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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).