The purposive method of legal interpretation in practice

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In this study, I discuss the unique Israeli way of statutory interpretation according to which the court should interpret statutes in light of the purpose behind their legislation. After a brief survey of the Israeli legal system, I discuss the place of interpretation in legal philosophy in general and in the legal philosophy of Aharon Barak – the most influential figure in Israeli current jurisprudence – in particular. Finally, I present the judicial criteria for application of the purposive method of legal interpretation and elucidate how this method is applied in Israeli courtrooms by means of an example of the judicial interpretation of section 13(5) of the Defamation Law presented in the *Fuad Chir v. Oded Gil* case (Permission of a civil appeal 1104/07). From the point of view of comparative law the Israeli way of statutory interpretation is interesting as in comparison to the other methods of statutes interpretation applied in the Western family of legal systems, it is an extremely flexible method of statutes interpretation.

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1 The Israeli legal system

The Israeli legal system is best described as a mixed system, belonging to the Western family of legal systems, incorporating characteristics of

Common Law, Continental Law and Religious Law.[1] As to the rulings of the courts, Israeli adjudicators draw mainly from Western sources: Common Law and Continental Law, and adhere to the principle of innocent until proven guilty. Originally, the strongest influence on the Israeli legal system was that of English Common Law. However, as years progressed, the influence of American Common Law became predominant. Continental Law's influence on the Israeli legal system can be found in the civil body of laws (e.g. contracts, property) and the incorporation of the requirement of bona fides. The Israeli courts do not use the jury system. Although the Israeli legal system is based on The Common Law, it rejects the jury system: all questions of fact and law are determined by the judge or the judges of the court concerned.[2]

2 The place of interpretation in legal proceedings

In order to render judicial justice judges (in systems of common law) are to reconstruct the legal truth from the conflicting reconstructions of the discussed occurrence presented by the litigating parties, and to apply their interpretation of the law to this truth.[3] Each party, the prosecution and the defence, attempts to convince the judicial forum of the veracity of its description of the occurrence under consideration. The representatives of each party present in court a narrative that reconstructs this occurrence by emphasizing those events which are relevant according to the party's point of view. These narratives provide the subject matter of the judicial process: judges render judicial justice by reconstructing the legal truth from the opposing narratives and by applying the law to this truth. Judicial justice is determined, then, by the content of "the law" – namely by the content of the legal norm (including the written laws, precedents, judicial presumptions,

[1] Religious courts are authorized by Israeli law to rule in matrimonial issues of citizens of the religion in question according to the religion's law; Rabinical courts, for example, are authorized to rule in matrimonial issues of Jewish citizens according to the Jewish Law (הלכה halacha).

[2] *See* Edrey 2002; Levush 2003; Zemach 2002: 24—25. For further discussions on the Israeli legal system see: http://www.lareau-law.ca/codification-Israel.html.

[3] It is assumed that the two opposing versions of the occurrence give the judicial forum all the data necessary for a decision based on the true portrayal of the facts.

and the like) that functions as a code of behaviour both in court and outside it.

The legal norm is, of course, nothing but a textual generalization. The occurrence discussed in a lawsuit, on the other hand, is a unique and concrete happening involving actual human beings in a given social context. Therefore, in order to apply an abstract law to a concrete occurrence, one has to cope with the philosophical problem (which was first phrased precisely by Plato) about the relationship between the conceptual (the "ideal" in Plato's terms) and the actual. The concrete occurrence and the abstract law must be brought closer together in order to apply the latter to the former.

In fact, the concrete occurrence is inevitably abstracted as it is described (by the parties' representatives) in the terms of the legal discourse. The judges' role is to bring the law closer to the occurrence by interpreting it in the context of the legally true portrayal they reconstruct from the opposing narratives. In the terms of Barak's legal philosophy (that will be surveyed next), the judges' role is to bridge the gap between law and life.

An ideal system of law should supply a clear solution to any conflict a judge may face; namely, in a system of this kind the judge should be able to interpret the law in the context of any possible case by using a dictionary only. Unfortunately, human systems of law are not ideal and in order to interpret the laws of human systems judges cannot do with dictionaries alone – they have to read sometimes between the lines of the law and for this end they sometimes take into consideration, for example, the law's legislative history as an indication of the legislative purpose. This – the fact that judges have to read sometimes between the lines of the law – raises the questions of the legitimate degree of flexibility of statutes interpretation and the legitimate methods of judicial interpretation. According to L. M. Solan,

> …the choice is between a more standard set of methodologies, sensible enough most of the time but sure to result in errors, even on its own terms, and a more relaxed set of evidentiary standards, less able to constrain judicial discretion, but better able to head off results that are likely at odds with what an enacting legislature intended its law to accomplish. (Solan 2005: 206)

Solan himself holds that flexible methodologies of statutes interpretation are highly suspicious:

> I agree strongly with those scholars who have called for more empirical research into the real likelihood of mischief when judges resort to legislative history, or perhaps other species of evidence that textualists reject. (ibid.)

In what follows I discuss the view directly opposed to Solan's: the view of the Israeli legal system according to which judges can apply an amazingly flexible purposive method of statutes interpretation.

3 Legal interpretation in Barak's legal philosophy

The Israeli purposive way of interpreting statutes was introduced by Aharon Barak. Barak, a renowned legal scholar and former judge retired, in September 2006, as Chief Justice of the Israeli Supreme Court. As a Supreme Court Justice, Barak became the most influential figure in Israeli jurisprudence and promoted some new far-reaching legal doctrines. He was behind a series of decisions in the mid 1980s and early 1990s that applied several controversial legal doctrines (including the purposive method of legal interpretation, a new approach to overruling precedents, and the lowering of the standing doctrine) that expanded the Court's powers of review.

This expansion of the Court's authority reached a new peak in 1992 with the passing of three "basic laws" – "Human dignity and liberty", "The government" and "Freedom of Occupation" – that was meant to carry out some of the functions of a constitution without being a constitution (This category of "basic laws" was a compromise between the modernist parties in the Israeli Parliament – the Knesset – that wanted Israel to have a modern constitution and the traditionalist religious parties holding that the Jewish Law – the Halacha – should be regarded as the Israeli constitution.) According to Posner (2007), Barak has equated these "basic laws" into a constitution by holding that the Knesset cannot repeal them.

Barak presents his views on the judicial role in his 2004 book *A Judge in a Democratic Society* ("Barak 2004", Hebrew: שופט בחברה דמוקרטית). The book's title in its English page for international codification is "The Judge in a Democracy" – the very same title of

Barak's 2006 English book ("Barak 2006"). The following survey of the place of legal interpretation in Barak's legal philosophy is based on the more comprehensive Hebrew version – "Barak 2004".

3.1 Sometimes judges have to change the law

According to Barak's model of judiciary, the objective of judicial ruling is to strike the proper balance between conflicting social values in order to regulate relations between legal entities – either humans or legal personalities (like incorporated organizations). Barak's starting point is that judicature regulates relations between litigants on the basis of a given social reality that is not stable but changes continuously (Barak 2004: 55). Obviously, changes in the social reality are often accompanied by changes in the system of social values; Barak explains that as a consequence of the continuous changes in the social reality, judicial ruling may necessitate decisions that change the existing law or even create new laws:

> …the proper balancing of the conflicting social values… is often accomplished by a decision that changes the existing law… or creates a new law that did not exist before (if by interpreting the constitution or legislation, if by filling gaps in the law, and if by developing the common law).[4] (Barak 2004: 398)

Barak explains further that in order to change the existing law or to create a new law the judge may have to develop special judicial measures:

> When changing an existing law or creating a new law the judge is not deterred by striking down a legal policy that was introduced in the past… For these ends the judge is willing to develop new judicial measures (like a new system of interpretation, new approaches to overturning precedents, new rules for opening the court's doors for litigants)… (Barak 2004: 398)

Of course, it is the role of the legislative branch of government to change the law in order to adopt it to life's changing needs. The judge's role is limited to the interpretation of the legislature's statutes. Barak

[4] All quotes are translated from Hebrew by me – S.A.A. – unless otherwise specified.

emphasizes, however, that according to his interpretation of the notion "interpretation", the judge is authorized to change the interpretation of a given statute and to give it, by so doing, a new meaning that bridges the gap between law and life:

> The judge may give a statute a new meaning… without changing the statute itself. The statute remains as it was, but its meaning changes, because the court has given it a new meaning that suits new social needs. The court fulfills its role as the junior partner in the legislative project. (Barak 2004: 57 – translated in Barak 2006: 4-5)

Barak explains that the purposive system of interpretation is a judicial measure that enables judges to change the existing law (by giving it a new meaning) in order to adapt the law to life's changing needs. (Barak 2004: 59)

3.2 Barak's purposive system of legal interpretation and Dworkin's system of interpretation

Barak's purposive system of interpretation is similar to Dworkin's system which Barak describes as a comprehensive and coherent system of interpretation that is based on the assumption that "law" is an interpretive concept. Barak emphasizes that according to Dworkin the law is based on integrity where

> According to the view of law as integrity, claims of law are true if they are consistent with and derivable from principles of justice, fairness and procedural due process that give the best interpretation to society's legal procedure. (Translated to Hebrew from Dworkin in Barak 2004: 210)[5]

Barak agrees with Dworkin and emphasizes that as far as legislation is concerned, integrity means keeping the coherence of the principles of the legal system. He concludes that in statutory interpretation the judge should regard the statute as integrity; namely, the judge should give the statute the interpretation that sheds the best light on the statute's political history. Barak quotes Dworkin's explanation according to which the ideal judge.

[5] There is some mistake in the reference to Dworkin's original texts of this quote in Barak 2004; however, Dworkin express these views, for one example, in his "In Praise of theory" (1997: 356—358).

Barak admits explicitly that he recognizes the influence of Dworkin's system of interpretation on his purposive system – but emphasizes that the two systems are essentially different. Dworkin's starting point is that the law is based on integrity and Barak doubts that the development of law in any democratic legal system can be described as based on integrity alone. Dworkin holds that all norms, including all statutes, are based on an over-all integrity reflecting conception. Barak finds it hard to accept this approach; Dworkin's approach is based, according to Barak's opinion, on a too monolithic concept of law while "law" seems to Barak to be a much more complicated concept. According to Barak's view, law reflects life and life is diversified; he concludes that law as a social phenomenon cannot be described by any one rune – whether this rune is integrity (as Dworkin holds) or efficiency (in the manner of the law and economics scholars) or justice. Barak's approach is eclectic: Dworkin's integrity approach is oriented to justice, honesty and fair hearings process – while according to Barak' there is no reason to prefer these three values over the totality of society's democratic values (Barak 2004: 211).

3.3 The legitimacy of Barak's purposive system of interpretation

The judge's role according to Barak's model of adjudication is, then, to bridge the gap between law and life and this role necessitates sometimes changes in the law. Judges who are not deterred by changing the law are sometimes accused of legal activism; Barak admits that his legal philosophy is activist, but contends that it is a moderate type of activism: according to his philosophy a judge might find it necessary to change the law, but the change must be controlled:

I will present now Barak's notion of "legitimate development of the law" in order to show that according to Barak's philosophy of law, introducing the purposive system of legal interpretation is a legitimate expansion of the limits of legitimacy. Barak emphasizes that judges can expand the border of legitimacy:

> As judicial legitimacy determines the boundaries of activism and self-restraint, activist judges may try to change the border of legitimacy. For this end they may develop new judicial measures, such as new interpretation methods, to enable them

> to work actively. It goes without saying that the development itself must be legitimate. (Barak 2004: 399)

The crucial point is that, according to Barak's philosophy of law, if the Court decides to expand the border of legitimacy – the expansion is legitimate by definition. Barak holds that expanding the boundaries of legitimacy is legitimate if it is approved by the Court; he explains, in the course of a discussion of the question whether any change in the constitution that sustains the formal requirements is valid, that changing the border of legitimacy is legitimate if it fits with the basic principles of the Constitution:

> An approach that founds expression in comparative law is that not every constitutional amendment is constitutional, as the change in the Constitution should conform to the basic principles of the Constitution. (Barak 2004: 99)

It is obvious, of course, that only the Court is authorized to determine whether a particular act fits with the basic principles of the Constitution or is in conflict with them. We can conclude, no doubt, that when the Court acts in an activist manner and change the border of legitimacy by developing a new judicial measure (including, in particular, by introducing the purposive system of legal interpretation) – the development is always legitimate as we must assume that the court would not develop the measure in question if the development was in conflict with the basic principles of the Constitution.

3.4 Barak's analysis of the notion of "legislative purpose"

Barak' purposive system of interpretation is, as noted, one of the judicial measures that enable Israeli judges to change the law (in order to adapt it to life's changing needs). According to purposive systems of interpretation, the judge should interpret statutes in light of their "legislative purpose" – in light of the purpose behind their legislation. In what follows I will discuss Barak's analysis of the notion of legislative purpose – the analysis that opens the way for changing the law by changing statutes' interpretation.

Barak distinguishes between the subjective and the objective purposes of legislation. The subjective purpose reflects the real will of the legislators. Barak explains that

> …in the subjective aspect we are looking for the "real" will of the legislature. …as we shall see, the will of the legislators is not the only criterion [of authoritative statute interpretation]. It is also not a crucial criterion. (Barak 2004: 190)

Barak further distinguishes between two kinds of subjective purposes: "subjective concrete" and "subjective abstract". The subjective concrete will of the legislature (called by Dworkin "the interpretive" will) is the will shared by the majority of the Members of Parliament as to the outcomes to result from the statute's text in certain specified cases. The subjective abstract will of the legislature finds expression in the goals, interests, policies, objectives and functions that the legislators intended to implement.

When a judge is searching for the legislative purpose s/he should ignore, according to Barak, the legislature's concrete will and taken into consideration only the legislature's "abstract" subjective. Barak is explicit that this concrete will should not be taken into consideration unless it teaches us about the abstract will (Barak 2004: 191).

Barak agrees with Dworkin that in order to treat the law as integrity the judge should give it the interpretation that sheds the best light on its political history emphasizing:

> In order to fulfill this mission [the mission of treating the law as integrity] the judge should consider the legislature's abstract will and ignore the concrete will. However, the interpreter does not focus only on this historic will [the legislature's abstract will], and he does not freeze the meaning of the law to the moment of its enactment. Dworkin's starting point is in the present. The purpose of interpretation is to give the law that was enacted in the past the best political justification at present in order to regulate social life in the future. (Barak 2004: 210—211)

Barak emphasizes that the objective purpose of any statute (at any time) – regulating the future social life – is not the actual, concrete or abstract, will of the legislature but what the legislature are supposed to will according to the fundamental principles of the law. Barak holds that the interpreter should assume that the fundamental principles of the law were – alongside the unique purpose of the particular statute – the legislative purpose the legislature sought to achieve by the statute. In

other words, the objective purpose of any statute is, according to Barak, the purpose that should be attributed to the type and nature of the statute in the realization of the fundamental values of democracy:

> The objective purpose of the law is the interests, goals, values, objectives, policies and functions that the law is supposed to realize …[This purpose is not] a guess or conjecture as to the will of the legislature. It applies even when it is obvious that the legislators could not have willed it… At the low levels of abstraction it reflects the will of the legislators if they thought about it, or the will of the reasonable legislature. At a higher level of abstraction it reflects the purpose that should be attributed to the type and nature of the statute. …finally, at the highest level of abstraction the purpose of the statute is the fulfillment of the basic values of democracy. This last purpose is not unique in this or that statute. It applies to all statutes. (Barak 2004: 192)

4 The Israeli method of legal interpretation

Dorit Beinisch – who retired, in February 2012, as Chief Justice of the Israeli Supreme Court – describes, in her decision in *The State of Israel v Barak Cohen* (criminal appeal 10987/07 further discussion), the method of interpretation applied in the Israeli court as follows:

> Let us recall… the basic principles that have been shaped in the decree regarding the interpretation of expressions in the law… In the way that was outlined by president Barak and have been accepted in our legal system we will start any interpretive journey with the language of the law and choose among the linguistically possible meanings the one that most closely implements the law's purpose. (*The state of Israel v. Barak Cohen*, Cr. A. 10987/07, Judge Beinisch§10)

President Beinisch emphasizes that the purpose of a statute is examined at the very first stage of the interpretive journey – together with the statute's language. She is explicit that a linguistically possible interpretation of a statute is reasonable only if it implements the statute's purpose. According to President Beinisch, the interpreting judge does not reconstruct the purpose of a given statute from its

language only; she is explicit that, among other things, judicial interpreters should use for this end any legislative instruction they found relevant:

> One can learn about the purpose of the statute from various sources that were recognized in our legal system as tools of legal interpretation. These sources include, among others, the language of the act of legislation, its place in the law and its integration with other legislative instructions which are relevant to the issue. (*The state of Israel v. Barak Cohen*, Cr. A. 10987/07, Judge Beinisch§10)

Reconstructing the purpose of a given act of legislation the interpreting judge should take into consideration both the subjective and the objective purposes of the act; President Beinisch explains that

> The interpreter should define the subjective and the objective purposes of the statute in question and balance both purposes. The subjective purpose reflects the [abstract] will of the author of the statute and one can learn a great deal about it from the legislative history of the relevant statute. The objective purpose is a normative issue [what the legislature are supposed to will according to the fundamental principles of the law] and it reflects the ultimate values and principles at the basis of the legal system that any statute, it is always assumed, tries to promote and never to oppose. (*The state of Israel v. Barak Cohen*, Cr. A. 10987/07, Judge Beinisch §10)

The legally appropriate interpretation is, according to President Beinisch, the one that most closely implements the law's purpose:

> Once the interpreter determines the [balanced] purpose of a certain statute, he should choose among the reasonable possible interpretations of the language of the statute the meaning that implements its purpose better than any other meaning. (*The state of Israel v. Barak Cohen*, Cr. A. 10987/07, Judge Beinisch§10)

To sum up, according to the method of interpretation used in Israeli courts, in order to apply a certain interpretation as the legally appropriate one, the interpreting judge is to identify first the subjective and objective purposes of the interpreted legal text; then, the interpreter

is to balance the text's two purposes; and, finally, the interpreter is to suggest a way of implementation of the balanced purpose.

In what follows I present, as an example of purposive legal interpretation, Judge Rubinstein's opinion in the *Fuad Chir v. Oded Gil* case (permission of a civil appeal 1104/07).

5 Case study: Permission of a civil appeal 1104/07 (*Fuad Chir v. Oded Gil*)

5.1 The case's circumstances

Factual circumstances: The appellant and the respondent in this case were both lawyers who represented adversary sides in legal proceedings. During a discussion in the Tel Aviv Regional Labor Court (in October 11, 2000), the appellant said regarding the respondent:

The appellant's utterance under consideration

> A police investigation is taking place and at the moment an indictment is being prepared by the district attorney and for this reason the bar association is considering suspension of colleague Oded's [the respondent's] membership.

There was no question that all these accusations were false: the appellant did not argue that the things he said were true.

The respondent sued the appellant for slander (*Fuad Chir v. Oded Gil*, permission of a civil appeal 1104/07, Vice president Rivlin§3). It was obvious that the appellant's utterance is slander according to the (Israeli) Defamation Law. However, the utterance was said in the course of a discussion before a judicial authority (the Tel Aviv Regional Labor Court); and the legal issue was whether therefore it is "a permitted announcement" according to section 13(5) of the Defamation Law. This section of the Defamation Law – section 13(5) – is, then, the text needs interpretation.

Let us take a closer look at this text.

Legal circumstances: Section 13 of the Defamation Law (1965) specifies a number of "permitted announcements" as the title of this section states; the section is divided into sub-sections listing 11 kinds of announcement that cannot be used as grounds for criminal or civil lawsuit. According to sub-section 13(5),

> 13. Permitted announcements

> [The following announcements] will not be used as ground for criminal or civil lawsuit –
>
> …
>
> (5) An announcement made by a judge, a member of a religious court, arbitrator, or another person having lawful judicial or quasi-judicial authority, in the course of a discussion before them, or according to their decision, or an announcement made by a litigant, a litigant's representative or witness, in the course of a discussion of the said kind.[6]

Procedural circumstances: The Tel Aviv Magistrate's Court ruled that although the appellant's utterance under consideration is slander, it is "a permitted announcement" according to section 13(5) of the Defamation Law (*Fuad Chir v. Oded Gil*, permission of a civil appeal 1104/07, Vice president Rivlin§4).

The case made its way to the Regional court that convicted the appellant explaining that the defense given by section 13(5) of the Defamation Law should be limited, and cases of exceptional malice and wickedness are not permitted by this section (*Fuad Chir v. Oded Gil*, permission of a civil appeal 1104/07, Vice president Rivlin§5). The appellant got permission to appeal to the Supreme Court against the Regional court's conviction.

5.2 The debate

The opinions in the Supreme Court were divided; vice President Rivlin's opinion presents the reasoning behind the majority's opinion that the appellant's utterance is a "permitted announcement" and Judge Rubinstein presents his (minority) opinion that this utterance is an illegal slander. The discussion focused on whether section 13(5) gives to things said in court unconditioned defense against lawsuits according to the Defamation Law. I will present first the pre-Barak reasoning behind the majority's opinion (as this reasoning is based on a non-purposive interpretation of section 13(5) it elucidates how pre-Barak justices would have approached the case).

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[6] The Hebrew language and Israeli law do not differentiate between "libel" and "slander"; both English terms are translated as "דיבה" (diba) or, in legal Hebrew, "לשון הרע" (leshon ha-ra; literally: "language of evil").

The first premise of this reasoning (the "major premise" of the legal syllogism) is section 13(5) of the Defamation Law quoted above; relevantly, this section says:

> (1) …an announcement made by …a litigant's representative …during a discussion [before a person having lawful judicial authority] …will not be used as grounds for a criminal or civil lawsuit.

The factual premises of this reasoning (the "minor premise" of the legal syllogism) are:

> (2) During a discussion in the Tel Aviv Regional Labor Court, the appellant spoke bluntly to the respondent saying [the utterance under consideration]. (*Fuad Chir v. Oded Gil*, permission of a civil appeal 1104/07, Vice president Rivlin§3)

And:

> (3) The utterance under consideration was said by a litigant's representative during [a discussion in the Tel Aviv Regional Labor Court which is] a discussion before judicial authority. (*Fuad Chir v. Oded Gil*, Permission of a civil appeal 1104/07, Vice president Rivlin§11)

The majority concluded on basis of this reasoning, that the appellant's utterance is a permitted announcement (namely, that it may not be used as ground for criminal or civil lawsuit according to the Defamation Law"):

> The utterance under consideration is a permitted announcement according to section 13(5) of the [Defamation] Law. (*Fuad Chir v. Oded Gil*, Permission of a civil appeal 1104/07, Vice president Rivlin§11)

There was no question, in this case, that the language of section 13(5) of the Defamation Law expresses the meaning reconstructed by vice President Rivlin's interpretation and approved by the majority. In particular, there was no question that the phrase expressing the trait characterizing permitted announcements in section 13(5) – "[announcement made] in the course of a discussion" – means that an announcement is only required to have taken place during the time and in the place of a discussion before a judicial authority in order to be acknowledged as a permitted announcement.

Indeed in the first version of the Law of Defamation, section 13(5) protected against charges of defamation statements said in court *for the purpose of the court discussion and in connection with it only*. However, in order to ensure free talk in court, the 1967 amendment deleted the words "and for the purpose of the discussion and in connection with it" from the phrase expressing the trait characterizing permitted announcements. Judge Rubinstein admits, accordingly, that the language of the law and the history of its legislation tend to the pole of extending the defense given by section 13(5) to everything said in court:

> The language of the law and the history of legislation tend to a certain degree to the pole of extending the defense [to all announcements made in the course of discussions]… (*Fuad Chir v. Oded Gil*, Permission of a civil appeal 1104/07, Judge Rubinstein§29)

This means, apparently, that section 13(5) defends anything said in court – including the appellant's utterance – against lawsuits according to the Defamation Law. However, Judge Rubinstein held that a different interpretation of section 13(5), according to which the appellant's utterance is an illegal slander, is necessary.

Judge Rubinstein's approach is based on the Jewish Law according to which any talk on what other people do or say is allowed only under certain conditions and only when it is necessary for some practical utility.[7] His verdict presents, accordingly, his (minority) opinion that the defense against lawsuits given by section 13(5) to things said in court is conditioned and the appellant's utterance does not meet the conditions necessary for being acknowledged as a permitted announcement. He explains that a different interpretation is necessary as follows:

> …in my opinion, the soul and conscience do not allow the interpreting judge to ignore putting others to shame, humiliating and degrading them, often in what can be regarded as malice or wickedness and to stay in the dimension of formal or formalistic interpretation. …We should promote, if not

[7] Examples of talks for practical utility would be telling a girl who considers marrying a certain man about this man's serious problems, or criticizing public figures in order to keep them away from problematic routes.

> accomplish, interpretation that prevents misusing the permission [to speak freely in court]… (*Fuad Chir v. Oded Gil*, Permission of a civil appeal 1104/07, Judge Rubinstein§29)

In order to promote interpretation that prevents misusing the permission to speak freely in court, Judge Rubinstein applies the following purposive interpretation to section 13(5) of the Defamation Law.

5.3 The purposive interpretation suggested by Judge Rubinstein

The method of purposive interpretation used in Israeli courts was presented in §4 above; according to this method, the judicial interpreter is to identify first the subjective and objective purposes of the interpreted text, then to balance the text's two purposes and, finally, to suggest a linguistically possible and implementable interpretation that gives expression to the text's balanced purpose. In other words, judicial interpretations are legally appropriate if they meet the criterion of appropriateness of purposive legal interpretations expressed by:

> (1) If an interpretation of a section of law that balances the section's subjective and objective purposes and implements the balanced purpose, is linguistically possible – then this interpretation is legally appropriate. (compare: *the state of Israel v Barak Cohen* criminal appeal 10987/07 further discussion, Chief Justice Beinisch §10)

According to Judge Rubinstein's purposive legal interpretation, section 13(5) of the Defamation Law is to be interpreted as meaning that:

Judge Rubinstein's purposive interpretation of section 13(5)

> Words uttered in court are "permitted announcement" – they cannot be used as ground for a defamation lawsuit – only if the things uttered are relevant, true according to the speaker's best knowledge, and said with no intention to put to shame.

Judge Rubinstein identifies the section's subjective and objective purposes as follows:

> Indeed, the [subjective] purpose of section 13(5) of the Defamation Law found expression in the ruling emphasizing the need to enable all concerned, litigants and lawyers (as well

> as judges) to express themselves in the judicial process without fear that any word or slip of the tongue might become subject to further proceedings. But as far as I am concerned libertinism cannot be the world's way, and the other's dignity, be it a rival and adversary, must not be trodden underfoot in any courtroom.
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> …we should interpret the law in a way that gives expression to [its objective purpose:] the Israeli values according to basic law: human dignity and liberty…(*Fuad Chir v. Oded Gil*, Permission of a civil appeal 1104/07, Judge Rubinstein§32)

We come now to the appropriate balancing to these two purposes. It is obvious that Judge Rubinstein's interpretation of section 13(5) protects human dignity against defamation – in line with what is, according to his discretion, the section's objective purpose; however, this interpretation might pay some price in terms of legal justice. Suppose indeed that the representative of one of the litigants knows some piece of information that might damage someone's reputation, and thinks that the court should consider this piece of information relevant to the case. If this representative is not sure that the court would consider the piece of information in question relevant, and if she is not sure she can demonstrate in court that she believed it, she might prefer not to say it (suspecting, for example, that some lawyer might possibly be able to demonstrate in court that any reasonable person would have realized that the piece of information in question is false). If the particular piece of information is, in fact, relevant – then the representative's decision not to say it might result in injustice to the represented litigant.

Judge Rubinstein holds, however, that the value of human dignity makes this price (in terms of legal justice) inescapable since his interpretation of section 13(5), gives appropriate expression to what is, according to the Judge's discretion, the balanced purpose of section 13(5):

> (2) …considering the purpose of the section to enable free talking in the judicial process but [also considering] the need to protect humans' dignity and good reputation, the good reputation is preferred by the balancing that suggests itself…

> (*Fuad Chir v. Oded Gil*, Permission of a civil appeal 1104/07, Judge Rubinstein§38)

Judge Rubinstein explains that in order to give expression to the balancing preferring the value of human dignity over free talking in the judicial process, a distinction protecting the value of human dignity by forbidding deliberate damages to people's good reputation in court is necessary:

> …a distinction characterizing cases that cannot be regarded as "permitted announcements" is necessary …[considering] the need to protect humans' dignity and good reputation… (*Fuad Chir v. Oded Gil*, Permission of a civil appeal 1104/07, Judge Rubinstein§38)

Accordingly, he suggests implementing his interpretation of section 13(5), by means of the following distinction between "permitted announcement" on the one hand and "slander with a wicked or malicious element" on the other:

> An utterance that according to the judicial assessment is not just false according to its speaker best knowledge, but is also wicked or malicious – is not permitted [by section 13(5)]. The distinction [characterizing "permitted announcements"] is then [that in court any announcement is permitted except] slanders having a wicked or malicious element. (*Fuad Chir v. Oded Gil*, Permission of a civil appeal 1104/07, Judge Rubinstein§39)

If this suggestion is accepted then Judge Rubinstein's interpretation can be implemented; however, the fact that the distinction (between slander and permitted announcements) suggested by the Judge is presented in an opinion of a member of the Supreme Court is not enough to make it a legal principle. A judicial suggestion becomes a legal principle only when the interpretation it implements is demonstrated appropriate. The third premise of Judge Rubinstein's reasoning is a methodological presumption of the method of purposive interpretation presented in §4 above:

> (3) The distinction implementing Judge Rubinstein's interpretation is a valid legal principle if the Judge's interpretation is appropriate.

In order to show that his interpretation of section 13(5) of the Defamation Law is legally appropriate, Judge Rubinstein is to show that it meets the criteria of appropriateness of purposive legal interpretations expressed by premise 1. For this end Judge Rubinstein presents his fourth premise saying that his interpretation is a linguistically possible interpretation of section 13(5). Judge Rubinstein quotes for this end the words of Judge Dr Vardi in civil appeal 1682/06 (in the Tel Aviv regional court). Judge Dr Vardi considered there the legal interpretation of section 13(5), and noted that in spite of the 1967 amendment,

> …in the ruling the phrase "during discussion" is [interpreted as] implying "connection between the announcement and the discussion and so the situation returned to a certain degree, as it were, to what it was before the said amendment or to intermediate situation". (*Raskin v Lev*, civil appeal (Tel-Aviv) 1682/06 §14, quoted in: *Fuad Chir v. Oded Gil*, Permission of a civil appeal 1104/07, Judge Rubinstein§25)

The fact that in the ruling the phrase "during discussion" in section 13(5) is sometimes interpreted as implying a connection between the announcement and the discussion is enough to demonstrate premise 4 if it is assumed that "any interpretation of a legal text that was already accepted in the ruling is linguistically possible":

> (4) Judge Rubinstein's interpretation is linguistically possible interpretation of section 13(5) of the Defamation Law.

Judge Rubinstein can demonstrate now that the appellant's utterance under consideration is a slander of the kind prohibited by the Defamation Law. This is done by two further premises one of which is explicit:

> The things the appellant said to the respondent in the court-room of the Tel Aviv labor court at October 11, 2000 and which are at the basis of this case …had no ground in reality. (*Fuad Chir v. Oded Gil*, permission of a civil appeal 1104/07, Judge Rubinstein§2)

The fact that the things the appellant said to the respondent had no ground in reality is enough to demonstrate premise 5 if it is assumed that "a man saying things with no ground in reality must know that he has made them up".

> (5) The appellant must have known that his utterance under consideration was false.

Being obvious, the other premises enabling Judge Rubinstein demonstrating that the utterance under consideration is a slander of the kind prohibited by the Defamation Law are left implicit. The first of these obvious implicit premises says that:

> (6) The appellant's utterance under consideration is malicious.

The second obvious implicit premise says that:

> (7) The appellant's utterance under consideration is an announcement and it was presented in the course of a court discussion

Judge Rubinstein's conclusion is, finally:

> (=/) If my opinion was accepted we would not grant the appeal [against the conviction of the appellant in the regional court, according to which the appellant's utterance is a slander of the kind prohibited by the Defamation Law]. (*Fuad Chir v. Oded Gil*, permission of a civil appeal 1104/07, Judge Rubinstein§41)

6 Discussion

My purpose in this work is not to evaluate the Israeli purposive method of legal interpretation but to describe it; however, a modest evaluation of this method of interpretation may be in place here. In order to evaluate this method I will consider the same case from the point of view of the most similar method in other jurisdictions – Dworkin's. According to Dworkin, claims of law are true if they are derivable from principles that give the best interpretation to society's legal procedure. In our case two possible claims of law were suggested: the majority's claim (presented by vice President Rivlin) that is derivable from the principle of legal justice and Judge Rubinstein's claim that is derivable from the principle of human dignity.

The majority's claim sheds quite a good light on the legislation of section 13(5) of the Defamation Law. As noted in section 5.2 above, in the first version of the Law of Defamation, section 13(5) took human dignity into consideration by protecting statements said in court against charges of defamation only if these statements were said "for the

purpose of the court discussion and in connection with it". However, once it turned out that this phrase might stand in the way of free talk in court (and therefore in the way of legal justice), the 1967 amendment deleted it.

On the other hand, the light Judge Rubinstein's claim sheds on this process of legislation is highly problematic. Accepting Judge Rubinstein's claim is giving this process of legislation an interpretation according to which the legislature just pretended to remove the bar standing in the way of free talk in court and therefore in the way of legal justice. According to this interpretation the legislature deleted the explicit phrase but kept its signification by meaning the words "during discussion" in section 13(5) as implying connection between the said statement and the court discussion.

We see then that the majority's interpretation of section 13(5) (as derivable from the principle of legal justice) sheds on society's legal procedure a better light than Judge Rubinstein's interpretation (as derivable from the principle of human dignity). Therefore, Judge Rubinstein's claim would be considered false in Dworkin's system of legal interpretation: it is derivable from a principle that does not give the best interpretation to society's legal procedure. In Barak's system, on the other hand, Judge Rubinstein's suggestion was actually rejected – but could be accepted. The case under consideration shows, then, that Barak's system of legal interpretation is more flexible than Dworkin's system and must be, therefore, extremely flexible.

From the point of view of other democratic societies this extremely flexible system of legal interpretation might appear outrageous (see, for example, Posner's "Enlightened Despot"). However, from the point of view of Israeli society, Barak's system is acceptable for two reasons. The first reason is that it is not the most flexible system of interpretation used in Jewish history: the Torah (the first five books of the Hebrew Bible) is considered to be the "words of God" and the Talmud (the cornerstone of Jewish Law) is considered to be an interpretation of the Torah. The point, here, is that the system of interpretation the Talmud applies to the Torah is even more flexible than Barak's system of legal interpretation.

The second reason making Barak's system acceptable in Israel is that its extreme flexibility is often necessary: it may happen in Israel

that, if because of the balance of political power and if because of another reason, a certain urgent social problem cannot be solved. In many cases the flexibility of the purposive method of legal interpretation enables Israeli Court to solve these problems. Take for example the problem of people who have insurance in case they lose working ability and lose working ability as a consequence of an accident involving no physical violence. The problem is that the typical policy of insurance in case of lose of working ability as a consequence of an accident covers an accident only if it is occasioned through external violent means.

The Israeli Supreme Court discussed a case of this kind in Civil Appeal 779/89 *Shalev vs. Sela insurance company*. The appellant (Shalev) suffered a severe heart attack (myocardial infarction) making him permanently disabled right after a rough verbal dispute at work; the respondent" (*Sela insurance company*) claimed it did not have to pay him the insured allowance since his accident was not occasioned through violent means. The Court (led by Judge Barak) applied purposive interpretation to the policy in order to rule that "verbal violence" is a kind of violence – meaning that the appellant's accident is covered.

My own thoughts on Judge Rubinstein's suggestion – to apply the purposive method of interpretation in the Defamation case before us – are that the court's majority was right to reject Judge Rubinstein's suggestion (and to apply the traditional method of interpretation) because the respondent's problem is not a problem that cannot be solved otherwise: he could submit a complaint against the appellant to the professional ethics committee of the Israeli Bar Association which is authorized to take due measures in cases of this kind.

7 Summary and Conclusion

In this work I surveyed Barak's notion of legislative purpose and discussed the Israeli method of purposive legal interpretation according to which judicial ruling may necessitate decisions that sometimes change the existing law or create a new law; I elucidated this method by means of one case of defamation. According Barak's notion of legislative purpose, legislation has two purposes – subjective and

objective – where the *subjective* purpose is further subdivided into two kinds of purposes: the subjective concrete purpose that reflects the real will of the legislators shared by the majority of the Members of Parliament, and the subjective "abstract" purpose – the goals, interests, policies, objectives and functions that the legislators intended to implement. The *objective* purpose of legislation is what the legislators are supposed to will according to society's fundamental principles and it is also subdivided further into kinds by degrees of abstraction.

According to the purposive method of interpretation used in Israeli courts, in order to apply a certain interpretation as the legally appropriate one, the interpreting judge is to identify first the subjective and objective purposes of the interpreted legal text; then, the interpreter is to balance the text's two purposes; and, finally – to suggest a way of implementation of the balanced purpose. Israeli court can roll that any interpretation of a legal text that implements a certain balancing of the text's purposes is the legally authoritative interpretation of the text.

The Israeli purposive way of interpreting statutes that was introduced by Aharon Barak is, together with Barak's new approach to overruling precedents and to the lowering of the standing doctrine, one of the controversial far-reaching legal doctrines supported by Barak that expanded the Court's powers of review. This judicial measure – the purposive interpretation – is, no doubt, a revolutionary development that changed the border of legitimacy in the common law based Israeli law. Once this method of legal interpretation is accepted, the judge's role is no longer limited to the interpretation of the legislature's statutes; using this judicial measure the judge can change the law by changing statutes' interpretation. This power given to judges might be very hazardous of course in the wrong hands; however, the present discussion shows that when used with sufficient caution it may be of great benefit to society.

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