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Multilingual Lawmaking and Legal (Un)Certainty in the European Union

Susan Šarčević

In recent years multilingual lawmaking in the European Union (EU) has come under increasing attack for its failure to provide greater legal certainty to Union citizens. This article examines the extent to which EU multilingual legislation satisfies the requirements for the legal certainty of citizens recognized by human rights law. At the heart of the problem is legal translation which is inherently imperfect, thus resulting in divergences between the 23 authentic texts of EU legislation. While other bilingual and multilingual jurisdictions can rely on the courts to correct the imperfections of legal translation, an analysis of the case-law of the Court of Justice of the European Union shows there is no reason to expect the Court to strike a balance between legal certainty and multilingualism if doing so would risk undermining the effectiveness of EU law. Three proposals for the reform of EU multilingualism are discussed and evaluated. In a final attempt to preserve the status quo of EU multilingualism, the author examines what is being done and what could be done to improve the quality and thus reliability of EU multilingual legislation.

Keywords: EU policy of multilingualism, legal translation, legal certainty, multilingual interpretation, the right to rely on legislation in one's own language

1 Paradoxes of EU multilingualism

European Union multilingualism is unique for several reasons, the most obvious being the unprecedented number of official languages. The

only “international” organization to confer the status of official language on the major language of all of its Member States, the EU currently boasts 23 official languages, soon to become 24 with the accession of Croatia, which is scheduled to become the 28th Member State on 1 July 2013.

In keeping with the principle of language equality enshrined in Council Regulation 1/1958/EEC, all official languages enjoy equal status, at least theoretically, regardless of the extent to which each language is spoken or the economic power of the particular Member State. This follows from Article 1, as well as from Articles 4 and 5, which require regulations and other documents of general application to be “drafted” in all official languages and published in the Official Journal of the EU. Moreover, all instruments of primary and secondary EU law are deemed equally authentic, thus putting all language versions of EU legislation on equal footing for the purpose of interpretation.

Although considerable concern was voiced prior to the last three enlargements as to whether the benefits of multilingualism warrant the cost and whether the Union could function efficiently in more than 20 languages (see Šarčević 2007: 37), all proposals to discontinue the policy of EU multilingualism based on language equality were flatly rejected by politicians. More recently, however, legal factors have come into play, shedding light on the paradoxes of EU multilingualism, stressing the negative impact of multilingualism on EU lawmaking in light of the growing lack of legal certainty.

Back in 2001, the European Commission acknowledged that “linguistic inconsistency and incoherence in directives and their national transposing instruments pose a threat to cross-border transactions”, thus creating legal uncertainty which hinders the proper functioning of the internal market.¹ The Commission’s critical remarks sparked a lively debate on the intricate link between language, law and culture, encouraging scholars to examine the role of multilingualism in EU lawmaking. Early on, scholars of European private law agreed that multilingualism is essential as it enables EU law to function in an increasing number of languages. However, they conceded that, due to

¹ Communication from the Commission to the Council and the European Parliament on European Contract Law (OJ C 255 of 13.9.2001).

the imperfections of legal translation, multilingualism is an obstacle to the harmonization of European private law (on later developments in European contract law, see Baaij 2012a: 16-22).

More recently, lawyers of public law have joined the debate and are mounting attacks on EU multilingual lawmaking for its failure to provide greater legal certainty to Union citizens (e.g., Schilling 2010). On the one hand, Article 22 of the EU Charter of Fundamental Rights recognizes linguistic and cultural diversity as a fundamental right of European citizens. However, linguistic and cultural diversity is now alleged to be the very cause of growing legal uncertainty in EU multilingual legislation (Kjær 2011: 2). By shifting the emphasis to human rights, the attacks could prove to be fatal, driving the paradox of EU multilingualism to the point of self-destruction.

In the wake of the entry into force of the Treaty of Lisbon in December 2009, the discriminatory effects of EU multilingual legislation on Union citizens can no longer be neglected. Under Article 6(2) of the EU Treaty, as amended by the Lisbon Treaty, the EU is committed to accede to the European Convention of Human Rights (ECHR) and the negotiations for membership are currently in progress.² Upon accession of the EU to the ECHR, EU multilingual legislation will be subject to the criteria for legal certainty developed and practiced by the European Court of Human Rights in Strasbourg. In anticipation of this moment, this article examines the extent to which EU multilingual legislation satisfies the two basic requirements for the legal certainty of citizens recognized by human rights law and the rule of law (section 2). The focus then shifts to the imperfections of legal translation and inevitable divergences between the various language versions of EU legislation which undermine legal certainty (section 3). Following an analysis of the interpretive methods used by the Court of Justice of the European Union (hereinafter: Court of Justice, or the Court) in cases involving legal certainty, the question arises whether the Court is likely to strike a balance between legal certainty and multilingualism without compromising its main goal of promoting the uniform interpretation and application of Union law (section 4). In light of the growing legal uncertainty, three proposals made by scholars for

² See progress report at hub.coe.int/what-we-do-human-rights/eu-accession-to-the-convention.

reforming EU multilingualism are explained and evaluated (section 5). Closing with reflections on the future of EU multilingualism, the article examines what is being done to improve the quality and reliability of EU multilingual legislation, making suggestions for further action in an attempt to preserve the status quo of EU multilingualism (section 6).

2 EU multilingualism and legal certainty

The human rights law developed by the European Court of Human Rights sets two basic requirements for the legal certainty of national legislation, both of which will apply to EU multilingual legislation when the EU accedes to the ECHR. First, the legislation must be accessible to citizens and secondly, its effects must be foreseeable or predictable (Schilling 2010: 49). In the context of EU multilingualism, this means that EU legislation must be accessible to citizens in their own language and that it must be reliable in the sense that citizens are able to *foresee* the legal effects, thus enabling them to base actions in law on legislation in their own language without fearing discriminatory results.

2.1 Requirement of accessibility

Since EU law has direct effect on the citizens of the Member States, it follows that Union citizens have the democratic right to have access to the law in their own language (Strandvik 2012: 32; Paunio 2007: 396). The right of citizens to accessibility is undisputed and has been upheld by the EU policy of language equality from the very beginning. As regards the treaties of primary law, the founding fathers of the European Communities (today the EU) acted in accordance with principles of international law by drawing up the Rome Treaties of 1958 in the four languages of the six founding States – Dutch, French, German and Italian – and declaring all language versions to be equally authentic. In this spirit, the Council of Ministers conferred the status of official and working language on the four original languages of the six founding States in Council Regulation 1/1958/EEC of 15 April 1958, which has been amended upon the accession of new Member States to

include the new languages.³ As confirmed by the Court of Justice in the *CILFIT* case,⁴ all language versions of EU secondary law are also equally authentic.

Like the treaties of primary law, the legislative acts of secondary law (e.g., regulations, directives, decision) are “drafted” in all official languages and published in the Official Journal of the EU (OJ), which is accessible at the Eur-Lex database.⁵ As for the case-law, judgments of the Court of Justice are drawn up in French, translated into the language of the case (if this is not French) and then translated into the other official languages and published in the European Court Reports, which are available at the Court’s database.⁶ Accordingly, it is safe to conclude that EU law is accessible to Union citizens and other individuals (natural and legal persons).

As an unwritten requirement of accession, all candidate countries must translate the entire body of EU law (*acquis*) into their language. After the final legal-linguistic revision, the translations are authenticated by the EU institutions and published in special editions of the Official Journal. Technically speaking, all EU legislation should be published and made available to the public by the date of accession. However, this did not happen in the historic enlargement of May 2004 when the number of official languages jumped from 11 to 20 overnight. The late publication of certain legislation and translation errors resulted in a number of court cases, the most famous of which is the *Skoma-Lux* case,⁷ in which the Court of Justice held that, in accordance with the principle of legal certainty, obligations contained in Union legislation cannot be imposed on individuals (citizens and entities) of a new Member State if the legislation has not yet been published in the

³ Pursuant to Article 1 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community, as amended by the respective Accession Acts, the official languages of the Union are: ‘Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish’.

⁴ Case 283/81 [1982] ECR 3415, para 18.

⁵ At <http://eur-lex.europa.eu/en/index.htm>.

⁶ At <http://curia.europa.eu/en/content/juris>. In this context, it should be mentioned that only judgments in the language of the case are authentic.

⁷ The language in question was Czech. See Case C-161/06, *Skoma Lux sro v Celní ředitství Olomouc* [2007] ECR I/10841.

Official Journal in the language of that State. Following this reasoning, the Court ruled, “A Community regulation which is not published in the language of a Member State is unenforceable against individuals in that State” (see Bobek 2011: 125).

From the date of accession the Commission’s Directorate General for Translation (DGT), the largest translation service in the world, is responsible for the translation of EU legislation into all official languages. To dispel concerns that the DGT was unable to meet its obligations after the 2004 accession, the Commission issued a Communication on a New Framework Strategy for Multilingualism in which it renewed its commitment “to give citizens access to European Union legislation, procedures and information in their own languages” and concluded that “multilingualism is essential for the proper functioning of the European Union” (COM(2005) 596 final, 3, 15).

2.2 Right to rely on legislation in one’s own language

While the criterion of accessibility is a mere formal requirement, the second requirement is problematic because it concerns the quality, more precisely the reliability of the equally authentic texts of multilingual legislation. In essence, this aspect of legal certainty guarantees Union citizens the right to rely on the authentic text of EU legislation in their own language without discriminatory effects. Pursuant to the case-law of the Court of Human Rights, the key criterion of the test of reliability of a legislative text is the foreseeability (or predictability) of its effects. According to Schilling, “Foreseeability of its effects requires that the law is sufficiently clear for the citizen to foresee, if need be with the assistance of a lawyer, its effects, ie what he must or must not, do and what he may, or may not, expect or require from public authorities” (2010: 49).

Since EU legislation is drafted in one language and translated into the other official languages, the question arises whether the language versions of EU legislation are “sufficiently clear” so as to enable citizens to foresee the consequences of the particular instrument on the basis of the text in their own language. As Schilling points out, citizens should have no reason to doubt the meaning of their own language version, thus enabling them to base actions in law on that text. These are “legitimate expectations” of Union citizens which need to be

protected by the courts; any decision contrary to the principle of legal certainty should be considered discriminatory (Schilling 2010: 53, 56, 61; on legitimate expectations, see Habermas 1996: 198, cited in Paunio 395, n. 74).

In keeping with the principle of equal authenticity, the ultimate goal of EU multilingual lawmaking is to preserve the unity of the single instrument in all authentic texts with the aim of promoting the uniform interpretation and application of EU legislation by the national courts in all Member States (Šarčević 2012a: 86-87). In theory, all authentic texts of EU instruments of primary and secondary law, including subsequent translations, are deemed to be “originals” and are thus presumed to have the same meaning. As for the treaties of primary law, the presumption of equal meaning is derived from Article 33(3) of the Vienna Convention on the Law of Treaties, which states that the terms of a multilingual treaty are presumed to have the same meaning in each authentic text. Similarly, the case-law of the Court of Justice has confirmed that each of the equally authentic language versions of EU instruments of secondary law is presumed to have the same meaning.⁸

Whether and to what extent the authentic texts of EU legislation actually have the same meaning is a matter of interpretation. In bilingual and multilingual jurisdictions⁹ the meaning of the authentic texts of a single instrument is presumed to be the same *unless alleged otherwise*. This implies that the presumption of equal meaning stands as long as the wording of an authentic text is “sufficiently clear”, as Schiller puts it (2010: 49), or is “unambiguous and free from doubt”, as Derlén says (2011: 145). Therefore, as regards the test of reliability, the legal effects of an authentic text can be deemed foreseeable if the wording of that text is “sufficiently clear” so as not to raise a problem of interpretation. In Derlén’s words, “The right to rely on a single language version exists as long as this version is unambiguous and free

⁸ Referring to the *CILFIT* judgment, Advocate General Tizzano commented that the Court wanted the national courts “to bear in mind that the provision in question produces the same legal effects in all those versions”, opinion delivered in Case C-99/00 *Kenny Roland Lyckeskog* [2002] ECR I/04839, para. 75; cf. Advocate General Stix-Hackl’s opinion in Case C-495/03 *Intermodal Transports BV v. Staatssecretaris van Financiën* [2005] ECR I/08151, para. 99.

⁹ For instance, section 10B(2) of the Hong Kong Interpretation and General Clauses Ordinance reads: “The provisions of an Ordinance are presumed to have the same meaning in each authentic text”.

from doubt” (2011: 145). In such cases, the requirement of reliability is fulfilled and citizens should have no reason to doubt the “protection of legitimate expectations based on that language version” (Schilling 2010: 61). However, as we will see, this is not always the case in the practice of the Court of Justice. First, however, it is necessary to briefly examine the production of multilingual texts in the EU and the fallacy of the presumption of equal meaning.

3 Legal translation - a threat to legal certainty

Both lawyers and linguists are quick to concede that it is impossible to produce parallel texts of a single instrument which have the same meaning (Dolczekalska 2009: 361; Gémar 2006: 77), thus reducing the presumption of equal meaning to a mere fiction. This is particularly true in EU multilingual lawmaking, which, contrary to some bilingual jurisdictions such as Canada and Hong Kong,¹⁰ is dependent on traditional methods of translation.

3.1 Production of EU multilingual legislation

The main actors in EU multilingual lawmaking include technical experts and policymakers who are not professional drafters, translators who are usually linguists, and lawyer-linguists who are lawyers with high-level language abilities. Today lawyer-linguists are mainly responsible for legal-linguistic revision, which goes beyond a purely linguistic revision of a target text to include legal and linguistic revision of the source text as well, as a result of which it is sometimes referred to as co-drafting (Šarčević and Robertson 2013: 186, citing Burr and Gallas 2004: 199).

In EU multilingual lawmaking, the source or base text is drafted in either English or French by policymakers and technical experts in the Commission who are usually non-native speakers of the source language. Whereas French and English were on par as drafting languages in 1997, most texts are now drafted in English. Since 2001

¹⁰ The French and English texts of Canadian federal legislation and the English and Chinese texts of Hong Kong legislation are produced by professional drafters simultaneously using methods of co-drafting (on co-drafting in Canada, see Šarčević 2000:100-102) or simultaneous drafting, as it is called in Hong Kong (Cao 2007: 72; Cao 2010: 80).

lawyer-linguists from the Commission examine and revise the initial base text to ensure that the language is clear, precise and translatable into the other languages. Thereafter, Commission translators in the DGT translate the base text into all other official languages. The translations are then monitored by Commission lawyer-linguists with a view to verifying terminological consistency within the particular text and with other EU instruments in the same field.

After approval by the Commission, all language versions of the particular instrument are sent to the Council and Parliament for debate, amendment and enactment. As earlier, lawyer-linguists of the Council are responsible for the final legal-linguistic revision and verification of the concordance of all language versions prior to their publication in the Official Journal. More recently, a process of shared legal-linguistic revision known as co-revision is carried out by teams of lawyer-linguists from the Council and Parliament (see Guggeis and Robinson 2012: 70). In addition, Parliament lawyer-linguists are responsible for revising amendments submitted during the parliamentary processes, which have been translated into all languages by translators of the Parliament's Directorate for Translation (for details on the work of lawyer-linguists, see Šarčević and Robertson 2013).

3.2 Inevitable divergences

Although EU translators are called upon to convey the legal content of the base text as accurately as possible and all language versions are subject to legal-linguistic revision and verification, divergences in meaning between the various language versions of EU legislation are inevitable (on causes and types of divergences in EU legislation, see Šarčević 2006: 125-126).¹¹ Moreover, as Tabory has suggested, "The probability of confusion, errors and discrepancies is multiplied in direct proportion to the number of authentic texts" (1980: 146). While she is

¹¹ Cf. Cao, who identifies three sources of *inter-lingual uncertainty*, as she calls it: 1) lexical uncertainty, 2) syntactical and grammatical ambiguity and 3) uncertainty arising from errors or variations. She does not deal with the problem of legal certainty as a right of citizens to rely on a provision in their own language but rather the need for uniform interpretation regardless of the language version (2007: 73); Cao's later article (2010) has essentially the same content (without Canada); however, she drops the term *inter-lingual uncertainty*, using instead terms such as *linguistic disagreements* (71), *linguistic differences* (72), *divergences* (77), *linguistic discrepancies* (79) etc.

referring to the six authentic texts of UN legislation, this gives us a good idea of the probability of the divergences occurring between the 23 authentic texts of EU legislation. At the heart of the problem, however, is not only the diversity of the many languages but first and foremost the diversity of the legal systems and cultures of the 27 Member States, a fact which outsiders (e.g., Cao 2010: 85) and even insiders often overlook when discussing EU translation. Whereas De Groot remarked that EU translation is “relatively easy” because it involves only one legal system (1999: 14), in reality EU law is still developing and continues to be dependent on the legal systems of the Member States. Therefore, EU translation is not yet translation within one legal system but translation across systems. In this sense, Kjær describes EU translation as a complex operation involving 23 languages and 28 legal systems: EU law and the national systems of the 27 Member States (2007: 80).

Most lawyers regard divergences in meaning between the various language versions as an inevitable fact of EU multilingual lawmaking that must be accepted. While many divergences are not harmful, others have the potential to lead to different results in practice. Under ordinary circumstances this would not be cause for alarm. However, according to Schilling, harmful or significant divergences, as he calls them, are “the rule rather than the exception” in EU legislation. Based on his 25 years of professional experience in the linguistic service of the Court of Justice, Schilling estimates that at least one significant divergence between two or more language versions occurs regularly in lengthy EU legal texts (2010: 51). This is cause for concern as it considerably increases the risk of legal uncertainty.

In fact, as Professor Solan warns, “The opportunity for inconsistencies among the various language versions is so profound that it would not be surprising if the entire system collapsed under its own weight” (2007: 2). According to Solan, the reason the system has not yet collapsed is the sensitivity of the Court of Justice to strike a proper balance when ascertaining the uniform meaning of the equally authentic language versions of EU legislation. Like judges in bilingual

Canada and Hong Kong (Beaupré 1986: 156; Cao 2010: 84¹²), it is up to the judges of the Court of Justice to correct the inherent imperfections of translation by resolving divergences between the various language versions of EU multilingual legislation in cases brought before it.

4 Corrective role of the Court of Justice

As the sole authority to interpret EU law, the Court of Justice promotes the uniform interpretation and application of EU law by ascertaining the meaning of disputed provisions referred to it by national courts in references for a preliminary ruling. This also includes any provision which is unclear or ambiguous in the language version of the referring national court or is alleged to diverge from the other language versions. The Court's task is not to decide the national case in question but rather to determine the uniform meaning of the disputed provision, which is binding on all national courts.

4.1 Basic interpretive methods of the Court of Justice

Unlike in Canada and Hong Kong where special rules for construing bilingual legislation are codified in their respective Interpretation Acts,¹³ in EU law the decision on how multilingualism is to affect the interpretation of EU legislation has been left to the Court of Justice. Over the past 50 years the Court has developed dynamic methods of multilingual interpretation which have enabled it to accommodate the increasing number of languages. In keeping with the principle of equal authenticity, the starting point of EU multilingual interpretation is the general requirement to compare all language versions of the disputed provision.

In the *Van der Vecht* case (1967), the Court addressed the controversial issue whether the comparison is mandatory at all times. The somewhat awkward wording of the Court's judgment states that

¹² However, in my opinion, Cao goes too far when she suggests that the interpretive methods of the Court of Justice «may serve as a point of reference and guidance» for other jurisdictions such as Hong Kong (2010: 85).

¹³ Canadian Federal Interpretation Act (R.S.C., 1985, c. I-21), at <http://laws-lois.justice.gc.ca/eng/acts/I-21/index.html>; Hong Kong Interpretation and General Clauses Ordinance, at <http://www.legislation.gov.hk/eng/drafting.htm>.

national courts need to consult the other language versions “in cases of doubt”, thus implying that no comparison is needed if the national text is sufficiently clear.¹⁴ Later the Court explained in *Stauder* (1969) that European law needs to be interpreted and applied in a uniform manner in all Member States and therefore the disputed provision in question must be interpreted in light of all language versions. Since the different language versions together form the meaning of the provision, it concluded that the courts have the duty to compare all language versions in all cases, not only in the event of a linguistic discrepancy between the various language versions.¹⁵ At that time there were only four authentic texts. Nonetheless, subsequent enlargements have not led the Court to change its position. Instead, it has repeatedly emphasized the obligation to compare the other language versions and now refers to the matter as settled case-law (Baaij 2012b: 218; cf. Derlén 2009: 35; also Šarčević 2002: 248). While the Court of Justice is in a better position to compare the 23 language versions of a disputed provision, it is highly questionable whether this is done on a regular basis in practice. As for the national courts of the Member States, they generally rely solely on the version in their own language, unless it is ambiguous or obscure (Paunio 2007: 398).

As a cumulative requirement, all authentic texts of a particular instrument are to be given equal interpretive weight in the event of divergence or ambiguity. In the famous *CILFIT* case the Court made it clear that this general rule of international treaty law applies to the interpretation of instruments of both primary and secondary primary law. Among other things, the Court recognized in its judgment of 1982 that all language versions of EU secondary legislation are equally authentic and therefore need to be given “the same weight”,¹⁶ a position it has repeatedly confirmed in later cases as well (e.g., *EMU Tabac* 1998¹⁷). However, reconciling linguistic discrepancies in a way that gives equal weight to each language version is extremely difficult, if not downright impossible in EU multilingual legislation, especially for the national courts. Using the metaphor “Castles in the Air”, Derlén

¹⁴ Case 19/67 [1967] ECR 345.

¹⁵ Case 29/69 [1969] ECR 419.

¹⁶ Case 283/81 [1982] ECR 3415, paras. 18-19.

¹⁷ Case 296/95 [1998] ECR /I1605, para.36.

scolds the Court for creating extensive obligations for the national courts without providing any genuine guidance as to how they can be realized in practice (2009). Moreover, from the point of view of legal certainty, the Court's basic requirement that all language versions must be compared and given equal weight when resolving divergences between authentic texts is contrary to the principle of legal certainty for individuals (cf. Paunio 2007: 401). Above all, it defies the test of reliability. Instead of promising the reliability of one's language version without the threat of discrimination, it sends the very opposite message, warning Union citizens that they cannot rely on their own language version of a EU legislative text, even in cases where it is sufficiently clear.

4.2 Priority of the teleological approach

In 1977 the Court addressed the issue of legal certainty in *North Kerry Milk Products*, acknowledging that "the elimination of linguistic discrepancies by 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."¹⁸ In an attempt to find a compromise solution, the Court argued, "It is preferable to explore the possibilities of solving the points at issue without giving preference to any one of the texts involved".¹⁹ In essence, this approach excludes giving priority to a single language version and as such is the flipside of the same-weight principle, both of which signal a departure from literal interpretation based on the wording of the text. As the best method of reconciling linguistic divergences, the Court proposed its teleological approach, which it supplemented to include not only the spirit and objectives of the text but also its wider context and general scheme. In this sense, the Court succeeded in reconciling the linguistic discrepancies in the case at hand by examining other EU legislation on the same subject matter, enabling it to determine the uniform interpretation of the disputed provision by a contextual, broader interpretation taking account of the purpose and general scheme of the rule regulating the issue at stake. However, by promoting integration

¹⁸ Case 80/76 [1977] ECR 425, para. 11.

¹⁹ Ibid.

and uniformity of laws, the Court's teleological approach may "collide with the principle of legal certainty", as Paunio puts it (2007: 396).

In cases hinging on linguistic discrepancies, recent studies show that the prevailing approach is not the teleological but rather the literal method of interpretation (Baaij 2012b: 219). Greatly simplified, the literal approach consists mainly of two main categories: the majority argument in which the Court gives preference to the meaning attributed to the majority of language versions, and the clarity argument where preference is given to the language versions that the Court considers clearer or less ambiguous than the other versions. However, as a rule, it also examines the purpose of the disputed rule after having determined the majority or clearer language versions in order to ensure their compatibility. Moreover, in the case of incompatibility, the Court reserves the right to give priority to a teleological argument even though it contradicts the clear meaning. The fact that the Court may resort to the teleological argument to correct a literal interpretation has serious implications for legal certainty. First, it makes it impossible for individuals to predict with any degree of certainty which interpretive methods will be used by the Court in a particular case, thus creating even greater legal uncertainty. Secondly, it sends a strong signal suggesting that there is no reason to expect the Court to strike a balance between legal certainty and multilingualism if it would put the effectiveness of EU law at risk.

The issue of legal certainty is particularly sensitive in cases where plaintiffs or applicants who bring an action based on a provision in their own language stand to suffer economic loss or criminal consequences as a result of conflicting interpretations that may not be evident in their own language version. In such cases, courts are generally encouraged to uphold the principle of legal certainty by ruling in favour of the individual who relied on the provision, as the Court of Justice did in *Privat-Molkerei Borgmann* (2004).²⁰ However, closer scrutiny of the judgment reveals that, although legal certainty may appear to have been the overriding factor, there were other considerations as well, above all the compatibility of the German-language provision with EU (then Community) law. As the Court put it,

²⁰ Case C-1/02 [2004] ECR I-03219.

“Where it is necessary to interpret a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the EC Treaty and the general principles of Community law... and, more specifically, with the principle of legal certainty” (para. 30).

The dispute turned on a formal question, i.e., whether the time-limit in Regulation 536/93 should be interpreted as the time of dispatch, as the majority of language versions suggested, or the time of receipt, as indicated in the Greek, Dutch and Finnish versions. Since the various language versions diverged in meaning, the Court examined the purpose of the Regulation by referring to the preamble. However, as Derlén points out, the teleological approach offered no interpretive guidance at all (2011: 150), thus allowing the Court to rule in favour of the individual. In this case, Borgmann had the good fortune that his language version sided with the majority and did not compromise the objectives of the provision. In other words, the Court’s decision favouring Borgmann posed no risk to the effectiveness of European law.

Individuals in other cases concerning financial and taxation issues were not as fortunate, thus suggesting that the Court of Justice does not hesitate to rule against the language version of an individual if the wording of that text does not comply with the clarity or majority argument and is found to be contrary to the purpose of the disputed provision. For example, in *Röser* (1988),²¹ a case involving the prosecution of a German citizen for not complying with EU legislation relating to the marketing of wine, the Court admitted that the interpretation of the German wording of the provision in question was open to an interpretation according to which Röser’s conduct seemed lawful. Despite a warning from the Commission that it would be against the basic principles of criminal law to punish the defendant, the Court ignored the warning and ruled in favour of the other language versions. According to the Court, the other language versions made it *clear* that the broader interpretation leading to the opposite result had to be adopted (paras. 22-25; see Derlén 2011: 149). Referring to the *Pubblico Ministero v Sail* case,²² the Court argued that the effectiveness

²¹ Case 238/84 [1986] ECR 795.

²² Case 82/71 [1972] ECR 119.

of European law must be consistent and cannot vary according to its possible effects on various branches of national law.

Similarly, in *Herinksen* (1989)²³ the Court of Justice adopted a broad interpretation in a matter of taxation, which hinged on the question whether letting of garages was excluded from value added tax. A number of language versions, including the national version relied on by Herinksen, indicated that it was. However, after examining the other language versions and the purpose of the provision, the Court came to the opposite conclusion. Again there were words of warning, this time from Advocate General Jacobs, who favoured a literal interpretation of the provision, given the tax law context (Derlén 2011: 149). Nevertheless, the Court ruled against the individual in the interest of promoting uniform law and ensuring the effectiveness of European law.²⁴

Summing up, we agree with Derlén that the limited weight attributed to legal certainty amounts to “an abdication on the part of the Court” (2011: 150). For our purpose, this leads us to conclude that, based on the case-law, it is not reasonable to expect the Court to strike a balance between legal certainty and multilingualism if favouring the individual would undermine the effectiveness of EU law. The apparent incompatibility of these three factors sends a strong warning that the paradox of EU multilingualism has reached the point of absurdity. Unable to rely on their own language version and unable to foresee how the Court will rule after comparing the other language versions of a disputed provision, Union citizens are trapped in a discriminatory position which denies them their right to legal certainty. As the number of victims of EU multilingualism increases, it can be expected that the individuals will take their cases to the Court of Human Rights when the EU accedes to the ECHR. This alarming situation raises a red flag signaling that the time has come to seriously consider proposals to reform EU multilingualism.

²³ Case 173/88 [1989] ECR 2763.

²⁴ Similarly, in the area of indirect taxation, the Court concluded in *Codan* (Case C/236 97[1998] ECR I-8679) that the meaning of the Danish term for *stock exchange turnover taxes* (*boersomsaetningskater*) in Council Directive 69/335 must be extended to cover all “taxes on the transfer of securities”, the broader expression used in all other language versions except German.

5 Proposals to reform EU multilingualism

Of the numerous proposals made by various authors, only three are discussed here as any more radical solution, such as reducing the number of official languages and thus language versions of EU legislation, would be contrary to the principle of accessibility of the law, which is also a requirement for legal certainty. The first two proposals call for a reduction in the number of authentic texts of EU legislation, thus sacrificing the principle of equal authenticity but continuing to require instruments of primary and secondary law to be “drafted” and published in all official languages. The third proposal retains the principle of equal authenticity *per se* but would introduce mandatory consultation languages.

5.1 One authentic text

Discussing the criterion of foreseeability, Schilling claims that, in order to foresee the effects of any EU instrument, theoretically Union citizens would need to consult all 23 language versions, which is highly unreasonable. On the other hand, in his view, it would be reasonable to expect citizens to consult or hire experts to consult one, two or maybe three authentic language versions and to compare them with the text in their own language. Nonetheless, he concludes that legal certainty would be best achieved if there were only one authentic text of EU legislation, while the others would be reduced to official translations (2010: 64). In such case, any ambiguities and divergences in the official translations would be resolved on the basis of the authentic text.

Like the earlier practice in international treaty law, Schilling proposes that the language version of the base text be declared authoritative, as it would most likely reflect the true legislative intent. In his opinion, a system of rotation between all the official languages would also be acceptable, as this would effectively guarantee equal treatment of all languages but would be impractical under other aspects. In pragmatic terms, he agrees that the simplest solution would be to make one and the same language authoritative for all legislative texts, that language being English.²⁵ However, he acknowledges that the one-

²⁵ In defence of English, Schilling mentions that the Group of Intellectuals for Intercultural Dialogue engaged by the Commission in 2008 accepted English as the language of international

authentic-text solution would probably be the most difficult to achieve politically (2010: 65).

5.2 European reference language model

Another proposal, also by Germans, is to adopt a European reference language model, which would reduce the number of authentic texts of EU legislation to two reference languages at the EU level, which would serve as reference texts for the other languages (C. and K. Luttermann 2004: 1008-1010). This system of bilingualism would be extended to the mother tongue by requiring the other Member States to translate all EU legislation into at least one of their official languages. The “authenticity” of the other language versions would be upheld insofar as they are in agreement with the two authentic reference language texts. All legal and linguistic questions of interpretation would be resolved by comparing the two authentic reference texts and the uniform interpretation would be binding for the whole Union. According to K. Luttermann, the two reference languages – English and German – have been chosen on the basis of the democratic majority principle. Namely, English is the first most commonly used language in the EU, and German the second.²⁶ Since these two languages ensure that both Continental law and Common law are represented, in her opinion, the model preserves cultural and legal diversity (K. Luttermann 2009: 332-335).

5.3 Mandatory consultation languages

An expert on EU multilingual interpretation, Derlén regards the system as “broken” but is confident that it can be fixed. In his view, requiring the national courts to consult all language versions is absurd and, furthermore, the Court of Justice has failed to provide viable guidelines as to how that rigid requirement is to be fulfilled in practice (2011: 152, 157). Contrary to the other proposals, Derlén’s model does not sacrifice the principle of equal authenticity, at least not in theory, but calls for sweeping reforms in practice by making English and French

communication (2010: 65 n. 121). Braselmann supported the one-authentic-text solution back in 1992; however, the language was French (1992: 73-74).

²⁶ Based on statistics in the Annex of the Commission’s Communication on a New Framework Strategy for Multilingualism (COM(2005) 596, 16).

consultation languages, which the national courts would be required to consult in addition to their own national language. Mandatory consultation of the three language versions would apply at all times, not just in “cases of doubt”. Moreover, the consultation languages would not be decisive when reconciling divergences but would carry the same weight as the national language, thus respecting the same-weight requirement of the current multilingual policy (2011: 157).

Derlén concedes that his proposal would elevate English and French to a privileged position; however, as he points out, these languages already enjoy a special position, which is *de facto* recognized by the national courts. Emphasizing the assets of multilingual interpretation, Derlén is optimistic that using English and French as mandatory consultation languages would contribute to a “truly multilingual Union”, considerably improving the chances of achieving uniform interpretation and application of EU law in the Member States. To counter criticism that introducing two mandatory consultation languages would be too difficult and/or too burdensome for the national courts, Derlén reminds potential critics that settled case-law requires judges to consult all language versions and that the Commission is empowered to bring an enforcement action against a Member State whose courts do not comply with the Court’s case-law (2011: 157, n. 44). Stressing the advantages of multilingual interpretation, he concludes that comparing three language versions is better than no comparison at all (2011: 161-164).

5.4 Evaluation of the proposals

From the legal point of view, the question arises as to how radical the reform can be without causing the entire system to collapse. Above all, is it feasible and desirable to sacrifice the principle of equal authenticity? Both Schilling and Luttermann attempt to justify their respective proposals to radically reduce the number of authentic texts by reference to the language policy of the Court of Justice. As mentioned earlier, the Court’s judgments are drawn up in French, translated into the language of the case (if this is not French) and then into the other official languages. Although all language versions are published, the only authentic and thus authoritative version is the judgment in the language of the case, which is usually the language of

the parties, and in preliminary rulings, the language of the referring court. In my view, the Court's restrictive regime of authenticity is justifiable because the authentic judgment has direct effect only on the parties to the case. On the contrary, EU legislation has direct effect on all Union citizens. Therefore, citizens whose language version would no longer be authentic stand to lose a lot; hence, this would entail discrimination on a huge scale.

As to the individual proposals, Schilling compares his one-authentic-text solution to international treaty law, commenting that it is common practice for countries whose languages are not official to publish their official translation of an instrument together with one of the authentic texts, thus guaranteeing accessibility of the law. Indeed, Union citizens would have access to the "real" law if they published their official translation together with the authoritative text. However, the one-authentic-text solution was abandoned in international treaty law long ago. While it can be argued that equal authenticity is only a fiction, it is firmly anchored in the EU treaties and settled case-law. Therefore, in my opinion, any attempt to repeal the equal authenticity of the language versions of EU legislation would destabilize the entire system. From this point of view, Derlén's proposal provides the only viable option as it retains the legal basis of equal authenticity. Furthermore, it preserves EU multilingualism to the greatest extent possible, changing only the requirements of the national courts when interpreting EU multilingual legislation.

Apart from the issue of equal authenticity, one could say that Luttermann's and Derlén's proposals are similar in that she proposes adopting two reference languages, he two consultation languages. However, Derlén's proposal is much more sophisticated and preserves the equal-weight requirement and the mandatory comparison rule in all cases. As for the number of consultation languages, Schilling suggests that it would be reasonable to require citizens or their counsel to consult one, two or perhaps three language versions in addition to the text in the national language. Since English is already the quasi *lingua franca* of the EU (Pozzo 2012: 185-201), it is logical that it will be one of the consultation languages, however, as Schilling concedes, not necessarily the only one. If two other language versions are to be consulted, the question is which two. In light of the historical role of

French in the European Communities and its significance in the EU institutions today, in my opinion, French is the obvious second language. For almost 50 years French was the main drafting language and still is one of the drafting languages, although English is the base text in most new legislation. Moreover, French is the sole working language of the Court of Justice and one of the working languages of all EU institutions involved in the lawmaking process.

While Derlén's proposal is acceptable from the legal point of view, it is questionable whether EU politicians are ready for such a reform. From the procedural standpoint, any change in the Union's present policy of multilingualism would require unanimous approval by the Council. Needless to say, achieving political consensus on such a sensitive issue as EU multilingualism would be a difficult, if not impossible task. But is there another alternative to save the system?

6 Future of EU multilingualism

Before endorsing the proposed reform, in my opinion, it is not only advisable but also necessary to examine what is being done behind the scenes in an attempt to preserve the current status of EU multilingualism. Since legal uncertainty is attributed largely to the imperfection of legal translation, we turn our attention first to EU translation. As mentioned in section 3.2, Kjær regards EU translation as a process involving 23 languages and 28 legal systems: EU law and the laws of the 27 Member States (2007: 80), thus making both linguistic and systemic divergences inevitable.

6.1 Attempts to preserve the status of EU multilingualism

According to Strandvik, Quality Manager at the DGT, the Commission is doing everything in its power to improve the quality of the translations (2012: 32). Some of the initiatives launched by the DGT over the past decade include the "systematic use of term bases and translation memories, elaboration of language-specific style guides, clear drafting campaigns, creation of networks to improve communication and integration between the different actors involved in the legislative process throughout the workflow, including national experts for terminological queries, etc." (Strandvik 2012: 32 n. 27).

Other actions include a Total Quality Management exercise and, more recently, a Programme for Quality Management in Translation: 22 Quality Actions. Nonetheless, as Strandvik admits, there is room for improvement.

As I see it, the main problem is not just the quality of the translations, but drafting quality in general. It is well known that improving the quality of the base text will in turn improve the quality of the translations. Considerable progress has already been made in this respect by broadening the role of the lawyer-linguists. As mentioned in section 3.1, lawyer-linguists from the Commission (native speakers of English or French) examine and revise the initial base text before it is sent to the translators. Lawyer-linguists of all languages participate in so-called translatability sessions to ensure that the source terms are translatable into their respective languages and make suggestions to revise the base text if necessary. Legal-linguistic revision in all institutions now includes the opportunity to revise the language of the base text as well, provided no substantive changes are made. Increasing the number of lawyer-linguists would certainly improve the reliability of all language versions, especially because the translators in the legislative institutions are mostly linguists without sufficient knowledge of law.

EU multilingual lawmaking can be successful only with team effort. Therefore, greater interaction is needed between all actors in the production process: policymakers, technical experts, legal-linguists and translators. Although the responsible policymakers and technical experts cooperate with the lawyer-linguists at all stages of the legislative process, the translators work in isolation. Since lawyer-linguists are responsible for terminological consistency within their own language version and across languages, interaction between lawyer-linguists and translators would bring valuable insight to both sides, reducing the risk of significant divergences between the various language versions. Furthermore, it would be helpful to require the so-called lead translator²⁷ to attend the pre-translation strategic meetings

²⁷ The lead translator's responsibilities are mentioned in sub-action 5.2 of the DGT's Programme for Quality Management in Translation, http://ec.europa.eu/dgs/translation/publications/studies/quality_management_translation_en.pdf (2009: 13).

organized by the DG responsible for the particular instrument. This would enable her/him to gain a greater understanding of the key concepts and potential pitfalls, including any intentional ambiguities, which must remain in tact in all language versions. Sharing this information with all translation teams assigned to the project would certainly enhance reliability. Moreover, greater interaction is needed between the 23 Translation Units of the DGT to encourage translators to take account of the multilingual aspects of the translation operations and to consult several language versions.

6.2 Greater harmonization of national laws

While such programmes and actions will help improve the quality and thus reliability of all language versions, a more sweeping reform is needed on several fronts in a final attempt to save EU multilingualism. With the aim of improving the drafting quality of EU multilingual legislation, basic drafting guidelines were set forth in the Joint Practical Guide,²⁸ which was adopted by the three legislative institutions back in 2003. Based on the Swiss drafting tradition, the guidelines are instrumental for developing drafting practices that respect multilingualism and multiculturalism. For instance, guideline 1 calls for the base text to be drafted in “clear, precise and simple language”, taking account of the fact that it “must fit into a system which is not only complex, but also multicultural and multilingual” (point 1.2.1). As set forth in guideline 4, “Targeted emphasis on simplification plays a central role in respecting multilingualism.” Guideline 5 advises drafters to avoid technical terms of national law as a means of enhancing the translatability of the base text (see comments in Šarčević 2007: 42-51). To what extent these drafting principles are implemented in practice is another matter.

The best example is probably the Principles, Definitions and Model Rules of European Private Law, better known as the Draft Common Frame of Reference (DCFR),²⁹ which was prepared mainly

²⁸ Joint Practical Guide of the European Parliament, the Council and the Commission (for persons involved in the drafting of legislation within the Community institutions), at <http://eur-lex.europa.eu/en/techleg/pdf/en.pdf>.

²⁹ Published by Sellier Publishers in 2009, the full edition of the DCFR consists of five volumes containing ten Books of model rules regulating the entire life of a contract and specific contracts but also *negotiorum gestio*, torts and unjust enrichment. A terminology list with

by academics of the Study Group on a European Civil Code and the Research Group on EC Private Law. Written in neutral English, the DCFR is formulated in a meta-language intentionally detached from national legal languages, laws and cultures to the greatest extent possible. Conscious efforts were made by the drafters to use the above drafting principles. First, they consistently avoided technical terms, choosing neutral terms, which are easily translatable and understood across most legal systems. Secondly, they use simple, clear and direct sentence structures with the aim of avoiding any inaccuracies, approximations or real mistranslations in one or more of the other languages (see Šarčević 2010: 34-40). While the drafters have succeeded in producing a base text that is transparent and translatable, their greatest achievement is undoubtedly their pioneer efforts to create a uniform terminology in a number of areas of European private law by attempting to create uniform concepts which will guarantee legal certainty in cross-border transactions. In my opinion, this is where the heart of the problem lies and holds the key for preventing (or greatly reducing) not only linguistic but also systemic divergences between the various language versions of EU legislation.

Accordingly, greater harmonization of national laws is needed to bring about the convergence of the national legal systems and the development of autonomous EU concepts which would be understood in all official languages and implemented uniformly in the national legal systems of the Member States. From the standpoint of translation, this would bring us closer to De Groot's view of EU translation (1999: 14) as translation within one legal system with an autonomous conceptual system (section 3.2). This, indeed, would be the ideal situation, but it would require an autonomous conceptual system in all areas of law and the existence of a European legal culture (on a European legal culture, see Hesselink 2009: 1-6; Hesselink 2002: 11-71). While Euroskeptics view this as a vision that cannot be achieved in reality (Legrand 1996: 61-62), optimists regard it as a commitment that could be achieved with greater harmonization (e.g., Ajani and Rossi

2006: 83-84). This, of course, would require dedicated work by many future generations.

6.3 The final test

As for now, EU politicians are testing whether the Member States are ready and willing to move forward in this direction. In the interest of providing greater legal certainty to consumers and traders in cross-border transactions, the Commission proposed a Regulation on a Common European Sales Law (CESL),³⁰ which is based on the DCFR. Although the CESL would be an opt-in instrument providing a “neutral modern contract law regime” which would co-exist in each national legal system with the existing national contract law, it is the first attempt to create uniform rules of a European contract law that would be applicable in all Member States. Since traders and consumers will be encouraged to choose this optional instrument only if their rights, obligations and remedies are clearly spelled out and predictable in all language versions, legal certainty will be instrumental in determining the success or failure of the CESL. For this and other reasons, the CESL is the first EU legal instrument to be drafted in plain language. This is a significant step forward and could also be crucial for determining the future of EU multilingualism. If the combined efforts of maximum harmonization, strict adherence to the drafting principles in the Joint Practical Guide and the use of plain language significantly improve the reliability of all language versions of the CESL, then this model could provide the key to averting the reform of EU multilingualism. On the other hand, failure of the CESL to provide a sufficient degree of legal certainty to individuals would indicate that the time has come to act on Derlén’s proposal of limited multilingualism.

³⁰ COM(2011)635 final, 2011/0284 (COD), Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law SEC(2011)1165 final and SEC(2011)1166 final.

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The purposive method of legal interpretation in practice

Sol Azuelos-Atias

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.

Keywords: jurisprudence, Aharon Barak, Dworkin, defamation, legal truth

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; Rabbinical courts, for example, are authorized to rule in matrimonial issues of Jewish citizens according to the Jewish Law (7277 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 finds 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's 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).

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.

...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 courtroom 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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The “Jurisprudence of Interests” (Interessenjurisprudenz) from Germany: History, Accomplishments, Evaluation

Remus Titiriga

This paper analyses the jurisprudence of interests (Interessenjurisprudenz) as one of the most important German methodological schools. The first part of the paper evaluates its position in the great methodological debate (Methodenstreit) over the role of a judge, which emerged in the beginning of the twentieth century in Germany. The ancient conceptual methodology (Begriffsjurisprudenz) came under siege from new methodological orientations like the “free law school” and the “school of objective interpretation.” The most effective challenger and winner in the debate was this Interessenjurisprudenz, which was developed by Von Heck at Tübingen. The second part of the paper articulates the main contributions and the specific vision of the movement as regards the method of the judge. The last part briefly assesses the actual significance of Interessenjurisprudenz in German legal space and in other legal cultures (Anglo-Saxon and French).

Keywords: Interessenjurisprudenz, conflicting considerations, interest, Begriffsjurisprudenz, school of objective interpretation, free law school, Wertungsjurisprudenz

1 Introduction

This paper is addressed to an Anglo-Saxon or French legal audience. As a matter of fact, the German jurisprudence of interests

(Interessenjurisprudenz) is almost unknown to this public. Interessenjurisprudenz belongs to an approach based on balance or proportionality (rationality of conflicting consideration), which is a dominant mode of legal reasoning of our time.¹

The major thinkers responsible for creating this approach were Oliver Wendell Holmes in the United States, René Demogue in France, and Philipp von Heck in Germany. There were certain influences on this matter in the Continental Europe and the United States, influences that seem to have been forgotten today.² Although the technique of conflicting considerations has a rich European genealogy, it received its most elaborate form in the United States between 1940 and 1970.

In the early fifties, the Constitutional Court of Germany adopted also the technique of proportionality. More recently, the European authorities, such as the European Court of Justice and the European Court of Human Rights, adopted also the technique of proportionality as their usual technique.

The following considerations will try to join the debate about the rationality of conflict considerations in the judge's activity in the historical dimension.

2 The Interessenjurisprudenz in the methodological debate (Methodenstreit) of Germany

2.1 The classical theory: Begriffsjurisprudenz

2.1.1 The coming-out of Begriffsjurisprudenz

1. Regarding the technique of weighting of interests or balancing, see Alex Aleinikoff, «Constitutional Law in the Age of Balancing », in 96 *Yale L.J.*, 1987, pp 943 et seq; Robert Alexy, «On Balancing and Subsumption: A Structural Comparison », in 16 *Ratio Juris*, 2003, pp 433 et seq; Robert Alexy, «On the Structure of Legal Principles », in 13 *Ratio Juris*, 2000, pp 294 et seq; Francois Ost et Michel van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Bruxelles, Publications des Facultés universitaires Saint-Louis, 2002; Benoît Frydman «L'évolution des critères et des modes de contrôle de la qualité des décisions de justice», Working Papers du Centre Perelman de philosophie du droit, n° 2007/4, on line from October 11, 2007, <http://www.philodroit.be>.

2. See for an interesting discussion about the subject, Duncan Kennedy et Marie-Claire Belleau, «La place de René Demogue dans la généalogie de la pensée juridique contemporaine», *R.I.E.J.*, 2006, pp. 163 et seq. See also, more recently, Duncan Kennedy, « A Transnational Genealogy of Proportionality in Private Law », in *The Foundations of European Private Law* (ed) Stephen Weatherill et a., Oxford, Hart Publishing, 2011, pp 185 et seq.

The European legal thinking of the nineteenth century was dominated by two forms of positivism: the French school of exegesis (based on statute law) and the German historical school, which restricted the interpretation to Roman legal sources (mainly *Corpus Juris Civilis* of Justinian). Since the middle of nineteenth century and following the works of G. F. Puchta, the German historical school began to build a deductive system of legal concepts. The new vision replaced Savigny's³ organic connection of institutions with logical connections between concepts as a source of new rules. It also explicitly added the science (the doctrine) to the other two traditional sources of law (the statute law and the custom).

On this ground would emerge in Germany *Begriffsjurisprudenz* (the doctrine of concepts) under the leadership of Rudolf von Ihering. In his *Spirit of Roman Law* of 1852–1858, he conceived *Begriffsjurisprudenz* as achieving the systematic structure previously considered by Puchta.⁴ Ihering saw the deconstruction of institutions and legal rules in their “logical elements,” followed by a reconstruction, as able to produce new legal rules. This was a “multiplication of law on its own ground,” a “growth from inside,” since “the concepts were productive ... and may generate new ideas” by a purely inductive approach similar to natural sciences' methodology.⁵

2.1.2 Methodological details of *Begriffsjurisprudenz*

Ihering identified two levels of doctrine.⁶ On the first level, *Begriffsjurisprudenz* extracted from legal sources, by means of abstract interpretation, the *legal concepts*. On this level, the so called *low doctrine* focuses on the interpretation and clarification of existing law, the clarification of ambiguities and contradictions, and the arrangement (condensation) of legal material with help of classification concepts.

3. See for a complete presentation Mathias Reimann, “Nineteenth Century German Legal Science,” *Boston College Law Review*, Volume 31, Issue 4, Article 2, 7-1-1990, <http://lawdigitalcommons.bc.edu/bclr/vol31/iss4/2>.

4. See the French version of Rudolf von Ihering, *L'esprit du droit romain dans les diverses phases de son développement* (4 vol), Fr. trans, Octave de Meulenaere, Paris, Marescq Aîné, 1880.

5. Larenz (Karl), *Storia del metodo nella scienza giuridica*, Milano, Giuffrè Editore, 1966, pp. 28.

6. Philipp (von) Heck, “Jurisprudence of Interests,” pp. 38, in Magdalena Schoch (tr.ed), *The Jurisprudence of Interests. Selected Writings*, Harvard University Press, 1948.

The *high doctrine*, on the second level, was the domain of legal science. It did not address the results of the general classification of concepts as mere condensations, but as legal entities with a structure similar to natural bodies. Each concept (obtained by condensation) should be accurately determined as to its inner structure. For example, each right had to be examined in order to determine its object, content, and purpose.⁷ The ultimate result must be, according to Ihering, a “formula” or a definition. In this way, the concept was “interpreted” (or constructed). Afterwards, the definition must be strictly respected and used as a basis for new rules and for deciding new cases (not considered when the concept was defined for the first time).

It is exactly this unlimited use of “constructions” that is the main value, according to Ihering. Therefore, all these concepts, their “system” will be seen as an endless source for new legal materials.

Begriffsjurisprudenz has constrained the judge to apply the law (the statute) by a logical insertion (subsumption) of the facts of a case under legal concepts. Any independent evaluation from the judge was prohibited since his activity was modelled on mathematics; he was only supposed to comprehend, to understand the rules through the concepts. The judge may eventually obtain the missing rule from the concept that was the ground for the other, existing rules. This procedure was promoted to the dignity of a general method and was applied not only for normative concepts (found in legal texts) but also for classification concepts (produced by the legal science).⁸ Thus legal gaps were solved with classification concepts, which were themselves the basis for new rules.⁹

Apparently, this procedure received the support of the German courts of the time since, in many cases, the Supreme Court of the Reich

7. We can give a few illustrations of the way Ihering conceived these structural problems: “In a co-ownership is it the ownership, the right, or the value of the property that is divided? Is it the ‘obligatio correalis’ of Roman law a plurality of obligations with identical contents, or is it an obligation with several subjects?” See Philipp (von) Heck, *op. cit.*, pp. 38.

8. Thus the determination of a protection for the author’s works was based on the construction of a classification concept for the property rights in general (based on a normative concept of property law). Then it was obtained by a pure intellectual construction of the protection regime characterizing the copyright (immaterial property).

9. This procedure will be later called the “method of inversion” by Interessenjurisprudenz.

adopted decisions based on the idea that concepts were the origin for legal rules.¹⁰

2.2 The crisis of *Begriffsjurisprudenz* and the emergence of competing methodological doctrines

By the end of the nineteenth century and the beginning of the twentieth century, the *Begriffsjurisprudenz* began its decline in Germany. By then, the law was increasingly seen as a product of political decisions and as a means to regulate social relations based on choices. In other words, the law ceased being seen as an autonomous system and became part of social reality.

During this period, several authors started to reject the system of concepts. Among them was Ihering himself (in his *Anonymous letter on contemporary legal science* from 1861 and in the four volumes of his *Spirit of Roman Law* from the 1864 edition). Ihering believed that not only legal rules but also dogmatic concepts, established through “construction,” changed over time. It was no longer possible to identify the practical validity of a rule with its logical consistency. All rules have their origin in practical relations and practical reasons. A concept was invented only for teaching convenience, and not as a logical ground for new rules. Therefore, the system of legal concepts had to be seen only as a teaching system.

On the other side, this time, Ihering praised a new teleological approach, which considered the legal rules as grounded on practical reasons since the “utility and not the will, is the substance of law.” To define this notion, the author used the terms “good,” “value,” “enjoyment,” and “interest” and defined the subjective rights as legally protected interests.

These considerations of the late Ihering were a first charge against *Begriffsjurisprudenz*. However, Ihering was not able to offer an alternative methodology. Thereafter several other doctrines tried to fill this space.

2.2.1 The School of Objective Interpretation

10. Philipp (von) Heck, “Jurisprudence of Interests”, pp. 42, op. cit.

The objective hermeneutics theory appeared in the late nineteenth century. It considers, like *Begriffsjurisprudenz*, that the interpretation of a statute must be cut off from its historical origin. The legal meaning is not what the legislature has thought but whatever is immanent to the objective law.¹¹ Therefore, the adherents of “objective interpretation” propose a technique of transposition. Under this technique, the terms of a rule are separated from their historical surroundings and placed in the current environment. Thereafter they are interpreted as if they were adopted today.

There are certain differences between *Begriffsjurisprudenz* and the objective interpretation doctrine. The rationality of the legal system is seen by the latter in a formal sense, as logical connexions of concepts, but also in a substantial way, as a teleological system of rational goals. The system establishes its unity on the authority of general principles seen as normative and evaluative rules, and not as an abstract synthesis of concepts. The result is a method known as teleological and focusing on the “the goal pursued” by the statute.

This method comprises two steps. First of all, there is a search for actual social conditions that the statute should meet. Afterwards, there is a search for a better and more suitable solution according to the ideas of this moment. From several possible literal interpretations must be chosen the one “that is the best response to that purpose.”¹² This approach refreshes the interpretation of legal rules by adapting them to the new situations they must answer.¹³

However, the theorists of objective interpretation did not see an opposition between the teleological elucidation of the rule and the rational method of *Begriffsjurisprudenz* because the goals were not those of historical legislature or original social forces (*intentio*

11. See Kohler, cited by Larenz, op. cit., pp. 39.

12. Idem. pp. 39 et seq.

13. Teleological technique aims to adapt the legal system through a reasoning by which the purpose or the function of rules is essential in their interpretation. See for a French and Anglo-Saxon context the very interesting developments of Duncan Kennedy, «Two Globalizations of Law and Legal Thought: 1850-1968», in 36 *Suffolk L. Rev.*, 2003, pp 631 et seq; Duncan Kennedy et Marie-Claire Belleau, « François GénY aux Etats-Unis », in Claude Thomasset, Jacques Vanderlinden et Philippe Jestaz (dir.), *François GénY, mythe et réalités : 1899-1999, centenaire de Méthode d'interprétation et sources en droit privé positif, essai critique*, Cowansville, Éditions Y. Blais, 2000.

legislatoris) but the objective goals of the statute revealed through its rational examination (*ratio legis*).

2.2.2 The Free Law School

The ideas of the school of free law silently emerged in the early nineteenth century and became distinguishable in the early twentieth century.

There are several factors that favoured its coming out. The arrival of the German Civil Code (BGB) revealed a number of its flaws. Certain problems were not anticipated, and there was no means to fill the gaps or circumvent the clear provisions from the code. Very soon, the theorists discovered the creative activity of judges, who started to use the general clauses from the code (good faith, morality) to remove its special provisions (while in principle, special rules should prevail over the general ones). They also came to admire the freedom of English higher courts or the U.S. Supreme Court.

In this context, Ehrlich asserted in 1903 the ideas of “free research of law” and “free legal science.”¹⁴ Then in 1906, Kantorowicz, in his book *The Struggle for the Science of Law*,¹⁵ declared that, in front of legal gaps, the judge must be free to find the law or to create it. This marked the start of the public legal methodological debate known as *Methodenstreit* (fight between methods) in Germany.

The principle of judicial discretion was the greatest challenge addressed by *Freirechtsschule* for *Begriffsjurisprudenz*. The basic proposal of Ehrlich and his successors, at least in the beginning, was the idea that the judge may choose the best solution of a case only if he is free to assess its individual characteristics, regardless of the rules from the statute.¹⁶ Therefore, the reasons for a decision can be derived only from the case itself since the case has the law in itself “*sua lex*.”¹⁷

14. Reprinted in Ehrlich Eugen *Fundamental Principles of the Sociology of Law*. Transaction Publishers, New Brunswick, [1913] 2001.

15. H. Kantorowicz, *Der Kampf um die Rechtswissenschaft*, Carl Winter, Heidelberg, 1906.

16. Therefore, a decision taken in this way may be called “decision without statute law.”

17. This is the reason for rejecting the idea of filling the gaps of a statute based on solutions from the statute itself (through the use of arguments such as “*analogia legis*” and “*argumentum a contrario*”—this rejection being shared also by Geny).

From the beginning, the proponents of this movement have attacked with passionate fervour both the practice of the courts and the classical legal theory. This kind of propaganda was effective. If the discussion had been conducted more quietly and only among experts, it would have taken more time for the movement to achieve its purposes. However, this “modus operandi” had also its shortcomings.¹⁸ The arguments were presented in a way that provoked passionate reactions from opponents and prevented a calm evaluation. The ambiguous term “free law”¹⁹ was later abandoned and replaced with the more neutral “sociological jurisprudence,” and that helped clarify the controversies and appease the spirits.

Nevertheless, the doctrine of free law has failed to impose its vision about the role and the most opportune practice of the judge. Its critics underlined that, in normal cases, the application of general rules from a statute provides acceptable results. On the other hand, the critics observed the limit of the insight and neutrality of the judge and underlined that, in many situations, the predictability of judicial decisions was much more important than their material justice.

In any case, this doctrine has administered a fatal blow to *Begriffsjurisprudenz*, which, from now on, would leave the legal scene to become a chapter in history. However, the merit for occupying the methodological space liberated by *Freirechtsschule* returned to the parallel and rival school of *Interessenjurisprudenz*.

2.3 *Interessenjurisprudenz* as the main challenger in “*Methodenstreit*”

Interessenjurisprudenz (doctrine of interests) is much more subtle than the free law doctrine. Its origin may be found in the late Von Ihering (by 1892), who considered that “the rights are legally protected

18. Max Rumelin, “Legal Theory and Teaching”, pp. 21, in Magdalena Schoch, op. cit.

19. The term “free law” has been used to express different ideas. Some lawyers have argued that the binding force of a statute depends on its effectiveness. Others, proceeding from the theory of objective interpretation, argued that the content of a statute must be limited to its “clear and unambiguous terms.” Some others came to the conclusion (not accepted by all followers of “free law”) that the judge has the right, under certain circumstances, to reject the obedience to the statute law or, as it was sometimes said, to change the statute law. Cf. Max Rümelin, “Legal Theory and Teaching”, pp. 23 in Magdalena Schoch, op. cit.

interests,” and who understood that statutes are recognitions of interests and have a social purpose.

The fight against the doctrine of concepts (*Begriffsjurisprudenz*) was likewise the starting point of *Interessenjurisprudenz*.²⁰ The opposition was not against the formation of concepts itself and the adoption of judicial decisions on the basis of normative concepts.²¹ The opposition was directed against the deduction of new legal rules from classification concepts—in other words, against interpretation through “constructions.” The criticism of the formal system of abstract concepts was focused mainly on their inability to produce new rules. Such a system of concepts should have just a descriptive value (being useful only to learn the law).²²

Interessenjurisprudenz considered its own general concepts relating to interests (e.g., situations of the parties, interest for development, interest for security, etc.) as unable to build a system. These concepts have a decisive role in determining the real interests and then in the interpretation and application of statutes.

We have seen that the fight against the doctrine of concepts (*Begriffsjurisprudenz*) was the starting point of *Interessenjurisprudenz*.

However, the second front of *Interessenjurisprudenz* was directed against the theory of free law.²³

To the extent that the followers of the free law school sought to liberate the practice of the judge from the chains of conceptualism, they were objective allies for the doctrine of interests. The latter doctrine has benefited from the dynamism of the other school, but—and as these

20. Philipp (von) Heck, “The Formation of Concepts,” pp. 107 in Magdalena Schoch, *op. cit.*

21. The normative concepts being distinct from dogmatic concepts (of classification) are still considered as useful. Von Heck considers that such concepts, as part of the statutory provisions, must be reintegrated into the rule when the rule is applied. They have as much authority over the judge as other components of the disposition itself. These situations have nothing in common with the method (rejected by Von Heck) that derives new rules from the concepts of classification (construction through concepts). See Philipp von Heck, “The Formation of Concepts,” pp.107 in Magdalena Schoch, *op. cit.*

22. Such abstract concepts are the subjective rights, the wrongful act, etc. See Larenz, *op. cit.*, pp. 65 et seq.

23. Philipp von Heck, “The Formation of Concepts,” pp. 108, in Magdalena Schoch, *op. cit.*

two movements have often been confused—she also suffered from the violent reaction triggered by the free law doctrine.²⁴

In fact, the two methodological schools were essentially different. *Interessenjurisprudenz* is far from a free development of the law envisioned by *Freirechtschule*. Von Heck believed that the mistake of the free law doctrine, insofar as it aims to produce a positive law, was born from the misconception that the interpretation of statutes is limited to their text.²⁵ The main safeguard of *Interessenjurisprudenz* in this respect is the principle of historical interpretation of statutes through the research of interests (see 3.2 below).

The third front of *Interessenjurisprudenz* is directed against the objective interpretation doctrine.

The doctrine of interests fights the technique of transposition defended by the “objective interpretation” (the legal rules are separated from their historical surroundings, placed in the current environment, and interpreted as if they were adopted today).

Von Heck considers this procedure as contrary to everyday experience and not able to offer any practical guarantee. Its results may be useful only by accident, and in most cases, they would be a pure nonsense. Von Heck believes that the only way to develop the statute law in agreement with practical needs is to separate the historical interpretation of the statute by its later adaptation. An obsolete statute can never be understood as a simple integration into the present, but rather only through a judicial adaptation. If historical interpretation is excluded from the beginning, the result is not just a misreading of adaptation; rather it may also reveal other faults and lead the public to mistrust the loyalty of judges toward the statute.

2.4 The outcome of *Methodenstreit*

24. Von Heck had good reasons to stress his opposition to this doctrine since the jurisprudence of interests has often been treated as a variant of the “free law” theory. According to Von Heck, this is a mistake and the chronological order of events would be exactly opposite, *Interessenjurisprudenz* being the oldest school and the “free law” doctrine being a later occurrence. We can make the same remark for François Gény, who, in his second edition of the treatise *Méthode d'interprétation et sources en droit privé positif*, presented Von Heck as a member of the “free law” school. Therefore the confusion is recurrent.

25. According to Von Heck, this misconception explains also the revival of the theory with Isay in the '20s.

2.4.1 Interessenjurisprudenz as the winner of Methodenstreit

Born in civil law as the main challenger in the methodological fight (Methodenstreit), Interessenjurisprudenz finally won the debate in Germany. Interessenjurisprudenz also conquered the field of public law. Under the name of teleological doctrine, some scholars of public law (municipal and international) from Tübingen (Triepel, Thoma, and others) have occupied the positions previously held by the conceptualist school. Beyond public law and civil law, the controversy has affected the law of the procedure (where the victory of Interessenjurisprudenz would happen later) and criminal law (where the victory was ensured from the beginning).²⁶ From the '20s onward, these victories in the theoretical battlefield have provided for the doctrine of interests the highest audience from German courts.

But an Interessenjurisprudenz influence has reverberated well beyond the borders of Germany, and especially in Switzerland. The Swiss Parliament adopted in 1907 a famous provision²⁷ that drew the attention of the legal scholars and was seen by Gény as “the most appropriate summary of his own developments.”²⁸ This provision requires the judge to be responsible for creating law without referring to another source. The precautions taken by its writer, Eugen Huber, were linked to the changing powers of the judge. In fact, the preparation of the article occurred while the victory of the free law school over Begriffsjurisprudenz was ensured.

26. It may be mentioned a decision in German criminal law about a doctor who caused an abortion- followed by the death of the infant (at a time when abortion was still prohibited and punished in Germany) to a woman injured in an accident. In this situation, the method of interests has been called as a backup. The court saw the existence of a gap that could be filled “ad favorem.” The judge compared the punishment (penalty) for infanticide with that provided for homicide (the penalty was more severe in the second case). In this way, the conflict of interest between the survival of the mother and the survival of the child was solved on the ground of weighing interests already made by the legislature. Since the doctor has acted to save the mother (the greatest interest considered as such by the legislature to the detriment of the child), he was found not guilty.

27. The judge faced with a shortage of (statute) law and custom may “decide in accordance with the rules that he would establish if he had to act as legislature” while “building on solutions established by the doctrine and jurisprudence” (Civil Code of Obligations of Switzerland, art1, para.1 s. 2 and 3).

28. Gény, *Méthode d'interprétation et sources en droit prive positif*, tome II, pp. 326–327.

Huber recognized a wide discretionary power for the judge but placed boundaries in order to avoid arbitrariness and judicial uncertainty. The judge was not considered a lawmaker but must act *like* a legislature (approximately as a legislature). In fact, when a Swiss judge acted as a legislature, he creatively applied the mechanisms developed by *Interessenjurisprudenz*. Under this system, corresponding to the practice of the Swiss Federal Court, the interpreter must seek the origins of the statute and the extralegal context in which it arose in order to recognize the value judgments that have guided the legislature and the objectives he intended to achieve.²⁹

2.4.2 Reasons for the success of *Interessenjurisprudenz*

For *Freirechtsschule*, social reality must be considered, and the judge should assume the creation of law based on this social reality. The gaps of the statutes were seen as inevitable. The texts were the ground for interpretation, but out of the texts (in front of legal gaps), the judge was a creator of law. The ideology of separation of powers and the submission of the judge to the statutes were under attack. This might be the main reason (added to the lack of real guidance for the judge) that stopped *Freirechtsschule* from being accepted. Anyway, *Freirechtsschule* was the first methodological doctrine aware of the role played by social reality in shaping the law.

The objective interpretation was equally aware of social reality. But one may also identify here its unhistorical vision (on the pathway of *Begriffsjurisprudenz*). The texts of statutes are seen and have a meaning in agreement with the purposes resulting from actual social context without any historical perspective. Therefore, the teleology, seen only as actual purpose, is invited in interpretation. However, one cannot see any considerations of legal gaps or the idea of judge as a servant of legislature. Anyhow, if the objective interpretation was less methodologically directive (than *Interessenjurisprudenz*), it has proposed certain solutions where *Freirechtsschule* has only offered the complete liberty of the judge.

Interessenjurisprudenz was the first movement historically sentient. This historical dimension made *Interessenjurisprudenz* attentive to the

29. Cf. Deschenaux (Henry), *The Preliminary Title of the Civil Code*, Ed. University, Freiburg, 1969, pp. 76 et seq.

psychological and social context for the adoption of a given statute in the past. But it made *Interessenjurisprudenz* equally attentive to the moment of interpretation and the psychological and social context of the present day. This doctrine understands also the inevitability of legal gaps (being aware of the signals exposed mostly by *Freirechtschule*).

The subtlety and the multidimensionality of this last approach explain its success over the competing schools. In addition, it brings to the judge a detailed guideline for finding solutions by acting as a sentient adjunct of legislature.

3 Interpretation theory in *Interessenjurisprudenz*

In fact, the doctrine of interests turns toward social reality. As such, most of the doctrine is dedicated to the judicial application of law.

3.1 The use of the concept of “interest” as a causal element of the norm
 Von Heck, the leader of the school, makes a distinction between the notion of purpose of a rule and the interests for whose conflict the rule is a solution.³⁰ His basic idea is that a norm is not the product of a single purpose but the “resultant” (vector) of a conflict of interests (including “ideal interests”).

The ultimate goal of judicial decisions is the satisfaction of life’s needs, of material or ideal desires existing in a legal community. Von Heck called all these “desires and trends” interests. He designates as “genetic theory of interests” the idea that interests will be “causal” for the legal rule since they are “representations of duties” for the legislature, who transforms them into prescriptions. He considered a causal chain and saw the real interests as essential in the creation of statutes. These interests (including the interest for peace and order in a

30. Phillipp von Heck, «The Formation of Concepts and the Jurisprudence of Interests», in M. Magdalena Schoch, op. cit., p. 35–36: « The fundamental truth from which we must proceed is that each command of the law determines a conflict of interests; it originates from a struggle between opposing interests, and represents as it were the resultant [vector] of these opposing forces. Protection of interests through law never occurs in a vacuum. It operates in a world full of competing interests, and, therefore, always works at the expense of some interests. This holds true without exception. If we confine ourselves to an examination of the purpose of a law we see only the interest which has prevailed. But the concrete content of the legal rule, the degree in which its purpose is achieved, depends upon the weight of those interests which were vanquished ... Therefore the teleological jurisprudence of Jhering is not sufficient. »

legal community) are not abstractions but facts (akin to the positivist idea of science)³¹ and are efficient causes of events. The statute's rules are not only intended to differentiate the interests but are themselves the product of interests. Thus, the statute is a final result of conflicting interests (of material, national, religious, and ethical nature) struggling to be recognized.

Von Heck disapproves the role attached by *Begriffsjurisprudenz* to syllogism. To him, the judge must carefully verify whether the actual situation, the opposition of interests to be weighed, is identical to the large number of interests already captured by the legislature. In other words, the establishment of the applicable rule (the major of the syllogism) stems from a dialectic between the rules and the facts of the case (the minor of the syllogism).

Interessenjurisprudenz states, as the traditional methodological school (*Begriffsjurisprudenz*), that the primary role of the judge is to apply the statute. On the other hand, its approach is quite different, since, for Von Heck, the judge must be a thinking associate of the legislature.³² Unlike the doctrine of concepts, *Interessenjurisprudenz* asserts that the intellectual activity of the judge is not a formal (or logical) thinking but an emotional thinking. The judicial reasoning is considered in the light of life and interests, and not as conforming to some truth tables. Therefore, the decision of the judge should refer, apart from exceptional cases, to the scale of values reflected by the legal system.

3.2 The Determination of Real Interests

The judge's role is to rank the interests of parties in the case and to make win the party whose interest has greatest value. It must "recognize the real historical interests" that have caused the statute and take into account these interests in deciding the case.³³

31. The positivist conception of science that Von Heck placed, unconsciously, at the base of his theory recognises beyond sciences as logic and mathematics, only "causal science." A fact is acknowledged in a scientific way if it is reduced to its causes—physical, biological, historical. Therefore, even the interpretation of statute is, for Von Heck, an explanation through causes. See Larenz, *op. cit.*, pp. 66.

32. Philipp (von) Heck, "The Formation of Concepts," pp. 178, in Magdalena Scoch, *op. cit.*

33. Larenz, *op. cit.*, pp. 65.

The centre of gravity moves from the personal decision of the legislature and his psychological will to its grounds, and then to the “causal factors” that motivated it.

Thus, the reason to require a method of interpretation defined as “historical research of interests” becomes clear. Under the concept of interpretation are considered several different processes, such as the determination of the dispositions of a statute, its interpretation in the narrow sense, and possibly, its development. And only for the first two processes, Von Heck considers the “historical interpretation” as the most suitable technique of analysis.

As a matter of fact, one can find here a third way between objective interpretation and subjective interpretation, and this doctrine was also qualified as historical objective interpretation.³⁴ Von Heck is borrowing from the last one the idea that the meaning of a rule is not revealed by what the legislature is saying, while he takes from the first one the need for a historical research.³⁵

Therefore, the interpretation must uncover the “normative” will of the legislature.³⁶ The rule must be understood in order to solve the case in the same way as the legislature would have done. To achieve that, the interpreter must follow two steps:

1. The first step concerns the interpretation itself—the research of interests (*Interessenforschung*). On this stage, the judge should determine the content of the rule from the perspective of all interests that caused its achievement. To obtain the correct representation of the rule, the interpreter will join a series of representations obtained by various means:
 - The first of these representations comes from the text of the statute, interpreted according to the usual means (grammar, philology, etc.).
 - The second representation relates to circumstances and motives that led to the enactment of the rule. This research is based on a preparatory work, the work of commissions,

34 . Buergisser (Michel) et Perrin (Jean-Francois), « *Interessenjurisprudenz. Statut et interprétation de la loi dans l’histoire du mouvement* », pp. 327 et seq. in *Droit et intérêt vol 1 Approche interdisciplinaire*, Bruxelles, Facultés universitaires Saint-Louis, 1990.

35. *Idem*, pp. 327 et seq.

36. Von Heck opposes the “normative will” to the “psychological will” of the legislature, the latter being understood as the will of the legislature as reflected in the preparatory works.

etc., and may determine the interests explicitly incorporated into the lawmaking process. This representation must be further refined to reveal the conflict of interests on the basis of which the rule was enacted.

- The third representation tries to find the silent part of the lawmaking process, the elements that influenced the rule without being stated in preparatory works.

At the end of the process, the judge gets the final representation of the rule. And this allows him to apply the statute by respecting the real will of the legislature.

2. On the second step, the judge will confront the outcome of the first research with the case at hand. He may possibly find that the rule has a gap (lacuna) or need to be corrected.

The judge should refrain from any value judgments as long as the facts of the case are covered by the legislature's will. On the other side, the judge should act creatively when the legislature's will is taken into default. The changes of circumstances request from him to adapt the statute to new situations by supplementing it or, where appropriate, by redesigning and surpassing its dispositions.

3.3 A lower limit for the interpretation process through interests

Stoll, one of the followers of the doctrine of interests, stated that in simple situations, the decision is not obtained by analysing the conflicts of interests but by logical subsumption for the reason of its sheer simplicity. Therefore, the weighing of interests would be useful only for difficult affaires, but not for routine ones.

Von Heck agreed with him but noted the role played in these routine cases by the intuitive weighing of interests. The situations where the procedure of simple logical subsumption can be used are those in which the result of the logical subsumption is consistent with the outcome of interests' analysis and when this outcome seems obvious. In such cases, the analysis of interests is not absent but is made intuitively, in the judge's subconscious. It remains important, however, because if the judge finds that the result does not comply with the interests at stake, it would feel reluctant to apply the logical subsumption.

Here, the analysis of interests has less the role of a conscious motivation, but rather that of a control tool, an alarm device that wakes up the judge whenever the subsumption is not adequate and the conscious and detailed analysis is required.

Hence, Von Heck recognizes that a decision in accordance with the principles outlined can be achieved not just by deliberate and rational weighing of interests but also by intuition, based on the sense of justice (*Rechtsgefühl*) or “*judicium*.” We are dealing here with a mentally condensed operation, made possible by practice, the constant exercise of previous conscious acts. However, since the intuitive decision can sometimes be distorted by numerous factors, this intuition must to be controlled by the conscious mind.

The doctrine of interests is, according to Von Heck, the method that allows the development of this “*judicium*” and guarantees the speed of logic subsumption and the perception of its limits.

3.4. An Upper Limit in the Interpretation Process through Interests

According to Von Heck, there are several stages in the application of the doctrine of interests:³⁷

1. Sometimes the logical subsumption under a normative concept of a statute matches the statute’s aim and is in harmony with the results of interests’ evaluation. This is the normal case. The legislature has shaped and expressed the statute in a manner consistent with the value he recognized as decisive. When the judge finds that the concepts of the statute match the legislative intent, it gets the right decision by a logical application of those concepts.

2. Other times, the legislature has not explicitly expressed and defined the layout or the concept and has delegated to the judge the making of the provision or the definition of the concept. The judge should perform the task assigned to him by following the value judgments that emerge from the statute and the guidelines of the legislature.

37. Philipp Heck, “The Formation of Concepts,” pp. 180, in Magdalena Scoch, *op. cit.*

3. Some other times, there is a gap in the statute, an unintentional obscurity or a default of provisions applicable to particular facts. Again, the judge shall proceed by filling the gap through a weighing of interests. *In doing so, the judge must be guided primarily by the value judgments of the legislature and, secondly, by his own assessment.*

The analysis of interests is not preventing the need for the judge to choose between analogy and “argumentum a contrario.” It simply provides a good way to examine a case so that the result will be consistent with the legislative intent and the real needs.

4. Finally, sometimes the provision of a statute is in conflict with the practical needs that the statute also recognizes. Here, it is necessary to know if the judge can correct the provisions of the statute, briefly speaking, if the idea of value contained in the statute must prevail over the provision itself. It is precisely here where the doctrine of interests and the theory of free law diverge. Von Heck believes that judges have no right to amend the statutes except in exceptional cases. And in any case, he forbids the judge to have any disagreement with the values from the statute.

4 Final evaluation of Interessenjurisprudenz

4.1 Doctrine of Interests (Interessenjurisprudenz) in the German Space
If in Switzerland this is still the current method of judges, in Germany, after the Second World War, the doctrine of interests was overtaken by the doctrine of values (Wertungsjurisprudenz).³⁸

The first reason for this evolution is a practical one. During the Third Reich, the German judges had used in a poor way the weighing of interests, and after the war, it was considered necessary to ensure the pre-eminence of the values hence violated.

The second reason, theoretical this time, is tied to the understanding, by the scholars, of evaluations and the criteria by which interests may be weighed. These scholars discovered a conceptual deficiency in Interessenjurisprudenz.

Already at Von Heck, and after him at Stoll, there are situations leading beyond the genetic “theory of interests.” Besides that, while in

38. Modugno (Franco), “Sistema giuridico,” en *Enciclopedia Giuridica*, Istituto della Enciclopedia Italiana, 1988, no 2.1.

some texts the interests appear as “causal factors,” there are other texts in which the interests refer to assessments made by the legislature. Hence, the interest is either the subject or the criteria of evaluation or even the “causal” factor of the rule. There is a lack of clarity—not only terminological but essentially methodological.³⁹

Therefore, the aim of Von Heck, the statute viewed as a simple product of interests in a struggle for domination in society, is surpassed. The real complete picture is accessible only through the doctrine of values (*Wertungsjurisprudenz*), which clearly differentiates the concept of interest from the legislative assessment scale.⁴⁰

The discovery of this legislative assessment scale requires a complete analysis of the legal system, considering a set of basic principles that even the legislature, consciously or unconsciously, took into account in his assessments. And here, constitutional law (and the fundamental rights of the new democratic Germany) is called to play a major role. As a matter of fact, *Interessenjurisprudenz* is nowadays integrated in the broader and deeper methodological current of *Wertungsjurisprudenz*.

4.2 *Interessenjurisprudenz* and the Anglo-Saxon or French world

There was no reception of German *Interessenjurisprudenz* in the Anglo-Saxon or French world. As a matter of fact, Von Heck’s work was not translated into English until 1948, and he exercised no discernible influence in the United States. Moreover, Von Heck’s work was never translated into French, unlike Ihering’s, Gierke’s, and Ehrlich’s, the German creators of the social approach to law.

Most recently, some important authors start paying (incidental) attention to Von Heck and his *Interessenjurisprudenz* doctrine from an the Anglo-Saxon or French perspective. Duncan Kennedy and Marie-Claire Belleau⁴¹ wrote two impressive studies about the role of René

39. Larenz, *op. cit.*, pp. 124.

40. Westermann, cited by Larenz, *op. cit.*, pp. 124.

41. Duncan Kennedy et Marie-Claire Belleau, « La place de René Demogue dans la généalogie de la pensée juridique contemporaine, » *R.I.E.J.*, 2006, p. 163 et seq. Some of these considerations are reproduced more recently (in English) in Duncan Kennedy, « A Transnational Genealogy of Proportionality in Private Law » in *The Foundations of European Private Law*, (ed) Stephen Weatherill et al., Oxford, Hart Publishing, 2011, pp 185 et seq.

Demogue, a French jurist, in the genealogy of contemporary conflicting considerations thinking.

Although less concerned with Von Heck, they expressed, from an American viewpoint, interesting considerations about his doctrine. They recognize Von Heck as one of the most important creators of the contemporary mode of conflicting considerations, but they equally express critical opinions about Von Heck's developments. For example, in their vision, Von Heck is a less sophisticated practitioner of the method he helped to invent than Demogue.⁴²

They identify also a first flaw in the fact that Von Heck had repeatedly pointed out that "ideal interests" were just as important as "material interests" (wants or needs) in lawmaking and interpretation. In this respect, modern conflicting considerations are sharply different from Heck's version.

Today, conflicting considerations include conflicting moral axioms ("pacta sunt servanda," "res rebus sic stantibus"). They include, most prominently, subjective rights in conflict, without any suggestion that the rights are reducible to interests. "Moreover, in contemporary conflicting considerations, all the considerations have to be universalisable, so that all utilitarian considerations have to be 'social interests'. Whereas Heck prides himself on adding ideal to material interests, the modern approach considers only the ideal."⁴³

This criticism seems unmerited if it is seen from the position of the modern American way (mostly formulated in Torts and Constitutional law) of considering conflicting considerations. As a matter of fact Von Heck was answering the problems of a different origin and in a specific context, that of a Continental civil law. Another answer to these critics may be found in the fact that *Interessenjurisprudenz* was later integrated in Germany (see *supra*) by *Wertungsjurisprudenz*, where the ideal considerations (constitutional or extra constitutional) play a major role.

A different fault discovered by the authors is that Von Heck fails to distinguish between interests attached to particular social actors

42. Duncan Kennedy et Marie-Claire Belleau, *op. cit.*, p. 181, 182; Duncan Kennedy, *op. cit.*, p. 197, 198.

43. Duncan Kennedy, *op. cit.*, p. 199.

(debtors and creditors) and interests plausibly attributed, though with different degrees of force, to everyone (e.g., security of transactions).⁴⁴

We consider this opinion as correct, but once again, the later development of German Wertungsjurisprudenz (see *supra*, 4.1) seemed to have answered it plainly (by eliminating, among others, the recurrent confusion between interests and evaluation's scale of legislature).

The distinguished authors are equally criticising Von Heck because he operates within the framework of interpretation on the ground of a hierarchy of sources. According to Von Heck, when there is a gap or conflict, the task of the judge would be to simply replicate the balance of "interests" from by the statute to be interpreted.⁴⁵

However, the authors answer this criticism themselves and recognise that for Von Heck, it is important "to radically reduce the problem of judicial subjectivism and to subordinate the judge to the legislator and the jurist to the judge, [by] eliminating separation of powers problems." Our own developments about the opposition of Interessenjurisprudenz to the subjectivity of the free law school during Methodenstreit (see *supra*, 2.3) goes in the same direction.

Finally, the authors underline that Von Heck is reluctant to recognise that if there is a gap in applying a rule to a new situation not considered by the drafters of the original solution, a new evaluation of interests as they play out in the new circumstances is needed. Modern American conflicting considerations technique is ready to do this kind of new evaluation. But Heck objects to that by underlining that "it is only in exceptional cases that the jurist method is called upon to make [a new] evaluation. As a rule, all he has to do is to ascertain the value judgments of the legislator."⁴⁶

We consider that, once again, Von Heck was immersed in a different legal system and was facing very different constrains. He needed to distinguish himself from the rival schools and to be also attentive to the separation of powers.

Generally speaking, Von Heck was historically situated. As the creator of a new direction, he could not answer all the questions. The

44. Duncan Kennedy, *op. cit.*, p. 199, footnotes 47.

45. Duncan Kennedy et Marie-Claire Belleau, *op. cit.*, p. 184; Duncan Kennedy, *op. cit.*, p. 199.

46. Duncan Kennedy et Marie-Claire Belleau, *op. cit.*, p. 184, 185; Duncan Kennedy, *op. cit.*, p. 200.

later developments from Wertungsjurisprudenz, which included Interessenjurisprudenz, seem to respond to many of these situations.

What is the final judgment about Interessenjurisprudenz? A part of the answer lies in the posterity of legal thinkers who created the trend of conflicting considerations.

Demogue was never accepted in France, his country of origin. He had a certain influence, largely forgotten today, in the development of conflicting considerations in the United States (during the 20's).

Oliver Wendell Holmes, the originator of conflicting considerations in the United States, remains one of the strongest references there even today.

Von Heck succeeded in Germany. His work was translated too late to have any clear influence on American legal thinking (as was the case for Demogue). However his national success shows his genius and the usefulness of the subtle method he developed. The value and the interest of any study about Interessenjurisprudenz are therefore unquestionable.

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Reasonableness and “the Reasonable Person” in the Chinese Context

Jingyu Zhang and Qinglin Ma

Legal argument in English pervasively relies on the term *reasonable*, which carries with it a framework of evaluation that plays an important part in English discourse. The *reasonable person* standard plays a central role in law. This paper examines *reasonableness* and constructs *the reasonable person* in the Chinese context. A case in point is the role public opinions played in the court’s alteration of a verdict from life-long to a five-year imprisonment for a 23-year-old worker who illegally withdrew 170,000 Chinese *yuan* with his own debit card from an ATM. Clearly, it is necessary to construct an objective standard of the hypothetical ordinary person. This construction accords with the people-centeredness approach in China’s scientific development concept and its goal in building a harmonious society.

Keywords: reasonableness, reasonable person, rule of law, Chinese civil law

1 Introduction

Legal argument in English pervasively relies on the term “reasonable” (Fletcher, 1996), which carries with it a framework of evaluation that plays an important part in English discourse (Wierzbicka, 2006). The “reasonable person” standard plays a central role in law, especially in tort law, criminal law and administrative law (Moran, 2003). China has been undergoing great transformations ever since the open-up to the world in the early eighties of the 20th century, and at the same time it has witnessed the construction of many laws, including tort law, law of

knowledge/intellectual property, and property law, to name just a few, along with administrative law and regulations. One of the biggest changes is the adoption of “presumption of innocence” which replaces “presumption of guilt” in the Chinese Law which produced many cases of injustice.

China, a nation generally known as being governed by the rule of man, and is now striving for the rule of law as a popular slogan goes “we must observe the rule of law and get rid of the rule of man” (Xiao, 2008). The present situation seems to be that the rule of law and the rule of man exist side by side in China. Nevertheless, the rule of law calls for the adoption of legal concepts such as reasonable person.

Judges play a vital role in the legal practice and subjective judgment standard is the mainstream criterion in measuring any case following the Soviet Marxist ideology in China (Guo, 2009). Judges have formulated their own mode of judgment based on their experience in the job, which is to settle lawsuits according to standards required by law, according to common sense and the way of the world. No unified method or procedure has been formulated. There is no explicit mention of *reasonable person* or saying of *bonus pater familias* in the Chinese law proper. However, since the start of the new century, the academia and public media are paying more and more attention to the discussion of reasonable person standard, with some researchers even calling for the application of such an objective standard in the Chinese law system (e.g., Mei, 2006, 2010; Fan & Zhang, 2003). According to Lin (2000), what is the “reasonable person” in the Anglo-American law is called “bonus keeper” (*shanliang guanli ren*) in the civil law of Chinese Taipei.

The words *reasonable* and *unreasonable* carry with them a framework of evaluation that plays an important part in Anglo-/English discourse. This framework of evaluation is language and culture-specific (Wierzbicka, 2006:104). The question that arises first is whether there is such a framework of evaluation in the Chinese language and culture, especially in contemporary China. To answer this question we have to look at the distinction of the reasonable and the rational in English and Chinese. We find that there is confusion or mixture of ‘reasonable person’ and ‘rational person’ in the Chinese legal literature which coincidentally matches the evolution of

reasonableness in the English language and culture. Since the Chinese law system has borrowed many legal concepts from both the common law and the civil law, and there are legal concepts related to reasonableness and *reasonable person* such as *reasonable doubt* and *reasonable care* in local legislations and the national basic criteria of vocational morals of judges, it is highly recommended that reasonable person standard be adopted in the Chinese Law.

2 The Concept of Reasonableness and the Standard of Reasonable Person

Reasonableness, as a concept employed in modern legal systems, is “both elusive and multifaceted” (Saltman, 1991:107). Being culture-specific and historically shaped, and as a key Anglo value, reasonableness can be understood as “a core set of concepts concretizing into a series of practical and normative requisites that form the basis for judging decisions and actions of legal relevance” (Bongiovanni, et al, 2009: xi). According to Bongiovanni et al (2009), it serves a wide range of functions yielding multifaceted criteria whose content varies from case to case. Reasonableness is different from instrumental rationality because reasonableness (value-oriented) is concerned with the right and good whereas rationality (goal-oriented) is concerned with efficiency (Alexy, 2009:5-6). Further, reasonableness draws more on economic, political, moral considerations, social practices and norms, and on the other side, rationality draws more on the correctness of reasoning. As Wierzbicka puts it, “one can be rational or irrational on one’s own, but one is usually being reasonable or unreasonable when one is interacting with other people” (2006:106).

The fictional reasonable person is not without problems and suspicion and criticism are from feminists, critical race theorists and others in terms of political correctness and in the difficulties inherent in fashioning a legal standard by reference to some idealized person. Herbert’s (1935) fictional case, *Fardell v Pott*, is the first mockery of it in that the court is faced with the puzzle of applying the reasonable man standard to a woman. We believe the objective standard of reasonable person is philosophically sound and pragmatic.

Sadurski (2009) argues that reasonableness in both law and political theory at the level of their deep justification appeals to liberal, egalitarian, and consensus-oriented values. In law, the concept of reasonableness, when used in a “strong sense”, is inherently tied up with proportionality, also with the test of necessity, and thus is a guarantee of minimal restriction to constitutional rights compatible to the attainment of a given purpose. Compared with other approaches, it is more transparent when it comes to revealing to the public all the ingredients of the judicial calculus, and most importantly, it reduces the sense of defeat for the losing party. In political philosophy, the notion of reasonableness applies to the determination of the standards of justifications for authoritative decisions so that they can be considered legitimate, i.e., calling for respect even from those subjected to them who do not agree with them on merits. This idea is attractive in that it combines two popular traditions of democratic theory: those of social contract and those of deliberative democracy (Sadurski, 2009).

3 Reasonableness vs rationality

The distinction between the concepts “rational” and “reasonable” has attracted a lot of attention in the field of philosophy in general and the philosophy of justice in particular. Sibley’s (1953) seminal paper “the rational versus the reasonable” connects the distinction closely with the idea of cooperation among equals and is of central importance in understanding the structure of justice as fairness (Rawls, 2001:7). According to Wierzbicka (2006), the sense of the word *reasonable* that Rawls (2001) has primarily in mind is that which has its opposite in *unreasonable*, i.e., the sense that bears an implication of not wanting too much (from other people). It is precisely this sense that is linked with the idea of “cooperation between equals” and with the notion of fair. This sense implies a whole ideology of social interaction. In social interactions, firstly we should appeal to other people’s thinking as well as their will. Secondly, it is good to limit our claims to other people’s goodwill and not to request too much. Thirdly, in uttering our wishes, it is good to take into account of other people’s point of view. It is good to act in this way not only on moral grounds but also because this is

what reason dictates. Here reason and morality converge in the ideal of cooperation with other people (Wierzbicka, 2006).

According to von Wright (1993:173), rationality is “goal-oriented”, whereas reasonableness, by contrast, is “value-oriented”. According to Rawls (1993: 48 f.), the distinction can be traced back to Kant’s distinction between hypothetical and categorical imperatives (Kant, 1964: 82). Thanks to this reference to Kant, it is clear that the decisive point of the reasonable is its moral nature. Rawls puts this in the following way: “merely rational agents lack a sense of justice” (1992: 52), so reasonable people are moral agents. Besides rationality and morality, Sartor’s (2009) sufficientist reasonableness includes a third aspect, consonance, which requires that in order for a determination to be reasonable with regard to a certain context (culture or form of life), it must also be *consonant* (or at least not completely dissonant) with the ideas prevailing in that context, and in particular, with the norms that are practiced in that context. In this study, we adopt Sartor’s (2009) sufficientist reasonableness because it accords with the current people-oriented spirit reflected in China’s scientific development concept and China’s goal of building a harmonious society. We will return to this later.

4 Reasonableness vs ties of friendship as a framework of evaluation in the Chinese Language and Culture

While reasonableness is a framework of evaluation in the Anglo culture, its Chinese counterpart is *qing* and *li*, ‘ties of friendship’ and ‘being able to stand to sense’, or ‘being reasonable’. The Chinese framework of evaluation has a sense of human touch, or ties of friendship as the following fixed expressions show:

- 人情味 [ren qing wei]: human touch/interest, the milk of human kindness
- 有人情味 [you ren qing wei]: have human appeal; show empathy
- 没有人情味 [mei you ren qing wei]: impersonal, not exceptionally human

- 讲人情 [jiang ren qing]: respect of the person/set great store by friendship
- 不近人情 [bu jin ren qing]: be unreasonable
- 人之常情 [ren zhi chang qing]: normal practice (in human relations), human nature
- 情理之中 [qing li zhi zhong]: reasonable and/or understandable
- 情有可原 [qing you ke yuan]: excusable and/or understandable

A New Century Chinese-English Dictionary (Hui, 2003) & Dict.cn

In a society ruled by law, ties of friendship play less and less role in adjusting the human relations. There is a tendency in the Chinese culture to adopt the concept of reasonableness as a framework of evaluation. *He li bu he li* and *jiang bu jiang dao li* both meaning ‘being reasonable or unreasonable’ are two most used evaluation expressions. The idioms or phrases abound in this framework.

Expressions of Being Reasonable:

- 合情合理 [he qing he li]: be fair and reasonable; stand to sense
- 合乎情理 [he hu qing li]: reasonable; sensible
- 通情达理 [tong qing da li]: show/have good sense; be understanding and reasonable
- 知情达理 [zhi qing da li]: reasonable, sensible
- 言之成理 [yan zhi cheng li]: sound reasonable
- 言之有理 [yan zhi you li]: speak in a rational/convincing way

A New Century Chinese-English Dictionary (Hui, 2003) & Dict.cn

Expressions of Being Unreasonable:

- 不合情理 [bu he qing li]: unkind and irrational; unreasonable
- 不通情理 [bu tong qing li]: unreasonable; impervious to reason
- 不可理喻 [bu ke li yu]: will not listen to reason
- 情理难容 [qing li nan rong]: contrary to reason or common sense; incompatible with the accepted code of human conduct
- 讲道理 [jiang dao li]: bring out the reasons
- 不讲道理 [bu jiang dao li]: unreasonable; be unreasonable

A New Century Chinese-English Dictionary (Hui, 2003) & Dict.cn

Although the concept of ‘a reasonable person’ plays a key role in British and British-derived laws, it does not mean it only belongs to the language of law and is not used or relied on ordinary language. On the contrary, as the corpora such as Cobuild demonstrate, it is also widely used in ordinary English (Wierzbicka, 2006). To see how the Chinese equivalent of *reasonable person*, *heli ren* and related terms are used in Chinese language, we conducted a search in Beijing University Corpus of Modern Chinese (1.06GB), and the results are reported in Table 1.

Table 1: Results from Beijing University Corpus of Modern Chinese

Chinese character	[pinyin]	English equivalent	Result
合理人	[heli ren]	reasonable person	0
理性人	[lixing ren]	rational person	27
合理 (的) 时间	[heli (de) shijian]	reasonable time	22
合理 (的) 怀疑	[heli (de) huaiyi]	reasonable doubt (suspicion)	9
合理 (的) 结果	[heli (de) jieguo]	reasonable result(s)	16
合理 (的) 限制	[heli (de) xianzhi]	reasonable limit(-ation)	26
合理 (的) 机会	[heli (de) jihui]	reasonable chance/opportunity	5
合理 (的) 期望	[heli (de) qidai]	reasonable expectation(s)	6
合理 (的) 希望	[heli (de) xiwang]	reasonable hope	9
合理 (的) 注意	[heli (de) zhuyi]	reasonable care/attention	0
合理的力量	[heli de liliang]	reasonable force	6

Note: The English equivalents are translated by Zhang & Ma.

As Table 1 shows, there is no result about *he li ren*, but there are about 27 results about *li xing ren* in Beijing University Corpus of Modern Chinese. Most common phrases containing *reasonable* used in legal and ordinary situations such as *reasonable doubt*, *reasonable force*, and *reasonable time* have their equivalents in the Chinese corpus with the exception of *reasonable care*. In the subsequent sections, we turn to how these legal terms are used in the Chinese legal context.

5 The Reasonable Person Standard in Chinese Legal Literature

China has long been a nation ruled by the rule of man through virtuous leaders like Bao Zheng, a statesman in North Song Dynasty, who is

known for his integrity, justice, and refusal to bend to an unlawful power. With its modernization and globalization, China is now striving for being a nation ruled by the rule of law. At present, it seems that the rule of law and the rule of man exist side by side in China. As a popular slogan goes we must follow/observe the rule of law and get rid of the rule of man. The rule of law calls for the legal concepts such as reasonable person (Xiao, 2008).

In the new millennium, there is more and more mention of ‘reasonable person’ and ‘rational person’ in the Chinese legal literature. As a matter of fact, there is more mention of ‘rational person’ (*li xing ren*) than ‘reasonable person’ (*he li ren*) partly because *li xing ren* (rational person) is already adopted as a term in economics and partly because it is a common collocation. By contrast, *he li ren* (reasonable person) is a loan term exclusively in the legal field. We also conducted a keyword and title search in China National Knowledge Infrastructure (CNKI) and the search of *li xing ren* as keyword produced 698 results, as title 87 results while the search of *he li ren* as keyword yielded 70 results and as title 5 results. The use of *li xing ren* in CNKI covers a wide range of fields: economics, law, education, ethics, public health, and etc.

In the Chinese legal literature, there is a confusion or mixture of ‘reasonable person’ and ‘rational person’, which coincidentally matches the evolution of reasonableness in the English language and culture. According to Wierzbicka (2006), both *rational* and *reasonable* have their starting point in the concept of “reason,” but two centuries ago (if not earlier), their paths parted, and *reasonable* went its own way. The emergence of the modern concept of ‘a reasonable man’ is causally linked with the British Enlightenment. The Age of Enlightenment was seen as the Age of Reason, but the reason cherished by most influential figures of the British Enlightenment was not “pure reason.” It was a reason focused on empirical reality, on “facts,” on “common sense,” and on probabilistic thinking. *Reasonable* refers inherently to a potential discussion or debate with other people and implies an expectation that if they considered the matter, they would think the same. *Rational*, by contrast, has nothing to do with other people and refers precisely to a way of thinking (Wierzbicka, 2006). For example, In Liu (2001), both *rational person* and *li xing ren* are used in the

article. However, according to Liu, “rational man” is universally used as the criterion for the judgment of errors and to ascertain whether or not the delinquent part has the prediction to the damage because of breaking contract. But it is rarely discussed in the law field. “Rational man” should be the person who can bear the civil liability independently. This criterion is not only good for overcoming shortcomings caused by the subjective standards, but also good for realizing equality before the law and the value of justice. It also embodies the essential needs of legal liability. Liu is certainly talking about *reasonable person*.

Other examples of the confusion of *reasonable person* and *rational person* in the Chinese legal literature abound. In Y. Li’s (2005) article, “person in civil law and its rational basis”, the author uses *reason* for *li xing*, but, *rational person* for *li xing ren*. Xiong & Zhang (2009) make an economic analysis regarding the reasonable person standard as the accident negligence responsibility determination standard. However, they use ‘reasonable person’ only for their English title and abstract, for the Chinese title and article use *li xing ren* instead of *he li ren*.

However, there are legal scholars, though few in number, who use *reasonable person* correctly and consistently. For instance, in Mei’s (2006) applying the reasonable person standard in civil adjudication and Mei’s (2010) reasonable person standard in authorizing criteria of civil law, the author has consistently used *he li ren* and called for the application and adoption of reasonable person standard in the Chinese civil law.

6 Legal Concepts related to reasonableness in Chinese Context

Although the reasonable person standard does not appear in the Chinese law, related legal concepts such as *reasonable doubt* and *reasonable care* do exist in some local legislation.

6.1 Accountability based on reasonable doubt

The term *heli de huaiyi* “reasonable doubt” actually appears three times in the 2001 version of *Basic Standards of the People’s Republic of China on Professional Judges* issued by the Supreme People’s Court on Oct 18, 2001, specifically in the 1st, the 11th and the 45th Articles. For

example, the 11th Article stipulates that “judges should keep from engaging in activities outside one’s position what may cause the public to have reasonable doubt about his or her judicial justice, honesty and uprightness” (translated by Zhang & Ma). The promulgation of this regulation was seen as a sign of progress for the judiciary. However, in the 2010 revised version issued by the Supreme People’s Court on December 6, 2010, there is no mention of such concept as “reasonable doubt”. It is hard for us to figure out the underlying reasons for this. Anyway, the absence of this important concept in the new law tells us that the revised version needs further revision. In connection to this, the incident of judge impeachment in Panshi City, Jilin Province attracted a widespread attention and it is known as the first case of judge impeachment in China (Shen, 2003; Q. Li, 2003). On February 24, 2003, the court of Panshi City unveiled *Interim Provisions in Impeaching Law-enforcement Officials of No-confidence*, which was later renamed *Interim Provisions in Implementing Accountability Based on Reasonable Doubt to Law Enforcement Officials*. In the mid of May, 2003, Xuebin Wang, Deputy Chief Judge of the Civil Division of this court was impeached and was relieved of his post for his attending a dinner entertained by the defendant’s daughter, during the litigation time the case was heard and he was the hearing judge.

Although the impeachment of the judge is unconstitutional, accountability based on reasonable doubt in the place of impeachment provisions is well-received by the public (Cheng, 2003; Chen, 2007). Accountability based on reasonable doubt does have an isomorphic relation with presumption of guilt logically, but they play different roles in achieving their goals in different areas, namely, civil law and criminal law. Accountability based on reasonable doubt aims to enhance the professionalism and trustworthiness of judges, and it is exercised in judges’ professional integrity. If accountability based on reasonable doubt is applied to criminal cases with presumption of guilt, it will result in infringement of the rights of citizens. If presumption of innocence is applied to professional ethics, it will extinguish last traces of judges’ trustworthiness.

Cao (2004) reported that the forth draft of *Shenzhen’s Municipal Bylaw of Precautions against Post Crime* has clear stipulations of media supervision: journalists enjoy the right to know, right of having

reasonable doubt, right to criticize, right to liberty and security of person.

Innovation of “right of reasonable doubt” complies with the notion of running state affairs according to law: exercise of public power should stand the test of reasonable doubt. There is a belief in practice that the performance of public power players is above outsiders’ suspicion, and it runs on self-verification. Such a belief is a self-deception. An ironic case is *Zen Jincheng & Zhang Kuntong*, former chiefs of Henan provincial transportation bureau, who had sent letters written in their own blood to take pledge in their innocence to the Provincial Party Committee before they were proved guilty of corruption.

6.2 Obligations of Reasonable Care in the Administrative Law

Obligations of reasonable care in administrative law were stressed in the Work Report of Shandong High People’s Court by the Court’s President Ying Zhongxian who mentioned a special case, *U.S Pan Asian Educational Foundation v. Qingdao Educational Bureau* over the change of the legal representative of Qingdao International School. The plaintiff, U.S Pan Asian Education Foundation, filed a suit against Qingdao Educational Bureau for its improper registration of the replacement of the legal representative of the School and requested the court of the first instance to relinquish the administrative act of the bureau. The High Court after its careful review of the case, corrected the verdict of the Intermediate Court and affirmed the decision of the first trial, i.e., relinquishing the administrative act of the defendant and thus protected the lawful rights and interests of the foreign investors.

The story behind the case is that the Agency for U.S Pan Asian Education Foundation decided to replace the former president of the School with Guo Zongming who is actually not a director of U.S Pan Asian Education Foundation and therefore not qualified to be elected as the Chairman of the Board. The right to apply for the replacement of the legal representative of the School still lies in the School not the Agency. The bureau did not abide by the principle of prudent and careful check and examination, failed to fulfill its duty of reasonable care and attention, and as a result approved the illegal change of the legal representative of the School. The local educational bureau should

have reviewed the record of the Charter of the school, and found out the flaws. Thus it committed an administrative mistake in its administrative check and approval. Therefore there are legal flaws in the administrative act of the educational bureau's confirmation of the change of the president of the School.

6.3 The Reasonable Person Standard and Chinese Legal Practice

The reasonable person standard accords with the people-centeredness in the background of China's Scientific Development Concept and China's goal of building a harmonious society. Law roots itself in society. The construction of rule of law is conditioned by the character of society (Qiu, 2004). Compared with the ideal type of "rural China" proposed by Fei (1984), Chinese villages are witnessing major changes in terms of the nature of farmers' values, behavioral logic and linkage patterns. Villages today can no longer be adequately described by concepts such as "rural China" and "acquaintance society"; and there is a corresponding change in the setting and logic of rural legal practice (Dong, Chen & Nie, 2008). By defining the social character of the present transferring China, Qiu (2004) puts forward the basic category "Commercial-agrestic China". Not only "discourse disorder" but also "structural disorder" has been observed in rural areas; this means that endogenous village forces are unable to keep order effectively. In a rural society that is taking on more and more of the features of modernity, national law plays an increasingly indispensable role in maintaining social order, and promoting a harmonious society. With an ever-increasing number of farmers moving to cities in the industrialization period, China is undergoing great transformations into a stranger society. Reasonableness and reasonable person concepts would benefit China's transformation into a nation ruled by law.

A case in point is the role public opinion played in the court's alteration of a verdict from life-long to a five-year imprisonment for a 23-year-old young worker Xu Ting who illegally withdrew 170,000 Chinese *yuan* with his own debit card from an ATM in Guangzhou. Xu was charged with theft of financial institution and the first-instant court gave him a life-long-imprisonment sentence. It is reported that more than 90% public opinion was sympathetic with the defendant and felt that the life-long-imprisonment decision of the first trial was unfair and

unreasonable. The dispute is over whether ATM is financial institution, whether there is a difference between stealing money from a typically financial institution and illegal withdrawal from ATM. It would be doubtful that any reasonable person would think that ATM is a financial institution. Furthermore, there is a big difference between an illegal withdrawal from ATM and stealing or robbing a financial institution. Xu's case is an example in point that ordinary people, in this case, the public can think well and their thinking is essentially good and trustworthy. Had the first court applied the reasonable person standard instead of mechanical adjudication, as they did in their hearing *de novo*, the law would have served its purpose of maintaining the social justice and stability.

The impact of Xu's case is enormous. Ms Du, a laid-off female worker, who went to withdraw 3,000 *yuan* in a bank in Nanjing, was given 30,000 *yuan* instead. She found the extra 27,000 *yuan* shortly when she went shopping. She immediately went back to the bank to return the money, but was kept from entering the bank because the bank was about to close. Fearing being put into prison, she left the 27,000 *yuan* in a local police station. Finding out the shortage of 27,000 *yuan*, the bank sent people to Ms Du's residence and the police station to collect the money. They explained the error was due to improper handling by a new cashier.

A similar case was reported by Eric Kelsey from Reuters On July 7, 2011. German authorities are investigating a soldier who turned in safety deposit boxes containing more than 1 million Euros (938.3 thousand pounds) in cash two days after the boxes fell off a truck. Prosecutors are investigating whether to bring charges of attempted embezzlement against the soldier. The general comment on the possible charge following the report is that the soldier should be given a medal, not charged.

In the Chinese law system, it is of necessity to adopt the concept of reasonable person. It is democratic, as well as pragmatic because most ordinary people are "reasonable people" and their thinking is essentially good and trustworthy, for in most situations they will be able to think well enough for practical purposes (Wierzbicka, 2006). The ability to frame any general concept as 'fictional', 'mythical' or a 'construct' is a fundamental feature of 'reflexive modernity' (Beck et

al., 2003). It is through ‘the mediation of the imaginary that we are able to conceive of the real in the first place’ (Gaonkar, 2002:7). Most of all it accords with China’s people-centred approach in building a harmonious society.

7 Conclusion

We highly recommend that the reasonable person standard be adopted in the Chinese Law on the basis that the Chinese law system has borrowed many legal concepts from both the common law and the civil law, and there are legal concepts related to reasonableness and reasonable person such as *reasonable doubt* and *reasonable care* in local legislations and *Basic Standards of the People’s Republic of China on Professional Judges*.

In the Chinese law system, it is of necessity to adopt the concept of reasonable person. In China, we practice the people’s jury system in the trial courts. The Chinese jurors are a group of people selected by the court who generally hold important posts or positions in society. Their jobs are actually different from those of Common law. They are asked to hear the case in the court, but do not take part in any decision-making of the case. However, their signature is required on the verdict of the court before it can be taken into effect. At present, the legal reform on this practice in some provinces is being undertaken, e.g. Shaanxi Province is now experimenting a jury system similar to that of common law. Jurors are chosen from all walks of life, and the jury is composed of ordinary people, teachers, clerks, workers, etc. The legal concept of reasonable person is expected to guide the communication between legal profession and ordinary people, so all the jurors are armed with this objective standard.

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