according to the intention or whether there are defects or factors that need to be remedied or changed.[26]

5.3 Client Order Handling

MiFID Article 22 states that when investment firms execute orders on behalf of clients, they must apply procedures and arrangements which provide for the prompt, fair and expeditious execution of the orders, relative to other client orders or the trading interests of the investment firm. Directive 2006/73/EC Articles 47–49 describe in detail how this requirement must be fulfilled. The investment firm must inter alia make sure that the orders are promptly and accurately recorded and allocated. Furthermore, a retail client must immediately be informed about any material difficulty relevant to the proper carrying out of orders.

5.4 Increased Investor Protection

Compared to ISD, MiFID has considerably increased the *substantive* protection of the investors. As mentioned, ISD only included *regulated markets*. The fact that

[26]For further details on the legal aspects of the best execution-obligation in MiFID, see Iseli et al. 2007, pp. 313–325.

all systems in which information is exchanged and transactions carried through by means of financial instruments are now regulated will in itself increase the investor protection. In addition, ISD did not define the functions attached to a regulated market but left it to each individual Member State to determine the markets which should be considered regulated. It meant that it was not given that a certain type of system or market would be considered a regulated market in all Member States and that the investor protection was therefore not necessarily considered uniformly in all Member States. On the other hand, MiFID contains clear definitions of the different system which the Directive regulates, cf. Article 4(1) (vii) (Systematic internaliser), (xiv) (Regulated market) and (xv) (Multilateral trading facility (MTF)).

The fact that the number of investor-oriented activities requiring authorisation has been extended is furthermore a factor which contributes to strengthening the investor protection. As a central aspect the execution of investment advice now presupposes authorisation from the relevant authorities, whereas ISD which only contained requirements to the investment advice offered as ancillary activity to other investment activities.

In addition, the increased requirements to the way in which the investment firms must execute orders for their clients bring along increased protection of the investors. Furthermore, the increased quantity of information, which must be given to the investors, increases the investor protection. Additionally collecting of information about the clients, which the investment firms must initiate for taking a Suitability test or Appropriateness test, contributes to further investor protection.

Finally the increased requirements to the organisation of investment firms and their business routines lead indirectly to increased protection of the investors.

> The information which according to the Directive must be given to the clients to enable them to make investment decisions on a qualified and informed basis seems to be both relevant and necessary in order to describe the concrete investment service in a precise, true and fair and exhaustive way. However, it is a large quantity of information which increases the risk of information overload. Therefore, there is the risk that the clients give up reading the material on account of the volume. MiFID tries to take into account this situation by levelling the information. The investment firms are not obliged to give all information directly to the clients. The information which the clients are entitled to according to section 19(3) shall be provided in a durable medium or by means of a website, cf. Directive 2006/73/EC Article 29(4). It is also the case regarding the information which the client is to receive about the order execution policy of the investment firm, cf. Directive 2006/73/EC Article 46(2). This levelling of information ensures that the necessary information is always available to the client, but that the client in question is not at the same time overloaded with information.
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> The fact that MiFID is a full harmonisation directive and not a minimum harmonisation directive like ISD may, furthermore, be a problem in relation to the investor protection as the implementation of the Directive in certain countries, including Denmark, has led to a minimisation of the investor protection in certain areas.
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> On a broad perspective, however, it must be stated that MiFID has in general meant an increased *substantive* protection of the investors.[27]

[27]For further details on MiFID's investor protection rules, see, for example, Ferrarini and Wymeersch 2006.

6 The Consumer Credit Directive

The new Consumer Credit Directive is larger than the original directive from 1987 – 32 articles compared to the previous 18 articles. An increased number of questions are regulated in the Directive. The Directive must be implemented in national law by 12 May 2010.

6.1 Obligation to Convey Information

As previously mentioned the obligation to convey information is one of the cornerstones in the Directive regarding consumer protection. The structure in the Directive follows the entry of the contract directly. The content of standard information in advertising is regulated in Article 4, the obligation to convey pre-contractual information prior to entering into the contract is then regulated in Articles 5 and 6 and the credit agreement is regulated in Article 10. Especially the obligation to convey pre-contractual information is comprehensive, e.g. information must be given on the conditions of a credit agreement and its costs. The reason for this obligation is the request for the highest possible transparency and comparability between different credit offers. It follows from both Articles 5 and 6 that the information must be given *in good time* before the consumer is bound by a credit agreement or a credit offer. Consequently in the future it will not be sufficient to give the information in the form of a written credit agreement when entering into the contract.

In Annex II of the Directive a standard form is introduced – Standard European Consumer Credit Information. The information according to Article 5 must be given by using this form. Contrary to the former directive which just contained a survey of examples of essential details in the contract, the consumers are now secured the opportunity to compare several credit agreements – both in national and in cross-border situations. Similarly the creditors are secured a standard, the observance of which leads to the fulfilment of the given requirements.

Creditors and credit intermediaries, if any, have furthermore the obligation to give sufficient *explanations* so that a consumer is in a position to estimate whether a proposed credit agreement fits in relation to the needs and financial situation of the person and where it is relevant: obligation to explain a number of information details, cf. Article 5(6). The information to be given according to Article 5(1) and the essential features of the proposed products plus the specific consequences which these products may have for the consumer, including the consequence of the non-payment from the part of the consumer, must be explained, if relevant.

The more traditional obligation to convey pre-contractual information is thus supplemented by an obligation to assist the consumer to enable him or her to evaluate and decide whether a concrete credit agreement – or which of more credit agreements offered – is suitable for the consumer's needs and financial situation. Compared to the former consumer credit directive, a comprehensive obligation to convey information has hereby been introduced. This obligation means that the consumer protection is provided at other occasions than just traditional obligation to convey information. Form and volume of the assistance mentioned and the persons

to whom the assistance should be offered is according to the provisions a choice for each Member State. The detailed contents of what is called obligation to assist are then left to each Member State. This is quite interesting as this does not directly seem to harmonise with the principle of full harmonisation. The national regulation form chosen – public law or private law – is also an interesting question as this has direct influence on the sanctioning of a non-performance of the obligation to assist.

Although the obligation to assist resembles advising, giving advice at credits is not directly regulated in the directive and is thus primarily a national matter. Following the discussion on full harmonisation it is relevant to mention that the purpose of this directive is to harmonise *only certain* aspects concerning agreements covering credit for consumers, cf. Article 1. The Member States may maintain and introduce national law provisions as long as the directive does not contain harmonised provisions regarding the same aspects, cf. Article 22 conversely. National regulation of financial advising at credits thus corresponds with the principle of full harmonisation in the directive as long as the national regulation does not result in a lower standard than the one which is laid down in Article 5(6).

6.2 Other Consumer Protection Rules

6.2.1 Assessment of Creditworthiness

Before the new Consumer Credit Directive was adopted, there were no EU rules on the obligation of creditors to assess creditworthiness of clients which they could refer to legally at non-performance. According to Article 8(1) the Member States must now ensure that creditors assess the creditworthiness of consumers before entering into the credit agreement. The assessment of the creditworthiness must be based on adequate information obtained either from the consumer or by searching in a relevant database. If the parties agree to change the credit amount after the conclusion of the credit agreement, the creditor must before each essential rise of the credit amount update the available financial information on the consumer and assess the creditworthiness again, cf. Article 8(2). Furthermore, it follows from recital 26 of the preamble that the Member States should try to promote responsible credits. Especially in an expanding market it is important that irresponsible credits are not exercised, including that credit is not granted without previous credit assessment of consumers.

Regarding cross-border credit the Member States must according to Article 9 ensure that creditors access the databases used in the area of each individual Member State in order to assess the creditworthiness of consumers. The conditions for this access must be non-discriminatory.

6.2.2 Right of Withdrawal

According to Article 14 consumers have now a time limit of 14 calendar days to withdraw from a credit agreement without giving any reason. There is already a right of withdrawal for, e.g. distance marketing of financial services and entry into

timeshare agreements.[28] The period of 14 days runs from the day on which the credit agreement has been entered into or from the day on which the consumer has received the terms and conditions of the agreement plus the information to be given in connection with the credit agreement (Article 10), if this point of time is later than the point of time entering into the agreement. A consumer who wants to exercise the right of withdrawal must before the time limit inform the creditor this and reimburse the capital and accrued interest. The amount should be reimbursed without undue delay and 30 calendar days after the information on the exercise of the right of withdrawal, at the latest.

6.2.3 Credit Intermediaries

Credit intermediaries were not regulated in the former Consumer Credit Directive. However, certain of the just adopted consumer credit rules will also apply to credit intermediaries. A credit intermediary is defined in Article 3 (f) as

> a natural or legal person who is not acting as a creditor and who, in the course of his trade, business or profession, for a fee, which may take a pecuniary form or any other agreed form of financial consideration:
>
> (i) presents or offers credit agreements to consumers;
> (ii) assists consumers by undertaking preparatory work in respect of credit agreements other than as referred to in (i), or
> (iii) concludes credit agreements with consumers on behalf of the creditor;

According to Article 21 (b) and (c) the Member States must make sure that acting as intermediary against payment of a fee only happens if the size of the fee is conveyed to the consumer and agreed upon in writing between the consumer and the creditor or on another durable medium before the conclusion of the credit agreement. In addition the credit intermediary must communicate to the creditor the size of the fee for the purpose of calculating the annual percentage rate. According to Articles 5 and 6 the obligation to convey information is applicable to both creditors and credit intermediaries.

6.3 Increased Consumer Protection

Rules like the ones following from, e.g., Article 5(6), Article 8 and Article 9 mean that according to the new Consumer Credit Directive, the basis for the consumer protection is more complex. More situations than previously are thus contributing to ensure the protection of consumers at raising loans and credits. The obligation to convey information has been the traditional basis for the consumer protection. During recent years there has, however, been a general tendency to apply other means to increase consumer protection, e.g. the obligation mentioned to assess

[28] Directive 2002/65/EC. OJ L 271, 09.10.2002, p. 16–24 respectively Directive 1994/47/EC. OJ L 280, 29.10.1994, pp. 83–87.

the creditworthiness of a potential borrower and the introduction of the right of withdrawal in various areas.

As mentioned, the implementation of the new Consumer Credit Directive in Danish legislation is anticipated to be implemented in the existing Credit Agreements Act. The character of some of the rules, however, may indicate that they will be implemented in Danish legislation by means of other rules. For example, the obligation to provide adequate explanations, cf. Article 5(6), and the obligation to assess the creditworthiness of consumers, cf. Article 8, are related with the obligation to advise the consumer and possibly advise the consumer against a certain loan. In Denmark the responsibility of the adviser is defined as part of the professional responsibility. Advising is regulated in the Executive Order on Good Business Practice for Financial Undertakings, whereas the obligation to give advice against a certain borrowing follows from either general rules or non-statutory considerations. According to case law from the Danish Complaint Board of Banking Services there exists an obligation in certain cases to give advice against borrowing.[29]

It is obvious to assume that the tendencies in the area and the close relation between the themes mentioned lead to the fact that the obligation to assess the creditworthiness of a consumer and to provide adequate explanations will follow from the Executive Order on Good Business Practice. The provision will then be of a public law character.

7 The Significance of the Way of Implementation

As previously mentioned MiFID is implemented by way of public law regulation, and the Consumer Credit Directive is expected to be implemented by way of both private law and public law rules. The way of implementation is basically of no significance to the legal *contents* of the rules, but it will be significant regarding a number of other questions, e.g. regarding the influence of a provision due to the interpretation of the rule. This may be of importance for the level of consumer protection.

7.1 Possible Sanctions

As mentioned above the way of implementation, the sanctioning and hence the effectiveness of this is a national matter, and neither MiFID nor the Consumer Credit Directives states concrete sanctions to be attached to the infringement of the provisions of the directives. The Consumer Credit Directive states only that Member States shall lay down penalties which must be effective, proportionate and dissuasive, cf. Article 23, and MiFID states just that Member States shall lay down

[29]Jørgensen 2008.

administrative sanctions which must be effective, proportionate and dissuasive, cf. Article 51.

The way of implementation may affect the type of sanctions attached to the infringement of a given set of rules – public law rules are primarily sanctioned by enforcement notice, restraining injunction or punishment, while violation of civil law rules are basically sanctioned due to contractual law or tort law, e.g. invalidity of the contract or economic compensation.

> If a consumer obtains a credit with his financial institution in connection with securities trading made by the same financial institution at the client's expense, then both MiFID and the Consumer Credit Directive are involved at the same time. As it appears from the above, both sets of rules contain a number of comprehensive pre-contractual obligations to convey information from the part of the investment firm and the creditor, respectively. To a certain extent these obligations to convey information overlap. In a situation as the one mentioned any given obligation to convey information will thus follow from more than one set of rules. This is for example the case for the obligation of the investment firm/creditor to provide certain information on identification. However, infringement of the one set of rules regarding obligations to convey information will be attached to public law sanctions, while infringement of the other will be attached to civil law sanctions.

From an overall and forward-pointing perspective of consumer protection, the public law sanctioning possibilities have some evident advantages as the authorities are provided with the possibility of forcing the sector in general to do business in a certain way or within given frames. A public law set of rules to which no civil law sanctions are attached can be of only minor value to the individual consumer in connection with a possible dispute. However, providing an explicit statutory basis is not a precondition for applying civil law sanctions, and it will to some extent be possible to impose civil law sanctions for infringement of public law rules. When settling a dispute, an interpretation of the rules may thus have an influence on the use of contract law and/or tort law determinations regarding the specific contract.[30] The extent to which this is the case depends on the individual applicable law and the law-enforcement authorities' decision making in relation to the treatment of concrete cases.

7.2 Application of Law and Enforcement of Law

The effectiveness of the increased consumer protection due to MiFID and the Consumer Credit Directive depends on the application of law and the enforcement of law. Naturally consumers can enforce their rights at the courts, but both nationally and internationally an action in a court of law is a prolonged and expensive process which is often disproportionate to the frequently limited subject matter in the case. Especially this prevents many consumers from bringing an action to the courts. As a consequence, focus at both EU level and national level has been on alternative dispute resolution mechanisms which can ensure consumers a better, cheaper

[30] Selvig 2002, pp. 703–720.

and more effective access to complain. The possibility of making a complaint to an out-of-court complaint board is an essential element in the consumer protection, as consumers are hereby ensured an easy, inexpensive and rapid treatment of complaints.

In the Financial Services Action Plan complaint procedures are mentioned as one of the six main initiative areas in relation to retail markets, and the Commission has consequently taken several initiatives regarding alternative dispute resolution (ADR). In several of the directives adopted in recent years there are provisions in which it is stated that the Member States must ensure the possibility of alternative dispute resolution in the consumer area. Such provisions exist in both MiFID and the Consumer Credit Directive – both in the previous and in the present directive. The following appears from MiFID Article 53(1):

> Member States shall encourage the setting-up of efficient and effective complaints and redress procedures for the out-of-court settlement of consumer disputes concerning the provision of investment and ancillary services provided by investment firms, using existing bodies where appropriate.

From the Consumer Credit Directive Article 24(1) it appears that:

> Member States shall ensure that adequate and effective out-of-court dispute resolution procedures for the settlement of consumer disputes concerning credit agreements are put in place, using existing bodies where appropriate.

The Commission has furthermore adopted two recommendations on the principles applicable to institutions responsible for out-of-court settlement of disputes in the consumer area and on principles for out-of-court institutions for amicable settlement of disputes in the consumer area.[31] Furthermore, it follows from the Commission's White Paper on Financial Services Policy 2005–2010 that the Commission will investigate the different national complaint systems in the financial market to point out possible shortcomings.[32]

In itself the existence of alternative dispute resolution boards ensures, however, not an adequate consumer protection. Such a protection presupposes that these institutions are willing and able to apply and enforce the existing consumer protection rules.

In Denmark the financial complaint boards consist of the Insurance Complaint Board, the Complaint Board of Banking Services, the Mortgage Complaint Board, The Complaint Board of Investment Funds and the Complaint Board of Danish Securities and Broking Companies.

The Complaint Board of Banking Services functions as the alternative dispute resolution institution regarding complaints about Danish financial institutions and Danish branches of foreign financial institutions. It has turned out that the tendency of this complaint board to apply and interpret a given rule and enforcing this rule

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[31] EFT L115/31 of 17.04.1998 (98/257/EC) and EFT L 109/56 of 19.04.2001.

[32] See the Commission's consultation document of 11.12.2008 – Alternative dispute resolution in the area of financial services. MARKT/H3/JS D(2008).

to a certain extent depends on whether the rule is of a public law or private law character. This is especially the case regarding complaints about advising.

Financial institutions are offering investment service and credit to consumers. Therefore, bringing complaints for the Complaint Board of Banking Service regarding complaints about the items included in the sets of rules due to MiFID's investor protection rules and the Consumer Credit Directive will be of much relevance. The question of the application and enforcement of these sets of rules by the Complaint Board of Banking Service will be treated in the following.

7.2.1 MiFID

Even if MiFID has been implemented in Danish law by public law regulation, the questions which the Directive includes cannot be characterised as being only of a public law character. Several of the questions which are regulated in the rules have, in spite of the way of implementation, also private law character. This is the case for the rules mentioned on conduct of business obligations, best execution and client order handling. The MiFID investor protection rules are therefore provisions with private law contents disguised as public law. Crucial for the protection of the individual investor is that the Danish Complaint Board of Banking Services will apply and interpret MiFID's investor protection rules when settling a private law dispute, so that thereby civil sanctions will be attached to the infringement of the public law provisions.

The rules according to MiFID are still relatively new in Danish law, and so far there has only been a single case at the Complaint Board regarding matters included in the executive orders implementing the MiFID investor protection rules, see case No. 76/2008. However, since 2003 there has in Denmark been an Executive Order on Good Business Practice for Financial Undertakings which has the same features as the executive orders implementing the MiFID's investor protection rules, i.e. a public law set of rules with private law contents. The attitude of the Complaint Board to this set of rules is anticipated to give a hint of the destiny awaiting the new investor protection rules. A matter which further supports this presumption is that some of the provisions in the new Executive Order on Investor Protection in connection with Securities Trading have replaced Part 9 in the Executive Order on Good Business Practice for Financial Undertakings, which dealt with special rules for securities brokers.

From the Code of Guidance to the Executive Order on Good Business Practice for Financial Undertakings it appears that failure to perform the provisions of the executive order will not in itself have civil law consequences. However, failure to perform the provisions may affect certain civil law issues and according to circumstances be included in the evaluation whether a financial company according to the general rules on tort has given rise to liability or an agreement totally or partially must be changed or ignored according to the provisions in the Danish Contract Act. According to the code an interpretation of the rules may thus result in a civil law sanctioning.

It has turned out that the Danish Complaint Board of Banking Services is very cautious about applying the rules of the executive order and let them affect the considerations at concrete (advising) cases. This is caused by the fact that matters included in the executive order are not of private law character, see case No. 128/2006 and case No. 34/2005.

> Case No. 128/2006: "Please note that the extent of authority of the Complaint Board includes private law disputes. Any questions of the compliance of Executive Order No. 1046 of 7 October 2004 on Good Practices for Financial Undertakings may be raised before the Danish Financial Supervisory Authority [. . .]."
>
> Case No. 34/2005: "The question of the claimant's possible infringement of [. . .] Executive Order No. 1046 of 27 October 2007 on Good Practices for Financial Undertakings is decided by the Danish Financial Supervisory Authority and is therefore not included in the jurisdiction of the Complaint Board."[33]

This attitude seems alone to be reasoned in the public law character of the set of rules. The Complaint Board has several times failed to let subject matters take legal effect, though it is clearly included in the executive order. See case No. 22/2008 in which the majority of the Complaint Board found that a financial institution, which had abstained from advising a client regarding the rules for tax-free share deposits, was not responsible for inadequate advising. This was the fact though it appears from section 12 of the Executive Order on Good Business Practice that financial undertakings in their advising must include consequences of the tax rules relevant to the client in relation to the products and performances which the advising includes.[34]

In a number of new cases some minority shareholders in a bank have brought an action against the bank after they have been compulsory redeemed and after the bank has merged with another financial institution. The shareholders, who about 12 months before the compulsory redemption changed their receipts into shares in the bank, have demanded compensation asserting that the bank failed to advise them adequately in connection with the exchange. This question obviously seems to be included in the Executive Order on Good Business Practice, but the Complaint Board makes its own (correct) decision without even looking at the rules of the executive order, see case No. 35/2008 and case No. 42/2008.

In other cases the Complaint Board blames the financial institutions matters included in the executive order without giving these matters legal effect, see case No. 141/2004 which dealt with the question whether a financial institution had incurred liability for the loss of a client on partly financed share investments. In this case the Complaint Board declared:

> After the alleged the Complaint Board does not find reason to hold the respondent liable to damages. This applies even if the respondent could be blamed for not declining to contribute to the risky investment engagement, cf. [. . .] [previous] section 13 in Executive Order No. 1046 of 27 October 2004 on Good Practice for Financial Undertakings.[35]

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[33] See also case No. 398/2003.

[34] See also case No. 272/2007.

[35] See also case No. 236/2005.

It is worth noting that the Complaint Board finds reason to blame the bank for their behaviour without adding any civil law effects.

As regards the question of advising, the Danish Complaint Board of Banking Services apparently only gives the Executive Order on Good Business Practice for Financial Undertakings' preventive legal effect.[36]

> At the same time the Complaint Board seems not cautious in relation to applying the Executive Order on Good Business Practice in relation to other questions. E.g. it appears from the executive order section 19 that a financial institution cannot without an individual and rational argument deny the opening of an ordinary deposit account. The failure of financial institutions to comply with this provision is given legal effect by the Complaint Board, see for example case No. 23/2208 and case No. 42/2004. The Danish Complaint Board of Banking Services seems therefore to be somewhat inconsequent in their attitude towards the executive order. This inconsistency may also be illustrated by case No. 236/2005 and case No. 172/2008.

Much indicates – unfortunately – that the attitude of the Danish Complaint Board of Banking Services to the executive orders implementing MiFID's investor protection rules is the same as the one taken regarding the Executive Order on Good Business Practice for Financial Undertakings. The above-mentioned case No. 76/2008 dealt with the question on whether a financial institution should have advised a client in response to his request for sale of his share deposit or whether *execution only* could be done. The issues which the case dealt with are obviously covered by the Executive Order on Investor Protection. Yet it does not directly appear from the case that the majority of the Complaint Board has found it reasonable to apply and interpret the rules by solving the case. Under these circumstances the *actual* protection of the individual investor through the practice of the Complaint Board would be limited. The private investor does not obtain the intended facilitated and inexpensive access to get a legal decision which the treatment of an out-of-court dispute resolution board should ensure.

There are a number of situations in which the Danish courts have considered infringement of public law rules important in relation to a civil law conflict. See UfR 1996.120 SH in which a businessman was granted compensation due to the acting of a financial institution and where the requirement in the public law Act of Bank and Savings Bank concerning fair business practices and good financing institution practice were included in the settlement of the case.[37] The protection of the consumer according to relevant law is thus to some extent less dependent on whether the protection rules are of a public law or private law character, if the case is solved in court. It seems as if the courts are less reluctant to intensively apply and interpret public law rules when solving private law cases.

As mentioned above an action in court is both expensive and slow and therefore often not a real complaint possibility for each individual consumer. The fact that

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[36] See Andersen and Legind 2005 for a critic comment on The Danish Complaint Board of Banking Services' lack of application and interpretation of the executive order.

[37] See also UfR 1987.699 V and UfR 2005.1978 H.

the courts are less reluctant applying public law rules in private law cases, therefore, does not contribute decisively to the public law protection of the individual consumer in a specific case.[38]

7.2.2 The Consumer Credit Directive

As mentioned the former consumer credit directive has been implemented in Danish law by private law regulation. The relevant complaint boards, including the Complaint Board of Banking Services, apply the rules to a great extent.

Case No. 87/2005 from the Complaint Board of Banking Services is regarding the obligation to convey information according to the Credit Agreements Act at credit agreements with a fixed amount. The Complaint Board took the view that at the time of entering into the contract the information was not given of the costs in relation to the loan of DKK 20,000, including the fact that the total costs had not been stated as one single amount. Hence the obligation to inform in accordance with section 9(1) (iii) of the Credit Agreements Act, cf. section 13 (the Directive Article 4(2) and Article 1(2)) was disregarded. According to section 23 of the Credit Agreements Acts, which contains the civil law sanctions to the infringement of section 9, the claimant should therefore only pay the amount of DKK 20,000 including the interest rate mentioned in the provision. In case No. 198/2003 the Complaint Board found also that section 9(1) (iii) and section 23 of the Credit Agreements Act should apply in a concrete dispute between a consumer and a financial institution.

If parts of the rules of the new consumer credit directive are implemented in the Executive Order on Good Business Practice for Financial Undertakings, it is reasonable to assume that the Complaint Board of Banking Services in this case also will be cautious by applying the rules. The close connection between advising and the obligation to give adequate explanations as well as the credit rating supports this assumption.

8 Summary

The objective of MiFID is the creation of an integrated financial market, in which investors are effectively protected and the efficiency and integrity of the overall market are safeguarded. Equivalently the development of a more transparent and efficient credit market without internal frontiers and with high consumer protection is vital in order to promote the development of cross-border consumer credit activities. In both cases the objectives are sought fulfilled by full harmonisation of the rules of the Member States.

The investor protection of retail clients and the protection at consumer credits rest on a broader foundation than earlier. As something new, investment advisers must, for example, exercise what is known as Suitability tests and Appropriateness tests

[38]For further details on the implementation of MiFID in Danish Law, see Jensen et al. 2007, pp. 180–202.

in order to ensure that the investment service in question is suitable or appropriate for the consumer. In the credit area creditors must assess the creditworthiness of consumers before granting credits, and likewise consumers will in future have a right of withdrawal of 14 days.

The substantive contents of the rules basically lead to an increased protection, and the full harmonisation of the rules ensures that they cannot be dispensed by so-called gold plating. The *substantive protection* is hence the same in all the Member States.

The implementation in national law is, however, of essential significance for the *actual protection*. A systematic division of national law into public law and private law is in principle a national matter. By the implementation of directives in national law the individual Member States also have a certain freedom to act regarding the adoption of the EU rules in this systematic division of national law.

During recent years in Denmark there has been a tendency to regulate certain aspects of the direct relationship between financial undertakings and their clients by public law regulation without paying attention to the actual private law character of the rules. The same could be said regarding the implementation of certain EU acts in which rules of private law character are implemented as public law. This is the case at the implementation of MiFID's investor protection rules. This tendency means that the actual protection is less trustworthy. Firstly, the consumer cannot lean *directly* on the public law rules as there are no civil sanctions attached to the infringement of the rules. Secondly, reluctance is seen regarding the application and interpretation of the public law rules in private law cases, which lead to the fact that the consumer nor *indirect* benefits from the rules. The Danish Complaint Board of Banking Services is cautious to apply and interpret public law rules, including rules regarding advising, when solving private law cases. On the other hand it seems as if the courts are less reluctant to apply public law rules in private law cases. If a case is solved by the courts the protection of the consumer is thus to some extent less dependent on the character of the rules. However, an action in court is both expensive and slow and therefore the access to an out-of-court complaint board is an essential element in the consumer protection, as consumers are hereby ensured an easy, inexpensive and rapid treatment of complaints. Therefore it seems problematic that the Danish Complaint Board of Banking Services apparently thinks that the public law rules must be given only preventive legal effect and hence only apply and interpret the rules to a very limited extent in private law cases.

On the contrary, both the content of the Danish Credit Agreements Act, which implements the first consumer credit directive from 1987, and its legal label indicate that the act is of a private law character, and the Danish Complaint Board of Banking Services applies the rules at the decision of disputes concerning consumer credit. The actual consumer protection at credits and loans is therefore consistent with the objective of the Directive.

The Consumer Credit Directive from 2008 is expected to be partly implemented in Danish law by an act amending the existing Credit Agreements Act whereas selected parts will probably be implemented in the Executive Order on Good Practice for Financial Undertakings. A public law implementation of parts of the

Consumer Credit Directive will lead to the fact that the problem concerning MiFID's investor protection rules may also be a topic regarding consumer credit.

Even in the case of fully harmonised EU rules, the way of implementation seems to have essential significance. In Denmark this is especially the case regarding the application and interpretation of the consumer protection rules and hence the actual protection in the area of financial services.

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Chapter 8
Joint Competence of the EC and Its Member States as a Source of Divergent Interpretations of the TRIPS Agreement at Community and National Levels

Monika Niedźwiedź

Abstract This chapter's objective is to verify the thesis that the type of Community competence is the source of possible divergent interpretations of the TRIPS agreement at Community and national levels, in particular with regard to a direct effect of the agreement. Furthermore, the role of the principle of consistent interpretation as a tool for an indirect effect of the TRIPS provisions mitigating against divergent interpretations of the agreement at Community and national levels is discussed. Finally, the national (Polish) case-law on the TRIPS is considered in order to answer the question if national judges are aware of the fact that the interpretation of the TRIPS agreement (to which Poland was a party before its accession to the European Union) and the effect thereof in domestic law depends on the existence of Community competence in the field of intellectual property rights and as a result is determined by either Community or national law. It is concluded that plurality of "interpretative centres" seems to be a characteristic of the contemporary, global system of law. However, it carries the risk of divergent interpretations which would result in fractionating of law and, from the perspective of an individual, would impair legal certainty. Entry into force of the Lisbon Treaty will bring about a substantial change to the benefit of the uniform interpretation of the TRIPS agreement in a multicentre system of Community law, however at the expense of individuals if the ECJ upholds its politically motivated stance with regard to the lack of direct effect of the TRIPS provisions.

1 Introduction

The purpose of this chapter is, firstly, to verify the thesis that the type of Community competence is the source of possible divergent interpretations of the TRIPS agreement at Community and national levels, in particular with regard to a direct effect of the agreement. Secondly, the role of the principle of consistent interpretation

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as a tool for an indirect effect of the TRIPS provisions mitigating against divergent interpretations of the agreement at Community and national levels will be discussed. Thirdly, the national (Polish) case-law on TRIPS will be considered in order to answer the question if national judges are aware of the fact that the interpretation of the TRIPS agreement (to which Poland was a party before its accession to the European Union) and the effect thereof in domestic law depends on the existence of Community competence in the field of intellectual property rights and as a result is determined either by Community or by national law.

2 The TRIPS Agreement as a Source of International and Community Law

The TRIPS agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) was signed on 15 April 1994 in Marrakesh as a part of an agreement establishing the World Trade Organisation. All the Member States of the European Union are parties thereto. The WTO agreement was also approved on behalf of the Community, within the area of its competence, by the Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1). The existence and character of Community's competence with regard to TRIPS were clarified in opinion 1/94 of the Court of Justice of the European Union (further referred to as ECJ) on the conclusion by the Community of the WTO Agreement. In the Treaty establishing the European Community there is no explicit EC external competence provided for to conclude WTO agreements, and the TRIPS in particular. However, its competence derives from the doctrine of implied external powers elaborated in the ECJ's jurisprudence. It is noteworthy that an important aspect of this doctrine is the relationship between the existence of EC internal legislation and the existence of EC external competence. The ECJ held in opinion 1/94 that the harmonisation achieved within the Community in certain areas covered by TRIPS was only partial (para. 103) and as a result the Community and its Member States were jointly competent to conclude the TRIPS agreement. From the point of view of Community law this constitutes a so-called mixed agreement. Therefore the TRIPS agreement was approved on behalf of the European Community with regard to that portion of the TRIPS provisions which falls within the competence of the European Community (Article 2 of the Council Decision 94/800/EC), however, without any allocation between the EC and its Member States of their respective obligations towards the other contracting parties (see *Merck Genéricos*, para. 31; See also Miller, 1999, pp. 608–610). In such a situation the Member States and the Community institutions have "an obligation of close co-operation in fulfilling the commitments undertaken by them under joint competence when they concluded the WTO Agreement, including TRIPS" forming an integral part of Community law to the extent covered by the Community's competence (see *Dior*, para. 36 & *Merck Genéricos* para. 31). It follows from the foregoing that the TRIPS agreement not only is the source of international law but has also become an integral part of Community law.

3 Interpretation of the TRIPS in the ECJ Jurisprudence

Since an international agreement constitutes a part of the EC legal system, the ECJ has jurisdiction to interpret the provisions thereof. However, its jurisdiction is limited to the provisions of the agreement which fall within the scope of application of Community law. The ECJ has shown rather extensive approach to determining the scope of application of Community law with regard to its jurisdiction over the TRIPS agreement (Heliskoski, 2000, pp. 404–408; Leal-Arcas, 2003, pp. 247–249). In *Hermès* answering the question of the Dutch court on interpretation of Article 50 of TRIPS, the ECJ held that "where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly" (para. 31–32), regardless of whether the dispute in the main proceeding is covered by national or EC law (Heliskoski, 2000, p. 407; Kokott & Schick, 2001, pp. 664–665). It recapitulated its stance in subsequent judgements (see *Dior*, para. 33–40; *Schieving-Nijstad* para. 30; *Anheuser Busch* Inc. para. 41) and even widened it in *Merck Genéricos* (para. 31–33; see Holdgaard, 2008, pp. 1240–1242). Only when the Community has not yet legislated in a given field an international agreement does not fall within the scope of Community law. Consequently it falls within the competence of the Member States and it is for national courts to interpret the relevant provisions of the agreement and to rule on the status of a provision of the TRIPS agreement within the national legal system (*Dior*, para. 49; *Merck Genéricos*, para. 34). It follows from the above that the competence issue is significant in the determination of whether the interpretation of TRIPS falls under ECJ's jurisdiction. In the areas covered by the EC competence national courts are to follow the interpretation of TRIPS by the ECJ. It is rightly pointed out that "if competence is the criterion for jurisdiction, the latter will be the hostage of the complexity of the former" (Eeckhout, 2004, p. 237).

Interpretation of a provision of an international agreement determines the scope and content of the provision and involves the question of its effect in a domestic law (Community or Member State's law). It follows that the issue of direct effect of a provision of international agreement is that of interpretation. In the light of Article 1 para. 1 of the TRIPS agreement, it neither recognises nor precludes that its provisions have direct effect on domestic law as it is for the parties to the TRIPS agreement to determine the appropriate method of implementing the provisions of this agreement within their own legal system and practice. Direct effect of the provisions of international agreements may be one of the methods of implementation of international agreements. However, whether in the domestic law of the WTO member it is an appropriate method of implementation depends on the member's constitutional rules. As far as the direct effect of TRIPS provisions is concerned, the jurisprudence of the ECJ with this regard is well-established and the Court consistently rejects the possibility of individuals to rely on the provisions of TRIPS before the Community and national courts in the areas within the competence of the Community (*Dior*, para. 44, referred to also in *Schieving-Nijstad*, para. 53 & *Merck Genéricos*, para. 35). For the reasons its conclusion was based, the Court in *Dior* (para. 44) refers

to the *Portugal v. Council* judgement where it held that "the agreement establishing the WTO, including the annexes, is still founded on the principle of negotiations with a view to entering into reciprocal and mutually advantageous arrangements" (para. 42) and "some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law" (para. 43). As a result, accepting that "the role of ensuring that Community law complies with those rules devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners" (para. 46). It further refers to the wording of final recital in the preamble to Council Decision 94/800, according to which "by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts" (para. 48).

Therefore the core argument against the direct effect of the TRIPS provisions as a matter of Community law rests mainly in the nature and structure of the WTO agreement. It follows from the above that the lack of direct effect of TRIPS provisions under Community law is not doubtful in the light of ECJ's jurisprudence; however, the reasoning of the ECJ with this regard is criticised. It has been noticed that the reasons for not granting the direct effect to WTO agreements in Community law are not based on legal arguments, but are rather political in nature (Eeckhout, 2004, pp. 301–309; Bronckers & Kuijper, 2005, pp. 1343–1348; Bronckers, 2007, pp. 615–617). It is of vital importance to note that the denial of direct effect of TRIPS provisions refers to those falling within a field in which the Community has already legislated. In a field where the Community has yet not legislated (thus falling within the competence of the Member States), Community law "neither requires nor forbids the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the TRIPS Agreement or to oblige the courts to apply that rule of their own motion" (*Dior*, para. 48; *Merck Genéricos*, para. 34). Therefore in *Merck Genéricos* the Court found that Article 33 of the TRIPS Agreement forms part of a sphere in which, *at this point in the development of Community law* [emphasis added], the Member States remain principally competent (i.e. in the sphere of patents). As a consequence it is national not Community law that determines whether or not to give direct effect to that provision (para. 46–48). It is stressed, however, that from the ECJ's jurisprudence, a guideline for the national courts may be inferred, namely that even in domestic situations, granting direct effect of a TRIPS agreement would be a last resort (Barcz (I), 2006, p. 26).

It follows from the foregoing that in the light of the ECJ's jurisprudence the competence issue not only is relevant in determining the Court's jurisdiction to interpret the TRIPS agreement but also is decisive in determining the application of its provisions as a matter of Community law. It will be shown that making an interpretation depending on the competence issue may turn to be problematic. And furthermore it is not a desirable situation from the point of view of an individual in terms of legal certainty.

From the point of view of an individual the issue of a direct effect of an international agreement is of vital importance and in some cases it may be an effective remedy in the case of non-compliance by a Member State or the Community with their international obligations. Meanwhile it follows from the jurisprudence discussed above that possibility for an individual to rely directly on the TRIPS agreement will depend on whether a provision falls within the competence of the Community or of the Member States, being excluded in the former case. In order to determine whether a given provision is in the sphere of the EC competence, the existing legislation shall be taken into consideration. In this context, the question arises how extensively shall be a given field regulated by Community law in order for that law to be relevant to determine the effect of TRIPS provision also in national law, excluding the direct effect of it. The jurisprudence regarding TRIPS refers only to this issue in general terms. In *Dior* (para. 47 and 49) the ECJ refers to "a field to which TRIPS applies and in respect of which the Community has already legislated". Likewise the Court stated in *Merck Genéricos* (para. 35). It is in contrast with the Court's jurisprudence regarding the violation by the Member States of their obligations stemming from international mixed agreements (i.e. agreements concluded by the EC and its Member States within their joint competence). In *Commission v. Ireland*, in determining the Community character of an obligation deriving from the agreement establishing the European Economic Area, the Court held that an obligation "comes within the Community framework given that it features in a mixed agreement concluded by the Community and its Member States and relates to an area covered *in large measure* by the Treaty" (para. 20 emphasis added). In *Commission v. France* it held that since the international agreement in question creates "rights and obligations in a field covered *in large measure* [emphasis added] by Community legislation, there is a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments" (para. 29). The fact that particular obligations have not yet been the subject of Community legislation does not affect the finding that these obligations constitute part of Community law (para. 30). Shall the criterion "to be covered in a large measure" be applicable also with regard to determining which provisions of the TRIPS form a part of Community law as it has not been mentioned in the ECJ's case-law on TRIPS? The author shares the view that it shall. Otherwise it would result in further extension of Community competence, which is hardly acceptable (Holdgaard, 2008, p. 1242). One must also pay attention that the issue in question is also inextricably linked with the question of determining "a field" in which the Community has already legislated. The broader the field, the more legislation would be expected in order to establish the existence of Community competence and the exclusive jurisdiction of the ECJ to interpret the provisions of an international mixed agreement. Moreover, the field is determined in relation to the international agreement in question. For example, in *Commission v. France* the field was environmental protection, the agreement referred to the protection of the Mediterranean Sea against pollution, and the legislation sought by the Court in order to establish its jurisdiction and Community nature of the obligations was dedicated to the protection of waters against pollution (para. 28). If an agreement

(or its provision to be interpreted) were on patent protection, one legislative act on Community patent would suffice to establish the ECJ's jurisdiction to interpret such a provision as a matter of Community law. It may be inferred form *Merck Genéricos* (para. 41) that if there is only a specific isolated regulation in the field in question, the existence of Community legislation in the field in question cannot be established.

It must be agreed, however, that the Court itself has provided no clear guidance with regard to determining the relevant field as well as the "amount" of Community legislation relevant to establish its exclusive jurisdiction to interpret the TRIPS agreement as part of Community law (Holdgaard, 2008, pp. 1245–1247).

Another problem is that external implied competence of the Community is of dynamic character and may change in time. In particular, as the existence of the implied external competence is derived from the existing internal legislation, each time the Community legislates internally, the existence of the EC external competence can be established. Taking *Merck Genéricos* as an example, if the Community adopted a legislative act in the field of patents (for instance a regulation on Community patent), the Court's conclusion in that case would be different. It would be contrary to Community law for Article 33 of the TRIPS Agreement to be directly applied by a national court subject to the conditions provided for by national law. If the Community adopts the proposal for a Council Regulation on the Community patent (COM, 2000, 412 final, revised proposal see document of the Council of the EU of 23 May 2008, 9465/08), the scenario will become a reality. It is noteworthy that the Court's conclusion in *Merck Genéricos* with regard to determination of the effects of Article 33 of TRIPS is preceded by the introductory phrase "as Community legislation in the sphere of patents now stands". From the perspective of an individual seeking protection of his/her intellectual property rights before a national court, it is another source of uncertainty.

It is only certain that in the field covered by Community legislation as Community law stands at time, a direct effect of the TRIPS provisions interpreted as a matter of Community law is excluded. However, the Court imposes an obligation on national courts to interpret TRIPS provisions with a result of an indirect effect of the TRIPS.

4 The Principle of Consistent Interpretation as a Tool Mitigating Against Divergent Interpretations of the TRIPS Agreement

Consistent interpretation is of particular importance in a multicentre system of law and it is well developed in Community jurisprudence and legal writing (see, e.g. Betlem, 2002, pp. 397–418; Betlem & Nollkaemper, 2003, pp. 569–589, Eeckhout, 2004, pp. 314–316; Lööf, 2007, pp. 888–895). The principle of consistent interpretation provides national courts with alternative to the direct effect tool to ensure that the Community law is effectively applied (Betlem & Nollkaemper, 2003, pp. 571–572). In the case of the principle of consistent interpretation, the Community rule is used to construe a rule of a national law in the

light of Community law. In Community law, the principle of consistent interpretation operates at three levels. On the first level, national law is interpreted in order to give effect of Community law (primary and secondary) in a domestic legal system. The second level encompasses situations where the secondary Community law is interpreted and construed in the light of the EC primary law. Finally, the third level refers to situations where the Community law (primary and secondary) is construed in the light of international law (Betlem, 2002, p. 398). In this chapter the first level will be considered, namely the interpretation of national law in the light of the TRIPS agreement as a source of Community law. It must be stressed that, as follows from the ECJ jurisprudence discussed below, it is the duty of national authorities to satisfy the principle of consistent interpretation under Community law.

In *Hermès* the Court held that, since the Community is a party to the TRIPS agreement and since that agreement applies to the Community trademark, the national courts, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under a Community trademark, are required to do so, as far as possible, in the light of the wording and purpose of Article 50 of the TRIPS agreement (para. 28). In *Dior*, referring to para. 28 of the *Hermès* judgement, the Court added that in a field in which the Community has not yet legislated, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law (para. 48). Consequently, in the latter situation, national courts are not required to interpret national law as far as possible in the light of the wording and purpose of Article 50 of the TRIPS agreement as they are free to give this provision effect according to their domestic law. In particular, they can directly apply the provision. In broader terms, the duty of consistent interpretation was formulated in *Schieving-Nijstad* (para. 55), as the Court held that national courts are required to interpret national law, as far as possible in the light of the wording and purpose of Article 50(6) of TRIPS, *taking account, more particularly, of all the circumstances of the case before them, so as to ensure that a balance is struck between the competing rights and obligations of the right holder and of the defendant* [emphasis added].

In *Pfeiffer* where the ECJ invoked the duty of consistent interpretation of the domestic provisions enacted in order to implement the directive, it held that the obligation to interpret national law in conformity with directive "does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied" and to ensure full effectiveness of Community secondary law (para. 115). It follows that the principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law in order to ensure full effectiveness of Community law (para. 118). Therefore the ECJ has extended the substantive scope of the duty of consistent interpretation beyond merely the provisions enacted in order to implement the directive. The question arises whether this extensive reading of the doctrine of consistent interpretation is of universal character, i.e. it may be as well applicable to the duty of consistent interpretation of national provisions enacted

in order to implement the obligations stemming from international mixed agreement such as TRIPS. In *Hermès* and *Dior* the Court refers to the obligation to interpret national law as far as possible in the light of the wording and purpose of the TRIPS provisions. It does not precisely mention what is meant by "national law", and in particular, whether it is restricted only to the provisions of national law enacted for the purpose of the TRIPS agreement implementation. It follows that a broader understanding of "national law" in this context is neither required nor excluded. It is important to note that in *Pfeiffer* there is a generally framed statement that "the requirement for national law to be interpreted in conformity with Community law *is inherent in the system of the Treaty*, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of *Community law* when it determines the dispute before it" [para. 114, emphasis added]. It follows from the above that while interpreting national law in conformity with the provisions of TRIPS, the national authorities are obliged to do so taking into account the whole body of rules of national law in order to ensure full effectiveness of the TRIPS provisions. Such an interpretation is in favour of a uniform interpretation of the TRIPS provisions in Community and national law. Moreover, as the ECJ held in *Pfeiffer*, "if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court *is bound to use those methods* in order to achieve the result sought by the directive" [emphasis added, para. 116]. It stems therefrom that the duty of interpretation of national law in conformity with Community law imposes also an obligation to use these methods of interpretation which serve the best effectiveness of Community law.

It is of vital importance to note that the dynamic character of the Community's external implied competence is capable of decreasing the degree of protection offered to individuals by a domestic legal system with regard to application of the TRIPS provisions. If in a Member State a direct effect of the rights for individuals stemming from the TRIPS provisions within the Member States' competence is recognised, and subsequently the Community legislates in this field with a result that becomes competent for external matters as well, it is no longer possible for an individual to directly rely on the provision of the TRIPS. The hope for an individual would be the consistent interpretation of national law in conformity with the TRIPS provision. It follows from the foregoing that the ECJ, although stressing the need for uniform interpretation of TRIPS provisions as a matter of Community law (*Hermès* para. 32, *Dior* para. 37 i 38), by denying the direct effect of TRIPS provisions in Community law and imposing on national authorities the obligation of consistent interpretation, has chosen a solution that does not serve the best of the uniform application of TRIPS throughout the Community (Gagliardi, 1999, p. 290). This is because an indirect effect of the TRIPS provision, constituting the pattern of consistent interpretation, in fact depends on national law since the subject of consistent interpretation is a provision of national law. Therefore, the characteristics of a provision of national law bear on the results of consistent interpretation. Namely,

it matters whether it is compatible or contradictory to the provision of the TRIPS agreement (Gagliardi, 1999, p. 290). It must be stressed that the obligation of consistent interpretation is subject to certain limits. In particular, the obligation does not exist if it resulted in an interpretation *contra legem.* In consequence, in particular cases, uniform interpretation of the TRIPS provision may be impaired.

It is therefore questioned whether the principle of consistent interpretation may be "a valuable substitute for a direct effect" (Heliskoski, 2002, p. 173; Kokott & Schick, 2001, p. 666, Mik, 2003, p. 140). However, as the ECJ is consistent in denying a direct effect of TRIPS provisions within the competence of the Community, the principle of consistent interpretation seems to be the best and the only possible solution (Zhang, 2003, p. 17).

5 Interpretation of the TRIPS Agreement in the Jurisprudence of Polish Courts

According to Article 87 of the Constitution of the Republic of Poland of 2 April 1997, ratified international agreements are the sources of universally binding law of the Republic of Poland. After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute (Aricle 91 para. 1 of the Constitution). An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes (Article 91 para. 2 of the Constitution). If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws (Article 91 para. 3 of the Constitution). It follows from the provisions of the Polish Constitution that it is based on a presumption of direct applicability of international agreements in domestic law if they are capable of having such effect. Direct application of agreements is allowed if the characteristics of the agreement itself allow for its direct application and norms are complete and precise. Poland has become a party to the TRIPS agreement with regard to all its provisions as from 1 January 2000. Since that time, the TRIPS has been referred to in judgements of Polish courts in a number of cases. In some of the cases Polish courts found the TRIPS inapplicable to the dispute because the dispute concerned circumstances that occurred before the entry into force of the TRIPS agreement with regard to Poland (e.g. judgement of Supreme Administrative Court of 2 June 2003, II S.A. 309/02). In most of the cases the courts considered TRIPS provisions but found it unjustifiable to rely on TRIPS by parties over national law (e.g. judgement of the Supreme Court of the Republic of Poland of 10 February 2006, III CSK 112/2005). It also follows from the jurisprudence of the Polish courts that Polish law is interpreted in the light of the TRIPS provisions (e.g. judgement of the Supreme Court of the Republic of Poland of 28 February 2007, V CSK

444/2006, judgement of the Supreme Administrative Court of 5 July 2001, I SA/Łd 758/99). Furthermore, the Polish courts recognise the possibility of a direct effect of the TRIPS provisions (judgement of the Supreme Administrative Court of February 2006, II GSK 54/05; judgement of the Supreme Court of the Republic of Poland of 28 February 2007, V CSK 444/2006). Accession to the European Union results in the obligation of Polish authorities to apply Community law, including international Community agreements. The question arises whether Polish authorities are aware of the fact that some international agreements to which Poland used to be a party to, should, as from the date of accession, be applied not in their capacity of pure international agreements but as Community source of law bearing the characteristics of the Community legal order resulting from the ECJ's jurisprudence. In this context, the judgement II GSK 54/05 of 8 February 2006 of the Polish Supreme Administrative Court is of particular importance. In this judgement, the Court decided on the direct applicability of Article 33 of the TRIPS agreement. It was a cassation appeal against the decision of the Administrative Court with regard to a decision of the Polish Patent Office, which had refused the extension of the patent, which, according to the claimant, should have taken place on the basis of Article 33 of the TRIPS Agreement. In the proceeding, it was suggested that the Supreme Administrative Court should refer the question from the preliminary ruling to the Court of Justice of the European Union with regard to the direct applicability of Article 33 of the TRIPS agreement. The Supreme Administrative Court refused to refer the said question. In the reasoning of its decision it observed that as the circumstances of the case referred to the period prior to Poland's accession to the European Union, the TRIPS agreement should be considered by this Court in its capacity of a domestic international agreement, not as Community law. For that reason the court held that it was not its task to consider the position of TRIPS in the light of ECJ's jurisprudence. It follows from this decision that the Supreme Administrative Court was aware of the consequences of Poland's accession to the EU as to the application of international agreements. The Court resolving the dispute admitted direct effect of Article 33 of the TRIPS agreement and repealed the decision of the Polish Patent Office undertaken in violation of this article of the TRIPS Agreement.

It follows from the Polish jurisprudence mentioned above that the TRIPS provisions are capable of having direct effect and it will be recognised if the conditions thereof are satisfied. However, the courts seem to be aware of the specific position of the TRIPS in domestic law due to the joint competence of the EC and its Member States over the agreement and that the ability of TRIPS to have direct effect in Polish legal order shall be restricted in fields covered by the competence of the Community. It is noteworthy that in some of their judgements, Polish courts expressly referred to the jurisprudence of the ECJ, refusing a direct effect of the TRIPS provisions falling within the competence of the Community (judgement of the Supreme Court of the Republic of Poland of 10 February 2006, III CSK 112/2005; judgement of the Supreme Court of the Republic of Poland of 28 February 2007, V CSK 444/2006).

6 Conclusion

Advocate General Tesauro, in his opinion of 13 November 1997 delivered in the *Hermès* judgement, observed that "the Community legal system is characterised by the simultaneous application of provisions of various origins, international, Community and national; but it nevertheless seeks to function and to represent itself to the outside world as a unified system. That is, one might say, the inherent nature of the system which, while guaranteeing the maintenance of the realities of States and of individual interests of all kinds, also seeks to achieve a unified modus operandi" (para. 21). The consequence of multicentre character of the Community legal system is the application of law by the centres located at both Community and national levels. With regard to the TRIPS agreement, one must also take into account the interpretation of TRIPS by dispute settlement bodies within the framework of WTO. Plurality of "interpretative centres" seems to be a characteristic of the contemporary, global system of law (Łętowska(I), 2008a, p. 6; Łętowska(II), 2008b, pp. 4–8; see also Chap. 1). However, it carries the risk of divergent interpretations which would result in fractionating of law and, from the perspective of an individual, would impair legal certainty. It is therefore desirable that, as far as the Community system of law is concerned, the importance of a uniform interpretation in a multicentre system is recognised. This seems, however, to be at the expense of legal certainty. The jurisprudence of the ECJ with regard to the TRIPS agreement seems to be consistent with regard to general statements, including the need for uniform interpretation of the TRIPS agreement as a matter of Community law, but it is far from being clear-cut with regard to details. Firstly, broadly construed jurisdiction of the ECJ to interpret the TRIPS agreement in cases where a provision thereof is applicable to situations covered by both national and EC laws contrasts with its competence to rule on direct effect of the TRIPS provisions limited to those provisions falling within the competence of the Community.

Secondly, it follows from the jurisprudence discussed above that the possibility for an individual to rely on the TRIPS agreement depends on whether a provision falls within the competence of the Community or within the competence of the Member States. In order to determine whether it is in the sphere of the EC competence, the existing legislation shall be taken into consideration. In this context the ECJ does not clarify how much Community legislation is required in order for Community law to be relevant in determination of the effect of the TRIPS provisions in disputes pending before national courts of the Member States. Thirdly, from the perspective of an individual seeking protection of his/her intellectual property rights before a national court, a dynamic character of the EC competence is another source of uncertainty. Extension of Community legislation results in EC law being relevant with regard to determining the effects of the TRIPS provisions before Community as well as national courts. It is clearly visible that a major source of divergent interpretations is the joint competence of the EC and its Member States with regard to the TRIPS agreement resulting in neither of them being fully competent to interpret the whole provisions of the TRIPS agreement. It must be stressed that the application

of TRIPS in a multicentre system of law arises when the agreement is not complied with by a Member State or the Community, and an individual is seeking protection before national or Community courts relying directly on an international agreement. In such a situation, depending on the extension of the Community's competence, either Community or national law will be relevant in order to determine the application of the TRIPS provisions. From the point of view of legal certainty this is hardly acceptable. For the time being, however, it is inevitable in the light of the principle of conferred powers provided for in Article 5 EC Treaty. In the multicentre system of law the ECJ seems therefore to balance the "realities of States and individual interests of all kinds" and the requirement of a uniform interpretation of the TRIPS in the interest of the Community as a player on the international arena. It is the duty of consistent interpretation that mitigates against denial of direct effect of the TRIPS agreement in Community law. However, it does not fully compensate for it.

The situation will change after the Lisbon Treaty comes into force. It follows from Articles 3(1) (e) and Article 207(1) of the Treaty on the functioning of the European Union (the current Treaty establishing the European Community as amended by the Lisbon Treaty) that the Union shall have exclusive competence with regard to commercial aspects of intellectual property rights. As a result, after the entry into force of the Lisbon Treaty, the ECJ will have exclusive jurisdiction to interpret and determine the effect of the whole TRIPS agreement in disputes arising before Community and national courts (Holdgaard, 2008, p. 1249). This will be a substantial change to the benefit of the uniform interpretation of the TRIPS agreement in a multicentre system of Community law. It will also satisfy the need of presenting the Community system of law to the outside world as a unified system. If the ECJ upholds its politically motivated stance with regard to the lack of direct effect of the TRIPS provisions, however, this change will be to the detriment of individuals relying on the TRIPS agreement before Community and national courts. In this situation, the duty of consistent interpretation by Community and national courts seems to be the last legal resort of an individual.

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Chapter 9
Some Idealism About Realism. Judging Under Certainty and the Standardization of Adjudication in the EC Law

Mariusz Jerzy Golecki

Abstract The standardization of adjudication in the EC law is preserved by three strategies. The public strategy is based on Article 226 of the EC Treaty. The deliberative strategy has been regulated under Article 234 of the EC Treaty. The recent rulings of the Court of Justice of the European Union in Köbler and Traghetti cases have created the framework for the application of the improved deliberative strategy that might be called a strategy of privatization. In many cases the heterodoxical judicial practice of the national courts creates negative externalities for subjects whose rights being formally protected by the EC law are in fact neglected by the national legal system. Thus, the activity of national courts throughout the European Union should be standardized, leading to a greater homogeneity of judicial rulings concerning the application of the EC law in different Member States. The economic analysis of those strategies will enable one to formulate an answer to fundamental questions about the application of the EC law by the national courts within Member States.

1 The Problem

The application of the EC law is determined by a division of competences among the domestic courts of the Member States and the Court of Justice of the European Union. Therefore, it is based primarily on the communication between these judicial institutions. Such a complex judicial system is becoming increasingly ineffective due to various reasons: heterogeneous practices adopted by national courts, lack of means of efficient control, unification of these practices and, last but not least, congestion of cases being decided by the ECJ. All those conditions have been reconsidered by the authors of the *Report by the Working Party on the Future of the*

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European Communities' Court System in January 2000; they admit that "A close look at the Community judicial statistics throws three phenomena into sharp relief, all of them familiar enough and all of them evidence of a serious crisis in the current court system in the Communities." It seems that the recent cases decided by the ECJ dealing with the state liability in case of judicial errors committed by national courts of last instance within the process of the application of Community law may serve as a benchmark for development of the most effective instruments of standardization of various judicial practices and approaches to application of the EC law in different Member States and various legal cultures, be it common law or civil law in the Romanic or Germanic legal families. Nevertheless, the question remains as to what standard of states' liability would be an optimal one while taking into account the maximization of three important criteria: effectiveness of the Community law, efficiency understood as a relationship between costs and benefits as well as protection of the rights of individuals.

2 Standardization vs. Harmonization

Some authors put forward the thesis that law is one of the most important standardizing systems, sustaining social order and creating the platform for social and technological development (Jørgensen, 1997). In various forms this observation had been well rooted in the legal theory, at least since the pioneering works of Max Weber who emphasized the functional nature of legal rules as a framework for economic and administrative activity. On the other hand, some authors stress the need for a more detailed description of legal systems. H.L.A. Hart built his concept of legal system upon a distinction between primary and secondary rules (Hart, 1997). The complex nature of the entanglement between coercive orders addressed to all members of society and power-conferring rules, comprising the institutional nature of any legal system delimited by the rule of recognition and reflecting the practice of judges and other officials, distinguishes legal rules from other social norms, such as positive morality, custom or religion.

Hart indicated the important distinction between primitive law and developed legal systems. Indigenous law does not comprise secondary rules, leaving primitive society with three main drawbacks: rigidness, since there is no possibility to update obsolete or inadequate norms; indeterminacy of application of general rules; and indeterminacy of law as such, for there are no universally accepted conditions of validity and identity of a given set of legal rules. Additionally the institutional nature of law reflects the distinction between prescriptive and constitutional rules (Searle, 1969). Prescriptive rules confine legitimate behaviour whereas constitutive rules create the possibility and meaning of action itself. However, this distinction is relatively blurred by the fact that prescriptive and constitutive rules are indispensably entangled with each other (Schauer, 2002).

The above-mentioned remarks on the complexity of rules may additionally be supplemented by the propositions about the relationships between rules and standards. Generally speaking standards may be regarded as a class of rules. The concept of standardization refers to the submission of some process or object to

some standard, treated as a pattern of behaviour or the characteristics of an object. Thus standardization differs slightly from harmonization or unification of rules. Standardization operates on the level of Hartian primary rules, concerning either external behaviour or some specifications of the given object (Hart, 1997).

Whereas standardization refers to the external point of view, harmonization refers to other rules, including secondary ones; Article 95 (1) of the EC treaty defines harmonization as the adoption of "measures for the approximation of the provisions laid down by law, regulation, or administrative action in Member States which have as their object the establishment and functioning of the internal market." Additionally, the difference between approximation and harmonization has been investigated and explained by the ECJ in Case C-217/04 *UK* v. *EP and Council (European Network and Information Security Agency (ENISA)* [2006] ECR I-3771, para. 43).

The above-mentioned observations indicate that harmonization generally operates on the level of rules, regulations or administrative actions; hence it may include the process of standards creation. This is especially evident in case of the so-called technical harmonization, which relies on standards created by independent private bodies (Barnard, 2007). It is, however, worth mentioning that Article 95 (1) of the EC Treaty does not refer to approximation of judicial, especially interpretative, practices, leaving adjudication practically out of the scope of harmonization. The cohesion of adjudication is, should rather be, preserved by the complex system of judicial co-operation and the procedure of preliminary references.

The case law created by the ECJ contains some basic framework for the division of competences between the ECJ and national courts. In this paper it is assumed that judicial activity may be regulated by some standards even in highly sophisticated cases. Standardization usually concerns the process of production or some characteristics of a product. Nevertheless, it may be assumed that some operations of legal system such as adjudication may be apt for standardization in a way analogous to the process of production. Such an approach to adjudication has been suggested in law and economics literature; for example, R. Posner suggests that adjudication is just a process of production of cases (Posner, 1973). This approach could be expanded in order to embrace not only the production of binding precedents but also any judicial decisions in forms of judgements, rulings or verdicts even if not binding for other courts. Economic theory prompts that standardization aiming at unification of services or policies may be applied in order to internalize negative externalities, internalizing network or system effects (Holler, Knieps, & Niskanen, 1997).

3 Liability for Judicial Error as an Instrument of Standardization of Application of the EC Law: The Positive Analysis

The standardization of adjudication within a hierarchical judicial system is usually preserved by the system of appeals and by the control of cases exerted by higher courts such as a court of appeal or eventually by the Supreme Court. The underlying

rationale for this strategy is based on the behavioural assumption according to which each judge tends to avoid overruling. As a result the court system usually sustains the cohesion and diminishes the number of judicial errors (Shavell, 1995).

The economic literature on judicial system is well established. Major topics concern such problems as optimal judicial structure (Kornhauser, Lewis, & Sager, 1986) and optimal judicial discretion (Landes, 1971; Landes & Posner, 1979; Cohen, 1992; Cooter & Ginsburg, 1996; Higgins & Rubin, 1980). What would happen however if the Supreme Court within some jurisdiction had no virtual possibility to review cases from lower instances? This is the arrangement present in the EC law. The relationship between the ECJ and national courts, especially with regard to the courts of last instance, cannot be properly described as a hierarchical structure. The ECJ does not have the competences to revise or control verdicts of national courts. Concurringly, the European courts do not have powers to overrule judgements given by national courts. This kind of arrangement is somehow puzzling for many commentators for it requires a completely new approach to standardization and unification of judicial activity. It seems that in case of conflict between the approach adopted by the ECJ and a ruling given by a national court of the last instance, two strategies are *prima facie* possible.

The first strategy may be called a *public strategy* and it finds its normative ground in Article 226 of the EC Treaty, which states that

"If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the later may bring the matter before the Court of Justice."

According to this provision, the Commission has the power to initiate the procedure leading to the application of sanctions against the Member State violating the EC law. However, it is not clear to what extent the procedure based on Article 226 could be applied in case of infringement of the EC law by the highest court within the Member State. In the ruling C-129/00 *Commission* v. *Italy* [2003] ECR I-14637 the ECJ has admitted that the well-established judicial practice being contradictory with the EC law could be treated as a breach of the EC law by the given Member State. This case concerned the problem of the notorious practice of the Italian *Corte di Cassazione*, which had been alleged to be contradictory with the EC law. Nevertheless, the Italian court had relied on its own interpretation of the EC law in cases dealing with custom duties. Some commentators (Chalmers et al. 2006) observed that the ruling of the ECJ had been based on vague assumptions according to which the main reason for breach of the EC law stems rather from the bad quality of statutory law as enacted by the Italian parliament than from the direct actions of the Italian court. The ECJ was not apt to admit openly that the interpretative practice of the Italian Supreme Court led directly to infringement of individual's rights protected by the European law. Hence, it may be stated that the application of the procedure based on art 226 of the EC Treaty in case of judicial practice of national courts seems to be problematic, if not impractical. Additionally, the *public strategy* seems to be very rarely applied by the European Commission, especially in case of infringements of the EC law by the national courts.

The second strategy, which may be called a *deliberative strategy*, is formulated as a preliminary reference procedure under Article 234 of the EC Treaty. The strategy is based upon a procedural link between national courts and the ECJ. Article 234 (3) states a duty imposed on the court of last instance to make references to the ECJ. Therefore, "a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law" shall bring also questions of mere interpretation of the European law before the ECJ. There are precise obligations of supreme national courts, stemming from the primary European law as interpreted by the ECJ. According to the *CILIFT* decision (case C-283/81 *CILFIT Srl i Lanificio Galardo SpA v. Ministry of Health* [1982]), it would be safe to assume that there is no duty to refer a question to the ECJ in two instances: either when the question is not relevant for the national court's decision or when the interpretation of the EC law is obvious.

The peculiar system of conversation between the ECJ and the supreme courts in Member States had been deprived of much of its attraction in recent years. The *deliberative strategy* seems to be ineffective since the ECJ has no instrument of control over the practice of national courts as far as preliminary references are concerned. This institutional *lacuna* may be illustrated by the differentiated number of preliminary references from Member States as well as by the various practices adopted in different national court systems.

As an institutional response to the deficiencies of the *deliberative strategy* the ECJ endorsed the principle of state liability for judicial error committed by the domestic court, especially the court of last instance. The recent rulings of the ECJ in *Köbler* and *Traghetti* cases have created the normative framework for the application of the improved *deliberative strategy*, which might be called a *strategy of privatization*. This strategy relies on the assumption that private individuals may bring suits against their states in case of infringement of the EC law (Somek, 2007). The suit should be brought in front of the national court, which has the obligation to make a preliminary reference in majority of cases. This obligation concerns all courts of last instance. Other courts have the right, but not the obligation, to make a preliminary reference. As a result one may state that this arrangement may constitute a backdoors method to regain the ECJ's control over the interpretation and application of the EC law.

The approach consists in the recognition of the principle of state liability and might be derived from joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy*, where the ECJ held that a Member State was liable for the loss and damage caused to individuals as a result of breach of the Community law for which it was responsible. The existence of State liability was derived from various assumptions: Community law creates rights for individuals, national courts should protect those rights, the full effectiveness of Community law should not be impaired and the protection of the rights weakened due to impossibility to obtain redress when rights of individuals were infringed by a breach of Community law for which a Member State can be held responsible (van Gerven, 1995).

The relationship between *deliberative* and *privatization* strategies has been examined by the ECJ's ruling in *Köbler v. Republic of Austria* (case C-224/01, [2003] E.C.R. I-10239). The Court stated that a Member State may be liable for

damages in case of national court's serious misapplication of the EC law. The Court explained that the specific nature of the judicial function would limit the availability of such damages to exceptional cases only, in which a national court has manifestly infringed the applicable European law. Additionally, other factors should be taken into account, such as the clarity and specificity of the rule that was violated, whether the violation was intentional, whether the erroneous legal conclusion was excusable, the views expressed by a Community institution and the court's failure to comply with its obligation to make a reference for a preliminary ruling.

The effect of *Köbler* case is far from being clear. On one hand, some decisions of the national supreme courts can render the State liable for breach of the Community law. On the other hand, the application of this principle will be elaborated by the ECJ on a case-by-case basis (Breuer, 2004). The approach presented in *Köbler* has been repeated and reinforced in case C-173/03 *Traghetti del Mediterraneo SpA v. Italy* [2006], where the ECJ stated that any limitation of State liability on the part of the court was contrary to the Community law if such limitations were to lead to the exclusion of liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed. The ECJ held that "Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of the Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court. Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in (...) the judgement in Case C-224/01 *Köbler* [2003] ECR I-10239."

The *strategy of privatization* adopted by the ECJ in *Köbler* has thus been reinforced in the ECJ judgement in *Traghetti*. This fact has induced serious debate in literature (Ruffert, 2007; Albors-Llorens, 2007). Many commentators emphasized the threat of uncertainty and instability of legal position. Some of them expressed doubts concerning the potential distortions resulting from those rulings and the application of doctrine of state liability to judicial errors (Somek 2007). Moreover, it had been pointed out that the *privatization strategy* inevitably leads to the redefinition, if not destruction, of the traditional, hierarchical structure of national courts within Member States. Those structures will eventually be transformed into some layers composed of constitutional courts (first level), highest courts (or courts of last instance, ending the procedure – second level), lower courts (third level). Thus, the question arises as to whether the destruction of the hierarchical order of court system in Europe does mean that the *strategy of privatization* adopted by the ECJ is inadequate and wrong. The sustainability of centralized enforcement and hierarchical court system in the EU may surprisingly turn out to be an unrealistic or too expensive option. Therefore the adoption of the *strategy of privatization* may lead to a more plausible alternative, based on tort liability for judicial error in the EC law. It is especially discernible from the perspective of administration of the

EC court system, as has been emphasized in *The Report by the Working Party on the Future of the European Communities' Court System*, where the Working Party admitted that "(...) to be consistent with the above remarks on the ordinary courts, there should therefore be an obligation on courts of final instance to consult the Court of Justice only on questions which 'are sufficiently important for Community law' and about whose solution there is still "reasonable doubt" after examination by the lower courts."

The traditional assumption of the legal theory states that we live in a world where legal rules are commonly known, especially by judges, who operate within a costless environment. In other words, it is assumed that the application of law (adjudication) takes place within a world without scarcity of resources. Since adjudication and potential judicial errors are expensive, and a properly working judicial system requires an optimal allocation of judicial resources, then it is the role of the economic analysis of law to provide with an adequate set of instruments and explanatory tools.

The alternative between public strategy based on centralized enforcement of the EC law and the private strategy based on the activity of potential litigants resembles the famous discussion initiated by R. Coase in "The problem of social cost" (Coase, 1988). Coase observed that the traditional approach of welfare economics as concentrated in Pigou's doctrine of taxation was wrong. Whereas A. Pigou saw taxation as the exclusive instrument of internalization of externalities, Coase indicated the relative character of such a claim. Whether or not taxation is necessary would depend on the level of transaction cost and the capacity of e.g. the polluter and the pollute to enter into agreement. Alternatively tort law could intervene by virtue of protection by norms later called by Calabresi and Melamed as "liability rules" (Calabresi & Melamed, 1972).

Thus, the fundamental assumption of Coasian approach is based on relativity of a potential instrument, both public and private ones. A similar alternative is discernible between *public* vs. *private* strategy of enforcement of the EC law. The action of the Commission based on Article 226 of the EC Treaty could be regarded as an equivalent of taxation. The infringement of the EC law by the State is to be punished with a special fine, calculated according to the detailed instructions respecting the financial situation of the state, the gravity and notoriousness of the breach. The *strategy of privatization* requires no action from the Commission. Hence it is a more flexible instrument of internalization of externalities by the application of private law rather than a centralized sanction on the EC level. The injured party may claim compensation from the infringing State. Therefore, a control of the quality of application of the EC law is provided on a very micro scale.

The complex liaisons between the ECJ and national courts give rise to two additional problems. The first one concerns the negative externalities arising in case of non-standardized, heterogeneous or even contradictory practices of national courts applying the EC law. The second issue is a typical agency problem. National courts, especially courts of the last instance, are supposed to act as agents of the ECJ. However, the judicial independence and a relative autonomy of national legal

systems do not offer a firm ground for a proper principal–agent relationship. On the one hand, the EC Treaty provides the ECJ with the exclusive competence to interpret the EC law; on the other hand, it lacks the power to maintain an effective control over the national courts. This paradoxical nature of the EC law has led the ECJ to produce various methods of coordination, such as the state liability for judicial error in the application of the EC law.

The application of the economic analysis of law in order to examine state liability for wrong decisions of domestic courts applying the Community law is possible as a result of the acceptance of an additional assumption. According to this, adjudication should be treated in an analogous way to production activity (Posner, 1992). Therefore, there are two areas of the application of the economic analysis of law. The first one is linked to the modelling of the judicial strategy, depending on a probability of correct judgement (epistemic perspective). The second one comprises the modelling costs of the application of the EC law using the standards set out by the ECJ case-law (*CILFIT* standard). Those costs include costs of adjudicating on the EC law according or contrary to the *CILFIT* standard plus costs of potential judicial errors: loss suffered by individuals deprived of the adequate and effective protection of their rights established by the EC law.

One of the assumptions, broadly accepted within the economic analysis of law, declares that individuals tend to maximize their utility function. This fundamental assumption may be transferred to the economic analysis of State liability for the breach of Community law by national courts. In particular it points out that judges tend to maximize their satisfaction; hence, they behave as if they were *rational utility maximizers*. This activity of judges is discernible in the increase in the number of correct decisions, therefore in the maximization of the number of rulings that would not be reversed in the appeal proceedings, so these verdicts would not result in excessive costs of litigation or diminishing the courts' prestige.

The maximization of utility function by judges results in the inclination to force their own preferences through the increase of influence on judicial decisions, broadening the scope of their factual competences as well as maximization of the impact of given decisions by creating case-law lines (Chalmers, 1997).

According to this assumption (assumption A), the judges' motive may be described as the tendency towards the maximization of benefits resulting from a decision (Posner, 1973; Landes & Posner, 1980). Let us denote the value of the case v.

In case of a proper decision these benefits have a positive value, while in case of a wrong decision (judicial mistake) they take a negative value.

The attempts to elaborate a precise characteristics of judges' behaviour, in particular the description of their preferences, have not been completely successful (Pound 1940; Higgins & Rubin, 1980; Greenberg & Haley, 1986; Elder, 1987; Cohen, 1991; Cohen, 1992; Cooter, 1983; Posner, 1996). Nevertheless, it may be stated that judges tend to decrease the number of revised or annulled decisions, to decrease arrears linked to the examination of cases (particularly within the context of the requirement of case examination in a reasonable time) and to decrease the costs

linked to setting out a single judgement. Relying on the above-mentioned assumptions, the problem of economic optimization of adjudication may be described in the following way:

Let *SC* be the social cost of judicial ruling, C_d include the costs of delay in proceedings, C_i the costs of detailed investigation of Community law and C_e cost of judicial error. The economic purpose of the process of application of law is the minimization of total costs of the application of law, which include administrative costs and costs of judicial mistakes (assumption B):

$$\min SC = C_d + C_i + C_e \tag{9.1}$$

The level of costs of judicial errors should equal the sum of loss resulting from the improper application of Community law. Therefore when a domestic court makes a mistake in the process of application of Community law this may result (but not always should result) with the necessity of paying by the Member State compensation *D*. The amount of compensation will be dependent upon the regime of State liability accepted at the level of Community law. Under the assumption of full compensation from the court's budget under strict liability rule, the sum of loss $C_e = D$.

This loss might, but not necessarily, has to be covered, as it depends on the standard of liability for judicial error. However, the cost of judicial error for a given court additionally depends on the link between the potential compensation and the court.

The problem of a potential distortion of judges' behaviour in case of liability for judicial error has already been signalled in the law and economics literature (Fon & Schaefer, 2007). It has been suggested that the liability for judicial error should be placed on a state agency relatively far from the court as this would minimize the potential distortions of judge's behaviour. The above proposition was regarded as valid at least in case of the criminal courts.

The EC law cases have unique characteristics; hence, the potential liability should not result in jeopardy for judicial independence. Assuming the optimal liability would rather strengthen the rule of law. Additionally, it should be stressed that the liability for judicial error plays a role sufficiently different from compensation for wrongful convictions in the criminal cases. The principle of State liability is being regarded as an alternative to *public strategy* or *deliberative strategy* and as a means of potential control, or as standardization of judicial practices in the EC law cases throughout Member States. The effectiveness of a given strategy depends on the character of incentives influencing judges' behaviour. The strength of this "incentive effect" is to be reflected by the γ parameter. The value of the parameter lies between 0 and 1, thus $\gamma \in [0;1]$.

In case of deliberative strategy $\gamma = 0$, which means that there is virtually no expected influence of the outcome of litigation and potential judicial error in case of wrongful application of the EC law. This situation corresponds with the *deliberative strategy* having been adopted by the ECJ before *Köbler* and *Traghetti* cases, when no liability rule had been recognized.

Within the *strategy of privatization* $\gamma > 0$ and $\gamma \leq 1$. Under $\gamma = 1$ one may assume the full compensation under strict liability rule with the assumption that the liability for judicial error is effectively placed upon the court.

The examination of economic results of state liability for the decisions of domestic courts in case of the EC law should be based on the modelling of potential court's strategies. Therefore, one may assume that in case of the application of Community law domestic courts may choose between a thorough examination of a case (close scrutiny), according to the standard of Community law set out by the ECJ in *CILFIT* case or making a decision concerning another choice (Case C-283/81 *CILFIT Srl i Lanificio Galardo SpA v. Ministry of Health* [1982]).

This second strategy comprises the possibility of making a decision or commencing a procedure of a preliminary reference, without engaging in a deep analysis of Community law and ignoring the standard elaborated by the ECJ in *CILFIT* case. The option is justified by the presumption of an adequate competence of the national court even in cases where the EC law plays a paramount role, as it has been suggested by Lord Denning in a famous English case *Bulmer* v. *Bollinger* ([1974] Ch. 401, [1974] 3 WLR 202 (CA). The same position has been taken by the Polish Supreme Court in case I CK 207/05 of 08.11.2005 (OSN 9/2006 p. 54), where the Court stated that the ECJ has no power to give an opinion on the potential contradiction between national legislation and the EC law, since the power of the ECJ is limited to the interpretation of the EC law. This ruling is openly contradictory not only with judgement of the ECJ in C-283/81 *CILFIT Srl i Lanificio Galardo SpA v. Ministry of Health* [1982] but also with the ruling in the C-173/03 *Traghetti del Mediterraneo SpA v. Italy* [2006] case.

The acceptance of the assumption of a two-stage process of decision-making enables one to compare two regimes of liability for a mistake in the application of Community law. A given domestic court examines a particular number of cases within the scope of the EC law. The court may engage in three potential actions: (a) pass an "independent" ruling thoroughly ignoring the EC law, (b) examine the state of affairs using the criteria developed by the ECJ, and (c) pass a preliminary question without a close investigation and thus shifting the cost of the application of the EC law on the ECJ. (Fig. 9.1).

As far as the first situation is concerned, domestic court may pass the ruling in a way that is not consistent with the assumptions of the doctrine of *acte claire*, hence not taking into account the specific features of Community law. Such an action is rational only under the assumption that the court is minimizing the costs of the application of Community law C_{i}. This approach had been adopted in English case *Bulmer* v. *Bollinger* [1974]; therefore the strategy could be described as the application of *Bulmer* standard. This standard is incompatible with the criteria formulated by the ECJ (in case 283/81 *CILFIT Srl i Lanificio Galardo SpA v. Ministry of Health* [1982]), according to which domestic court is obliged to examine whether the application of the Community law is so obvious as not to create any doubts (*acte claire*). The adoption by the court of the strategy of an independent ruling might be profitable, since the court seems to minimize the costs of the application of the EC law. This kind of strategy by domestic courts, which is likely to ignore Community

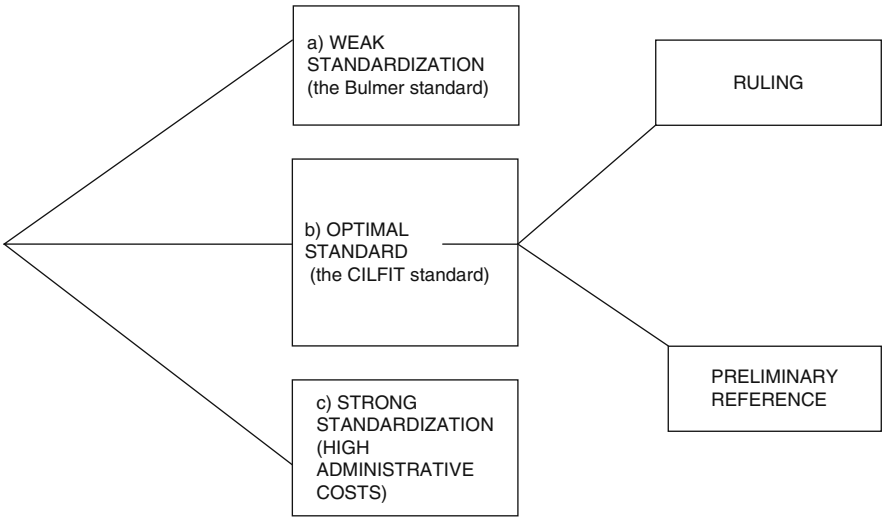

Fig. 9.1 The possible options of national court in case of application of the EC law

law, may be described as a *cheap and weak standardization of the application of the EC law.*

As far as the second option is concerned, the examination of the state of affairs using the criteria developed by the ECJ, a domestic court may examine whether in a given case there is a necessity of passing a preliminary question. According to the principle formulated in case 283/81 *CILFIT Srl i Lanificio Galardo SpA v. Ministry of Health* [1982], domestic court should check whether Community law is so obvious that it does not raise any doubts (*acte claire*). While performing the task domestic courts should take into account the fact of the existence of many equivalent linguistic versions of the legal provisions and should compare them. Additionally, domestic courts should establish the precise meaning of legal terms used in Community law. Moreover, the court should perform an integral interpretation of the norms of Community law in a proper context, in relation to the aims realized by the Community law, in the light of the dynamism of the integration and also taking into account a specific stage of integration in a particular moment of law application.

Hence domestic courts should perform a deep analysis of a given norm, taking into account also possible interpretative divergences within the Community. The court, before passing a judgement or before passing a preliminary ruling, should examine thoroughly and interpret properly the norms of Community law as well as adjudication of the ECJ (according to the doctrine of *acte eclaire*). This possibility is also used in case when the domestic court first passes a preliminary question to the ECJ and then withdraws it. In such a case the court bears the costs of preliminary investigation of the EC laws. The investigation allows it to choose with greater precision a possible path: either to pass a judgement independently or to pass a

preliminary question of the ECJ (*optimal standardization of application of the EC law*).

The third option is linked to the preliminary reference procedure being initiated by the domestic court. The verdict of the ECJ contains an official interpretation of the EC law. That interpretation part of the ruling is binding and it should serve as a basis for a judgement to be given by the national court. Therefore, while applying the ECJ verdict the domestic court should be free from a potential liability based on the improper use of the Community law. Moreover, the judgement of the national court is virtually always consistent with the EC law, since it is based on the preliminary ruling issued by the ECJ. This strategy may be described as a *costly and strong standardization of application of the EC law*.

The model of domestic courts' action is based on the estimation of expected benefits (gains) or costs of every of the above-mentioned strategies, taking into account various probabilities linked to different factors in the process of delimiting the sphere of probability, where the court would choose a given path.

Every case is linked to some level of probability p that it may be solved properly by domestic court where p has a given function of density f(p) (probability density function). The complexity of every potential case has an accidental and exogenous character.

In situations when the court resolves a given case properly, it gains a benefit denoted V. However, when the court passes an improper decision, it results in a loss (the cost of judicial mistake) denominated as D. The cost is not dependent on the fact whether the given verdict, which is inconsistent with Community law, would result with liability of the Member State. Therefore when domestic court makes a mistake in the process of application of Community law this may result (but not always should result) with the necessity of paying by the Member State compensation, depending on the value of the parameter γ, where $\gamma \in [0;1]$.

The acceptance of the second strategy (b) will increase the cost of application of the EC law stemming from the thorough investigation of the relevant legal sources. Let this cost be denoted C_i. It is important that the proper application of the EC law is not costless, since the cost results from the proper application of Community law according to the standard accepted by the ECJ. Still, it should be stressed that a detailed examination according to the *CILFIT* standard increases the detection of cases, which due to their complexity are very probable not to be ruled independently by domestic courts. In other words, the exogenous probability of a proper decision in those cases is low and the preliminary investigation by national court increases the probability of an optimal choice.

Hence it should be assumed that the examination of a case according to the *CILFIT* standard is an imperfect method. The court's output may be improper in two different ways. Firstly, while carrying out the examination, the court may mistakenly assume that the case at stake is too complex while in fact it is not. Then the court is apt to set up the preliminary reference procedure, thus raising the costs without justification. Such a situation may happen if the court has no knowledge about the already passed verdict of the ECJ in a similar case. The error usually stems from the fact that the national court was not sure about the analogous relationship between

the two cases, holding that the case under examination is not similar enough to the already given ECJ ruling. The occurrence of this type of error is linked to the fact that while addressing the preliminary reference the ECJ assumes that national court could have deployed the already existing ECJ case law. Thus the error is detected only *ex post* and against the later ruling of the ECJ.

Let α be the probability that the correct decision taken by the domestic court is mistakenly taken by that court to be *prima facie* improper (type 1 error). Let β be the probability that the erroneous decision taken by the domestic court is mistakenly taken by that court to be proper (type 2 error). This latter error results with the ruling set up independently by the national court. Type 2 error can only be detected by other national court, which supervises the decision on the basis of breach of the EC law or by the European Commission monitoring the application of the EC law in Member States.

The assumption about the probability of two kinds of errors indicates that the probability of type 1 error equals the probability of type 2 errors. Therefore one may further assume that $\alpha<0,5$ and $\beta<0,5$. Hence it may be still further assumed that the tort liability of the national highest court in case of infringement resulting with loss to the individual may be based on either strict liability or negligence.

While aiming at determination of the optimal strategy of action for domestic court, one should compare the expected values of potential strategies, in relation to the probability factor linked to them. These probabilities may be described as an indifference curve along which the court is neutral (indifferent) whether to perform an examination and ask a preliminary question or whether to perform an examination and pass a verdict independently. The first expectation is that the court asks a preliminary question when the probability of passing a proper ruling is below the lower curve of probability. The court passes an independent ruling in cases when the probability of a proper ruling is above the higher curve. All cases between the higher and lower curve of probability will thus be examined.

It should be assumed that the court tends to the maximization of expected benefits stemming from the ruling, thus taking into account the existing standard of liability in case of a breach of Community law. The court maximizes benefits as a result of verdicts consistent with Community law, while passing of a judgement with mistakes results in State liability. Therefore the expected value of each case solved by domestic court is a function of standard liability, probability that the passed verdict is a proper one and actions of the court such as passing judgements, asking a preliminary question or making detailed examination of a case from the Community law perspective.

Let C_d then denote the costs of delay in proceedings, C_i the costs of investigation of Community law and C_e the cost of judicial error. Additionally according to the above assumptions let p denote the probability of the correct application of the EC law by domestic court, related to the complexity of a given case. Let v be the value of a case; it is assumed that judges tend to maximize this value. Let V_1 denote the total value of the case under the strategy of *costly and strong standardization of application of the EC law*. Consecutively, let V_2 be the total value of the case under the strategy of *cheap and weak standardization of application of the EC law*.

Finally let V_3 denote the total value of the case under the *strategy of the optimal standardization of application of the EC law*. Therefore the total values of given cases under those strategies are as follows:

(1) When domestic court asks a preliminary question to the ECJ, without performing detailed examination – strategy (c) *costly and strong standardization* on Fig. 9.1, then

$$V_1 = pv - C_d - C_i, \text{ where } C_d = 0, C_i = 0, p = 1, \text{ then } V_1 = v - C_d \tag{9.2}$$

The assumption is that in case of asking a preliminary question the potential benefits of solving the case as well as the costs of prolonged litigation balance each other, $V_1 = C_\mathrm{d}$ and hence it equals zero. $V_1 = 0$.
(2) When domestic court passes a judgement independently, without performing detailed examination of EC law – strategy (a) *cheap and weak standardization* on Fig. 9.1, then

$$V_2 = pv - (1 - p)\gamma D \tag{9.3}$$

(3) In cases when domestic court before passing a judgement or before passing a preliminary ruling examines thoroughly and interprets properly the relevant part of the EC law according to the *CILFIT* standard – strategy (b) *optimal standardization of application* on Fig. 9.1, then value of case (V_3) holds as follows:

$$V_3 = p(1 - \alpha)v - [(1 - p)\beta\gamma D] - C_i \tag{9.4}$$

If one assumes that the standard liability adopted within the Community law is based on no liability rule as in case of *deliberative strategy*, which means that $\gamma = 0$, then

$$pv > p(1 - \alpha)v - C_i, \text{ consecutively } V_2 > V_3 \tag{9.5}$$

and

$$pv > v - C_\mathrm{d}; \text{ hence } V_2 > V_1 \tag{9.6}$$

The potential cost of a judicial error does not influence the expected value of a ruling in case when the court initiates a preliminary reference procedure and also when the judgement is made independently by the court, using the *CILFIT* standard. According to both basic assumptions, A and B, the court will tend to adopt (strategy a), which means that courts will avoid any preliminary references, with or without detailed examination of the EC law. Thus the national court would adopt *cheap and weak standardization* (strategy b). In the long run under no liability rule heterodox English *Bulmer* standard would prevail over the orthodox *CILFIT* standard. This might be the best justification for the adoption of the principle of State liability in case of judicial error in a form adopted by the ECJ in *Köbler* and *Traghetti* cases.

4 Liability for Judicial Error as an Instrument of Standardization of Application of EC Law: Normative Analysis

The question remains how should the application of the principle of State liability in case of judicial error in the EC law be applied and which factors should be taken into account in order to standardize the judicial practice within the scope of application of the EC law throughout the EU Member States. The economic analysis of State liability for judicial error should be based on the assumption that judicial activity of domestic courts in some instances may result in damage. Moreover, it should be stressed that this issue is directly linked to the sphere of operation of the principle of State liability in the EC law, aiming at the maximization of the effectiveness of European law and also for the minimization of the costs resulting from that activity. Thus the adoption of the standard of examination of the EC law by national court should be strictly dependent on the relative probability of the correct application of the EC law.

The optimal standardization according to the *CILFIT* standard should enable judges to distinguish complicated or difficult cases from the relatively easy ones. Still the *CILFIT* standard should not be associated with preliminary investigation. The aim of the preliminary investigation is to enable the judges to decide whether the application of the *CILFIT* standard is necessary and thus justified. In case of a very promising (easy) or very hard litigation there is no need for national court to spend its resources for the application of the *CILFIT* standard. The standard should be used particularly in dubious cases, after the preliminary examination, when the court will use the *CILFIT* standard with costs $C_i>0$, and then will decide whether to start the procedure of preliminary reference, leaving the interpretation of the EC law to the ECJ or giving its own independent final judgement.

The application of this two-step procedure (initial investigation and/or *CILFIT* examination) would optimize the process of application of the EC law and would standardize the judicial practice, since the investment in a thorough examination of the EC law could be potentially efficient. However this condition is fulfilled only under the liability rule. Within the principle of strict liability with full compensation rule, where $\gamma = 1$, two possible bounds of probability are to be indicated: the higher probability bound and the lower probability bound.

Let the higher probability bound be denoted p_h and the lower probability bound be denoted p_l. The main purpose of the preliminary investigation and examination lies in the possibility of indication whether the case is strong (p_h) or weak (p_l). While considering the extreme case in which $\gamma = 1$ (full strict liability rule), the expected *ex ante* value of the case holds as follows:

$$V_2 = V_3 \text{ for the higher bound of probability } (p_h) \tag{9.7}$$

Hence for p_h,

$$Pv - (1-p)\gamma D = p(1-\alpha)v - [(1-p)\beta\gamma D] - Ci \tag{9.8}$$

$$V_3 = V_1 \text{ for the lower bound of probability } (p_l) \tag{9.9}$$

Hence for p_l,

$$p(1-\alpha)v - [(1-p)\beta\gamma D] - Ci = 0 \tag{9.10}$$

At this stage one may repeat the comparison of the value of cases $V_{1,}$ V_2, V_3 related to both higher and lower probability bounds.
For p_h,

$$pv - (1-p)\gamma D < p(1-\alpha)v - [(1-p)\beta\gamma D] - Ci, \tag{9.11}$$

$$\text{which means that if } p < \frac{(1-\beta)D - Ci}{\alpha v + 1 - \beta D} \tag{9.12}$$

then the national court will make a preliminary reference even without a detailed examination. On the other hand, for p_l,

$$p(1-\alpha)v - [(1-p)\beta\gamma D] - Ci > 0, \tag{9.13}$$

$$\text{which means that if } p > \frac{\beta(D) + Ci}{(1-\alpha)v + \beta D}, \tag{9.14}$$

then the national court will adopt *Bulmer* standard, giving the judgement without both detailed examination and preliminary reference.

$$\text{Finally, for } p > \frac{\beta(D) + Ci}{(1-\alpha)v + \beta D} \text{ and } p > \frac{(1-\beta)D - Ci}{\alpha v + 1 - \beta D}, \tag{9.15}$$

when the probability of the appropriate judgement lies between the lower and the higher probability bound, national court will apply the *CILFIT* standard, spending resources for an expensive and detailed examination of the case. Depending on the result of the examination the court will give judgement or make a preliminary reference.

If probability of a given ruling lies below p_l, then the court is not willing to use resources for performing an examination; therefore it will ask a preliminary question without making the examination according to the *CILFIT* criteria. When the probability of a proper ruling lies above p_h, the court will pass a judgement independently without making the examination according to the *CILFIT* criteria. In the zone between p_l and p_h, the court will perform an examination according to *CILFIT* standard and will rely on the results of this examination. In a situation when State liability is based on the standard of strict liability, the examination of a case according to the *CILFIT* standard serves only to distinguish those cases that may

be solved independently by domestic court from those cases where domestic court should initiate a preliminary reference procedure and rely on the ECJ's judgement. The fact that such an examination has been performed does not exempt State from the potential liability if the judicial ruling appears to be *ex post* inconsistent with the EC law. The application of the *CILFIT* is, however, not always efficient. The court minimizes redundant costs C_i and maximizes the value of the case. This will lead to the strong correlation between the *ex ante* complexity of a given case in front of the court and total expected costs, including the cost of judicial error. This observation proves the hypothesis that the *privatization strategy* is primarily conducive to the unification of the adjudicative practices in the EU, while the protection of rights is of a secondary concern, as has rightly been suggested by some authors (Bertolino, 2008).

5 Conclusion

The basic conclusions concern the prospective actions of the national court: under the strict liability with full compensation from court's budget, the court has a strong incentive to apply the *CILFIT* standard, when it is justified by the expected complexity of the case. The national court is apt to comply with the *strategy of privatization*, making the preliminary reference only in case of a reasonable doubt. Thus the *strategy of privatization* adopted in the recent rulings of the Court of Justice of the European Union seems to be a valuable and feasible alternative to centralized *public strategy* based on Article 226 of the EC treaty, maintaining both the uniformity of application of the EC law as well as efficiency. Additionally, it might be observed that the potential results of the extension of the *strategy of privatization* are difficult to foresee.

The standardization of the EC law by the indirect, economic incentives seems to bear some costs. If national courts will review the judgements of other national courts in case of the potential infringement of the EC law, the process may lead to some unexpected results. The *privatization strategy* could inevitably lead to the redefinition or even destruction of the traditional, hierarchical structure of national courts within Member States. As an effect the imposition of State liability for judicial acts would be likely to lead to the situation in which lower national courts may be unwilling to find that superior national courts have infringed the European law. They might therefore look to the ECJ to make the final judgement, which would eventually lead to the potential conflict within a presumably cooperative institutional environment.

It is worth reminding that at the moment the EC Treaty does not provide for a system of appeals to the ECJ against national court decisions. Therefore it is not surprising that the question still remains open whether the *strategy of privatization* is going to be an intermediate stage of development of the European hierarchical system with the ECJ on the top of the hierarchy or whether it will become a stable institutional solution based on the structural peculiarity of the European law. In both cases, however, economic analysis of law remains a valuable analytic tool enhancing

the understanding of the formal as well as informal practices of legal actors and illuminating the weight of available institutional alternatives.

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Part III
European Criminal Law

Chapter 10
Pro-European Interpretation of Criminal Law Vis-à-vis the Constitutional Standards of the European Union Member States

Barbara Nita

Abstract This chapter examines the problems of a pro-European interpretation of criminal law connected with the implementation of the European Arrest Warrant in EU Member States, as seen against the background of tension between the principle of constitutional supremacy, as guaranteed by the constitutions of the EU Member States, and the principle of primacy of European law. Constitutional questions about the implementation of the EAW are discussed on the example of the position of authorities appointed to review the constitutionality of laws in various EU Member States. It is argued that the ECJ's derivation of the general principles of Community law from the shared constitutional tradition of EU Member States reduces the area of potential conflict between national laws of constitutional rank and European law. Further progressive convergence of the criminal law systems of EU Member States, with due respect for the constitutional standards, will eliminate a considerable part of the problems involved in ensuring interpretations conforming with European law, while at the same time respecting constitutional standards.

1 Introduction

A pro-European interpretation creates specific problems at the interface between criminal law seen in the constitutional context and European law. The Constitution is at the highest level in the hierarchy of legal acts. On the other hand, European law takes precedence over the domestic law of EU Member States. The question arises whether this tension may be removed by a pro-European way of interpreting the Constitution, in particular if it takes into account the specific nature of the constitutional guarantees related to criminal law.

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2 The Mutual Relationship Between Community Law and Constitutional Law

The question of how to reconcile the principle of constitutional supremacy, as guaranteed by the constitutions of EU Member States, with the principle of primacy of European law, and also the doubt over whether the authorities reviewing the constitutionality of law in EU Member States have the power to examine the constitutionality of European laws have long commanded the attention of legal doctrine (Winczorek, 2004; Biernat, 2004; Biernat, 1998; Lazowski, 2003). This issue, in the aspect of the relationship between constitutional law and that part of European law that belongs to Community law, has been commented upon a number of times by both the judicial authorities appointed to review the constitutionality of laws enacted in EU Member States and the Court of Justice of the European Union.

2.1 Jurisprudence of the Court of Justice of the European Union

The ECJ's standpoint has been consistent in foregrounding the principle of primacy of Community law.[1] Moreover, the ECJ case law formulates a requirement to interpret national laws in conformity with Community law. When undertaking this construction, a national court must interpret the relevant legislative provision taking into account not only the letter of the law but also the context, system, function and purpose that it serves. Any conforming construction of derivative law should include such an interpretation that will make it possible to take the primary legislation into consideration, and in particular those provisions of the treaty that formed the basis for adopting the relevant legislative enactment (Biernat, 1998; Mik, 2004). The requirement of a conforming interpretation boils down to the obligation to ensure the compliance of national laws with EU law. However, meeting this requirement cannot lead to an interpretation *contra legem.*[2] On the other hand, the view is put forward that the interpretation should be *mutually friendly* (Łętowska, 2010).

2.2 Statements Made by the Authorities Appointed to Review the Constitutionality of Law in EU Member States

Such statements lack consistency in this respect. The matter is particularly complicated by various constitutional determinations of the status of European law and its relation to the internal legal system (discussed in more detail by Albi, 2007).

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[1] See, for example, the judgements: *Van Gend en Loos* of 5 March 1963 (Case 26/62); *Internationale Handelsgesellschaft* of 17 December 1970 (Case 11/70); *IN.CO.GE.'90* of 22 December 1998 (C-10/97 through C-22/97); *Kühne & Heitz* of 13 January 2004 (C-453/00).

[2] See, for example, the ECJ judgement of 23 October, C-408/01: *Adidas-Salomon AG*.

Regardless of such differences, the EU Member States recognise that, due to the principle of primacy of European law over national laws, in the event of a contradiction occurring despite an attempt to interpret national law in conformity with European law,[3] the internal law of a rank lower than constitutional must yield to European law.[4] Things are different, however, in the case of a conflict between European law and constitutional law. In this respect, there is no uniform position among the authorities appointed to review the constitutionality of laws enacted in EU Member States. In its judgement of 28 November 2003 (KR 1/00), the Austrian Constitutional Court (*Verfassungsgerichtshof*) clearly confirmed the primacy of Community law over internal laws of constitutional rank.[5] The standpoint that the Constitution holds priority in the event of a contradiction between European law and constitutional law has been taken by the following constitutional courts, among others: Lithuanian[6] and Romanian.[7] The French State Council (*Conseil d'Etat*), in a judgement of 3 December 2001 (ref. 226514), also clearly stated that the principle of primacy of Community law must not compromise the supreme power of the Constitution within the national legal order.[8] In this context, a noteworthy judgement is that passed by the Polish Constitutional Tribunal (*Trybunał Konstytucyjny*) on 11 May 2005 (K 18/04),[9] in which the Tribunal on the one hand concluded that it was not competent to undertake an autonomous evaluation of the constitutionality of the EU's primary legislation, but on the other hand, by citing Article 188.1 of the Constitution, it recognised its own jurisdiction to review the constitutionality of the accession treaty, as an international agreement ratified by Poland. Particularly noteworthy is also the judgement of the German Federal Constitutional Court (Bundesverfassungsgericht, hereinafter: FCC) of 12 October 1993 (2 BvR 2134, 2159/92) in the *Maastricht* case,[10] continuing the line adopted in an earlier ruling, of 22 October 1986 (2 BvR 197/83), in the *Solange II* case.[11] With respect to

[3]The requirement of an interpretation conforming with Community law: a judgement of breakthrough significance was passed by the ECJ on 10 April 1984 in the case: *S. von Closon, E. Kamann vs. Nordrhein-Westfalen*, available at http://www.europa.eu.int

[4]See, for example, the judgement of the Italian Constitutional Court (*Corte Constitutionale*) of 5 June 1984 (case file ref. 170/84), GC 1984., pp. 1098 et seq.; the judgement of the German Federal Constitutional Court (*Bundesverfassungsgericht)* of 9 June 1971 (2 BvR 225/69), BVerfGE 31, 145; the judgements of the Austrian Constitutional Court (*Verfassungsgerichtshof*): dated 26 June 1997 (B 877/96) and 5 March 1999 (B 3073/96), available at http://www.ris.bka.gv.at/vgh/; and the decision of the French Constitutional Council (*Conseil constitutionnel*) of 10 June 2004 (ref. 2004-496 – DC), JO 20 June 2004, p. 11182.

[5]The ruling is available at http://www.ris.bka.gv.at/vgh/.

[6]Judgement of the Lithuanian Constitutional Court of 14 March 2006, case file ref.17/02-24/02-06/03-22/04, available at http://www.lrkt.lt/dokumentai/2006/r060314.htm.

[7]Judgement of the Romanian Constitutional Court of 17 May 2007 (59D/2007), the author's own resources.

[8]The author's own resources.

[9]OTK 5A/2005, 49.

[10]BVerfGE 89, 155.

[11]BVerfGE 73, 339.

enactments of secondary EU legislation, the German constitutional court declared cooperation with the ECJ in the supervision of the admissibility of applying such legislation in Germany, consisting in the FCC confining its role to that of a general guarantor of compliance with the basic rights standard adopted in the Constitution. The direction set by the rulings in these two cases, *Solange II* and *Maastricht*, was principally continued by the judgement of 7 July 2000 (2 BvL I/97) in the *Bananas* case.[12]

3 Mutual Relationship Between the Third Pillar European Law and the Constitutions

For a long time, these doubts and arguments did not pertain to criminal law as, until quite recently, European law did not regulate this area. Traditionally, criminal law remained the domain of national sovereignty (Stiebig, 2005). With the rise of the European Community and the ensuing free flow of goods, the need to undertake effective measures to counteract supranational crime, in particular organised crime, called for fragmentary regulation in this field as well.

The intervention of European legislation into this area of law added new currency – also in the context of criminal law – to the question about the relations between European law and the internal laws of constitutional rank in EU Members States.

3.1 Judgements of the Court of Justice of the European Union

The cooperation method forming the basis for the sources of law in the third pillar of the EU has rendered both the argumentations used in the debate on the relation between Community law and constitutional law, and the relevant rulings of constitutional courts and the ECJ, inadequate for transfer into this sphere. The situation is doubtlessly further complicated by the multiplicity and level of detail of constitutional regulations referring directly to criminal law, and the inadmissibility of any analogy to the disadvantage of the accused.

A breakthrough was brought about by the ECJ judgement of 16 June 2005 in the *Pupino* case (C-105/03).[13] In this case, the ECJ expressed the opinion that it would be difficult for the EU to carry out its task effectively if the principle of loyal cooperation, referred to in Article 10 of the EC Treaty,[14] was not binding on police and judicial cooperation in criminal matters, as covered by Title VI of the EU Treaty.[15] Furthermore, the ECJ states that the binding nature of framework

[12] BVerfGE 102, 147.

[13] Available at http://www.curia.eu.int

[14] Treaty Establishing the European Community, Official Journal of the European Communities of 24 December 2002, C 325/33.

[15] Treaty on European Union, Official Journal of the European Communities of 24 December 2002, C 325/5.

decisions places an obligation on the national authorities in EU Member States, and in particular on the judiciary, to interpret their internal laws in a pro-European manner (construction of national law in conformity with EU law), i.e. to provide such an interpretation that will make it possible to achieve the purpose set out in the Framework Decision. Thus, the ECJ took the line that the requirement of a pro-European interpretation applied to legislative enactments in the third pillar of the EU as well. Substantiating its standpoint, the ECJ points out that this is not affected by the fact that, under Article 35 of the EU Treaty, the prerogatives of the ECJ are narrower than those stipulated by the EC Treaty or the circumstance that, in the light of Title VI of the EU Treaty, there is no comprehensive system of appellate measures and procedures ensuring the conformity of the enactments of EU institutions with the law.

The requirement of a conforming interpretation, however, is not binding in an unlimited way. Specifying its limits in the *Pupino* case, the ECJ indicated that the national courts' obligation to refer to the Framework Decision in their interpretation of national criminal law is subject to limitations resulting from the general principles of law, including, but not limited to, the principle of certainty and non-retroactivity. In particular, those principles prevent that obligation from leading to the criminal liability of persons who contravene the provisions of a framework decision from being determined or aggravated on the basis of such a decision alone, independent of the implementing law. Notwithstanding an interpretation method, this sphere is a domain of particularism.

It is noteworthy that the ECJ took a similar standpoint in the joint adjudication of the *Berlusconi* cases, C-387/02 and C-403/02, on 3 May 2005.[16] The doubt that was resolved by this judgement referred to criminal proceedings conducted in Italy against several individuals, including the former Italian prime minister, Silvio Berlusconi. The criminal charges referred to the disclosure of false information in the annual financial statements of commercial companies, which had allegedly made it possible to transfer funds to concealed reserves used for financing illegal operations. In the course of the proceedings, the law was amended and the acts that those persons were accused of were reclassified from indictable offences (*delitto*) to summary offences (*contravvenzione*). The applicability of a shorter period of limitation to the latter precluded any further continuation of the proceedings. Under these circumstances, the Italian court voiced a doubt whether the amended provisions introduced adequate sanctions for a violation of Community law, in particular the First Companies Directive of 9 March 1968, stipulating the requirement for national laws to provide for effective, proportionate and dissuasive penalties for violations of Community laws. Providing answers to the questions referred to it for a preliminary ruling, the ECJ stated that, where a national court came to the conclusion that the provisions of national law did not satisfy the Community law requirement that penalties be appropriate, they were required – in line with long-standing ECJ case law – to refuse to apply such provisions without the need to wait for their repeal.

[16] Available at http://www.europa.eu.int.

Expressing this thought, the ECJ ruled that a directive could not, of itself and independent of a national law adopted by a Member State to implement it, have the effect of determining or aggravating the criminal liability of persons who acted in contravention of the provisions of that directive.

The latter idea had surfaced earlier in the ECJ case law, in particular in its judgements of 8 October 1987, Case 80/86: *Kolpinghuis Nijmegen,* and 7 January 2004, Case 60/02: *Criminal proceedings against X.*

In the *Pupino* case, the ECJ pointed out that the obligation placed on a national court to refer to the purport of a framework decision when interpreting the relevant rules of its national law ceased when the latter could not receive an application that would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of a conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*. In this context, the ECJ further points out that, when specifying the limits of applicability of a conforming interpretation, the national court is required to consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the relevant framework decision (see also Fletcher, 2005; Chalmers, 2005).

According to the ECJ, the resolution of conflicts between third pillar European law and the law of the Member States of the EU should not be limited to the application of a linguistic interpretation.

3.2 The Attitude of the Authorities Set Up to Control the Constitutionality of the Law in Member States of the European Union: Particular Importance on the Issue of the Constitutionality of the Provisions on the European Arrest Warrant

A special place among statements made by the authorities appointed to exercise the powers of review over the constitutionality of law in EU Member States, with respect to the relation between third pillar EU law and their internal laws of constitutional rank, is occupied by those referring to the implementation of EU Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States.

3.2.1 Framework Decision on the European Arrest Warrant and a Conflict Between European Law and the Constitutional Provisions of Member States

Interesting conflicts between European law and constitutional provisions of EU Member States are connected with the concept of the European arrest warrant (hereinafter: EAW).

The idea of the EAW is based on the principle of mutual recognition of decisions issued by foreign law enforcement authorities (for a more detailed discussion, see Horng, 1999).[17] It presupposes the acceptance of differences between the various legal systems and confidence in the rulings coming from foreign law enforcement authorities. This principle, rooted in Article 28 of the EC Treaty, is genetically connected with private law (for a more detailed discussion, see Horng, 1999). It was "transposed" into the sphere of criminal law with special emphasis on the common "base" shared by all the EU Member States in the form of the human rights standards set out by the ECHR, which is binding upon all of them (Alegre, 2003; Esser, 2003; Nilsson, 2006). It is intended to prevent excessive differences in the levels of protection of such rights in the various countries. Shortly before the EU enlargement by 10 new countries, including Poland, some English language sources expressed doubts as to whether the legal standards in this area in the candidate states corresponded to those prevailing in the "old" Member States (Alegre & Leaf, 2003; Mackarel, 2007). The situation is further complicated by the absence of a uniform European criminal procedure, although initiatives to lay the groundwork for it have been undertaken within the EU (Kadric & Scheiber, 2004).

Still, the EAW Framework Decision did not point to any situations precluding surrender due to the constitutional regulations of EU Member States as grounds for refusal to execute a European warrant. For this reason, both Polish and foreign publications have featured a number of critical opinions about the EAW ever since the adoption of the Framework Decision (Garlick, 2005).

The obligation to implement the Framework Decision resulted in a particularly difficult task for the Polish Parliament to adjust national legal regulations to such standards adopted by the European Union, which – at least verbally – seemed to be in evident conflict with obligations resulting from the provisions of the Constitution. Pursuant to Article 55 Section 1 of the Polish Constitution in its original form, the extradition of a Polish citizen was unacceptable. However, Article 55 Section 2 of the Constitution stated that the extradition of a person suspected of a politically motivated, non-violent crime shall be forbidden.[18] Such reasons for refusing to implement the EAW are not considered in the Framework Decision.

Over time, it turned out that the problem involved in the Framework Decision requirement to surrender nationals did not pertain solely to those EU Member States where constitutional provisions expressly prohibited such surrender. It also surfaced with reference to the Cypriot, Czech and Finnish Constitutions, and the German Basic Law (*Grundgesetz*).

The constitutional doubts voiced in the context of the EAW were partly corroborated in the case law of the authorities appointed to exert the powers of review over the constitutionality of laws in the Member States bound by the Framework Decision.

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[17] See recital (6) in the EAW Framework Decision.

[18] The transposition of EAW into the Polish internal legal order is discussed by Weigend and Górski (2005). See also Leczykiewicz (2006).

In a judgement of 27 April 2005 (ref. P 1/05), the Polish Constitutional Tribunal adjudicated that Article 607t § 1 of the Criminal Procedure Code, in the part which allows the surrender of a Polish citizen to the EU Member State based on the European Arrest Warrant, is inconsistent with Article 55 Section 1 of the Constitution.[19] At the same time, taking advantage of the option created by the Constitution, the Constitutional Tribunal postponed the extinction of Article 607t §1 of the Criminal Procedure Code for a period of 18 months from the date of publishing the sentence in the Official Journal. Because of the scope of the reference, the Constitutional Tribunal did not deal with other constitutional controversies raised in the literature related to EAW, i.e. the inconsistency of the legal instrument with Article 55 Section 2 of the Constitution in its original form.

Only 3 months after the judgement of the Polish Constitutional Tribunal, the German Federal Constitutional Tribunal, in a judgement of 18 July 2005 (ref. 2 BvR 2236/04), adjudicated that the entire act on EAW is unconstitutional and ruled that it was void.[20] Article 16.2 of the German Basic Law, in its first sentence, prohibits the extradition of German nationals, but then, in the second sentence, makes a concession for surrendering them to an EU Member State or to an International Criminal Court, as long as the rule of law (*Rechtsstaat*) is observed. The second sentence, allowing for the extradition of German nationals to EU Member States, among other places, was added to Article 16.2 by the Act Amending the Basic Law (*Gesetz zur Änderung des Grundgesetzes*) of 29 November 2000.[21] Previously, the provision guaranteed full protection against the surrender of German nationals.[22] The statement of reasons (Grounds) for the judgement does not indicate that the FCC has concluded that the EAW is a disproportionate legal instrument per se from a constitutional point of view. It states, however, that – in the transposition of the Framework Decision – the ordinary legislators did not exercise their power to restrict the surrender of German nationals under an EAW, as provided for by Article 4.7 of the Framework Decision. The other objection referred to the lack of judicial control over surrender rulings. The FCC further states that, in the sphere of national law, the legislators have not specified with adequate precision the reasons for a refusal to execute a European warrant.

Both rulings attracted diverse opinions in publications, mostly very critical (for a more detailed discussion, see Nita, 2007). The objections that were voiced about the rulings of both courts referred to acting against the process of European integration. In German publications, the ruling on the EAW has actually been nicknamed

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[19] OTK 4A/2005, 42, also available at http://www.trybunal.gov.pl (in Polish, English and German). The judgement was widely discussed. See Nita (2006a).

[20] The judgement was published in *Neue Juristische Wochenschrift* 2005, p. 2289. The sentence, together with the statement of reasons, is also available on the German Federal Constitutional Court website http://www.bundesverfassungsgericht.de. For a more detailed discussion, see Buermeyer (2005).

[21] BGBl I, S. 1633.

[22] For a more detailed discussion, see Geyer (2006) and Schünemann (2003). These objections are assessed critically by Meyer (2005).

Solange III, as a critical way of pointing out that 12 years after the *Maastricht* ruling and 19 years after the *Solange II* judgement, the FCC deemed it necessary to take a different view of the constitutional limits of European integration.[23]

In its judgement of 7 November 2005 in the *Konstantinou* case (ref. 29/4/2005), the Cypriot Supreme Court unanimously ruled that the provisions of Act no. 133 (1)/2004 on the European Arrest Warrant and Surrender Procedure within the European Union were void due to the guarantee provided in Article 11.2(f) of that country's Constitution. Namely, under that provision: "Every person has the right to liberty and security of person. No person shall be deprived of his liberty save in the following cases (. . .) (f) the arrest or detention of a person to prevent him from carrying out an unauthorised entry into the territory of the Republic, or of an alien against whom action is being taken with a view to deportation or extradition."[24]

Due to the wording of § 9.3 of the Constitution (*Suomen Perustuslaki*)[25] of 11 June 1999, the Parliamentary Committee for Constitutional Law in Finland concluded that it was impossible to implement the Framework Decision fully in that country's legal system. Namely, under that provision: "Finnish citizens shall not be prevented from entering Finland or deported or extradited or transferred from Finland to another country against their will" (Ojanen, 2006).

Equally noteworthy here is the judgement of the Czech Constitutional Court (*Ustavni Soud)* of 3 May 2006 (Pl. US 66/04),[26] finding the EAW provisions to be conforming with that country's Constitution. A model example of a constitutional review in proceedings in the Czech Constitutional Court was Article 14.4, 2nd sentence, of the Charter of Fundamental Rights and Freedoms (*Listina základnich práv a svobod*) of 1991, under which a citizen must not be forced to leave his own country. The significance of this guarantee is not identical to that expressed by Article 55.1 of the Polish Constitution in its original wording (i.e. before amendment), which the Czech Constitutional Court actually expressly pointed out in the statement of reasons for its judgement.

One should also note the opinion expressed by the French Council of State (*Conseil d'Etat*) on 26 September 2002 (ref. 368/282),[27] stating that the rights and freedoms guaranteed in the Declaration of the Rights of Man and of the Citizen of 1789, and also in the Preamble to the Constitution, are not contradictory to the extradition of a French citizen. The transposition of the European warrant arrest to French legislation should, however, be preceded by the appropriate amendment of the Constitution, due to certain unwritten fundamental principles of law.

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[23] This is pointed out with emphasis by Geyer (2006).

[24] The full text of the judgement, along with the statement of reasons in Greek and a brief discussion in English, is available at http://www.eurowarrant.net/. For a more detailed discussion, see Stefanou and Kapardis (2006).

[25] Act No 731/1999.

[26] The author's own resources.

[27] The author's own resources. See also Errera (2006) and Pfützner (2006).

The constitutional context, in the connection with which the above statements of foreign organs were pronounced, is not identical. However, the comparative analysis provides interesting observations as to the understanding of EU relations by the constitutional courts of the Member States, between constitutional law and regulations of European law in the third pillar.

3.2.2 The Constitutional Guarantee Prohibiting the Surrender of Nationals and the Pro-European Teleological Interpretation

Of key significance to the resolution of the constitutional problems presented to all the authorities appointed to review the constitutionality of laws, who made statements about the constitutionality of EAW implementing regulations, was a determination of the extent of the constitutional guarantee prohibiting the surrender of nationals. Primary importance was attached to resolving the doubt as to whether surrendering a national under an EAW was a form of extradition.

In my view, the Polish Constitutional Tribunal rightly dismissed the standpoint that the two different terms (surrender and extradition) used in the Framework Decision to juxtapose the EAW against "classical" extradition were – even when combined with a pro-European interpretation of the Constitution – to be decisive against the application of the guarantee provided for in Article 55 of the Constitution against EAW-based surrender. At the level of the Constitution, the term "extradition" has an autonomous meaning, regardless of the meaning ascribed to it in ordinary legislation. In the construction of constitutional terminology, definitions formulated in legislative enactments of a lower rank cannot be binding and decisive for its interpretation. Therefore, of decisive significance is the sense and essence of the relevant constitutional guarantee. Any assumption to the contrary would make it possible to contravene constitutional guarantees by formal classification – in ordinary statutory law – of an institution that has the features of extradition as a different legal instrument.

The idea that, at a constitutional level, surrender under an EAW is an institution different from extradition was expressly dismissed by the Supreme Court of Cyprus in its ruling of 7 November 2005, already cited above.

In the context of the ongoing debate over the question of whether the EAW is a different legal instrument to extradition, it is noteworthy that no such argumentation was used in the case referred to the German FCC. Shortly before that court issued its ruling, an opinion had actually been expressed in German publications that the change introduced by the EAW to the extradition procedure was not sufficiently radical to conclude that the term "extradition" was no longer adequate for that institution (cf. Lagodny, 2005).

Foregrounding the guarantee aspect of the prohibition to surrender German nationals, the FCC pointed out that, by prohibiting the surrender of a citizen to foreign judicial authorities, it was also intended to protect him against being tried in a foreign legal system and against the execution of his penalty there. The guarantee of Article 16.2 of the German Basic Law thus emphasises the special connection between a citizen and the legal order of his native land, guaranteeing him specific

laws and freedoms. The ban on extradition is a guarantee of the right to be tried by one's "own" court.

The purpose of the prohibition formulated in Article 55.1 of the Constitution, within the ambit required to resolve the constitutional problem referred to it, was identically described by the Polish Constitutional Tribunal. Namely, it stated that the ban on extradition was a guarantee of the right to be tried by a Polish court. As a result, the CT concluded that the definitively formulated ban on the extradition of Polish nationals, guaranteed by Article 55.1 of the Constitution, is absolute, and a citizen's personal right that is derived from it cannot be subject to any limitations.

The same thought was expressed in the statement of reasons for the ruling of the Cypriot Supreme Court on the unconstitutionality of the local EAW implementing legislation. The Cypriot Supreme Court made a clear reference to the standpoint taken by the Polish Constitutional Tribunal with respect to the guarantee stipulated by Article 55.1 of the Polish Constitution.[28]

Equally noteworthy here is the standpoint expressed by the Finnish Parliamentary Committee for Constitutional Law, namely that the implementation of EU measures is not acceptable if carried out in a manner degrading the standard of constitutional and other guarantees relating to human rights, as they mark the limits of the supremacy of European law over internal legislations (Ojanen, 2006).

According to the authorities set up to control the constitutionality of the law in the Member States of the EU, regardless of the method of interpretation, the guarantee nature of the constitutional provisions must be taken in account. Interpretation of the constitution through the prism of a lower rank provisions, even those that have been established as a result of the implementation of European law, is clearly unacceptable.

3.2.3 The Third Pillar Law in the System of the Sources of Internal Law

In the context of the constitutional problem regarding the EAW, the rulings of the authorities appointed to exercise powers of review over the constitutionality of laws in EU Member States took up an important issue of a broader nature, namely that of the relationship between national legislation enacted to implement third pillar EU legislation and the Constitution.

In this context, neither the Polish nor the German constitutional court took up the issue of the positioning of third pillar legislative enactments within the system of the sources of national law. After all, it was internal national legislation that was subject to constitutional appraisal, rather than European law.

Assessing the purport of the questioned regulations, however, both the German and the Polish constitutional courts conclusively recognised their own competency to exercise the powers of review over the constitutionality of national legislation implementing framework decisions.

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[28] For a more detailed discussion, see Stefanou and Kapardis (2006).

In the context of the relation between EAW implementing legislation and the Constitution, the Cypriot Supreme Court concluded that this framework decision – while obliging the states that were bound by them to ensure the full transposition of their provisions into their internal legal systems – still left them the choice of the forms and measures used to achieve this goal. It also pointed out that, despite the transposition of framework decisions being obligatory, a framework decision did not have a direct legal effect. This means that it is necessary to shape the regulations transposing the EAW into the Cypriot legal order in conformity with the Constitution. As a result, the Cypriot Supreme Court concluded that the measures and forms used to transpose a framework decision must not violate the provisions of the Constitution.[29] It expressly dismissed the opinion presented in the proceeding closed by this ruling by the Attorney General, namely that the principle of primacy of Community law over national law should, *mutatis mutandis,* apply to EU law in the third pillar.

The Czech Constitutional Court expressed a diametrically different position in this aspect. In its judgement of 3 May 2006, it stated that Article 1.2 of the Constitution, which stipulates that "The Czech Republic shall observe its obligations under international law", when interpreted in correspondence with the principle of cooperation expressed in Article 10 of the EC Treaty, was a constitutional principle under which national laws (including provisions of constitutional rank) should be interpreted in conformity with the principles of European integration and cooperation between Community bodies and Member State authorities. The statement of reasons for the judgement indicated that the standpoint of the Czech Constitutional Court corresponded in this respect to the ECJ's statement regarding the *Pupino* case. Namely, that Court pointed out that, in a situation where several alternative interpretations of the Charter of Fundamental Rights and Freedoms were feasible – and some of them made it possible to meet the Czech Republic's obligations as a member of the EU – it was necessary to adopt such an interpretation rather than any other. This applies in particular to Article 14.4 of the Charter, which prohibits forcing citizens to leave their country. The purport of this particular regulation is not the same as that of Article 55.1 of the Polish Constitution in its original wording, which the Czech Constitutional Court expressly pointed out in the statement of reasons for its judgement.

The polemic commentaries on the judgement of the Polish Constitutional Tribunal focus on the relation between European law and constitutional law.

As indicated before, framework decisions are not directly binding, though EU Member States are required to implement them. In this context, some Polish publications have pointed out that, despite the fact that the subject matter of the Constitutional Tribunal's review was the Code of Criminal Procedure, the assessment that it made has an indirect impact on the assessment of the Framework Decision as such. Some authors actually conclude that the Constitutional Tribunal

[29]For a more detailed discussion, see Stefanou and Kapardis (2006).

lacks the competency to review regulations resulting from the implementation of a framework decision.

The problem of the admissibility of the control of the constitutionality of domestic regulations implementing framework decisions was also raised in the proceedings of the FCC. The German government, represented by Prof. Dr. J. Masing, presented its position opposing the permissibility of the control of the act on the EAW (see also Hinarejos Parga, 2006). This view was based on the assumption of the supremacy of the European law regulations, of which implementation is compulsory and superior to the domestic law, including the constitutional regulations. As a result, he claimed that, in the situation when FCC has doubts as for the compliance of the decisions of the framework decision with constitutional guarantees, it should direct the question to the Court of Justice of the European Union (further: ECJ).[30] The FCC recognised its competence in examining the constitutionality of the regulations of implementations resulting from framework decisions (see also Hinarejos Parga, 2006). This judgement was reached with three dissenting opinions. The claim of the impermissibility of issuing sentences raised by the FCC on account of the lack of cognition was only raised by one judge, M. Gerhardt.

The problem of the relation between the ECJ and constitutional courts of the EU Member States certainly will reappear. This problem is very controversial. It is worthwhile adding that Prof. S. Broß – an FCC judge and author of the dissenting opinion to the analysed judgement – in the period preceding the sentence presented the difficult-to-accept view that the FCC never has the duty to refer to the ECJ because of the lack of the identity of the matters included in the cognitions of ECJ and FCC (Broß, 2004).

Unlike Germany, Poland has not yet decided to make any declaration about the recognition of ECJ jurisdiction in the third pillar on the ground of Article 35 of the EU treaty (Płachta & Wieruszewski, 2005). For this reason only it was impossible for the Constitutional Tribunal to direct preliminary questions to the ECJ, concerning the nature of a European Arrest Warrant.

Both the discussed judgements have an influence on the assessment of the framework decision in the scope referred to in the sentence. In both cases, however, there are constitutional doubts referring to regulations of domestic law to be adjudicated. Consistently the ECJ emphasises in its judicature that its competence concerns exclusively the interpretation and examination of the validity of European legal acts and does not extend to an assessment of the domestic law (Czaplinski, 2005, Płachta & Wieruszewski, 2005). In my opinion, the interpretation of the framework

[30]The Belgian Court of Arbitration (Arbitragehof), due to doubts over the conformity of the Framework Decision on EAW with the EU Treaty, in both substantive and procedural aspects, referred a preliminary question to ECJ. The judgement was given on 3 May 2007, case C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad.* According to ECJ, *Examination of the questions submitted has revealed no factor capable of affecting the validity of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.* See also Pérignon (2007) and Geyer (2008).

decision itself by the ECJ could in no way influence the evaluation expressed in the statements of both constitutional courts.

In the context of the relations between the European law and domestic law in proceedings in both constitutional courts, there was a problem of the interpretation in accordance with the EU law of legal documents in the third pillar, which does come under the *acquis communautaire* of the EC.

This question was not addressed by the Polish Constitutional Tribunal explicitly because it was not necessary in the examined case. The Constitutional Tribunal cited the earlier judicature of the ECJ, pursuant to which the pro-European interpretation of domestic law is not possible if its effect deteriorated the situation of an individual, and especially when the criminal responsibility was introduced or made more severe.

With respect to the regulation stipulated by Article 11.2(f) of the Constitution, an opinion coinciding with the standpoint of the Polish Constitutional Tribunal was voiced on this issue by the Cypriot Supreme Court in its judgement cited herein above, which proclaimed the provisions of the EAW implementing act to be unconstitutional.

The position of the Polish Constitutional Tribunal left some commentators with certain feeling of incompleteness, because it did not avoid stating the unconstitutionality of Article 607t § 1 of the Criminal Procedure Code. It was shown here that, on the grounds of the Accession Treaty, Poland transferred some competence to the EU. Where the transfer of competence appeared, EU law is superior to domestic law. Relating to these remarks, an accusation was formulated against the Constitutional Tribunal of the infringement of the pro-European interpretation requirement under the framework decision, citing especially the ECJ's position expressed in the *Pupino* case.[31] With reference to this case, a new statement appeared that, if the ECJ judgement had been reached earlier, i.e. before the statement of the Constitutional Tribunal, its outcome would probably have been different (Grzelak, 2005).

In the *Pupino* case, answering the preliminary question of the Court in Florence (*Tribunale di Firenze*), the ECJ stated that EU Member States and their internal legislative bodies are obliged to apply a pro-European interpretation of their internal regulations, i.e. of such an interpretation that allows achieving the purpose indicated in the framework decision. And thus the ECJ recognised that there is an obligation for a pro-European interpretation also in the third pillar legal acts. However, this duty does not have an absolute character. It cannot, in particular, constitute the basis for the interpretation of domestic law *contra legem* (Fletcher, 2005, Chalmers, 2005).[32]

According to the jurisprudence of the constitutional courts of EU Member States, the nature of constitutional guarantees excludes their interpretation "*through the*

[31] ECJ case of 16 June 2005, C-105/03, available at http://www.curia.eu.int.

[32] See also Leczykiewicz (2006): "It is unlikely, however, that had *Pupino* been decided in advance the Tribunal would have come to another conclusion. The Tribunal clearly believes that its obligation to interpret consistently would be limited by the principle of fundamental rights protection" (pp. 1188–1189).

prism" of lower level acts. Constitutional interpretation must take into account the autonomous nature of the Constitution. This requirement sets the limits on a universal approach in the pro-European interpretation of law.

3.2.4 The Constitutional Principle of Subordination to International Commitments and the Pro-European Interpretation

Both Polish and German constitutional courts were accused of an unfavourable attitude to European law.[33] In my opinion, this accusation can be accurately referred only to the German sentence of the FCC, and even this to a limited degree.

As the immediate invalidity of the unconstitutional Article 607t § 1 of the Criminal Procedure Code would be inconsistent with the international obligations of Poland (the duty to implement framework decisions is a constitutional requirement, resulting from Article 9 of the Constitution), the Constitutional Tribunal, on the basis of Article 190 Section 3 of the Constitution, postponed the legal invalidity of the controlled Criminal Procedure Code regulation for the latest constitutionally acceptable date, i.e. 18 months from the date of its announcement in the Official Journal. In the period of the postponed invalidity of Article 607t § 1 of the Criminal Procedure Code, the legal state of persons with Polish citizenship surrendered in the EAW procedure did not change (Nita, 2006a, 2007). This deadline passed on 5 November 2006.[34]

By postponing the invalidity of the unconstitutional Article 607t § 1 of the Criminal Procedure Code, the Constitutional Tribunal effectively "suspended" the application of the Constitution regulation of a guarantee character for the period of 18 months. It was conscious of the fact that this decision is connected with depriving citizens of the protection resulting from Article 55 Section 1 of the Constitution. It decided to give priority to Article 9 of the Constitution as "a bond of statutory principles, guaranteeing the correct judiciary and processes at independent courts, linking Poland and remaining Member States of the European Union." From the rationale of the sentence, it can be concluded that, by the decision to postpone the invalidity of the controlled regulation, it aspired to balance the need to observe international obligations resulting from Article 9 of the Constitution by the Republic of Poland as well as the need to ensure the freedoms guaranteed by Article 55 Section 1 of the Constitution (Nita, 2006b).

The FCC's pronouncement of the invalidity of the entire Act on the EAW was a much more hostile gesture towards the process of European integration. In the justification it was stated that applying the interpretation of regulations of the Act on the EAW would not be in accordance with the Constitution, even stating the

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[33] Leczykiewicz D., 1190–1191. Critical on the adopted method of interpreting the Constitution by applying pure national standards – Hinarejos Parga A., p. 587 i n.

[34] The possibility of executing the EAW in the period of the delayed entry of the judgement of the CT was addressed by the Supreme Court in a decision of 13 December 2005, file ref.: III KK 318/05, OSNKW 2006/4, 37. See also comments: critical by Hofmański (2006) and approving by Nita (2006a).

partial invalidity of this act, with a mention of the personal freedom protection. It met with a very critical assessment of Judge G. Lübe-Wolff in the dissenting opinion (Hufeld, 2005; Tomuschat, 2005). In my opinion, this radical decision was justified because the statement about the unconstitutionality of the Act on the EAW was undertaken not only on account of the incompliance with Article 16 Section 2 of the fundamental act but also because of the conflict with the regulation guaranteeing the right to appeal from the decision of surrender.

The judgement of the Constitutional Tribunal shows the direction of the desired legislative changes (Steinborn, 2005). It includes a significant statement that the invalidity of the unconstitutional regulation will not result directly in the compliance with the legal state required by the Constitution. Achieving this purpose is possible only through the interference of the legislature. A similar thought is found in the justification of the sentence of the Supreme Court in Cyprus stating the unconstitutionality of regulations on the EAW.

In the context of necessary legislative changes connected with the judgement of the Constitutional Tribunal, it is worth emphasising that, in the justification of the German FCC, in the reference to the earlier judicature there was a thought that a change of the fundamental act, creating a breach in the previously absolute ban on the surrender of German citizens, is not "an unconstitutional regulation of the Constitution". The surrender of a Member State's own citizens to other EU Member States does not infringe the dignity of the accused (Article 1) or the principles of the state of law (Article 2). However, by ratifying the Amsterdam and Nice Treaties, Germany undertook to participate in building up elements of freedom, safety and justice. Constituting regulations facilitating the extradition procedure is one of these elements.

A similar thought was expressed in a much earlier opinion, dated 26 September 2002, in which the French Council of State indicated that the EAW framework decision contained an enumeration of reasons that could justify the refusal to surrender a person they applied to. These reasons do not, however, include the political nature of the offence, while a long-standing line of the Council's rulings recognises the ability to refuse extradition if the prosecuted offence is of a political nature as a fundamental principle of law. The Council pointed out that this was an obstacle to the full transposition of the EAW. This obstacle, however, can be eliminated by an appropriate amendment of the Constitution.

The same was indicated in the statement of reason for the judgement of the Cypriot Supreme Court proclaiming the EAW implementing legislation unconstitutional and also in the ruling of the Czech Constitutional Court (for a more detailed discussion see Komarek, 2007).

3.2.5 The Constitutional Principles of a Democratic State Ruled by Law and Proportionality as a Limit to Pro-European Interpretation

The constitutional problem adjudicated by the FCC also indicates that even an amendment of the Constitution in the direction, as suggested in the reasons for the ruling of the Constitutional Tribunal, does not have to mean the end of constitutional problems connected with the EAW. Stating the unconstitutionality of the Act on the

EAW, although Article 16 Section 2 of the fundamental act allows for the possibility of surrendering a state's own citizens, shows that such a decision does not entirely neutralise the absolute character of the ban on surrendering one's own citizens. Exceptions to this ban, however, are subject to a constitutional evaluation, including from the perspective of their conformity to the principle of proportionality.

The German FCC pointed out that, when enacting regulations implementing the EAW into the German legal system, the national legislature was under an obligation to transpose the purpose of the Framework Decision in a manner involving the least possible interference with the freedom guaranteed by Article 16.2 of the Basic Law. This was so because, as a matter of principle, German nationals are protected against extradition. In the situations indicated in the second sentence of that provision, the protection may be limited, but in determining its limits, the legislators are bound by other provisions of the Basic Law. Any variations on this principle must be interpreted in compliance with the requirements of the constitutional principle of proportionality.

In the grounds for its judgement, the FCC pointed out that the provision of Article 16.2 of the Basic Law did not give the ordinary legislators the power of unlimited variation from the rule prohibiting the extradition of German nationals. As expressed in that provision, the requirement to adhere to the rule-of-law principles restricts the admissibility of variations on that prohibition, meaning primarily that either the EU Member State or the International Criminal Court to which a German national is to be surrendered must meet the requirements of Article 23.1 of the Basic Law, i.e. the provision referring to the conditions of Germany's participation in the European Union. This provision refers to the protection of the fundamental rights, which is in its essence comparable with the protection guaranteed by the Basic Law.

Following up on this conclusion, the FCC placed the ordinary legislators under an obligation to achieve the purposes of the Framework Decision in the transposing enactment in such a manner as to ensure that the restriction of a national's right to freedom prior to extradition remains within the boundaries determined by the principle of proportionality. In this context, the FCC found it mandatory to enact statutory provisions meeting the requirements of determinacy and the characteristic of a state founded on the rule of law (*Rechtsstaat*), by endowing the authorities making decisions on execution under the European warrant with at least such legal instruments that will enable them to consider – in each specific case separately – the reasons for protecting the rights of a citizen within his native legal system and the reasons for surrendering him. Namely, a refusal to surrender nationals is a rule that the Constitution (both the German and the Polish one in their new wording) allows for exceptions from, subject to assessment from the point of view of the constitutional principle of proportionality and other constitutional principles. The duty to take such an interpretation of the laws implementing the Framework Decision that – within the limits set thereby – will protect nationals against surrender is the obligation of the authorities applying these laws.

A similar thought was expressed in the statement of reasons for the ruling of the Czech Constitutional Court on the constitutionality of the EAW implementing legislation. Having ascertained that the provisions transposing the Framework Decision into the Czech legal system did not expressly provide for the possibility of

refusing to execute an EAW in the event described in Article 4.7 of the Framework Decision, the Court pointed out that their interpretation, conforming with European law corresponding to the constitutional principles of certainty of law and protection of confidence, presupposed taking this provision into consideration in judicial rulings on the execution of the European warrant. In this respect, the ruling of the Czech Constitutional Court is thus much more liberal than the equivalent judgement of the German FCC. Namely, it is based on the assumption that, within the limits determined by the provisions of the Framework Decision, the protection of nationals from surrender under an EAW is possible through judicial interpretation, without the need to have a provision in an ordinary statutory enactment repeating the provision of Article 4.7 of the Framework Decision.

Formulating the requirement for control over regulations being in effect in the state to which the surrender in the EAW procedure is supposed to follow, the German constitutional court also enabled the possibility to refuse the execution of an EAW in the event of any incompatibility in this aspect. Thus, it widened the catalogue of causes for refusal determined in the framework decision with those resulting from the Basic Law.[35] These requirements are implemented with a new act implementing the framework decision on EAW to the German legal system, effective from 2 August 2006, and passed on 20 July 2006.[36]

The German FCC, referring to the constitution as a basis for a refusal to execute EAW, is not a secluded idea. Selma de Groot expressed a similar view, stating that such a refusal does not have to be based only on premises clearly indicated in the framework decision on account of fundamental rights determined in the Nice Chart of Fundamental Rights of the EU and in national constitutions (cf de Groot, 2005). A similar opinion was expressed by Garlick, stating the impermissibility of effecting the EAW in Great Britain, if it infringed the Human Rights Act 1998 (Garlick, 2005, Conway, 2005).

At this point, there is no telling which direction will be followed in the future practice of rulings relative to the interpretation of this additional justification for a refusal to execute a European warrant. A wide interpretation of this additional premise for refusal, resulting directly from the content of the German constitution, can lead to paralysing of the EAW.

This comment is also true with respect to Article 55 of the Polish Constitution, amended following the judgement of the Constitutional Tribunal. It left the first clause of that article unchanged to the extent that this provision guarantees Polish nationals protection against extradition as a rule. As opposed to the original wording of the Constitution, however, it allows for some concessions from this rule. These are indicated by the two ensuing clauses of Article 55 of the Constitution. Under the second clause “The extradition of a Polish citizen may be granted upon a

[35]Reference by the German FCC to such constitutional reasons as the grounds for the refusal to execute the EAW is not an original idea. Similarly de Groot (2005), Garlick (2005) and Conway (2005).

[36]BGBl I, 1721.

request made by a foreign state or an international judicial body, if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition: (1) was committed outside the Republic of Poland, and (2) constituted an offence under the law in force in the Republic of Poland, or would have constituted an offence under the law in force in the Republic of Poland if it had been committed in the Republic of Poland, both at the time it was committed and at the time of the making of the request." Further obstacles to extradition are identified in Article 55.4 of the Constitutions, which reads "The extradition of a person suspected of having committed a crime for political reasons, but without the use of force, shall be forbidden, and so shall an extradition that would violate the rights and freedoms of man and of the citizen."

This is so because a framework decision applies solely to relations between EU Member States. The first limitation on the acceptability of the surrender of Polish nationals, dictated by Article 55.2 of the Constitution in its amended wording, is the unconditional requirement that the act to which a European warrant refers should be committed outside the Republic of Poland. This requirement goes against the provisions of the EAW Framework Decision, whose Article 4.7 recognises, in sub-section (a), an (optional) reason for a refusal to execute an EAW in a situation where the arrest warrant refers to offences that, under the law of the executing Member State, have been partially or fully committed in the territory of the executing Member State or at a place recognised as such and – in sub-section (b) – those committed outside the territory of the issuing Member State, and where the law of the executing Member State does not allow for prosecution for the same offences when committed outside its territory.

Even more complications are caused by the second requirement, which makes the surrender of a Polish national contingent on the requirement that the act that a European warrant refers to should constitute an offence under the law of the Republic of Poland or would have constituted an offence under the law of the Republic of Poland if it had been committed in the Republic of Poland, both at the time when it was committed and at the time of the making of the request. This prerequisite goes against the provisions of the Framework Decision. Namely, its Article 2.2 lists offences with respect to which the possibility to refuse to execute an EAW is excluded even if they fail to meet the prerequisite of the double criminality of the act. The limiting condition is the requirement that the act covered by an EAW should be punishable in the issuing Member State with at least 3 years' imprisonment.

To the extent that Article 55.4 of the amended Constitution repeats Article 55.2 of the Constitution as originally worded, the full implementation of the EAW is impossible, because the Framework Decision does not allow for a refusal to execute a European warrant in a situation where it applies to a person suspected of committing an offence for political reasons without the use of force.

Article 55.4 of the Constitution *in fine* stipulates an obstacle to extradition that is alien to the Framework Decision, namely a situation where extradition would violate

the freedoms and rights indicated in that provision. This applies to Polish nationals and people without Polish citizenship alike, regardless of the nature of the offence committed. Thus, in comparison with the original version of the Constitution, this provision has considerably limited the acceptability of extradition.

At a constitutional level, extradition regulations are not confined to relations between EU Member States in this sphere, but rather are more general. This norm also applies to surrendering a Polish national or a person without Polish citizenship to an EU Member State under an EAW, and will be analysed here in this respect.

The Framework Decision itself, in its 12th recital, declares the inviolability of the constitutional principles of the Member States, referring to respect for the right to a fair trial. Then recital (13) precludes the acceptability of extradition if it involves a serious risk that, in the country to which the accused is to be surrendered, he would be "subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." As already indicated, due to the binding force of the ECHR, this risk is quite remote.

In its judgement, the FCC stated that the constitutionally acceptable extradition of German citizens to EU Member States was justified by the fact that these states respected ECHR, and particularly its Article 6. At the same time it imposed a duty to shape the regulations on EAW, so that they would impose a duty on the legislature to control whether the standards of the lawful state to which a German citizen was to be surrendered were observed. It underlined that, in spite of the shared "base" for all the member states in the form of ECHR, the regulations of individual Member States differed (Brunn, 2005).

The Czech Constitutional Court expressed a diametrically different position in this aspect. Namely, it stated that there was no need to assume that other member states guaranteed a lower standard of protection of basic rights as compared to the standards preserved in this aspect by regulations effective in the Czech Republic (Nita, 2008).

Perhaps the difference in the opinions of the German and Czech constitutional courts on this issue is connected with a greater suspicion towards the guarantees of "new" EU Member States. Also, the different constitutional contexts were probably meaningful in this aspect.

Namely, the proclamation of the unconstitutionality of the German EAW Act by the Federal Constitutional Court, despite the fact that Article 16.2 of the Basic Law allows for the possibility to surrender that country's citizens within the EU, indicates that such a provision does not entirely neutralise the fundamental rule adopted in the Basic Law, namely the ban on the surrender of German nationals.

The statement of reasons for the ruling of the German FCC included the idea that, due to the nature of the relation between a citizen and a state community, based on the principles of freedom and democracy, a citizen cannot, as a matter of principle, be excluded from that community. This means the ban on the extradition of citizens is not merely a manifestation of the state's responsibility for its citizen, because it is actually guaranteed as a personal freedom. In this respect, the standpoints of the Polish and German constitutional courts were convergent. Elaborating upon this idea, the German constitutional court concluded that the rationale underlying this freedom does not involve protection from a fair punishment. It does, however,

involve the protection of a citizen staying in his own country against the uncertainty of being tried under foreign law by a foreign judicial authority, in conditions that are difficult to gain any orientation in (Nita, 2008). Moreover, the requirement to adhere to the principles of the rule of law (*Rechtsstaat*) expressed in Article 16.2 of the Basic Law, as a prerequisite for the constitutionally admissible extradition of German nationals, is not a reiteration of the general principle of the rule of law determining the limits of any restriction of civil rights and liberties. As already indicated, this requirement means that the level of protection of rights in the country to which a German national is to be surrendered must correspond to that guaranteed by the Basic Law.

Given this (principally comparable) protection of civil rights and liberties in the legal systems of EU Member States, determined by the ECHR, which is binding upon all of them, this circumstance – in the case of surrender under an EAW – should not play an important role. Nonetheless, when formulating the requirement to review the laws in effect in the country requesting such surrender, Article 55.4 of the Polish Constitution allows for the possibility to refuse to execute a European warrant where nonconformity is ascertained. Thereby, it points to the possibility of extending the Framework Decision's list of reasons for a refusal to execute the European warrant, by citing constitutional provisions.

It is noteworthy here that, in the context of this problem, the German FCC concluded that, although each Member State was obliged to respect the rule-of-law principle under Article 6.1 of the EU Treaty, the German legislators still could not be allowed to ignore the eventuality that the procedures followed in that Member State failed to meet these principles. Unlike what was adopted by the Czech Constitutional Court, in the opinion of the German court it is not sufficient to bind the judicial authorities ruling on execution of EAWs with guarantees of civil rights and liberties. Namely, the FCC found it indispensable to enact such statutory provisions that would make it possible to consider this issue separately for each specific case.

The new German statute implementing the EAW, dated 20 July 2006 (*Europäisches Haftbefehlgesetz*),[37] as recommended by the guidelines included in the statement of reasons for the FCC judgement, includes provisions that – within the boundaries set by Article 4.7 of the Framework Decision – will protect German nationals from surrender under an EAW, if that warrant pertains to a crime committed at least partly in Germany. Additional grounds for refusing to execute a European warrant are also provided for by the EAW implementing legislation in Finland (Ojanen, 2006).

The related discrepancy between the grounds for a refusal to execute a European warrant, as set out in the Framework Decision and those provided for by the internal regulations of the EU Member States, poses the problem of the relationship between European law and national law.

Analysing this problem in the context of the Polish Constitution, it should be pointed out that the limits of the pro-European interpretation that were set in the *Pupino* ruling (ECJ) will not allow the problem of the conflict between the EAW

[37] BGBl I, 1721. The Act has been in effect since 2 August 2006.

Framework Decision and the limitations on the admissibility of extradition of Polish nationals stipulated in Article 55.2 of the Constitution to be resolved. The prerequisites set out in that provision, i.e. the double criminality of the act and the requirement that it be committed outside of Poland, will therefore render the full implementation of the Framework Decision impossible.

This remark should be referred to Article 55.4 of the Constitution, to the extent that this provision applies to the problem of extraditing a person suspected of having committed an offence for political reasons without the use of force. The unconditional wording of this provision will not leave any room for devising an efficient solution for the conflict between the Framework Decision and the Constitution by the mere application of a pro-European interpretation.

The requirement of a pro-European interpretation for legal documents in the third pillar, resulting from the ECJ sentence in the case of *Pupino*, with reference to the premise shown in Article 55 Section 4 of the Constitution *in fine* in the new version arouses optimism. On account of a common "base" for all the Member States in the ECHR form, a premise concluded in this regulation, restricting the admissibility of extradition in relations between the EU Member States, will be probably neutralised by a pro-European interpretation applied in the adjudicating practice.

The pro-European interpretation can remove the inconsistency between European law and internal constitutional law only if the wording of a constitutional guarantee is not clearly contrary to the provision of European law.

4 Conclusions

The rulings discussed above, issued by the judicial authorities appointed to exercise the powers of review over the constitutionality of laws enacted in EU Member States, indicate that incorporating the idea of European integration into the sphere of criminal law on the basis of this principle is not going to be an easy process due to constitutional limitations. It is not, however, an insurmountable barrier. This is indicated by the attitude of these authorities, which is favourable to European law, in particular their suggestions for specific amendments of the constitutions, included in the statements of reasons for their rulings on the unconstitutionality of EAW-related legislation.

The conflicts between provisions of constitutional rank and European law are surmountable through the application of pro-European interpretation to a certain extent only.[38] Namely, the ECJ case law indicates that the limits of construction conforming with European law are marked by the prohibition of a *contra legem* interpretation. The universalist approach is therefore not helpful here.

As regards criminal law, additional limitations in this respect result from the general principles of law, in particular the principles of certainty and non-retroactivity.

[38] Such an opinion, still before the EAW was found unconstitutional, had been expressed by Alegre and Leaf (2003) and (2004).

A pro-European interpretation cannot lead to the determination or aggravation of criminal liability.

As already mentioned before, in its judgement passed in the *Berlusconi* case, the ECJ indicated that the principle of retroactive application of more lenient penalties was part of the constitutional tradition shared by the Member States. It is thus a general principle of Community law, which must be respected by any national court applying national law implementing Community law. The idea of introducing the principle of *lex mitior retro agit* as a general principle of Community law derived from the constitutional tradition of EU Member States has recently been referenced by the ECJ, specifically in its adjudication of the *Campina* case (C-45/06) of 8 March 2008. In its statement of reasons, the ECJ reiterated the thought that the principle of choosing the more lenient penalty to be applied retroactively is an element of the constitutional traditions shared by the Member States of the European Union. It should therefore be recognised as a general principle of Community law, which the ECJ is the guarantor of and which national courts are under an obligation to respect.

The ECJ's derivation of general principles of Community law from the shared constitutional tradition of EU Member States leads to a universal approach and reduces the area of potential conflict between European law and national laws of constitutional rank. The only drawback here is that the authorities exercising the powers of review over the constitutionality of laws in EU Member States are not able to reference such principles until the ECJ derives a specific principle from the shared constitutional tradition of the Member States. In other words, they do not have the capability of generating such rules autonomously through a pro-European interpretation of national law.

Another factor that is not insignificant is the minimum standard of protection of rights and liberties set by the ECHR, a convention binding upon all the Member States and the European Union as such. Common to all Member States, the "base" of the ECHR is an important factor promoting a universal approach instead of particularism.

Under Article 6.2 of the EU Treaty, the European Union respects the fundamental rights guaranteed by the ECHR of 4 November 1950. This declaration is not tantamount to the incorporation of the ECHR into primary Community law and consequently is not tantamount to endowing it with directly binding force. In the legal literature, it is often concluded that this provision recognises that the European Union is bound by the ECHR in its wording established by the ECHR in Strasbourg. It is noteworthy here that the European Community has not joined this convention. The requirement for Community institutions to respect its provisions with reference to collective entities has, however, been consistently confirmed by the ECJ on a number of occasions.[39] An important change in this respect is envisioned by Article 1(8) of the Treaty of Lisbon of 17 December 2007, which amends Article 6 of the EU Treaty to stipulate, in Clause 3, that "The Union shall accede to the European

[39]This is emphasised by Engels (2002). See also Callewaert (2004).

Convention for the Protection of Human Rights and Fundamental Freedoms." Two other provisions of Article 6 of the EU Treaty are noteworthy in their new reading, as amended by the Treaty of Lisbon. Clause 2 of the amended Article stipulates that "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." And then Clause 1 reads: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

Regardless of the subsequent and future fate of the Treaty of Lisbon, the fact that the European Union has been bound by the provisions of the ECHR guaranteeing certain rights and liberties in the wording given to them by the ECHR is an important factor in the progressive convergence of the ECJ case law and the rulings of the judicial authorities appointed to review the constitutionality of laws enacted in EU Member States. This is so because the guarantees laid down in the ECHR are a guideline for an interpretation of constitutional-rank provisions in conformity with the provisions of that convention. Any movement below the ECHR standard, due to the need to take into consideration the provisions of the ECHR and its supplementary protocols in the interpretation of constitutional guarantees, would be tantamount to the non-conformity of any such regulation with the Constitution (Gusy, 2002).[40]

Further progressive convergence of the criminal law systems of the EU Member States, with due respect for constitutional standards, will doubtlessly eliminate a considerable part of the problems involved in ensuring interpretations conforming with European law, and at the same time respecting the constitutional standards.[41]

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[40] Cf. e.g. the judgement of the Polish CT of 19 February 2008, file ref. P 48/06, OTK ZU 1A/2008, Item 4. The same is the conclusion reached by the German FCC. See, for example, BVerfGE 31, 145 (147); BVerfGE 74, 358 (370).

[41] A similar opinion can be found in Deen-Racsmány (2006) and Gómez-Jara Diez (2006).

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Chapter 11
Linguistic Pluralism and Interpretation of European Law in the Third Pillar, Discussed with Reference to the Example of Article 54 of the Convention Implementing the Schengen Agreement

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Abstract European law is multilingual, and all language versions are deemed equally authentic. The multiplicity of the language versions of European law often leads to discrepancies and poses far-reaching difficulties of interpretation. Just as in the case of national law, linguistic construction is of paramount significance. The use of this construction requires all the language versions of the interpreted provision to be taken into consideration and compared. This requires the use of comparative linguistic construction. Third-pillar European law is interpreted both by the Court of Justice of the European Union (ECJ) and by national courts, as well as other authorities applying laws in EU Member States. Article 54 of the Schengen Convention, though apparently simple, poses a number of far-reaching doubts as to interpretation, further aggravated by the above-mentioned multilingualism. The divergence of meanings delineating the scope of the prohibition imposed by the *ne bis in idem* principle in Article 54 is indicative of the inadequacy of linguistic construction as a means of determining the meaning of that provision. It is noteworthy that the use of the comparative method reduces the field of potential discrepancies in the understanding of the provisions of European law in EU Member States. However, the use of this method on the part of national courts and the ECJ does not mean that the outcome of the interpretation will be the same.

1 Introduction

Third-pillar European law is interpreted both by the Court of Justice of the European Union (ECJ) and by national courts, as well as other authorities applying laws in EU Member States. In any case, however, constructions provided by the ECJ are of key significance as they are binding upon all Community institutions and EU Member States (Biernat, 2006).

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European law may be interpreted using a variety of construction methods. The following methods of interpretation are used more often than others in ECJ rulings: linguistic, systemic and teleological. Just as in the case of national law, linguistic construction is of paramount significance, being the starting point for any interpretation of the provisions of European law (Fryźlewicz, 2008; Biernat, 2006).

European law is multilingual, and all the language versions are deemed equally authentic. The use of linguistic construction in the field of European law requires all the language versions of the interpreted provision to be taken into consideration and compared.[1] This requires the use of comparative linguistic construction (Mik, 2000; Majkowska-Szulc, 2007; Fryźlewicz, 2008).

The linguistic pluralism of European law often leads to discrepancies between the various language versions. This may, in turn, lead to a lack of interpretive uniformity, posing a threat to the autonomous nature of European law, which is to be interpreted and applied uniformly in the various Member States of the European Union.

Linguistic interpretation also concerns the difficulty encountered by the fact that the meaning of the expressions used in the various language versions may be determined solely in the context of particular institutions known to the legal systems of the respective countries (Mansdörfer, 2004; Specht, 1999). And these will not necessarily have their equivalents in other systems.

The understanding of specific expressions within the internal legal system of an EU Member State may also be different from the understanding of the corresponding expression as used at the level of European law. It leaves room for particularism.

For these reasons, the multiplicity of the language versions of European law poses far-reaching difficulties of interpretation.

2 The Difficulties Posed by Article 54 of the Schengen Convention

A particularly interesting example in the third pillar is Article 54 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders (hereinafter "the Schengen Convention" or "the Convention") signed by the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the Republic of France. This provision endows the principle of *ne bis in idem* with a supranational dimension within the EU.

Article 54 of the Convention, while apparently simple, poses a number of far-reaching doubts as to interpretation, further aggravated by the multiplicity of language versions in which the Convention is available.

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[1] See ECJ judgments of 15th July 1964, case *Flaminio Costa vs. E.N.E.L.(C-6/64)* and of 6 October 1982, case *Srl CILFIT and Lanificio di Gavardo SpA vs. Ministero della Sanità (C-283/81).*

2.1 Authentic Versions of Schengen Convention

There is no consensus among the authors of relevant publications as to which of the languages of the Convention can be considered authentic. The Schengen Convention was originally drawn up in three languages: French, German and Dutch. These language versions are thus undoubtedly authentic. In some authors' view, the inclusion of the Schengen arrangements in the *acquis communautaire* (under a protocol added to the Treaty of Amsterdam as of its effective date, i.e. 1 May 1999[2]) gave all the language versions of the Convention the status of authenticity (Eicker, 2004).[3] Still, if this view was rejected under the assumption than the only authentic versions are those in the three original languages of the Convention, an analysis of the expressions they use leads to divergent results anyway (Böse, 2003).

2.2 Various Language Versions of Article 54

In the Polish language version, Article 54 is worded as follows, in literal translation into English:

> *A person whose trial has ended in the issuance of a final judgement within the territory of one Contracting Party must not be prosecuted within the territory of another Contracting Party for the same act provided that a punishment has been imposed and enforced or is in the process of enforcement or can no longer be enforced under the legal provisions of the sentencing Contracting Party.*

To determine the scope of the *ne bis in idem* principle in Article 54 of the Convention, two different terms are relevant: "act" and "final judgement". The Convention provides no definitions of the terminology used in it.

The term "final judgement" (*prawomocny wyrok*), as used in the Polish language version of the Convention,[4] would indicate that this provision covers court rulings only, and even more specifically solely those issued as judgements.

The German language version of the Convention refers to "final adjudication" (*rechtskräftige Aburteilung*) rather than "final judgement" (*rechtskräftiges Urteil*).

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[2]Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts of 2 October 1997; Protocol integrating the Schengen acquis into the framework of the European Union; *Official Journal* C 340 of 10 November 1997.

[3]The Polish word *wyrok* means "judgment", i.e. proclamation of the adjudication of the merit of the case, concluding the proceeding. However, in the context of criminal proceedings, if the idea of acquital is not signalled, this term has a strong connotation of "sentence", i.e. specification of the imposed punishment (which the judgment obviously contains if the accused is found guilty), and therefore *wyrok* is often used in this meaning as well, due to the fact that there is no other Polish noun directly equivalent to "sentence" in this context. This semantic ambivalence should be kept in mind with reference to the Polish version of the Convention and comments made on it in Polish publications.

[4]For an analysis of the corresponding terminology used in other language versions, see Böse (2003).

The former term is of course a broader one, covering sentences and acquittals, and not only those that take on the form of a [sentencing] judgement.

The corresponding terms used in the English and Italian texts are practically equivalent semantically with the term used in the German version. These are *a person whose trial has been finally disposed of* and *giudicata con sentenza definitiva*, respectively (Tonini, 2000; Conway, 2003; Böse, 2003).[5]

In the Dutch language version, "adjudication" is translated as *vonnis*. The semantic scope of this term encompasses both judgements and decisions (Böse, 2003; Specht, 1999; Eicker, 2004), and therefore only partly overlaps with the meaning of *wyrok* ("judgement") in the Polish Code of Criminal Procedure.

The French language version uses the expression *définitivement jugée*. The meaning of this expression is a matter of dispute in juristic publications. The standpoint that seems to be gaining the upper hand, however, is based on the assumption that the meaning of this expression is equivalent to the corresponding term in the Dutch language version (Conte & Maistre de Chambon, 2001; Böse, 2003; Eicker, 2004; Nita, 2005).

2.3 Multiplicity of Language Versions

It is highly unfortunate that the Polish version uses wording that makes the inadmissibility of prosecution contingent on the fact that *a punishment has been imposed and enforced, or is in the process of enforcement or can no longer be enforced under the legal provisions of the sentencing Contracting Party*. Such wording erroneously suggests that the prohibition stipulated in this provision does not take effect in the event of a judgement of acquittal (!). No other language version of the Convention analysed here limits in this way the scope of rulings giving effect to the prohibition deriving from the *ne bis in idem* principle. Actually, an analysis of the corresponding expressions used in other language versions indicates beyond any doubt that acquittal rulings are not excluded from the group of those that give effect to this prohibition. The fact that the provision discussed here covers not only sentencing judgements but also judgements of acquittal as well has also been confirmed by the ECJ in two judgements of 28 September 2006: C-467/04, *Criminal proceedings against Francesco Gasparini and others,* and C-150/05, *Jean Leon van Straaten vs. the State of the Netherlands and the Republic of Italy*.

The fact that this provision covers both sentencing judgements and acquittals is also unambiguously indicated by its linguistic interpretation (in other language versions). It is not, however, entirely obvious whether this applies to all sentencing and acquitting judgements.

Things may become unclear here, particularly concerning sentencing judgements where the enforcement of the punishment imposed on the accused is conditionally

[5] An unofficial English translation of the Convention uses the expression *a person who has been finally judged*. This difference is, however, of no consequence to the subject matter discussed here.

suspended. Namely, in the provision discussed here, the inadmissibility of repeated prosecution for the same act is made contingent by an additional condition of completed enforcement of the punishment, its current ongoing enforcement, or the inadmissibility of its enforcement under the internal laws of the state that issued the ruling imposing the punishment.

Although this goes against the linguistic wording of Article 54 of the Convention, German case law practice is based on the assumption – correct in our view – that the requirement of current ongoing enforcement of the punishment is met in the case of a ruling conditionally suspending the enforcement of the punishment (Schomburg, 2002; Mansdörfer, 2004). The same standpoint was taken by the Polish Supreme Court in its judgement of 2 June 2006.[6] This interpretation is prompted by both purposes (as indicated above) of the principle stipulated by the provision analysed here. The same conclusion was reached by the ECJ, based on a teleological construction, in its judgement of 18 July 2007: C-288/05, *Criminal proceedings against Jurgen Kretzinger*.

It is unclear whether Article 54 covers rulings issued as a judgement only, or also those issued as a decision. Assuming that it also covers decisions, a further doubt arises, whether these include only those that resolve the problem of the liability of the accused on the merits of the case or also those that are issued for formal reasons.

It is impossible to agree with the categorical statement of the ECJ in its judgement of 11 February 2003 in joined cases C-187/01 and C-385/01, *Criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, namely that there are no grounds whatsoever for claiming that Article 54 of the Convention applies to judicial rulings only.

The meanings of the expressions used in the provisions of European law in the various language versions prompt associations with diverse institutions of law existing within the various legal systems. This may lead to misinterpretation. It reveals the shortcomings of a particularistic approach (see Łętowska, 2009).

In Polish juristic literature, when analysing the meaning of Article 54 of the Schengen Convention, M. Rogalski points out that *The notion of 'adjudication' [osądzenie] includes both sentencing rulings ([sentencing] judgements and penal orders for minor offences) and acquittals. It does not refer to such decisions concluding a proceeding which are not judgements*.[7]

This standpoint corresponds to the meaning of the expression "final adjudication" (*prawomocne osądzenie*) in ordinary usage. According to a dictionary definition, in Polish, "to adjudicate/judge" (*osądzić*) means to consider the case and issue a judgement, to sentence somebody by a judgement (Doroszewski & Kurkowska, 1977; Skorupka, Auderska, & Łempicka, 1969).

Due to the divergent meanings of the corresponding expressions used in the various language versions of the Convention, the linguistic method of construction is not useful in efforts to determine the meaning of the analysed expression (Nita, 2005).

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[6] IV Ko 22/05. OSNKW 2006, 7–8, 75.

[7] Rogalski 2004, 35.

2.4 Systemic Interpretation

In light of the difficulties involved in the linguistic interpretation of international conventions,[8] the German Federal Supreme Court (Bundesgerichtshof) attempted to provide a systemic interpretation of the provision analysed here by juxtaposing its content with Article 58 of the Convention. In the German language version, the latter provision allows for the application of farther-reaching internal regulations with respect to the *ne bis in idem* principle than those specified in Article 54 with reference to judicial rulings (*Justizentscheidungen*). In that Court's assessment, the different natures of the expressions used in Articles 54 and 58 of the Convention call for a narrow interpretation of Article 54 (Stein, 2003; Böse, 2003). The Polish wording of Article 58, however, provides no grounds for such argumentation as it uses the expression "judgements of foreign courts" (*wyroki sądów zagranicznych*).

A comparison of the Polish and German translations of the Convention indicates that, depending on the language version, systemic interpretation leads to divergent results. This method of construction is therefore useless here as well. Namely, references to language are usually inevitable in any systemic construction.

2.5 Teleological Interpretation

These difficulties involved in the use of linguistic and systemic interpretation prompt the use of a teleological construction, preferred by the ECJ.

2.5.1 Double Purpose of the *ne bis in idem* Prohibition

The recitals to the Convention indicate that the covenants adopted therein are aimed, among other things, at removing checks on the movement of persons at borders shared by the countries bound by it. Achieving this goal without prejudice to the state of security is possible solely through close cooperation between the police and the judiciary (Stein, 2003; Böse, 2003). Please note, however, that the provision analysed here is included in Title III of the Convention "The Police and Security", Chap. 3 "Application of the *ne bis in idem* Principle". The other two chapters included in this title are "Police Cooperation" (Chap. 1) and "Mutual Assistance in Criminal Matters" (Chap. 2).

The purpose that the *ne bis in idem* prohibition is to serve and augment the effectiveness of criminal proceedings by intensifying cooperation in criminal matters. By formulating the rule of recognising foreign rulings, the provision analysed here is intended to lift some of the burden from the judiciary authorities in the various EU

[8] In German juristic literature, the semantic differences of lexical items describing the scope of the *ne bis in idem* prohibition in Article 54 of the Convention are analysed in detail by Böse, 2003, pp. 747–749; Specht, 1999, pp. 134–138.

Member States and thereby to enable them to conduct proceedings in cases as of yet unadjudicated with greater efficacy.

At the same time, Article 54 of the Convention has a guarantee aspect. A "final adjudication" enables the accused to fully exercise the right to move freely within the European Union, which he should be able to exercise without being afraid of prosecution anew in another country. Therefore, a teleological interpretation of Article 54 of the Convention requires taking two objectives into consideration: efficiency of proceedings and the guarantee nature of the prohibition formulated in it (Böse, 2003; Specht, 1999). The prohibitive objective of this provision is highlighted in ECJ case law referring to Article 54 of the Convention in a manner that may suggest that, in that Court's view, this goal is principal, or even exclusive. This is not correct, as the beneficiaries of the guarantee included in Article 54 of the Convention are not solely the citizens of EU Member States and other states bound by the Convention. Namely, the *ne bis in idem* principle prescribed in that provision is not limited by a prerequisite of citizenship.

The teleological interpretation of the provision analysed here cannot, therefore, be undertaken solely with respect to its significance as a guarantee. It requires taking into consideration the two objectives of equal standing: efficiency of proceedings and the guarantee nature of the prohibition formulated in this provision, which will not necessarily lead to a convergent outcome of such interpretations (Specht, 1999; Jung, 2000; Nita, 2005).

2.5.2 The Criterion of Objective

Some German publications point out, relevantly, that an interpretation of Article 54 of the Convention that takes into account the latter of these objectives indicates clearly that the prohibition formulated there should bar new prosecution also in the event of an earlier conclusion of a proceeding with a ruling issued by a non-judicial authority with powers to conduct proceedings. A teleological interpretation that takes into consideration the objective to improve the efficiency of criminal prosecution does not, however, produce a clear result. Namely, its measure is not merely the fact of the final conclusion of criminal proceedings (a fact that would be an argument in favour of a broad interpretation of the expression "final adjudication"). Achieving this objective also depends on the degree to which a ruling issued abroad corresponds to the goals of the criminal proceedings (Böse, 2003; Specht, 1999; Thomas, 2002; Satzger, 2001).

2.6 Article 54 in the Jurisprudence of the ECJ

The ECJ case law interpreting Article 54 of the Convention highlights the guarantee aspect of the prohibition imposed by the *ne bis in idem* principle. By reference to Article 2 of the EU Treaty and the recitals in the protocols integrating the Schengen *acquis* into the framework of the EU, an express statement is made that one of the objectives of the EU is to maintain and develop the Union as an area of freedom,

safety and justice, where the free movement of people is guaranteed. When understood through the prism of this objective, Article 54 of the Convention is meant to prevent a situation where a person exercising the right of free movement within the European Union would be prosecuted for the same act in several states. This goal can be achieved only when the *ne bis in idem* prohibition will also be triggered by rulings that finally conclude proceedings issued by authorities other than a court and in a form different than a judgement.

The ECJ makes only a side reference to the latter goal of the provision analysed here – effective criminal procedure, i.e. one that achieves the goals set for it. In its judgement of 11 February 2003, in joined cases C-187/01 and C-385/01, *Criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, the ECJ pointed to the connection between the obligations imposed on the accused and the offence committed, thus making a reference to the principle of adequate penal response, arguing that both the form of the ruling finally disposing of the matter and the fact that it is issued by a non-judicial authority are of no significance to the achievement of both goals referred to above.

2.6.1 Meaning of "Judged/Adjudicated/Finally Disposed of"

In this judgement, the ECJ relied on the teleological method of construction to adopt a broad understanding of "judged/adjudicated/finally disposed of" as used in Article 54 of the Convention, extending it to cover also rulings concluding preliminary proceedings, issued without the involvement of a court by a public prosecutor in an EU Member State, whereby certain obligations, and in particular the obligation to pay a specific sum of money, are imposed on the suspect.

This ECJ ruling, binding upon all the states that are parties to the Convention, is a significant breakthrough in the understanding of the scope of rulings triggering the *ne bis in idem* prohibition in Article 54 of the Convention. Until it was issued, the states bound by the Convention had rather been inclined to follow a narrow interpretation of this provision, limiting the meaning of "judged/adjudicated/finally disposed of" to rulings issued by courts only, and in some cases even solely to court judgements containing either a sentence or an acquittal. Specifically, the German Federal Supreme Court (Bundesgerichtshof), in the period preceding this judgement of the ECJ, had represented a viewpoint that the provision principally applied to judgements issued by courts. At the same time, it allowed for a broader interpretation whereby the term "final adjudication" (*rechtskräftige Aburteilung*) would include other rulings as well, as long as they were issued by a court.[9]

Any teleological construction of Article 54 of the Convention requires taking into consideration two objectives that are not necessarily convergent. One is to increase the effectiveness of criminal prosecution by intensifying the cooperation of the police and the judiciary, in order to compensate for the removal of checks on the shared borders. Another is the guarantee aspect of Article 54 of the Convention.

[9]Eicker (2004, p. 98), and case law referred to therein.

A "final judgement" enables the accused to exercise his right to move freely within the EU without fearing prosecution in another state (Böse, 2003; Specht, 1999; Eicker, 2004).

The teleological construction undertaken with respect to this objective of the provision analysed here has become the basis for all subsequent ECJ rulings.

In its judgement of 11 February 2003, addressing the doubts expressed in the questions referred to it for a preliminary ruling, the ECJ also made a reference to the latter purpose of the provision analysed here – effective criminal procedure, i.e. one achieving the goals set for it. When substantiating its standpoint, the ECJ pointed to the connection between the obligations imposed on the accused and the offence committed, thus indirectly referring to the principle of adequate penal response. In its construction of the provision analysed here, it also pointed out that its broad interpretation of Article 54 of the Convention did not contradict the directive of taking into account the rights of the victims or harmed parties, as it does not preclude their bringing a civil action to pursue their claims.

The teleological construction adopted in the cases concluded by the judgement of 11 February 2003 indicates that the prohibition formulated in Article 54 of the Convention not only applies to sentencing judgements or acquitting judgements but also has a broader scope. As to its limits, however, the only clear conclusion that can be drawn from the ECJ ruling is that non-judicial decisions reached as arrangements in criminal procedure regulated by the law of the state where such a decision is made trigger the prohibition of Article 54 of the Convention as long as certain obligations are imposed on the accused as part of such an arrangement. The prohibition is also triggered by public prosecutors' rulings – equivalent to sentencing judgements – which definitively conclude the proceedings, as long as some sanction is imposed on the accused. The interpretation adopted by the ECJ indicates that, by admitting the offence and accepting the conditions of the proposed arrangement, the accused is judged within the meaning of Article 54 of the Convention also in those cases where the ruling finally disposing of the proceedings comes from a non-judicial authority.

In the judgement of 11 February 2003, the ECJ connected the term "finally adjudicated/finally disposed of" with the ruling and enforcement of the sanction imposed on the accused. In the statement of reasons for its judgement, the ECJ pointed out that the need for the accused to perform the obligation imposed upon him is a consequence of the attribution to him of the act he is accused of. The ECJ also noted that the obligations placed on the suspect should be treated as a *sui generis* punishment, which means that, in the event of such a ruling, the prohibition prescribed by Article 54 of the Convention is triggered only when the imposed obligations have been performed, are in the process of being performed or can no longer be performed according to the laws of the country where the ruling has been issued. It is impossible to deduce from the statement of reasons for this judgement whether this is a condition precedent for triggering the prohibition imposed by the *ne bis in idem* principle.

The Polish language version of Article 54 of the Convention would indicate that the prohibition prescribed in this provision takes effect when the perpetrator has been finally adjudicated and – in the event when he is found guilty and sentenced –

punishment has been ruled against him and enforced, is being enforced or can no longer be enforced.

A literal interpretation of the Polish language version of Article 54 of the Convention would therefore lead to the conclusion that the requirement of completed or current enforcement of punishment, or the existence of an obstacle preventing its enforcement, applies solely to a sentencing judgement. This would mean that rulings that are not sentences but are final judgements within the meaning of this provision of the Convention bar further prosecution despite the fact that no punishment has been ruled against the accused.

Analysis of the relevant provision in the German language version of the Convention (using the term *Verurteilung*) leads to the same conclusions.

The Polish language version of the Convention, as in the Italian one, uses the term "punishment" (*kara*) in this context (the Italian translation includes the expression *la pena sia stata eseguita)*. The German translation uses the broader notion of "sanction" (*Sanktion*). The English version refers to the enforcement of the sentence, and specifically uses the expression "the sentence has been served", which, however, produces an association of "incarceration" or (colloq.) "doing time" as punishment.

Important argumentation against such an interpretation is provided by the statement of reasons for the judgement of the ECJ dated 11 February 2003, cited here several times already. The requirement for completed enforcement, current ongoing enforcement of the punishment or the potential inability to enforce it is referred by the ECJ to sanctions imposed on the perpetrator by a public prosecutor's decision concluding the preliminary proceedings.

However, in those cases where the proceedings are discontinued due to the fact that the perpetrator is not subject to punishment, the situation is different. The underlying rationale is based on the assumption that, due to certain circumstances of the criminal act – predefined in applicable regulations – and in particular due to the perpetrator's conduct after the act, an adequate response will consist in merely proclaiming the unlawful nature of the act, without imposing a punishment. The inclusion of rulings issued in reliance on this rationale within the ambit of Article 54 of the Convention is supported by a teleological interpretation of this provision, both with respect to the guarantee aspect of the prohibition formulated in it and with a view to the desirable improvement of effectiveness in criminal prosecution. A different interpretation would discriminate against perpetrators of offences that are less damaging to the public good and those who have not questioned their liability, in particular if they have shown active repentance.

The doubt over whether the applicability of the *ne bis in idem* prohibition in Article 54 of the Convention is contingent on the enforcement of the punishment ruled against the accused was the object of a question referred to the ECJ for a preliminary ruling by the Regional Court (Landgericht) in Regensburg in *Criminal proceedings against Klaus Bourquain* (C-297/07). In a judgement of 11 December 2008, the ECJ found that the *ne bis in idem* principle, enshrined in Article 54 of the Schengen Convention, is applicable to criminal proceedings instituted in a contracting state against an accused whose trial for the same acts as those for which he

faces prosecution was finally disposed of in another Contracting State, even though, under the law of the State in which he was convicted, the sentence imposed on him could never, on account of specific features of procedure such as those referred to in the main proceedings, have been directly enforced.

Even further-reaching doubts arise upon attempts to determine whether the prohibition formulated in Article 54 of the Convention takes effect in the case of an order discontinuing the proceedings due to the statute of limitations.

In its judgement of 10 March 2005, in the case of *Filomeno Mario Miraglia* (C-439/03), the ECJ – when making a statement on the scope of applicability of the principle set out in that provision – concluded that it did not apply to judicial decisions closing the proceedings without resolving the merits of the case, as a result of a public prosecutor's decision to discontinue prosecution solely on the grounds that criminal proceedings have been initiated in another country bound by the Convention. Citing the statement of reasons for this judgement, in its ruling of 28 September 2006 in case C-150/05, *Jean Leon van Straaten vs. the State of the Netherlands and the Republic of Italy*, the ECJ pointed out that concluding that such rulings trigger the prohibition of Article 54 of the Convention would be in conflict with the purpose of that provision.

Bearing this in mind, one should consider whether the prohibition formulated in Article 54 of the Convention should be triggered by a ruling issued because prosecution is time-barred.

The Supreme Court of Austria concluded, in its judgement of 17 June 2004, that discontinuing preliminary proceedings due to the statute of limitations on the prosecution of a punishable act did not trigger the prohibition formulated in Article 54 of the Convention. In its statement of reasons, it relied primarily on a literal interpretation of this provision, which, in the Austrian/German language version, covers solely sentencing and acquitting judgements, and the standpoint of the ECJ expressed in its judgement of 11 February 2003, mentioned above.

The literal interpretation of Article 54 of the Convention, the ECJ judgement cited by the Austrian court and also – to some extent – the standpoint taken in a subsequent ruling, dated 10 March 2005, would indeed provide argumentation in favour of such a construction of the provision discussed here.

Doubts over the scope of the *ne bis in idem* principle from the perspective of the statute of limitations have been recently resolved by the ECJ, namely in its judgement of 28 September 2006, *Criminal proceedings against Francesco Gasparini and others* (C-467/04). The Court concludes in it that the *ne bis in idem* principle enshrined in Article 54 of the Schengen Convention applies to rulings closing proceedings against an accused due to the existence of a procedural obstacle in the form a limitation period, so that prosecution is time-barred.

In the statement of reasons for this judgement, by referring to Article 54 of the Convention (unambiguous in this respect, even if we consider the multiplicity of the language versions of the Convention), the ECJ first and foremost concluded that the provision contained no direct reference to a final judgement triggering the prohibition imposed by the principle included in that provision.

Subsequently, the ECJ again referred primarily to the guarantee objective of the *ne bis in idem* principle in international criminal cooperation between EU Member States. This objective would be undermined, in the ECJ's view, if the prohibition formulated in that provision were not triggered by a ruling issued due to the fact that the limitation period on a punishable act had elapsed. As in its previous rulings, the Court also made a reference to the mutual trust in the criminal justice systems of the various states bound by the Convention, as the basis for applying the prohibition imposed by the principle formulated in this provision and the resulting non-limitation of the applicability of the *ne bis in idem* principle, through the requirement to harmonise the legislations of these states.

The fact that reference is made only to the guarantee objective of the provision discussed here, without referring to the other purpose of Article 54 of the Convention, leaves one with a sense of incompleteness. The outcome of a teleological interpretation, taking into account the objective of improving the effectiveness of criminal prosecution, would not necessarily be convergent here with the one reached by taking into consideration just the guarantee significance of the prohibition stipulated by this provision.

Arguing for its standpoint in the statement of reasons for the judgement, the ECJ also cited Article 3.2 and Article 4.4 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

The former of these provisions, when formulating grounds for an obligatory refusal to execute an European warrant arrest, indicates that such grounds include a situation where a final judgement with respect to the same acts has been passed in another EU Member State for the person covered by the warrant, provided that, where there has been a sentence, the sentence has been served or is currently being served, or may no longer be enforced under the law of the sentencing Member State.

The fact that a limitation period on the enforcement of a punishment triggers the prohibition stipulated in Article 54 of the Convention, given the wording of this provision stating that the *punishment (. . .) imposed (. . .) can no longer be enforced under the legal provisions of the sentencing Contracting Party*, leads to an obvious outcome upon the application of linguistic interpretation.

Recognising that the prohibition formulated in Article 54 of the Schengen Convention is also triggered by rulings closing proceedings issued where prosecution is time-barred, the ECJ adopted the latter of the two interpretations of this provision as presented above, i.e. the one dissociating itself from the division into substantive and formal grounds. The specification of a limitation period on the prosecution of a punishable act is an expression of the legislators' penal policies. However, as indicated above, trust in rulings coming from foreign judicial authorities, which is the foundation of the *ne bis in idem* principle in international penal cooperation, should also be reflected in the penal policies created by the legislators. Special attention should be paid to the issue of application of the *ne bis in idem* prohibition in those situations where prosecution in one of the states bound by the Convention has been discontinued due to lack of evidence. A consequence of the principle of the presumption of innocence is that an acquitting judgement issued

by a court may equally result from the fact that the court, in the course of its proceedings, has reached certainty that the accused is innocent from the fact that the prosecutor has failed to prove him guilty due to lack of evidence.

The question about the applicability of the *ne bis in idem* prohibition stipulated in Article 54 of the Convention to a situation where prosecution in one of the states bound by the Convention has been discontinued due to lack of evidence is not resolved with much consensus in the literature.

Noteworthy in this context is the judgement of the German Federal Supreme Court (Bundesgerichtshof) of 10 June 1999, recognising that prosecution is not barred in Germany by a previous order of a French court in the same matter, discontinuing the proceeding due to lack of evidence (*ordonnance de non lieu*). (Bohnert & Lagodny, 2000; Eicker, 2004). This standpoint is not widely accepted in juristic publications. Some of the German legal doctrine considers such orders discontinuing proceedings to be equivalent to acquitting judgements (Schomburg & Lagodny, 1998; Lagodny, 1997; Kühne, 1998; Bohnert & Lagodny, 2000).

In its judgement of 28 September 2006, in case C-150/05, the ECJ ruled that the *ne bis in idem* principle formulated in Article 54 of the Schengen Convention applied to rulings under which the accused had been finally acquitted due to lack of evidence.

Stating the reasons for its standpoint in this respect, the ECJ cited the literal wording of Article 54 of the Convention, indicating that it included no direct specification of the judgement triggering the *ne bis in idem* prohibition.

As in various previous judgements, when arguing in favour of this standpoint, the ECJ used the guarantee aspect of the prohibition of Article 54 of the Convention as its starting point, stating that, should this provision not apply to a final judgement acquitting the accused due to lack of evidence, the exercise of the right to move freely within the EU would be endangered.

2.6.2 Meaning of "Act"

As indicated in the opening paragraphs of this paper, the scope of the prohibition imposed by the *ne bis in idem* principle formulated in Article 54 of the Convention is determined by two expressions: "final judgement" and "act".

The understanding of the identity of *idem* as an element determining the scope of the *ne bis in idem* principle of Article 54 of the Schengen Convention is not unambiguous either. In particular, doubts may be caused here by the question whether the notion of an "act" used in this provision should be understood as a historical event, i.e. as factual grounds for liability. A linguistic interpretation of the word "act", as used in Article 54 of the Convention, leads to results that are far from being uniform.

In the Polish language version, Article 54 of the Convention guarantees that the same person will not be prosecuted or punished again "for the same act" (*za ten sam czyn*). This expression refers to an act as a historical occurrence (Nita, 2006).

The meaning of its linguistic equivalents in the French (*les mêmes faits*) and Dutch (*dezelfde feiten*) texts also points to an act as an element of the factual background (*status de facto*), a historical occurrence (Böse, 2003). A similar outcome

results from a linguistic analysis of this expression in the Italian language version (*i medesimi fatti*) and in the English text: *the same act* (Böse, 2003; Tonini, 2000; Conway, 2003).

However, the term *dieselbe Tat*, as used in the German language version of the convention, conveys an act within the procedural meaning. German publications point out that the decision to endow this term with such meaning was made by the German government when it was signing the Convention implementing the Schengen Agreement (Böse, 2003). This argumentation does not seem convincing as the usefulness and admissibility of the historical interpretation of European law are the objects of much doubt in juristic literature (Biernat, 2006, see also ECJ judgement C-169/00 *Commission vs. Finland*). Be it as it may, this is the understanding of the term adopted by the German Federal Supreme Court (Bundesgerichtshof) in practice generating its case law (Dannecker, 2003).

Given the divergent meanings of the corresponding expressions used in the various language versions of the Convention, the linguistic method of construction is not useful for determining the meaning of the term analysed here (Nita, 2006; Nita, 2005). The need for a global approach is clearly visible here (cf. Łętowska 2010).

A statement on the subject of understanding the term "act" used in Article 54 of the Convention was made by the ECJ for the first time in its judgement of 9 March 2006, *Criminal proceedings against Leopold Henri Van Esbroeck* (C-436/04), cited already in the discussion of the temporal scope of this provision.

In its answer to the question referred for a preliminary ruling, the ECJ stated that what was decisive for the application of the *ne bis in idem* prohibition expressed in Article 54 of the Convention was the identity of the acts comprehended as a set of behaviours that are inextricably linked together in time and space, and also by their subject matter, irrespective of their legal classification and the legal interests protected. As a matter of principle, the ECJ left it for the judicial authorities in the countries bound by the Convention to undertake the final assessment of the existence of such an inextricable link; however, with respect to the specific case whose factual background had given rise to the doubt expressed in the question referred for a preliminary ruling, the ECJ concluded that the punishable act, consisting in exporting and importing the same narcotic drugs, was, in principle, the same act within the meaning of Article 54 of the Schengen Convention.

Thus, in its answer to this part of the question referred for a preliminary ruling, the ECJ addressed two issues. Its general statement is that the identity of *idem*, with respect to Article 54 of the Convention, should be considered as a historical event. A more specific conclusion refers to the identity of *idem* in the case of an event consisting in exporting and importing the same narcotic drugs. Namely, here the situation is additionally complicated by Article 71 of the Schengen Convention, which places on its signatory states an obligation to adopt all measures necessary to combat the illegal trafficking of narcotic drugs. And then, under Article 36 of the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol, the offences enumerated there, including but not limited to importing and exporting narcotic drugs, were to be considered distinct offences if committed in different countries.

Notably, as opposed to the two previously cited judgements providing interpretations of Article 54 of the Convention, in this judgement – with respect to the identity of *idem* – the ECJ did not recognise teleological construction as the only adequate method for determining the meaning of that provision. Referring to the linguistic method of construction in its statement of reasons, the Court concluded that the wording of Article 54 of the Convention, using the expression "the same act", indicated that the provision applied to the contentious act as a historical event, precluding its legal classification.

As already mentioned, in several language versions of the Convention, this expression has the same meaning as that adopted by the ECJ in this case.

In the period before the ruling discussed above, the issue of identity of *idem* within Article 54 of the Schengen Convention was considered in the literature, based on the teleological method. This method of construction – in addition to linguistic interpretation – was also used by the ECJ in the case concluded by the judgement analysed here.

In this case – as in the two previous cases involving the interpretation of Article 54 of the Convention – the ECJ highlighted the guarantee aspect of the prohibition formulated in this provision. Making a reference to Article 2 of the EU Treaty and the recitals to the protocol integrating the Schengen *acquis* into the framework of the European Union, the Court pointed out that one of the objectives of the EU was to maintain and develop the Union as an area of freedom, safety and justice, where the free movement of people would be guaranteed. It concluded that, when understood through the prism of this objective, identifying the purpose of the regulation enshrined in Article 54 of the Convention, the Court indicated that it was intended to prevent a situation where a person enjoying free movement within the European Union would be prosecuted in several states bound by the Convention. It referred to two of its previous rulings, namely the judgements already cited here: of 11 February 2003 and of 10 March 2005, emphasising that the *ne bis in idem* principle as formulated in that provision was intended as a guarantee to the accused, who had already been judged in one of the states bound by the Convention, of the ability to move freely without fearing prosecution in another state bound by it.

From this perspective, taking into consideration the prohibition stipulated in the provision analysed here, the signatory states to the Convention should indeed understand the notion of "act" as a historical occurrence rather than as a basis for liability. Otherwise, the latter understanding would cause a far-reaching limitation of the prohibition formulated there.[10] Therefore, divergent legal classifications of the same act and the lack of identity of the protected legal interest cannot bar the application of Article 54 of the Convention. The ECJ rightly points out here that, due to the lack of harmonisation of the legal systems of the various states bound by the Convention,

[10]This viewpoint is shared by Dannecker (2003, pp. 603–605); a different one is taken by Böse (2003), who suggests the use of the criterion of identity of the protected legal interest and argues that this would provide a broader understanding of the prohibition formulated in Article 54 of the Convention. See (Böse 2003, p. 763).

taking these circumstances into account would cause serious barriers to the exercise of the right to free movement.

A teleological interpretation of Article 54 of the Convention, undertaken with its guarantee purpose in mind, thus points to the need for such an understanding of "act" as the one adopted by the ECJ in the analysed judgement.

However, a teleological interpretation that takes into account another objective, i.e. to increase the effectiveness of criminal prosecution, does not yield a clear result. Achieving this goal also depends on the extent to which a ruling issued abroad corresponds to the objectives of criminal procedure.

In this context, the ECJ's decision to leave it to the judicial authorities in the various states bound by the Convention to undertake the definitive assessment of the existence of an inextricable link between events making it possible to treat them as the same *idem* seems to be a step towards the latter purpose of the regulation included in Article 54 of the Convention – to increase the effectiveness of criminal proceedings.

In an effort to establish the meaning of *idem* within Article 54 of the Convention, the ECJ refers to the thought expressed in the first judgement containing an interpretation of that provision, passed on 11 February 2003. It concludes correctly that no provision of Title VI of the EU Treaty, relating to police and judicial cooperation in criminal matters (whose Article 34 and Article 31 formed the basis for Articles 54–58 of the Schengen Convention), or the Schengen Agreement, or even the Convention itself, made the application of the *ne bis in idem* in supranational relations contingent on the harmonisation, or at least approximation, of the criminal laws of the countries bound by these documents. Quite the contrary, the application of the *ne bis in idem* principle stipulated in Article 54 of the Schengen Convention is based on the mutual trust in foreign legal systems and foreign criminal justice authorities and their rulings, even if the application of one's own national law would lead to a different solution in a specific case.[11]

The construction of the term "act" in Article 54 of the Convention is not undermined by the wording of its Article 71, which obliges the states bound by it to adopt all measures necessary to combat illegal trafficking of narcotic drugs due to the lack of prescribed priority of the various provisions of the Convention. Article 71 does not limit the scope of the *ne bis in idem* prohibition stipulated in Article 54 of the Convention.

In this respect, making a statement on the understanding of the identity of *idem*, the ECJ – just as in its previous judgements containing interpretations of this provision – granted priority to the guarantee nature of the *ne bis in idem* prohibition.

The ECJ referenced its own standpoint expressed in this judgement in another ruling, issued on 28 September 2006 in case C-150/05, *Jean Leon van Straaten vs. the State of the Netherlands and the Republic of Italy*, and also in two judgements dated 18 July 2007: *Criminal proceedings against Jurgen Kretzinger* (C-288/05) and *Criminal proceedings against Norma Kraaijenbrink* (C-367/05).

[11] This argumentation has been put forward in German publications before (cf. Böse, 2003, p. 757).

The question referred for a preliminary ruling that initiated the ECJ procedure in this case was whether possession of a certain amount of heroin in the Netherlands first, and then directly afterwards a portion of it in Italy, was the same act within the meaning of Article 54 of the Convention.

In its reply, the ECJ stated that, in the case of offences involving narcotic drugs, the amounts of drugs or the people involved were not required to be identical. It cannot be ruled out then that a situation where they are not identical constitutes a set of behaviours that are inextricably linked together.

This view deserves complete approval, particularly if we consider that the criminal jurisdictions of the various countries may be limited to only some of the people involved.

Making reference to its own judgement of 9 March 2005 in the case *Criminal proceedings against Henri Van Esebroeck*, the ECJ stated that a punishable act consisting in exporting and importing the same narcotic drugs and prosecuted in states bound by the Convention was, in principle, "the same act" within the meaning of Article 54 of the Convention. Still, the unambiguous and definitive assessment of the identity of these events – taking into account whether they formed an inextricably linked set of circumstances – was the prerogative of the local court adjudicating the specific case.

None of these ECJ judgements solves all the problems involved in the understanding of the identity of *idem* in the Schengen Convention.

The most doubts remain unsolved with respect to such situations as the concurrence of offences and concurrence of statutory provisions, continuous offence and continuing offence, or joinder of offences. The ECJ judgements analysed here set the direction for interpretation aimed at solving potential doubts. They do not, however, resolve them definitively.

The ECJ recognises that the only criterion relevant to the determination of the meaning of *idem* in Article 54 of the Convention is the identity of the event, understood as a whole, composed of inextricably linked circumstances.

Since, by taking into account the prohibition stipulated by the provision analysed here, the states bound by the Convention should understand the term "act" as a historical occurrence rather than as a factual basis of liability, one should conclude that also in the case of ideal concurrence, where several charges are based on the same facts, they should, in principle, be tried in a single proceeding, and thus, in such cases, the *ne bis in idem* principle should bar new prosecution in another state bound by the Convention with respect to the same historical occurrence.[12]

The divergence of meanings delineating the scope of the prohibition imposed by the *ne bis in idem* principle in Article 54 of the Schengen Convention is indicative of the inadequacy of linguistic construction as a means of determining the meaning of that provision. It is characteristic that in nearly all of its judgements attempting

[12] See Concurrent national and international criminal jurisdiction and the principle "ne bis in idem". Draft resolution of 17th International Congress of Criminal Law, *Revue Internationale de Droit Penal*, 2002 (3–4), 1180 and in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2004 (1), 259. (See also Nita, 2006.)

to determine the meaning of this provision, the ECJ has used a teleological construction. The only ruling passed on the basis of a linguistic interpretation was the judgement of 28 September 2006 in case C-467/04: *Criminal proceedings against Francesco Gasparini and others*. In this case as well, the ECJ made side references to the results of teleological construction, pointing out that they were convergent with the linguistic interpretation of the provision.

3 Conclusions

It is noteworthy that, in its rulings analysed here involving the determination of the meaning of Article 54 of the Convention, the ECJ dismissed those language versions that did not correspond to the outcome of the teleological construction.[13]

The use of the comparative method reduces the field of potential discrepancies in the understanding of the provisions of European law in the EU Member States and promotes a universal approach. However, the use of this method on the part of national courts and the ECJ does not mean that the outcome of the interpretation will be the same. The ECJ undoubtedly is better able to take a broader, cross-section look at the purport of the interpreted provision in the various language versions, without selecting any of them as the starting point. National courts, for obvious reasons, tend to refer to the meaning of a specific provision of European law in their own language version, which in turn promotes particularistic approach.

Another feature specific to the third-pillar sources of law is that they are usually transposed into the internal legal systems of the EU Member States. The limits of a pro-European interpretation set out in ECJ case law indicate that the obligation placed on national courts to refer to foreign language versions as well cannot lead to the determination or aggravation of the criminal liability of people contravening criminal law.[14] Thus, a foreign-language version of a provision of European law can be taken into account only with a view to being used in the favour of the accused. In this context, due to the binding force of the ECJ interpretations, doubts may arise as to the course of action to be followed by a national court when it encounters a discrepancy between the meaning of a provision of European law transposed into the internal legal system and the meaning ascribed to such a provision by the ECJ.

This doubt pertains solely to those instances where the meaning of a provision submitted for interpretation is determined by the ECJ to the disadvantage of the accused. Given the binding force of ECJ case law for national courts in EU Member States, the postulate of interpretation advantageous to the accused implies the need to apply the provision in the wording given to it by the ECJ. In the event of discrepancies between the wording of a national law and the interpretation established by

[13] Such practice in the context of Community law has been identified in the literature (cf. Łętowska, 2009; Fryźlewicz, 2008).

[14] A judgment of breakthrough significance was the one passed by the ECJ on 16 June 2005 in case C-105/03 *Pupino*.

the ECJ based on the comparative method, which – in those cases where the national court follows the binding interpretation of the ECJ – would cause consequences disadvantageous to the accused, it becomes necessary to change the provision of the internal law so as to eliminate such discrepancy. Additional guarantee significance for the accused will be provided here by the *lex mitior retro agit* principle. The ECJ judgements of 3 May 2005 in joined cases C-387/02 and C-403/02 *Berlusconi*, and C-45/06 *Campina* of 8 March 2007 indicate that this principle is in effect as a general principle of community law, resulting from the common constitutional tradition of the EU Member States.

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Chapter 12
Introducing Hermeneutic Methods in Criminal Law Interpretation in Europe

Alicja Ornowska

Abstract Hermeneutics as a theory of legal interpretation approaches law as literature. It implies that extracting the sense of interpretation is an internal and personalized process of analysis between an interpreter and a legal text itself. Such an approach leads to interpretation being a dialogue between a text and an interpreter, contextualization and constant reinterpretation. In criminal law, however, a predominant role is played by the rules of legality, lenity and strict construction of criminal statutes. They all create a particular methodology of criminal law interpretation. These rules are deeply enrooted not only in the European legal traditions but also in legal texts and documents that constitute what is called European criminal law, especially the Convention for the Protection of Human Rights and Fundamental Freedoms. Criminal law doctrine and jurisprudence unequivocally declare that they strive towards constructing the only appropriate interpretation of criminal statutes. This chapter scrutinizes whether a hermeneutic approach is in fact antagonistic to interpretation of criminal statutes or whether contradictions between them are actually illusory. This chapter aims to indicate that although criminal courts do not explicitly acknowledge hermeneutics in their judgements, they make use of it in practice nonetheless, as the use of hermeneutic theses might be traced in these judgements.

1 Specificity of Interpretation to Criminal Law

1.1 General Views

In European legal culture, adaptation of rules of legal hermeneutics for the purposes of criminal law seems to be a subversive undertaking and a misapprehension of

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criminal law methodology and its immanent specificity. Nonetheless, I would like to show that within these two domains that *prima facie* seem to be incompatible, intriguing interrelations can be found. The implementation of a hermeneutic approach towards a criminal legal text is therefore not erroneous but desirable.

Interpretation of criminal law is most closely, of all law branches, rooted in the principles of legal positivism and strict constructionism. Nonetheless, some representatives of criminal law doctrine stress that theoretical foundations of interpretation of criminal law do not differ from interpretation of other law branches (Giezek, 2007, p. 57). It is, however, an approach simplifying the genuine disposition of interpretative emphases. The canons of criminal law interpretation give primacy to the plain meaning rule disregarding the character of provisions interpreted. Yet, it might be argued that this rule in criminal law doctrine and criminal jurisprudence is being absolutized (Gensikowski, 2005, p. 112). In this chapter I present the position of the relative autonomy of particular branches of law.

In criminal law doctrine there is a controversy over the correct and accurate law interpretation (Królikowski, 2007, p. 3). Advocates of the formal-dogmatic method opt for fixing the interpreter's attention on the reconstruction of a rule of law from the criminal code or other sources of criminal law on the basis of strictly linguistic and logical analysis. The intention and ultimate priority of the interpretation was the eventual delimitation of the criminalized sphere from the criminally neutral sphere and the instrument used to achieve this priority was semantic analysis. Advocates of the dialectic-dynamic method perceive the final aim of the adjudication process as an inherent component of the interpretation process. The interpretation activity must not be isolated from determination of guilt or innocence, but must be performed in accordance with the goal of delivering a legally valid judgement concerning criminal charges. Interpretation therefore cannot be reduced to operations on parts of speech; it must be a procedure of practical realization of the legislator's projects. Therefore the process of interpretation and its aim create specific *iunctim.*

In my opinion the dialectic-dynamic method is complementary to the formal-dogmatic approach as it accentuates the importance of pragmatic orientation by stressing the cohesion of linguistic analysis with the aims of the criminal court process. It does not modify the formal-dogmatic methodology that a criminal lawyer should make use of. This methodology assumes a certain degree of automatism in subsumption of given facts under a certain criminal provision. Such an understanding of interpreters' objectives reduces criminal law interpretation to a plainly reconstructive exegesis of a legal text and elucidation of its formal-logical sense. This perception was brought to the extreme in some criminal law textbooks and criminal law commentaries available on the market, in which the merits of criminal interpretation equate the citation of definitions of words used in articles. Some authors demonstrate an enhanced predilection to semiotic analysis, so they examine cardinally or even exclusively the semantic elucidation of the article. Their oeuvre of legal text analysis is in consequence similar to one of a specialized linguist. This type of approach turns commentaries that should be practically oriented into typical language dictionaries. Therefore there can be no doubt that a criminal law doctrine's

stand reflects a strong commitment to the literal interpretation of criminal statutory provisions.

1.2 Principle of Legality

An apotheosis of the plain meaning rule in criminal law can be understood only after acceptance of an unimpairable precept of determination of criminal liability, which is the principle of legality (or positivity) expressed by a Roman maxim *nullum crimen sine lege* (Grześkowiak, 2007, pp. 21–23). This particular principle has a profound meaning in criminal law methodology. No liability should be attached unless a person's conduct objectively meets the criteria specified in advance as only this can constitute the first of two elements of crime – a legally forbidden act, equivalent to a *common law* notion of *actus reus*. Also the punishment should be inflicted only upon the basis of the statute (*nullum poena sine lege*). The fundamental principle of legality is also incorporated in Article 7 of ECHR and in its minimalist sense renders it to being governed by rules which are non-retroactive, fixed, knowable and certain.

The function of the precept is twofold: minimizing the arbitration of the law-applying organs and strengthening the personal autonomy by securitization of a "fair play" approach, which implies providing individuals with information as to the exact meaning of the criminal law in force. As a consequence, it implies some postulates that are specifically meant for the legislator, for the adjudication organs and for both (Ashworth, 2006, p. 68). One can derive from the principle an unequivocal dictate of maximal precision and certainty of criminal provisions (*nullum crimen sine lege certa*) and of strict construction of these provisions (*nullum crimen sine lege stricta*) and of criminal law-making being the prerogative of parliament (*nullum crimen sine lege scripta*). Prohibition against *ex post facto* law-making shall secure evenhandedness in the administration of justice according to the principle of separation of powers (Eser, 2006, p. 26). Criminal offences should be clearly enough defined to enable people who wish to be law-abiding to adjust their behaviour to the wording of a statute and shape their conduct accordingly *pro futuro*. In *Silver v. United Kingdom*[1] the European Court of Human Rights explained that a norm cannot be even regarded as "law" unless it is formulated with sufficient precision to enable a citizen to regulate his conduct. The Court stated that citizens must be able to foresee the consequences which a given action may entail (Herring, 2005, p. 23). Therefore as Jonathan Herring states it is not enough to formulate an offence which says "It is a criminal offence to behave badly" even in a situation when the authorities defined each time which conduct is regarded as bad (Herring, 2006, p. 11). Specification *post factum* whether a specific crime was committed or not does not make it easier to obey the law. The law must be readily available to the public, so that

[1] *Silver and Others v. the United Kingdom* (1983) 5 EHRR 347, judgement of 25th March 1983.

people could be aware what types of conduct are prohibited. At this juncture, legal descriptive and linguistic methods are considered most appropriate for criminal law interpretation. Therefore strict formal interpretation methods and reduction of text rendition to predicate calculus as a working habit of criminal judges seems *prima vista* a self-explanatory choice.

The principle has not only a formal aspect. Axiology plays a crucial role here. The principle accentuated the statute as the main source of criminal law, because of *ratio* of a statute. Behind each and every legal act there are questions of the justice and rectitude of law. As a legislator embodies rationality and righteousness, an enacted statute stands for rational and righteous law. Such an approach clearly corresponds to Kant's definition of state (*civitas*) being the union of a number of men under juridical laws.

The principle of legality has a fundamental meaning not only in determination of criminal liability. Apart from having a normative function, it is also the central axiom and *sui generis* interpretation paradigm for the criminal law as a legal branch generally. The character of the principle as a rule belonging to the canon of criminal statutes interpretation is often disregarded in legal literature. It is commonly accepted that criminal law has a specific role and must also have a safeguarding function. This means that interpretation must be kept to the necessary limit and its range ought to be minimized. Interpretation must be as narrow as possible, according to the statutes' immanent legal reason and reasonable sense of the text. The top priority is given to imperatives of clarity and ascertainableness of criminal provisions, in particular logical and terminological precision. All ambiguity or vagueness in the words of the statute is treated suspiciously or is directly and immediately criticized. For many scholars in criminal law there is no room for dynamic interpretation. This attitude ensues from the presupposition that criminal law has the potential of imposing unique and severe punishments for transgressing a law and therefore it should be interpreted restrictively (*odiosa sunt restrigenda*) (Bojarski, 2002, pp. 55–59). In Poland, like in common law countries, this precept is derived from the principle of legality, but in some jurisdictions it is unequivocally expressed in a statutory formulation forming special interpretative *meta*norms. The illustration of such a formulation is Article 111-4 of the French Criminal code (*La loi pénale est d'interprétation stricte*) (Buchała & Zoll, 1997, p. 66).

1.3 Rule of Lenity

As the second *differentia specifica* of criminal law interpretation, one must identify the rule of lenity, expressed by a Latin proverb: *in dubio pro reo.* The rule of lenity prohibits expanding criminal liability beyond the sphere explicitly criminalized and instructing that in a case of ambiguous criminal statute, the court should resolve the ambiguity in favour of the defendant (Fuchs, 2004, p. 33). Interpretation shall not act to the detriment of the defendant. This implies a reading of criminal statutes in which fewer activities come within the definition of a crime. Such a narrow legal text reading has a fundamental role safeguarding the due process of law (Solan,

1993, p. 67). As a model of a proper interpretation process it is worth referring to Sanford Schane's example. He analysed whether the law introducing a curfew "Old men and women must not be out in public after 8 o'clock at night" shall apply to a young woman. Performing an appropriate selection among acceptable interpretations of this provision means that an interpreter should select an outcome of the interpretation process that would be most favourable to young women, in this case it means acquittal (Schane, 2006, pp. 41–43). Making use of the *in dubio pro reo* principle is appropriate for clearing legal and factual doubts, but it is only then possible when complete evidence material is collected in a case. As a digression one can add that the principle of legality, although an imperative with a secular tradition, is being more and more criticized as a rule diminishing the role of a victim and consequently leading to destruction of equilibrium between the parties of criminal process.

1.4 Principle of Strict Construction of Criminal Law

The principle of strict construction of criminal law belongs as well to the canon of criminal law precepts (*Analogieverbot, Generalisierungsverboty*). According to Hall's definition, reasoning by analogy is used in a situation where "two phenomena resemble each other in certain features which are regarded not as accidental but essential. And these similarities are deemed to be preponderate over the differences. A proposition is known to be true of one of the phenomena; it is asserted to be true 'by analogy' to be true of the other" (Hall, 2005, p. 36). Consequently if two given legal situations are similar to each other and these similarities outweigh the differences between them, then the legal solution that would be proper in the first situation is suitable also in the second (*a similibus ad similia*). In criminal law it is a dogma that analogy cannot be used to the disadvantage of the accused. The interpretation of the *corpus delicti* that would lead to the extension of the criminal liability of the accused (*in malam partem*) is inadmissible (Morawski, 2006, p. 201). Admissibility of analogy for the benefit of the accused (*in bonam partem*) raises a fundamental controversy within the European doctrine of criminal law (Petrucci & Pezzano, 2006, p. 29).

1.5 Common European Legal Culture and Criminal Law

All the above-mentioned rules prescribe a coherent scheme of judicial incompetence in the formulation of substantive criminal law, a scheme that is euphemistically described as slightly unrealistic (Jeffries, 1985, p. 189). They all have a long-lasting tradition in criminal law of both common law and civil law countries. It is worth looking at the phenomenon of law as the reflex of culture placed in a specific time and place, a sign of diversity constantly striving towards unity (Górski, 2005, p. 3). By such an approach, examining the core fundaments of criminal law systems both in common law and in civil law it might be found that in the field of criminal law there is no substantial difference between civil and common law. They are

axiologically homogenous. Therefore it might be argued that there is a common pan-European legal culture regarding the canon of criminal law systems (Witkowska, 2008, pp. 108–114). This can, however, be observed only when it is left aside that there is a difference in acknowledging or non-acknowledging court sentences as a source of law and as an authoritative interpretation of law in front of concrete cases.

The axioms are just as deeply enrooted in the criminal law system of common law as of civil law. In civil law countries, *nullum crimen sine lege* and the principle of strict construction of criminal law became widespread under the influence of the French Revolution. The mere formulation of principle of legality is associated with Paul Johann Ansel Feuerbach, who in his textbook for criminal law from 1801 expressed this canon in its famous Latein formula. However, its traces shall be found much earlier, already in ancient Greece and Rome. Already Plato in his *Laws* stated that the lawgiver shall lay down what things are evil and bad and what things are noble and good (Harries, 1997, p. 132). In England, because of the influence of Hobbes' philosophy, adapting these principles came naturally. As early as 1651, Hobbes wrote that no law made after a fact done can make it a crime, for before the law there is no transgression of the law (Williams, 1961, p. 580). The rule *in dubio pro reo* was already formulated in ancient Rome and has been developed since then throughout Europe. Antonin Scalia cites an assertion of Peter Maxwell from *On the Interpretation of Statutes*, who in 1875 wrote that the rule of lenity dates back to the time where there were over 100 capital offences in English law, including cutting down a cherry tree in an orchard or to be seen for a month in the company of gypsies (Scalia, 1997, p. 29).

Nevertheless, it should not only be taken into consideration that common and civil laws share common criminal law fundaments and analogous tradition. Nowadays, it is even more important that these fundaments are embedded in legal texts or derived from documents that constitute the so-called European criminal law, especially the Convention for the Protection of Human Rights and Fundamental Freedoms. It is of great significance as the Convention enables judicial control over realization of these fundamental principles in practice. Any person who feels his or her rights have been violated under the Convention by a member state of the Council of Europe can bring a case to the European Court of Human Rights. The possibility of a case of an alleged violation of human rights to be heard by the Strasbourg Court is a unique and important guarantee for an individual that so far proved to be very effective.

In general, constitutional courts can also provide legal remedy in case of an infringement of the fundamental principles of criminal law as they are also enshrined on domestic ground in written constitutions. In the United Kingdom there is no written constitution, but the Human Rights Act 1998 gives further legal effect in the United Kingdom to the fundamental rights and freedoms contained in the European Convention on Human Right. It is a United Kingdom Act of Parliament which obliges courts to interpret legislation in accordance with the Convention "so far as possible". If a judge decides that it is not possible to interpret a statute in line with the Convention, then the court should issue a declaration of incompatibility and after adopting a prescribed procedure Parliament might be required to consider amending this statute (Jefferson, 2001, p. 9).

2 Seeking the Only Appropriate Interpretation of Criminal Law Statutes

Taking these paradigms into consideration, the doctrine and jurisprudence of criminal law in general take the view of interpretational monism. The jurisprudence presupposes a particular attitude towards interpretation, because the interpreter should "take up all possible and available actions, aiming at constructing *the only* appropriate interpretation" of criminal law, as was stated in the ruling of the Polish Supreme Court.[2] It presupposes that there is such an interpretation that can be declared as the only one that is right. To ensure that law is interpreted in the one and only desirable way, the legislator himself might introduce legal provisions that govern the interpretation in legal order. Such a situation is in Italy. In Article 12 c.p.v.,[3] which is also in force for the branch of criminal law, it is stated that in law application no other sense of words might be attributed to them than the obvious meaning inferred from their connection with the rest of the text and the intention of the legislator. If there is a controversy and it is not possible to determine a specific provision that should be applied, other provisions should be regarded, which regulate similar cases or analogous situations. If a case is still doubtful, it should be decided according to general principles of the legal system of the state. However, Article 14 c.p.v. provides that criminal provisions and legal exceptions should not apply to other cases and terms than they were considered for (Petrucci & Pezzano, 2006, pp. 28–29).

This concept, that there is just one appropriate interpretation that just needs to be discovered and identified, should be evaluated as utopian. Csaba Varga exposes its absurdity through the invocation of Meneghello Bruno's quote from *Il formalismo nello interpretazione giuridica*: " In substance, given a well-drafted law and a certain fact, it is supposed that any judge, young or old, conservative or progressive, educated or ignorant, in any part of the globe, now or a 100 years ago, should arrive at the same conclusion" (Varga, 1994, p. 321).

This counterfactual assumption has been taken on as a result of adoption of an erroneous concept that deductive and logical interpretation is a condition *sine qua non* to achieve undifferentiated results. Delusiveness of such a thesis is unquestionable and self-evident.

2.1 Hermeneutics as the "Third Way" of Interpretation

The alternative method of interpretation is offered by legal hermeneutics, which is understood as one of the trends of the "third way" in the philosophy of law, and also as an important theory of interpretation of legal texts (Wronkowska & Ziembiński, 1997, p. 73). Implementation of hermeneutic theses in practice is more suitable to

[2]The Polish Supreme Court: judgement of 20 December 2006 (IV KK 235/06).

[3]Codice civile – Disposizione sulla legge in generale (R.D. 16 marzo 1942, n. 262)

meet heuristic aims rather than traditional interpretation rules like the plain meaning rule, Golden rule and mischief rule. Hermeneutics does not reject the rules but adapts them and re-profiles them in order to better realize hermeneutic priorities.

An indisputable fact is that the most appropriate branch of law to which one can apply hermeneutic theses is constitutional law, as well as related legal branches such as human rights law. Hermeneutic interpretation has often been called forth in the jurisprudence of the European Court of Human Rights, for example in the case *Öztürk v. Germany*.[4] The Court stated in this case that the relative lack of seriousness of the penalty cannot deprive an offence of its criminal character. The fact that the offence committed by Mr. Öztürk was minor did not take it outside the scope of Article 6, which guarantees to "everyone charged with a criminal offence" the right to a court and to a fair trial. The Court added that it would be contrary to the object and purpose of this Article if the states were allowed to remove from its ambit a whole category of offences on the ground of regarding them as petty. One of the rights protected by Article 6 entails, for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter. The Court declared that Germany violated the Convention as the state did not provide Mr. Öztürk with such an assistance (Frowein, 1983, p. 10). A dissenting opinion of Judge Matscher to this case serves as a perfect illustration of a hermeneutic argumentation. He opted for a substantive approach and an autonomous interpretation of concepts of "civil rights" and "criminal charges", which would call for in-depth comparative studies. The states should endeavour to arrive at a common understanding underlying the concepts contained in the Convention, having regard to the object and purpose of the text. In his view, legal hermeneutics is the method best suited to multilateral conventions such as the European Convention on Human Rights.

European jurisprudence is generally reluctant to invoke ideas of philosophical trends, although there were some exceptions regarding the law of nature (*lex naturalis*)[5] or positivism.[6] Nonetheless, there was hardly a case where jurisprudence explicitly invoked principles of hermeneutics. Hermeneutic interpretation has been called forth more often in the analyses of criminal law doctrine.[7]

The reluctance to clearly invoke hermeneutics is not surprising. As hermeneutics is accused of introducing semantic nihilism, criminal law seems to be unsuitable for

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[4] *Öztürk v. Germany*, judgement of 21 February 1984.

[5] For example, the German Constitutional Court on European Arrest Warrant: verdict of 18 July 2005 (2 BvR 2236/04), the Polish Supreme Court: ruling of 17 November 2005 (I KK 218/2005), the Polish Supreme Court: ruling of 28 September 2000 (V KKN 171/98), the Polish Constitutional Tribunal: verdict of 29 April 2003 (SK 24/2002).

[6] For example, the Polish Constitutional Tribunal: verdict of 23 February 1998 (K 25/98), the Polish Supreme Court: verdict of 8 April 1952 (IV K 19/51).

[7] For example, the gloss of Dariusz Wysocki to the resolution of the Polish Supreme Court of 7 September 2000 (I KZP 22/2000), OSP 2001/12 p. 631.

such an application (Hassemer & Kargl, 2005, p. 183). Implementing hermeneutic methods and paradigms frequently brings about judicial activism. It is of vital importance because an allegation of judicial law-making is one of the most serious accusations that can be made in a criminal case in civil law countries like Poland (Wróbel, 2005, p. 383). What is paradoxical, however, is that courts do not explicitly acknowledge hermeneutics in their judgements, but in my opinion it might be argued that they make use of it in practice nonetheless. They might not decree that they implement hermeneutic methods, but this methodology might be traced back to these judgements.

2.2 Origin and Evolution of Hermeneutics

Hermeneutics owes its provenance to the analysis of the Bible, as the lineage of an actual implementation of hermeneutic methodology dates back to ancient times and primeval endeavours to construct a general formula for rendition of sacred texts (Sobański, 2008, pp. 104–107). Since the normativeness of the Bible was indisputable and incontrovertible, it was inferred that correspondent disputes are to be found in explication of other legally binding texts. Development of the tendency towards using hermeneutic analysis to interpretation of other normative texts was therefore ineluctable. As E.D. Hirsch has written, traditional "hermeneutical theorizing was confined almost exclusively to two domains where correct interpretation was a matter of life and death (or Heaven and Hell) – the study of scripture and the study of law" (Levinson & Mailloux, 1988, p. ix). The similarity between the Bible and legal acts could also be found on the structural level (Sarkowicz & Stelmach, 1998, pp. 76–77).

Hermeneutics is an umbrella term for studies of philosophical theories of the understanding of texts. It proclaims that the world cannot be isolated from the sphere of language because it is the only entity that is understandable. For that reason it constitutes ontology of law. Friedrich Schleiermacher, Dilthey Wilhelm, Martin Heidegger, Edmund Husserl, Emilio Betti, Paul Ricoeur, Arthur Kaufmann and Hans-Georg Gadamera with his opus magnum "Truth and Method" belong among others to the key hermeneutic philosophers. Hermeneutics is manifold and we can distinguish, for example, biblical hermeneutics, philological, legal, analytical and hermeneutics as a theory of communication (Stelmach & Brożek, 2004, pp. 226–263). Being aware of the multifariousness of hermeneutics I will use in this chapter concepts that are characteristic to many hermeneutic trends, even if they are of a contradictory character. Development and differentiation of hermeneutic trends occurred quickly and correlated with the proliferation of areas of concern, which gradually encompassed not only interpretation of spiritual texts or literature but all culture products (Bernstein, 1983, p. 112).

Hermeneutics as a theory of interpretation is concentrated around a major aim, which is text understanding, and it approaches the problem of understanding

epistemologically (Czajka, 2006, pp. 51–52). Hermeneuein is a Greek term, meaning the ability of explaining and interpreting. Etymology of the term is unclear, but often the term is linked to the Greek god Hermes, who acted as a messenger between the other gods and was entrusted with delivering and interpreting information (Stelmach, 1999, p. 49).

The end of the eighteenth century gave rise to legal hermeneutics. The trend was based on the assumption that legal texts should be interpreted as literary texts. However, it also adopted the assumption that law is characterized by its own legal cognitive objectives and for that reason it required special interpretative methods (Redelbach, Wronkowska, & Ziembiński, 1994, p. 119). Furthermore, the interpretation of law serves a major goal, which is the practice of law, and therefore has a real, measurable social importance, which distinguishes it from the interpretation of non-legal texts (Jabłońska-Bonca, 2004, p. 30). Interpretation of law (*Auslegung*) is a dynamic and creative process of this realization (*Rechtsverwirklichung*). It is the art of a rational and intuitive reconstruction of legal standards, which are subsequently applied to a set of facts. It does not impair the reasonableness and necessity of literal interpretation. However, this interpretation should always be confirmed by other means of reasoning. The process of interpretation is three-fold and includes the recreation of the real meaning of the rule of law, explication of law and then application of a legal standard to the facts in question. All three steps are an integral part of the hermeneutic experience (Gadamer, 2004, p. 306).

3 Hermeneutic Theses

3.1 Contextualization

Hermeneutics disputes the existence of a universal scheme of exegesis of legal texts. It makes suggestions about the accuracy of methods of interpretation, but never arbitrary guidelines. Such an assumption consequently entails a multitude of legitimized results of an interpretation process. The selection between these results is made from the perspective of axiological presuppositions. Undoubtedly, hermeneutics contains a paradigm of author-oriented text interpretation as it stresses that comprehension of the text shall start from the point of view of its intention (Warzecha, 2005, p. 149). It presupposes that every reading of a text occurs within a society, tradition or a living current of thought, all of which demonstrate exigencies, irrespective of how adjacent or nonadjacent the reading might be tied to the *quid*, to "that in view of which the text was written" (Ricoeur, 1974, p. 3). In statutory interpretation the principle that the intention of the legislature in passing the law should govern its interpretation is uncontested. The discovery of this intention requires the interpreter to make policontext research and thus to take into account the social, political or historical situation. Detachment of legislation from the determinants of its inception prevents not only the correct understanding of the rule of law but also comprehending the problem that law was intended to remedy or

the law's axiology. Misunderstanding the context of law, law as such cannot be comprehended.

While interpreting criminal law, it is essential to refer constantly to the will of the legislator, which must always be regarded as a starting point of legal analysis. For example, by referring to the literal wording of the offence of corruption, an interpreter must scrutinize, whether an actual intention of the legislator was to penalize giving a box of chocolates to a state official after a favourable decision as a sign of gratitude. An interpreter must examine whether a legislator formulating *corpus delicti* of false imprisonment in a criminal statute intended to criminalize a conduct of deliberately confining someone for a period of 5 min. The process of interpretation undoubtedly commences with an analysis of the literal wording of a statute; however, without contextualization, it is impossible to understand *quid* of a statute and the output of reading will be misleading.

Walter Gropp presents cases that might serve as an example of a necessity to contextualize formulation of *corpus delicti.* The § 242 of German Criminal Code states that whoever takes chattels belonging to another away from another with the intention of unlawfully appropriating them for himself or a third person shall be liable to imprisonment of not more than 5 years or a fine. It would be contrary to the will of the legislator to interpret the element of appropriation in a way that a thief must necessarily keep chattels or pass them to another person. A thief might as well sell a stolen thing and keep the money. The word "chattels" in a sense of the aforementioned offence stands not only for a thing in material terms but also for the value of a thing.

It is also worth invoking the reasoning of *Bundesgerichtshof* in what is called the construction site case.[8] A truck collided with a passenger car without the truck's driver noticing this fact. The driver drove to the construction site that was 300 m away and stopped to load the truck. There he was informed by a passing driver of what happened. Nonetheless, after loading the truck the driver decided to drive away and not return to the place of the accident. The driver was charged with a hit-and-run accident and convicted. *Bundesgerichtshof* referred to the preparatory materials of the legislation phase and stated that the legislator's will was to ascertain that the offence was committed by the driver but not in the moment when he moved away from the place of the accident but when he learned about this event and decided not to return (Gropp, 2005, pp. 58–59).

An example for hermeneutic necessity for contextualization in criminal law may be the analysis of Article 150 § 1 of the Polish Criminal Code penalizing the crime of euthanasia. The wording of the article is clear and concise: "Whoever kills a human being on his demand and under the influence of compassion for him shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years." It is visible *prima facie* that the article is silent about the grounds that bring

[8] *Baustellen*-Fall; the German Supreme Court: judgement of 30 August 1978 (4StR 682/77, BGHSt 28,129).

about the compassion. Despite that literal wording it is widely accepted in jurisprudence that the crime of euthanasia can be committed only by putting an end to the suffering of people with an intensive incurable illness. Without meeting this requirement, the court would qualify the act as a murder, while sentencing. Only a few representatives of Polish criminal doctrine accept the strictly literal interpretation of this article and would also qualify as euthanasia acts of killing on demand influenced by compassion caused by disappointment in love or fear of disgrace (Tarnawski, 1981, p. 258).

Moreover, Article 149 of the Polish Criminal Code states laconically: "A mother who kills an infant in the course of the delivery and under its influence shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years." From the statutory wording it is not evident that a crime of infanticide consists of a situation in which a mother kills *her* child. However, the doctrine introduces this requirement almost unanimously (Tarnawski, 1981, p. 104). The similar case is with the crime of bigamy. Article 206 of the Polish Criminal Code states: "Whoever contracts a marriage, despite the fact that he is already married shall be subject to a fine, community service or the penalty of deprivation of liberty for up to 2 years." According to this Article, if an individual decided to marry the same person with whom he or she is already validly married, this individual would be held criminally liable for concluding re-marriage. Nonetheless, such an understanding of this Article is considered as inappropriate.

Lech Gardocki defines the above-exemplified requirements, which are relevant and cannot be disregarded while analysing criminal statutes and yet have not been expressed literally, as non-statutory sources of criminal law (Gardocki, 2005, pp. 123–129). Such factors ought to be taken into account, based on hermeneutic methodology. Only through the complex study of context of law, its genesis as well as its axiology, can one properly interpret a statute's *ratio legis*. All these factors should be borne in mind in the process of judging.

3.2 Canon of Text Objectivity

As a result of the evolution of views in hermeneutics, the autonomy of the work itself started to be stressed and the context of a text recipient was accentuated, in accordance with what is called the canon of text objectivity (Oniszczuk, 2004, pp. 230–231). As hermeneutics approaches law as literature, it implies that extracting the sense of interpretation is an internal and personalized process of analysis between an interpreter and a legal text itself, consequently reinstating the primacy of the reader. The interpreter is a subject axiologically evaluating and also co-creating the process of interpretation, since only in the framework of the interpretative process is law being transformed and eventually constructed (Gadamer, 2004, p. 34). Describing this outcome with entomologic terminology, it might be said that law under interpretation is going through a particular stage of metamorphosis and only after that stage do we deal with the imago of law. Schleiermacher believed that

the final result of interpretation is a combination of interpretative reflection of the author's intentions and of the context of an interpreter and a comparison with other texts co-existing in the legal culture with the one interpreted (Stawecki, 2005, pp. 95–96). In the hermeneutic theory, the interpreter is far from being an inert machine making an automatic subsumption of law. Rather he is a key player in the process of interpretation, although he does not create law *ex nihilo*.

Hermeneutic assumptions are based on the distinction between objective and subjective interpretation, a concept that originated in Germany, present also in Italian doctrine (Petrucci & Pezzano, 2006, p. 28). As Nauke summarizes this, on the contrary to what an English-speaking person might expect, objective interpretation assumes that once a statute is passed it acquires a life of its own (Naucke, 1986, p. 538). In objective interpretation therefore, it must be analysed what meaning a specific statute provision acquired over time. On the contrary, subjective interpretation refers to the original will of the legislator (Stein, 2000, p. 12).

This hermeneutic presupposition of text objectivity can be traced in a reasoning of criminologist Nils Christie, who considers pros and cons of replacing judges with computers. He states: "Computers open the way to new, complex possibilities. But now when a technical tool for perfection has been created, we are able to see more clearly that complete clarity, predictability, and pre-programmed behaviour suited for administrative control can never be the only ideals for any legal system. (...) Maybe law is closer related to art than most of us are aware" (Christie, 1991, p. 69). Hermeneutics welcomes this idea that the interpretative process is a particular sort of art, where both the text and an interpreter are of significance. Interpretation is thus a *sui generis* dialogue between them (Gadamer, 2004, pp. 361–362).

Nonetheless, it might be argued that such an approach to law interpretation clashes with the principle of legality. This can be observed in the example from jurisprudence of the German highest instance as its mode of interpretation significantly evolved over time. In 1871 the Criminal Code of the German Reich entered into force, which contained the provision that an act may be punished only if the punishment was statutorily determined before an act was committed. In 1899 a man rented an apartment, which was provided with electricity and an electric meter. This tenant consumed electricity but reconstructed the electric system so the consumption could not be measured with a meter. He was accused of theft and found guilty. Nonetheless, Reichsgericht, the highest court instance of that time, acquitted him. The court delivered a famous judgement. Citing the wording of the aforementioned Criminal Code, the Court stated that a theft can only be committed on "things". It referred to the notion of things present in German and Roman law, which defined things as physical objects that occupy a given space. It explicitly rejected a broader interpretation accentuating that German courts are constrained by statutes. Therefore, electricity as a flowing force and not a "thing" could not be an object of theft. The judgement was especially memorable as it attempted to draw a line between interpretation in its pure form and an inadmissible analogy to the detriment of the accused. It declared that adapting criminal statutes to new living conditions by jurisprudence was impermissible. This task is reserved solely for the legislation. Extension of criminal law through analogy puts into question the independent

administration of justice as to make a proper extension of law, it is necessary to find a fair balance between different and often contradictory interests. Literary interpretation should take preference and an interpreter should trace a historical linguistic sense of the statutes' wording.

Although Reichgericht drew a sharp line between an analogy and interpretation, it shall be noticed that this line is rather fluid. Aversion to objective interpretation of Reichsgericht appears to be rather outdated as scholars commonly accept that if Bundesgerichtshof were to hear a similar case at present, the verdict would be the opposite (Naucke, 1986, pp. 538–539). The approach of Bundesgerichtshof to objective interpretation evolved over time. It acknowledged in one of the recent judgements that the German Constitution rejects narrow positivist approach to statutory interpretation and declared that pronouncing the legislator's will is not the only task of judiciary. Creative interpretation is not forbidden from the constitutional viewpoint.[9] Statutory interpretation cannot solely rely on the sense of words existing at the time a statute was adopted, but it must take into consideration the rationale and function at the moment of interpretation. This means that the hermeneutic canon of text objectivity also has a predominant role in criminal law.

Offences against property are a good example that English courts welcomed the concept of text objectivity and decided to develop criminal law through interpretation despite adopting the rules of legality and lenity. In eighteenth-century England the central offence against property was larceny, which meant in those days the taking and carrying away of another's chattels with the intention to deprive him of his possession. Under such law a man named Pear rented a horse from a stable, saying that he wanted to ride to Surrey and back. However, he did not return the horse and kept it for himself. As Pear obtained the horse legally there was no element of trespassory taking. Nonetheless, judges did not have any doubts to interpret the provision on the offence of theft through an expansion of its ambit.[10] Such an interpretation was needed in commercial and urban society at that time, because a type of conduct such as Pear's threatened commercial relationships (Packer, 1968, pp. 81–82). Therefore judges decided to be active actors and not passive participants of an interpretation process.

The Polish Supreme Court acted similarly when it delivered a judgement that reshaped the system of monetary sanctions in Poland.[11] In the Polish Criminal Code from 1997 the innovative system of day fines was adopted. It means that fines are geared to an offender's net daily income, which should make them equitable and fairly distributed (Senna & Siegel, 1999, p. 468). A court while imposing a fine expresses in units the severity of the crime and multiplies it by a daily-income value particular to the offender. Nevertheless, many crimes are spread across other statutes than the Criminal Code and it happens that in these provisions fine payments are

[9] The German Supreme Court: judgement of 3 March 2005 (GSSt 1/04).

[10] *Rex. v. Pear* 2 East's P.C. 685 (1779).

[11] The Polish Supreme Court: judgement of 21 May 2004 (KZP 4/04).

specified not by day units but by stating the maximum amount of fine that is possible to impose for a particular fine. The minimum sum is, however, not indicated and that was a question for the Supreme Court in a reference for a preliminary ruling. As there are no provisions that would solve this dilemma in a given situation, no matter what kind of resolution had been taken by the Supreme Court, it would always have contained a seed of creativity. It could be expected that the Supreme Court would reach a decision that the minimum fine in these circumstances is at the minimum level economically possible to impose, which is 1 grosz (Wróbel, 2005, p. 389). The Court could also draw an analogy to a day-fine system from the Criminal Code and state that the minimum fine is 100 zloty, which is an equivalent of the minimum day fine. Nonetheless, the Polish Supreme Court decided to reach an unanticipated and difficult to rationally justify resolution and stated that the minimum fine, if not indicated in the particular provisions, is 1 zloty. In such an interpretation, the Supreme Court co-created the law, which is theoretically forbidden in civil law countries. However, in my opinion the judgement should face the wave of criticism not because it is innovative and constitutes judicial rewriting of legislation but because it is not based on convincing and reasonable arguments and it is contrary to the aforementioned axiom *in dubio pro reo*. Consequently, in this case, the creative interpretation of the Supreme Court must be assessed as being too far-reaching.

3.3 Fore-Understanding and Prejudices

A key concept of legal hermeneutics is a theory of fore-understanding (*Vorverständnis*). Law only makes sense in terms of its own national or cultural environment. Consequently, Hans-Georg Gadamer argued that interpretation always refers to certain pre-assumptions, prior knowledge and hidden prejudices of an interpreter about the matter of interpretation, a Heidegger's fore-having, foresight and fore-conception (Gadamer, 2004, pp. 268–273). Prejudices in Gadamer's works do not have a pejorative connotation. As a concept, they derive from the fact that an interpreter is never an impartial observer, but is deeply rooted in the cultural and legal traditions (Gizbert-Studnicki, 2006, p. 63). Without these traditions, an individual loses the ability to comprehend. The interpreters initiate the process of interpretation with primary internal knowledge and beliefs and they have a direct impact on the final outcome of interpretation. Fore-understanding means a primal projection, an unspecified concept of the result concluding the process of interpretation, which is the general idea of a just judgement.

Tracing the presence of elements of fore-understanding in criminal judgements, it might be counterproductive to limit the focus to the level of national state. As Nelken states, at the microlevel it may be more appropriate to study the culture of the local courthouse and examine *inter alia* different social groups, interests or professional associations (Nelken, 2004, p. 121).

Criminal legal texts often use idiosyncratic notions; therefore, the need to take into account the elements of fore-understanding is particularly evident when criminal statutes consist of vague and uncertain words, sometimes culturally determined like the crime of insult. To assess what acts may be considered an insult, one ought to appraise whether a certain act is an expression of contempt for a human being according to generally accepted assessments in a certain culture (Kulesza, 1984, p. 169). As there is profuse jurisprudence to what constitutes an insult, there is no doubt that an act has an insulting character when someone uses vulgar words, for example, by using slang words for sexual organs,[12] as well as when someone uses words in order to affront or demean.[13]

Nonetheless, the crime of insult can be committed also in less common situations. In Germany there is an ongoing debate whether addressing someone informally in the form of calling each other in the second-person singular "du" (called *Duzen*) might be a form of an insult. Because of cultural and linguistic context, this debate is fully incomprehensible for a person whose mother tongue is English. In Germany, such an informal form of address is perceived as arrogant for adult persons who do not know each other. A judge from *Amtsgericht* in Bonn also came to such a conclusion in the case of a quarrel on a local bus, when a bus driver addressed a young Turkish student "You, free rider." For such an insult the bus driver was ordered to pay a fine of 100 DM. Significantly larger sums of fines are to be taken into account if one uses this form of address in front of a policeman or a state official (Besch, 1998, pp. 57–58). Nonetheless, it should be noticed that a certain social shift in this regard is taking place, which can be observed in the example of a celebrity, Dieter Bohlen. In 2006 he was charged with insulting a policeman by addressing him informally (*Duzen*) and after the trial, which gathered much public attention, he was acquitted. This confirms the inevitable changeability of cultural paradigms and therefore a certain degree of flexibility of prejudices.

An act of insult can consist of drawing a picture, showing a certain gesture or using terms or phrases that only in the particular cultural circle or environment are perceived negatively and express insensitivity or contempt, like calling someone a Jew or a communist (Marek, 2006, p. 521). Moreover, acts and words must be contextualized. Describing a person working in a slaughterhouse as a "butcher" is not insolent, arrogant behaviour, but saying the same word to a physician is an offensive remark (Kalitowski, 2006, p. 706). Qualifying an act as a crime of insult will depend on the prior knowledge, opinion and internal conviction of a judge, which is precisely hermeneutic prejudice.

In England and Wales there is still in force an extremely vague statutory formulation of section 5 of the Public Order Act 1986 which states that it is an offence to engage in disorderly behaviour or threatening, abusive or insulting behaviour, likely to cause harassment, alarm or distress. The ambiguity of this offence was resolved

[12]For example, Judgment of the Polish Supreme Court from 5 April 2002 (II CKN 953/2000).

[13]For example,. Judgment of the Polish Supreme Court from 30 August 2001 (V KKN 118/99) on the word "impostor".

by judges in a multitude of ways, while each and every judge relied upon his or her own experience or beliefs. It also provides wide discretion for police officers. Based on their own understanding of such notions like harassment, alarm or distress they might arrest people for conduct of which they do not approve, even if penalizing such a conduct is far from the original intention of the legislator. Therefore, in general it is used to deal with people who swear at police officers. There were, however, also extreme cases like *Masterson v. Holden*, in which the Divisional Court held that the magistrates were entitled to say that two men kissing were insulting the passers-by.[14] The defendants were charged under the Metropolitan Police Act that came into force in 1839 and preceded the Public Order Act. It can be easily inferred that moral preconceptions, local and national tradition and pre-assumption of which conduct is of insulting character and which is not were in this case of vital importance (Herring, 2006, p. 11).

The same is true in the case of the term "materials with pornographic content" in Article 202 of the Polish Criminal Code, which under certain circumstances criminalizes *inter alia* producing, disseminating, preserving, possessing, importing, propagating pornographic materials or presenting them in public. It has been ascertained that there is no objective designatum of this term, neither is there a universal, verified and scientifically based definition that would describe its meaning. Thus, if there is no general consensus as to what pornographic content is, any assessment regarding the term in question will be made solely by a judge. Moreover, it is evident that the boundary between the terms "pornographic content" and "erotic" content is perceived differently by each and every person. The actual demarcation of that boundary is influenced by a multitude of factors (Michalska & Wojciechowska, 2001, p. 121). A judge's previous experiences, his or her beliefs, morality or individual sensitivity exemplify only some of these factors. Therefore hermeneutic fore-understanding plays a crucial role here.

3.4 Hermeneutic Circle

It is essentially important that fore-understanding, which is inevitable in a process of criminal law interpretation, does not transform this process into an unrestricted, abstract and therefore arbitrary law creation. It has to remain always text-oriented. As criminal law provisions build a specific coherent legal system in terms of linguistic expressions, certain elements constituting *corpus delicti* are repeated in different parts of this system. Criminal law interpretation must take into account this inherent coherence so that the net of law provisions remains bound and untorn. For that reason, interpretation is restricted through the requirement not only that the output of the interpretation must fit into the existing law system but also that the rationale of the judgement and especially *ratio decidendi* (in common law) must stay in conformity with it (Jakobs, 1993, p. 86).

[14] *Masterson v. Holden* (1986) 1 WLT 1017 (DC).

Such an approach reflects the fundamental concept in the theory of hermeneutics, which is a principle of the hermeneutic circle (*der hermeneutische Zirkel*). It assumes that every piece of text makes sense only if it is related to its entirety, and also the starting point for the interpretation should be the initial comprehension of the whole of the text. Interpretation should be oriented circularly and create a unique spin of approximations and corrections (Zieliński, 2008, p. 74). In the case of legal interpretation, this means accentuating one of the key rules belonging to the canon of textual interpretation: *noscituur a sociis*. The principle states that if the meaning of a word is uncertain, its meaning may be determined by reference to the rest of the statute. The legal act must be interpreted holistically (Jabłoński, 2006, p. 226). As a consequence, the theory of hermeneutics stresses also the necessity of searching for hidden crosses and words' interrelations in the statute.

The hermeneutic circle also implies that uncritical use of *clara non sunt interpretanda* may lead to a *cul-de-sac* of the process of interpretation (Bielska-Brodziak, 2008). Tushnet's hyperbolic comparison perfectly illustrates this problem. He stated that even clear constitutional provision like the one granting passive electoral rights in presidential elections only to candidates who are 35 years old may in fact be unclear in the case of a religious group putting up a child as a presidential candidate, who is according to the group's beliefs a reincarnated ancient guru (Binder & Weisberg, 2000, p. 159). Sanford Levinson and Steven Mailloux use a further example, asserting that the provision might be ambiguous in the case of using different calendars like the Gregorian solar calendar or the lunar calendar followed in Judaism, Islam and China (Levinson & Mailloux, 1988, x).

The fact that no meaning of a word is absolutely and undoubtedly clear is exemplified also by a hilarious court hearing on *Frigaliment Importing Co. v. B.N.S. International Sales Corp.* reported by A.L. Corbin and subsequently referred to by W.B. Michaels[15] (Michaels, 1988, pp. 217–218). The question in the case was to determine the actual meaning of a contract between the companies. The defendant, the New York company B.N.S., sold to a plaintiff, a Swiss company, Frigaliment, 75000 fresh frozen chickens. After the chickens' arrival in Switzerland, the plaintiff discovered that they were old "stewing chickens" or "fowl" and not "fryers" or "roasters" as the company expected. Although the word "chicken" is lexically precise and unambiguous, it was unclear in the case in question and the court needed to determine what the chicken actually was. The plaintiff maintained that the word has a particular trade usage, whereas the defendant argued that this meaning is by no means universal. To establish the proper meaning of the word "chicken", Mr. Weininger, who was an operator of a chicken eviscerating plant, testified on behalf of the defendant that "Chicken is everything except a goose, a duck and a turkey." A.L. Corbin is partially right that the problem is not that the word as such is ambiguous, but that the contract parties do not share the same understanding of it. However, in the end it is the courts' task to decide which of the word's understandings is the

[15] *Frigaliment Inporting Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).

correct or at least the more correct one. According to hermeneutic theses, to perform this task properly, the court must carry through an in-depth interpretation of a contract as such, looking for the other connotations of the word in question. The usage of the word in a different context but within the same text might approximate finding its meaning. Subsequently, if that does not provide a solution, the court shall analyse the cultural, linguistic and social circumstances of the closing of a contract.

In the doctrine and jurisprudence of Polish criminal law, one can also find examples of an application of the principle of the hermeneutic circle. The hermeneutic thesis that all passages of a text shall be confirmed by the entirety of this text is well illustrated by the definition of the crime of brawl. Practitioners and commentators unanimously define brawl as a mutual fight of at least three people, each of which plays in an incident a double role: the attacker and self-defender. Thus, the crime of beating is defined as a situation of an active assault of two or more persons upon one or more persons. In this situation however, there are two distinguishable sides and the attackers' side has an advantage over the attacked side. The two definitions are obviously embedded in the tradition of criminal law but are not literally comprised in the Criminal Code. The relevant Article 158 § 1 states only that "Whoever participates in a brawl or a beating in which a human being is exposed to the immediate danger of the loss of life or to the consequence referred to in Article 156 § 1 or in Article 157 § 1 (serious or medium bodily injury or an impairment to health) shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years." Notwithstanding such a laconic statutory formulation, with the implementation of a proper and in-depth interpretation, one can find normative justification for definitions of both crimes.

It is possible to derive without many difficulties a definition of the crime of beating from the wording of a statute by using the traditional canon of rules of linguistic interpretation. The fact that the legislator used the word "participate" logically excludes the activities of a single perpetrator. Decoding the definition of the crime of brawl, however, requires further detailed scrutiny and using the theory of the hermeneutic circle. An interpreter must confront Article 158 § 1 with all other provisions from the chapter of the Criminal Code: "Offences Against Life and Health". Only after that kind of confrontation might it be concluded that if any other meaning of the word "brawl" was adopted, the provision would become superfluous, pointless and deprived of any substance. The other articles from the aforementioned chapter cover all other crimes against life and health, the only space left for the meaning of a brawl is a situation of a mutual and at least threefold tussle (Gardocki, 2005, p. 126).

It must, however, be borne in mind that law does not have one, still and unchangeable interpretation. Legal hermeneutics stresses that law provisions should be interpreted "over and over again" and constantly updated to the changing circumstances (Warzecha, 2005, p. 148). This concept is very similar to the principle of adaptive interpretation. Holistic interpretation should cover not only the text interrelations but also the statute's functioning over time. To illustrate this interrelation it might be useful to invoke Radbruch's comparison to a tunnel. In his concept the way law is deduced resembles an open circle. The reality of law is divided into two

constituent parts: a priori and a posteriori. Each of them can be defined only in the relationship with the other. This circular movement characterizes each critical philosophy. The circular interpretation is similar to constructing a tunnel from two sides of a mountain. If the two parts meet, the process has succeeded. Radbruch concludes that in philosophy, there is no other evidence of truth than immanent coherence of thought that embraces the whole (Kaufmann, 2001, p. 324).

The continuity of interpretation causes development of law and its progressiveness. E. D. Hirsch draws a parallel that just as the New Testament is conceived to be an advance over the Old, so the judgement in *Brown v. Board of Education of Topeka* abolishing racial segregation should be regarded as an advance over *Plessy v. Ferguson*, which introduced it (Hirsch, 1988, p. 68). It should be added, however, that both these famous judgements constitute a superstructure to the permanent content of the US Constitution and the principle of equality contained therein.

Such an approach to law is currently of vital importance as criminal law must be interpreted also in conformity with the jurisprudence of ECJ and the EU legislation (Padovani, 2004, pp. 12–14). The interpretation should allow for what was previously and what is now, as well as what will happen after the implementation of the law.

Examples of applying the hermeneutic rule of ongoing interpretation might be found in German jurisprudence. In one case, a person was accused of stealing all belongings from a victim after he had given to this victim a narcotic substance in a drink through trickery.[16] Under the statute in force at the time, robbery meant taking and appropriating things by force. Historically, using force was defined as using physical power or strength to overcome resistance. Bundesgerichtshof did not acknowledge this traditional interpretation as exclusive. The court stated that changing social circumstances should be taken into account and called this method a "natural view" (Naucke, 1986, p. 541). This "natural view" reflects, however, the concept of circular and constant interpretation.

A clear evidence of applying the concept of the hermeneutic circle in English jurisprudence can be a judgement in a case of marital rape. The House of Lords removed the marital rape exemption in a well-known and highly controversial case *R. v. R*, although there was a long-established line of judgements that kept a husband immune from liability for rape of his wife [17] (Ashworth, 2006, pp. 70–71). There was hardly any doubt that the law should be changed. However, it can be claimed that such a change should be prospective not retrospective. Such a change was introduced by parliaments after a wide social debate in other criminal law systems that differentiated between liability for marital and non-marital rape like the systems of Germany and Switzerland (Dackweiler, 2003, pp. 50–67). The case *R. v. R* was under control of the Strasbourg Court for the alleged violation of non-retroactivity principle, but the majority of the Court held that the House of Lords did not go beyond the legitimate adaptation of the ingredients of a criminal offence to reflect

[16] The German Supreme Court: judgement of 5 April 1951 (W. Ger. 1 BGHSt 145–148).
[17] *R. v. R* (1992) 1 AC 599.

the social conditions of the time. Consequently, the House of Lords' interpretation of the criminal offence was a mere clarification.[18] In this sentence the Court referred to respect for human dignity as the fundamental objective of the European Convention on Human Rights. Therefore development of law by means of interpretation is fully acceptable as long as its aim is a deeper realization of this objective.

The hermeneutic circle helps in the demythologization of the commonly alleged finitude of criminal provisions. Hermeneutic paradigms can be traced in the method of circular and constant interpretation ab ovo, which was applied by the Supreme Court, for example, in a ruling on the criminal responsibility of persons who in the territory of a foreign country marketed drugs[19] (Wróbel, 2005, p. 393). It is an activity that, on the basis of international agreements, ought to be subject to prosecution in the Republic of Poland. However, the legislator in Article 43 of the Prevention of the Drug Habit Act from 24 April 1997 used the phrase "contrary to the statutory provisions". So far this phrase has been interpreted as meaning Polish statutes, obviously valid on the territory of the Republic of Poland. The Supreme Court relied, however, on its own previous interpretation of Article 4 of the Criminal Code. The Court stated previously that "statutory provisions" stand for the whole legal order and the phrase in question could mean any other applicable law. The Supreme Court based its argumentation on recalling the wording of Articles 109-113 of the Penal Code. In these articles, a distinction is made between a Polish criminal statute and a statute being in force in a place of committing a criminal offence. Consequently, due to a usage of an in-depth and multifarious interpretation of an originally seemingly clear criminal provision, the Supreme Court came to the innovative conclusion that "the word *statute* is not reserved exclusively to the Polish statute".

4 Summary

The aforementioned judgements serve only as an exemplification of the thesis that the hermeneutic paradigms perfectly fit even for the theory and practice of such a text-oriented branch of law as criminal law. They should also demonstrate that using strictly textualist interpretation is a reductionist move from the start. I agree with the statement that positivism takes the sentences of the law as an object of study, but its sententiousness has never provided a satisfactory basis for determining the meaning of legal pronouncements (Douzinas, Warrington, & McVeigh, 1991, p. 30). Purely positivist approach to law is oversimplified. Thus, hermeneutic methodology might widen the perspective of criminal law interpretation without being detrimental to its principal foundations. Hermeneutics uncovers the delusiveness of an automatic subsumption of certain facts to statute's provisions. It explains interpretation as a complicated and multi-sided relationship rather than as pure

[18] *S.W. and C.R. v. United Kingdom* (1995) 21 EHRR 363, judgement from 22nd November 1995.
[19] The Polish Supreme Court: judgement of 21 May 2004 (I KZP 42/03).

deduction. Hermeneutics accentuates that the output of the interpretation process is being developed further and therefore makes a net of references with a statute and other cases. All these aspects can also be observed in criminal law, a branch of law that is commonly regarded as reflecting the most ideas of legal positivism (Hassemer & Kargl, 2005, p. 177).

Certain restraint in hermeneutic interpretation is of course highly desirable. To paraphrase the words of Marek Zubik, there is only a step away from the reliance by a judge not so much on the letter or spirit of the law as on its phantom (Zubik, 2006, p. 31). It has been ignored, however, that a strictly linguistic interpretation could lead astray. A purely textual approach, limited to semantic analysis, is able to solve only some legal problems and often only those of minor character. It is therefore essential that criminal law retains its fundamental methodological rules but simultaneously liberates itself from the rigid corset of strict constructionism and textualism.

What is even more important, hermeneutics offers a set of interpretational methods that might just as well be applicable in common law and civil law countries and in fact they are contemporary in use in both common law and civil law. By adapting these methods throughout Europe universal interpretational standards might be developed, especially that hermeneutics plays a significant role in the jurisprudence of the European Court of Human Rights. Such a standardization would not lead to the final creation of one interpretational mode. Rather it would unify the methodology of interpretation, therefore strengthening the already existing pan-European legal culture in criminal law.

Anticipating the possible objections of unrepresentativeness or atypicality of selected jurisprudence, it must be clarified that the choice of judgements was made to correspond to the subject. The selection served the illustration that legal hermeneutics is not an abstract and unintelligible philosophical concept but offers a progressive, theoretically well-established method of interpretation. Hermeneutics is able to stress divergent points in the interpretation process and therefore opens brand new prospects for the understanding of a legal test, even if it is a criminal statute submitted to the rule of legality.

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Part IV
Private Law

Chapter 13
Fifty Years in Five? The Brazilian Approach to the New York Convention

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Abstract Despite Brazil's adoption of the New York Convention in 2002, national judges have not yet embraced it, applying instead the 1996 Arbitration Act when adjudicating enforcement claims of foreign arbitral awards.

This practice raises doubts about the extent to which Brazilian courts are undertaking a universal approach to the interpretation of the transnational standards governing recognition of foreign awards in the country.

While the basic underpinning of the Convention has in fact been adopted by Brazilian judges, they have failed to give due consideration to the legal principles and doctrine amassed in the five decades of the New York Convention. Judges have applied domestic provisions that necessarily interface with international standards, such as those related to public policy and the validity of the arbitration agreement, in a mostly isolated fashion. Accordingly, the substantive application of the Convention could bridge the gap between domestic practice and the body of knowledge built around the Convention, helping Brazilian case law to align itself with the transnational approach to the enforcement of foreign arbitral awards.

1 Introduction

During the second half of the 1950s, the slogan "fifty years in five" became the uppermost symbol of the political and economic environment in Brazil. President Juscelino Kubitschek adopted this slogan to designate the central aim of his administration: bring the country to a period of continuous development and economic prosperity, fast enough to attain in 5 years what would typically take 50 to be accomplished.

Coincidently, in 2008, when the 50th anniversary of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter New York

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Convention, or Convention) was celebrated,[1] practitioners also witnessed the fifth year of the legal framework that currently governs the recognition of foreign awards in Brazil, crafted after that Convention's late adoption in the country.[2]

In fact, as a result of a traditional prejudice against private dispute resolution systems, Brazil only ratified the New York Convention in June 2002, becoming one of the most recent countries where that treaty entered into force.[3]

Nonetheless, the use of arbitration as a means of resolving international conflicts had been rapidly expanding among Brazilian companies since 1996, when Congress passed a new law with the purpose of fostering arbitration in the country (Arbitration Act – no. 9.307/1996). One of the objectives of the 1996 Arbitration Act was precisely to overcome the hurdles in putting the New York Convention into force. With that in mind, the legislator reproduced in the Act (Articles 37–39) the basic provisions of the Convention regarding the recognition and enforcement of foreign arbitral decisions. Thus, since 1996, domestic rules that are very similar to some of the Convention's main clauses have governed the enforcement of foreign awards in Brazil.

Still, the ultimate goal of strengthening arbitration – especially international commercial arbitration – could not have been achieved until the leading benchmark Convention in the field (van den Berg, 1981) came into operation in the country.

After the New York Convention's promulgation in 2002, one would have expected that judicial opinions would turn their attention to the Convention. Due to unclear reasons, however, judges continue to make reference solely to the Arbitration Act instead of the Convention. This is the scenario in which the case law emerged and presently develops in the country.

The purpose of this paper is to examine the extent to which Brazilian judges are coping with the supranational standards embedded in the New York Convention, even though these standards have only been indirectly applied via the national Arbitration Act. Are the judges managing to take a universal approach to the interpretation of this national law when enforcing foreign arbitral awards? Do their methods and arguments meet the particular demands of international practices related to commercial arbitration? To what degree does the Brazilian practice as to enforcement of foreign awards fall within the general interpretive trends of the New York Convention or contribute to its transnational harmonization?

In analyzing this issue, the paper will scrutinize the most important precedents issued so far on the enforcement of foreign arbitral awards. Even though Brazilian case law is still incipient with regard to many important questions raised by the Convention, this analysis will show, preliminarily, that the Superior Court of Justice seems to have adopted the main general policies underlying the New York

[1]The convention was adopted by diplomatic conference on 10 June 1958.

[2]The final milestone in that framework took place in 2004, when exclusive jurisdiction to hear recognition claims was attributed to the Superior Court of Justice (*Superior Tribunal de Justiça*).

[3]The Convention's status is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

Convention. A narrow interpretation of the exhaustive grounds for refusal of recognition, together with the avoidance of reassessing the merits of the arbitral decision, are some factors that are giving rise to a *pro-arbitration bias*.

Nevertheless, the analysis will also demonstrate that the case law is still finding its way in dealing with standards and matters particularly susceptible to supranational commercial and arbitral practices, of which the public policy exception is an example. The answers given so far to debates such as those involving the lack of reasons for the award, written form, and tacit acceptance of the arbitration agreement are not entirely cohesive or satisfactory.

This paper then aims to show that the direct application of the New York Convention, as opposed to the national law, could help the case law to align with transnational best practices, by enriching the domestic decisions with the body of principles, precedents, and methods that have been developed in the international commercial arbitration setting over the last 50 years.

2 Overcoming the Traditional Resistance in Bringing the New York Convention into Force: Task Accomplished?

With the purpose of better understanding the domestic legal culture surrounding the recognition and enforcement of foreign arbitral awards in Brazil, it is important to briefly examine the context in which the New York Convention's adoption took place in the country.

There is no doubt that the Convention has encountered severe obstacles on its way to becoming operative in Brazil, the first evidence of which are the 44 years lying between its conclusion and its adoption by the federal government. From the outset, legal counsels at the Ministry of Foreign Affairs opposed the nation's adherence to the document. In particular, one legal counsel, also a well-known scholar, issued opinions in June and August 1958 recommending that Brazil not take part in the Convention. His main argument was that domestic legislation only permitted the enforcement of foreign decisions issued by state authorities, i.e., public judges, thus banning the possibility of enforcing arbitral awards. Arbitral awards could only be recognizable in the territory if and when confirmed by a judicial decision in the country where rendered (Medeiros, 2001).[4]

This reasoning had two long-lasting consequences for arbitration in Brazil. First, it reinforced the burdensome system of the so-called *double exequatur*, whereby the parties had to obtain prior leave for enforcement from a court of the state where the arbitral award was made before seeking its recognition in the territory. Second, it prevented the ratification of the New York Convention in the country for more than four decades.

Nonetheless, in 1996, after a long period of time during which international arbitration – and arbitration in general – virtually stagnated in Brazil, Congress

[4]The opinions relied upon an interpretation of Article 15 of the Civil Code's Introductory Law.

undertook its most successful attempt to promote the development of arbitration in the country by passing the Arbitration Act (no. 9.307/96).

The new Act abolished the requirement of *double exequatur* by granting arbitral awards the same authority as court decisions (Articles 18 and 31) and subjecting awards issued abroad only to enforcement proceedings in Brazil (Article 35).[5] It thus removed an additional barrier to the enforcement of arbitral awards and made conflict resolution less lengthy and costly to the party interested in enforcing a foreign decision in the country.

Moreover, the Act roughly reproduced the basic provisions of the New York Convention regarding the recognition and enforcement of foreign arbitral awards, with the manifest purpose of circumventing resistance to the Convention. Indeed, the draft bill that later became the Arbitration Act was inspired by the New York Convention, as well as the UNCITRAL Model Law on International Commercial Arbitration and the Panama Convention of 1975 (Carmona, 2004). As a result, Articles 38 and 39 of the Act restate in substance the grounds for refusal provided by Articles V(1) and (2) of the New York Convention.

As mentioned above, in 2002 the Convention was, at long last, approved and promulgated in Brazil.[6] The Convention entered into force in the midst of numerous structural reforms that were taking place in the country with the goal of modernizing the state and enhancing its openness to international trade and business.[7] Also, the long-standing resistance to the Convention's adoption had eroded after the end of the *double exequatur* requirement.

In 2004, an amendment to the Brazilian Constitution (no. 45/2004) shifted the original and exclusive jurisdiction to hear enforcement actions from the Federal Supreme Court to the Superior Court of Justice. The transferal aimed at increasing the speed of recognition proceedings (Gama Jr., 2005), by removing them from a court that has a massive workload as to constitutional matters. As a result, since 2004 the Superior Court of Justice has been the locus where Brazilian modern case law concerning the enforcement of foreign arbitral awards emerges and develops.

Despite the Convention's entry into force, however, Brazilian judges continued to solely apply the domestic legislation on arbitration. In fact, local judges have made virtually no reference to the New York Convention so far. Even though parties invoke its provisions quite often, claims have been decided exclusively on the basis of the national Arbitration Act.

The reasons for that omission are uncertain, but some conjecture is possible. First and foremost, as mentioned above, the grounds for refusal of enforcement provided by the Arbitration Act and the New York Convention are very similar.

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[5]The leading case recognizing the end of the *double exequatur* requirement is *MBV Commercial and Export Management Establishment* v. *Resil Indústria e Comércio Ltda.* (S.T.F., SE-AgR No. 5206, Relator: Sepúlveda Pertence, 30.04.2004, S.T.F.J.).

[6]See the Legislative Decree no. 52/2002 and the Executive Decree no. 4311/2002.

[7]See, e.g., the Federal law nos. 8884/1994 and 10149/2000 (antitrust), 8987/1995 (public concessions), no. 9279/1996 (intellectual property), no. 9472/1997 (telecommunications), no. 9478/1997 and 10433/2002 (energy policy), no. 9610/1998 (copyright), no. 101/2000 (public finance), and no. 10233/2001 (transportation).

This removes incentives for judges to make use of the latter, especially considering that the Convention entered into force after the Act was enacted.

In addition, and more generally, one could argue that it is more convenient for national courts to apply local law than transnational provisions. Ascertaining the binding effect of a federal statute is more straightforward than an international agreement, subject to several cumulative steps to enter in effect in the territory (i.e., signature or accession, legislative approval, ratification, and executive promulgation).

Furthermore, and perhaps most importantly, judges may feel more comfortable in dealing with rules that originated in and belong to their own cultural environment. It is easier to employ purposive and systemic interpretation; judges are chiefly trained to maneuver domestic legal materials, and interpretation tools such as precedents, doctrines, and scholarly books and articles are more readily available. All in all, the result is that local judges seem to perceive national legal provisions as more binding (hard law) and having a stronger persuasive effect in judicial opinions than the supranational law (soft law).

There are several examples that illustrate the above analysis, within the field of international arbitration. Apart from the non-application of the New York Convention, Brazilian courts have never invoked the Inter-American Conventions on International Commercial Arbitration (Panama, 1975) and on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo, 1979), despite the fact that they were promulgated as long ago as 1996 and 1997, respectively.[8] Also, the Las Leñas Protocol of 1992 for the MERCOSUL has barely been applied to the recognition of foreign decisions thus far, the same being true as for many valid bilateral treaties on the subject.[9]

The fact that Brazilian judges have remained silent about the New York Convention raises some questions: is it sufficient to apply only the Arbitration Act to the recognition of foreign arbitral awards falling under the Convention? How has the exclusive employment of domestic legal materials affected the enforcement of foreign awards in Brazil? Are the boundaries of the national legal system able to cope with the transnational standards and practices embedded in the Convention, and in international commercial arbitration in general?

Any answers to these questions presuppose a survey of the existent national case law, to which this article turns next. Even though the precedents on the enforcement of foreign arbitral decisions are not abundant, they allow one to access the court's current vision on some crucial issues for the efficacy of international commercial arbitration, as well as for the uniform implementation of the New York Convention. The review of case law shows that the Brazilian practice would benefit from a different approach to the Convention, by broadening its argumentative repertory to encompass the debates, precedents, and principles that surround the New York Convention's application in the international arena.

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[8] See the Executive Decrees no. 1902/96 and 2411/97.

[9] See, e.g., the bilateral treaties signed by Brazil and Uruguay (executive decree no. 1850/1996), Argentina (no. 1560/1995), Spain (no. 166/1991), and France (no. 91.207/1985).

3 The Current Judicial Approach to the Recognition and Enforcement of Foreign Awards

The investigation of Brazilian case law will proceed as follows. First, the general policies and principles underlying the recognition of foreign arbitral awards in Brazil will be considered. Then, the article will focus on some specific controversial themes regarding the public policy provision and the written form requirement of the arbitration agreement.

3.1 The Basic Framework

As recognized by courts and scholars worldwide, the New York Convention's main purpose was to facilitate the recognition and enforcement of foreign arbitral awards and arbitration agreements in the signatory countries (van den Berg, 1981). Underlying the Convention there is a strong policy in favor of arbitral dispute resolution, as asserted by the US Supreme Court in the landmark *Mitsubishi Motors* case.[10] A corollary of this policy is that the treaty's provisions set up a clear presumption for the enforceability of arbitral awards (Born, 1999).

Three main features of the Convention's clauses regarding the recognition of foreign awards convey this favorable approach toward arbitration, the so-called *pro-enforcement bias*.[11] First, the text provides a small and limited number of grounds under which a court can deny enforcement to an award (Articles V(1)(a–e) and (2)(a and b)). Second, none of the grounds for refusal give room to a review of the arbitration's merits. More generally, these provisions are to be construed narrowly by the interpreter. Third, the party opposing recognition of an award has the burden to prove that the case falls into one of the circumstances of Article V – except for the public policy defense, which the court can invoke on its own motion (Article V, 2) (van den Berg, 2003).

The precedents rendered so far by the Superior Court of Justice signal that a general policy in favor of international arbitration has been embraced. Since 2004, the vast majority of enforcement claims brought to the Court have been granted.[12] The acknowledgment that there can be no reexamination of the merits at the enforcement proceedings has appeared within the decisions to the point of becoming commonplace.[13] By that same token, the Court has constantly stated that the analysis

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[10] See *Mitsubishi Motors Corp.* v. *Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 631, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). See also *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 (1974).

[11] See *Parsons & Whitemore Overseas Co. Inc.* v. *Société Générale de l'Industrie du Papier*, 744 F.2d 1482; 1984 U.S. App. LEXIS 17332.

[12] Of 19 already adjudicated enforcement claims, 15 were granted by the Court, a ratio of 79%.

[13] See, e.g., *Bouvery International S.A.* v. *Valex Exportadora de Café Ltda.* (S.T.J., SEC No. 839, Relator: Cesar Asfor Rocha, 16.05.2007, S.T.J.J.), *GuidoSimplex – Società in Nome Colletivo di Giancarlo Venturini* v. *Cavenaghi Cavenaghi e Companhia Ltda*. (S.T.J., SEC No. 918, Relator: Cesar Asfor Rocha, 29.06.2007, S.T.J.J.), *Grain Partners SPA* v. *Oito Exportação e Importação*

should be restricted to the provisions of Articles 38 and 39 of the Arbitration Act (corresponding to Article V of the Convention). As a result, judges have rejected defendants' objections to enforcement not enumerated in that list, such as previous breaches of contract (see Sect. 3.2), general errors of fact or law,[14] violation of Brazilian consumer law, non-translation of the applicable arbitration law, frustration of purpose (impossibility-of-performance doctrine),[15] and fines not provided as remedy for breach of contract.[16] And as mentioned above (see Chap. 2), obtaining a leave for enforcement in the country of origin has been consistently deemed unnecessary.[17]

The case law therefore endorses the exhaustive character of the grounds for denial of enforcement, as well as the narrow interpretation that ought to be given to them. In addition, judges have already recognized that the burden of proving the occurrence of any obstacle to recognition provided by Article 38 of the Arbitration Act (corresponding to Article V(1) of the Convention) lies with the respondent.[18] All in all, the Court has scrutinized foreign awards with sufficient caution to ensure that they do not step outside the boundaries of Article V, nor second-guess the judgment rendered by arbitrators.

In this sense, the Brazilian and transnational judicial approaches to the New York Convention's basic framework regarding the enforcement of arbitral awards are very similar. As a general rule, both demonstrate a pro-arbitration bias and openness to foreign decisions.

3.2 The Public Policy Exception to Enforcement

Turning to specific grounds for denial of enforcement, the treatment given so far by the Superior Court of Justice to the public policy exception is particularly worthy of analysis. This provision not only contains a supranational standard of crucial importance to the New York Convention system but also has been frequently relied upon by the parties opposing recognition of foreign awards in Brazil. It thus represents a useful tool in evaluating Brazil's acceptance of the Convention, as well as the

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de Cereais e Defensivos Agrícolas Ltda. (S.T.J., SEC No. 507, Relator: Gilson Dipp, 18.10.2006, S.T.J.J.), and *First Brands do Brasil Ltda.* v. *STP – Petroplus Produtos Automotivos S.A. PPA* (S.T.J., SEC No. 611, Relator: João Otávio de Noronha, 11.12.2006, S.T.J.J.).

[14] *First Brands do Brasil Ltda.* v. *STP – Petroplus Produtos Automotivos S.A. PPA*, supra n. 14.

[15] *Union Europeénne de Gymnastique* v. *Multipole Distribuidora de Filmes Ltda*. (S.T.J., SEC No. 874, Relator: Francisco Falcão, 19.04.2006, S.T.J.J.).

[16] *GuidoSimplex – Società in Nome Colletivo di Giancarlo Venturini* v. *Cavenaghi Cavenaghi e Companhia Ltda*., supra n. 14.

[17] See, e.g., *Litsa Líneas de Transmisión del Litoral S.A.* v. *SV Engenharia S.A* (S.T.J., SEC No. 894, Relator: Nancy Andrighi, 20.08.2008, S.T.J.J.), *Spie Enertrans S.A*. v. *Inepar S.A. Indústria e Construções* (S.T.J., SEC No. 831, Relator: Arnaldo Esteves Lima, 03.10.2007, S.T.J.J.).

[18] *Bouvery International S.A.* v. *Irmãos Pereira Comercial e Exportadora Ltda.* (S.T.J., SEC No. 887, Relator: João Otávio de Noronha, 06.03.2006, S.T.J.J.).

way national case law fits into the interpretive trends of the public policy standard throughout the world.

Transnational practitioners draw a distinction between purely domestic and international public policy (*ordre public à usage international*). The former is deemed to apply to the relations established exclusively in the national setting, whereas the latter pertains to a country's international relations. Hence, the range of matters encompassed by international public policy is narrower than that belonging to the domestic one.[19] In foreign jurisdictions, many courts have embraced this distinction, applying the more limited international public policy test when interpreting Article V(2) of the New York Convention (Redfern and Hunter, 2004; Sanders, 1979; van den Berg, 1981; Kleinheisterkamp, 2005; Cole, 1986).[20]

In Brazil, this distinction has not been acknowledged in the cases adjudicated so far. As a matter of fact, one of the first decisions issued by the Superior Court of Justice in an enforcement proceeding signaled that the broader meaning of public policy – the one involving domestic concerns – would be adopted.[21]

Nonetheless, the precedents that followed employed a restricted conception of the public policy test, even though no reference has been made to the notion of international public policy. Several cases have recognized that the situations triggering application of Article 39 of the Arbitration Act (corresponding to Article V(2) of the Convention) are to be confined to a very limited set.

More specifically, on three occasions the Court has refused to regard as a violation of public policy the argument that the party requesting enforcement failed to comply with a contractual obligation in the first place (the so-called *exceptio non adimpleti contractus*). This exception, which the parties cannot circumvent in the domestic setting, was deemed not included among the grounds for denial of enforcement. Therefore, application of this exception would exceed the Court's powers when scrutinizing a foreign award.[22]

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[19] According to Recommendation 1(c) of the Final Report on Public Policy of the ILA Committee on International Arbitration (Resolution 2/2002), "the expression international public policy (. . .) designate(s) the body of principles and rules recognized by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy)."

[20] For a survey of the court decisions, see the Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards of the ILA Committee on International Arbitration (London Conference Report, 2000).

[21] In *Thales Geosolutions Inc.* v. *Fonseca Almeida Representações e Comércio Ltda.*, (S.T.J., SEC No. 802, Relator: José Delgado, 19.09.2005, S.T.J.J.), the Court attempted to draft a list of matters considered to belong to the public policy test, including all Constitutional, Procedural, Criminal, Administrative, and Family Law, among others. Never being applied, the list has been in practice abandoned.

[22] See *Thales Geosolutions Inc.* v. *Fonseca Almeida Representações e Comércio Ltda*, supra n. 22, *Grain Partners SPA* v. *Oito Exportação e Importação de Cereais e Defensivos Agrícolas Ltda.*, supra n. 14, *International Cotton Trading Limited ICT* v. *Odil Pereira Campos Filho* (S.T.J., SEC No. 1210, Relator: Fernando Gonçalves, 20.06.2007, S.T.J.J.).

Additionally, in *Mitsubishi Electric Corporation*, the Court held that parallel proceedings on the same subject matter of the arbitration, pending before a state court at the time enforcement is sought, does not hinder the recognition of the foreign award under the public policy clause.[23] This ruling brought an end to an old judicial inconsistency over the question by repealing the rationale supporting the contrary precedents.[24] Similarly, in *First Brands do Brasil* the Court has recognized that an action to set aside an award pending in Brazil does not represent an obstacle to the enforcement of the arbitral decision.[25]

The Superior Court of Justice has also rejected several contentions that an award was contrary to public policy due to a violation of due process. For example, in *Spie Enertrans*, the party that entered into the arbitration agreement was later acquired by another company (Inepar S.A.), which thereby assumed the former's obligations. When a dispute arose, the successor company took part in the arbitration proceedings, but raised the question that it had not signed the arbitral convention, and an express manifestation of its willingness to be bound by the agreement was essential. The arbitral tribunal rejected the contention and issued an award in favor of the other party (Spie Enertrans).

During enforcement proceedings, Inepar invoked the same arguments and opposed recognition of the foreign award on public policy/due process grounds. The Court rejected the defendant's point of view, stating that Inepar had succeeded the incorporated company in all its rights and obligations – including the arbitration agreement. Thus, no breach of due process or public policy had occurred, especially considering that Inepar had participated in the arbitral proceedings. Having amply debated the jurisdiction question as well as the merits, Inepar had been able to present his case before the arbitrators and therefore could not allege violation to the right to a legal defense.[26]

By the same token, in the *Grain Partners* case the Court refused a contention that the arbitral tribunal had breached the defendant's right to counsel or to have a proper legal defense, thus being contrary to public policy. Oito Exportação argued that the arbitral proceedings were extremely costly, which impeded the party from nominating its arbitrator and later appealing against the award. The judges granted enforcement, holding that the parties not only had freely opted to enter into the arbitration agreement but also had been informed of the proceedings' initiation and presented their defense. Hence, there was no violation to the due process clause.[27]

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[23] *Mitsubishi Electric Corporation* v. *Evadin Indústrias Amazônia S.A.* (S.T.J., SEC No. 349, Relator: Eliana Calmon, 21.03.2007, S.T.J.J.).

[24] Prior to *Mitsubishi*, there were precedents issued on enforcement proceedings of foreign court decisions that both granted and denied recognition when parallel proceedings on the merits were pending before a Brazilian court. See, e.g., *Philipe Gallo* v. *Maria Augusta Gallo* (S.T.J., SEC No. 819, Relator: Humberto Gomes de Barros, 30.06.2006, S.T.J.J.); *Giuseppe Vaglio* v. *Daniela Montenegro Messeder* (S.T.F., SEC No. 7209, Relator: Marco Aurélio, 30.09.2004, S.T.F.J.).

[25] *First Brands do Brasil Ltda.* v. *STP – Petroplus Produtos Automotivos S.A. PPA*, supra n. 14.

[26] *Spie Enertrans S.A.* v. *Inepar S.A. Indústria e Construções*, supra n. 18. See also *Litsa Líneas de Transmisión del Litoral S.A.* v. *SV Engenharia S.A.*, supra n. 18.

[27] *Grain Partners SPA* v. *Oito Exportação e Importação de Cereais e Defensivos Agrícolas Ltda.*, supra n. 14.

The due process/public policy challenge has been rejected not only where the defendant had actually presented his defense before the arbitral tribunal. Provided that the parties had been given proper notice of the arbitration proceedings, that is, had been granted full *opportunity* to participate in the process and present their case, albeit not making use of it, the Court has held that enforcement is to be granted to the foreign award.

In *Union Europeénne de Gymnastique*, the arbitral tribunal entered a default judgment against the defendant, Multipole, who later opposed recognition of the award in Brazil arguing that he had not received proper notice of the arbitration. Having found evidence that the respondent had been notified when the proceedings were initiated, as well as when the hearings took place, the Court recognized the foreign award. Neither did it matter that the notice letter did not take the form required by the Brazilian law. As long as the notice enables the party to present an adequate defense before the arbitrators, it does not trigger the public policy exception, even though the party remains silent.[28] It should be underscored that this restriction to the public policy clause is expressly dictated by the Arbitration Act (Article 39, §).[29]

In light of the foregoing precedents, it is possible to draw the conclusion that Brazilian case law favors an overall narrow interpretation of the public policy standard. The vast majority of defenses relying on this provision have been rejected by the Court as being eventual attempts to reexamine the merits of the arbitral proceedings. In particular, the due process clause has been construed so as to confine its scope to the basic principles of a fair hearing and to avoid the domestic procedural rules and formalities playing a decisive role in enforcement proceedings.

Accordingly, it is fair to say that the national approach fits into the basic framework of the transnational interpretation of the Convention's Article V(2), despite the domestic indifference to the notion of international public policy. The Superior Court of Justice has not only restrained itself when handling the public policy provision but also limited the application of the due process clause to offenses of basic standards of natural justice, as have a number of courts of foreign jurisdictions (Mantilla-Serrano, 2005).[30] For example, it is generally accepted in the international setting that the notice of the arbitrators' appointment or of the arbitration proceedings required by Article V(1)(b) of the Convention does not have to follow the specific form required by the national law for domestic court or arbitral proceedings. Also, default has not been deemed a bar to enforcing the award, provided that the party has been properly notified (van den Berg, 2003).

That being said, it does not follow that Brazilian judges have squarely rejected all defenses based on public policy grounds. The Superior Court of Justice has found a

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[28] *Union Europeénne de Gymnastique* v. *Multipole Distribuidora de Filmes Ltda*., supra n. 16. See also *International Cotton Trading Limited ICT* v. *Odil Pereira Campos Filho*, supra n. 23.

[29] "Service of a party domiciled or resident in Brazil, according to the arbitration agreement or the law of the country where the arbitration was held, shall not be considered a violation to the national public policy. Even service by mail with proof of receipt is admitted, provided that it grants the Brazilian party reasonable time to present his defense."

[30] See, again, the survey portrayed in the ILA Interim Report on Public Policy, supra n. 21.

violation of this clause in two cases where enforcement was ultimately denied. Since both cases deal more closely with the issue of the form of the arbitration agreement, they will be analyzed in a separate section (see Sect. 3.3).

Apart from that, the most sensitive issue relating to the public policy exception seems to be the enforcement of foreign awards that lack sufficient reasoning.

Brazilian law, like the legislation of many other countries belonging to the Civil Law tradition, requires national judges in any case to provide the reasons on which they base their decisions. The Federal Constitution establishes that obligation, which is seen as a fundamental right of the parties and a natural component of the due process clause (Article 93, IX[31]).

Following this constitutional provision, the Code of Civil Procedure states that the reasoning and analysis of the factual and legal questions are an "essential requisite" of court judgments (Article 458, II). Likewise, the Arbitration Act mandates arbitrators in Brazil to provide reasons for the award and also state whether the decision was *ex aequo et bono* (Article 26, II).

For many years, this legal framework has led the Supreme Court to some uncertainty when adjudicating enforcement claims of foreign decisions that lack sufficient reasoning. The Supreme Court's record here has been mixed, refusing to recognize some judgments on this basis but granting recognition to others.[32] This scenario prevented clear assessments of the case law on the issue. However, after jurisdiction to hear enforcement claims was transferred to the Superior Court of Justice, the judges had two opportunities to decide whether foreign judgments that lacked sufficient reasoning, issued by judicial courts, could be enforced in the country. In both cases, the Court held that recognition of a decision without a statement of reasons would be contrary to the public policy, and denied enforcement.[33]

These more recent precedents of the Superior Court of Justice indicate that foreign arbitral awards lacking explicit rationale may also face obstacles to recognition in Brazil. Indeed, this was reinforced by the Court's recent decision in *Tremond Alloys and Metals Corp*.

Tremond Alloys, an American company, and Metaltubos, a Brazilian enterprise, were parties in a sales contract of chemicals. When Metaltubos did not comply with its obligations under the agreement, arbitration proceedings were initiated under the American Arbitration Association (AAA). Despite having been notified of the proceedings, Metaltubos did not present a defense. The arbitral tribunal found that a breach of contract had occurred and ordered Metaltubos to reimburse Tremond

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[31] "All judgments issued by the Judiciary Branch shall be public, and all decisions shall be given reasons, under penalty of nullity, (. . .)."

[32] See, e.g., *Foreign Trade Organization for Chemical and Foodstuffs Geza* v. *Fenelon Machado S.A. Exp. Imp.* (S.T.F., SEC No. 3977, Relator: Francisco Rezek, 01.07.88, S.T.F.J.), *Ana Paula Maia Camargo* v. *André Boer* (S.T.F., SEC No. 5661, Relator: Marco Aurélio, 19.05.1999, S.T.F.J.).

[33] See *Universal Marine Insurance Company Ltd.* v. *União Novo Hamburgo Seguros S.A.* (S.T.J., SEC No. 879, Relator: Luiz Fux, 02.08.2006, S.T.J.J.); *MFF* v. *PRF* (S.T.J., SEC No. 880, Relator: Fernando Gonçalves, 18.10.2006, S.T.J.J.).

Alloys for the losses it had incurred, plus interest and the costs of the arbitration process.

Tremond Alloys then sought enforcement of the award in Brazil, to which Metaltubos resisted, arguing, *inter alia*, that the arbitral judgment was invalid because the arbitrators had not provided the reasons on which their ruling was based. The Superior Court of Justice found that the decision contained sufficient reasoning and therefore recognized the award under scrutiny. Nevertheless, the Court also acknowledged that under Article 26 of the Arbitration Act, foreign arbitral awards have to be accompanied by explicit reasons to be enforceable in the country.[34]

In accordance with this precedent, under the current circumstances, the Court is likely in future cases to deny enforcement to a foreign award that is not supported by sufficient reasoning. Relying on the obligation set in Article 26, II, of the Arbitration Act to national arbitral decisions, the Court seems to regard such an award to be contrary to public policy.

However, this outcome would not be desirable, and the reasoning underlying it must be criticized. Article 26, II, belongs to a chapter of the Arbitration Act applicable only to national arbitral awards, that is, those rendered in Brazilian territory (Article 34, §). The right to be given the reasons that justified a decision is certainly of paramount importance in the domestic legal order, as shown by the set of provisions establishing it, especially the Federal Constitution. Therefore, it may constitute a public policy matter within the national boundaries. Despite that, this right does not belong to the international public policy, to the body of principles and rules recognized in Brazil that apply to its relations with foreign countries and judgments.

In the international setting, arbitral awards that lack a statement of reasons are commonly deemed valid, particularly in Common Law nations, where it is customary that such awards are rendered. Many countries do not require the arbitrators to state the grounds for the award, so long as the parties have agreed to dispense with reasons.[35] Similar provisions can be found in many arbitral institutions' rules, as well as in the UNCITRAL Model Law.[36] Such a requirement, therefore, does not belong to the procedural public policy in the international community. Foreign jurisdictions where arbitral awards are required under local law to contain the reasons on which the award is based have been relying precisely on the distinction

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[34] *Tremond Alloys and Metals Corp.* v. *Metaltubos Indústria e Comércio de Metais Ltda.* (S.T.J., SEC No. 760, Relator Felix Fischer, 19.06.2006, S.T.J.J.).

[35] See, e.g., the English Arbitration Act (Article 52, IV), the German Code of Civil Procedure (ZPO, Article 1054, II), the Spanish Arbitration Act (Article 37, IV), the Austrian Code of Civil Procedure (ZPO, Article 606, II), the Danish Arbitration Act (Article 31, II), the Chilean Arbitration Act (Article 31, II).

[36] See, e.g., the rules of the ICDR/AAA (Article 27, II), the London Court of International Arbitration (Article 26, I), the Inter-American Commercial Arbitration Commission (Article 29, c), and the Commercial Arbitration and Mediation Center for the Americas (Article 29, II). See also the UNCITRAL Model Law on International Commercial Arbitration (Article 31, II) and its Arbitration Rules (Article 32, III).

between purely domestic and international public policy to enforce international arbitral awards that lack such reasoning, so long as the awards are valid under the law of the country where they were made (van den Berg, 1981; Fouchard, Gaillard, & Goldman, 1999).[37]

Hence, the absence of a statement of reasons in the award is not deemed to be part of the public policy standard of Article V(2), according to the interpretation given to this standard by the courts of the signatory countries.[38] The Superior Court of Justice should not disregard this practice when enforcing a foreign arbitral award, especially in light of the international nature of the dispute at issue.[39] Arguably, if Brazilian judges acknowledged the distinction between domestic and international public policy and employed the latter test,[40] they would tend to move the case law toward the same conclusion reached by the community of states members of the New York Convention. And local judges will be soon called upon to issue judgment on the matter again, since at least one enforcement claim of a foreign arbitral award without reasons is now pending before the Court.[41]

3.3 Written Form of the Arbitration Agreement

As mentioned in the precedent section, the Superior Court of Justice regarded enforcing foreign arbitral awards as being contrary to public policy on two occasions (*Plexus Cotton* and *Oleaginosa Moreno*). In both, the controversy was centered on the existence and validity of the arbitration agreement. The point under debate was

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[37] See, e.g., the Belgian case *Inter-Arab Investment Guarantee Corporation* v. *Banque Arabe et Internationale d'Investissements* (22 Y.B. COM. ARB. (1997) 643), the Dutch *Isaac Glecer* v. *Moses Israel Glecer* (21 Y.B. COM. ARB. (1996) 635), the French *Denis Coakley Ltd.* v. *Sté Michel Reverdy* (9 Y.B. COM. ARB. (1984) 400), and the Italian *Bobbie Brooks Inc.* v. *Lanificio Walter Banci s.a.s.* (4 Y.B. COM. ARB. (1979) 289). A German court further reasoned that "in the case of foreign arbitral awards, it must be borne in mind that the deciding arbitrators come from different legal cultures and follow the customs of their procedural system when writing reasons" (reported in 31 Y.B. COM. ARB. (2006) 640).

[38] Lack of reasons may only constitute a bar to enforcement under Article V(1)d of the Convention, if such a decision is invalid under the arbitration agreement or the law of the country where the arbitration took place, and this defense is invoked by the respondent. See the Spanish Case *X.S.A.* v. *Y.* (11 Y.B. COM. ARB. (1986) 523).

[39] According to the ILA Committee on International Commercial Arbitration, "an enforcement court should look at the practice of other courts, the writings of commentators, and other sources, to determine to what extent a principle that is submitted to be fundamental is regarded as fundamental by the international community. This should facilitate consistency in the application of the public policy test" (Final Report on Public Policy, supra n. 20).

[40] As recommended by the International Law Association in the Recommendation 1(b) of the Final Report on Public Policy, supra n. 20.

[41] *Kanematsu USA Inc.* v. *ATS – Advanced Telecommunications Systems do Brasil Ltda.* (S.T.J., SEC No. 885, Relator: Francisco Falcão).

the form requirements of the agreement to arbitrate, a subject that gives rise to controversies across the board.[42]

Notably, the Court dealt with this issue for the first time before those two cases were decided and it granted enforcement to the arbitral award. In *L'Aiglon* v. *Têxtil União*, the Brazilian company Têxtil União S.A. entered into two agreements to purchase cotton from the Swiss company L'Aiglon S.A. After some time during which both parties complied with the contracts, Têxtil União stopped making the payments. L'Aiglon then initiated arbitral proceedings before the Liverpool Cotton Association (now International Cotton Association Ltd.), based on arbitration clauses included in the two purchase contracts. Ultimately, an award was issued in favor of the Swiss seller.

L'Aiglon then sought enforcement of the arbitral award in Brazil. The Brazilian company opposed recognition, contending essentially that it had never agreed to submit any disputes arising from the contracts to the arbitral tribunal. It conceded that the agreements contained an arbitration clause, but argued that the parties had not signed the documents. Thus, the arbitral award could not be enforced in the country, since an explicit acceptance of the arbitral clause was a *sine qua non* of the arbitrators' jurisdiction.

The Court rejected the respondent's arguments, stating that Têxtil União had appeared before the arbitral tribunal, presenting its case. Additionally, the defendant did not question the arbitrators' jurisdiction at any time during the arbitral proceedings. The judges further reasoned that the parties had performed under the contracts for some time and that in the international trade arena, the common practice is to submit contractual disputes to arbitration. Specifically, conflicts arising from cotton transactions are ordinarily taken to the Liverpool Cotton Association, a traditional institution in that market. Based on these reasons, the Court held that the respondent had accepted the agreement to arbitrate, even if tacitly, and therefore granted enforcement to the foreign award.[43]

Several months later, the Court was called upon once again to decide whether an arbitral award rendered by the Liverpool Cotton Association could be enforced in the country, in *Plexus Cotton Limited* v. *Santana Têxtil Ltda*. The parties entered into two agreements whereby Santana Têxtil would purchase Nigerian cotton from the British enterprise Plexus. Having disagreed with the goods' quality, the buyer refused to make the payments. Plexus then submitted the dispute to the Liverpool Cotton Association, where both parties nominated arbitrators and presented their cases. The arbitral tribunal found that Santana Têxtil had breached the contracts and condemned it to indemnify Plexus. The losing party unsuccessfully appealed against the award.

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[42] As recognized by the UNCITRAL in its Recommendation regarding the interpretation of article II(2), and article VII(1), of the New York Convention, adopted on 7 July 2006 at its 39th session, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006 recommendation.

[43] *L'Aiglon S.A.* v. *Têxtil União S.A.* (S.T.J., SEC No. 856, Relator: Menezes Direito, 18.05.2005, S.T.J.J.).

Plexus first attempted to enforce the award in Brazil at the time the Supreme Court still had jurisdiction over the subject matter. The claim was dismissed because the plaintiff had not presented evidence of the arbitration agreement's existence.[44]

In 2005, the British company filed a second enforcement claim, now before the Superior Court of Justice. Santana Têxtil opposed, alleging first that recognition was prevented by *res judicata* resulting from the prior rejected action. Santana Têxtil also argued that it had not signed the purchase and sales agreement that supposedly contained the arbitration clause and therefore had not agreed to take the dispute to the Liverpool Cotton Association.

The Court agreed with the defendant, stating that the parties had not entered into an arbitration agreement. First and foremost, the contracts were signed only by Plexus and thus did not contain the buyer's signature. This was significant since under Brazilian law an essential requirement of arbitration agreement is that it be in written form (Arbitration Act, Article 4, § 1), showing an "express and manifest" willingness of the parties to submit their conflict to the arbitrators. Even if, as asserted by the arbitral tribunal, the English law regards an arbitration agreement not signed by both parties as valid and binding, there is no similar provision in Brazilian law.

The judges added that even though Santana Têxtil had nominated an arbitrator and presented a defense on the merits, it had nonetheless formally opposed the arbitral tribunal's jurisdiction each time it appeared before the arbitrators. Thus, the defendant never agreed to submit the dispute to the Liverpool Cotton Association, even tacitly.

In summary, the Court found that clear evidence of the defendant's voluntary intention to arbitrate the conflict was lacking, which prevented the award's enforcement due to a violation of public policy. Regardless of that reasoning, however, the Court decided to dismiss the case on *res judicata* grounds, due to the final judgment previously rendered by the Supreme Court on the first recognition proceedings.[45]

The last case on the matter, *Oleaginosa Moreno* v. *Moinho Paulista Ltda.*, was decided 3 months later. Oleaginosa Moreno sought enforcement of an arbitral award issued in the United Kingdom by the Grain And Food Trade Association (GAFTA) against Moinho Paulista Ltda. The plaintiff alleged that the defendant had breached four purchase contracts for wheat entered into by the parties, leading the Argentinean seller to initiate arbitral proceedings before the GAFTA. The arbitral tribunal rendered a decision in favor of Oleaginosa Moreno.

In its defense, Moinho Paulista made two arguments. First, that the parties had not entered into purchase and sales agreements, and that the contracts on which the award was based were made orally by a person who did not represent it. Second, Moinho Paulista argued that the arbitral tribunal lacked jurisdiction to resolve the

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[44] *Plexus Cotton Limited* v. *Santana Têxtil S.A.* (S.T.F., SEC No. 6753, Relator: Maurício Corrêa, 13.06.2002, S.T.F.J.).

[45] *Plexus Cotton Limited* v. *Santana Têxtil S.A.* (S.T.J., SEC No. 967, Relator: José Delgado, 15.02.2006, S.T.J.J.).

conflict, since the parties had not entered into a written arbitration agreement, and the defendant had never consented during the arbitration to the jurisdiction of the GAFTA over the conflict.

The claimant replied to the second argument stating that the parties bound themselves to an arbitration agreement by several telex exchanges.

The Court refused to discuss the first of the defendant's arguments, holding that the issue of the lack of representation was already decided by the arbitrators and could not be reexamined by the enforcing court. Nonetheless, the judges shared the defendant's opinion as to the second argument. In the view of the Court, the fact that the main contracts were made orally posed no problem. But according to the Arbitration Act (Article 4, § 1), the agreement to arbitrate must be in writing, either included in the purchase contract or contained in a separate document or exchange of letters referring to the main contract.[46] The Court acknowledged that there had been a telex exchange, but also gave weight to the fact that it took place between two brokers representing plaintiff Oleaginosa Moreno.

As a result, the Court found no evidence that a written arbitration agreement was entered into by the parties. The judges conceded that they would have conceivably recognized such an agreement, provided that Moinho Paulista had taken part in the arbitral proceedings without questioning the arbitrators' jurisdiction, thereby tacitly accepting the arbitral solution. However, the defendant appeared before the GAFTA alleging, from the outset, that the tribunal lacked jurisdiction to adjudicate the dispute. Based on that, the Court denied enforcement to the award on public policy grounds.[47]

In analyzing the foregoing case law, the first point to be noted is that it does not provide a definite position of the Court as to the form requirements of the arbitration agreement when enforcement of a foreign award is sought. The three precedents issued so far are not sufficient to portray a clear judicial view of the many nuances this subject encompasses. In fact, it seems that the Court is still struggling to find a coherent solution to some of the problems posed by the forms of the agreement to arbitrate.

This is not to say that no rationale can be drawn from the existing case law. For the present, the opinions provided in the three judgments show that the Court regards the written form of the arbitration agreement as an essential requisite for enforcement. In principle, the signature of both parties to the contract is required (*Plexus Cotton*), but an exchange of correspondence between them may also evidence a written agreement to arbitrate (*Oleaginosa Moreno*). The arbitration clause may appear either in the main contract or in a subsequent document which refers to the original contract. Furthermore, the main contract can have been made orally, as long as the arbitration agreement has been concluded in writing (*Oleaginosa Moreno*).

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[46] The Court here quoted *en passant* Article II(2) of the New York Convention, in one of the very few occasions in which any reference was made to this treaty on enforcement proceedings.

[47] *Oleaginosa Moreno Hermanos Sociedad Anónima Comercial Industrial Financeira Inmobiliaria y Agropecuaria* v. *Moinho Paulista Ltda.* (S.T.J., SEC No. 866, Relator: Felix Fischer, 17.05.2006, S.T.J.J.).

Finally, in the absence of a written arbitration clause, the Court also seems to permit as a valid agreement to arbitrate one that is impliedly accepted by the parties. In particular situations, the Court takes into account the parties' behavior conveying the intent to submit their dispute to arbitral resolution, even though this mutual aim has not been expressed in written form (*L'Aiglon*). In other words, the Court gives weight to a tacit acceptance of the arbitration agreement.

Nonetheless, the case law still leaves undefined the extent and requirements of the tacit acceptance doctrine outlined by the Court. In particular, it is unclear whether this doctrine refers to a situation where the proposed arbitration agreement is not explicitly accepted by one of the parties, which however performs under the container contract, or designates the case in which – regardless of what has happened before – the parties appear before the arbitrators, presenting their case without raising a jurisdictional question.

Indeed, a clearer understanding of tacit acceptance is necessary to answer very pragmatic questions. In order for the Court to apply this doctrine, does it suffice to demonstrate the prior compliance of the parties with the main contract (fact deemed relevant in *L'Aiglon*) or is it necessary that they submit themselves to arbitration by taking part in the proceedings without questioning the arbitrators' jurisdiction (as *Oleaginosa Moreno* suggests)? Is it sufficient for a party who has not expressly acceded to a written agreement to contest the jurisdiction in the arbitration proceedings so as to prevent the future enforcement of an award (*Plexus Cotton*)? If so, should a simple objection to the arbitrators' jurisdiction ban tacit acceptance altogether, even if the parties had performed under the underlying contract? It does not seem reasonable to conclude that the party has impliedly accepted all contractual terms but one (Kaplan, 1999).

The case law of other signatory parties to the New York Convention has been dealing with these and other similar questions regarding the form of the arbitration agreement for a long time. Courts and commentators around the world have been debating the myriad of problems surrounding the interpretation of Article II(2), with regard, for instance, to the means of communication employed by the parties, incorporation by reference, subsequent contract, customs of trade, third non-signatory parties,[48] use of brokers, and indirect and tacit acceptance (Sanders, 1979; van den Berg, 1981/2001; Gaja, 1991; Hanotiau, 2007; Harnik, 1983).[49]

These problems stem from the complexity and constantly evolving forms of international commercial transactions. As a result, a number of national arbitration

[48] With regard to this matter, it was noted in the previous section that the Court has decided in *Spie Enertrans* and *Litsa Líneas de Transmisión del Litoral S.A.*, supra n. 18, that a third party who succeeds the original signatory of a contract becomes bound to the arbitration agreement contained therein. In both of these cases, the Court deemed irrelevant the fact that the defendant had opposed the arbitrators' jurisdiction during the arbitral proceedings.

[49] See also the UNCITRAL Report of the Working Group II (Arbitration and Conciliation) (36th session, New York, 4–8 March 2002), available at http://uncitral.org

laws have adopted more liberal standards for assessing the validity of the arbitration agreement, such as the German Code of Civil Procedure (Article 1031),[50] the English Arbitration Act (Article 5), the Spanish Arbitration Act (Article 9), the Netherlands Arbitration Act (Article 1021) and the Swiss Private International Law Act (Article 1781). To that end, the UNCITRAL has also amended Article 7 of its Model Law on International Commercial Arbitration and removed the reference to an agreement "in writing" from its draft revised Arbitration Rules.[51]

Additionally, bearing in mind the controversies and difficulties emerging from Article II(2) of the Convention, in 2006 the UNCITRAL issued a recommendation that this provision be construed "recognizing that the circumstances described therein are not exhaustive" and that Article VII(1) be applied "to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement."[52]

So far, Brazilian case law has not taken into account the debates held in the international arena concerning the interpretation of Article II(2) and its role in enforcement proceedings. The problem of the form requirements of the arbitration agreement has been dealt with in an insulated fashion, with no regard to developments reached abroad. The Court has also shown hesitation in bringing to the discussion the practices embedded in international commerce and arbitration: while in *L'Aiglon* it gave weight to the customary resort to the Liverpool Cotton Association to resolve international disputes within the cotton market, this very fact was deemed irrelevant in *Plexus Cotton*.

The advantages of deepening the relationship between the domestic decision-making and the international background in relation to the form of the arbitration agreement seem to be obvious. Among the grounds for refusal of enforcement prescribed by Article V, the invalidity of the arbitration agreement is one of the most sensitive to the varying practices employed by international trade players. And the broadening distance between those practices and the language employed in Article II(2) ("arbitration agreement *signed* by the parties or contained in an *exchange* of letters of telegrams") is widely recognized and combated worldwide.

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[50] "(1) The arbitration agreement shall be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement. (2) The form requirement of Sect. 1 shall be deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and – if no objection was raised in good time – the contents of such document are considered to be part of the contract in accordance with common usage. (3) The reference in a contract complying with the form requirements of Sects. 1 or 2 to a document containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract." "(6) Any non-compliance with the form requirements is cured by entering into argument on the substance of the dispute in the arbitral proceedings."

[51] See the UNCITRAL Working Group II documents A/CN.9/WG.II/WP.147, para. 7, and A/CN.9/619, paras. 25–31, available at http://uncitral.org.

[52] See the UNCITRAL 2006 Recommendation, supra n. 43.

This response has been given, among others, through an expansive interpretation of Article II(2)'s language or the application of more liberal requirements on the basis of Article VII(1).[53] As an example, Brazilian case law could profit from the latter, relying on the *more-favorable-right-provision* to apply the law chosen by the parties or of the country where the award was made when accessing the arbitration agreement's validity and existence. Perhaps, it may lead a situation like the one in *Plexus Cotton* to a different outcome.

4 Real Adoption of the New York Convention: A Step Forward

As noted in the beginning of this paper (see Chapter 2) and evidenced by the foregoing analysis (see Chapter 3), Brazilian practice, regarding the recognition and enforcement of foreign arbitral awards, has not embraced the New York Convention so far, even though this treaty has entered into force in the country in 2002. The national case law has been developing with virtually no regard for the most important legal document in the field of international commercial arbitration.

It is true that the Arbitration Act of 1996 reproduces the main framework of the Convention concerning the recognition of foreign awards and that some of the basic principles underlying that structure have been brought into play by the Court (see Sect. 3.1).

Nevertheless, the survey of domestic precedents also shows that, in many ways, Brazil has not profited from adopting a mainly insular standpoint when enforcing foreign arbitral awards. Specifically, the interpretation given so far to standards and rules that are highly linked to the international practices, such as the public policy provision and the form requirements of the arbitration agreement, lack connection to the global knowledge accumulated around the New York Convention. Also, the very Arbitration Act dictates that the international treaties of which Brazil is a member shall be given priority in governing enforcement proceedings (Article 34).

It is important to always bear in mind the supranational nature of the judgment brought to enforcement in the domestic court. The award is the result of an international commercial arbitration process, whose effectiveness is at stake in the recognition proceedings. This means that whenever enforcing foreign arbitral decisions, the national judges are necessarily confronted with the task of construing transnational rules. In interpreting the public policy clause or assessing the validity of the arbitration agreement, the Court has to tackle issues that are not confined to the internal legal system, but follow and share basic international patterns. The problems faced abroad are analogous to those presented in the domestic setting.

In that sense, the Brazilian practice would benefit significantly from broadening its legal interpretation to encompass the entire body of principles, policies, case

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[53] See, e.g., the Spanish cases *Kil Management A/S* v. *J. García Carrión, SA* (32 Y.B. COM. ARB. (2007) 518) and *Ionian Shipping Line Co. Ltd.* v. *Transhipping SA* (32 Y.B. COM. ARB. (2007) 532), and the German case reported in 32 Y.B. COM. ARB. (2007) 372.

law, debates, research, and commentaries that encircle the New York Convention. If national judges acknowledged that the Convention governs the recognition of foreign arbitral awards in the country, and brought its provisions into operation, they would bridge the gap between the domestic reasoning and the argumentative repertory, methods of legal inquiry, and set of legal materials employed in that Convention's interpretation worldwide.

In so doing, Brazilian case law would share the learning and achievements accumulated in 50 years of the New York Convention's history, as well as join the international community in the ongoing development of this treaty. This connection would be salutary not only as to issues that are to some extent settled across the board, such as narrowing the scope of Article V(2) to international public policy, or excluding the lack of reasons from this standard, but also with regard to debates that are very much alive, such as the form requirements of the arbitration agreement and tacit acceptance. Not to mention that the Court could rely on provisions not reproduced in the Arbitration Act, like Article VI, and the valuable *more-favorable-right-provision* of Article VII(1).

In a nutshell, the change in behavior described above would finally represent the adoption of the New York Convention in Brazil not only formally but also in substantive terms.

Needless to say, the New York Convention provisions are geared to connect the national reality of enforcement proceedings to the supranational atmosphere of commercial arbitration. The Brazilian strict reliance on domestic legislation and disregard for the New York Convention's transnational context, despite the similarities between the Arbitration Act and that Convention, has not been able to foster that relationship to the greatest possible and most desirable extent. The application of the Convention may turn the current domestically focused assessment into a more universal approach to the rules and standards that control recognition of foreign arbitral awards.

In addition, provided that Brazilian courts take into consideration the international experience related to the New York Convention, the chances of adhering or contributing to its uniform interpretation would increase.[54] The desirability of this outcome would be twofold. First, it would represent the final step in inserting Brazil in the international commercial arbitration context. Second, harmonization of the case law among the different signatory parties promotes the institutional reinforcement and the worldwide implementation of the treaty.

In fact, to be uniformly interpreted across the board is an obvious goal of a Convention that aims at favoring the international circulation of arbitral awards.[55]

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[54]The ILA Committee on International Commercial Arbitration encourages courts "to look to the practice of courts in other jurisdictions in relation to the application of public policy with a view to achieving a consensus and a consistent approach" (Final Report on Public Policy, supra n. 20).

[55]In the famous words of the US Supreme Court, "the goal of the Convention (. . .) was to encourage the recognition and enforcement of commercial arbitration agreement in international contracts and to *unify the standards* by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries" (*Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 (1974)).

The manner in which the New York Convention is interpreted by courts is the "main source of its effectiveness" (van den Berg, 1981).[56] This is the reason why the United Nations pointed out the "necessity for further national efforts and enhanced international cooperation to achieve universal adherence to the Convention and its uniform interpretation and effective implementation."[57]

Furthermore, provided that the Brazilian Superior Court of Justice incorporates the New York Convention's extensive background within its practice, this may contribute to reflecting on and building a strong and coherent national case law regarding the recognition of foreign arbitral awards under that treaty. This, in turn, would result in consistency and predictability, valuable features for the parties in the country and abroad.

By the same token, that incorporation would send an important positive message to the international players. It would signal that Brazil applies the international *jus commune* to enforcement proceedings rather than the generally less-known domestic legislation, and therefore is fully integrated into the commercial arbitration environment. All in all, this may strengthen the development of arbitration in the country, encouraging arbitration agreements involving Brazilian parties and increasing the number of awards brought to enforcement in the territory.

Undoubtedly, there is plenty of room for that transformation, since the 5-year-old case law is still embryonic with regard to a lot of issues that have been discussed for decades in the transnational setting.

5 Conclusion

The celebrated late adoption of the New York Convention in Brazil did not mean that this treaty became fully operative in the country. Although some of its provisions are indirectly applied through the Arbitration Act of 1996, which roughly replicates Articles IV and V of the Convention, the domestic judges have not yet relied on this international framework in enforcement proceedings.

This situation raises questions regarding the extent to which the Superior Court of Justice has been employing the necessary universal approach to the enforcement of foreign arbitral awards, and coping with the supranational standards of the New York Convention.

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[56] As stated by the ILA Committee on International Commercial Arbitration in its Final Report on Public Policy, supra n. 20, "greater consistency would lead to a better ability to predict the outcome of a public policy challenge, irrespective of the court in which enforcement proceedings are brought. This, in turn, should discourage speculative challenges and facilitate the finality of arbitral awards."

[57] General Assembly Resolution A/RES/62/65, 12.06.2007, following Resolution A/RES/61/33, 12.04.2006. See also Resolution 2205 (XXI), 17.12.66, which established the United Nations Commission on International Trade Law (UNCITRAL) with the objective of promoting the uniform interpretation of international conventions in the field of international trade.

The precedents issued so far show that the basic features of the Convention seem to have been embraced by the Court. Yet the case law still suffers from its disconnection with the transnational experience surrounding the Convention, for instance when interpreting the public policy provision or assessing the form requirements of the arbitration agreements.

Direct application of the New York Convention could remedy this deficiency, by enhancing the development of domestic case law with the insights derived from the extensive debates, research, and jurisprudence generated throughout the world. The results of such application could enable the Brazilian international arbitration practice to catch up with five decades of transnational development. At that point, perhaps, one could revive the slogan "fifty years in five" to describe the evolution of international arbitration in Brazil.

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Chapter 14
Explaining Transnational Rules: Discourses and Material Conditions When Implementing the Swedish Corporate Code of Conduct

Karin Jonnergård and Ulf Larsson-Olaison

Abstract An understanding of how regulatory reforms are explained and put into action is vital for understanding the diffusion as well as the effects of transnational rules. In this chapter we claim that two processes of interpretation take place as a rule is transferred from the international scene and implemented into a specific national context: first, a process to make the import of the rule understandable and, second, a process in order to explain the content of the rule and to apply it in the local context. In this chapter we focus on the first of these processes and investigate how a transnational device for regulating corporate governance, corporate governance codes, gets on the regulatory agenda and is explained as appropriate on a national level through appealing to international discourse of how problems should be defined and solved.

1 Introduction

For a transnational rule to be implemented and interpreted on a national level it has to be understandable. In other words, the reasons for the rule to come about have to be expressed and appear legitimated in the local context where it is meant to be applied. When importing a rule to a national context, two interconnected processes of sensemaking occur. First, in order to make it feasible to import a rule, the local conditions must be understood in a way that makes the rule appropriate to apply in this context. This implies that in order to legitimize import of a rule, either some local problems and/or some material conditions must be perceived to exist to which the rule applies. In addition, the norms behind the rule have to be perceived as legitimate. Second, after the import, as the rule is implemented, it has to be explained and its content argued for. This second process of interpretation is partly dependent on the first one. If the rule is understood as appropriate for solving a problem in the specific national context, then its content is easier to explain and legitimize. While

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most of this book focuses on the second process of interpretation, in this chapter we will focus on the first process, i.e. how import of a rule gets on the regulatory agenda and how an understanding is built of the local context as appropriate for the import of certain rules. We will do this by introducing the case of the import of a code of corporate governance in Sweden and describe how the perception of ownership of Swedish public listed companies is sharpened in order to suit the transnational rules of minority protection and the effect of this on the content of the implemented rules.

Code of corporate governance is a British invention, which was widely diffused to different legal systems during the 1990s. It is one of several regulatory devices for gaining convergence of different corporate governance systems in order to ease the global integration of financial and product markets (McCann, 2007; Oxelheim, 1996; Oxelheim & Randoy, 2003). Through implementing similar rules for the governance of listed companies, the information and evaluation by international investors of these companies are facilitated. In this way, codes of corporate governance are similar to what Goode (1997 p. 2) defined as "transnational commercial laws", i.e.

> . . .law which is not particular to or the product of any one legal system but represents a convergence of rules drawn from several legal systems or even, in the view of its more expansive exponents, a collection of rules which are entirely anational and have their force by virtue of international usage and its observance by the merchant community. . .

Within the EU, the corporate governance code has been legally enforced, as each country is required to have such a code as part of its regulation of the stock market (2005/162/EG). The contents of these codes are, however, not legally regulated, but part of the national self-regulation system. Regulating the existence, but not the content, of a code opens up for variations in both the rules included and the understanding of why they are appropriate in a certain context. In other words, the development of codes of corporate governance includes both processes of interpretation mentioned in the first paragraph above.

Transnational regulations are not merely motivated by local demands, but furthermore imposed by negotiations and discussions on the international level. Our assumption is that import of regulatory reforms is supported by agendas emerging from the international arena about what is right and what is wrong. In other words, the international agendas are important for the process of making a rule appropriate to a specific context. Our intention is to investigate how these international agendas may make import of rules understandable and thereby influence local action.

The rest of the chapter is organized in the following way: First, we develop a frame of reference for how the agenda setting on the national level is influenced by the international development in the area, and how and why a code of corporate governance appeared as a solution to the regulative problems within the Swedish corporate governance system. Second, we investigate whether the assumptions behind the agenda setting that led to the code hold true. Third, we discuss the extent to which these assumptions are reflected in the code. We end the chapter with a discussion about the relation between perceived problem, actual situation and solutions in a situation of regulatory imports.

2 Frame of Reference

In order to investigate how an understanding is built of the local context as appropriate for the import of certain rules, we first have to gain knowledge of how the issue arrived on the regulatory agenda. To do this we apply the so-called agenda-setting theory developed within political science. This theory has been developed to describe political decision-making in the United States during the 1980s. In order to be applicable to the regulatory state of today, we complement the agenda-setting theory with the idea that central legal regulation has been exchanged for the regulatory state and the so-called programmes for regulating certain sectors of society. We take this notion a step further and claim that, regarding transnational regulation, these programmes are international rather than national. They imply a certain rhetoric that may be used to build an understanding of the appropriateness of a certain rule. In other words, the programmes give a basis for legitimizing import of a rule by defining either some problems and/or some material conditions that motivate this import.

2.1 Putting the Corporate Governance Regulation on the Agenda

One classic theory of how an issue gets on the regulatory agenda is the agenda-setting theory (Kingdon, 1984, 1995). This theory is based on the garbage-can model (Cohen, March, & Olsen, 1972), which is a general social theory of problem-solving processes. It is built on the assumption idea that problems and solutions are disconnected streams of ideas that occasionally meet in problem-solving. A problem-solving process may therefore start with a solution looking for a problem to apply to, just as well as with the definition of a problem. Applied to political processes this implies streams of problems and solutions; politics and actors are partly separated and connected on occasions when windows of opportunity are opening up and the different streams coincide. The window of opportunity may open up due to a change in material or other conditions that influence the ideology or legitimacy of politicians (Kingdon, 1995, p. 172). Politics in this context have to do with managing the flow of actions carried out by politicians in order to be perceived as legitimate or to be re-elected. In its simplicity, the theory may give the impression that a certain amount of haphazardness is involved in the agenda-setting processes. However, in his original development of the theory Kingdon (1984) emphasizes that the political entrepreneurs, who are "willing to invest their resources in return for future policies they favor" (Kingdon, 1995, p. 204), are important for which, and in what way different, issues enter the political agenda. These entrepreneurs are usually actors a bit offside the centre of the political power, but may, of course, also be people in the centre of political power. O'Malley (2007), for example, shows convincingly how Tony Blair most skilfully uses release of information and structuring of issues in order to achieve a decision regarding the United Kingdom's involvement in the war with Iraq. The conclusion is that the influence a person may have on a political process rests on the ability to manage the different streams of problems and solutions in order to get an issue on the agenda.

The agenda-setting theory has been criticized for having concepts which are diffuse and difficult to operationalize and because profound qualitative, rather than quantitative, studies are needed in order to develop or confirm the theory (Soroka, 1999). Without criticizing the theory as such, recent research has pointed at a substantive complexity in the interactions between actors when different agendas are set (e.g. Hancher & Moran, 1989; Miller & Rose, 1992). In addition, one may question whether Kingdon's theory is context-dependent and less suitable in a neo-liberal European landscape than an American governmental structure during the 1980s. Two aspects of the theory will be highlighted here. First, the perception of problems and problem-solving models as more or less disconnected streams, i.e. they may exist in relative independence of each other and have to be connected by an occurrence or an entrepreneur. Second, the perception that changes in existing conditions (i.e. a problem) or politics is the trigger for setting new agendas. The first aspect we will, hopefully, confirm by discussing how different streams create an agenda. The second one we will more or less reject, or at least redefine, by stating that it is not changes in existing conditions that create agenda-setting and the consecutive regulation, but the perception of problems that are salient for political entrepreneurs and in popular societal discourses.

2.2 Putting a Code of Corporate Governance on the Agenda

Reformation of the public firms' governance through regulatory changes has been at the heart of the public agenda since the early 1990s. The EC company directives, and the changes therein, the OECD corporate governance code, the US Sarbanes-Oxley Act and the UK Combined Code, are examples of this wave of regulations. In Sweden, a new Companies Act and a first formal binding code of corporate governance have recently been issued. Much of the Swedish regulatory discourse in the area departs from a perception that a drastic change has occurred in ownership structures of the public firms and that Swedish ownership structures have gone from individual and local to institutionalized and global ownership. This in turn – it is argued – implies a need for regulatory reforms. From an academic point of view one might understand the perception of changing ownership as a basis for regulatory changes as a confirmation of Coffee's (2001) conclusion that changes in the material condition for corporate behaviour are followed by new regulation.

A common international solution for the problem of regulating firms in a corporate governance system characterized by dispersed ownership is the introduction of a code of conduct. The code of corporate governance is a British invention, closely linked with the British context and legal tradition. In 1991, in the aftermath of several financial scandals and collapses, the Financial Reporting Council, the London Stock Exchange and the accountancy profession established the Committee on the Financial Aspects of Corporate Governance. The Committee was chaired by Sir Adrian Cadbury and their report, issued in December 1992, became widely known as "The Cadbury Report". In Britain, the Cadbury Code has been succeeded

by a number of new reports and codes covering new issues and parties in the corporate governance system. The code of corporate governance, thereby, is regulation descending from a corporate governance system (the Anglo-Saxon ones) where the ownership is dispersed.

In Sweden, a code of corporate governance was introduced in 2005. It was initiated by the governmental "Commission of Trust". The commission was appointed by the government in order to rebuild the trust in the Swedish business community after a number of scandals during the late 1990s. To implement a code was not a part of the original directive from the government to the commission, but soon it became one of the commission's main objectives. One important reason for putting a code of conduct on the agenda was to make Sweden interesting for foreign investors who were used to the existence of such a code in their home countries (SOU 2004:47, The Commission of Trust). The commission therefore formed a "code group" in cooperation with Swedish major business interests in order to develop a code of corporate governance. The problem to be solved by the code was, according to the preparatory work of the Swedish Code of Corporate Governance by Commission of Trust and the code group, to create potential for the exercise of an active ownership role as the ownership situation of the public firms shifted from individual and local ownership to institutional and international owners, i.e. when ownership became more dispersed (see The Commission of Trust, SOU 2004:47, also perfectly in line with The Company Committee, SOU 2001:1). Thus, the perception was that when ownership disperses there is a demand for new regulations protecting the dispersed ownership from a re-concentration, or what we might call ex ante minority protection (cf. Coffee, 2001).

The commission's arguments in favour of formation of a specific code group were the advantages of self-regulation and market enforcement, supervised by, and under the constant threat of, state intervention. The establishment of the code group was also in accordance with the traditional Swedish way of developing regulation. Sweden has long been characterized as applying a "corporatism" mode of regulation (Puxty, Willmott, Cooper, & Lowe, 1987). This implies that problems and solutions leading to regulation are detected and discussed in cooperation between different interest groups and the state, and with considerations of the contextual situation in hand. To sum up the development that led to the Swedish corporate governance code: the problem to be solved was defined as active ownership (minority protection) in context with dispersed ownership, the solution was a code of conduct and the technique self-regulation under the supervision of the state. The question is why this specific solution appeared on the agenda.

2.3 Finding Problems and Problem-Solution Models

Both the problem defined and the solution discussed by the Commission may be seen as part of a larger agenda for converging different national corporate governance systems. The globalization of the financial markets is most often a

salient argument for convergence of corporate governance systems and has been the subject of lively discussion on the international arena by politicians as well as by researchers. Corporate governance is a label for a number of actors and control mechanisms important for the control of the public corporation. The issue of convergence of different national corporate governance systems thereby includes a manifold of aspects and areas for regulation. It may be defined as a bundle of issues connected under one label, or what Miller and Rose (1992) labelled a neo-liberal programme for regulation.

A neo-liberal programme may be seen as a technique for the governance by states that has evolved during the last decades (cf. Moran, 2002; Lodge, 2008). According to Miller and Rose (1992) the neo-liberal government is characterized by on-distance governing. This implies that central legal regulation has been exchanged by the so-called programmes, ideas and solution models related to different societal problems that are supported by different actors in various organizations simultaneously and lead to different kinds of regulation, not merely laws. Miller and Rose (1992) describe New Public Management (NPM; Hood, 1991), the wave of reforms imported to the public sector from the private one during the late 1980s and the 1990s, as one such programme on an overriding level, and quality assurance in the health care as one more specific programme within NPM. In both cases, a manifold of actors and types of regulations were involved. This implies that even if problems, politics and actions are partly disconnected, they may be sorted in under different programmes.

Many of the neo-liberal programmes have been developed on the international arena and diffused to various national states (cf. Meyer, 2003; Meyer, Boli, Thomas, & Ramirez, 1997). For example, the idea of convergence of different national corporate governance systems is connected to the emergence of international financial markets. The emergent international financial markets are also closely connected to the more general globalization of the business society. According to Fligstein (2001), globalization (together with the neo-liberal discourse) is to be seen as an American programme up to now mostly materialized in the productions- and sale-organizations of the global company. In addition, one may claim that also the capital that finances these global companies is internationalized (Oxelheim, 1996). Besides this, Fligstein maintains (2001) that one should distinguish between globalization as an ideology, the idea of and the desire to make the business world global, and globalization as the material effects that really may be deferred to globalization of the businesses.

In this context, code of corporate governance can be seen as part of the international discourse, or ideology, of convergence of corporate governance systems and this discourse can be seen as emerging from an American programme. One condition that appears as important for this programme is ownership (cf. Gourevitch & Shinn, 2005). Scientifically, the point of departure has been the condition of diffused ownership for both empirical research and theoretical development (Bearle & Means, 1932; Alchian & Demsetz, 1972; Fama, 1980; Fama & Jensen, 1983). Theoretically a basic assumption is that diffused ownership implies an efficient

capital market.[1] However, diffused ownership implies that no individual owners have the incentive to perform the needed control of the top management team.[2] It is usually more efficient for the shareholder of a company with diffused ownership to sell her/his share than to attempt to influence the top management. Instead, the control over the top management team has to be carried out by other mechanisms, for instance by means of the signals from the market and hostile takeover.[3] In contexts with ownership concentrated to one or a few strong owners, the strong owner is expected to control the top management, but another problem arises: how do we prevent the large owners from enriching themselves at the cost of the minority owners? The answer has been to suggest more comprehensive regulation to protect the minority (cf. La Porta, Lopez-De-Silanes, & Sheifer, 1999; Coffee, 2006). The American programme regarding owners may, thereby, be said to include problems and solutions related to various types of owners, market effectiveness and different relationships between owners (minority/controlling owners). The rhetoric or ideology of this programme indicates that the corporate governance system with newly dispersed ownership needs to implement a new regulation, for example, an internationally accepted corporate governance code, in order to deal with the new ownership situation. As seen above, this was the case for the Swedish commission for trust and its code group.

Being the basis of the international discussions in the area, the American programme regarding ownership may be viewed as a "worldwide model" (Meyer et al., 1997, p. 44) of corporate governance:

"Worldwide models define and legitimate agendas for local actions, shaping the structures and policies of national states, and often local actors in virtually all of the domains of rationalized social life – business, politics, education, medicine, science, even the family and religion."

Worldwide models are created and diffused by global actors such as states, professional organizations, pan-national policy organizations, etc. To be internationally accepted and legitimated and in order to be perceived as modern and "good", nations have to implement (at least formally) some of these models. Worldwide

[1] Theoretically, this is based on neo-economic theory developed during the 1950s to 1970 in the United States as a reaction to a downfall in the US economy. The downfall was blamed on US companies that became too large and diversified and were therefore no longer efficient. Instead, smaller and less diversified companies and division of investments through the capital market (rather than by top management in large companies) were suggested (see Lazonick & O'Sullivan, 2000 for a description of this development).

[2] This is based on the so-called agency theory, whereby the top management team is viewed as an agent for the owner/principal. As it is presumed that both the agent and the principal are self-maximizing, the theory assumes a need for the principal to control the agent in order to assure that the agent fulfils his/her function.

[3] It is assumed that top management's well-being depends on her/his reputation on the labour market for top management. A good performance on the stock market gives a basis for a good reputation on the labour market, while a hostile takeover may imply that the top management loses their job

models, thereby, offer problems and solutions as well as legitimacy for the political entrepreneur to act on. The implementation of such a model is more closely connected to the stream of action made by politicians in order to be perceived as legitimate, rather than get on the agenda due to change in material conditions (cf. Kingdon, 1995). In the case of implementing a code of corporate governance, therefore, the condition for ownership in a specific context will not be the basis for putting the code on the agenda, but will be re-interpreted in the light of the dominant world model at the present time (cf. Jonnergård & Larsson, 2007).

To view the code of corporate governance as part of a worldwide model may explain the diffusion of the code around the world. Since the early 1990s a code of conduct has been one dominant solution to demands for regulation in the area. In particular, the Cadbury code, issued in 1991, has become the standard for codes implemented in other national contexts (see above p. 5). The idea of a code has spread quickly throughout the world. The European Corporate Governance Institute (ECGI) lists on its website (http://www.ecgi.org/codes/all_codes.php) over 140 different codes from all over the world and from different pan-national or international organizations. The initiators of the codes and the status of the codes vary substantially. Many nations have several codes that are issued by different bodies and enforced in different ways. What seems to be similar about the different codes (with a possible exception of the Australian one) is their structure. The codes include the same issues, even if the substantial regulation about them may differ. Apparently some issues have to be included in order to make the code legitimate in the eyes of the world society and the foreign investors. In this way it is a powerful model for problem-solving in different converging corporate governance systems.

2.4 Summarizing the Framework

In summary, if transnational rules are to be implemented, they have to be understandable in the national context. This is brought about through two processes of interpretation: one that explains why the rule is suitable in the specific context and one that clarifies the content of the rule. The first of these processes of interpretation may be viewed as agenda-setting, where the agenda may arise as a reaction to either a change in the material conditions in hand or a change in ideology or rhetoric in order to increase the legitimacy of the politicians or the political process. In the case of implementing a code of corporate governance we claim that the latter is valid, i.e. the implementation of the code is part of an ideology for supporting the globalization of the business society. This ideology arises from an American programme that has become dominant in the international discussion in the field; it has become a world model. The programme includes a number of perceptions, problems and solutions held together by some common assumption of the world (for example, the importance of diffused ownership and capital markets for economic growth). The worldwide model of diffused ownership offers a suitable description of a problem (and/or solution) and calls for a problem-solving model for regulation. A code of corporate governance offers such a model and prescribes at the same time

the items that ought to be included in the code. To import a corporate governance code, thereby, implies that the first process of interpretation of the regulation is connected to the international discourse and understanding in the area, rather than to local material conditions.

3 The Perceived Problem of Ownership Change in Sweden

In the following sections we will illustrate the framework given above by describing how the ownership dispersion in Swedish firms was introduced as a problem (in Kingdon's use of the word) and to be solved by the introduction of a code of corporate governance that appeared. In the first section, we trace the agenda in use by the regulators in various preparatory legal works proposing corporate regulations. It is argued here that the perceptions of ownership posed in these preparatory works limit which regulatory solutions could be applied and that this implies – in this case – a perceived correspondence between the local conditions of regulation and internationally set agendas. In the following two sections, this argument is developed by looking deeper into the actual statistics on ownership of the Swedish public firms. The final section presents an alternative way of viewing the ownership situation in Sweden that will be contrasted with the actual regulation developed in Sect. 4.

3.1 Regulators' Perceptions of the Ownership of the Public Swedish Firms

As mentioned, the regulatory mode of Sweden has been defined as corporatism (see Puxty et al., 1987). This implies that economic regulation is developed through negotiations between the national elite in politics, labour and business, and that consensus has been established around solutions on important issues such as the division of the industrial surplus and the balance between self-regulation and the law. The close collaboration between different parties and the consensus solutions are fundaments in the so-called Swedish model that have been present since the 1930s (see Högfeldt, 2004; Stafsudd, 2009). This model has supported and been supported by a concentrated ownership among the Swedish companies, strong unions and a stable political situation.

The ownership of the Swedish industry goes back to the boom of entrepreneurship that took place between 1860 and 1931 when most of the large Swedish companies existing today were established. Through the financial crises and corporate scandals (the most notable being the Kreuger scandal) during the 1930s, the ownership was concentrated to the main Swedish banks. Legal measures, however, implied that the bank ownership was moved into investment companies, controlled by the bank. Together with some visible industrial families, these investment companies acted as parties in the negotiations with the state. The existence of few visible owners as opponents in the negotiations increased the efficiency of the Swedish

model (Collin, 1998). To date, the concentrated ownership has been supported by different legal means such as the existence of dual class shares, pyramiding and cross-holdings.

The traditional political elite of Sweden have been the Social Democrat party. This party has held power most of the time from the 1930s to 2006. When the party gained power, large industrial companies were considered the most important unit of production, the ownership of which, in time, was to be transferred to the public, creating "social enterprises without owners" (Stafsudd, 2009). A move that according to Henrekson and Jacobsson (2003) would be eased by a large owner concentration as it would be easier to socialize large firms in a few hands than smaller firms in many hands. However, over time the Swedish Social Democrat party has been characterized more by democracy than by socialism and since the late 1970s and the early 1980s the party has supported private ownership and the freedom of incorporation (see Henrekson & Jacobsson, 2003).

Thus, one might say that the traditional Swedish model was formed by the tension between corporatism and socialism. Two main perceptions of ownership coexisted. The first one viewed concentrated ownership as advantageous as they were supposed to support the industrial development in collaboration with the state and the union. The second one viewed the present situation as a step towards a future stage with "social enterprise without owners". Both these views, however, led to a perceived mandate for social engineering of the ownership situation of the firms, predominantly through (tax) regulation.

The different views on ownership have initiated a number of parliamentary task groups on desirable ownership structure. The latest one was the so-called Ownership Commission. This was initiated in 1985 as a response to criticisms from the Communist party's leader CH Hermansson (1971) and his, in Sweden, famous naming and shaming book on the "fifteen families" who were in control of Swedish business.[4] In the Ownership Commissions, different experts were teamed with politicians from different parties. Their work was performed at a crossroad for Swedish ownership politics. When the result of the commission's work was reported in 1988, East European communism was starting to collapse and a new area of deregulation and liberalization was well under way. Thus, there was a perceived need for a new way of describing the ownership situation of the Swedish listed firms and it became the main task for the commission to fulfil this need. The Ownership Commission made a very thorough analysis of the ownership situation of Swedish firms. In their conclusions, the commission highlighted an identified growth in internationalization and institutionalization of the ownership of the Swedish firms. This conclusion later became established as the truth, in the public and scientific discussion of Swedish ownership, and a new (third) perception of Swedish ownership emerged.[5]

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[4]This book had a considerable impact on the discussion about ownership in the late 1970s and early 1980s and may be seen as one of the main sources for the leftwing political visions at that time.

[5]For example, scholars have supported this picture, e.g. Angblad, Berglöf, Högfeldt, & Svencar, (2001), Henrekson and Jacobsson (2003) and Högfeldt (2004).

The notion that the ownership of the Swedish public firms has become internationalized and institutionalized prevailed when new regulation for the public firms was proposed. This is illustrated by the following quote from the preparatory work to a new Company Act (SOU 2001:1):

"Another aspect worth mentioning at this point is the large changes in the ownership structure amongst Swedish public firms that have taken place during the second half of the 1990s. A great many of our largest firms are today more than half owned by foreign legal entities. These foreign owners are often pension funds and institutions that invest a fraction of their assets in stock, and which very rarely interfere with the company management, but are rather more likely to sell their stock when displeased with management. However, it is not only the category foreign owners which to a large degree consist of institutions. Also the Swedish owners comprise a great number of funds, insurance companies, and other institutions, while the physical persons that just a few decades ago held a majority of our quoted firms, today have seen their positions greatly reduced."

Put more succinctly by the Commission of Trust (SOU 2004:47) who is the issuer of the corporate governance code scrutinized here (our translation):

"The ownership of the public firms has to a great deal been institutionalized and internationalized."

Besides a new perception of who owns the Swedish companies, these quotes illustrate a new attitude to the relation between the owners and the state. Following the Ownership Commission's conception of ownership, the idea of social engineering by influencing firm ownership was dismissed; internationalized or not, the ownership development was not perceived as being able to change by political means. The objective of the regulation has instead turned into adopting the situation in hand, that is, how to facilitate active ownership in the face of internationalization and institutionalization rather than providing for more Swedish and private owners. However, as the Swedish financial markets have yet not proved themselves efficient in disciplining management – already the Ownership Commission noted the weaknesses of the Swedish market for hostile takeovers – there is a need for regulation compatible with the new dispersed ownership.

3.2 Foreign Ownership of Swedish Public Firms

It should be clear that the Ownership Commission (1988) only superficially treated the internationalization of the ownership. The commission noted that it rose from 4 to 8%, but it fell back to 6% during the surveyed period. Consequently, the commission only considered an increase in foreign ownership as a trend that had to be taken into account in the future and which may change if certain restrictions such as limitations of foreign ownership stakes in high profiled firms and sectors were removed. As the financial markets in Sweden were deregulated in the late 1980s, foreign ownership increased to about 30% and skyrocketed in 2000 to 40% (Statistics Sweden, www.scb.se). The importance of foreign ownership for the development of industry was highlighted in both academia (i.e. Henreksen & Jacobsson, 2003;

Jonnergård & Kärreman, 2004; Agnblad, Berglöf, Högfeldt, & Svencar, 2001) and public commissions (i.e. The Companies Act Commission, SOU 2001:1 and The Commission of Trust, SOU 2004:47). The idea of these public commissions seemed to be that by issuing regulation familiar to foreign owners, they could be expected to act as responsible owners (see Sect. 2.2 above).

The figures from Statistics Sweden, the official Swedish statistics bureau, presented above, do not reveal the identity or the intentions of the foreign owners. In Fristedt and Sundqvist's annual book "Owners and Power in Sweden's Listed Companies", however, the biggest foreign owners (around a third of all the foreign owners) are listed. This listing implies that foreign owners are not a homogeneous group. The list includes business firms (such as Renault, Volkswagen and MAN), foreign states (such as Finland and Singapore) and large international institution investors (such as Fidelity and Franklin-Templeton). The heterogeneity among the foreign owners may imply heterogeneity in the owners' intentions as well. For example, it is likely that a global truck manufacturer, participating in the global consolidation of the truck market, has a different view of their shareholdings in Volvo[6] than a New York index fund manager.

As we do not know the identity of smaller foreign owners we cannot be sure of the foreign owners' connections to Sweden. For instance, there are financial products only available to Swedish residents that for tax purposes use a middle country (all Swedish banks have so-called Luxemburg-funds in their offers to customer) when investing in the Swedish stock market. There are also certain holdings from Dutch foundations with connections to former Swedish citizens indicating that money moved from Sweden for tax purposes is being reinvested in Swedish firms.[7] These persons are still major owners of their family companies acting behind legal tax constructions and will probably relate to their ownership in a markedly different way than, for instance, a foreign government.

Finally, foreign ownership does not affect all public firms in the same manner. On the contrary, there is a tendency for foreign owners to invest in the largest Swedish firms. This is illustrated in Table 14.1 where we can see the foreign ownership of the firms, as mean, median and standard deviation for both capital and votes in the firms listed on the Stockholm Stock Exchange in 2007. From these numbers it becomes clear that not all public firms are affected equally by the foreign ownership.

In other words, instead of being one common category, the international investors are of different kinds, probably with various intentions with their ownership and with different approaches to the control of the firm.

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[6]Merely Renault's 20% stake in Volvo corresponds to 3.5% of the total foreign ownership of the Stockholm Stock Exchange (Fristedt & Sundqvist, 2007).

[7]The Rausing family controlled Tetra Laval BV ownership in Alfa Laval representing 0.4% of all foreign ownership on the Stockholm Stock Exchange (Fristedt & Sundqvist, 2007).

Table 14.1 Foreign ownership on the Stockholm stock exchange 2007

Number of listed firms	252		
Foreign ownership of equity, mean	25%	Foreign ownership of votes, mean	23%
Foreign ownership of equity, median	20.5%	Foreign ownership of votes, median	18%
Standard deviation	0.5–80.5%	Standard deviation	0.1–88.5%

Source: Fristedt and Sundqvist (2007)

3.3 Institutional Ownership of Public Swedish Firms

The concept of institutional ownership has been at the heart of the Swedish political discourse since the 1970s.[8] On the one hand, some discussants claim that institutional investors are desirable from an efficiency perspective, since the firms are owned and controlled by "professional" owners, with no strong feelings for the family name or emotional connections to the manufacturing municipality or the business. On the other hand, when the social consequences of fast-moving capital have been noted – at plant closing, labour lay-offs or the sale of "firms of national interest" – the lack of "flesh and blood" owners has been portrayed as a hazard for the long-term development of the society. These standpoints can be viewed in politics (without any right–left implications), from the business society itself and in media; the institutionalization of the ownership is always a topic of interest in Sweden.

In the 1980s, the Swedish Ownership Commission put great emphasis on the constant decline of individual direct holdings of stock that had been taking place since the 1950s, when the Swedish households' ownership accounted for almost 80% of total market value on the Stockholm Stock Exchange. Shortly after the Commission report was presented in 1988, the decline in individual stockholding started to level out and has since 1991 been between 10 and 15% of the total stock market capitalization (www.scb.se). The decrease in individual ownership has been interpreted as an indication of a corresponding increase in institutional ownership. Individual stockholdings are, however, affected by various issues, most importantly, taxation. Individual shareholdings, and stockholding by foundations or closely held firms, are treated differently by the Swedish taxation system. This has, over time, had an effect on the ownership patterns (Henriksen & Jacobsson, 2003). In the early 1990s, for example, transferring capital into a private corporation or in a private foundation that, in turn, invested in stocks, led to a tax reduction, while individuals who owned stocks were taxed. In such a situation it would be highly irrational to continue to

[8]One could claim that institutional investors have held a prominent position in Sweden since the 1930s when banks and investment companies took over ownership of the biggest Swedish firms. These banks and investment companies were, however, owned by well-known industrialists or families, implying that the institutions were looked upon as persons rather than institutions (cf. Stafsudd, 2009).

own controlling blocks of shares as a private person instead of using a private corporation as a "vehicle of control". However, it is still the same private person who controls the public firm even though the shares in the public statistics are held by a private corporation (i.e. an institution). In other words, it is rather the form of ownership than the ones who own the shares that has changed in Sweden over time. In this chapter we therefore do not treat private shareholdings through private corporations or foundations as institutional ownership. We base this argument on the notion that this kind of ownership solution does not distort any incentives for control and it does not create any new agency costs (cf. p. 11 above). As long as the families or the financial groups are the owners behind the institutional forms, we still define the stockholding of the institutions as family or "sphere" ownership. It is a matter of who controls the firm, not the tax-purpose constructs or the vehicle of control that is the heart of ownership.

What about the institutional ownership then? In this chapter, institutional ownership is considered when an additional layer of agents is placed between the public firm and its owner. That is, when person A hands over cash to person B at his/her discretion and the cash is used to buy shares in a firm controlled by person C. Corporate governance usually focuses on the relation between person B and person C, but that would only be half the problem if one did not expect person B to act in total alignment with the interests of person A. Thus, it is the double-layer agency problem that makes institutional ownership differ from physical ownership. The size of what we consider institutional ownership is found in Table 14.2 The figures are summarized from the Statistics Sweden categories "Banks, financial institutes and more", "Funds", "Insurance companies, pension institutes" and "Social security funds". What is clear from Table 14.2 is that this ownership form has been constant between 25 and 30% since the 1980s. A large increase assumed in the public discourse is not at hand.

In summary, we may distinguish two types of owners that use institutions as a vehicle for control. First, controlling owners and, second, formal institutional owners. The ownership share of formal institutional owners has been more or less constant during the last 25 years.

Table 14.2 Ownership of the public Swedish firms (% of market value),

	Non-financial	Institutions	Investment companies	State	Private	Non-profit	Foreign
2006	9	25	5	5	14	5	37
2003	9	27	6	6	14	5	33
2000	7	25	6	5	13	5	39
1998	7	27	6	3	15	7	35
1993	17	28	7	4	17	7	21
1988	21	27	11	5	20	9	7
1983	16	18	16	1	30	11	8

Source: http://www.scb.se/Pages/TableAndChart____17770.aspx

3.4 Ownership of the Swedish Public Firms

The data in Table 14.2 only present ownership of the cash-flow rights of the firms. In Sweden, the political preference for large individual owners (see Bergström & Samuelsson, 2001; Collin, 1998; Högfelt, 2004) has led to a legal framework that provides a number of possibilities to separate voting rights from cash-flow rights, so-called dual class shares. These have made way for clearly identifiable dominant owners in many firms. Dual class shares have been used by traditional owner families and financial group to retain their control over firms, by companies investing for operational reasons in other firms as well as by foreigners investing in Sweden. In Table 14.3 the control of the firms of the Stockholm Stock Exchange in 2007 is presented, ranging from dispersed ownership (or management control) to foreign owner control. However, the largest group is still individual (family) or sphere control.

As may be seen in the table, 66% of all Swedish firms are still owned by an identifiable controlling owner. The myth of dispersed ownership may therefore – if not neglected – at least be put in perspective.

In conclusion, the public agenda used in politics and regulations of the ownership of the public firms has focused a good deal on the perceived increases in institutional and international ownership, and the new regulation that may be needed due to these changes. The perceived changes in the ownership situation have, however, slight bearing on the structure of ownership in Sweden. Much of the ownership remains local and individual and consists of owners who exercise control of incumbent management. The names of the owner families and other constellations may have changed over time, but we see new forms of concentrated ownership rather than a general trend towards dispersed ownership in the Swedish corporate governance system. Likewise, it is obviously true that the foreign ownership has increased substantially since the market was deregulated in the 1990s. Foreign owners are, however, a heterogenic group, of which some act as controlling owners and others do not. The former do not need corporate governance reform to control the firms

Table 14.3 The control of the firms listed on the Stockholm stock exchange 2007

Number of firms	252			
Dispersed ownership	85			
Controlling owner, 20–29% of votes	60			
Controlling owner, 30–49% of votes	58			
Controlling owner, 50% of votes	49			
Controlling owners	167	–	Individual or family/ sphere	126
		–	Swedish industrial	17
		–	Foreign	24

Source: Fristedt and Sundqvist (2007).

and the latter who do not act as owners would probably favour minority protection over possibilities to get involved in actual control. In other words, we have described a situation where there is a perception of a "problem of ownership" in accordance with the worldwide model described in sector two, but where the material conditions are not in agreement with this "problem". With this as a background we now turn to discuss the effect the "new ownership notion has had on the code of corporate governance".

4 The Solution of a Swedish Corporate Governance Code

After defining "the problem" and relating this to the material situation in hand, it is time to look into the suggested solution. As mentioned in Sect. 2, the solution to changes in ownership structure according to the worldwide model for corporate governance is the import of a corporate governance code and this was also the solution implemented in Sweden. As mentioned above, a corporate governance code most often contains a package of rules defined by those in the British Cadbury report. In other words, the structure of a corporate governance code is based on governance problems experienced in Britain, constituted by the British ownership structures and applied in relation to other British regulation (such as the London City Code on takeovers or the Companies Act). The Swedish code has a structure similar to the British one and labels the rules in the same way. However, the content of the rules has to a great degree been adapted to local circumstances (Jonnergård & Larsson, 2007). To understand the codes' effect on ownership we thereby have to look at the content rather than at the label of the rules.

Viewing the code as a solution to the problem of diffused ownership, we focus on the code rules relating to different types of owners. As a first step, we categorize the rules favouring majority or minority owners. Majority owners, in turn, could be divided into individual (family) owners and sphere ownership, Swedish industrial and foreign, following the classifications in Table 14.3 Minority owners are further divided into local institutional owners, international institutional owners and small individual minority owners following the different minority interest groups reported in Jonnergård and Larsson (2007). The whole analysis is found in Appendix 1 and the Swedish corporate governance code can be found at //www.bolagsstyrning.se.

As can be seen in Table 14.4, the rules in the Swedish corporate governance code in the majority of the cases (45 out of 69) relate to the conflicts of interest that occur between different owners in the public firm. These rules almost exclusively support the minority owners. The most favoured owners are the small individual owners and the international institutional investors. However, given their local occurrence and the size of their holdings, one should not underestimate the favours given to the local institutional investors either. Thus, the Swedish corporate governance code is a piece of regulation directed at protection and in favour of minority owners at the expense of traditional controlling owners. The small individual owners as the primary group benefiting from the regulation may be an attempt to revitalize the ownership of individual households after a long

Table 14.4 Number of rules favouring different owners

Number of rules	69[a]		
Rules not relevant	24		
Rules favouring minority	44	– Whereof national	28 (2)
		– Whereof international	39 (5)
		– Whereof small individual	38 (4)
Rules favouring majority	3	– Whereof individual (family) /sphere	3
		– Whereof Swedish industrial	0
		– Whereof foreign	0

[a] One rule can favour more than one owner. Number of rules only relating to one certain type of owner is reported in (parentheses).

period of decline connected to the traditions of the Ownership Commission. The other two benefiting groups, the international investors and the local institutions, are very much in line with the thinking of the Companies committee and the Commission of Trust. However, most of these groups' new forward positions came at the expense of the traditional owners, and that might be seen as something very unresponsive following the picture given above of actual ownership and control of Swedish public firms. The code is, thereby, very much in accordance with the worldwide model discussed in Sect. 2 and gives less consideration to the actual ownership situation. This finding will be the starting point of the discussion below.

5 Discussion and Conclusion

We started this chapter by claiming that in order to make transnational rules understandable two processes have to take place on a local level. The first one, which we have focused on here, deals with understanding the rule as appropriate in the national context where it should be implemented. The second one deals with creating an understanding of the content of the rule. In this chapter we have described the first of these processes of interpretation as agenda-setting processes in which problems and solutions are loosely connected and put together through either a change in material conditions or a need for legitimacy by the politicians. We have suggested that one source of both defined problems and solutions is so-called programmes, bundles of ideas connected to a specific social area, which may emerge in a national context, but which in many cases emerge on the international arena in discussions and negotiations within different international or pan-national organization of activities. In the case of corporate governance, we have identified an American neo-liberal programme as a framework which, by means of international cooperation in the

area, has emerged as a worldwide model for defining problems and solution for the convergence of corporate governance systems. What is left to discuss is (i) how the worldwide model of corporate governance may be used to explain the new regulation and (ii) the possible effects the understandings from such a worldwide model may have when applied in the Swedish corporate governance systems.

The worldwide model of corporate governance supplies, first of all, an overriding understanding for why new regulation is needed. According to this model, new regulation is needed in order to facilitate efficient flows of investment on a global capital market. Such efficiency has for a long time been on the agenda for international organizations such as the World Bank, international cooperation, for example, in the OECD, and pan-national collaborations such as the European Union. The idea is, therefore, well-established and embedded in international networks. In addition, it has been on the political agenda internationally as well as nationally for several decades. In Sweden, for example, the capital markets were deregulated in the late 1980s in order to facilitate such a development. To facilitate efficient investment on a global capital market is, however, not only a political agenda, but built on economic theory and consequently built on certain theoretical assumptions and logical deduction. As such, the world model provides normative as well as cognitive arguments for why a certain regulation should be implemented and through this it may serve as a basis for understanding why a certain rule should be implemented. In addition, when discussing the diffusion of the code, we are dealing with a complex structure of national (Swedish) agenda-setting, depending on a pan-national (EC) agenda-setting. The choice of which agenda to promote on the national level is thereby partly delimited by the agenda-setting process on pan-national and international levels. Therefore, the politics involved affect the legitimacy of the politicians both to their own voters and towards the international community. The application of a well-known worldwide model is a way to promote such legitimacy. In other words, the American programme for corporate governance is a powerful model for explaining the import of certain rules as it gives a normative-political basis and a logical-deductive explanation for the rule as well as legitimacy in relation to a certain political agenda.

What we have shown in this chapter is that it is not self-evident whether the logic of such a model has to agree with local conditions in order to be implemented. Rather, some of the assumptions behind the model get interpreted on a national level *as if* they apply. In our case, we have observed that the ownership structure has not gone through any major changes, even though such changes have been used to argue for new corporate governance reforms. On the other hand, the perception of such changes has been part of the political as well as scientific discourse for some time and it is not surprising that they have become taken for granted. With a less thorough analysis of the number than ours, the figures of ownership may also be interpreted in a way that they agree with the perception of changes in ownership structure.

The issue is what kinds of effect the new regulation will have on the Swedish system for corporate governance and for the Swedish ownership structure. On this we may only speculate. In the literature regarding the relationship between the development of the capital markets and its regulation, two major hypotheses have

been formulated. First, Coffee (2001, p. 14) claims that material changes lead to changes in regulation. He states:

> In short, if form follows function (that is, if legal rules are determined by the system of corporate governance that pre-exist those rules), then no similar rapid legal transition should necessarily be expected in the Continental economies in which concentrated ownership is still the norm

If Coffee's (2001) discussion holds true, we would not expect any great effect of the discrepancy between the material condition and the content of the corporate governance code. As form follows function, without a function (i.e. a material change that has to be dealt with) new regulations are condemned to be more or less useless. In this case the process for understanding why a rule is appropriate in the specific context will not help with applying the content of the rule as such.

However, La Porta, Lopez-De-Silanes, Sheifer, and Vishny (1998) and La Porta et al. (1999) suggest that a change in ownership structure is a both intentional and desirable effect of changes in the national regulation for corporate governance. In other words, they suggest that a change in regulation for minority owners, regardless of the initial material conditions, will give incentives for a more diffused ownership structure in the future, and thus to adjust to the worldwide model of corporate governance implies in the long run more efficient global capital markets. In this case the process for understanding why a rule is appropriate will probably be supportive in explaining the content and for the obedience of the rule.

These hypotheses are built on different empirical studies and partly different normative approaches. Coffee (2001) is a description of the historical development of ownership structure, while La Porta et al. (1998, 1999) build their conclusion on contemporary analysis of the legal systems in different countries around the world. While Coffee (2001, 2005) acknowledges differences between corporate governance systems, La Porta et al. (1998, 1999) use the American model as their normative point of departure. These changes make it difficult to speculate on whether the one or the other applies in our case.

One conclusion we may draw, however, from this chapter is the importance of not only understanding the rule as such when implementing transnational rules but also how this rule is explained as appropriate in the national context. This process may both give the framework for explaining the rule and influence its material effects as it gets implemented.

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Chapter 15
The Translation of Transplanted Rules: The Case of the Swedish Nomination Committee

Ulf Larsson-Olaison

Abstract This chapter concerns how the Swedish national corporate governance system is reformed by regulatory means. The regulation in focus is the implementation of nomination committees, an idea from the UK Cadbury Code, imported to Sweden as part of the Swedish Corporate Governance Code. The main objective is to understand the intersections between international best practice regulation and local practices on the one hand, and between actions by the regulator and those regulated on the other hand. The first intersection is captured by the use of the concepts of transplantation and convergence derived from the sciences of law and economics, and the second intersection is captured by the concept of translation from organizational theory. The main findings of the chapter concerning the Swedish nomination committee implementation are that the imported regulations result in local rather than in international convergence and that the impact of regulators in transplanting transnational rules is limited by translations made by those regulated.

1 Background

In December 1992, in the United Kingdom, the Committee on the Financial Aspects of Corporate Governance issued a report, later known as the Cadbury Code. Its rule no. 4.30 deals with director nomination by a nomination committee. This committee should be formed as a subcommittee of the board, have a majority of nonexecutive directors and be chaired by either the chairman of the board or a nonexecutive director. In December 2004 the Swedish Code Group issued a formally binding Swedish corporate governance code for the largest firms listed on the Stockholm

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stock exchange. Section 2.1 deals with nomination committees.[1] A Swedish nomination committee is appointed by the Annual General Meeting (AGM), has a majority of non-board members, no members from management, and no board member is allowed to chair. Thus, the typical Cadbury nomination committee is a subcommittee of the board, formed by one executive director and two nonexecutive directors, with one of the nonexecutives as chairman. On the other hand, following the Swedish code, a typical nomination committee should be formed as a subcommittee of the AGM and have one director (not an executive director, rather someone representing a major owner on the board) joined by two non-directors (probably representing major owners outside the board).

Often when the globalization of the world's capital markets is discussed the focus is on convergence (Coffee, 2001). Convergence implies the reform of inferior corporate governance systems[2] (like the Swedish one) to better assemble a superior corporate governance system (like the British). Reforming local regulation in line with international regulation can achieve convergence, the most efficient way to converge the regulatory structure being to transplant the regulation (Watson, 1974; La Porta, Lopez-De-Silanes, Sheifer, & Vishny, 2000). An example of a transplant leading towards convergence is the introduction of nomination committees in Sweden as described above.

However, it would be problematic to account for the differences in a Swedish nomination committee in relation to the Cadbury nomination committee only by means of the concepts of convergence and transplantation. In this chapter, drawing on organization theory, the use of the general model of translation (Latour, 1986; Czarniawska & Jorges, 1996) is proposed to enrich the transplant concept. The translation model stresses the importance of the actors involved in the process and the way they handle different concepts and practices (Latour, 1986). In the specific process studied here the actors are found on two different levels: the firm level and the regulatory level. On the firm level several Swedish firms have introduced nomination committees prior to regulatory demands. On the regulatory level there has been an ongoing debate dating back to when the Cadbury report was first published.[3]

In this chapter both the transplantation process and the translation process are followed with the purpose of providing a rich empirical account of the transplantation of the nomination committee from the United Kingdom to Sweden. The contribution is twofold. First, empirical studies of transplanted corporate governance regulation are rare.[4] Second, drawing on the empirical study, some theoretical implications for corporate governance system reforms through regulatory change are proposed. This is important as translational regulation will be used continuously in developing local corporate governance.

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[1] We will return to the label used in the Swedish code below. For now it is enough, however, to state that the formal Swedish translation used in the code is "nomination committee."

[2] In this chapter corporate governance is defined according to Shleifer and Vishny (1997) as the national system of rules and norms safeguarding the investment of the suppliers of finance.

[3] In this chapter the introduction of the Swedish code is used as a demarcation of this debate, even though it has continued.

[4] For exceptions see Gillespie (2002) and Kanda and Milhaupt (2003).

Next, a frame of reference is built on the concepts of translation, transplantation, and convergence. Thereafter the research design is displayed, followed by the case of the Swedish nomination committee. After a discussion the paper is concluded.

2 International Corporate Governance in Local Practice: Transplants and Translations

This frame of reference is structured to enable a discussion of the main theoretical differences in the view of how international best practice rules function in local practice. First, the concept of transplantation of legal rules is introduced in the convergence discussion. This is contrasted with the influence of local context and actors. Second, the influence of local actors is conceptualized by the use of the notion of translations.

2.1 Transplants and Those Transplanting

In order to survive, according to the convergence thesis, local corporate governance systems must adapt to international best practice or they will perish in competition (Hansmann & Kraakman, 2004; La Porta, Lopez-De-Silanes, Sheifer, & 1999). This position and its consequence are summarized in this quote:

> Despite a continuing bias in favor of home-country investing, the internationalization of capital markets has led to more cross-border investing. New stockholders enter, and they aren't always part of any local corporate governance consensus. They prefer a corporate governance regime they understand . . . Gordon and Roe (2004, p. 2)

One of the most viable methods to achieve an understandable corporate governance regime is held to be by a reform of the regulation (Hansmann & Kraakman, 2004; Coffee, 2001). This concept of convergence treats regulation as an answering machine, where international competition automatically leads to better rules, thus simultaneously treating regulation as the standardization and enhancement of effectiveness. Standardization is important, as international investors recognize local practice in common rules. This is a gain for the investors. This gain is also an enhancement of the effectiveness, as local firms thereby grow more competitive in the struggle for global equity capital. The international investors, and their taste in regulation, are often described as Anglo-American (Oxelheim & Randoy, 2003). Thus, to compete for international capital standardization is needed and that is achieved by the transplant of Anglo-American rules. Watson, the legal historian who most comprehensively treated the concept of legal transplants, summarizes:

> First, the transplanting of individual rules or of a large part of a legal system is extremely common . . . Secondly, transplanting is, in fact, the most fertile source of development. (Watson, 1974, p. 95)

The transplant perspective is used in "The new comparative economics" (Djankov, Glaeser, La Porta, Lopez-de-Silanes, & Shleifer, 2003). The interest of

new comparative economics is to compare different economies in terms of corporate governance. However, as the results of the research tend to show that some corporate governance systems are better, there is a tendency toward the normative:

> For most countries, the improvement of investor protection requires radical changes in the legal system ... laws generally need to be amended ... the law's general stance toward outside investors – suggests at least tentatively that many rules need to be changed simultaneously to bring a country with poor investor protection up to best practice. (La Porta et al., 2000, p. 20)

The new comparative economics, drawing on Watson (1974), is based on the notion of legal origins (common law or civil law). The implication of this research is the need to transplant investor protection regulation from common law countries to civil law countries (La Porta et al., 1999; 2000). Real-world examples are frequent, i.e., the introduction of corporate governance codes around the world (Aguilera & Cuervo-Cazurra, 2004) and company law harmonization efforts by the European Union.

However, scholars have questioned the use of the transplantation metaphor for understanding the transfer of rules from one society to another (Kahn-Freund, 1974; Teubner, 1998). Transplantations point to medical science (Kahn-Freund, 1974), and as the transplanted rules do not always achieve the desired ends, other metaphors have been proposed. Such metaphors include "degrees of transferability" (Kahn-Freund, 1974), "the transplant effect" (Berkowitz, Pistor, & Richard, 2003), and "legal irritants" (Teubner, 1998). Obviously, both sides take the metaphors literally, as they tend to think of the transfer of the rule as a transfer of a physical artifact that could be disconnected from the users of the rule (see Legrand, 1986, for his criticism on Watson, 1974). This literal view is attributed to the ways by which Watson introduced the concept, but in this chapter the use of the transplant metaphor is nonetheless proposed to be considered figuratively rather: the same rule is transplanted as the regulator uses the same phraseology (label). However, in contact with the users of the rule the meaning of the rule may, or may not, be altered. Thus, we need to highlight local elites and their use of rules, in order to seriously consider the criticism by both Berkowitz, et al. (2003) and Kahn-Freund (1974) of the transplant concept.

To focus on local elites is controversial in the scholarly area of corporate governance, as local elites are often given negative connotations such as "tunneling," "regulatory capture," and "minority shareholder expropriations" (La Porta et al., 1999; Gordon & Roe, 2004). In this chapter the local elites are considered a precondition – a rule without a user is nothing (Berkowitz, et al., 2003), and the transplanted rule must be meaningful for the local users or else they will not use it (Kahn-Freund, 1974).

2.2 Those Transplanting Are Also Translators

Turning to local users to understand why international rules change in local use calls for a different approach. This chapter draws on organization theory. In this theory a

similar situation exists when following how organizational practices spread among organizations. A static perspective, comparable to the perspective of Watson (1974), labeled the diffusion model (Tolbert & Zucker, 1983), is often contrasted with a translation perspective (Latour, 1986; Czarniawska & Jorges, 1996). In a diffusion model the actors involved in the diffusion are not important, what is important being the diffusing practice. The contrast to this, the translation model, rather emphasizes that it is not the initial force or local resistance that decides the diffusion of an innovation

> the spread in time and space of anything – claims, orders, artifacts, goods – is in the hands of people; each of these people may act in many different ways, letting the token drop, or modifying it, or deflecting it, or betraying it, or adding to it, or appropriating it. (Latour, 1986, p.267)

With this starting point it becomes obvious that the actors involved in the process and their relationship to the transplanted rule are of utmost importance to the result of the transfer. One example is found in the study by Buck, Shahrim, and Winter (2004) of the introduction of "American" stock option programs in Germany

> [suggesting] that US-Style ESO schemes have been translated to meet the needs of interest groups in German firms, and to fit in with the wider governance environment in Germany. German ESOs do not seem to provide an example of convergence on US-style governance structures. (Buck, et al., 2004, p. 184)

From this perspective it is taken for granted that the rule traveling from one context to another will become something else (see Czarniawska & Sevón, 2005). Thus, what we must study is what happened, as pointed out by Sahlin-Andersson:

> we need to understand both how the "diffusion" happens and how forms and practices are shaped and reshaped in various stages of this process: we need to follow how ideas travel. (Sahlin-Andersson, 1996, p. 7)

Following Sahlin-Andersson, we need rich empirical accounts. Before we turn to that section, however, a short summary of the theoretical positions of the paper will be made. It is proposed that the actual diffusion of international best practice rules from one context to another is transplantation. This transplantation is a metaphor and should not be thought of as an actual transplantation in a medical sense – we need to think of it figuratively. There will be actors involved in this transplantation and they will adopt the rule as they think appropriate. What is interesting is then how these local elites translate actual rules, and for this we need a rich empirical material.

3 Research Design

This chapter is based on a longitudinal single-case study of the process where the nomination committee became the regulated solution for board nomination in Sweden. In this section the case data are presented and relevant methodological questions are addressed.

The case study is built on extensive empirical material: semi-structured interviews, annual reports, ownership data, board data, auditor data, ownership policies, and regulatory documentation.

Following the implementation of the Swedish Corporate Governance Code, 12 regulators and self-regulators were interviewed. The interviewees are both from the governmental "Commission of Trust," which initiated and participated in the code developing process, and from the "Code Group," the group formed jointly by the commission and the business society responsible for the code. In this chapter the interviews are treated anonymously and this trade-off of validity was made to increase the quality of the answers provided.

The interviews were conducted in relation to the development of the Swedish Corporate Governance Code, which is the final phase of the nomination committee implementation in Sweden. Thus, extensive verbal accounts of this part of the process are used to develop the case. However, the interviews have great bearing on the story presented earlier in the process. Several of the interviewees have a long history in the Swedish corporate governance system, i.e., as long-time leaders of central organizations and also long-time regulators. Thereby the semi-structured interviews covered and gave input to the case for the entire period studied.

The nomination practices of the listed Swedish firms were captured by annual reports. They represent the best available source for covering actual firm behavior. The annual reports were surveyed for the years 1998, 2000, 2002, and 2004.[5] The population consists of all firms listed on the Stockholm Stock Exchange, the former A-list and O-list. To be included in the sample the firms have to be listed for the full year and to produce an annual report. For 1998 this amounts to 223 firms; however, for 14 firms it has been impossible to find the annual report, which leaves us with 209 firms. In 2000 it was 252 (14 nonresponses), for 2002 273 (0 nonresponses), and for 2004 253 (0 nonresponses).

The data from the annual reports are categorized into seven categories – 1: no disclosure of board nomination practice; 2: nomination committee with a majority of board members; 3: nomination committee with a majority of non-board owners; 4: nomination committee non-specified; 5: the director nomination is coordinated by the chairman; 6: the annual report states that the firm does not have any committees; and 7: the dominant owners coordinate the board nomination. The categories were the result of the categorization process and capture all the reported nomination practices.

Data on the firm level for ownership and votes are collected by the annual book *Owners and Power in Sweden's Listed Companies* by Fristedt and Sundqvist (1998, 2000, 2002, 2004). These books are used to mine data for firm market value, identity of largest owner, share of capital and votes for largest owner, foreign ownership share of capital and votes (excluding the share of a foreign owner when also the

[5] In the rare cases where the financial year is not identical with the calendar year the first half was used, i.e., for 1998 annual reports from 1997/1998 were used rather than from 1998/1999.

largest owner), and the number of "corners" (owners with at least 10% of the votes and/or capital).

Regarding the identity of the owner, many Swedish firms are controlled by so-called spheres (see Agnblad, Berglöf, Högfeldt, & Svencar, 2001; Collin, 1990). These spheres are often tied to a family and will figure in the case. The leading spheres are Wallenberg and Handelsbanken, but other spheres such as Stenbeck, Lundberg, will also occur in the material.

Fristedt and Sundqvist publish *Directors and Auditors in Sweden's Listed Companies* annually (1998, 2000, 2002, 2004). These publications are used to mine data on management presence on the board (the CEO[6]), the presence of foreign directors, the presence of Anglo-Saxon directors, and interlocking directorships. The data on foreigners are based on present residence.

The interlocking directorship is measured by two components. First, the number of directors unique to that board alone, expressed in percentage of total directors. Second, the average number of directorships within the sample.

Fristedt and Sundqvist's *Directors and Auditors in Sweden's Listed Companies* is also used to mine data on "big league" auditors (an auditor active in more than 6 firms in the population), firms using more than one audit firm and the audit firm used.

In 1997 and 2003 Kristiansson collected all ownership policies in Sweden. These are mainly issued by institutional investors and provide information on their stand on different corporate governance issues. In this chapter they are treated as part of the regulation development process, as these organizations can by no means directly force any firm to implement the solutions, but by repeating their positions they can affect regulators. As ownership policies are updated continuously, the Kristiansson books contain a unique source of the situation in 1997 and 2003.

In Sweden self-regulation has traditionally held a strong position in corporate governance regulation. From the SICSEC to the "Code Group" a great deal has been said on board nomination. Both the SICSEC and the "Code Group" will be discussed at greater length below; here it is only necessary to note that these are the dominant self-regulatory institutions in the Swedish corporate governance system during the period studied.

In formal binding regulation the board nomination question has been discussed, for instance in the preparatory work for the latest Swedish Companies Act or the different corporate governance documents from the EC. These discussions have also been used to enrich the case.

Together these data are used to build two possible stories about how the nomination committee became the regulated solution for board nomination in Sweden. There could be and, since corporate governance is a self-interest-driven area, there

[6]Please note that a Swedish board is composed differently with regard to management in comparison with, for instance, Anglo-Saxon boards.

are other possible stories about this. However, with the extensive data collected the story presented is provided with some validity.

4 The Case: The Convergence of Swedish Board Nomination

The following section provides two separate accounts of the development of Swedish board nomination procedures. Firstly, the proceedings on the Swedish regulatory level are displayed. Secondly, the disclosure of Swedish listed firms is presented. Before this a brief background is given to the Swedish corporate governance system.

4.1 The Traditional Swedish Corporate Governance System and the Board Nomination Issue

In 1992 the Cadbury Report started a wave of international corporate governance reform. This report was a response to current misbehavior in British listed firms and the focus was on the nonexecutive directors (NEDs) of the boards. Directors tied to the CEO acted with low integrity, were unable to exercise control, and thus became scapegoats (Spira, 1999). The British corporate governance system is characterized by dispersed firm ownership and by the market forces rather than owners being supposed to control management. Therefore the focus on NEDs is natural. NEDs are to be independent of the firm with regard to both employment and ownership and thereby the independent experts control management. To increase the number of NEDs on the boards, and also the actual independence of each NED, nomination committees should be formed as subcommittees of the boards (Carson, 2002). The idea was simple: if the recruitment of new NEDs was handled by NEDs – separated from the rest of the board in a committee – new NEDs would improve board independence. Consequently, in the Cadbury UK nomination committees were formed as a response to the power of the CEOs, whereby the boards needed to be empowered to exercise the control function (Carson, 2002).

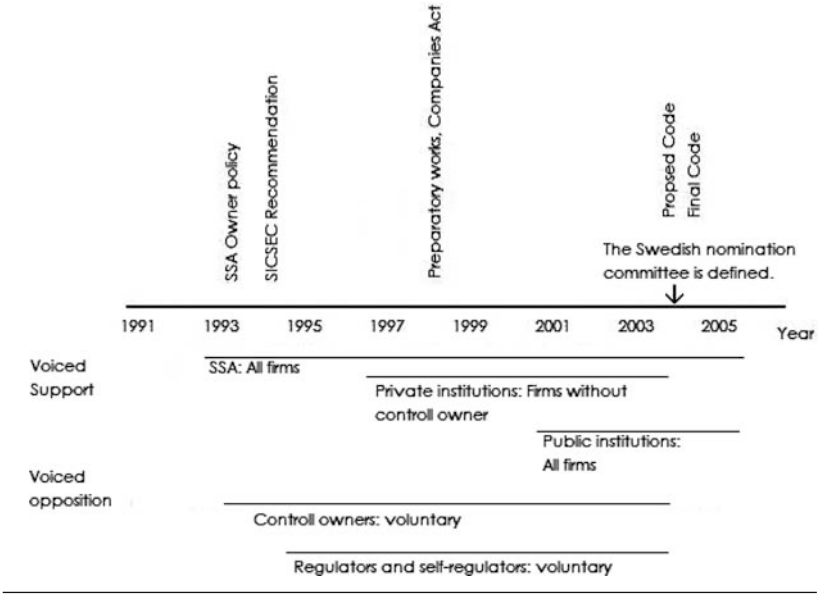
The Swedish corporate governance system is characterized by only mildly dispersed ownership, with active traditional owners (Jonnergård & Kärreman, 2004; Agnblad, et al., 2001). The introduction of nomination committees was, by many actors, regarded as a solution to a non-existing problem. Ownership is exercised by board presence and board nomination (Jonnergård & Kärreman, 2004; Sjöstrand & Petrelius, 2002). It was, and still is today, not unusual that the CEO holds a position on the board but is prohibited to be chairman. Instead, the boards comprise representatives of the traditional owners, employee representatives, and outsiders (Jonnergård & Kärreman, 2004). The nomination to new board members that took place among the largest owners was traditionally coordinated by the chairman (Sjöstrand & Petrelius, 2002). Thus, unlike the situation at Cadbury UK, managerial influence on board work is not the main problem in Sweden.

4.2 Swedish Regulatory Development for the Nomination Committee

The description of the regulation developing process by which Sweden implemented the nomination committee is summarized in Table 15.1 and thereby a timeline for the process is established.

A year after Cadbury, in 1993, the idea of the nomination committee first came up in the Swedish debate. It started through the issuing of a corporate governance policy, or as it is called an Ownership Policy, by the Swedish Shareholders' Association (SSA).[7] The issuing of an ownership policy was an innovation; it is the document that many of the following policies and codes in Sweden are based on. The basic idea of an ownership policy is to influence firm and regulator action; SSA can by no means force firms or regulators to follow or implement their solutions and thus the policy is a statement of their positions on the topic at hand. The leading actors of the Shareholders' Association came across the Cadbury Report at an early stage and were greatly influenced by it. The Shareholders' Association did not specify how this nomination committee should be composed or how they should perform their duties, but they started lobbing intensively for the committee formation in media and at the annual general meetings. It would not be an exaggeration to say that the Shareholders' Association put corporate governance reform on the Swedish agenda

Table 15.1 The Regulatory Developing Process



[7] Organization for small shareholders.

altogether. This was largely done by their publication of the policy, and one of their most loudly voiced reforms was the introduction of the nomination committees. Considering the scoop of the Shareholders' Association, its relative size, and the existence of stronger interest groups in the Swedish corporate governance system, it is easy to underestimate their influence on corporate governance reform. However, the direction for a Swedish corporate governance system that the association pointed out was clear: the board nomination practices needed reform by the introduction of nomination committees. Eleven years later this was the solution.

In 1994, as a direct response to the Shareholders' Association, the "Swedish Industry and Commerce Stock Exchange Committee" (SICSEC, Näringslivets börskommitte) issued a recommendation on board nomination. SICSEC was at the time the leading body for self-regulation in the Swedish financial markets and had the possibility of enforcement through the listing requirements at the Stockholm stock exchange. Among the founders almost all major stakeholders of the Swedish financial markets were represented, which implies that the organization was tightly knit together with the traditional owners and ownership spheres. Therefore it is not strange that the SICSEC took a negative position toward the formation of nomination committees, as they might create a problem for traditional owners in exercising their rights. SICSEC's argument was that nomination was not a problem in most Swedish firms, since the ownership structure implied that the control problem was solved – nobody entered a Swedish board feeling gratitude toward the CEO. The SICSEC clearly took the position of the traditional owners, fueling those who opposed the idea of nomination committees and legitimizing the then current practice of a great number of Swedish firms.

The SSA ownership policy was followed by a number of policies from institutional investors, who also wanted to express their positions on different corporate governance issues. In Kristiansson (1998) all Swedish owner policies present in May 1997 are collected. There it is evident that board nomination has risen on the agenda of the institutional investors. In the 14 provided owner policies, most of them from private pension funds, demands for nomination committees were raised in all public firms (the SSA). Three policies do not mention nomination committees. The remaining 10 point out that a nomination committee is appropriate for board nomination in firms lacking big owners. This implies that the institutional investors were willing to work with board nomination, and in most cases within the formalized process that they readily referred to as nomination committees. This was only, however, when there was no traditional owner present. This could be called one of the first steps of what Skog (2004) refers to as "The awakening of the Swedish institutional investor" associated with the debate about institutional investors acting as "real" owners.

For quite a long period, from 1997 to 2004, the Swedish Shareholders' Association and some of the institutional investors continued the struggle for nomination committees at the firms' AGMs. Besides, few regulators or other major stakeholders in the Swedish corporate governance system gave their opinion publicly on the use of nomination committees. One notable exception

occurred in 1998, when the Swedish government published the preparatory work for a new Companies Act. There the question of mandatory nomination committees is discussed with a direct reference to the SSA proposal. The preparatory work does not reject the proposal as vigorously as SICSEC did in 1994, but the rejection is supported by the same arguments as, and with reference to, SICSEC. Finally, the preparatory work concludes that the government would not hesitate in the future to impose mandatory regulation if problems with public firms' board nomination should become evident. However, the then current practices seemed to be working in the eyes of the regulators drafting the new Companies Act.

The number of ownership policies increased as the public pension funds, insurance companies and the government also issued theirs. They were compiled again by Kristiansson in 2003, by which time they had risen to 19. This time the Shareholders' Association was no longer alone in demanding nomination committees in all firms. The Swedish government and the public pension funds were generally positive toward nomination committees, and one of the pension funds demanded it. The insurance companies were also positive, but not to the same extent as the public pension funds. The private pension funds, which made up the bulk of the corporate governance policies in 1997, do not seem to have changed their minds: nomination committees are one possibility in firms without large owners.

The next time the nomination committees reached the public agenda was when the Government Commission for Trust, together with the Swedish Business Society, embarked on issuing a Swedish code of corporate governance. The Corporate Governance Code was issued by a formal process of referrals (see Jonnergård & Larsson, 2007). This implies that the code would take the same path as a government act in Sweden – with a proposal, a process of referrals, and a final proposal. In the first proposal, from 2004, all listed firms were to have an election committee[8] ("valberedning") appointed by the annual general meeting, taking the majority of the committee from outside the board, the only board member allowed being the chairman. It is important to note that, although the official translation into English still used the term nomination committee, the term used was election committee ("valberedning" in Swedish). I will return to this change in vocabulary. In this first proposal, the election committee was left with far-reaching responsibilities, leaving many actors in the Swedish corporate governance system in fear of a fifth corporate body.[9] Note that this is the first time that a regulator actually set about specifying how a board member should be nominated by the use of a committee. Up to this point the committee concept in Sweden was empty, leaving different actors to their own interpretations. By the issuing of the Code of Corporate Governance this vacuum was filled with meaning.

[8]In the Swedish cooperative and voluntary sectors the concept of election committee (valberedning) is a well-known method of dealing with board nomination issues in an attempt to avoid power concentration.

[9]The other being the AGM, the board, the managing director (CEO), and the auditor

Therefore, it is not strange that the election committee issue was fiercely debated. Many of the traditional actors in the Swedish corporate governance system opposed the proposal for the composition of the committee. The proposed total abolishment of directors other than the chairman in the committee would have made a clear cut with all other current firm practices. More importantly, it would have created a rather obscure situation in firms with a major physical owner exercising his/her ownership through board presence. If the major owner did not chair the board she/he would not be able to nominate candidates for the board even though the same owner should control the annual general meeting where the actual decision was made. It is also clear that the proposal was written to empower institutional investors, as they never exercise ownership through board presence. However, many of the institutional investors disapproved of this solution, as the far-reaching responsibilities of the election committee would label them insiders. At this stage it was also decided which firms were going to be regulated by the Corporate Governance Code, namely, the largest firms with a market value above 3 billion Swedish kronor (SEK).

Another interesting aspect of the process of referrals for the Swedish Corporate Governance Code was that there was little discussion of the actual presence of election committees. No actor stepped forward arguing against the formation of nomination or election committees. Obviously, in 2004, the question was no longer problematic or else everybody realized that a corporate governance code could not be issued leaving out nomination committees.

In the final version of the Swedish Corporate Governance Code the AGM was to appoint an election committee with a majority of non-board members and with no members from management. At this point the Swedish election committee had become something very different from a Cadbury nomination committee. Instead of the NEDs of the board forming a committee, as in the Cadbury solution, the Swedish election committee was going to be composed by owners outside of the board. Instead of a committee connected to the board it had become a committee connected to the AGM. This implies that the Swedish solution now only shares its name with the British original and that only in the official translations.

Finally, the question of the labels of this board nomination practice needs to be addressed. In corporate practice and in the English translated regulation the term is nomination committee and thus is the same as the internationally accepted terminology. In the Swedish version the usage of the term election committee (valberedning) stands out as very interesting as (i) it is an established term in the cooperative and voluntary sectors and (ii) it clearly marks the difference from international praxis. In fact, in the writings of the Swedish code group it is argued that the usage of the term election committee signals that it is another practice than the usual Cadbury nomination committee. This practice is, by some of the members of the code group, considered as an innovation that could be transplanted to other corporate governance systems in need of empowered owners.

To summarize, the regulatory developing process could be divided into three distinct phases. The first phase is a challenger phase, where the Swedish Shareholders' Association challenges the established Swedish corporate governance actors, who oppose or neglect the demands. The second phase is a mobilization phase, where

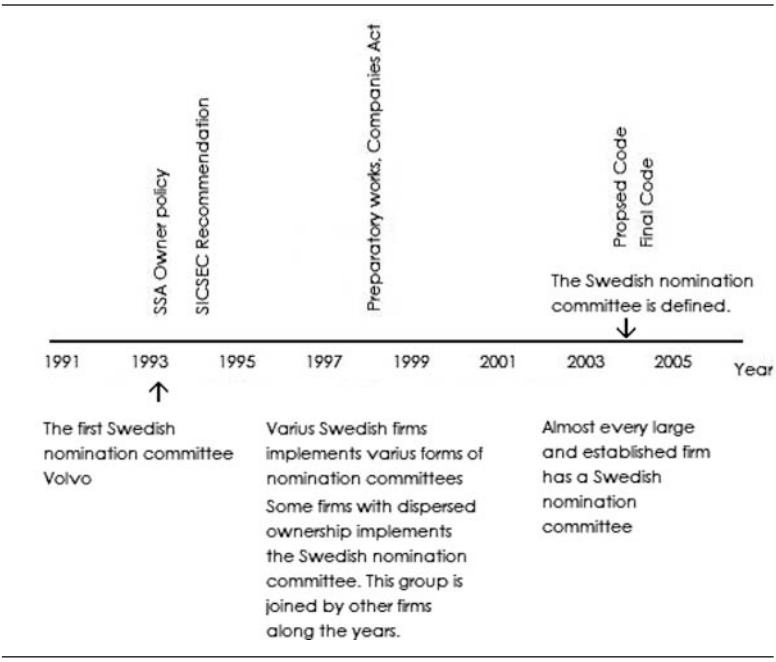
the Shareholders' Association mobilizes other stakeholders, like the institutional investors, while the establishment is still opposed to the idea. Finally, this "status quo" is broken and the final phase of consensus takes place. This final phase arrives very fast and it is almost as if nobody ever opposed the nomination committee concept. However, it is in this phase that it is established that it should not be a nomination committee of the Cadbury model but a Swedish nomination committee, and this committee should only be labeled nomination committee for foreigners, whereas in Sweden the term should be election committee.

4.3 Firm Actions in Face of International Capital Market Pressure

The development of the Swedish nomination committee was not only the result of regulatory developments. The pressures felt by regulators were also felt among the firms. In the following section the establishment of nomination committees among Swedish firms is followed. This process is summarized in Table 15.2 timeline.

The same year as the Shareholders' Association published its policy, the first formally documented nomination committee was formed in Sweden by Volvo. Volvo is one of Sweden's largest firms, but also an outsider firm, as it is not connected to an ownership sphere and thereby traditionally regarded as being under managerial control. The committee was composed of representatives of large institutional

Table 15.2 The firms and the nomination committee



investors with no directors included. This was not a result of the SSA policy; it was a result of the failed Volvo–Renault merger (Skog, 2004). The merger was blocked by Volvo shareholders. After the failed merger every position on the Volvo board needed new appointees and thereby the board influence on the decision was per definition impossible. The owners needed to step forward. In comparison with the original British idea, the Volvo nomination committee was not formed as a subcommittee to the board but as a subcommittee to the annual general meeting: nor was the nomination committee composed of NEDs but of larger institutional owners.

By 1995 nomination committees began to show up in more Swedish firms. One example is Skandia, the insurance company, which in the annual reports of later years describes the foresight of the annual general meeting, which proposed the formation of a nomination committee. Another interesting example is Industrivärden, the investment company. A striking difference between the nomination committees in Skandia and Industrivärden is found in relation to board members and owners. In Industrivärden the nomination committee is composed of board members, just as in the British original, but none of the members would have been classified as NEDs in the Cadbury terminology – they were all connected with the Handelsbanken interest sphere. In Skandia, on the other hand, like Volvo, the nomination committee was composed of owner representatives without a board representation (institutional investors) and thereby none of them could be regarded as independent in the Cadbury sense. Skandia, similar to Volvo, lacked traditional owners and was consequently controlled by management.

Thus, at least two different forms of board nomination practices labeled nomination committees are found in the mid 1990s, one where board directors representing traditional owners also formed nomination committees as a board subcommittee and one where representatives of owners not present on the board formed a subcommittee of the AGM.

4.3.1 The 1998 Firm Survey

A complete examination of all Swedish public firms' annual reports from 1998 on the disclosure of board nomination procedures is summarized in Table 15.3:

Firstly, the table is divided between the A-list and the O-list, where the A-list is the top list consisting of the largest and most established firms, whereas the O-list is to a larger extent composed of smaller, less established firms. Secondly, the table

Table 15.3 Nomination procedures 1998

	No Disclosure	Nom. Com. Board	Nom. Com. AGM	Nom. Com. Other	Chairman coordination	No sub-committees	Dominant owner coordination
A-list	47	11	9	2	10	6	5
O-list	69	7	10	5	5	18	5
Total	116	18	19	7	15	24	10

is divided into seven categories for disclosed board nomination practice (Chap. 3). The first category is "no disclosure," which means that the annual report contains no disclosure of board nomination. The second category, "nomination committee board," involves that a firm reports a nomination committee composed of a majority of board members (compare with Industrivärden above). The third category, "nomination committee AGM," is a reported nomination committee but is staffed by a majority of non-board members (for a similar example, see Volvo/Skandia above). The fourth category consists of firms that report a nomination committee without any specification of the members. The fifth category, "chairman coordination," is similar to the proceeding reported by Sjöstrand and Petrelius (2002) (Sect. 4.1), whereby the firm reports a process coordinated by the chairman among the largest owners. Notably, this chairman coordination is similar to the workings proposed by SISEC (Sect. 4.2). The praxis of the sixth category, firms that report that no board subcommittees exist, corresponds to the writings of SICSEC, as their recommendation deemed committees inappropriate. In the seventh category, "dominant owner coordination," the reported procedure points out one or two owners that appoint all new board members with regard to a special treaty.

In the annual reports of 1998 firms use different labels for the procedures. Three firms call it election committee ("valberedning" in Swedish) and one firm uses proposal committee ("förslagskommittée"). In Table 15.3 these different committees are classified in accordance with the body that actually held the positions: the proposal committee in category 2; two election committees in category 3; and one election committee in category 4.

In Table 15.3 only 86 out of 196 firms disclose anything about board nomination. There is no difference between the firms listed on the A-list and those on the O-list. Besides the vague notification that there exist no board subcommittees three procedures stand out as the most common disclosed procedures: nomination committees composed of board members, nomination committees composed of non-board owners, and chairman coordination. In Table 15.4 the characteristics of these firms on important corporate governance dimensions are contrasted with the non-disclosing ones.

In table 15.4 we find some interesting facts. In all four categories there are, on average, some remarkable similarities in firm size (market value, not disclosed here), foreign ownership, Anglo-Saxon directorships, board structure, and firm relation to the density of the Swedish auditor network. Four things stand out. First, the importance of owner identity, one large Swedish interest sphere, the Handelsbanken sphere, having chosen a Cadbury-like structure, which is disclosed,[10] while among other big interest spheres, the interest in disclosing the board nomination process is at the time low. Second, the ownership characteristics of firms disclosing a nomination committee formed as a subcommittee of the AGM show that the institutional investors are working in correspondence with their ownership policies (Sect. 4.2),

[10]Note that industrivärden discussed above is the leading investment company in the Handelsbanken sphere.

Table 15.4 Firm Characteristics in 1998

	Nomination committee on board	Nomination committee on AGM	Chairman coordination	No Disclosure
Average largest voting stake (%)	39	24	43	43
Average foreign ownership (%)	14	19	19	16
Average number of Anglo-Saxon directors	0	0	0.06	0.13
Proportion of CEO on board (%)	90	100	90	90
Proportion audited by "big league auditors" (%)	55	58	46	46
Average unique directors (%)	41	55	43	55
Average number of interlocks	2.2	1.4	2	1.5
Comment	Handelsbanken sphere nomination	Of 19 firms, 13 lack controlling owners	Hagstömer and Qviberg sphere nomination	Most traditional industrial families: Wallenberg, Stenbeck, Lundberg, Söderberg, etc.

since firms with rather dispersed ownership form nomination committees of this sort. Third, the low foreign/Anglo-Saxon influence among these early nomination committees, which is similar to that of other firms. One would think that foreign ownership and Anglo-Saxon directors would have had some bearing on the adaptation or non-adaptation of a nomination committee. However, the foreign ownership stakes are similar among all the firms and none of the nomination committee firms had an Anglo-Saxon director. Fourth, considering the average number of interlocks, the board nomination committee and the chairman coordination stand out; it is obvious at this point that firms more established in the Swedish system use these methods. All in all, a picture emerges of a variety of board nomination practices in accordance with firm needs.

4.3.2 The 2000 Firm Survey

The annual reports of the listed Swedish firms are surveyed for the year 2000. The result is summarized in Table 15.5:

Table 15.5 Nomination procedures 2000

	No disclosure	Nom. Com. Board	Nom. Com. AGM	Nom. Com. Other	Chairman coordination	No sub-committees	Dominant owner coordination
A-list	30	7	15	1	8	3	1
O-list	96	13	14	4	11	24	11
Total	126	20	29	5	19	27	12

As in the 1998 survey, Table 15.5 is divided between the more established A-list and the less established O-list. The table is further divided between the different observed categories of board nomination practices found in Swedish firms' annual reports. Again, labels different from the nomination committee are used. Three election committees (valberedning) are classified as belonging to category 3. One voting committee (valkommitté) is classified in category 4 and one proposal committee (förslagskommitté) in category 2. Finally, there is one committee (kommitté) classified in category 2.

From Table 15.5 we can see that the interest in disclosing the board nomination procedure has not increased. One interesting thing to notice is that nomination committees at AGMs are growing; this is partly due to the emerging migration of the Handelsbanken sphere to this category (see below, Sect. 4.3.3). We still see three procedures that stand out: the board nomination committee, the AGM nomination committee, and chairman coordination. These are contrasted with the non-disclosing firms of important corporate governance dimensions in Table 15.6.

Even though disclosure rates are slightly down from 1998, things are beginning to change. This is indicated by the fact that half of the influential Wallenberg sphere's firms are now disclosing "chairman coordination" as a support for traditional methods and for SICSEC. AGM nomination committees are beginning to stand out; they are marked as larger than board nomination committees, especially on the more established A-list (Table 15.5.) The average market value for AGM nomination committees stands out; this indicates the method that should be used for large firms with larger ownership dispersion. In addition to owner identity, the larger market value, and larger ownership dispersion for the AGM nomination committee, the firms in the four categories are remarkably similar. Thus, the disclosed nomination procedure, or the choice not to disclose, is dependent on who the owner is: if ownership is dispersed or the controlling owner is the Handelsbanken sphere, it is probable that the firm discloses that it has a nomination committee. If the firm is controlled by another traditional Swedish owner it is likely not to disclose, and if it does it will be "chairman coordination."

4.3.3 The 2002 Survey

Disclosure in Swedish firms was surveyed in 2002. This is summarized in the following table:

Table 15.6 Firm Characteristics in 2000

	Nomination committee on board	Nomination committee on AGM	Chairman coordination	No disclosure
Average market value, MDR	7.2	20.2	9.6	14.3
Average largest voting stake (%)	35	24	34	38
Average foreign ownership	13	21	19	20
Average number of Anglo-Saxon directors	0.05	0.03	0.15	0.18
Proportion of CEO on board (%)	90	90	84	81
Proportion audited by "big league auditors" (%)	35	55	47	36
Average unique directors (%)	60	53	55	63
Average number of interlocks	1.22	1.55	1.45	1.08
Comment:	Half of the Handelsbanken sphere firms	Some of Sweden's absolutely largest and most widely held firms. Also half of the Handelsbanken firms	Some large Swedish owners such as Hagströmer & Qviberg. Half of the Wallenberg firms	Most Swedish traditional owners: Stenbeck, Lundberg, Söderberg, Douglas. Also half of the Wallenberg firms

Table 15.7 follows the same structure as the tables of the 1998 and 2000 processes. Different labels are still used: four firms use the label "election committee" (three classified in category 3 and one in category 2), one uses "committee" (category 3), and two "nomination groups" (category 2).

Table 15.7 Nomination Procedures in 2002

	No disclosure	Nom. Com. Board	Nom. Com. AGM	Nom. Com. Other	Chairman coordination	No Sub-committees	Dominant owner coordination
A-list	7	5	27	0	11	3	1
O-list	92	27	35	12	21	20	12
Total	99	32	62	12	33	23	13

The disclosure of board nomination procedures has increased. Regarding the A-list, disclosure has become the norm, as only seven firms refrain from disclosure. On the O-list, on the other hand, 92 still avoid disclosure, but this is a marked improvement. However, the reported praxis still varies, and the three procedures – nomination committees composed of board members, nomination committees composed of non-board owners, and board nomination through chairman coordination – stand out. Following the pattern from the year 2000, the nomination committee composed of a majority of owners without board representation is clearly more frequent than the other two groups. This is even more striking on the A-list, where this procedure is clearly the dominant one. From Table 15.8 it becomes evident that things have changed:

To disclose the nomination process in the annual report has become standard among major firms – among the 99 non-disclosing firms only 19 have a market value

Table 15.8 Firm Characteristics in 2002

	Nomination committee on board	Nomination committee on AGM	Chairman coordination	No disclosure
Average market value, MDR	8	13	8	1.5
Average largest voting stake (%)	32	27	32	41
Average foreign ownership (%)	18	19	18	13
Average number of Anglo-Saxon directors	0.19	0.3	0.16	0.14
Proportion of CEO on board (%)	80	82	88	63
Proportion audited by "big league auditors" (%)	38	58	47	38
Average unique directors (%)	63	53	48	62
Average number of interlocks	1.25	1.5	1.8	1.1
Comment:	No pattern since Handelsbanken sphere left this group	The noncontrolling owner firms are crowded out by the Handelbanken and some of the Wallenberg sphere firms	Hagströmer & Qviberg sphere only has one firm left in this category, the Wallenberg sphere has four. Preferred method for Bennet sphere	The remaining traditional industrial families: Stenbeck, Lundberg, Stillström, etc.

over 1 billion SEK. The traditional spheres refraining from disclosure have become marginalized. The three largest categories have become very similar in almost every characteristic: market value, largest voting stake, foreign ownership, the number of Anglo-Saxon directors, proportion of CEOs on the board, the use of a "big league auditor," and interlocking directorships. This implies that the characteristics of the firms are becoming less important in determining how board nomination should work. The Handelsbanken sphere completes the emigration from board nomination committee to AGM nomination committee, together with some of the Wallenberg sphere firms, which indicates a growing consensus among the most established Swedish corporate governance actors on board nomination. However, as the remainder of the Wallenberg sphere firms, together with the Bennet sphere firms, disclose chairman coordination, support for the traditional methods is consciously displayed.

Thus, for 2002 a move toward an internal convergent pattern of board nomination is observed. Regardless of opposition the pattern is as follows: a listed Swedish firm, of a given size, should have a nomination committee and that committee should be linked to the AGM.

4.3.4 The 2004 Firm Survey

A survey of the annual reports from 2004 is summarized in Table 15.9.

Table 15.9 is arranged in the same way as Tables 15.3, 15.5, and 15.7. The variation in labels is growing. There are now 21 election committees ("valberedning", 6 in category 2, 14 in category 3, and 1 in category 4); 7 firms variably use nomination committee and election committee in their disclosure[11] (6 in category 3 and 1 category 4); there is one informal nominations committee (category 3) and there are three nomination groups ("nomineringsgrupp," all category 3).

Table 15.9 shows that the disclosure of board nomination praxis has become institutionalized, even on the O-list, and thus less established firms closely follow the practice of the more established ones. It is also becoming clear that nomination

Table 15.9 Nomination procedures in 2004

	No Disclosure	Nom. Com. Board	Nom. Com. AGM	Nom. Com. Other	Chairman coordination	No sub-committees	Dominant owner coordination
A-list	2	7	32	0	6	0	1
O-list	25	59	81	11	16	4	9
Total	27	66	113	11	22	4	10

[11] The common way of using both labels used to be having one in the heading and another in the running text. A possible explanation for this is that by this time the work of the Swedish code group (see above) was beginning to be known among the firms, and in the final corrections of the annual report mistakes occurred.

Table 15.10 Firm characteristics in 2004

	Nomination committee on board	Nomination committee on AGM	Chairman coordination	No disclosure
Average market value, MDR	6	17	9	1.4
Average largest voting stake (%)	31	27	35	44
Average foreign ownership (%)	15	21	17	14
Average number of Anglo-Saxon directors	0.12	0.38	0.22	0.18
Proportion of CEO on board (%)	58	67	63	62
Proportion audited by "big league auditors" (%)	30	33	18	29
Average unique directors (%)	64	54	65	68
Average number of interlocks	1.1	1.5	1	0.9
Comment:	The Handelsbanken sphere void is filled by some traditional owners such as Douglas/Schö rling, Stenabeck, and Stena spheres. Notably, these owner's firms occurs in other categories	The Handelsbanken sphere is joined by a majority of the Wallenberg sphere firms, joined by firms from Stenbeck, Douglas, Stena, Hagströmer/ Qviberg, and Tigerschiöld	The three Wallenberg firms in this category are getting abounded as this traditional method has declined to only 22 disclosing firms	Just a few firms and just a few traditional owners, such as Lundberg. Only five firms with a market value over 1 billion SKR

committees formed by a majority of non-board members constitute the largest nomination practice, especially amongst the A-list firms, giving a hint of which practice a regulator might choose (see above). This corresponds to the figures presented in Table 15.10.

The divide between firms using nomination committees and those that do not is growing. Those firms that do not disclose their nomination practice are now rare and only owners in almost total control of the companies can refrain from doing so. The traditional method of "chairman coordination" has decreased and the last three Wallenberg sphere firms remain in isolation. However, the two most important

changes relate to the two different nomination committees. In slightly more closely held firms some traditional owners have moved to nomination committees with a majority of board members. This seems reasonable, since by now very few would doubt that the Swedish corporate governance code holds provisions on committees, but the stance on who should make up the committee was still open for discussion. The most remarkable development is of course the "victory" of the AGM nomination committee: almost half of all firms and 90% of the A-list firms disclose these proceedings.

5 Discussion: Divergences in a Convergent Process

In this chapter's empirical part we have witnessed a two-level change – on the firm level and on the regulatory level – of how the Swedish corporate governance system nominates its boards. A rather opaque structure, where traditional owners were in single charge, was left in favor of a more open structure where the traditional owners have to share their influence with other types of owners (i.e., local institutional investors). This took time and many pieces had to fall into place. Following the empirical material the process could be summarized as follows:

–Institutional entrepreneurship by the Swedish Shareholders' Association – a demand for nomination committees.
–A pressure on the institutional investors for exercising owner responsibility – a demand for nomination committees.
–Corporate scandals, in Volvo leading up to the first "Swedish" committee and in Skandia leading up to the Swedish code being issued. What is interesting to note, in this case, is that the firms involved in the scandals lacked large owners and that a nomination committee was part of the solution.
–There exist a number of firms with rather dispersed ownership, which causes problems in terms of board nomination. Their solution was the "Swedish" nomination committee.
–The logics of isomorphism and legitimacy made the committee concept diffuse among firms until the vast majority among the biggest and most established ones established a "Swedish" nomination committee.
–Regulatory fiat, with highly legitimate actors forced by fear of government intervention, finally settled for the "Swedish" nomination committee.

The original concept has been translated in two different ways. First, an actual translation of the Swedish label, from nomination committee (nomineringskommitté) to election committee (valberedning). This has been done in the official Swedish documents and only in the final phase. Second, the function of the rule has been translated from a subcommittee of the board to a subcommittee of the AGM including a change of the personnel. Viewed from this perspective, one might say that the first translation (of the label) is driven by the second (of the form), and

thus one might argue that there has been no attempt at transplantation. However, we must consider the fact that the second translation had already been made by the firms before the regulator changed the label. Since the translation of the label has only been made in Swedish, a Swedish investor is not likely to be "fooled" by this play with words, but perhaps a foreign investor with limited resources to devote to assessing individual companies in a foreign country ("ticking the boxes") would feel comfortable with the Swedish firm also having a "nomination committee" (see Gordon & Roe, 2004, on the home country effect).

This is highly congruent with translations found in Buck et al. (2004) and Buck and Shahrim (2005). For a long time a nomination committee in Sweden could be almost anything that the actor labeled so. These are simply good examples of the modifications, additions, or appropriations – in short the translation – that Latour (1986) speaks of. Certainly, as pointed out by Buck et al. (2004), actors would define and translate the concept to fit their interests. After more than 10 years of elaboration at the firm level the regulator finally settled for a solution and only after that one might say that the concept acquired a real meaning. What is interesting to note is that the regulator seemed to have no other choice than prescribing the solution used by the majority, the largest, and the most established firms. Thus, when institutionalization leads to the cohesive phase (Scott, 1995), the translation perspective (Czarniawska & Jorges, 1996; Buck & Shahrim, 2005) is limited – no more translations are possible – at least not in a regulatory sense. We are then only left with the memory of the great translation of the transplanted rule. Thus, the regulator's possible achievements are restricted by past translations of that which is being regulated. In this case, it would not be possible to introduce a nomination committee with a Cadbury stance, since the firm practice is likely to decouple and the legitimacy of the regulator would probably be questioned.

The firm-level development is not only compatible with the diffusion and more traditional neo-institutional perspective in its final phases. In the 1998 and 2000 surveys early adoption seemed to be driven by rational reasons (Tolbert & Zucker, 1983), i.e., the AGM nomination committees in the firms with dispersed ownership. The 2002 survey points at decoupling and confusion (Meyer & Rowan, 1977) – the nomination committee concept has by then become associated with legitimacy, but there is yet no consensus regarding the actual meaning of the concept. The final phase, the 2004 survey, is associated with the normative and cohesive forms of isomorphism (Scott, 1995), as all firms evidently now need nomination (election) committees, regardless of ownership situation and managerial discretion over board nomination.

Finally, we cannot deny the fact that we have witnessed a transplantation of an internationally recognized best practice rule into the Swedish corporate governance system, at least not if we accept the above statement that a foreign investor will see the Swedish concept of nomination committee and associate it with the international concept of such a committee. Nor can we deny that the regulator finally accomplished a formal convergence (Gilson, 2004). However, the regulatory structure does not converge on international best practice, as Gilson (2004) assumed, but it is converging internally. From the beginning, a great variety of nomination

practices existed among the Swedish firms. In the surveys from 1998 and onwards it became clear that different owners chose different methods of director nominations, i.e., that identity mattered and one could thus claim that firm characteristics mattered. In a firm with dispersed ownership most established actors agreed that nomination committees connected to the AGM were a good solution. However, if the firm had one single owner in control of, for instance, 30% of the votes on the AGM, the resources could probably be spent better. Finally, when the Swedish Corporate Governance Code is put to action there is no more room for variation; all firms are to have an election (nomination) committee as a subcommittee to AGM. It is a different solution from the international one, but it has been implemented in all firms following Code.[12] Notably, this could probably not have been accomplished without action by the regulator, since accomplishing a change in corporate governance without the regulator – as proposed by La Porta et al. (1999) – would have been complicated, and the reform would most certainly have been subject to various diverging translations.

Thus, this chapter claims that in the case of the transplantation of the nomination committee concept into the Swedish corporate governance system the convergence thesis does not hold internationally, but nationally. This is a rather unexpected consequence. Certainly, one might speculate whether this is only the first phase in a convergence process – first we need nomination committees and only after that can we obtain nomination committees of a real international character. However, it seems more reasonable to discuss the empirical findings of this chapter in terms of path dependencies (Bebchuck & Roe, 2004; Roe, 2002). The path dependency perspective implies that (regulatory) paths chosen in history rule out some, and suggest other, regulatory solutions. It is obvious that the Swedish history of a few large industrial owners in control of most firms (see Högfeldt, 2004; Henreksen & Jacobsson, 2003) has effected the implementation of the nomination committees. The independent directors were useless at nominating directors, as their loyalty lies with the traditional owners. Neither was it possible to propose a practice restricting the traditional owners' influence, because it is protected by the Companies Act. What was possible was a practice where the traditional owners were forced to listen to minority owners before making a decision. There were also paths chosen in other areas, such as the cooperative and voluntary sector concept of election committee, which effected this corporate governance change. Therefore, predictions based on the path dependence perspective are meaningless, as it seems reasonable that paths in almost any area might, or might not, be involved in shaping the future.

In this chapter we followed the process both on the firm level and on the regulatory level. Otherwise we would not have been able to see the interaction and the consequences of this interaction: institutional entrepreneurship (from the Swedish Shareholders' Association, DiMaggio, 1988), entrenched interest (from SICSEC and traditional owners, Kahn-Freund, 1974), and corporate scandals (in Volvo and

[12]Mandatory in the Swedish code regulation means in a "comply or explain" sense. However, the code has shown great normative influence and deviations have been very rare.

Skandia, Clarke, 2004) were all important. However, all things considered, firm legitimacy in both investors' and competitors' eyes and the ability to adopt and innovate (i.e., translate) paired with the genuine uncertainty about what constitutes "good corporate governance" are also reflected in the patterns of changing corporate governance systems. This highlights the complex workings of local actors in relation to international best practice regulation.

6 Conclusions: Transplant and Translate: A Double-Edged Sword

In this chapter following both firm-level action and action on the regulatory level, the process – where international corporate governance regulation is implemented in local practice – seems to be iterative. Starting from the La Porta, et al. (1999) perspective, the Swedish board nomination convergence on international best practice seems to be a question of labels rather than actual practices. Thus, from the perspective of an international investor, Swedish firms' implementation of nomination committees seems largely driven by symbolism and legitimacy, rather than by the wish to curb agency costs, and we could say that we are experiencing a transplant effect (Berkowitz, et al., 2003), as the transplantation of the UK nomination committee to Sweden resulted in another nomination committee. However, viewed from the perspective of local firms, at least initially, the development seems driven by efficiency motives (Tolbert & Zucker, 1983) rather than by an ambition to "fool" international investors. Firms in the Swedish corporate governance system lacking traditional owners, and thereby sensitive to agency costs associated with management, introduced nomination committees that were different from their UK counterpart but that nonetheless addressed a real problem in the Swedish corporate governance system (not the problem Cadbury intended to solve). As the process continues, more and more firms have to adopt and form nomination committees, even though their actual need is smaller than the early adopters (Tolbert & Zucker, 1983), thus bringing symbolism and legitimacy into the story again. Then, however, the institutionalization process and the regulators have ended up with an "innovation" (at least in the corporate sector) working against concentrated power and thus filling a previously not identified need. Thereby we might conclude that the relationship between local practice and international developments follows a rather obscure logic, to quote Iron Maiden:

> You'll take my life but I'll take yours too/You fire your musket but I run you through (Iron Maiden, *The Trooper*, 1983).

Thus, this chapter's conclusion is: in the case of nomination committees in Sweden, the international best practice corporate governance solutions kill traditional local corporate governance practice, but at the same time the local corporate governance practice kills the international best practice solution. Thereby the Swedish nomination committee constitutes a convergence but it is not on international best practice; the convergence is on local consensus. This convergence could

not be achieved without the regulators, although the regulators' solution could not be achieved without those regulated. Empirically, this phenomenon could not be observed without this chapter's focus on local actors.

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Chapter 16
Transnational Law, Between *Ius Mercatorum* and *Ius Civile*

Cristián Giménez Corte

Abstract This chapter analyzes how transnational commercial law is determined, interpreted, and applied by national judges. For these purposes, this chapter discusses the relationship between "national domestic law" and "international law" on the one hand and the relationship between "civil law" and "commercial law" on the other. This analysis attempts to determine how these two sets of relationships influence and, at the same time, are influenced by the new process of the transnationalization of the law. A study of transnational commercial law cases upheld by national courts serves as the basis for the proposed analysis.

1 Introduction

This chapter analyzes how transnational commercial law is determined, interpreted, and applied by national judges, with particular reference to cases from Argentina.

Section 2 establishes the general theoretical and historical background of the theory of interpretation and legal thinking in the continental legal tradition, stressing the diverse methodology employed in civil law in comparison to commercial law as branches of private law.

Section 3 examines four different judicial decisions. The first two were rendered by judges with competence in both "civil and commercial matters" and the other two decisions were issued by judges with competence only in "commercial matters" and not in "civil matters." This examination will show how the determination, interpretation, and application of transnational commercial law vary depending upon the preeminence of the *ius civile* or the *ius mercatorum* traditions in the reasoning process of judges.

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This chapter also analyzes the relationship between "national domestic law" and "international law" on the one hand and the relationship between "civil law" and "commercial law" on the other. This analysis attempts to determine how these two sets of relationships influence and, at the same time, are influenced by the new process of transnationalization of the law.

2 Theoretical and Historical Framework

2.1 Ius Civile

Interpretation means the determination of the meaning of a legal norm. In general, interpretation is linked to the interpretation of statutory law; interpretation, thus, "should provide the answer on the content to be given to an individual norm of a judicial decision . . . in the process of deducing it from a general norm of statute law, with the purpose of its application in a concrete case" (Kelsen, 1979, p. 349).

This definition of interpretation provided by Hans Kelsen defines, in general, the interpretation process in countries of the continental legal system.[1] In such countries, judges must base their decisions upon the law. When resolving a case, they must determine the relevant facts, frame these facts within the proper legal framework, determine which law is applicable to these facts, and ultimately decide upon the legal solution for the case by "deducing it from the general norm of statute law."

The French exegetic school of thought contended that each law has only one possible valid interpretation. The judge must subsume the concrete case into the general law (the axiom) and then deduce from there the only possible logical conclusion: the solution of the case (Ciuro Caldani, 1993).

The French exegetic school was the legal manifestation of the French Revolution, and its absolute reliance upon statutory law, in particular the codes, as the main important, almost exclusive, source of law is explained by the political and philosophical foundations of the Revolution. The law was, now, the product of reason and also the will of a legislature, which represented the people. The law, as opposed to local customs and royal decrees of the Ancient Regime, was at the same time a rational and a democratic product; it put everyone under the rule of law (principle of legality), ensuring through this the equality of all citizens. Having a general, written, public, and uniformed legislation, applicable to everybody and in the whole territory of the country, guaranteed not only protection against possible abuses by the government but also the predictability and reasonability required to plan and do business (Giron Tena, 1986).

[1]The term "continental legal system," as opposed to "common law," will be utilized in this study. For this purpose, the term "civil law" will not be utilized to describe the continental legal family; instead, "civil law" will be utilized to define one of the branches that, alongside commercial law and private international law, constitutes the private law in the continental systems.

Without prejudice to the validity of the above-mentioned principles, modern legal theory has demonstrated that the theory of interpretation of the exegetic school was wrong and that judges indeed enjoy a wide degree of discretion when interpreting and applying a norm.

For Kelsen, this degree of discretion escapes from the provinces of legal science and lies on the political side of the law. Kelsen maintained that there is no one valid method of interpretation. The interpreter is allowed to utilize the grammatical method or to explore the will of the legislature. The interpreter can make a literal interpretation or a systematic interpretation. All of these methods are equally valid and the choice of one or another lies in a "political" decision by the judge (Kelsen, 1979, pp. 351–353).

More recently, interpretation theories have suggested that the judicial decision-making process is even more complex, not purely logical but also dialogical. The process involves not only normative and factual factors but also sociological, economical, and teleological considerations, as well as recourses to values and justice. Current interpretation theories have undertaken the challenge left by Kelsen and are attempting to provide a scientific explanation for this decision-making process (Ariza, 2004).

Regardless of the final explanation for the interpretation process, one thing remains true: in modern democratic states, judges must base their decisions upon the law. This is mandated by the constitutions,[2] the procedural codes when establishing how decisions have to be structured,[3] and then by the constitutional appeals, which allow the nullification of a decision that has not followed the structure and principles set up in the procedural codes.[4]

From a different perspective, this way of legal thinking is the sophisticated and final product of a long historical process. The roots of the "continental" legal reasoning and legal science were initially elaborated by the scholastic school when systematizing the Canonic law. This type of legal science was then continued and improved by the glossators and post-glossators, who were trying to systematize the newly reborn Roman law. It was then passed to the exegetic school and from there,

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[2]In the case of Argentina, the Constitution establishes that no one shall be obliged to do what is not mandated by the law, and no one shall be deprived of what it is not prohibited by law (Article 19). Specifically, Articles 17 and 18 of the Constitution establish that decisions shall be based on the law.

[3]Article 163 of the Civil and Commercial Procedural Code (Law no. 17454 of 1981, modified in 2001, hereinafter CPCCN) establishes that a decision should include "3. A brief summary of the matters that constitute the object of the trial; 4. Separately, a consideration of the matters referred to in the previous paragraph; 5. The foundations and the application of the law; . . . 6. The express, positive and precise decision, according to the claims and defenses presented during the trial, qualified in accordance to the law, declaring the rights of the parties and condemning or absolving the claimant or the defendant, in whole or in part." In addition, Article 34 (Duties of Judges) of the CPCCN establishes that judges shall "4) Base all definitive or interim decisions, under penalty of nullity, according to the hierarchy of the norms in force and the principle of consistency."

[4]For example, Article 1.3 of the law 7055of 1974 of the Province of Santa Fe that regulates the appeal recourse of unconstitutionality.

with variations, to the present time (Molitor & Schlosser, 1980; Magallón Ibarra, 2002).

There are two key particularities in the historical development of the legal science in the continental legal tradition. The first is the crucial role that medieval universities played in this process. In effect, Roman law would be studied in the universities and disseminated across continental Europe through teaching. Therefore, its terminology, concepts, classifications, and categories became the terms, concepts, classifications, and categories utilized by jurists in their reasoning. This way of thinking, studying, and teaching would definitely contribute to the formation of the "continental" legal family (David, 1968).

The other key particularity is that this new legal science was mainly developed for the study of the Roman *ius civile* as private law. In the Middle Ages, as political factors led the development of public law in different domains and as Canon law (although also influenced by Roman law) had its specific scope of application, Roman law remained latent and was eventually reborn as the general law for the ordinary private lives of the people as the *common* law (Díaz Consuelo, 1988). Thus, " . . . Roman law, the civil order . . . has been the base, the foundation, of the legal science. Legal Science discussed this common and private law" (Giron Tena, 1986, pp. 26–27).

Through this process of reception and diffusion, the *ius civile* became the *ius commune* of continental Europe. However, the consolidation of the nation-states during the seventeenth and eighteenth centuries required one national and state law, together with one central government and one unified army. Consequently, the former "transnational" *ius civile* was incorporated into national laws and specifically into codes. This process of nationalization of the *ius civile* also broke its original universality.

The French Civil Code of 1804 was the paradigmatic example of this new codification process. It had a tremendous influence all across Europe, in Latin America, and particularly in the Argentinean Civil Code of 1871.

2.2 Ius Mercatorum

While the old Roman law was being brought to life again, for different reasons, in different places, involving different participants, employing a different methodology, but approximately during the same period, new usages and customs started to develop a new branch of law: commercial law.

Among the reasons for this initial separation, the sociological factor was very important. In effect, trade, in a sense close to its current meaning, was born somewhere in between the High and the Late Middle Ages. And together with trade was the need of its specific regulation. This situation was completely different during the Roman Empire (Piergiovanni, 1997).

The place of birth was no longer the cubicles of the canonist or the classrooms of the universities, but the houses of the merchants, where they carried out their

profession. The main players were no longer the law professors and their students, but the merchants themselves. And the method was not the study and comment of the Roman law, but the practice of commerce and the development of common practices.

These practices referred to interchange and the development of common tools for this purpose. These main tools included the letters and other documents utilized for the offer, request, and acceptance, in short, the exchange of goods. These letters would constitute a specific kind of commercial correspondence charged, as well, with juridical meaning. This continuous communication through letters would contribute to the creation and dissemination of common commercial rules among merchants in a back and forth of legal doctrine and commercial practice (Petit, 1997).

Accordingly, new common and general practices, usages, customs, and rules gradually began to develop and apply specifically to trade and traders. These new usages and customs were developed independently from the Roman schemes and were applied by special tribunals composed of merchants themselves instead of jurists. These tribunals were also independent from ordinary ones, and some of them were located in the same fairs where merchants would meet. The ad hoc and temporary nature of some of these tribunals led them to solve conflicts among traders in a fast and flexible way, applying principles of informality, good faith, and the value of oral promises. These new laws of the merchants were shared by and common to all traders, regardless of their nationality or place of business and, because of that, acquired certain universality.

However, around the seventeenth century, the *ius mercatorum* started to become absorbed by the royal law, i.e., by the state law.[5]

2.3 The "Civilization" of Commercial Law

In Spain, commercial usages and customs were officially recognized by ordenanzas (regulations) enacted by the Spanish kings. These included the famous Ordenanzas de Bilbao of 1737.

These ordinances would become the commercial law of Spain and its colonies. Later, the new commercial courts, called Consulados (guilds), that were established in Buenos Aires in 1794[6] and in other various cities of the Spanish Empire, had to apply these ordinances to solve disputes among merchants. Only in cases where no existing ordinance applied were they authorized to have recourse to the Leyes de Indias and the laws of Castilla (Malagarriga, 1963).

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[5]This process is relatively different in the common law countries (Le Pera, 1986).

[6]The Consulado had jurisdiction over the whole Vice-Kingdom of the Rio de la Plata, which encompassed approximately the current territories of Argentina, Uruguay, Paraguay, southern Brazil, southern Bolivia, and parts of Chile. It continued to work even after the independency of Argentina from Spain in 1810.

The judges of the Consulado were not professional lawyers but merchants; even more, parties had to act by themselves without legal representation.[7] Only in very rare and complex cases could the parties or the judges ask for the advice of a lawyer. The process before the Consulado was brief, informal, and, in general, oral. The parties (litigants) were expected to present their demands and counterdemands "briefly and simply." Documents and witnesses were examined in the same audience, after which the judges made their decisions (Cruz Barney, 2001, pp. 83–88).

The substantive law applied by the Consulado was, basically, the Ordenanzas de Bilbao, but the decisions of the judges were expected to be based upon "verdad sabida y buena fe guardada" (known truth and good faith).[8] This means that the final decision had to be consistent with the form of the process. As the process was informal, without legal arguments and without lawyers, aiming basically at the clarification of the facts, the decision had to be written "in short and clear terms, it is not allowed to use texts, authorities, arguments, or reasons to found the decision, it should be proceeded based solely on the known truth and good faith in the style of commerce," according to the text of the Ordenaza del Consulado de Burgos of 1766, which is more explicit than the one from Buenos Aires on this matter (Concepción Rodríguez, 2004).

In other words, the decisions were not based upon legal norms, but upon commercial usages and the standard of conduct of good merchants.

This phrase, "verdad sabida y buena fe guardada," expressed the idea of the *aequitas mercatoria* that was far more than a mere interpretative criterion to become a true source of law, independent from the other sources and on occasions the only source utilized to solve a case (Concepción Rodríguez, 2004; Giron Tena, 1986).

It was just in 1862 when the new Code of Commerce entered into force in the whole territory of the Argentine Republic, replacing the Ordenanzas de Bilbao. That same year in Buenos Aires, the new commercial courts were created, with professional lawyers as judges who had to follow the same procedural rules as the civil courts and were also organized following the structure of the civil courts. Of course, these new commercial judges had to base their decisions upon the new law: the Code of Commerce (Fernandez, 2002).[9]

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[7] Article XVI of the Royal Decree that established the Consulado de Buenos Aires stated that "it should be discarded everything that smell to subtleties or formalities of law." Real Cedula de Erección del Consulado de Buenos Ayres Expedida en Aranjuez a XXX de Enero de MDCCXCIV.

[8] Article V of the Royal Decree that established the Consulado de Buenos Aires reads, "The judicial process shall always follow a plain and simple style, based on the known truth and the good faith" (V. "En los juicios se ha de proceder siempre a estilo llano, verdad sabida y buena fe guardada . . . " "Known truth" means the truth proven in the process, while "good faith" means reliance that the other party will behave as would ordinarily be expected (Concepcion Rodriguez, 2004).

[9] Although before there were attempts to include lawyers alongside merchants as judges of the Consulate, it was only in 1862 that the full "professionalization" of the Consulates occurred (Zorraquin Becu, 1966). It was surely influenced by the Constitution of 1853 which had just entered into force in Buenos Aires and which expressly established that sentences shall be based on the law (Articles 17, 18, and 19), see *supra* note 2.

In the provinces, once the Consulado was closed, there were various attempts to create new commercial courts (Levaggi, 2005). Eventually, however, the commercial jurisdiction was unified with the already existing ordinary civil jurisdiction. It is apparent, therefore, that the process of nationalization of commercial law was stronger than in the city of Buenos Aires, since ordinary professional judges undertook competence in commercial cases as well.

These developments show that the way of thinking in commercial law initially was, and still is, different from that of the civil law. Only in the late nineteenth century was it decided to create "professional" tribunals composed of judges with a legal education, who would follow the same procedural code as the civil judges and, in the case of the provinces, would unify both jurisdictions.[10]

Afterward, everything changed. The new professional judges had to face commercial legal problems. How did they, then, solve them? To a certain extent they brought, they transplanted the civil legal science to the commercial legal field, and in doing so judges started to base their decisions in a similar way to that of the civil law.

Yet the spirit and the rationale of commercial law have survived and developed into a different, particular, and autonomous branch of private law.

2.4 "Commercialization" of Civil Law

From a current perspective, it is possible to see that commercial law has not merely survived these attempts at "civilization," but it seems that it is now resurging stronger. Actually, it seems that there is a counter-process of "commercialization" of the civil law. "[T]he commercialization of civil law is a widely known and easily understood phenomenon" (Kozolchyk, 1979, p. 37).

As shown in the previous chapters, the origin and development of commercial law differ from that of civil law. This original separation determined the forms of the regulation of private economic matters in the continental legal system that, since then, would be subjected to two different schemes: civil law and commercial law.

Still, both spheres of regulations are not completely separate from each other; on the contrary, there is a fluid relationship between them. Sometimes, this relation is dialectical, sometimes cooperative, and sometimes competitive. At all times, indeed, communication channels are open. After all, both civil law and commercial law are branches of private law, and, as such, they apply to the regulation of one aspect of human life (Ascarelli, 1964).

As previously discussed (Sect. 2.1), a number of factors led to the civilization of commercial law. However, as noted, a change in this trend is currently taking place

[10]Still, these differences are not absolute. Generally speaking, civil law is prototypically a jurist law, while commercial law is not. But, historically, there were cases that, for a number of reasons, the ordinary civil (and even criminal) justice was applied by lay judges. On the other hand, commercial law was occasionally applied by lawyers (Zorraquin Becu, 1966; Levaggi, 2005).

that is leading to a movement toward the commercialization of civil law (Garrigues, 1972).

Still, early manifestations of this process were previously apparent. One example is the transition from the subjective to the objective theory of commercial acts. This theoretical and legislative change led to the inclusion of not only professional merchants but also ordinary individuals under the personal scope of the application of commercial law (Broseta Pont, 1971).

Other, and more recent, manifestations of this process may be seen in the displacement of civil contracts by commercial contracts. Since almost all contracts are performed with the purpose of making a profit (Articles 8 and 450 of the Code of Commerce of Argentina), they fall under the material scope of the application of commercial law, with the exception of consumer contracts that are subject to a particular regulation, but, again, are outside of the Civil Code.

In this same direction, the displacement of the civil corporation regulated by the Civil Code by the commercial corporations of the Law of Commercial Corporations (LSC No. 19550 of 1972) may be analyzed, as almost all corporations are regulated now by the LSC and not by the pertinent articles of the Civil Code.

In addition, consideration may be given to the growing importance of commercial arbitration, which in certain cases surpasses ordinary national jurisdiction.[11]

For the purposes of this essay, the unprecedented importance gained by one prototypical source of commercial law should be stressed: customary law. As will be discussed below (Sect. 3), in certain cases, usages and customs take precedence over the classic national law.

Against this background, this study will analyze how current national judges are determining, interpreting, and applying the so-called transnational commercial law. For this purpose, this essay will study four different decisions.

3 Case Law

3.1 Case 1: ABN Amro Bank v. Guerrero S.A.

3.1.1 The Case

ABN Amro Bank (the Plaintiff) filed a claim against Guerrero S.A. (the Defendant). The Plaintiff based its claim upon the grounds that it was the confirming bank in a documentary credit operation in which the Defendant, as the applicant, requested Banco Feign, the issuing bank, to open a letter of credit. When the issuing bank

[11] In the case of Latin America, Brazil (Lei no. 9307/1996), Bolivia (Ley 1770/1997), Paraguay (Ley 1879/02), Chile (Ley 19971/2004), and Peru (Decreto Legislativo No. 1071/2008) had passed new commercial arbitration laws (based on the UNCITRAL Model Law on International Commercial Arbitration). In addition, the constitutional courts of Bolivia, Brazil, and Chile have upheld the constitutionality of these laws.

failed to perform its obligation, the confirming bank, now the Plaintiff, demanded the payment of the credit to the applicant.[12]

In its reply, the Defendant denied any kind of legal link with the Plaintiff and argued that it had asked Banco Feign to open a letter of credit, not the Plaintiff.

The first step taken by the Judge for Civil and Commercial Matters of the city of Rosario, Province of Santa Fe, Argentina, was to characterize the contract under discussion.[13] The judge characterized the contract as an international[14] documentary credit. Then, the judge subjected the documentary credit to the applicable law, which, in this case, was the Uniform Custom and Practice for Documentary Credits (UCP 500), 1993 revision. The judge reached this conclusion, because the parties had expressly chosen to submit their contract to the UCP 500.

In addition, the judge considered that the UCP was also applicable as customary law. The judge said that there was a "lack of a state regulation" (*ABN Amro Bank c. Oscar Guerrero S.A.* cons. 2) with regard to the documentary credits and that "these contracts are governed by the UCP – compiled by the International Chamber of Commerce (ICC) – that constitute 'a commercial banking custom generated by its spontaneous observance by traders and bankers . . . ' It is a self-created international consuetudinary law . . . " (*ABN Amro Bank* . . . , cons. 4).

In this line of argumentation, the judge (following the classical civil theory) reminded those involved that customary rules must fulfill certain requirements to be considered a rule of law. The judge said that customary rules must be observed constantly and uniformly and, at the same time, be observed as binding legal rules. Only then, the judge said, may a customary rule be considered a legal rule.

To prove the existence of the customary rule, the judge trusted in the statements given by two witnesses. An expert witness explained the ordinary applicability of the UCP to documentary credits. Both witnesses testified that the Defendant was a professional trader and an import–export operator usually involved in these sorts of banking operations. The judged considered that the Defendant, being a professional trader and being usually involved in import–export operations, should have known about the applicability of these usages to documentary credits.[15]

Next, the judge returned to his first argument, the party autonomy. He affirmed that parties may choose a foreign law to govern their international contract.

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[12]Documentary Credit and Standby Letter of Credit mean any arrangement whereby a bank (the "issuing bank") acting at the request and on the instructions of a customer (the "applicant") or on its own behalf is to make a payment to or to the order of a third party (the "beneficiary") or authorizes another bank to effect such payment against stipulated documents, provided that the terms and conditions of the credit are complied with. Cf. art. 2 of the Uniform Custom and Practice for Documentary Credits (UCP 500), 1993 revision.

[13]This is the first step taken in all of the judicial cases analyzed in this study. Characterization, also called classification, means "the allocation of the question rose by the factual situation before the court to its correct legal category . . . " (North & Fawcett, 1992, p. 44).

[14]The international character of the contract is given by the place of business of one of the parties: the Plaintiff was located abroad, in Canada (Lorenzo Idiarte, 2002).

[15]Although not applicable to the case, the judge seemed to follow the criteria set up by Article 9 of the CISG.

However, he added that "the chosen law must not necessarily be a state law. In this sense, the Lex Mercatoria does not lack a legal nature by the sole fact that it is not a national law: the UPC as well as the Incoterms of the ICC, constitute substantive law to which the Argentinean courts have, without interruption, granted legal nature. Therefore, the court should apply these agreed substantive norms according to the consuetudinary norms of international commerce" (*ABN Amro Bank* . . . cons. 11).

Finally, the judge utilized yet another legal argument. He applied the analogy, according to Article 16 of the Civil Code, and subjected the documentary credit to the rules of the contract of agency, which is regulated in the Civil Code. The judge concluded that, even considering the documentary credit as if it were a contract of agency, the solution would have been the same, as both legal regimes (the UCP and the Civil Code) regulate this aspect of the operation in a very similar, if not equal, way. Ultimately, the judge found in favor of the Plaintiff and ordered the Defendant to pay.

The Court of Appeals confirmed the judge's decision of first instance, although the Court of Appeals based its ruling upon only one argument: the autonomy of the parties. The Court of Appeals said that the parties submitted the contract to the UCP and to the material regulation that the UCP provides to the case (*ABN Amro Bank c. Oscar Guerrero S.A. s. demanda*. Fallo de Cámara).

3.1.2 Analysis

In this case, the judge utilized three different legal arguments to justify the application of the UCP to the contract of documentary credit.

First, the judge based the application of the UCP upon the autonomy of the parties. This sole argument would have been enough to justify the application of the UCP. The autonomy of the parties to choose the applicable law to international contracts is permitted by the Civil Code (Articles 1197 and 1212), it is recognized by the courts,[16] and it is supported by doctrine (Boggiano, 1991). This was the only argument relied upon by the Court of Appeals to uphold the sentence of first instance.

Nonetheless, the judge also utilized a second legal argument to justify the application of the UCP by ruling that the UCP was applicable as customary law. It should be highlighted in this case that the judge not only made a reference to the applicability of a customary rule but also, following the classical civil law theory (Llambías, 1995), proved the existence and validity of the customary norm through witnesses.[17]

It is not clear from the text of the decision why, after having grounded the applicable law on the autonomy of the parties, the judge also felt the necessity to introduce

[16] In a different case, the Supreme Court of Justice of Argentina (CSJN) sustained the applicability of the UCP, which "is applicable to the case by virtue of the autonomy of the parties and also by virtue of the custom and practice of documentary credits (Articles 207 y 218 inc. 6 Code of Commerce)." CSJN, 23/03/04, *in re Equipamientos Mecánicos Damcar Limitada v. Empresa Transporte Nihuil*.

[17] Compare how the customary rule is introduced in this case with cases nos. 3 and 4 below.

a second argument to support his decision. The judge probably introduced this second argument to justify the selection, through the autonomy of the parties, not of a "state" law, but rather of – in the words of the decision – a "non-national law." What is more, the judge went further and elaborated on the theoretical foundations of the *lex mercatoria*, grounding it in the "consuetudinary norms of international commerce" (*ABN Amro Bank* . . . cons. 11).

The judge asserted a third legal argument to justify his decision. The documentary credit is not regulated under Argentinean law, in the Civil Code, or in the Commercial Code. The documentary credit is, therefore, an atypical or innominate contract.

How should innominate contracts be regulated? According to Article 16 of the Civil Code, when a judge faces a situation for which there is no law, the judge should analogize the situation to a similar one for which there is a regulation and apply to the former situation the law foreseen for the latter. This process is called analogy. If, even in this case, it is not possible to find the proper regulation, judges must resolve the case according to the general principles of law.

In this case, the judge determined that the contract under discussion (documentary credit) could be analogized to the contract of agency (mandato) that is regulated in the Civil Code. The judge concluded that, if the case were to be solved applying the regulation of the agency, the result would have been the same (*ABN Amro Bank* . . . cons. 14–16).

As shown, the judge utilized three different arguments to base his decision. The judge applied the UCP based upon the parties, he applied the analogy, and he also applied the UCP as customary law, indicating in each instance that each of these arguments led to the same result.

The judge deduced the solution to the case from the law. Articles 1197 and 1212 of the Civil Code allow the autonomy of the parties to choose the applicable law to international contracts. Since the parties had chosen a specific law – the UCP – and since that law states that the applicant (the Defendant) of a documentary credit is a solidary debtor of the confirming bank, then, the applicant should pay.

The judge also based the solution upon the fact that the contract of documentary credit is not regulated under Argentinean law. Under such circumstances, Article 16 of the Civil Code says that such a case should be solved by analogy, which, in this case, would be by applying the analogous regulation governing the contract of agency. The result of applying the analogous regulation was to place two solidary debtors to the agent and, accordingly, the applicant should pay.

Finally, the judge applied the customary norm (whose uniform, general, constant, and regular observance was proven by witnesses), which established that the applicant of a documentary credit is obliged to pay to the confirming bank regardless of the behavior of the issuing bank. Again, the result of this analysis was that the applicant should pay.

When he applied the UCP as customary law, the judge not only made a mere reference to it; through witnesses, he proved the existence and applicability of this customary rule, fulfilling all of the requisites required by the traditional civil law theory, that is, following a civil law criterion. Once the (customary) norm was proven

and established, the judge then followed a sort of "deductive" process to reach the final conclusion.[18]

Why did the judge follow this line of thinking? Because this is basically a *civil* court. As noted above (Sect. 2.3), during the process of unifying the civil and commercial courts in the provinces of Argentina, these courts were also assigned to commercial matters. Naturally, these courts continued to apply in commercial matters their own methods of solving civil law cases.

3.2 Case 2: Banco Velox v. Banco Sudecor Litoral

3.2.1 The Case

This decision discussed the applicability of a customary rule to a bank operation. The case reached the Supreme Court of the Province of Tucuman via an extraordinary constitutional appeal called *recurso de casación*, permitting the Court to review the decision of the Court of Appeals on Civil and Commercial Matters of the city of Tucuman. This constitutional appeal is admissible in cases where the validity of the appealed decision is questioned because of its infringement of a substantive or procedural legal rule.[19]

Banco Sudecor Litoral SA (the Appellant) asserted that the legal regime of the certified cheques established by the law of cheques no. 24452 of 1995 set up certain conditions and formalities for these special kinds of cheques. However, the appellant contended, the lower court applied a supposed customary rule modifying that law. According to this customary rule, if the manager of the drawn bank signs and stamps the reverse side of the cheque and includes the legend "conform" (conforme), this would be enough to make the instrument a certified cheque, i.e., the existence of funds on deposit to cover the payment is guaranteed by the bank, even though, according to the law, there were more formalities to be met.

The appellant argued that the decision of the lower court applied this customary norm, which actually did not exist, that there was no uniformity, no generality, and no repetition of a certain way of conduct and, therefore, no custom. In any event, the appellant said, such a customary rule would be *contra legem* and, therefore, contrary to Article 17 of the Civil Code.

The Supreme Court held that the other party, Banco Velox, had proven by reports and statements provided by various different banks that there was a "practice by usages and customs" according to which managers of banks guaranteed the provisions of funds in bank accounts by inserting their signature, stamp, and the legend "conform." Although the appellant showed that some banking institutions do not follow this practice, the Court replied that it is not necessary to reach "uniformity" to meet the requisite of "generality" of a practice (*Banco Velox v. Banco Sudecor Litoral SA*, cons. 4).

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[18] In addition, it should be noted that the Court supported its arguments with five references to the legal literature on the matter against eight references to judicial precedents.

[19] Cf. Article 815 Procedural Code for Commercial and Civil Matters of the Province of Tucuman.

In addition, the Court said that this was actually a custom *praeter legem* but not *contra legem*. It was *praeter legem*, since it was possible to create, by the autonomy of the parties and by usages and customs, other different forms of bank guarantees beyond those expressly established in the law no. 24452 of cheques. This was based upon Article 19 of the National Constitution, which provides that everything that is not expressly prohibited is permitted (*Banco Velox* . . . , cons. 4).[20]

The Supreme Court added that not only the bank reports confirmed the existence of such usages and practices, but also the parties themselves had made several banking operations following the very same practice (*Banco Velox* . . . , cons. 4).[21] These practices of the parties are based upon Article 1197 of the Civil Code, which states that agreements between the parties are their own law (party autonomy)[22] and that this article of the Civil Code is not derogated by law 24452 on cheques.

The Court concluded by saying that "the importance of the usages and customs in commercial law is an axiom that does not require demonstration (*Banco Velox* . . . , cons. 6).[23] Usages are formed by the reiteration of spontaneous ways of behavior by the members of a certain group. The requirement of the antiquity is relative, but what is essential is the 'will of validity' (voluntad de validez) . . . " (*Banco Velox* . . . , cons. 6).

In addition to customary law, the Supreme Court grounded its decision on the theory of the appearance, good faith, and in the doctrine of the own acts (*venire contra factum proprium non valet*).

Eventually the Supreme Court rejected the constitutional appeal by saying that the determination of whether a practice constitutes a usage or a custom is a factual matter (cuestion de hecho) that is not open for constitutional appeal, which deals only with the infringement of the law. Thus, the Court upheld the decision of the lower court ordering the appellant to pay compensation for damages.

3.2.2 Analysis

In this case, the Supreme Court of Tucuman acted as the Court of Appeals of the Civil and Commercial Chamber. Unlike the previous case, this is an "internal" or domestic case, as all of the parties were located in the same country.[24]

The Supreme Court upheld the application of a customary rule by the lower court. As in the previous case, the Court considered that the existence of the invoked customary rule should be proven. The proof employed in this case consisted of the reports provided by other banks, which affirmed that the method utilized to guarantee the provision of funds was a usual method of conducting businesses in

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[20] Compare this interpretation of Article 19 of the National Constitution to the interpretation provided in Chap. 2.

[21] Also compare this argument with the criteria of Article 9 of CISG.

[22] Note also the link between the autonomy of the parties and customary law and how the Court also introduced a second argument to justify the decision – the autonomy of the parties – as in Case 1 above.

[23] However, the Court did prove them.

[24] See *supra* note 14.

the banking market. On this basis and following the traditional civil theory, the Court sustained that there was a general, constant, and regular way of conduct that constituted a customary rule. The Court held that it was not necessary to reach "uniformity" in the way conduct is performed, but that proof of a "general" way of behavior was enough to transform that behavior into a norm.

As in the previous case, there is an express judicial activity aimed at establishing the existence and validity of the applicable customary rule. This is proven by utilizing the different possible forms of proof provided in the procedural code. Once the rule is found, the solution is derived from it.

Again, however, as in the previous case, the Court also felt the necessity of basing the outcome upon additional legal arguments. The Court also grounded its decision on the theory of the appearance, good faith, and in the doctrine of the own acts.

In short, the Civil and Criminal Chamber of the Supreme Court of Tucuman upheld the decision of the lower Court of Appeals for Civil and Commercial Matters. This Court of Appeals was originally a "civil" court that was assigned also to solve commercial cases, and, in doing so, it followed a civil legal criterion.[25]

It should also be noted that very similar ways of reasoning were utilized in this case and in Case 1, regardless of the "national" or "international" character of the contract. What is more, the nature of the commercial usages applied is alike despite the fact that there was a reference to "international" commercial usages in Case 1, while this case involved only "practices of the place of business."

3.3 Case 3. SGZ v. Productos e Insumos de Fitennes S.A.

3.3.1 The Case

SGZ Bank – Südwestdeutsche Genossenschafts-Zentralbank AG – (the Plaintiff) filed a claim against Productos e Insumos de Fitennes S.A. (the Defendant) demanding the payment of US $68,650. The cause of the alleged obligation was a letter of credit that the Defendant, as the applicant, requested Banco Mayo (issuing bank) to open. The Plaintiff, as the confirming bank, paid the letter to the beneficiary. However, the amount of the letter of credit was not subsequently reimbursed by the issuing bank due to its bankruptcy. Because of this, the Plaintiff demanded its payment from the Defendant as the applicant.[26]

The Defendant argued that it had indeed paid the debt but to the issuing bank. The issuing bank corroborated this assertion by saying that, in this case, there were two different operations: one between the Defendant and the issuing bank and another between the issuing bank and the Plaintiff (the confirming bank). Therefore, by paying its debt to the issuing bank, the Defendant had honored all of its obligations.

[25] Compare the very similar way of reasoning in the previous case (Sect. 3.1).

[26] For a brief explanation of the concept of letters of credit, see *supra* note 12.

The Judge of First Instance for Commercial Matters of the city of Buenos Aires characterized the operation as an international documentary credit[27] and, accordingly, as one single operation involving all of the parties in the case, and subsequently ordered the Defendant to pay the debt. The Defendant appealed, and the case was brought to the Court of Appeals.

After characterizing the contract as a documentary credit, the Court of Appeals subjected the contract to the applicable law. In this case, the applicable law was the ICC Uniform Customs and Practice for Documentary Credits (UCP). According to the UCP, confirming banks act on behalf of the applicant, and the applicant undertakes all of the obligations and responsibilities arising from laws and customs in force in foreign countries and is obliged to compensate the banks of any consequences derived from them.

The Court of Appeals justified the application of the UCP by saying that "the binding force of these rules is based on the usages and customs universally observed. In addition, no evidence has been introduced in this case against the validity of such usages, receipted by the uniform customs and practice above mentioned. Moreover, from the text of the document that formalized the credit, the existence of clauses or terms establishing other different consequences or excluding the application of the UCP can not be deduced" (*SGZ v. Productos e Insumos de Fitennes S.A.,* cons. IV.e.11). The Court added that, "in the past, the parties utilized the UCP to formalize various international sales contracts" (*SGZ v. Productos e Insumos de Fitennes S.A.,* cons. IV.e.12.). Finally, the Court concluded that, "according to the above mentioned arguments, it has to be concluded that the UCP have legally binding force to govern the rights and duties of the parties" (*SGZ v. Productos e Insumos de Fitennes S.A.,* cons. IV.e.12).[28]

In short, the Court of Appeal ruled that, according to the UCP, the Defendant had to pay the Plaintiff the demanded amount of money.

3.3.2 Analysis

First, it should be highlighted that the first step in the reasoning process of both the lower and the higher courts was to characterize the banking operation.

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[27]The internationality of the contract is given by the place of business of the Plaintiff, which was located abroad. See also *supra* note 14.

[28]It should be noted that there was no recourse to the autonomy of the parties. This approach to usages and customs was, in a different case, also upheld by the Supreme Court of Justice of Argentina. The Supreme Court explained the nature of the arbitration and the reasons that may lead the parties to choose arbitration as a way to solve their disputes. Among these reasons, the Supreme Court claimed that "sometimes parties look for a different way to solve their dispute, parties do not wish that the case be solved according to the law enacted by the State, which is the law that national judges should apply. Parties wish to apply a different law, a corporative law, based on the usages of trade or international *lex mercatoria*, which is different from national law." Vote of Judges Petrachi and Bossert, cons. 4. CSJN, 29/04/97, *in re* Blanco, Guillermo y otro c. Petroquímica Bahía Blanca y otro s/ordinario.

However, the documentary credit is not regulated under Argentinean law, in the Civil Code, or in the Commercial Code. The documentary credit is, therefore, an atypical or innominate contract.

Then, how should innominate contracts be regulated? As noted above, according to Article 16 of the Civil Code, when judges face situations for which there is no law, they should analogize the situation to a similar one for which there is a regulation and apply to the former situation the law foreseen for the latter. If it is not possible to find the proper regulation even by analogy, judges must resolve the case according to the general principles of law.

However, the Court of Appeals decided not to analogize this innominate contract to, for example, a contract of agency (mandato), which is regulated by the Argentinean law. Neither did the Court resolve the case according to the general principles of law. The Court did not even consider the possible application of conflict of law rules that may have been applicable.[29]

The Court decided instead to characterize the banking operation as the contract of documentary credit, to bypass the recourse to analogy or the general principles of law, and to apply directly "usages and customs universally observed." In doing so, it seems that the Court decided (implicitly, since there is no express reference to it) to apply Article 17[30] of the Civil Code instead of Article 16. Still, the Court did not discuss the possible derogation of mandatory norms of the credit and banking laws by these usages and customs, which would have been prohibited by Article 17.[31]

As previously explained, according to the classical civil law theory, a customary rule is formed only if it is practiced regularly and uniformly, for a relatively large number of persons, during a relatively long period of time, and as if it is a binding rule. The Court, nevertheless, did not analyze whether these conditions had been met.[32]

In this case, the Court simply presupposed the valid existence of this customary rule[33] on documentary credits by saying that the UCP had "receipted" "usages and customs universally observed."

What is more, the Court seemed to put the burden of proof of the inexistence of the customary norm upon the party that may allege it by saying that "no evidence has

[29] Compare this way of reasoning with the reasoning process in Case 1; see Sect. 3.1.

[30] This article allows the application of usages and customs but only *secundum legem* or *praeter legem*.

[31] By contrast, this issue was addressed by the judge of Case 2.

[32] Compare how in the two previous cases (1 and 2) the judges discussed whether these conditions were met, and there was a procedural (production of evidence) and argumentative effort to demonstrate the existence and validity of the customary rule that would be applicable. It should be noted, however, that the conditions that a customary rule has to meet to be considered a "legal rule" are not required by any law but just by the doctrine.

[33] This is, in general, an approach of international arbitration cases.

been introduced in this case against the validity of such usages" (*SGZ v. Productos e Insumos de Fitennes S.A.,* cons. IV.e.11).[34]

Once the Court found the applicable law, i.e., the UCP, then its application followed the traditional exegetic *logical–formal judicial syllogism of argumentation* as put by the Court itself (*SGZ v. Productos e Insumos de Fitennes S.A.,* cons. IV.a.3). The Court applied the following axiom: the contract is governed by the UCP; Article 20 of the UCP says that the confirming bank has two debtors bound by a solidary obligation, which, in this case, were the issuing bank and the applicant. Since the issuing bank did not pay, the confirming bank is entitled to demand the payment from the applicant. Conclusion: the applicant should pay.

From this point of view, as shown, the interpretation and application of transnational customary law do not differ at all from the application of national statutory law. What differentiates "transnational customary law" cases from "national statutory law" cases are the ways that the premise of the argumentation is found and placed. That is, how the applicable "transnational" law is determined and placed as the axiom for the reasoning.

In general, when applying national law, judges must find the proper applicable law among all of the acts enacted by the parliament.[35] In this case, the axiom is presupposed to be valid and legitimate, since it was enacted, again, by a democratically elected parliament.

But, coming back to "transnational" law, can judges just surpass the law of the nation-state? It is evident that they can, as the case under analysis shows. Still, in this case, is this a legitimate application of the law? In others words, are judges allowed by the legal system to surpass national law to apply transnational law?

The short answer is yes, since the decision under analysis was not nullified by a higher court. As legal norms, including laws and decisions, can be nullified only according to the processes established by the same legal system to which they belong, they keep their validity irrespective of how flawed or unfair they may be seen unless and until they are nullified in the established way (Kelsen, 1979).

Yet this explanation does not seem completely persuasive, because it sounds too formalistic and even too simplistic. For this reason, other avenues may be explored to address the quest for the legitimacy of the application of transnational commercial law.

In effect, the second justification may be based upon the principle of *iura novit curia*. If national, international, and transnational usages and customs are sources of

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[34]The Court seemed to apply the principle of *iura novit curia* and to switch the burden of the proof: a customary norm is valid until the contrary is proven. Incidentally, it is interesting to note the nine references to the legal literature included in the decision, as supportive arguments, against just one reference to a precedent case. In contrast, in cases 1 and 2 (see Sects. 3.1 and 3.2), the judges seemed to rely more upon the previous case law rather than on the legal literature to support their arguments.

[35]Still, the process that leads judges to choose one law instead of other possible applicable laws is complex and controversial (Ariza, 2004).

law, as legitimate as statutory law, and if usages and customs are at the same level of laws in the hierarchical structure of the legal system, then judges are not only allowed to apply customary law, but must apply it.[36]

Still, when the same law (Article 17 of the Civil Code) has limited this possibility to only custom *secundum legem* and *praeter legem*, can the judge apply customary law *contra legem* anyway? Evidence overwhelmingly shows that custom takes precedence over law even *contra legem*, even in those cases in which law expressly forbids this type of custom (Gimenez Corte, 2002).

Despite the fact that a customary norm may be "in force," the legitimacy of the customary law can, again, be questioned. In effect, and as was shown, it is always difficult to determine the existence and validity of a customary rule. Sometimes, judges make an argumentative effort to prove it, but in other cases they just presuppose its existence.

In contrast, statutory law enjoys the full, clear, and undoubted legitimacy granted by members of the parliament, directly and democratically elected by the people. On the other hand, customary law may be seen as a manifestation of direct democracy. In effect, if custom is the "spontaneous" manifestation of the people, this affirmation may be true (Richard, 1997).

From a different perspective, customary law may also be criticized from the point of view of its publicity. Statutory law should be published in the official journals to become public and to allow all citizens to know the content of the law, which is a basic principle of a re-*public*. Customary law, by contrast, is not public. Nobody knows where to find it or how to determine its content. Nevertheless, it may be counter-argued that the principle of publicity of the law and the presumption of knowledge of the law are mere fiction, as it is factually impossible to know the content of all laws. Customary law, on the other hand, by its very nature, is known by the persons involved in a certain field of business.

Yet, because the rule of customary law is known only by persons involved in a certain field of business and not by the rest of the population, customary law lacks another basic principle of democratic legislation – its generality. Generality is linked also to the principle of equality.

For all of these reasons, it still seems that, if the Court decided to base its reasoning on the application of customary law as a source of law, it should have elaborated it more to justify more persuasively the application of customary law over state national democratic statutory law.

Why did the Court not do that? Maybe, because it implicitly (unconsciously, since it is not mentioned in the decision) was applying the law not within the framework of the Civil Code, but within the framework of the commercial law. After all, this is a "pure" commercial court that was "forced" to utilize civil tools.[37] And it is here that the basis of the argumentation changes.

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[36] It is possible to recall here that the already quoted Article 34 (Duties of Judges) of the CPCCN establishes that judges shall "4) Base all definitive or interim sentences, under subpoena of nullity, according to the hierarchy of the norms in force and the principle of consistency." Usages and customs are "norms in force."

[37] See Chap. 2.

Commercial law theory contends that, due to the autonomy and specialization of commercial law, in the event of a gap in the commercial law, it should be integrated first through the usages and customs and the principles of commercial law, and that only in the event of the failure of this first attempt should commercial law be integrated by the civil law (Fernandez & Gomez Leo, 1984).[38]

Accordingly, in the case under analysis, the Court had to solve a problem related to an innominate contract. Next, the Court characterized it as a documentary credit, so that it is a commercial contract. Then, the provisions of the Code of Commerce had to be applied. The Code of Commerce expressly allows judges to explore the possibility of applying customary law before resorting to the civil common law.

The Court may have followed this line of reasoning in finding the applicable law to the documentary credit. However, the Court did not expressly explain how it reached this conclusion, the Court simply and directly applied customary law, as if it had sufficient power to disregard the whole Civil Code and the entire Code of Commerce in the process.

Why did the Court act in this manner? Why did the Court not base its decisions on a full rational legal argumentation that would have granted legitimacy to the decision? Why did the Court not explain the basis of its decision? Because that would have been an exegetic civil way of reasoning to which commercial law is strange. As shown, commercial law follows other paths.[39]

This different path, this particular way of thinking, the spirit of commercial law, has survived all of these attempts of "domestication" in the double sense of nationalization and adaptation to the *civil* life. However, the strength of the civil law reasoning has penetrated, to a certain extent, the less developed commercial science. The result is a kind of syncretism in the way of legal thinking in private economic law. On the one hand, judges just take customary rules as given without the need to justify their existence, following the *aequitas mercatoria.* However, they then apply these customary rules to the facts of the case following the *ratio civilis*.

3.4 Case 4: *Global Packaging Solutions S.A. v. Banco de Galicia y Buenos Aires* S.A.

3.4.1 The Case

Global Packaging Solutions S.A. (the Plaintiff) filed a claim against Banco de Galicia y Buenos Aires (the Defendant). The Plaintiff demanded the payment of compensation for damages that resulted from the nonperformance of instructions given by the Plaintiff to the Defendant, specifically, an order to transfer a certain amount of money to a foreign bank.[40]

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[38] See also the Preliminary Title of the Code of Commerce and Articles 207, 218, and 219.

[39] See Chap. 2. This way of thinking was followed in another case by the Camara Nacional Comercial, sala A, 10/07/07, *in re* Banco Central de la República Argentina c. Casa Beato de A. A. Beato e hijos s. ordinario.

[40] This is an internal or domestic case, as the places of business of both parties are located in Argentina.

On November 30, 2001, the Plaintiff ordered the Defendant to withdraw from his own bank account the equivalent in Argentinean pesos of US $14,904 and to transfer that amount to a foreign bank with the final purpose of paying an import operation. The Plaintiff asserted that the bank did not take immediate action to perform his order. The next day, December 1, 2001, the government enacted emergency legislation that restricted international transfers, established exchange regulation, and devaluated the Argentinean currency. The Plaintiff alleged that, as the result of the Defendant's delay, it was too late for the Plaintiff to transfer the funds. Ultimately, the Plaintiff had to pay its obligation abroad at a prejudicial exchange rate.

The Defendant argued that the process of transferring money abroad takes at least 24 h after the bank receives the order to do so and that, before that period of time elapsed on December 1, 2001, the Government had enacted the emergency legislation. Therefore, the Defendant asserted, the action demanded by the Plaintiff had become a legal impossibility, a *force majeure* by act of the prince, that prevented the Defendant from performing its duties and relieving it of responsibility. The object of the case was, then, to determine whether the Defendant should have performed the order of the Plaintiff on the day of its reception or whether the Defendant was entitled to do so within a discretionary margin of between 24 and 48 h.

One of the judges of the Court of Appeals asserted that, "according to the banking usages it is not factually possible to perform such operation the very same day that the order is received, this conclusion is based on the natural and ordinary course of things and on the period of time that, according to the local usages and banking practices, this sort of operation takes. Therefore, it is not possible to require more celerity in the performance of the given order, not even taken into account the international norms on the matter" (*Global Packaging Solutions S.A. v. Banco de Galicia y Buenos Aires SA.,* cons. 6).[41] The judge continued, "In addition, the 'model law' on international transfer of credits approved by the UNCITRAL and by the General Assembly of the UN by resolution 47/1934 of 25/11/1992, said that if the instruction given to the bank has no mention of the date in which it should be performed, the bank may make the transfer that day or the following day" (*Global Packaging Solutions S.A* . . . cons. 7).

Still, if the bank performs the transfer the following day, it should do so on the terms of art. Article 11(2) of the model law provides, "If the receiving bank executes the payment order on the banking day after it is received . . . the receiving bank must execute for value as of the day of receipt." This judge concluded that, considering that the following day the emergency legislation entered into force, it was legally impossible to fulfill the obligation of the Defendant because of *force majeure*.

Notwithstanding these assertions by one of the judges, the other two judges of the Court of Appeal interpreted the same model law differently. They first justified the applicability of the model law to the case, which "although it is not a norm incorporated, or in force, in the legal system of our country, it properly exteriorizes the standard binding practices in international trade" (*Global Packaging Solutions*

[41] Note the reference to "local usages."

S.A . . . cons. 5, vote of the majority). Their interpretation of this "transnational" law to a national case was different, however, because, by applying Article 11.1(1) of the model law, these judges concluded that the bank should have transferred the money the same day that it received the order. Therefore, the bank was held responsible by two votes to one.

3.4.2 Analysis

As in the previous case, the existence and validity of the customary norm were presupposed, that is, there was no proof of it.[42] Once the customary applicable law was determined and established, however, the legal argumentation of the Court followed the civil rationale.

In addition, this case presents two interesting particularities. The first is that a "model law" was applied as customary law. Although the aim of the model law is to be utilized as a model for the national legislature when drafting its own national law, in this case the Court said that the model law is a manifestation of "standard binding practices in international trade" and, as such, directly applicable to the case.

The second particularity is that this "transnational law" or, as put by the Court, these "standard binding practices in international trade" were applied to an internal, domestic case. This is interesting but also controversial, since, in principle, it is possible to apply "foreign" law only to international contracts.

However, the Court applied in this case international customary law to a domestic contract. While there is no justification for this decision, it shows that there was no differentiation between "national" and "international" customary law, and it may also confirm the tendency to apply international law to national contracts.[43]

4 Conclusion

As shown in the above analyzed cases, transnational commercial law is applied by Argentinean courts in two different ways.

First, judges from the original civil courts tend to follow a more classic civil law method of reasoning.[44] When basing their decisions upon transnational customary law, these judges developed an important procedural and argumentative activity to

[42]This is also a commercial court; see Chap. 2 and Sect. 3.3.

[43]For the criteria of internationality, see *supra* note 14. The UNCITRAL model law on international commercial arbitration allowed the internationalization of the case by the will of the parties. Following this model, the arbitration laws of Brazil, Paraguay, Chile, and Bolivia seem also to allow the application of foreign law and international commercial law to domestic cases; see *supra* note 11. Incidentally, as in Case 3, there are in this case only three references to previous case law against six references to doctrine.

[44]It should be stressed that this is the analysis of just four different cases from which it would be very difficult to infer any kind of trend, let alone a general rule. To determine such a trend or general rule, a more extensive research would be needed.

prove and determine the existence and validity of the alleged customary rule. Once it is established, then it is applied following, say, a more or less common deductive process.

In the alternative approach, commercial judges simply presupposed the existence and validity of a customary rule. Although there was no procedural or argumentative activity to prove or to determine the existence of a customary rule, it was assumed that the rule existed.[45]

In the cases solved by civil judges, the reader and most likely the parties as well are, to a certain extent, convinced of the correct determination, interpretation, and application of the transnational customary rule. In contrast, in the cases solved by the commercial judges, the reader, let alone the losing parties, is not that convinced. The reader may have the impression that judges are applying transnational commercial customary law without basis, just because they have arbitrarily decided to do so.

Usages do not seem to be incorporated following a logical deductive process or a reasoned process. On the contrary, usages and customs appear to be "revealed" (by nature? by God?). This causes the paradoxical situation according to which usages that are usually presented as the new product of legal reason are in fact introduced, smuggled, into the decisions as by art of (legal) magic.

We know now that commercial judges apply commercial law this way based upon historical reasons, [46]yet this was not clear for the layman, for the citizen, or for the ordinary private *civil* person.

In these cases, but more remarkably in the commercial court cases, the determination of the customary norms appears to go against some basic principles of the modern democratic legal systems, such as the principles of legality and of publicity. What is more, and again, transnational commercial law is usually presented as more "reasonable" than nation-state law; although this affirmation may be true, its actual application definitely lacks the degree of rationality enjoyed by the application of the national domestic law.

Parallel to the process of the transnationalization of law, another process called the "commercialization" of civil law (Sect. 2.4) is taking place. According to this process, commercial law is expanding its personal and material jurisdiction regulating areas previously reserved for civil law. As it is expanding its quantitative scope, reaching not only professional merchants but also ordinary persons, commercial law should also make an effort to gain legitimacy. That is, when commercial law was applicable to and was applied by merchants exclusively, the legitimacy of the application of mercantile rules was almost obvious. However, when commercial law is applied not by specialized mercantile courts but by courts dealing with a wide

[45]In Case 1, the civil judge applied "international usages" to an international contract; in Case 2, the civil judge applied national usages to a national contract. Both judges, however, followed the same methodology and reasoning to determine the content of the customary rule. In Case 3, the commercial judge applied "international commercial usages" to international commercial contracts, while in Case 4 the judge applied "international commercial usages" to a national contract. Again, the methodology, the reasoning, and way of finding the content of the rule were similar.

[46]See Chap. 2.

degree of legal issues, and when commercial law is applicable not only to merchants but also to any ordinary civil person, then the criteria and principles of applicability must be legitimized.

This process of "commercialization" should be complemented by a new process of "civilization" of, if not the substance, at least the methodology of commercial law. Otherwise, commercial law will always remain somehow detached from the rational and democratic law-making process.

More than a debate between national law and transnational law, the debate seems to be between the *ius mercatorum* and the *ius civile* in the era of the transnationalization.

In any case, transnational commercial law is struggling to gain legitimacy. Modern national laws, new international conventions, and recent model laws, mainly on contracts and arbitration, are trying to grant to commercial law this desperately needed legitimacy. But there is still a long way to go; it took more than eight centuries to establish the legitimacy of civil law.

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