

## Conform Interpretation as a Method for Balancing Autonomy and Heteronomy: Introduction

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### Abstract

Conform interpretation is seen as a method to find compatibility between legal norms belonging to different, but coordinated systems or to find coherence within the system. In either case conform interpretation implies a shared interpretative culture and has important consequences for legal theory – including the theories of legal culture - and legal practice from a dogmatic perspective but also from a procedural and sociological perspective (sociology of the legal professions). It also has important political implications regarding autonomy and the separation of powers and the role of constitutional courts in a context of constitutional pluralism. The issue of conform interpretation is here addressed from a historical-cultural as well as philosophical-comparative perspective.

### Key words

Conform interpretation; objective interpretation; textualism; autonomy of the judiciary; legal interpretation; supreme courts; constitutional courts

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Part Three of the Special Workshop on “Autonomy and Heteronomy of Justice and the Judiciary, A Judges’ Justice Only?” dealt with the issue of conform interpretation, a typically European legal method with double roots in private international law - rules of conflict - and public international conceptions of monism and which branches out in European Community or Union law<sup>1</sup>, in international and European Human Rights law and in the constitutional traditions of the federal Member States. The most sophisticated development of conform interpretation is to be found in EU law<sup>2</sup>. This introduction draws from ideas presented by contributors<sup>3</sup> and discussed by all participants of the Workshop.

Conform interpretation basically consists in constructing a legal instrument belonging to a sector or subsystem of law (of whichever legal system) taking into account the principles and norms belonging to a broader, encompassing or overarching legal system or even those belonging to an altogether different, but still relevant legal system. Conform interpretation becomes a tool or a method to find compatibility between systems or to find coherence within the system, but in either case it will require a shared interpretative culture. This issue has important consequences for legal theory, including the theories of legal culture - and legal practice from a dogmatic perspective but also from a procedural and sociological perspective (sociology of the legal professions). It also has important political implications regarding autonomy and the separation of powers and the role of constitutional courts in a context of constitutional pluralism.

These issues are here discussed from some of these perspectives. The historical-comparative perspective adopted by Pia Letto-Vanamo is perhaps one of the most promising. But the theoretical perspective explored by Lidia Rodak on the limits of interpretation and the issue of objectivity of meaning is also crucial for any conceptual understanding of conform interpretation, and rich with practical implications. Ditlev Tamm adopts a very interesting legal cultural comparative perspective to look at Highest Courts and analyse the constitutional issue of autonomy by using an interesting combination of historic, dogmatic, theoretical, political and cultural indicators. The comparison of Nordic highest courts, using these parameters, gives extremely interesting and quite innovative results. One could say that the “crisis of justice” in Spain is in stark contrast with the picture drawn by Tamm. Crisis is now a recurrent noun in Spanish lore. The crisis of justice has been perpetuated since transition, even when the economic, social, cultural and political transformation of the country was being hailed internationally. Bengoetxea tries to dissect this Spanish crisis of Justice, which pervades since the dictatorship and transition, into seven theses where politicisation of highest judicial appointments and judicialisation of political antagonisms are the key features.

<sup>1</sup> The first hint at the method is in *von Colson and Kalman* (14/83, [1984] ECR 1891. and the case where it was theorised by the Court is *Marleasing* (106/89 [1991] ECR I-7321: national law must be interpreted and applied, *insofar as possible*, so as to avoid a conflict with a Community rule.

<sup>2</sup> Prohibition of non-conform interpretation is a major issue in case C-129/96 *Inter-environnement Wallonie* [1997] ECR I-7411 and it was confirmed in *Pupino* C-105/03, [2005] ECR I-5285. to the effect that a national court cannot be expected or required to stretch the meaning of internal norms beyond possible construction. Sometimes conform interpretation is a remedy or a substitute for (the lack of) horizontal direct effect of directives which implies that conform interpretation cannot be resorted to in order to impose horizontal obligations or to apply retroactively. The international conform interpretation and self-referential interpretation of EU law is developed in C-61/94 *International Dairy Arrangement*, [1996] ECR I-3989. In *Pfeiffer* C-255/97, [1999] ECR I-2835, the interesting criterion is stated that if conform interpretation is acceptable as a method in internal state law, then it must also be considered acceptable as regards Community law conform interpretation.

<sup>3</sup> Besides, contributors to this issue, the Workshop also had presentation by Rudolf Wendt, on constitutionally conform interpretation, by Dunia Marinas on Human Rights-conform interpretation in Spain, by Iris Canor on the dilemmas of conform interpretation in international law and by Niilo Jaaskinen on conform interpretation in the EU.

## From pre-modern to post-modern conceptions of the Judiciary

The pre-modern period in Europe is characterised by plurality; not only a plurality of laws but also of the roles of the judges and the rituals which are displayed in judicial functions, sometimes, themselves confused or merged with the very role of saying the law, *juris-dictio*. Participation in the process was obviously a necessary part of the rituals, but the different types of jurisdictions and laws applied made it difficult to bring unity into the system. Autonomy was thus preserved in respect of jurisdiction, but within each of the jurisdictional orders there was a more heteronomous approach, as appeals converged into some sort of hierarchy, ultimately the Monarch. However, the lack of easily accessible legal and judicial texts, the difficulty in communications, the absence of a well developed state structure or administration make it difficult to impose any form of uniformity in interpretation and application. Interestingly natural law theories will serve as a source of uniformity and heteronomy to a degree probably higher than any secular authority could provide. Sharing in a common understanding of Natural Law, which inspired interpretation of local laws in a pluralistic context, was a means of achieving a kind of uniform conform interpretation and a degree of heteronomy or at least a mitigation of relatively and seemingly absolute authority. The development of central power around the monarch or parliament would take some time to develop and to have a clear influence on centralisation and therefore on heteronomy, but it will interestingly come to clash occasionally with Natural Law, which also imposes limits on regal prerogatives and authority.

The Modern period is that of positive law, as the instruments and formats to print and record the law become available and the system of state administration develops. As Pia Letto-Vanamo reminds us in her contribution to this volume, the quest for objectivity and formalism goes along with state sovereignty. The legislator will progressively become "*la bouche qui prononce les mots de la loi*", following Montesquieu's famous definition; this is the epitome of heteronomy and authority and the birthplace of monism. However, a new triad is to develop with the special role of doctrine. The triad is composed of legislator-doctrine-judge. The concept of law is thus somewhat idealised or objectivised; it loses touch with local laws and custom (pluralism); also, justice becomes progressively removed from the local context where conflicts emerge and acquire meaning, to become a more distant and formal power, at best an administrative service in more democratic understandings, but in any case many of the rituals are preserved or transformed to confirm the impression of distance and specialised knowledge (and power). This is the point where collaborators acquire a special role and tend to become professional groups. Authority and heteronomy become central features of the Judiciary. This moment in history can also be called pre-globalisation, although forms of globalisation were present in pre-modern times, the rise of central powers and unitary kingdoms tended to reduce such phenomena.

This takes us to forms of post-modern law, which is characterised by many factors, not least a new pluralism and soft varieties of law that lack the formality of central law. New multi-level governance is the new self-conception of the administration and the common wealth and quality standards begin to perform a role not unlike that played by Natural Law. This affects Justice as well; conceived as a service, but also in a pluralist menu where ADR, often provided by lawyers, and forum shopping question its traditional monopoly. Impartiality and neutrality become values that need to be secured in the new forms of justice so that litigants and parties' rights are upheld, in line with democratic theory. This will force the Judiciary even further into a conception of public service rather than a constitutional power. Collaborators become essential, not only from an organisational or managerial perspective, but also as knowledge-and legitimacy providers, experts and specialised courts and tribunals, juries are reintroduced, secretaries and the administration ensure smooth and efficient management, and the executive facilitates access to Justice and to lawyers. A judge-only justice is no longer a desirable picture.

Conform interpretation is an important methodological and theoretical device in understanding this new predicament of justice and the judiciary; it helps define the limits of autonomy and discretion: sometimes it is possible to interpret state law in order to adapt it to supranational standards with no need for the legislator to step in. Sometimes this is not possible, and legal change needs to be formalised, and sometimes clashes and antinomies have to be declared. But conform interpretation can also be seen as a socio-legal practice that helps structure the legal profession and bring in a new form of uniformity, coherence, harmony in a diplomatic, smooth or non aggressive manner, avoiding power clashes, as can be seen with the new versions of constitutional pluralism that are being proposed as interpretations of our common supranational European constitutional predicament. Conform interpretation within the same system (intra-systemic conform interpretation) reinforces hierarchy and integration, and between systems (inter-systemic conform interpretation). It enhances coherence and legitimacy, think of interpretation of internal instruments in conformity with European or Universal Human Rights standards - and helps avoiding overt clashes of authority or helps preserve, or rather accommodate pluralism with a minimum commensurable legal formant. Ultimately it brings about a new concept of (interactive or reactive) law.

However, there are limits to inventiveness, to creativity or purposiveness in interpretation, so that conform interpretation is not always boundless and therefore not always available. Conform interpretation cannot be used as a short cut or disguised way of creating law anew. Setting precisely the limits or confines of conform interpretation, the extent of conformity "insofar as possible", along the brocard of *interpretatio contra legem*; in other words, saying that sometimes it is impossible to interpret a norm in conformity with another (incompatible) norm can be a circular endeavour, even though it sounds as common sense. It cannot be determined beforehand how far precisely "insofar as possible" implies or what *interpretatio* will be *contra legem* (further than possible), *praeter legem* (as far as possible) or *secundum legem* (insofar as possible) for that matter, unless one firmly adheres to objective theories of interpretation. The theoretical (hermeneutic), epistemological and methodological sides of the issue hint at the idea that perhaps there are objective limits to meaning and interpretation, and hence the relevance of theories of objectivity in legal interpretation explored, and criticised by Lidia Rodak in her contribution. The socio-legal and pragmatic and rhetorical sides of the issue put things into perspective by examining whether such limits might have more to do with structures of power, audiences of judicial decisions, judicial hierarchy and the profession, and of course, cultural factors that tend to pre-determine what are acceptable interpretations.

Judges simplistically but functionally relate to objectivity as a rhetorical device and hold that they are bound by what the legislator has written down (objective) rather than what the legislator might have intended to convey (subjective). The question remains exactly what it is that the legislator has written down, the very issue of meaning imposes itself and textualism becomes more of a methodological response: "look at the words of the instrument if you are searching for obvious, literal meaning". Those who advocate this 'obvious' or dictionary approach seek to enhance certainty and predictability of the law, together with transparency and democracy, where all members of the community share meanings. Positive law largely feeds from this view. However, a rather naïve sort of realism might be lurking behind this seemingly commonsensical theory, a realism where meaning is independent of the users, the subjects. To compensate for this absence, moderate realists reintroduce the epistemic subject, and the notion of use complements that of real or authentic meaning, how terms are used also becomes a way to gain knowledge of objective meaning, understood as correct interpretation. Dictionaries are still the reference, but more sophisticated dictionaries. The introduction of the subject opens up the way to intentional meaning, without leaving the actual words

used by the legal instruments, the question now becomes what its authors, the legislator, might have meant by the choice of such words.

Interestingly, Europe is characterised by a multilingual context and European law is seldom a monolingual law, to the effect that the objective meaning theory shows even more idealistic traits<sup>4</sup>. The reference book, the canon, now becomes a sophisticated language usage dictionary, with a users' guide and warning about the impossibility of exact translation. In the end an authoritative decision on interpretation will settle differences, but if such decision also aspires to be convincing, we open up the can of doubts again. Coherence theories might help but at the end of the day, acceptability of meaning in a given multicultural community of users, pragmatism and semiotics, is the necessary companion to objective interpretation, and this forces us to look into issues of social, cultural and political practices. A normative approach will probably find inspiration in the discourse theory of practical reason to suggest values like transparency, sincerity, exhaustiveness, and accountability in any endeavour to justify the choice of meaning.

The issue of conform interpretation is part of a family of terms comprising consistent, concurrent, uniform, harmonious, benevolent, conciliatory interpretations looking at the result of interpretation but the terms loyal, faithful, cooperative can also be used if one wants to emphasize the attitudes of interpreters i.e. to avoid outright confrontation. Thus, conform interpretation can be seen as a special form of systemic argument that can operate sometimes as an argument of interpretation and other times as an argument on the validity of norms, as a method of normative control seeking to avoid more radical antinomy solving arguments like *lex posterior*, *lex specialis* or *lex superior*. Conform interpretation is useful for non-hierarchical normative situations where norms belong to different systems or subsystems. It is also a comity-conscious method because it does not require courts to perform "unacceptable" interpretations but only to conform "as far as" or "insofar as" possible, "*autant que possible*", to quote the words of *Marleasing*, above. The EU law debate between supremacy and primacy would witness conform interpretation sidelining with primacy versions, which is a more inclusive approach that does not require full elimination of incompatible norms.

The paper by Ditlev Tamm shows to what extent the judicial architecture in a legal system, at least as regards the tip of the pyramid, can have an influence on the understanding of autonomy and heteronomy. Thus, not only analysing the composition of highest courts and the systems for appointment to highest judicial office but also considering whether there is bifurcation into one Highest or Supreme Court and one Constitutional Court or else a single highest court having both functions of cassation and of constitutional review of legislation, will have an impact on the understanding of heteronomy and of conform interpretation. Legal history and culture or tradition also account for important features in the understanding of heteronomy and in the conception of the judiciary as a constitutional power. The paper by Tamm gives a very general picture globally, and many of the issues mentioned in the contribution are then developed in greater detail as regards the Spanish case by Joxerramon Bengoetxea, who develops seven thesis to explain how the system has had a serious loss of reputation mainly because of excessive politicisation in the procedures for appointment to higher judicial posts and because of the judicialization of state politics. A particular procedural institute contributing to this disrepute is the abuse of the so-called "popular prosecution", one of the keys to understanding the prosecution of Judge Garzón.

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<sup>4</sup> For a criticism of objective interpretation in a multilingual context, see the interesting doctoral thesis by Elina Paunio, 2011. *Beyond Words. The European Court of Justice and Legal Certainty in Multilingual EU Law*, at the University of Helsinki, which I had the honour of "opposing".